International Law's Limitations on Contending with Terror

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My remarks will focus on the manner in which international law regulates armed conflicts between states and terror organizations. The struggle with a terrorist organization does not reach the status of an armed conflict on every occasion. In certain cases the acts of violence are relatively limited in their extent. In such situations, a state generally contends with terror threats via its law enforcement system by investigating, imprisoning, and placing terrorists on trial.

International law also refers to these issues. However, there are those situations where violent acts reach a level that induces us to recognize them as armed conflicts.

The phenomenon of an armed conflict between a state and a terrorist organization that takes place outside the state's territory has developed rapidly in recent decades. States in most cases employ law enforcement measures to contend with threats emanating from terrorist organizations operating outside of their territory. In extreme cases, states have initiated specific self-defense actions outside their boundaries against terrorist organizations.

As noted, conflicts between states and terrorist organizations have begun to mature into the dimensions of armed conflict. One can note the activity by Turkey in Northern Iraq and Israel's fighting in Lebanon in 1982. Additional prominent examples are Morocco's fighting with the Sahrawis in Western Sahara; the war between India and the Tamil Tigers in Sri Lanka at the close of the 1980s; the battles between Rwanda and the Hutu tribe rebels that took place within the area of the Congo; and, according to certain opinions, the war between the United States and al-Qaeda. With regard to wars in our theater: one can refer to Israel's war with Hizbullah that took place in Lebanon, and the 2009 war in Gaza between Israel and Hamas. Differences exist between these

armed conflicts that can yield distinctions regarding their legal classification, but what they all have in common is that they involve a conflict between a state and a non-state organization that takes place outside the territory of the state which is a party to the dispute.

Without pretending to provide an exhaustive explanation for the phenomenon, one can identify two factors that led to the empowerment of the terrorist organizations which, by the day's end, compelled states to act against them outside the states' own territory. First, in the latter half of the twentieth century, concomitantly with the increased number of states, the phenomenon of failed states also developed. These are countries where the central government has lost its monopoly on the use of force within the state, and therefore they constitute a convenient base of activity for terrorist organizations. The central government cannot prevent the organizations' activity, and in this manner the organizations can maintain training camps, accumulate weaponry, and plan terror activities unmolested.

Other countries are relatively limited in their capabilities to act against a terror organization because activity in the area of another country is required. Even if from a legal standpoint they are not totally restrained from taking action, still the action needed is more complex because it requires activity in the territory of another country.

Secondly, technological developments in recent years have vastly strengthened the terror organizations. If previously, terrorist organizations could not genuinely endanger states by activities outside their territory, currently, modern technology allows them to attack a state via activities from outside that state's territory, such as the use of rocket fire. This situation as well mandates actions in the territory of the country from which the firing takes place.

It is important to note that at the time the major conventions regulating the laws of war were drafted – the Hague Conventions of 1907 and the Geneva Conventions of 1949 – the phenomenon of a conflict between a state and a terrorist organization outside the boundaries of the state was almost nonexistent. Therefore, these conventions did not pretend to regulate this issue. The challenge is therefore clear: international law is required to contend with a relatively new phenomenon that has not been hitherto regulated by the conventions, while the practice in this regard was likewise not extensive.

Therefore, how does international law contend with this challenge? How does it relate to the phenomenon of armed military clashes between states and terrorist organizations that take place outside the state's territory? The question is whether it is proper to recognize a military conflict between a state and a terrorist organization that takes place outside the state's territory as an armed conflict. In my opinion, it is important to distinguish between the question of when is it permissible for a state to act through military measures against a terrorist organization and the question of what law applies to the military actions that the state adopts in the framework of its struggle with a terrorist organization. I do not want to focus on the question of whether a state is permitted to take military action against a terrorist organization. It would seem to me that even those who believe that one should handle terrorist organizations by law enforcement means would find it difficult to defend a position that a state such as the State of Israel is restrained from taking any military action against a terrorist organization such as Hizbullah which has launched rockets from Lebanese territory at the territory of the State of Israel, without the Lebanese government doing anything to stop it.

What legal system should apply in a situation where a state takes military measures against a terrorist organization, when the military conflict between the parties takes place at such a high intensity? It would appear that broad agreement exists on this matter among experts in

international law, as well as between states, that one should view such a situation as armed conflict, and apply to it the legal system of international law that refers to armed conflicts; in other words, to apply the laws of war.

However, even if one embraces the view that we are dealing with an armed conflict, the question of what type of conflict we are dealing with still arises. Traditionally, international law recognizes two categories of armed conflicts:

» International armed conflicts or, to be more precise, inter-state armed conflict.

» Armed conflict that is not international, or, as it is sometimes called in the literature, an intra-state conflict.

It is acceptable to think that an international armed conflict is a conflict between states – for example, the Yom Kippur War or the Iran-Iraq War. The classic example of an armed conflict that is not international is a civil war – for example, the conflict in Sri Lanka between the Tamil rebels and the government.

The question of classifying the conflict is an important question because it determines the legal system that will be applied to the conflict. Without delving into details, one can say that international law imposed much greater restrictions on countries involved in international conflicts than upon states involved in conflicts that are not international. The major reason for this was that quite a few states viewed civil wars as an internal matter and refused to include in the conventions directives that would limit them in a war of this category.

If we accept the basic categories of international law as a departure point for discussion, then armed conflict with terror organizations that takes place at least partially outside the boundaries of the state does not fall into any of the aforesaid categories. On the one hand, we are not talking about a conflict between states, and therefore we are not dealing with an international conflict, at least not in its classic understanding. On the other hand, we are not dealing with a dispute that is limited to the territory of a state, on the order of a civil war, and therefore the conflict does not fall into the classic category or the classic definition of a conflict that is not international.

Originally I proposed that the way of contending with this difficulty is to recognize a new category of armed conflicts which I termed "extra-state" armed conflict. Extra-state armed conflict does not conform to the definitions of either of the two familiar categories of conflicts in international law – an international armed conflict and an armed conflict that is not international – and this is not purely a formal matter of non-conformity to definitions. In a substantial sense a conflict between a state and a terrorist organization includes elements that are appropriated from both categories. On the one hand, the conflict has an international dimension because it is taking place outside the territory of a state. Therefore, some of the arguments that yielded a reduced regulation of conflicts that are not international, such as the argument that we are dealing with a state's internal matter, do not apply. On the other hand, we are dealing with a conflict against an organization that is not a state, and therefore it more precisely resembles an armed conflict that is not international rather than a conflict between states.

Although I still believe that from a theoretical standpoint there are interesting elements in the proposal to recognize a new category of armed conflict, this has not gained broad backing. The courts that were seized with the issues in recent years preferred to categorize armed conflicts in the framework of the existing categories rather than recognize the existence of a new category. For example, the American Supreme Court in *Hamdan v. Rumsfeld* refrained from deciding the question of how to define the conflict between the United States and al-Qaeda.

The situation with which the U.S. is contending in Afghanistan differs slightly from the situation with which Israel contended in its war with Hizbullah. The U.S. was fighting against two forces – the Taliban forces that held power in Afghanistan and the al-Qaeda forces, a terrorist organization that operated within the territory of Afghanistan. The American Supreme Court was presented with two approaches. One was to view al-Qaeda as part of the Taliban and characterize the conflict as an international conflict whose parties were the United States and Afghanistan. The alternative was to recognize the existence of two separate armed conflicts, one with the Taliban and the second with al-Qaeda, and contend with the question of what law applied to the armed conflict between the United States and al-Qaeda.

The Supreme Court decided that it was not required to decide between the various approaches. The judges ruled that paragraph 3 of the Geneva Conventions, the paragraph that regulates armed conflicts that are not international, applies to the entire armed conflict, which was not between two states, and its fixed principles apply to all categories of conflicts. As it sufficed to apply paragraph 3 of the Geneva Conventions in order to solve the problem facing the court, the court did not find it necessary to decide how to categorize the conflict.

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On the other hand, the Israeli Supreme Court in a series of decisions, the first of them being the targeted interdictions case, decided that the conflict between the State of Israel and the Palestinian terror organizations was an international armed conflict. In this decision, the court was relying on the position of Prof. Antonio Cassese, one of the leading scholars of international law, to the effect that armed conflict in occupied territory is an international armed conflict.

However, the court adopted a broader position than the position of Prof. Cassese and, in fact, decided that any armed conflict that crosses the boundaries of the state, without reference to the question of whether it occurred in an occupied area, is an international armed conflict. It is clear that the court reiterated its position recently when it analyzed the law applying to the 2009 Gaza operation. Understandably, this is a very different position from the position that the American court adopted on the fundamental issue of the legal categorization of an armed conflict between states and a terrorist organization.

The bottom line, therefore, is that broad agreement exists in international law that the laws of war apply to armed conflicts between states and terrorist organizations. The question of which legal system among the laws of war applies to armed conflicts between states and terrorist organizations *has not yet been decided definitively* in international law. Some believe that the laws that apply to an international armed conflict must apply in this case as well. Others maintain the position that the laws that apply to a non-international armed conflict must apply in these circumstances.

The difficulty that has been created due to the existing uncertainty regarding the specific legal system applicable to armed conflicts between states and terrorist organizations has been reduced to a certain extent, given the materializing trend in the field of the laws of war pointing to a convergence of the laws applying to a non-international armed conflict and an international

armed conflict. Relatively broad agreement exists that the principles applying to an international armed conflict with regard to protection of civilians or choice of targets applies as well in the framework of an armed conflict that is not international. The main difference that still remains between these two legal systems pertains to the combatants' right to the status of prisoner of war. The status of prisoners of war is recognized only in the framework of international conflicts and is not yet recognized in the framework of non-international conflicts.

In the final result, international law awards significant tools for fighting terror. International law recognizes that under certain circumstances the state can operate outside its territory as well against a terror organization. If the scope of a military conflict, its nature, and intensity cross a certain threshold, international law recognizes the existence of a situation of armed conflict between a state and a terrorist organization. In this situation the state is entitled to harm the fighters of a terrorist organization and its military targets.

Nevertheless, it is important to remember that this development of international law arouses serious questions. For example, under what circumstances is it permissible to act against a terrorist organization in the area of another country? How does one decide if a certain organization is a terrorist organization? Are we not awarding the states too much power to transpose a situation from a condition of law enforcement to a condition of fighting? How does one contend with the fact that terrorist organizations frequently operate from within a civilian population?