Chapter 25

Report on the Adoption of the Committee’s Final Report on the Definition of Armed Conflict (September 2010)

Mary Ellen O’Connell

Memorandum

To: The International Law Association Committee on the Use of Force
From: Mary Ellen O’Connell, Chair
Date: 29 September 2010

Re: ILA Biennial Meeting in The Hague, 15-20 August

Key documents mentioned in this memo are available on the website of the ILA at the Use of Force Committee page: http://www.ila-hq.org/en/committees/index.cfm/cid/1022

On 21 June 2010, Judith Gardam, the Use of Force Committee’s rapporteur, and I sent a draft or our Final Report on the Meaning of Armed Conflict in International Law to ILA Headquarters in preparation for the 74th Conference of the ILA in The Hague. The draft was posted on the ILA website. Judith and I also prepared a draft resolution for presentation at the Conference. On Wednesday, 18 August, at an Open Working Session at the ILA Conference chaired by Professor Duncan French, I presented the draft report for discussion, including a history of the Committee’s work and a summary of the draft Final Report. As many as 50 ILA members participated in all or part of the Working Session. Eight members of the Use of Force Committee participated: Christine Gray, Noam Lubell, Koichi Morikawa, Josef Mrazek, Eric Myjer, Michael Wood, and me. Jutta Brunnée was at the Conference but had to leave before the Open Working Session for family reasons. She spoke with me to express her support for the Final Report.

The Working Session discussion was recorded and a detailed report will appear in The Hague Conference proceedings. I will provide only a brief description here because of the delay before the publication of the proceedings and to let you know about the proposed next mandate for the Committee. The
The Working Session began with an introduction by Duncan French and my thanks to him for chairing the session. I then proceeded to outline the Committee's mandate; to provide a history of our work toward fulfilling the mandate, and to give a summary of our conclusions in the draft Final Report. I emphasized that the Report reflected a substantial effort by an outstanding 18-member Committee from 15 countries during a five-year period. We were privileged to have Judith Gardam as our rapporteur, someone expert in the *jus ad bellum*, *jus in bello*, and human rights law. We were also very fortunate to have had Christine Gray and Michael Wood with us throughout the five years, including at our meeting in The Hague. The Committee was guided at all times by the initial decisions taken by the Committee at our 2006 meeting in Berlin, hosted by Georg Nolte and attended by Jutta Brunée, Christine Gray, Elzbieta Mikos-Skuza, Michael Wood, and me. In particular, the Committee agreed to follow standard international law methodology and to adhere carefully to the Committee's mandate. The mandate was to consider the evidence in international law as to the definition of armed conflict for general purposes with respect to terrorism, asylum rights, neutrality, treaty law, arms control, combatant privileges, and the like. We were not asked what conditions trigger international humanitarian law. We did not seek to answer that question or to define different types of armed conflict.

We found that no treaty contained a general definition of armed conflict. Following standard methodology, therefore, required investigating evidence of state practice and *opinio juris*. We reviewed hundreds of conflicts in the course of our research. The Report specifically refers to 72 conflicts.

In 2007, the Committee participated in a multidisciplinary conference on the meaning of armed conflict at the University of Notre Dame. We found that in political science and peace studies a certain number of fatalities are necessary for a conflict to count as an armed conflict, such as 25 or 1000 deaths per year. In peace studies, the intentions of the fighters are also an important criterion. The Committee did not find that a certain number of fatalities or any fatalities at all are necessary for a conflict to amount to an armed conflict, nor did we find that the intentions of the party are a *sine qua non* of armed conflict. Nevertheless, the perspective of other disciplines did support our finding that the international community recognizes armed conflict as a definable situation, distinctive from situations in which peacetime law prevails.

In 2008, the Committee presented its Initial Report at the ILA's 73rd Conference in Rio de Janeiro. The Initial Report was also discussed in an Open Working Session and was well received. In the two years between the Rio Conference and the conference in The Hague, the Committee's Initial Report remained posted on the ILA website. I wrote an article about the Initial Report that was published in the *Journal of Conflict and Security Law*. The article was also posted on-line. During 2009, the Committee received valuable proposal will likely go to the Executive Council at its meeting in November, which is prior to the likely publication date of the proceedings.