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## The 'war on terror' and International Law

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## 6 | International humanitarian law

‘I observed that men rushed to war for slight causes or no causes at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.’

Hugo Grotius, 1625<sup>1</sup>

‘The war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.’

G.W. Bush, 2001<sup>2</sup>

‘We must define the nature and scope of this struggle, or else it will define us.’

B. Obama, 2013<sup>3</sup>

Discussions around the scope and nature of international humanitarian law (IHL) have dominated legal discourse in the ‘war on terror’. Whether this attention is deserved, or represents an overstretching of the notion of ‘war’ and with it an inflation of the relevance of IHL, is a matter of considerable dispute. IHL applies to particular conduct carried out in association with an ‘armed conflict’ as understood under IHL. Undoubtedly a critical preliminary matter, on which the nature of applicable law depends,<sup>4</sup> is whether, when and where operations aimed at counter-terrorism form part of an armed conflict properly so-called.<sup>5</sup> Beyond disputes concerning the applicability of IHL, are other myriad questions regarding the interpretation and application

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1 H. Grotius, *On Laws of War and Peace* (Paris, 1625), para. 28.

2 Address of the former U.S. President George W. Bush to a Joint Session of Congress and the American People, 20 September 2001.

3 Address by President Obama to the National Defence University, 23 May 2013.

4 While the generally applicable framework of human rights law (IHRL) continues to apply in armed conflict alongside IHL, its content is in significant respects altered by the co-applicability of IHL. See Chapter 7B3.

5 See below 6A1.

of IHL, and even the adequacy of a legal framework often impugned post 9/11 as ill equipped to address a 'new war' against a new enemy.<sup>6</sup>

This chapter seeks to set out the legal framework as it currently governs the conduct of states and non-state parties to armed conflicts. Part A of this chapter – which sketches out the legal framework of IHL – will begin with the law that defines whether there is an armed conflict, if so what sort of conflict, and when it begins and ends. This will be followed by a summary of specific provisions of the legal framework of IHL, in relation to who may be targeted, lawful methods and means of warfare and humanitarian protections that are relevant to terrorism and action against terrorism in such armed conflicts.

Part B of this chapter explores in more detail how this legal framework has been applied in practice in the context of the 'war on terror' since 2001. The question of greatest controversy and import is whether there can be, as the US government asserts, a conflict with al-Qaeda and associates or with terrorist networks of global reach. In this context, controversies surrounding terrorist networks as 'parties' to an armed conflict, and the relevance of the lack of temporal or geographic limits to the putative war of global reach, will be highlighted. In light of current international law, it will be doubted whether there can, legally, be an armed conflict with a movement such as al-Qaeda. There have, however, undoubtedly been conflicts since 9/11, most obviously in Afghanistan, Iraq or more recently Mali for example, which are often described as linked in varying ways to the fight against terrorism, to which IHL applies. Moreover, if the US seeks to invoke IHL in support of its conduct in broader contexts it should, at a minimum, be expected to apply the law consistently, and act in accordance with its terms.

Particular practices employed in recent years – from the designation of 'enemy combatants' to the use of drones to killings of persons considered members of al-Qaeda, for example – will therefore be considered in light of the legal framework. Specific issues that have arisen in the Afghan conflict, to which IHL clearly applies, are also discussed. IHL issues will also be addressed in subsequent chapters: Chapter 7 will explore the inter-relationship between IHL and international human rights law (IHRL), and Chapters 8-10 apply the legal framework in case studies concerning the Guantanamo Bay detainees, the killing of Osama bin Laden or the Extraordinary Rendition programme.

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6 See, e.g., U.S. President George W. Bush, 'State of the Union Address', 29 January 2002; Statement by Ambassador at Large, Pierre Prosper, Address at Chatham House, 20 February 2002 cited in E. Wilmshurst, *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), p. 2; see also discussion on the 'changing characteristics of war' in M. Berdal, 'The "New Wars" Thesis Revisited', in H. Strachan and S. Scheipers (eds.), *The Changing Character of War* (Oxford: Oxford University Press, 2011), p. 109.

## 6A THE LEGAL FRAMEWORK

International humanitarian law is applicable once there has been a resort to force, and an armed conflict has arisen. The threshold legal question for IHL to be relevant is whether there is an armed conflict, in accordance with the legal definition and understandings of the term discussed below. The use of the 'terrorism' label is not determinative of, and indeed not generally relevant to, the question of whether there is an armed conflict properly so-called.<sup>7</sup> For various reasons, chiefly political in nature, armed groups engaged in an armed conflict are often labelled 'terrorists,' particularly by opponents; this has been common historically in situations of non-international conflict, and may be more evident post 9/11.<sup>8</sup> Conversely, one of the unusual characteristics of the so-called 'war on terror' has been the labelling of terrorist organisations as 'enemy combatants' engaged in an armed conflict.<sup>9</sup>

This tendency to conflate terrorism and conflict by politicians, lawyers and the media has elicited much criticism in recent years for the confusion it generates, and its legal and practical implications.<sup>10</sup> The questions of whether there is an armed conflict, and whether particular acts are carried out in association with it, are preliminary legal questions, which must be determined by reference to IHL.

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7 See, e.g., *Ljube Bošković, et al*, ICTY IT-04-82-T, Judgment, 10 July 2008, where the Macedonian government considered the group in question as 'terrorist', while the ICTY found it was party to an armed conflict. Likewise, Israel considers Hezbollah a terrorist organisation, but the report of the UN Commission of Inquiry into Lebanon noted that this did not influence the qualification of the armed conflict: UN Report of the Commission of Inquiry on Lebanon, 23 November 2006, UN Doc. A/HRC/3/2, paras. 8, 9, 57, 62.

8 A common scenario arises in which governments designate opponents 'terrorists' to delegitimize them, and to prosecute them under criminal law, rather than treating them as participants in an armed conflict with rights upon capture. References to armed groups as 'terrorists' is common in many states, such as Colombia, Sri Lanka, and Russia (with regard to Chechnya), and some suggest increasingly so since 9/11: see A. Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism* (Oxford: Hart 2011) p. 100. Criminal charges have reportedly been used as 'bargaining chips' e.g. in Nepal in 2006 where the government agreed to drop terrorism charges against the rebels in exchange for a ceasefire. 'Nepal calls ceasefire with rebels', *BBC News*, 3 May 2006, available at: [http://news.bbc.co.uk/2/hi/south\\_asia/4969422.stm](http://news.bbc.co.uk/2/hi/south_asia/4969422.stm).

9 See discussion of US policy post 9/11 at Part B, and chapters 8 and 12. See also the Israeli Supreme Court's qualification of a 'continuous situation of armed conflict' between Israel and Palestinian 'terrorist organizations'. *The Public Committee Against Torture in Israel v. The Government of Israel*, HCJ 769/02, Israeli Supreme Court, 14 December 2006, para. 16 (hereinafter 'Ruling on Targeted Killings').

10 See, e.g., J. Pejic, 'Armed Conflict and Terrorism: There is a (Big) Difference', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), p. 171-204. Pejic discusses legal, political and practical reasons for keeping the terms distinct, including e.g. the risk of criminalizing lawful acts under IHL and disincentivising peace negotiations, at p. 203.

The precise content of IHL varies, to some degree, depending on the nature of the conflict. For IHL purposes, conflicts are broadly categorized into international or non-international in nature, although (as explored further below) the distinction is often unclear in practice and there are multiple variants on each form of conflict.<sup>11</sup> In any event, it is increasingly recognised that a common set of core principles applies to any type of conflict. IHL imposes constraints on how a conflict may be waged, its primary objective being to protect certain persons who do not (or no longer) take part in hostilities and to limit the methods and means of warfare for the benefit of all.<sup>12</sup> For this reason, a key consideration under IHL – unlike human rights law for example – is the status of the individual (as a combatant, a civilian, a person participating directly in hostilities, etcetera), which determines, to some extent, whether and under what circumstances that individual can be attacked, as well as the precise rights to which he or she is entitled upon capture.<sup>13</sup>

Where IHL does apply, it must be applied consistently. For example, as will be discussed further below, IHL recognises that ‘combatants’ are entitled to engage in conflict, and therefore it deprives them of their immunity from attack, while providing that once they are *hors de combat*, they must be subject to protections associated with their status, and cannot be prosecuted for engaging in hostilities. Particular rules must not be seen in isolation, but should be considered mindful of the range of consequences that flow from the status of individuals under IHL.

IHL should also be considered in the context of broader international law. Its relationship with other areas of international law, and its distinction from them, should be borne in mind. For example, the law that governs armed conflict (sometimes known as the *jus in bello*) applies irrespective of whether or not the use of force is itself lawful (according to the *jus ad bellum*, addressed at Chapter 5). Although, as shall be seen, in practice the two are at times conflated,<sup>14</sup> they are separate bodies of law raising different legal issues.<sup>15</sup>

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11 Recent practice shows that some conflicts do not fit readily into either category, being ‘transnational’ in nature, as discussed further below. On classification of conflicts, see Pejic, ‘The protective scope of Common Article 3: more than meets the eye’, ICRC, Vol. 93, No. 881, March 2011, p. 195 (hereinafter ‘Protective scope of CA3’) and generally Wilmschurst, *International Law and the Classification of Conflicts*, supra note 6.

12 The principal international instruments dealing with IHL are the four Geneva Conventions (GC) of 1949 and the two Additional Protocols to the Geneva Conventions adopted in 1977 (AP I and II). As noted by the ICJ, however, other rules are equally relevant. See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, ICJ Reports 1996, p. 226 (hereafter ‘*Nuclear Weapons Advisory Opinion*’), para. 75.

13 Core principles of IHL, such as the principles of humanity, military necessity and distinction apply at all times, as do humanitarian protections under Common Article 3. See further below and Chapter 8.

14 See e.g. 6B.2.1 below on drone killings and the US justification of ‘self-defence or IHL’.

Force may amount to an armed attack giving rise to a right of self defence, without amounting to an armed conflict.<sup>16</sup> On the other hand, the IHL rules that come into play in armed conflict sit alongside a core of international human rights law that applies in all situations. Although IHL is addressed in this chapter and IHRL in the next, it is important to have regard to both areas of law and the interplay between them in order to fully understand applicable law in particular armed conflict scenarios. As explored more fully in Chapter 7.B.3, this is particularly important where IHL may not provide specific rules on a particular issue (which we will see is especially relevant in non-international armed conflict situations).<sup>17</sup>

The critical preliminary question is, however, whether there is an armed conflict to which IHL applies at all, if so what sort of conflict, and when it begins and ends.

## 6A.1 WHEN AND WHERE IHL APPLIES

### 6A.1.1 Armed conflict: international or non-international

IHL applies in time of armed conflict. While the terminology of 'war' is often invoked, it should be noted that 'such references may prove to be more of emotional and political significance than legal'.<sup>18</sup> This is all the more true of emotive references in the post-September 11 world to the 'war on terror'. The same could be said of references to 'terrorism' which, as noted above, are not legally significant for the purposes of determining whether there is an 'armed conflict', and if so which rules of IHL apply.

While 'armed conflict' is not defined in IHL treaties,<sup>19</sup> the following definition, set down by the International Criminal Tribunal for the former Yugoslavia (ICTY), has been widely accepted:

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15 The lawfulness of one does not implicate directly the lawfulness of the other: the use of force in another state's territory may be lawful in self defence while the particular action taken is unlawful under IHL (or under IHRL). Conversely, unlawful force does not necessarily imply a violation of IHL.

16 Chapter 4 discusses 9/11 as an 'armed attack', while Section B explains why it did not amount to an armed conflict.

17 See, e.g., 'Persons detained by the US in relation to armed conflict and the fight against terrorism – the role of the ICRC', ICRC, 9 January 2012, available at: <http://www.icrc.org/eng/resources/documents/misc/united-states-detention.htm>. On sometimes difficult questions of interplay, see Chapter 7.B.3.

18 C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford: Oxford University Press, 1995), p. 39, 44.

19 See ICRC Commentary GC I, pp. 49-51.

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.<sup>20</sup>

The question of whether an armed conflict exists involves an essentially factual assessment,<sup>21</sup> rather than one 'laden with legal technicalities'.<sup>22</sup> In this factual assessment no relevance should be attached, for example, to the existence or otherwise of a 'declaration of war', or to acknowledgement by the parties that they are in a state of war.<sup>23</sup> Likewise, it is irrelevant that an opposing party (or other states) recognise the status of the other party, in determining whether there is, in fact, an 'armed conflict' or its nature.<sup>24</sup> Instead, as discussed further below, the essential characteristic of any armed conflict, international or non-international (considered in turn below), is the resort to force between two or more identifiable parties.

In practice, it may well be difficult to distinguish between armed conflict and organised crime, as it often is to distinguish between civil unrest and non-international conflict, or between international armed conflict (IAC) and non-international armed conflict (NIAC).<sup>25</sup> The current legal framework is premised, however, upon IHL applying only in armed conflict, and its content varying, to some extent, depending upon the nature of the conflict.<sup>26</sup>

20 *Dusko Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995 (hereinafter '*Tadić* Jurisdiction Decision'), para. 70. See also ICC Statute.

21 Disputes arise not infrequently as to whether particular facts satisfy the threshold particularly of non-international conflicts. See below as regards the disputed war on al-Qaeda post-September 11.

22 Greenwood, 'Scope of Application', supra note 18, p. 42.

23 *Ibid.*, p. 45. Common Article 2(1).

24 As, e.g., in Afghanistan, the fact that a state party to a treaty is not represented by a recognised government does not affect the international nature of the conflict or applicable IHL. Article 4 (A)(3) and GC III. See, in general, D. Schindler, 'The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols', (1979-II) 163 RdC 117.

25 In 2010, the UK Ministry of Defence forecast that: 'The distinction between inter-state and intra-state war, and between regular and irregular warfare, will remain blurred and categorising conflicts will often be difficult'. DCDC, 'Global Strategic Trends – Out to 2040', MOD 02/10c30(2010) and UK Strategic Defence and Security Review 2010, cited in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p.4.

26 Although some propose the 'unification of international humanitarian law' into one body of law applicable to any conflict, (see L Moir, 'Towards the Unification of International Humanitarian Law', in Burchill R., White, N.D., Morris, J. (Eds.), *International Conflict and Security Law*, (Cambridge, 2005), pp 108-128) and others a redefinition of how we understand conflict itself (see infra, US position and supporters), this chapter attempts to focus on an assessment of the law as it currently stands rather than how the law might evolve in the future. See also *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment, ICC, 14 March 2012 para 539.

#### 6A.1.1.1 International Armed Conflict

Article 2 of the Geneva Conventions, and the definition of armed conflict advanced above, both make clear that an *international* armed conflict (IAC) exists where force is directed by one state against another,<sup>27</sup> and this is generally thought to be the case irrespective of duration or intensity.<sup>28</sup>

While the proposition that the parties to international armed conflict constitute two or more states generally holds true, it is subject to qualification. Firstly, cases of total or partial military occupation, even if met with no armed resistance, and even if there is no longer any opposing party, still constitute international conflicts for the purposes of IHL.<sup>29</sup> Moreover, since the 1970s, wars of self-determination against colonial domination have likewise been included within the rubric of international conflicts for the purposes of IHL.<sup>30</sup>

An international armed conflict may also arise where a state or states intervene in a non-international conflict (NIAC), such that there are then states on both sides of the conflict.<sup>31</sup> They may become parties by intervening with their own troops, having other participants act on their behalf, or by rendering direct support to the military operations of one of the parties.<sup>32</sup> Some controversy surrounds the nature of the conflict that emerges from a state intervening on another state's territory, on the side of the state, or indeed if there is no other state involved on the conflict, such that the resulting conflict involves a (foreign) state on one side and a non-state actor on another. The majority view,<sup>33</sup> endorsed by the ICC, is that 'in the absence of two States opposing each other, there is no international armed conflict.'<sup>34</sup>

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27 Article 2 of the Geneva Conventions applies to '...any other armed conflict, which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.

28 See the ICRC Commentary to Common Article 2: 'Any difference ... leading to the intervention of members of the armed forces is an armed conflict ... It makes no difference how long the conflict lasts or how much slaughter takes place'. See, e.g., ICRC Commentary to GC VI, p. 19. As regards the existence, or not, of an 'intensity threshold', see part A.1.1.2 (i). On the *jus ad bellum* arising, see Chapter 5.

29 Greenwood, 'Scope of Application', supra note 18, p. 41. On occupation, see 6A.3.4 below.

30 See Art. 1 AP I.

31 Examples might include the recent intervention in Libya.

32 See ICTY, *Tadić* Jurisdiction Decision, supra note 20, paras. 137-40.

33 See a recent study of international experts under the auspices of the International Law Programme at Chatham House, in Wilmschurst, *International Law and the Classification of Conflicts*, supra note 6, noting a minority view that the use of force by one state in the territory of another gives rise to IAC, and the majority view that extra-territorial conflicts between states and non-state actors are NIACs. See also G. Aldrich, 'The Laws of War on Land', 94 (2000) AJIL 42, p. 62.

34 *Lubanga* Judgment, note 26, para 541.

The Lebanon conflict of 2006 may illustrate the complexity of the issues arising in practice.<sup>35</sup> That scenario (although complicated by some assertions of the Lebanese state's responsibility),<sup>36</sup> was a situation where force was predominantly directed at Hezbollah, a non-state actor, on another state's soil. The Israeli military intervention against Hezbollah targets was considered by some to constitute an IAC on the basis of their transnational nature;<sup>37</sup> for others, they gave rise to a cross-border NIAC, based on the state versus non-state nature of the parties.<sup>38</sup> For yet others (on perhaps the best view), it gave rise to a simultaneous IAC (between Israel and Lebanon, so far as the state's facilities and airports were attacked in pursuit of the ultimate Hezbollah target) and a NIAC (between Israel and Hezbollah forces).<sup>39</sup> Classification of this type of transnational use of force is clearly an area where opinion is divided and law and practice are likely to develop in years to come.

A further issue, on which some uncertainty has crept into the traditional approach to international conflicts, is whether there is an 'intensity' requirement for the use of force to give rise to any kind of armed conflict. The traditional view, reflected in the ICTY definition referred to above,<sup>40</sup> is that interstate use of force is *per se* sufficient to give rise to an IAC irrespective of its intensity.<sup>41</sup> While this view may remain dominant, it has also been questioned whether every forceful action should be seen as triggering an armed conflict,

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35 For a detailed discussion of the nature of the conflict, see I. Scobbie, 'Lebanon 2006', in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 387. The conflict is said to have begun with Hezbollah cross border incursions on 12 July 2006, as it mounted operation True Promise, although some contend it began with IDF forces entering Lebanese village, p. 390.

36 In a letter dated 12 July 2006, from Israel's Permanent Representative to the UN to the President of the Security Council, Israel alleged an 'acts of war from Lebanon'; however, Israel subsequently claimed that its actions were not against Lebanon but Hezbollah: Tzipi Livni, former Vice Prime Minister of Israel, press conference, 19 July 2006; see also *ibid*, p. 392-93.

37 UN Report of the Commission of Inquiry on Lebanon, supra note 7, para. 57. See also J. Stewart, 'The UN Commission of Inquiry on Lebanon: A Legal Appraisal', 5 (2007) *J. Int'l Crim. Just.* 1039, 1042-43; Bianchi and Naqvi supra note 7, p. 79; see also Akande, 'Extraterritorial Armed Conflicts' in Wilmshurst supra note 33.

38 This emphasis on the nature of the parties not geography accords with the ICTY approach. It rejected the proposition that IAC could arise between a state and non-state forces, absent a relationship of 'overall control' by a state over said non-state actors; see *Tadić*, IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999 (hereinafter '*Tadić* Appeal Judgment'); see also Chapter 3 on different standards of attribution for state responsibility purposes.

39 Pejic, 'Protective scope of CA3', supra note 11.

40 In that definition, the intensity requirement only applies to NIACs.

41 See the ICRC Commentary to Common Article 2 of the Geneva Conventions, note 26, and Pejic, 'Protective scope of CA3', supra note 11, p. 191-93 for policy reasons for rejecting a threshold for IACs.

and whether this may not rather depend on the 'surrounding circumstances'.<sup>42</sup> There was no doubt in the context of the Israeli military action (involving more than 100 airstrikes in one month) that any threshold of violence was satisfied.<sup>43</sup> It has been pointed out, however, that brief interventions involving force against specific terrorist targets have been a fairly common feature of practice in recent years, yet it is rare for the states involved or others to suggest that an inter-state conflict has arisen as a result.<sup>44</sup> While this may be explained by other reasons, including in some cases doubts as to whether the force may have been based on state consent,<sup>45</sup> in other cases where there is apparently no such consent, reluctance to invoke the armed conflict paradigm may reflect perceptions regarding the force not having met a certain threshold.<sup>46</sup> Thus, while the predominant view of current law remains that there is no threshold for IAC, this may be another area of the law where there is at least scope for differences of view as to whether a certain minimal threshold of force separates random acts of force from armed conflict for IAC, as it does for NIAC, to which we now turn.

#### 6A.1.1.2 Non-International Armed Conflict

For the most part, determining the existence of an international armed conflict is relatively straightforward, involving the use of force between states. The classification of *non-international* armed conflict (NIAC) creates somewhat greater scope for dispute as to whether a particular situation amounts to an armed conflict, as opposed to 'internal disturbances and tensions [or] isolated and

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42 E.g. should arrest on another state's territory, even if unlawful under the *jus ad bellum*, amount to 'armed conflict' triggering IHL? See, e.g., International Law Association (ILA), 'Final Report on the Meaning of Armed Conflict in International Law', The Hague Conference 2010 (hereinafter 'ILA Report'). Eg. UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Sec. 3.3.1 (OUP 2005) suggests consideration of 'surrounding circumstances' is required. The Ministry of Justice, 'War Powers and Treaties: Limiting Executive powers', Consultation Paper CP26/07, 25 October 2007, p. 25, para. 48 (available at <http://www.official-documents.gov.uk/document/cm72/7239/7239.pdf>) also suggests there may be some threshold. See also Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 8 p. 76-77.

43 Hezbollah attacked Israeli villages and captured two Israeli soldiers. Israel responded with a month of air strikes and artillery fire on targets in Lebanon, an airport blockade and ground invasion. See UN Report of the Commission of Inquiry on Lebanon, supra note 7; Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 8, p. 57.

44 Bianchi and Naqvi, *ibid.*

45 See, e.g., lethal attacks in Yemen or Pakistan, discussed below and Chapter 5.

46 Situations where there is no such apparent consent may include the targeting of alleged al-Qaeda in Pakistan yet, while there are divergent views on conflicts in Pakistan, few allege the existence of an IAC between the US and Pakistan. See Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, note 8, p. 76-77.

sporadic acts of violence',<sup>47</sup> which are explicitly excluded by IHL from the scope of armed conflict. This has historically often been a matter of controversy, not least because, as already noted, states are reluctant to acknowledge the existence of conflict and in particular to acknowledge insurgents and confer any perceived legitimacy upon them as parties to a conflict.

The factors that are central to the factual determination of the existence of a NIAC fall into two categories: firstly, the intensity and duration of the violence,<sup>48</sup> and secondly, the nature and organisation of the parties.<sup>49</sup>

Developments in the nature and complexity of NIACs have led the ICRC in recent years to describe an expanded typology of conflict that recognises multiple scenarios as potentially giving rise to NIACs. These include conflicts on one state's territory between the state's forces and armed groups, or between such groups; conflicts where international forces or other states intervene on the side of the state; conflicts that are based in one territory and spill over to another; and conflicts between states and armed groups across borders.<sup>50</sup> This reflects developments in practice, to which the legal framework seeks to adjust, and the complexity and controversy surrounding questions relating to the classification of conflicts.<sup>51</sup> However, in each scenario, the key questions remain whether the intensity threshold has been met and whether the parties meet the organisational requirements of parties to a NIAC, both addressed in turn below.

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47 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.' Article 1(2) AP I.

48 M. Sassòli, 'Non-International Armed Conflict: Qualification of the Conflict and Its Parties', background papers presented at the 2003 Sanremo Round Table on IHL; see Fleck, 'Non-International Armed Conflict', supra note 18. See also ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 30<sup>th</sup> Annual Conference of the Red Cross and Red Crescent, October 2007, available at: <http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf>, (hereinafter 'ICRC Report on IHL and Contemporary Armed Conflicts').

49 See *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment, ICC, 14 March 2012. See generally, 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48; Sassòli, 'Non-International Armed Conflict', supra note 48; Fleck, 'Non-International Armed Conflict', supra note 18.

50 Pejic, 'Protective scope of CA3', supra note 10, p. 195. Another category – transnational conflicts without territorial limits, asserted by some 'almost exclusively in the United States' and addressed below – is rejected by the ICRC as not amounting to a NIAC. See generally, 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48; see also *Lubanga*, supra note 49.

51 See generally Wilmschurst, *International Law and the Classification of Conflicts*, supra note 6.

*i) The Intensity Requirement?*

The factual existence of armed force,<sup>52</sup> of a level that distinguishes it from law enforcement, is a key criterion of non-international armed conflict.<sup>53</sup> Both the ICTY and the ICC have suggested that a NIAC involves 'protracted' violence; this formula put forward in *Tadić*, was endorsed to an extent more recently by the ICC in the *Lubanga* case, affirming that the groups involved need to have the ability to plan and carry out operations 'for a prolonged period of time'.<sup>54</sup>

Other judgements of the ICTY have placed the emphasis on the *intensity* rather than the *duration* of violence, which may better reflect the legal test.<sup>55</sup> This is consistent with the historical treatment of non-state actor violence, for example involving ETA or the IRA, which were certainly prolonged over an extensive period of time but may not have passed the intensity threshold at any one time and which were not, at least generally, considered to have amounted to armed conflict. This stands in contrast with the intense hostilities between Israel and Hezbollah in Lebanon in July of 2006, which, as noted above, were considered as meeting the intensity threshold for a non-international armed conflict. Regarding the sorts of factors that may contribute to an assessment of this threshold in less clear-cut instances, the ICTY has provided certain 'indicators', which assist in this assessment. These include the number of confrontations, the actors involved, the types of weaponry used and the extent of injuries and destruction.<sup>56</sup>

*ii) The 'Parties' to a NIAC?*

The parties to non-international armed conflict may be 'governmental authorities and armed groups', or two (or more) armed groups.<sup>57</sup> In addition, as noted above, where other states or international organisations become involved on the side of the state in a conflict, which is generally considered to remain 'non-international' so long as state forces on the one side oppose non-state actors on the other.<sup>58</sup> A controversial question relates to the circumstances in which an armed group may constitute a party to an armed conflict.<sup>59</sup>

Under IHL the non-state (or 'insurgent') groups that may constitute parties must be capable of identification as a party to the conflict and must have

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52 Report of the Commission of Inquiry on Lebanon, *supra* note 7, para. 51.

53 ICRC, 'International Humanitarian Law and Terrorism: Questions and Answers', 1 January 2011, available at: [www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm](http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm). See 6A.1.1.1 above.

54 *Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 234. See also *Lubanga*, Judgment, *supra* note 49.

55 *Ramush Haradinaj*, ICTY-04-84-T, Judgment, 3 April 2008, paras. 49, 60.

56 *Ibid.* In *Lubanga*, Judgment, *supra* note 49.

57 See ICC Statute, Article 8(2)(f).

58 J. Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', ICRC, in Wilmschurst, *International Law and the Classification of Conflicts*, *supra* note 6.

59 See Part 6B.1.1.1 below on whether al-Qaeda or associated groups may constitute such a party.

attained a certain degree of internal organisation.<sup>60</sup> This has been made clear by the ICTY in several cases, including the *Haradinaj* decision, and has been followed by the ICC in the *Lubanga* judgment.<sup>61</sup> Jurisprudence points to several 'indicators' or 'non-exhaustive criteria' to establish whether the organisational requirement is fulfilled, which include the existence of a command structure and disciplinary rules and systems within the group, potentially (but not necessarily) involving the control of territory and the existence of an operational headquarters; the ability to procure arms and to plan and carry out controlled military operations; the extent, seriousness and intensity of military operations and the ability to coordinate and negotiate settlement of the conflict.<sup>62</sup> By contrast, control of territory is not a requirement to constitute a party to a non-international armed conflict (although it is a jurisdictional threshold for the application of one of the applicable treaties, Additional Protocol II).<sup>63</sup>

The identification of the parties to a conflict is a key criterion on which the operation of IHL rules and principles of distinction and responsibility rest. While compliance with IHL is not itself a criterion,<sup>64</sup> the group must be *capable* of observing the rules of IHL to constitute a party to an armed conflict.<sup>65</sup> The significance of this issue for the 'war on terror' will be explored in Part B below.<sup>66</sup>

#### 6A.1.2 Temporal scope of IHL: defining a Start and an End Point?

When, in accordance with the criteria set out above, an armed conflict begins, involving the use of force between identifiable parties, the application of IHL is automatically triggered. IHL applies from the initiation of an armed conflict

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60 The ICRC emphasises the 'identifiable nature of the parties, and those associated with them'. See 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48, p. 19. On discipline as a criterion, see Sassòli, 'Non-International Armed Conflict', supra note 48.

61 *Haradinaj*, 2008 Decision, supra note 55, paras. 49, 60; see also *Boškoski*, paras. 194-206; see ICC's 'non-exhaustive list of factors' in *Lubanga* Judgment para 536-7.

62 See *Limaj, et al.*, IT-03-66-T, Judgment, 30 November 2005, para. 90 (citing *Slobodan Milošević*, IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004 Rule, paras. 23-24); see also *Haradinaj*, supra note 55, paras. 49, 60 for a set of indicative factors. *Lubanga*, ibid.

63 The territorial requirement is however a jurisdictional threshold for the application of AP II, but not for the existence of an armed conflict under IHL; *Lubanga* para 536.. See Fleck, 'Non-International Armed Conflict', supra note 18, and Sassòli, 'Non-International Armed Conflict', supra note 48.

64 Sassòli, 'Non-International Armed Conflict', supra note 48.

65 See *Boškoski*, supra note 5, para. 205: the 'organisational ability to comply' was relevant, not compliance itself, and the key question was 'level of organisation'. See also 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 47, p. 18-19.

66 See part 6B.1.1.2 below.

until the general close of military operations.<sup>67</sup> In relation to situations of occupation, while difficulties arise in identifying the beginning and end of an occupation, particularly long-term occupation,<sup>68</sup> the obligations of the occupying state continue until one year after the occupation comes to an end.

For international armed conflict, it is usually at least relatively straightforward to identify the point at which force between states triggers an armed conflict. For non-international armed conflict, the stage at which violence of sufficient intensity arose, or in line with the approach of the ICTY, when hostilities became 'protracted', may be less readily identifiable.

The end point of an armed conflict in turn occurs when the conditions for the establishment of a conflict cease to exist – where there is no longer use of force meeting any relevant threshold or no longer groups capable of constituting identifiable parties to the conflict. A temporary or tentative cessation of hostilities is clearly insufficient.<sup>69</sup> just as while a formal declaration is unnecessary to bring about an end of military operations as it was to initiate 'armed conflict'. Rather, the questions are primarily factual ones: has there been a definitive cessation of active hostilities, bringing the conflict to an end? In case of non-international armed conflict, are any on-going hostilities of insufficient scale or intensity to constitute an armed conflict, having reverted to sporadic violence? Where the other party to the conflict capitulates, or indeed no longer qualifies as a party, then it should follow that the cessation of hostilities is definitive and the conflict terminated.

#### 6A.1.3 Identifiable Territorial scope and the reach of IHL?

In the event of an armed conflict, it has been said that 'international humanitarian law continues to apply in the whole territory of States party to international armed conflict or, in the case of non-international conflicts, the whole territory under the control of a party, whether or not actual combat takes place there'.<sup>70</sup> Clearly then the reach of IHL can extend beyond the immediate area of hostilities or zone of battle. Traditionally, IHL was not however considered

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<sup>67</sup> Formulae used vary between IHL instruments, e.g. Article 6 GC IV refers to application until 'the general close of military operations', and on occupied territory until the end of occupation ; Article 118 GC III refers to the duty to repatriate at the 'cessation of active hostilities'. The *Tadić* Appeal Judgment invokes the perhaps looser phrase 'until a general conclusion of peace is reached', supra note 20, para. 70. See also H.-P. Gasser, 'Protection of the Civilian Population', in Fleck, *Handbook of Humanitarian Law*, supra note 18, pp. 209, 221. This does not limit specific obligations beyond the end of hostilities, e.g. to identify weapons that may continue to cause injury beyond the cessation of hostilities.

<sup>68</sup> ICRC, 'Challenges of Contemporary Armed Conflicts', supra note 48, p. 26-27; Wilmschurst, *International Law and the Classification of Conflicts*, supra note 6, p. 484.

<sup>69</sup> Greenwood, 'Scope of Application', supra note 18, p. 62.

<sup>70</sup> *Tadić* Appeal Judgment, supra note 38, para. 70. Territory includes land, rivers, territorial sea and air space. See *Lubanga*, supra note 48.

to extend to the territory of states not party to the conflict, unless those states allow their territory to be used by one of the belligerents.<sup>71</sup> It now seems increasingly well established that armed conflicts can and do spillover into the territories of states not party to the conflict. In respect of non-international armed conflict specifically, the ICTY has noted that while such conflicts generally arise 'within a state', the conflict need not unfold entirely within one state's geographic borders.<sup>72</sup> The Rwanda Statute acknowledged the same, by explicitly reflecting the cross-border history of that conflict.<sup>73</sup> The ICRC, and an increasing body of commentary, recognise that a non-international conflict may 'spillover' or even be 'cross border' without this necessarily altering the non-international nature of the conflict.<sup>74</sup>

The territorial sphere of NIACs may therefore have become more fluid, in accordance with developing realities. While a rigid approach to territorial limits of a NIAC is therefore increasingly untenable,<sup>75</sup> it has also been subject to much dispute whether the territorial dimension can be dispensed with entirely, as proposed by the US in relation to the controversial 'global war on terror' discussed in Part B below.<sup>76</sup> It has been suggested in response that some link to the territory of a state party to the Geneva Conventions, or a territorial *locus* for an armed conflict, is essential, even if it may expand beyond that state.<sup>77</sup> What is clear is that the key factors for determining whether a NIAC exists remain the nature of the parties to the conflict and the intensity of violence.

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71 Greenwood, 'Scope of Application of IHL', supra note 18, p. 51. If neutral territory is drawn into the area of war, and hostilities are conducted there, rival belligerents may also be entitled to take measures on that territory.

72 *Tadić* Appeal Judgment, supra note 38, para. 70.

73 'The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda ... as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens.' Statute for the International Criminal Tribunal for Rwanda, UNSCR 955, 8 November 1994, Art. 7 (ICTR Statute).

74 See ICRC expanded typology in Pejic, 'Conflict Classification', supra note 58; see, e.g., N. Schrijver and L. Herik, 'Leiden Policy Recommendations on Counterterrorism and International Law', Grotius Centre for International Legal Studies, 1 April 2010, para. 63, available at: <http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf> (hereinafter 'Leiden Policy Recommendations'). 'It is possible for an armed conflict involving non-state actors to extend to the territory of more than one state, without necessarily qualifying as an international armed conflict. Such "transnational" armed conflicts would be subject to IHL applicable to non-international armed conflicts.' Cf Akande, 'Extraterritorial Armed Conflicts', supra note 33.

75 See *ibid* and Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 8, p. 30.

76 See Part B.1.1. below for a discussion on the 'global war' controversy.

77 The precise geographic limits of NIACs, and how such spillover or expansion airtides, is a matter of some debate as discussed in Part B. See, e.g., Pejic, 'Conflict Classification', supra note 58.

## 6A.2 APPLICABLE LAW

The rules that govern any armed conflict depend, to a significant extent, on the international or non-international nature of the conflict discussed above. The applicability of some (but by no means all) treaty rules depends also on whether they have been ratified by all parties to the conflict. However, certain core rules of customary law are applicable irrespective of treaty ratification or the nature of the conflict.<sup>78</sup>

Historically, the focus of IHL was on governing international armed conflict, to which a more comprehensive body of treaty law therefore applies.<sup>79</sup> Developments in practice and legal thinking, however, have 'blurred' the distinction between international and non-international conflict and the rules applicable to each,<sup>80</sup> such that a 'common core' of customary IHL applies whatever the nature of the conflict.<sup>81</sup> Beyond treaties and customary law, reference must also be made to how IHL has been interpreted and applied by judicial bodies, national and international. While such jurisprudence was historically quite scarce, a noteworthy shift came with the work of international criminal tribunals, notably the UN ad hoc tribunals for the former Yugoslavia and Rwanda, as well as other ad hoc tribunals and since then the ICC.<sup>82</sup> By applying IHL in the context of concrete criminal cases, this jurisprudence has often led to a more rigorous analysis of the precise content and meaning of IHL.<sup>83</sup>

A long-established and intricate body of treaty law regulates the conduct of international conflicts and the protection of persons and property, such as the Hague Regulations of 1907,<sup>84</sup> the four Geneva Conventions of 1949, the

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78 See J. Henckaerts and L. Beck, *Customary International Humanitarian Law*, ICRC, (Cambridge: Cambridge University Press, 2005 (hereinafter 'ICRC Study on Customary IHL')).

79 Detailed rules governing IACs contrast to a more skeletal body of treaty law for NIACs (though the gap was narrowed by common Article 3 to the Geneva Conventions and AP II and through subsequent jurisprudence and practice). Divergence is seen e.g. in the ICC Statute Art 8.

80 The jurisprudence of the *ad hoc* tribunals found basic rules and principles in instruments addressed only to international conflict to apply to both types of conflict; see e.g. *Tadić* Jurisdiction Decision, *supra* note 20, paras. 119-24; see also *Lubanga*, *supra* note 48.

81 *Ibid.*, and the ICTY's approach to a common core of war crimes; see S. Boelaert-Suominen, 'The Yugoslavia Tribunal and the Common Core of International Humanitarian Law Applicable to All Armed Conflict', 13 (2000) LJIL 619, 630.

82 International Tribunal for the former Yugoslavia, established by SC Res. 827 (1993), 25 May 1993, UN Doc. S/RES/827 (1993); ICTR, established by SC Res. 955 (1994), adopted on 8 November 1994, UN Doc. S/RES/955 (1994) and ICC Statute 1998, all discussed in Chapter 4.

83 Grave breaches and other serious violations of IHL may carry individual responsibility, but not *all* violations of IHL are criminal: see Chapter 4A.1.1.2.

84 Hague Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907), 3 *Martens Nouveau Recueil* (Series 3) 461, in force 26 January 1910 (hereinafter '1907 Hague Regulations').

First Additional Protocol thereto of 1977 and the Hague Convention on Cultural Property of 1954.<sup>85</sup> To bind states parties to the conflict as treaty law,<sup>86</sup> the particular treaties must have been ratified or acceded to by those parties.<sup>87</sup> The US, UK and Afghanistan are all party to the four Geneva Conventions, for example, which were therefore binding on those states in the international armed conflict in Afghanistan as treaty law, though few other relevant treaties have been accepted by all parties.

While historically certain IHL treaty provisions only applied as treaty law if all parties to the conflict were parties to the treaty,<sup>88</sup> contemporary IHL rejects such a principle. The Geneva Conventions for example are binding on states parties engaged in armed conflicts, irrespective of whether other parties to the conflict are party to the Conventions. This reflects the fact that the core of IHL treaty provisions, by their nature, enshrine obligations *erga omnes* (i.e. obligations owed to all states, not merely the other parties to the treaty)<sup>89</sup> and that the content of many key provisions of treaties such as the Geneva Conventions is also customary law, discussed below. Moreover, where a treaty *is* applicable, its binding nature on parties to the conflict is not affected by the fact that an adversary may violate the obligations contained therein.<sup>90</sup> Non-observance of particular binding rules by one party does not justify violations by another.<sup>91</sup> In this vein, the ICTY has emphasised that crimes

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85 IHL instruments relating to conduct of hostilities and to the protection of persons caught up in armed conflict, are often broadly referred to as 'Hague' and 'Geneva' law respectively

86 The nature and number of parties to a conflict is a question of fact that may change over time. For the purposes of the conflict in Afghanistan, the position of Afghanistan, the US and UK is considered.

87 See the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 33, in force 27 January 1980. According to Article 18, VCLT, States are also required not to defeat the object and purpose of a treaty that they have signed but not yet ratified.

88 Eg contrast the St Petersburg Declaration 1868 with the Geneva Conventions or Additional Protocols.

89 See Article 1 of the Geneva Conventions imposing obligations on *all* high contracting parties. See also ICRC Commentary to GC I: 'A State does not proclaim the principle of the protection due to wounded and sick combatants in the hope of saving a certain number of its own nationals. It does so out of respect for the human person as such.' See also *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, ICJ Reports 1970, p. 32; T. Meron, 'The Humanization of Humanitarian Law', 94 (2000) AJIL 239, p. 249; T. Meron, 'The Geneva Conventions as Customary Law', 81 (1987) AJIL 348, 349.

90 'Reciprocity' in the observance of IHL was a traditional principle that has been rejected in modern IHL. See Meron, 'Humanization', supra note 89, pp. 247-48, 251.

91 See Article 51(8) AP I: 'Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population.' See also Article 60(5) Vienna Convention on the Law of Treaties enshrining the principle that, as regards treaties of a 'humanitarian character', the breach of treaty obligations is no excuse for material breach by other parties.

committed by an adversary can never justify the perpetration of serious violations of IHL.<sup>92</sup>

As regards non-international armed conflicts, a far more limited body of treaty law applies, the core provisions of which are Common Article 3 of the Geneva Conventions and Additional Protocol II of 1977, which applies when certain conditions are met.<sup>93</sup> Given the relative dearth of treaty rules, customary law is of particular significance.<sup>94</sup>

Among the fundamental principles of IHL that apply, irrespective of the application of treaty law, are the competing considerations of *humanity* and *military necessity*, reflected throughout IHL, from which the particular principles of *distinction*, *proportionality* and the prohibition on causing *superfluous injury or unnecessary suffering* derive.<sup>95</sup> These principles can be considered customary international law, applicable to all conflicts.<sup>96</sup>

The treaties mentioned above remain relevant so far as they reflect or provide evidence of customary law, and the rules contained therein may therefore be binding on states whether or not they are parties to particular treaties. Among the critical treaties that are recognised to fall into this category are the Geneva Conventions of 1949 and the Hague Convention Respecting the Laws and Customs of War on Land of 1907.<sup>97</sup> The bulk of the provisions of the First Additional Protocol to the Geneva Conventions are recognised

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92 See the discussion of this principle – ‘*tu quoque*’ – in *Kupreskic et al.*, IT-95-16-T, Judgment, 14 January 2000, paras. 765, 515-36 and *Martić*, IT-95-11-I, Rule 61 Decision, 8 March 1996, paras. 15-17.

93 Article 1 AP II sets out the jurisdictional threshold for the application of that treaty, requiring that the organised groups are under responsible command and exercise control over part of the state’s territory.

94 For a detailed analysis of the content of the customary rules of IHL, see ‘ICRC Study on Customary IHL’.

95 See ‘ICRC Study on Customary IHL’, supra note 78. T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Oxford University Press, 1991), p. 74, noting that ‘no self respecting state’ would deny the application of the principle of humanity to internal as well as international conflicts. On the ‘elementary considerations of humanity’ having the force of *jus cogens*, see *Delalic et al.*, IT-96-21-A, Judgment (ICTY Appeals Chamber), 20 February 2001, para. 143. The principles reflect the ‘dictates of public conscience’ established in ICJ jurisprudence: *Corfu Channel (United Kingdom v. Albania)*, Merits, ICJ Reports 1949, p. 4; *Nuclear Weapons Advisory Opinion*, supra note 12, para. 7.

96 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 14, para. 218, and *Tadić* Jurisdiction Decision, supra note 19, para. 102. As early as 1899, the Martens Clause (Preamble to the Hague Convention Respecting the Laws and Customs on Land) provided that certain basic standards of conduct apply to all conflicts. Later common Article 3 of the Geneva Conventions enshrined the same ‘principles of humanity’, which are considered customary law applicable to all conflicts.

97 Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, UN Doc. S25704. The report was unanimously approved by SC Res. 827 (1993), supra note 82.

as forming part of customary law.<sup>98</sup> As noted above, as a matter of customary law, there are now relatively few outstanding areas in which the content of legal protection in international and non-international conflict is different; some of these areas are discussed elsewhere in this book.<sup>99</sup>

The following section sketches out certain basic IHL rules concerning the selection of legitimate targets, lawful methods and means of warfare and the humanitarian protection due to persons affected by an armed conflict, all of which will be relevant to assessing the lawfulness of measures taken in the 'war on terror' discussed in Part B.

While little significance attaches to the use of the terrorism label as such, it should be noted that IHL prohibits the range of violent conduct that would commonly be referred to as 'terrorism' if committed outside armed conflict.<sup>100</sup> As discussed in Chapters 2 and 4, IHL also contains specific rules prohibiting acts of 'terrorism' or 'spreading terror among the civilian population' within armed conflict,<sup>101</sup> though acts of terrorism would fall foul of a broader range of IHL rules, most notably the basic principle requiring the protection of the civilian population from attack. As discussed in Section B of this chapter, the rules sketched out here are directly relevant to an assessment of the lawfulness of measures taken in response to international terrorism post 9/11.

#### 6A.2.1 Targeting: the principle of distinction and proportionality

IHL regulates who and what may be the legitimate target of military action during armed conflict. At the heart of these rules is the principle of distinction, which counters the notion of total war and requires that civilians and civilian objects must be distinguished from military targets, and operations directed only against the latter. Distinction is the single most important principle for

98 The UK is party to AP I, but Afghanistan and the US are not, although the US signed it on 12 December 1977. However, as the ICRC notes, 'it is not disputed that most of [AP I's] norms on the conduct of hostilities also reflect customary international law.' The ICTY has described it as 'not controversial that major parts of both Protocols reflect customary law'. *Kordić and Cerkez*, IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss the Amended Indictment, 2 March 1999, para. 30.

99 See 'ICRC Study on Customary IHL', *supra* note 78. Issues regarding detention safeguards is an example where IHL provides little guidance in NIACs, as discussed in Chapter 7.3. The rules on POW status, e.g., do not apply in non-international armed conflict, therefore fighters in a NIAC, if captured, can be prosecuted for fighting against the state. Other protections such as humane treatment, safeguards against arbitrary detention and fair trial guarantees apply to both. See also Chapter 8 on rules governing Guantanamo detentions.

100 On definitions and elements of terrorism, see Chapter 2.

101 Art. 33 GC IV and Art. 4(2)(d) AP II address the treatment of persons in the power of the adversary. Art. 51(2) AP I and Art. 13(2) AP II specifically prohibit the infliction of acts of terror on the civilian population with the primary purpose of spreading terror.

the protection of the victims of armed conflict, and is a principle of customary law applicable to all types of armed conflict.<sup>102</sup>

As explained below, attacks are unlawful if they are: (a) directed specifically against civilians or civilian objects; (b) launched indiscriminately without distinction between civilians and military targets or (c) directed at military objectives, but anticipated to cause damage to civilians or civilian objects that is disproportionate to the military advantage anticipated at the time of launching the attack.<sup>103</sup> As regards objects, only those, which contribute to the adversary's military capability, the destruction of which would give rise to definite military advantage, may be attacked.<sup>104</sup> The law imposes certain positive obligations on those responsible for attacks to ensure that these rules are given meaningful effect.

#### 6A.2.1.1 *Lethal Use of Force against Combatants and Armed Groups?*

In international armed conflict, members of the armed forces of an adversary are perhaps the most obvious legitimate military targets.<sup>105</sup> They have the 'privilege' of being entitled to use force, but it carries with it the serious implications, one of which is being susceptible to lawful targeting, as well as the privileged status of POW if captured, including immunity from prosecution for participating in hostilities, as discussed below. 'Combatants' include not only regular troops but may also comprise, under certain conditions,<sup>106</sup> irregular groups that fight alongside them and are '*under a command responsible to that party for the conduct of its subordinates*'.<sup>107</sup> Members of an armed group

102 The 'ICRC Study on Customary IHL', supra note 78, Vol. I, Ch. 1.

103 See Article 51(2) and (4) AP I and Article 13 AP II.

104 See Article 52(2) of Protocol I and Article 13 of Protocol II.

105 Article 4A(1), (2), (3) and (6) of the Third (Prisoners of War) Geneva Convention and Article 43(2) of AP I list persons who are members of armed forces or who are otherwise entitled to combatant status and thus have 'the right to participate directly in hostilities'.

106 The criteria in the Geneva Conventions have been relaxed under AP I. GC III requires that members of militias and volunteer corps other than the State's recognised regular armed forces fulfil four requirements: they must (a) have a commander responsible for subordinates; (b) have a fixed distinctive sign recognizable at a distance; (c) carry arms openly; and (d) operate in accordance with the laws and customs of war. See also 1907 Hague Regulations, supra note 84. However, AP I relaxed criteria (e.g., of wearing a fixed distinctive symbol) on account of having expanded the armed conflicts covered by the Protocol to include wars of liberation. Hence, carrying arms openly during military operations and being visible to the enemy preceding an attack became sufficient. See Pejic, 'Armed Conflict and Terrorism', supra note 10, p. 178. On these criteria being invoked to deny POW status see Chapter 8.

107 The ICRC study on customary law states that '[a]ll members of the armed forces of a party to the conflict are combatants, except medical and religious personnel' and '[t]he armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates'. 'ICRC Study on Customary IHL', supra note 78, Rules 3-4.

that 'belongs' to a party to the conflict may also be considered de facto combatants and also be susceptible to attack.<sup>108</sup>

The lethal targeting of those who fight with the adversary's forces, which may amount to murder if there is no armed conflict, is generally considered lawful in time of conflict under IHL. The traditional view is that a combatant in an IAC may legitimately be subject to lethal use of force at all times during the conflict, even if off-duty at the time of attack, although there is a growing body of authority that where 'alternatives' to the use of lethal force prove possible in the circumstances, these should be employed, consistent with the principles of humanity and military necessity.<sup>109</sup>

Undoubtedly, as soon as combatants are *hors de combat* (not engaged in military action), voluntarily or involuntarily, for example through injury, illness, surrender or capture, they are no longer military objectives but become entitled to the protection of the law. Hence it is unlawful to kill a person who has been wounded, has surrendered or been captured, or is otherwise no longer participating in the conflict.<sup>110</sup>

In these circumstances, it is clear that the acts of killing and taking prisoner are not lawful interchangeable alternatives. While members of the armed forces are generally lawful targets, certain persons accompanying the armed forces, such as medical and religious personnel, are not.<sup>111</sup> It will be a question of fact, dependent on the political-military role of individuals in position of authority within the particular regime, whether they are de facto operating as part of the armed forces. Combatants among the civilian population do not necessarily deprive the entire population of its civilian character; rather, the legitimacy of targeting a 'mixed' group would depend on the question of *proportionality*, discussed below.<sup>112</sup>

108 See D. Kretzmer, 'Use of Lethal Force against Suspected Terrorists', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (OUP, 2012), p. 638.

109 It is increasingly asserted that if a party could incapacitate and capture, instead of kill, a combatant, at no added military cost, this should be done. See, e.g. The Power to Kill or Capture Enemy Combatants, R Goodman, *EJIL*, Vol. 24, 2013; N. Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), p. 73; Kretzmer, 'Use of Lethal Force', supra note 108, p. 639; P. Alston, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', *Study on Targeted Killings*, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6, 8 May 2010, p. 10 (hereinafter 'Alston Study on Targeted Killings'); DOJ White Paper, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force," disclosed by NBC News, 4 Feb 2013. For the evolving US position see Part B. See also the related rules on direct participation of civilians in hostilities and loss of immunity below.

110 Note that for persons who are not members of the armed forces or organised groups belonging to the armed forces, they are civilians and the test is whether they are taking a 'direct part in hostilities', below. 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48, p. 22.

111 'ICRC Study on Customary IHL', supra note 78, Rule 4.

112 See part 6A.2.4 below.

In non-international conflict, the question of lawful targeting is more controversial. This is because treaty law governing NIACs does not provide a definition of persons who may be subject to attack (comparable to the definition of combatants applicable only in international conflicts). This is largely for the reason already alluded to- that states did not wish to recognise the right of armed groups on their territory to engage in armed conflict. As a result there is no right of belligerency as such under NIAC, and individuals engaged in conflict may be prosecuted for taking up arms.

Conversely, there is no explicitly recognised right to target such individuals, though this may be implicit. Some commentators suggest that, absent an explicit provision of IHL, rules comparable to those applicable in IAC can be read into the law of NIAC. As such, organised armed groups would be treated as legitimate targets on the same basis as combatants in IAC.<sup>113</sup> Others suggest, however, that as the rules are different (there being no privileges of belligerency or upon capture), such persons remain civilians under IHL. In either case, it is well recognised that they lose their protection from attack so far as they directly participate in hostilities, addressed below.

#### 6A.2.1.2 Civilian Protection and 'Direct and Active Participation in Hostilities'

The cardinal rule of humanitarian law is that civilians must not be the object of attack. While this follows logically from the fore-mentioned rule that only military objectives may be targeted, explicit provision for civilians appears throughout humanitarian law.<sup>114</sup> As discussed below, attacks against civilians are prohibited not only where they are deliberately directed against the civilian population as such, but also where the attacks are 'indiscriminate' or 'disproportionate'.<sup>115</sup> There is no exception to this prohibition,<sup>116</sup> and the notion that it is limited by the principle of military necessity has been rejected.<sup>117</sup>

Civilian immunity from attack is lost only where the person takes an active and direct part in hostilities, as set down in IHL treaties<sup>118</sup> and customary law.<sup>119</sup> This is reflected for example in a decision by the Israeli Supreme Court, which found that the situation in the West Bank and the Gaza Strip

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113 The ICRC Guidance controversially suggested that those that take up arms and participate in conflict in a "continuous combat function" may then be attacked at any time, even when they are not in fact directly participating at that time. See discussion on the ICRC Guidance below.

114 See e.g. Article 51(2) AP I and Article 13(2) AP II

115 While this section focuses only on military attacks directed against civilians as such, many other acts against civilians are prohibited by IHL, expressly or implicitly: see 6A.3.3 below.

116 'ICRC Study on Customary IHL', supra note 78, Rules 5-6.

117 For example, the Trial Chamber of the ICTY in *Galić*, supra note 115, expressly rejected the suggestion that the rule can be derogated from by invoking military necessity.

118 Article 51(3) of AP I states that "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."

119 'ICRC Study on Customary IHL', supra note 78, Rule 6.

amounted to an IAC in which terrorist groups participated as civilians who had lost their immunity from attack:<sup>120</sup> ‘terrorists participating in hostilities do not cease to be civilians but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack’.<sup>121</sup> Thus, according to the Israeli Supreme Court, terrorists may be targeted for military purposes where they actively and directly participate in hostilities. Yet, since 9/11 the scope of ‘direct participation in hostilities’ (DPH) – and the circumstances in which individual ‘terrorists’ might fall into this category, thereby losing their civilian immunity from attack – has been the focus of uncertainty and dispute.<sup>122</sup>

*i) What Constitutes Direct Participation in Hostilities?*

While the ICRC study notes that customary international law enshrines the principle, it acknowledges that ‘a clear and uniform definition of direct participation in hostilities has not been developed in state practice’.<sup>123</sup> As discussed below, a subsequent ICRC document, ‘Interpretative Guidance on the Notion of Direct Participation in Hostilities’, was therefore published in 2009 in an attempt to provide greater guidance on the meaning of direct participation, when and for how long civilian immunity is lost.<sup>124</sup> While the Guidance has itself been subject of considerable dispute from a range of sources and should not be taken as a categorical statement of the law in this area, it provides one important reference point from an undisputedly authoritative source on IHL.<sup>125</sup>

120 The Supreme Court’s starting point, based on previous jurisprudence, was that an armed conflict exists ‘between Israel and [] various terrorist organizations...’. Targeted Killings judgment, *supra* note 7, para. 16. This may reflect an unduly broad approach to the definition of armed conflict, rendering it questionable whether the situation should have been governed by IHL as the Court determined. Even so, the court’s approach to the *interpretation* of IHL may yet be instructive. See also Chapter 7B3 on this judgment and the interplay of IHL/IHRL.

121 *Ibid.*, at para. 31.

122 The legal framework is discussed in the section that follows. Its application and debates post-9/11 are in Part B below.

123 ‘ICRC Study on Customary IHL’, *supra* note 78, p. 23.

124 Interpretative Guidance on the Notion of Direct Participation in Hostilities under IHL’, ICRC, 2009 (hereinafter ‘ICRC DPH Guidance’).

125 Critiques and discussion of the ‘ICRC DPH Guidance’ abound. See *e.g.* R. Goodman and D. Jinks, ‘The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum’, 42 *N.Y.U. J. Int’l L. & Pol.* 637 (2010). See in response N. Melzer, ‘Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities’, 42 *N.Y.U. J. Int’l L. & Pol.* 831 (2010). the range of concerns. See also K. Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’, 42 *N.Y.U. J. Int’l L. & Pol.* 641 (2010); M. Schmitt, ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’, 42 *N.Y.U. J. Int’l L. & Pol.* 697 (2010); W. H. Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally

'Direct participation in hostilities' (DPH) covers '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'.<sup>126</sup> An 'act of war' plainly covers fighting against opposing armed forces on the one hand, while not including, for example, moral or philosophical support for or affiliation to the adversary, on the other. But many areas of uncertainty – to be assessed on the facts of each case – lie in between.<sup>127</sup> The ICRC 2009 Guidance noted that DPH refers to 'specific acts carried out by individuals as part of the *conduct of hostilities* between parties to an armed conflict',<sup>128</sup> which are designed to cause harm to the military operations or military capacity of a party to an armed conflict or, alternatively, death, injury, or destruction of protected persons or property, and have a causal nexus with that harm.<sup>129</sup>

By way of example, the Israeli Supreme Court found that selling food, providing strategic analysis and logistical general support, including monetary aid, were taking an *indirect* rather than a direct part in hostilities and would not meet the DPH criteria.<sup>130</sup> By contrast, operating weapons or collecting intelligence on armed forces was, in the Court's view, sufficiently 'direct and active' participation in hostilities to deprive the civilian of his or her civilian status.<sup>131</sup> The ICRC for its part in distinguishing 'direct' from 'indirect' participation, has found that 'war sustaining' roles, which do not give rise to loss of civilian immunity, 'would additionally include political, economic or media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agricultural or non-military industrial goods)'.<sup>132</sup>

Undoubtedly, there remain grey areas. Although one commentator has suggested that '[g]rey areas should be interpreted liberally, i.e., in favour of finding direct participation',<sup>133</sup> it is suggested that direct participation should be narrowly construed, in line with the fundamental nature of the protection of civilians in IHL. This is consistent with the rule that if any doubt arises as

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Incorrect', 42 *N.Y.U. J. Int'l L. & Pol.* 769 (2010). Some of these authors note that the ICRC DPH Guidance is not customary international law.

126 ICRC Commentary AP 1, p. 619, para. 1944.

127 See, e.g., Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed., (Cambridge: Cambridge University Press, 2010), p. 172; F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, ICRC, (Cambridge: Cambridge University Press, 2011); see also 'ICRC DPH Guidance', supra note 124.

128 'ICRC DPH Guidance', supra note 125, Part 1, IV.

129 *Ibid.*, Part I, V.

130 Ruling on Targeted Killings, supra note 9, para. 34.

131 *Ibid.*, para. 35.

132 'ICRC DPH Guidance', supra note 125, p. 5; Goodman and Jinks fn 123 above.

133 M. Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict', in H. Fischer, et al eds., *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (Berlin: BWV, 2004), pp. 505-09.

to whether someone is a combatant or a civilian, he or she must be presumed a civilian.<sup>134</sup>

*ii) For How Long is Immunity from Attack Lost Through Direct Participation?*

Under the relevant IHL provisions cited above, where a civilian does directly participate in hostilities, he or she loses protected status only 'for such time' as his or her participation continues. Considerable debate surrounds the interpretation of this phrase, as reflected in the ICRC Guidance. The ICRC Guidance suggests, somewhat novelly, that those civilians who have a 'continuous combat function' in hostilities may be targeted for as long as they exercise such a function.<sup>135</sup> By contrast, a civilian who participates on an *ad hoc* basis can only be targeted while actually engaging in the hostile acts themselves.<sup>136</sup>

Whether the 'continuous combat function' category reflects customary law may be doubtful, with some suggesting that the 'for such time as they take a direct part in hostilities' standard merits a narrower interpretation, whereby immunity is lost only for as long as the hostile acts themselves are underway.<sup>137</sup> Even before the ICRC Guidance, however, it had been recognized that some flexibility is due in this regard and that at least so far as a civilian engaged in a series or a 'chain of acts', whereby one act is completed but others being prepared, he or she may be considered still actively and directly participating in hostilities during that chain of events.<sup>138</sup> In the same vein, even on a narrower approach to immunity being lost only while the individual participates in the particular act(s) or operations, legal experts seem to agree that civilians preparing or returning from combat operations are still considered to be directly participating in hostilities, although a precise indication as to when such preparation begins and return ends remains controversial.<sup>139</sup>

*iii) Limits on the Use of Force against those Directly participating in Hostilities?*

The fact that a civilian directly participating in hostilities may have lost immunity from attack does not however mean that the lethal use of force against that person will always be justified. The question arises as to the extent to which, consistent with the principles of military necessity and humanity, there is an obligation under IHL to use less harmful means, short of lethal force,

134 As noted in Article 50 AP I: 'In case of doubt whether a person is a civilian, that person shall be considered a civilian'; see 'ICRC DPH Guidance', supra note 125, p. 71 et seq.

135 'ICRC DPH Guidance', supra note 124, Part 1, II and VII. See also Kretzmer, supra note 108, p. 638. Former Special Rapporteur Philip Alston criticised this as creating a status-based exception rather than a specific-acts based approach, see 'Alston Study on Targeted Killings', supra note 109; see response in Pejic, 'Conflict Classification', supra note 57.

136 'ICRC DPH Guidance', supra note 124, pp. 44-45.

137 'Alston Study on Targeted Killings', supra note 109.

138 Ruling on Targeted Killings, supra note 9, para. 39.

139 See 'ICRC DPH Guidance', supra note 125, p. 67.

against individuals taking direct participating in hostilities where this proves feasible.

The ICRC Guidance on DPH provides that where the circumstances are such that the armed or police forces of the government may be able to capture an individual without resorting to lethal force, without jeopardising its own forces or military advantage, the principle of humanity requires that this be done.<sup>140</sup> Likewise, a landmark decision by the Israeli Supreme Court adopted a parallel approach when it stated as follows:

[A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means, which should be employed.<sup>141</sup>

The view that such persons, despite losing civilian immunity, still should not be killed unless less harmful means have been considered and, if possible, exhausted, may flow from principles of IHL (as emphasised by the ICRC) or the increasing cross fertilisation between IHL and human rights law, both applicable in situations of armed conflict.<sup>142</sup> As noted above, there is increasing support in doctrine and practice related to counter-terrorism that capture should where feasible be employed in preference to killing, though much doubt remains around questions of feasibility.<sup>143</sup> While it would be difficult to assert categorically where the law on this point currently stands, it is at a minimum sufficiently in flux to question the entitlement under IHL to kill civilians engaged in hostilities without careful consideration of less onerous alternatives.

#### 6A.2.1.3 Targetable Objects

As regards objects that may be targeted, the most widely accepted definition is that in Article 52 of Additional Protocol I, which states:

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140 '[I]t would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.' *See ibid.*, p. 82.

141 Ruling on Targeted Killings, *supra* note 9, para. 40.

142 *See* Chapter 7B.3 on Interplay with human rights law. The Court's approach above is reflected in the approach of human rights bodies that e.g. 'Before resorting to the use of deadly force, all measures to arrest and detain persons suspected of being in the process of committing acts of terror must be exhausted.' 'Concluding Observations, Israel', Human Rights Committee, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 15.

143 *See* note 106, and the Obama administration's endorsement in principle discussed in Part B.

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 neutralisation, in the circumstances ruling at the time, *offers a definite military advantage*.<sup>144</sup>

This definition has been described as almost certainly embodying customary law.<sup>145</sup>

The basic rule is that attacks against civilian objects are prohibited.<sup>146</sup> The ICTY considers the prohibition on attacking 'civilian objects' or 'dwellings and other installations that are used only by civilian populations' part of customary law, applicable to all conflicts.<sup>147</sup> In addition to this general rule, attacks against certain specific categories of objects, such as buildings dedicated to religion, charity, education, the arts and sciences, historic monuments<sup>148</sup> and cultural property<sup>149</sup> are specifically prohibited by particular international instruments.

Some of the most difficult issues of targeting arise in relation to objects with dual military and civilian uses, such as bridges, roads, electric-power installations or communications networks. The controversy surrounding targeting television networks, which arose during the NATO bombing of the former Yugoslavia (and again in Afghanistan),<sup>150</sup> is an example. The question of fact is whether the target makes an effective contribution to military action and its destruction offers direct military advantage. International humanitarian law provides that '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'.<sup>151</sup>

Finally, while it is a serious violation of humanitarian law to deliberately put military objectives in the vicinity of civilians, doing so does not necessarily justify an attack from the adversary. If destruction of a target offers direct military advantage, that advantage must outweigh any incidental loss to

144 Article 51(2) AP I (emphasis added).

145 'ICRC Study on Customary IHL', supra note 78, Rule 8.

146 Article 52 API: 'General protection of civilian objects: Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.' On AP I rules governing conduct of hostilities as custom, see 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 47, p. 8.

147 *Tadić* Jurisdiction Decision, supra note 19, paras. 110-11 and the Trial Chamber's decision of 2 March 1999 on the joint defence motion to dismiss the amended indictment in *Kordić and Cerkez*, supra note 98, para. 31.

148 Article 56, 1907 Hague Regulations, supra note 84.

149 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, Articles 53 and 85. See Article 1 (definition) and Article 4; see also Article 53, AP I and Article 16, AP II. The obligation to respect cultural property 'may be waived only in cases where military necessity imperatively requires such a waiver'. Article 4(2).

150 See para. 6B.2.1 on targeting below.

151 Article 52(3), AP I.

civilians, all feasible steps having been taken to minimise civilian losses.<sup>152</sup> The lawfulness of an attack in an area where there is both a legitimate target and persons or objects that are immune from attack depends on questions of proportionality, as discussed below.

#### 6A.2.2 Indiscriminate attacks and those causing disproportionate civilian loss

In addition to the rule that attacks must not be specifically directed against civilians and civilian objects is another that provides that attacks must not be indiscriminate, that is, directed against military and civilian objectives without distinction.<sup>153</sup> The prohibition on indiscriminate attacks is a fundamental aspect of the customary principle of distinction, applicable in all conflicts.<sup>154</sup>

Closely linked to the principle of distinction is the 'proportionality' rule, which requires that those directing attacks against military objectives must ensure that civilian losses are not disproportionate to the direct and concrete military advantage anticipated to result from the attack.<sup>155</sup> Proportionality is generally accepted as a norm of customary international law.<sup>156</sup>

There is no precise formula for this proportionality calculus, and the relative weight to be attached to civilian and military losses will depend on all the circumstances. However, a few specific points deserve emphasis. First, the military advantage anticipated must be 'direct and concrete'.<sup>157</sup> It cannot

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152 See the discussion of proportionality and precautionary measures that must be taken by commanders, including the duty to minimise civilian loss and warn civilians of impending attacks, in this part, below.

153 Article 51 AP I refers to five forms of indiscriminate attacks, all of which are prohibited: those which *are not* directed at a specific military objective (para. 4(a)), those which employ a method or means of combat which *cannot be directed* at a specific military objective (para. 4(b)), those which employ a method or means of combat the *effects of which cannot be limited* (para. 4(c)), an *area attack* treating separate and distinct military objectives in an area containing a concentration of civilians as a single military objective (para. 5(a)), and an attack which may be expected to cause incidental civilian casualties or civilian property damage *disproportionate* to the expected military advantage. Different classifications of the same principles appear in different contexts. 'ICRC Study on Customary IHL', supra note 78, Rules 11 and 12.

154 *Tadić* Jurisdiction Decision, supra note 20, para. 127; *Kordić*, supra note 98, para. 31; 'ICRC Study on Customary IHL', supra note 78, Rules 11 and 12.

155 Article 51(5) AP I.

156 See generally J. Gardam, 'Proportionality and Force in International Law', 87 (1993) AJIL 391; see also W.J. Fenrick, 'Attacking the Enemy Civilian as a Punishable Offence', 7 (1997) *Duke J. of Comparative and Int'l L.* 539, 545 noting that the proportionality rule, 'is a logically necessary part of any decision making process which attempts to reconcile humanitarian imperatives and military requirements during armed conflict'. See generally W.H. Parks, 'Air War and the Law of War', 32 (1990) *Air Force L. Rev.* 1; 'ICRC Study on Customary IHL', supra note 78, Rule 14.

157 Article 57(2) AP I.

be long-term or speculative. The assessment of military advantage against potential loss must be made in relation to a *particular* military operation, not in relation to a battle, still less to a conflict as a whole.<sup>158</sup> Such an evaluation is not to be made after the fact, when the number of civilian and military casualties can be compared, but based on the information available at the relevant time and in the context of all the prevailing circumstances.

Finally, a mistaken evaluation of proportionality, just like a mistaken identification of a target, is not necessarily unlawful. However, ignorance as to the nature of the target, its military contribution or the extent of civilian losses is not *per se* an excuse. IHL lays down certain duties on those responsible for attacks that safeguard the principles of distinction and proportionality; if civilian losses result from a situation where these duties have not been observed, then a violation of IHL has occurred (and a crime may also have been committed by the person responsible for ordering the attack as discussed at Chapter 4, Section B).

#### 6A.2.3 Necessary precautions in attack

Complicated issues of targeting may arise, for example in respect of defended cities with 'dual use' facilities and the close intermingling of civilian and military elements. Likewise, rural terrain and guerrilla tactics may make target identification difficult. However, core principles of international humanitarian law require that every responsible military commander must take certain feasible precautions to ensure the lawfulness of a military attack.<sup>159</sup>

These include the commander's duty to verify the nature of the target. It is no excuse that a commander or other person who plans or decides upon an attack does not have the information available as to the true nature of a target, as IHL imposes a duty to inquire. If a commander cannot, upon inquiry, obtain the necessary information, he or she cannot attack assuming the target to be legitimate. On the contrary, if in doubt, the assumption must be that the target is protected.<sup>160</sup>

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158 See L. Doswald-Beck, 'The Value of the 1977 Geneva Protocols for the Protection of Civilians', in M.A. Meyer (ed.), *Armed Conflict and the New Law. Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (London, 1989), pp. 137 ff. Note, however, that many states appear to take a broader view of the proportionality calculus, and the ICC Statute's reference to proportionality as involving an assessment of the 'overall military advantage anticipated,' Article 8(2)(b)(iv).

159 Article 57 AP I; 'ICRC Study on Customary IHL', *supra* note 78, Rule 15 and 16.

160 This principle is reflected in Article 50(1) AP I, which states that 'in case of doubt whether a person is a civilian, that person shall be considered to be a civilian'. See also *Blaskić*, Judgment, Case IT-95-14-T. As noted above, a similar principle is reflected in Article 50 in respect of objects.

While an attacking side will understandably want to protect its forces, this does not take priority over precautions to protect civilians in the planning and execution of an attack, whose protection IHL clearly emphasises.<sup>161</sup> Thus in the choice of weapons and systems, it is obliged to use systems that provide for and enable reliable target identification.

Moreover, even if a target is identified and is legitimate (being a military objective that satisfies the proportionality rule), commanders must take all feasible steps to *minimise* the damage to civilian life and objects resulting from the military action. These include giving warnings of attacks that may affect the civilian population<sup>162</sup> and, where there is a choice of targets, choosing those least injurious to civilian life or objects.<sup>163</sup>

#### 6A.2.4 Methods and means of warfare: unnecessary suffering

The prohibition on waging war in a manner that causes unnecessary suffering and superfluous injury is a fundamental tenet of international law. The expression 'unnecessary suffering and superfluous injury' is used in a number of legal instruments, yet nowhere is it defined.<sup>164</sup> The concept is, however, clearly linked to the customary principle that all suffering caused in conflict should be pursuant, and proportionate, to military necessity. As such, the ICJ

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<sup>161</sup> See 'ICRC Report on IHL and Contemporary Armed Conflicts', *supra* note 47, p. 13.

<sup>162</sup> 'ICRC Study on Customary IHL', *supra* note 78, Rule 20 identifies this requirement for both IACs and NIACs; Article 57(2)(c) AP I; see Meron, 'Human Rights and Humanitarian Norms', *supra* note 95, p. 65, noting that an expert study on behalf of the Joint Chiefs of Staff acknowledged this duty as customary law.

<sup>163</sup> See Article 57(2) AP I: '(a) Those who plan or decide upon an attack shall: (i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; (iii) Refrain from deciding to launch any attack which 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; (b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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; (c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.' See also Article 50(7) AP I.

<sup>164</sup> See Article 23(e) 1907 Hague Regulations, *supra* note 84; Article 35 AP I; CCW Convention 1980.

has described causing ‘unnecessary suffering to combatants’ as causing ‘harm greater than that unavoidable to achieve legitimate military objectives’.<sup>165</sup>

An evaluation of what amounts to unnecessary suffering has to be case and context specific. However, certain methods and means of warfare, or particular weapons systems, are considered by definition to cause unnecessary suffering, as reflected in the specific treaty provisions that regulate the use of particular weapons<sup>166</sup> and the case by case determinations – of for example homemade mortars to nuclear weapons – by international courts.<sup>167</sup> The customary law prohibition on weapons causing unnecessary suffering covers those that are either (a) cruel or excessive in the nature and degree of suffering they cause, or (b) incapable of distinguishing combatant from civilian.<sup>168</sup> Among the first group are weapons considered so *inherently abhorrent* that they are banned absolutely, even when directed against combatants or other lawful targets, such as blinding laser weapons or poisons.<sup>169</sup> The second group covers weapons that are banned due to their inability to distinguish between civilian and soldier and hence *inherently indiscriminate* by nature, which arguably includes anti-personnel landmines.<sup>170</sup>

Controversy has centred on whether particular weapons systems fall within this definition and are prohibited by general international law. This is exemplified by the serious questions raised as to the lawfulness of the use of cluster bombs,<sup>171</sup> on two main grounds. First, because they are designed to disperse

165 *Nuclear Weapons Advisory Opinion*, supra note 11, para. 78. On the status of the principle as ‘established custom’, see ‘ICRC Study on Customary IHL’, supra note 78, p. 241 et seq.

166 See e.g. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, 2056 UNTS 577, in force 1 March 1999 (hereinafter ‘Landmines Convention’); Article 23(e) 1907 Hague Regulations, supra note 84; Article 35 AP I; Biological Weapons Convention, London, 10 April 1972, in force 26 March 1975; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993, in force 29 April 1997 (hereinafter ‘Chemical Weapons Convention’).

167 In *Blaskić*, supra note 160, paras. 501, 512 where use of homemade mortars constituted an indiscriminate attack. See also *Nuclear Weapons Advisory Opinion*, supra note 12, para. 95.

168 In its *Nuclear Weapons Advisory Opinion*, *ibid*, para. 78, the ICJ held: ‘States must never ... use weapons that are incapable of distinguishing between civilian and military targets.’

169 Eg CCW Convention’s four Protocols prohibiting the use of specific conventional weapons on ‘Non-Detectable Fragments’ (1980), ‘Mines, Booby Traps and Other Devices’ (1980 amended 1996), ‘Incendiary Weapons’ (1980) and ‘Blinding Laser Weapons’ (1995). See also Second Hague Declaration 1899; Article 23(a) of the 1907 Hague Regulations; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1928; *Nuclear Weapons Advisory Opinion*, *ibid* para. 54.

170 Eg anti-personnel landmines have often been cited as violative of these principles, due to their inability to distinguish civilian from military limbs. See also Landmines Convention and CCW protocol II above.

171 There is a NATO policy prohibiting the use of cluster munitions in Afghanistan, in place since 2007. The inherent lawfulness of cluster bombs has not been adjudicated but see ICTY decision in the preliminary hearing in the case of *Martić*, IT-95-11-R61, Review of the Indictment, 8 March 1996, discussed below; see also ‘Ticking Time Bombs: NATO’s Use

submunitions over a wide area and cannot be confined within the parameters of a military target.<sup>172</sup> Second, due to a high reported initial failure rate – estimated at seven percent on cluster bombs employed by the US – a significant amount of bomblets do not detonate immediately, lying dormant until disturbed at some future point.<sup>173</sup> The unpredictability of the person or object that will ultimately detonate the bomblets is such that the impact of these bomblets may be considered indiscriminate. In these circumstances, they effectively act as landmines, which have been subject to a widely ratified comprehensive treaty prohibition<sup>174</sup> and which are considered a violation of the prohibition on the use of indiscriminate weapons.<sup>175</sup> Cluster bombs were prohibited in a specific Convention which entered into force in 2010,<sup>176</sup> consolidating earlier doubts as to their lawfulness reflected in international practice,<sup>177</sup> and in earlier US practice in other contexts.<sup>178</sup>

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of Cluster Munitions in Yugoslavia', Human Rights Watch Report, June 1999, available at: <http://www.hrw.org/reports/1999/05/11/natos-use-cluster-munitions-yugoslavia> ; see also 'Cluster Bomblets Litter Afghanistan', Human Rights Watch Press Release, 16 November 2001, available at: <http://www.hrw.org/press/2001/11/CBAfgh1116.htm>.

172 See para. 6B.2.2 below; see also 'Strange Victory: A Critical Appraisal of Operation Enduring Freedom and the Afghanistan War', n. 3, Project on Defense Alternatives, Research Monograph No. 6, 30 January 2002, available at <http://www.comw.org/pda>.

173 See 'Long After the Air Raids, Bomblets Bring More Death', *The Guardian*, 28 January 2002, available at: <http://www.guardian.co.uk/world/2002/jan/28/afghanistan.suzannegoldenberg>.

174 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, 2056 UNTS, in force 1 March 1999. As of 5 December 2012, 159 states are party to the Landmines Convention. Data available at: <http://www.icbl.org/ratification>.

175 See also Human Rights Watch, 'International Humanitarian Law Issues and the Afghan Conflict: Open Letter to North Atlantic Treaty Organization (NATO) Defense Ministers', 17 October 2001, available at: <http://www.hrw.org/press/2001/10/nato1017-ltr.htm>.

176 The Convention on Cluster Munitions, which prohibits the use, transfer and stockpiling of cluster bombs, came into force in August 2010. The United Kingdom and Afghanistan are States Parties, but the US has neither signed nor ratified the Convention.

177 See reports in the context of Afghanistan, above. For earlier reports, see, e.g., HRW, 'Ticking Time Bombs', supra note 171; HRW, 'Cluster Bomblets', supra note 173. See preliminary hearing in the case of *Martić*, IT-95-11-R61, Review of the Indictment, 8 March 1996, above, indicated that the use of cluster bombs in the circumstances of that case may provide the basis for an indiscriminate attack charge. The Prosecutor's office of the ICTY noted a 'clear trend' towards their prohibition, in 'Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', 12 June 2000, 39 (2000) ILM 1257.

178 Reportedly during the 1995 Operation Deliberate Force in Bosnia, air combat commander Major-General Michael Ryan prohibited the use of cluster bombs, in recognition of the inherent danger to civilians. See also US Air-Force-sponsored study cited in HRW, 'International Humanitarian Law Issues', supra note 175; HRW, 'Cluster Bomblets', supra note 171.

### 6A.2.5 Humanitarian protections

IHL governs not only the conduct of hostilities, addressed above, but also affords protection to persons in the hands of ‘the enemy’. The key provisions of the Geneva Conventions provide that such persons are considered ‘protected’ from the moment when they fall into the hands of the adverse party.<sup>179</sup>

All persons taking no active part, or no longer taking part, in hostilities are entitled to protection under IHL; protections are due both to those who have never taken part in hostilities and to those who once did but are now *hors de combat*. Common Article 3 to the Geneva Conventions, which is customary international law applicable in all situations, provides that such persons must be treated humanely, without discrimination, and specifically prohibits violence to life and person, including cruel treatment, hostage-taking, outrages upon personal dignity and carrying out of sentences and executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees.<sup>180</sup> Beyond Article 3, more detailed provisions are contained elsewhere in the Geneva Conventions and Protocols, many of which reflect and give expression to fundamental principles of IHL, in particular the principle of humanity, and may as such reflect customary law.

#### 6A.2.5.1 Civilians

The duty to protect the civilian population lies at the heart of IHL. Rules regarding targeting of civilians are described above. As noted, for as long as civilians take up arms and participate directly in hostilities they may lose their immunity from attack, and they may also be prosecuted under domestic laws for engaging in conflict.<sup>181</sup> However all civilians, whether or not they took up arms, are entitled to the humanitarian protections set out in Common Article 3<sup>182</sup> and customary law applicable to all conflicts.<sup>183</sup> Additional provisions in the Fourth Geneva Convention (which applies to civilians that ‘find themselves ... in the hands of a Party to the Conflict or Occupying

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179 Human rights provisions, outlined in Chapter 7, apply to persons detained on a state’s territory or under its jurisdiction and supplement the specific provisions of IHL. See 7B3 on interplay between the two branches.

180 ‘Common Article 3.

181 It is not a violation of IHL or a war crime to engage in conflict as such, but nor does IHL offer protection from prosecution under domestic law, other than for privileged combatants entitled to POW status.

182 Common Article 3 provides humanitarian protection to all persons who do not, or no longer, take active part in hostilities.

183 ‘ICRC Study on Customary IHL’, *supra* note 78, Part VII, especially Ch. 32 ‘fundamental guarantees’.

Power<sup>184</sup> of which they are not nationals')<sup>185</sup> and Additional Protocol I apply to international conflicts.

The power into whose hands protected persons fall is obliged to refrain from violating their rights, but also to take necessary proactive steps to ensure their protection.<sup>186</sup> IHL makes explicit reference to a range of human rights protections,<sup>187</sup> for example respect for 'honour, family rights, their religious convictions and their manners and customs',<sup>188</sup> procedural rights relating to detention and fair trial,<sup>189</sup> property rights,<sup>190</sup> and particular groups, such as children, are entitled to special additional protection.<sup>191</sup> The duty of humanitarian protection extends also to ensuring that relief operations are conducted for the benefit of civilians, in territory under the control of a party to the conflict.<sup>192</sup>

#### 6A.2.5.2 Prisoners of war and the wounded or sick

Although combatants and other persons taking a direct part in hostilities are military objectives and may be attacked, the moment such persons surrender or are rendered *hors de combat*, they become entitled to protection.<sup>193</sup> That protection is provided for all conflicts by common Article 3 and for international conflicts in the First and Third Geneva Conventions relating to the treatment of the 'wounded, sick and shipwrecked' and 'prisoners of war', respectively,<sup>194</sup> supplemented by Additional Protocol I. As noted above, these

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184 Specific obligations relating to Occupying Powers are addressed at 6A.3.4 below.

185 See Article 4 GC IV and *Tadić* Jurisdiction Decision, *supra* note 19, para. 578-84.

186 This includes 'all measures required to ensure the safety of civilians ...'. Gasser, *supra* note 67, p. 212.

187 Article 38 GC IV – medical care, religion, freedom to leave territory, as discussed by Gasser, *supra* note 67, p. 283, and Article 39 GC IV (right to work).

188 Article 27(1) GC IV.

189 See provisions of GC IV and AP I in Chapter 8 on Guantanamo Bay.

190 The guarantee of property rights is found principally in Article 46(2) of the 1907 Hague Regulations rather than the Geneva Conventions, although *see also* Article 53 GC IV.

191 Article 24 GC IV; *see also* Article 77 AP I. These rights under IHL are supplemented by those enshrined in human rights law, which applies to all persons within a state's territory and subject to its jurisdiction, irrespective of nationality, as described in the following chapter.

192 See Article 59 GC IV on the duties of occupying powers to 'allow and facilitate rapid and unimpeded passage' of relief operations and Article 23 GC IV which imposes a similar obligation on all high contracting parties. Article 70 AP I extended the obligation to accept humanitarian relief to civilians in any territory of a party to the conflict.

193 This section deals with POWs and Sick and Wounded. *See* the basic rights to which all detainees are entitled in Chapter 8 in relation to the Guantanamo detainees.

194 GC I and III.

Conventions are binding as treaty law, but the key provisions are in any event customary in nature.<sup>195</sup>

As regards 'prisoner of war' status, which arises in international armed conflict, the Third Geneva Convention imposes limits on those who are entitled to such status. These include: (a) members of the armed forces of the opposing party, whether they belong to a recognised government or not, (b) members of militia or volunteer corps, provided they satisfy certain conditions, namely 'being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognisable at a distance; carrying arms openly; conducting their operations in accordance with the laws and customs of war'<sup>196</sup> and (c) *levées en masse*.<sup>197</sup> AP I recognises some loosening of these criteria,<sup>198</sup> and commentators have noted the need for flexibility in order 'to avoid paralysing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals'.<sup>199</sup>

Among the most basic protections owed to POWs under the Convention are the duties to treat them humanely and protect them from danger,<sup>200</sup> to supply them with food, clothing and medical care<sup>201</sup> and to protect them from public curiosity.<sup>202</sup> The procedural guarantees due to POWs are discussed in detail in relation to the detainees held at Guantanamo Bay at Chapter 8. In brief, they are also entitled to elaborate due process guarantees, including trial by courts that respect the same standards of justice as those respected by the courts that would try members of the military of the detaining state.<sup>203</sup> They may not be subject to any coercion in order to extract information from them and are entitled to disclose only their names, date of birth and rank or position within the armed forces.<sup>204</sup> POWs may not be subject to any punishment or reprisal for action taken by the forces on whose side they fought. A POW may not then be prosecuted by the capturing power for participation in hostilities or for any lawful acts of war; however, consistent with the duty to prosecute war crimes,<sup>205</sup> serious violations of IHL are subject to prosecution.

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195 See, e.g., Report of the UN Secretary General introducing the Statute of the ICTY, *supra* note 97. Note that POW status does not however apply in non-international armed conflict, although, as noted below, the principles may be applied in that context, too. 'ICRC Study on Customary IHL', *supra* note 78, Ch. 32 and 33.

196 Article 4(A) GC III.

197 Article 4(6) GC III.

198 See Article 44(3) AP I.

199 T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout', 92 (1998) *AJIL* 236. But see co-application of IHRL in Chapter 7B3.

200 Article 19 GC III.

201 Article 20 GC III.

202 Article 13 GC III.

203 See Article 84 and Articles 99-108 GC III.

204 Article 17 GC III.

205 The Geneva Conventions expressly oblige states to prosecute grave breaches, applicable in international conflict, while other sources, including the preamble to the ICC Statute, suggest an obligation to prosecute war crimes in all conflicts.

When hostilities have ceased POWs must be repatriated.<sup>206</sup> Other detailed rules regarding, *inter alia*, personal possessions, camps, structure, complaints and correspondence are set out in the Convention.<sup>207</sup>

If any doubt arises as to entitlement to POW status, a competent tribunal must determine the matter.<sup>208</sup> Pending such determination, the captured individual shall in any case enjoy the protection guaranteed to prisoners of war by the Third Geneva Convention.<sup>209</sup> Moreover, on numerous occasions, states have, as a matter of practice, extended POW status to cover persons not strictly entitled to such status under IHL, as was for example the practice of the United States in Vietnam.<sup>210</sup> This may reflect in part the core humanitarian IHL principles manifest in the specific provisions of GC III, as well as the desire to ensure similar treatment of their own forces if captured.

In any event, if the prisoners in question do not qualify for POW protection under the Geneva Convention itself, to the extent that certain of the provisions of that Convention are derived from the principles of humanity (and military necessity), they may apply as customary law. Moreover, as discussed in more detail in Chapter 8, they are, in any event, entitled to other protections under GC IV or, at a minimum, under common Article 3 and Article 75 AP I.<sup>211</sup>

With regard to the sick or wounded, as noted above they may not be subject to attack and, as with all persons *hors de combat*, they are entitled to humane treatment. In addition, there is a positive obligation under the First Geneva Convention to search for and collect the sick and wounded.<sup>212</sup> They must be protected, cared for and their medical needs attended to.<sup>213</sup> To this end, protection must also be afforded to medical personnel and equipment.<sup>214</sup> The First Geneva Convention concerns only the injured or sick among the armed forces. However, AP I extends its coverage also to civilians and others in medical need. Even when AP I is not binding as treaty law,<sup>215</sup> the principle of caring for sick and wounded civilians is consistent with the basic principle

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206 Article 118 GC III provides that 'POWs shall be released and repatriated without delay after the cessation of active hostilities.'

207 See for example, H. Fischer, 'Protection of Prisoners of War', in Fleck, *Handbook of Humanitarian Law*, supra note 17, p. 321, and H. McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflict* (Dartmouth Publishing Co. Ltd., 1990), pp. 89-108.

208 GC III, Article 5. While the tribunal must be 'independent' it need not necessarily be international, according to existing rules. The inclusion of an international element in that tribunal has been proposed to safeguard its independence. See Gasser, 'International Humanitarian Law: An Introduction' in H. Haug (ed.), *Humanity for all: the International Red Cross and Red Crescent Movement* (ICRC, Geneva, 1993), p. 22.

209 Article 5 GC III.

210 See the description of US practice in Vietnam, in Gasser, supra note 67.

211 *Tadić* Jurisdiction Decision, supra note 20, para. 102, citing the ICJ in the *Nicaragua* para. 218.

212 Article 15 GC I.

213 *Ibid.*; Article 12 GC I; Article 10 AP I; Article 7 AP III.

214 Articles 24 and 25 GC I.

215 The US and Afghanistan are not parties to AP I.

of humanity and the general duty to protect civilians, under customary law.<sup>216</sup>

#### 6A.2.6 Occupiers' obligations

IHL enshrines obligations specifically directed towards territory 'placed under the control of the hostile army', or 'occupied', during armed conflict.<sup>217</sup> Where a power is present on the territory in question and exercises *de facto* control of it, it is in occupation. The key criterion is whether the state exercised effective control, which may transcend the formal assumption of responsibility by a new authority. The obligations set out in IHL apply whether or not the occupying power meets with armed resistance.<sup>218</sup> The obligations incumbent on the occupying power are found in the Fourth Geneva Convention, the Hague law that preceded it<sup>219</sup> and the subsequent provisions of AP I; the bulk of these provisions reflect customary law.<sup>220</sup> As with other areas, these obligations supplement those of IHRL, which apply wherever the state exercises its authority or control.<sup>221</sup>

On the one hand, IHL establishes positive obligations on the occupying power to administer the territory, including establishing or maintaining law and order and a functioning legal system,<sup>222</sup> and protecting the population from attacks from their troops and private parties.<sup>223</sup> The human rights of the occupied population must be respected<sup>224</sup> and they must not be detained except where (and for as long as) 'imperative reasons of security' so justify, and then subject to procedural safeguards.<sup>225</sup> The power must ensure that the population has adequate food, medical supplies and facilities and, where necessary, that relief operations can be carried out.<sup>226</sup> On the other hand, IHL limits the authority of the occupying power, reflecting the transitional

216 See W. Rabus, 'Protection of the Wounded, Sick and Shipwrecked', in Fleck, *Handbook of Humanitarian Law*, supra note 18, p. 293, 294. Rabus notes that AP I Articles 6 and 8 extend the definition of the sick to cover those civilians who need medical assistance.

217 Article 42, 1907 Hague Regulations, supra note 84. On the sources and the extent of the obligation of the occupying powers both under IHL and IHRL see ICJ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, paras. 123-31.

218 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 47, p. 14.

219 In particular, the 1907 Hague Regulations, supra note 84.

220 See 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 47, p. 8.

221 See Chapter 7 Section A, the IHRL Framework for controversy as to extra-territorial application of IHRL in certain circumstances including application to occupied Iraq.

222 Article 43, 1907 Hague Regulations, supra note 84.

223 Article 47, 1907 Hague Regulations, supra note 84. For the IHRL obligations Chapter 7A.4.1.

224 Article 27 GC IV enshrines the general obligation: specific rights are provided for elsewhere, e.g., rights to fair trial in Article 75(1) GC IV.

225 These include appeal and six-monthly review.

226 See Articles 55-60 GC IV.

nature of occupation, to prevent it from benefiting from the occupation at the expense of the local population, or from making far-reaching or unnecessary changes in the political structure or legal system during its occupation.<sup>227</sup> The Fourth Geneva Convention on the Protection of Civilians also prohibits the transfer or deportation of individuals from occupied territory.<sup>228</sup>

#### 6A.2.7 Responsibility and ensuring compliance with IHL

Parties to an armed conflict are bound to respect the applicable rules of IHL. They will be responsible for violations of those rules by their own armed forces, and by other irregular forces that fight alongside their own forces, where these could be said to fall under their 'overall control'; such control arises where the Party 'has a role in organising, co-ordinating or planning the military actions of the military group'.<sup>229</sup>

Moreover, all states party to the Geneva Conventions have obligations to 'ensure respect' for the Conventions by all states.<sup>230</sup> Article 1 common to the Geneva Conventions imposes the duty on all High Contracting Parties to *respect* and to *ensure respect* for the Conventions, meaning that they should 'do everything in their power to ensure that it is respected universally'.<sup>231</sup> In 1968 and 1977 this positive obligation was reaffirmed without controversy by a broad representation of states, as a result of which the First Additional Protocol makes similar provision.<sup>232</sup> Whether or not party to a conflict, states parties to the Geneva Conventions are therefore obliged to take reasonable

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227 See, e.g., Articles 43 and 64 GC IV. The fact that this limitation is subject to exception in the interests of the population may provide a basis for the non-application of laws that would violate human rights law, as some human rights groups have noted.

228 Article 49, GC IV. See Chapter 10 on Extraordinary Renditions.

229 *Tadić* Jurisdiction Decision, *supra* note 20, para. 137. See Chapter 3, above. Note that this test of responsibility of a party to the conflict under IHL is distinct from the state responsibility test (Chapter 3) or the individual criminal responsibility that may attach to a commander or other superior in respect of the acts or omissions of his or her subordinates (Chapter 4A.1.2).

230 Common Article 1 of the Geneva Conventions. 'The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.' See ICRC Commentary on GC IV, p. 16.

231 *Ibid*, Common Article 1. This positive obligation was reaffirmed without controversy during the negotiation of AP I. See W.T. Mallison and S.V. Mallison, 'The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 concerning International Conflicts', 42 (1978) *Law and Contemporary Problems* 4, 12.

232 Mallison and Mallison, *ibid*, note that Article 1(1) of AP I paraphrases the obligations set forth in Article 1 of the 1949 Conventions.

and appropriate measures to ensure that other parties observe the Conventions.<sup>233</sup> This obligation applies in respect of international and non-international armed conflicts.<sup>234</sup>

It follows from this obligation on all states parties that they should not directly facilitate or encourage violations, for example by cooperating with an offending state in criminal or military matters,<sup>235</sup> where it is believed that IHL is being violated.<sup>236</sup> Moreover, beyond desisting from committing, encouraging or assisting such violations, the positive obligation to ensure respect requires positive measures to prevent violations by other states parties. As the ICJ noted in *The Wall*:

In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.<sup>237</sup>

States parties would enjoy discretion to decide what measures they deem necessary or effective, which may entail invoking the under-utilised inter-state judicial mechanisms,<sup>238</sup> or, at a minimum, making diplomatic representations regarding violations. As observance of humanitarian law transcends the sphere of interest of any individual state, action should not be taken only by states parties to the conflict, nor should it be limited to representations or other measures directed towards the protection of a state's own nationals.

Finally, while not all violations of IHL carry individual criminal responsibility, serious violations may also amount to war crimes for which individuals can be held to account before national or international courts.<sup>239</sup> As discussed

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233 ICRC Commentary to AP I, p. 18. This reflects the fundamental nature of IHL obligations as obligations *erga omnes*, see Introduction.

234 See 'ICRC Report on IHL and Contemporary Armed Conflicts', supra note 48, p. 21.

235 Criminal cooperation may include transferring individuals through extradition or other process, while military assistance may include provisions of weapons or other logistical assistance or certain types of training.

236 See Meron, 'Geneva Conventions', supra note 89, at 349. The ICJ in the *Nicaragua* case, supra note 96, para. 220, asserted the customary nature of such an obligation.

237 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 159.

238 Recourse to the ICJ is available between states, and human rights bodies such as the Human Rights Committee under the ICCPR could be invoked by one state against another for the application of human rights law (which as discussed in 7.B.3 would have to be interpreted in light of IHL in armed conflict situations).

239 All violations involve the responsibility of the party to the conflict, but only some serious violations entail individual criminal responsibility under customary or conventional law as discussed at Chapter 4. See, e.g., Article 3 Statute of the ICTY or Article 8 ICC Statute. Where violations do amount to war crimes they may be subject to prosecution on the national or international level and certain war crimes carry universal jurisdiction – Chapter 4A3. See W. J. Fenrick, 'Article 8. War Crimes', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos, 1999), pp. 173.

at Chapter 4, responsibility may be direct – for committing, ordering or aiding and abetting the commission of violations – or indirect, for superiors who fail to take necessary and reasonable measures to prevent violations by formal or informal subordinates. A specific additional positive obligation on states parties to the Geneva Conventions is the duty, in the event of grave breaches of the Conventions, such as mistreatment of POWs or depriving them of the rights of a fair trial, to seek out and prosecute those individuals responsible.<sup>240</sup> Then Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, has emphasised the obligation to ensure accountability for violations under IHL.<sup>241</sup>

Despite these obligations, it is often noted that the challenge to IHL lies in ensuring effective compliance. Beyond the responsibility of states, outlined above, the ICRC has a crucial, but limited, role as monitor of compliance with IHL and protector of persons caught up in armed conflict.<sup>242</sup> Other mechanisms exist in principle,<sup>243</sup> but in practice are not utilised, or grossly under-utilised, with the result that it is doubtful whether any meaningful IHL mechanism currently exists for rendering accountable parties that violate IHL, still less to provide individual or collective redress for victims of violations. Human rights mechanisms may, in certain circumstances, fulfil this role, to the extent that they apply human rights law alongside IHL, in times of armed conflict.<sup>244</sup>

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240 'Grave breaches' provisions appear in all four Geneva Conventions and AP I. *See, e.g.*, Articles 147 and 148 of GC IV and Article 85 AP I. For direct and indirect criminal responsibility, *see* Chapter 4, para. 4A.1.2.1. *See* discussion of this and interplay with IHRL obligations to investigate in Chapter 7B3.

241 *See, e.g.*, 'Alston Study on Targeted Killings', *supra* note 109, pp. 25–26.

242 For a detailed analysis of the role of the 'watchdog function' of the ICRC, *see*, in general, Y. Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law* (Geneva, 1998). However, the ICRC's strength is also its limitation, in that it generally works confidentially and without publicly condemning any party. In relation to Guantanamo Bay and Iraq, the ICRC may have adopted an unusually visible and vocal approach: *see e.g.*, ICRC, 'Guantanamo Bay: Overview of the ICRC's work for internees', 30 January 2004, available at: <http://www.icrc.org/eng/resources/documents/misc/5qrc5v.htm>. A report leaked in 2009 on 'High Value Detainees' indicates the sort of confidential communication between the ICRC and States, available at: <http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>, discussed in Chapter 10.

243 The Geneva Conventions set up the institution of Protecting Powers, i.e., neutral states or some other entity that, following designation by the parties to the conflict, would act to protect the interests of wounded or sick personnel, prisoners of war, internees, or other persons controlled by a hostile power. This has rarely been used and generally lacks credibility: ICRC Commentary to AP I, p. 77; Y. Sandoz, 'Mechanisms of Implementation under IHL, International Human Rights Law and Refugee Law', paper presented at the 2003 Sanremo Round Table on IHL, 'ICRC Report on IHL and Contemporary Armed Conflicts', *supra* note 48.

244 The approach of human rights courts and bodies and their willingness to engage with IHL alongside HRL vary. *See* H. Duffy, 'Harmony or Conflict? The Interplay between Human Rights and Humanitarian Law in the Fight Against Terrorism', in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013) and Chapter 7B.3. The 'ICRC

The need and/or desirability of an additional mechanism specifically directed towards IHL has long been under discussion but remains contentious.<sup>245</sup> In this context the paramount role of international community of states in ensuring compliance with IHL is particularly critical.

## 6B INTERNATIONAL HUMANITARIAN LAW AND THE 'WAR ON TERROR'

Since September 11 the world has been constantly reminded that it is at war, albeit 'a different kind of war'.<sup>246</sup> A correct understanding of whether IHL applies in any given situation depends on an understanding of whether there is in fact an armed conflict, if so with whom, and the nature of that conflict.

The first part of this chapter therefore considers basic questions relating to the existence, scope and nature of armed conflicts that may have arisen post-9/11. Is there, or can there be, an armed conflict of global reach with al-Qaeda and associates or other terrorist networks, and what is the nature of the conflicts in Afghanistan and Iraq? The second part of the chapter highlights specific questions to have arisen regarding the IHL framework, including in relation to targeting and the use of force – such as the extensive practice of drone killings of suspected al Qaeda or related terrorists in Pakistan, Yemen or Somalia, or the identification of drug lords and other 'supporters' of al Qaeda as legitimate targets in Afghanistan – or the compatibility of 'war on terror' detention policy with IHL rules.<sup>247</sup>

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Report on IHL and Contemporary Armed Conflicts', *supra* note 48, p. 23, notes that the role of human rights mechanisms in this respect was encouraged.

<sup>245</sup> See proposals to establish a mechanism for individual complaint under IHL, advanced at the Hague centennial conference 1999, in 'ICRC Report on IHL and Contemporary Armed Conflicts', *supra* note 48.

<sup>246</sup> 'The President has made very plain to the American people that the war on terrorism is not a traditional war ... in the sense that there is one known battlefield or one known nation or one known region. The President has made clear that we will fight the war on terrorism wherever we need to fight the war on terrorism ... this is a different kind of war, with a different kind of battlefield, where known political boundaries, which previously existed in traditional wars do not exist in the war on terrorism.' Press Gaggle by Ari Fleischer, Aboard Air Force One, 5 November 2002, available at: [www.whitehouse.archives.gov/news/releases/2002/11/20021105-2.html](http://www.whitehouse.archives.gov/news/releases/2002/11/20021105-2.html); see also Bush, 'State of the Union Address', *supra* note 6; Statement by Ambassador at Large, Pierre Prosper, *supra* note 6. The Obama administration also asserts it is engaged in a 'current, novel type of armed conflict' ('Respondents' memorandum regarding the Government's detention authority relative to detainees held at Guantanamo Bay', Misc. No. 08-442 (TFH), p. 1, para. 2) and 'a different kind of war', (Speech by President Obama, National Defense University, 23 May 2013).

<sup>247</sup> Detention is touched upon here and developed in other chapters; see Chapter 7B3 on interplay of IHL and IHRL and Chapter 8 on Guantanamo.

## 6B.1 ARMED CONFLICTS SINCE 9/11

## 6B.1.1 Conflict with 'al-Qaeda and associated groups'?

It has at times been tempting to dismiss post 9/11 references to the 'war on terror' as simply a rhetorical device with no more meaning than the wars on drugs or on crime oft-invoked in political circles. While there clearly cannot be an armed conflict with an abstract phenomenon, too much sleight of hand would overlook the seriousness with which the view was and is advanced by governments and at least some commentators, that there is an armed conflict with al-Qaeda, and other unidentified terrorist individuals, networks or organisations.

Since 9/11, successive US administrations have argued, in varying forms of words, that they were or are engaged in an armed conflict of global reach with al-Qaeda and "associated" forces.<sup>248</sup> The position of the Bush administration originally suggested that this conflict was akin to an international conflict, albeit a new kind of conflict that did not fit into any of the IHL categories.<sup>249</sup> This conflict was asserted to exist alongside the further international conflict in Afghanistan, although on occasion the two were conflated into 'in an armed conflict with al Qaida, the Taliban, and their supporters'.<sup>250</sup>

248 'The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world.' G. Bush, 'Executive Order: Interpretation of the Geneva Convention Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency', *Executive Order 13440*, 20 July 2007, available at: <http://www.fas.org/irp/offdocs/eo/eo-13440.htm>. See also Bush 2001 speech. note 1. The Obama administration essentially followed this line: see inter alia, speech by President Obama 23 May 2013, note 106; US National Security Strategy 2010; H. Koh, 'The Obama Administration and International Law', Remarks at the Annual Meeting of the American Society of International Law (ASIL), 25 March 2010, available at: <http://www.state.gov/s/1/releases/remarks/139119.htm> (hereinafter 'ASIL Speech') and further examples below.

249 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) on the government's position, accepted by the Court of Appeals. After the *Hamdan* judgement, it shifted to contemplating that the conflict may have been non-international.

250 For more recent statements under the Obama administration see, e.g., submission to the UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States of America', UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, p. 3, para. 12. The US claimed: 'The United States is engaged in an armed conflict with al Qaida, the Taliban, and their supporters.' Koh, 'ASIL Speech', supra note 248; *Executive Order 13440*, 20 July 2007, available at <http://www.fas.org/irp/offdocs/eo/eo-13440.htm> like Obama speech of 23 May 2013, provided that: 'The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces.'

The Obama administration came to power heralding a radical shift of approach by appearing to have promptly abandoned the 'war on terror' epithet.<sup>251</sup> Media reports that the 'war on terror' was dead<sup>252</sup> were, however, themselves short-lived. In his national security remarks on May 21, 2009 President Obama stated: 'Now let me be clear. We are indeed at war with al Qaeda and its affiliates.'<sup>253</sup> That this was more than simple political rhetoric was made clear from the US administration's legal position in subsequent litigation and from multiple high level speeches since, which have confirmed that the US considers itself engaged in an 'armed conflict with al-Qaeda, the Taliban and associated forces.'<sup>254</sup> Despite rejecting over time the broad 'war on a tactic'<sup>255</sup> and acknowledging the need to move away from a 'perpetual

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251 In The Hague in March 2009, Secretary of State Hillary Clinton stated: 'The [Obama] administration has stopped using the phrase and I think that speaks for itself ....', *Reuters*, 30 March 2009, available at: [http://www.reuters.com/article/2009/03/30/us-obama-rhetoric-idUSTRE52T7MH2\\_0090330](http://www.reuters.com/article/2009/03/30/us-obama-rhetoric-idUSTRE52T7MH2_0090330); see also A. Kamen, 'The End of the Global War on Terror', *The Washington Post*, 24 March 2009, available at: [http://voices.washingtonpost.com/44/2009/03/23/the\\_end\\_of\\_the\\_global\\_war\\_on\\_t.html](http://voices.washingtonpost.com/44/2009/03/23/the_end_of_the_global_war_on_t.html), referring to a leaked memo from the Office of Security Review, which states: 'This Administration prefers to avoid using the term "Long War" or "Global War on Terror" [GWOT]. Please use "Overseas Contingency Operation."

252 See, e.g., Kamen, 'The End of the Global War on Terror', *ibid.*, '[t]he decade-long global war on terror, which effectively ended with the killing of Osama bin Laden', in 'Goodbye, good riddance to the global war on terror', *Globe and Mail*, 7 September 2011 at: <http://www.theglobeandmail.com/news/opinions/opinion/goodbye-good-riddance-to-the-global-war-on-terror/article2155295>.

253 B. Obama, 'Remarks by the President on National Security', *The White House Office of the Press Secretary*, 21 May 2009, available at: [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/); see also, Obama, 'Inaugural Address', 20 January 2009, available at: <http://www.whitehouse.gov/blog/inaugural-address/>. 'Our nation is at war, against a far-reaching network of violence and hatred' and 23 May 2013 speech note 106.

254 Koh 'ASIL Speech', *supra* note 248. See also E. Holder, Attorney General, Department of Justice, Address at Northwestern University School of Law, 5 March 2012), available at: <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (hereinafter 'Holder Speech on Targeted Killing'); J. Johnson, 'National security law, lawyers and lawyering in the Obama Administration', Speech at the Yale Law School on 22 February 2012, transcript available at: <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/> (hereinafter 'Johnson Speech on National Security'); J. O. Brennan, 'Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws', 16 September 2011, available at: <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; see also J. O. Brennan, 'Speech at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy', 30 April 2012, available at: <http://www.whitehouse.gov/blog/2012/04/30/watch-live-john-brennan-president-s-counterterrorism-strategy>.

255 Background Briefing by Senior Administration Officials on the President's Speech on Counterterrorism, 23 May 2013 at <http://www.whitehouse.gov>.

war' paradigm, the administration's assertion that it is at war with al Qaeda and associated forces remained intact.<sup>256</sup>

As is relatively common for parties to a conflict, its approach to the *nature* of that conflict is less clearly articulated. It appears however to have evolved from considering the purported conflict with al-Qaeda an international conflict,<sup>257</sup> to considering it non-international in nature.<sup>258</sup> Such a shift may reflect the decision of the US Supreme Court in *Hamdan v Rumsfeld*, where the Court found that Common Article 3 applies to detainees captured pursuant to the 'war on terror'.<sup>259</sup> This has been cited in support of the existence of a non-international conflict with al Qaeda, though whether the Supreme Court judgement really provides support for this view, as opposed to upholding the applicability of minimal protective rules to any person detained, has itself proved contentious. While some read *Hamdan* as at least assuming that there is a global NIAC against al-Qaeda,<sup>260</sup> others question whether the Court in fact took any position on the existence or nature of the armed conflict(s) in Afghanistan or beyond.<sup>261</sup> In any event it has been relied upon by the US administration as providing legal imprimatur to its position that it is engaged in a NIAC with al-Qaeda and others.

The position of the United States administration regarding the existence of an armed conflict with al Qaeda contrasts starkly with the positions and practice of other states, including close US allies in the war on terror. Attacks in London, Madrid, Denmark and elsewhere did not provoke claims from affected states that an armed conflict had arisen, and indeed those governments

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256 Obama, May 2013 speech, note 246.

257 See, e.g., J. Pejic, "'Unlawful/Enemy Combatants': Interpretations and Consequences", in M. Schmitt and Pejic (eds.) *International Law and Armed Conflict: Exploring the Faultlines* (Brill, 2007), p. 341.

258 The Obama administration has referred to a 'current, novel type of armed conflict' and appears to rely on the interpretation of the Supreme Court in *Hamdan* to support the existence of a non-international conflict against armed groups, such as al-Qaeda and the Taliban.

259 *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).

260 See, e.g., J. Ku and J. Yoo, 'Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch', *Constitutional Commentary*, Vol. 23, 2006, p. 111. '[T]he Court held that Common Article 3...applied to the U.S. conflict with al Qaeda...The Court concluded that the war with al Qaeda in Afghanistan...qualifies as a 'conflict not of an international character occurring in the territory of one of the High Contracting Parties.'

261 See, e.g., J. Cerone, 'Status of Detainees in Non-International Armed Conflict, and Their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld', *American Society for International Law (ASIL)*, Volume 10, Issue 17, 26 February 2009, para. 12. 'Ultimately, the Court chose not to take a position on whether there were two separate conflicts, and refrained from characterizing the nature of the conflict(s).' Eg E. Shamir-Borer, 'Revisiting *Hamdan v. Rumsfeld*'s Analysis of the Laws of Armed Conflict', 21 *Emory Int'l L. Rev.* 601, 607-08 (2007) noting the Court 'reserved its position on the nature and classification of the conflict'.

distanced themselves from the war paradigm.<sup>262</sup> Despite close alliances between the US and UK in counter-terrorism, the UK former Attorney General is among those who described the notion of a war on terror as 'not only misleading but positively dangerous'.<sup>263</sup> Examples abound of international actors, including the ICRC, other inter-governmental organisations and authoritative commentators rejecting the notion of an armed conflict with al-Qaeda.<sup>264</sup>

The question that has been pivotal in much of this international discourse, and which has led to a gaping transatlantic rift,<sup>265</sup> is this: can or should al-Qaeda and other networks be considered parties to an armed conflict, to be defeated militarily in accordance with IHL, or should they properly be understood as criminal organisations, requiring effective law enforcement? Many policy arguments, emphasising the merits and demerits of considering al-Qaeda to be a party to a conflict have been advanced since September 11,

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262 'On the contrary, the post September 11 terrorist bombings in London, Madrid and Bali were not treated as acts of war, but as criminal acts, and the authorities applied law enforcement, not military, means to address them.' Eminent Jurists Panel, 'Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights: Assessing Damage, Urging Action', *International Commission of Jurists*, 2009, retrieved from <http://ejp.icj.org/IMG/EJP-Report.pdf> (hereinafter 'Eminent Jurists Panel Report'). See, e.g. then Director of Public Prosecutions: 'London is not a battlefield. Those innocents who were murdered on July 7 2005 were not victims of war... We need to be very clear about this. On the streets of London, there is no such thing as a "war on terror", just as there can be no such thing as a "war on drugs" ... The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.' K. Macdonald, 'Security and Rights', *Crown Prosecution Service*, 23 January 2007, available at: [http://www.cps.gov.uk/news/articles/security\\_rights/](http://www.cps.gov.uk/news/articles/security_rights/) last visited 6 December 2012.

263 Lord Goldsmith, Attorney General from 2001 to 2007, 'Justice and the Rule of Law', 43 *Int'l Lawyer* 27, 29 (2009): '... saying "War on Terror" then justifies holding people without trial after the international armed conflict has come to an end until this amorphous "War on Terror" has come to an end-and who is going to say when it has?' K. MacDonald, *ibid.*

264 See, e.g., ICRC, 'Challenges of Contemporary Armed Conflicts', *supra* note 47. 'On the basis of an analysis of the available facts, the ICRC does not share the view that a global war is being waged and it takes a case-by-case approach to the legal qualification of situations of violence that are colloquially referred to as part of the "war on terror."' European Commission for Democracy Through Law, 'Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners', *Venice Commission 66<sup>th</sup> Plenary Session*, 17-18 March 2006, available at: [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp#\\_ftnref47](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp#_ftnref47) ; Eminent Jurists Panel, *supra* note 262.

265 Proponents of a global war with al-Qaeda are described as 'almost exclusively in the US'. Pejic, 'Protective scope of CA3', *supra* note 10, p. 195. In support of the armed conflict model, see Bellinger, 'Armed Conflict with Al Qaida?', *Opinio Juris*, 15 January 2007, para. 9, available at: <http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida>. On the divide, see, e.g., A. Dworkin, 'Beyond the War on Terror: Towards a New Transatlantic Framework for Counterterrorism', *European Council on Foreign Relations*, May 2009, available at: <http://hram7.files.wordpress.com/2009/05/towards-a-new-transatlantic-framework-for-counterterrorism.pdf>.

of relevance to on-going discussions as to whether and if so how IHL might develop in the future. The focus of this section, however, is on whether, under current international law, the relationship between the US or other states and al-Qaeda and associates can meet the criteria for the contemporary definition of armed conflict.

As set out in the legal framework in Part A of this chapter, the key criteria require firstly, the use of force, and secondly, the existence of identifiable parties to the conflict with particular characteristics. Additional questions that have emerged regarding the reach of 'conflict' – temporally, as regards the 'long war' that may never end, or spatially, as regards whether an armed conflict can be geographically limitless and 'global' in scope. The legal criteria set out in Part A fall to be considered in relation to the questions whether there might in fact be an international or a non-international armed conflict with al-Qaeda. These categories of conflict are considered in turn below.

#### *6B.1.1.1 An 'International' armed conflict with al-Qaeda and associated groups?*

September 11 left no room for doubt that terrorist entities such as al-Qaeda can and do resort to the 'use of force' across international frontiers, satisfying the first criterion for an IAC. While some question the intensity of that force over time, the predominant view is that there is no threshold of intensity required in international (as opposed to non-international) armed conflict.<sup>266</sup> The more difficult question regarding qualification as an IAC relates to the nature of the 'parties' to an international conflict, which, according to current IHL, must be states. Exceptions to the inter-state model of IAC – including 'liberation movements' engaged in a struggle against colonial domination<sup>267</sup> or perhaps non-state entities exercising 'quasi-state' functions – do not seem relevant to al-Qaeda and related entities.<sup>268</sup>

Armed groups such as al-Qaeda, or armed individuals, may of course act under the authority of a state or states, but only if their conduct is attributable to the state, as set out in Chapter 3.<sup>269</sup> As noted there, and in Chapter 5 in relation to the use of force in response to 9/11, there has been no serious assertion of state responsibility for al-Qaeda terrorist attacks. Even in the

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<sup>266</sup> As noted in Part A, above, some now suggest that there is an intensity threshold even for IAC. See 'ILA Report', supra note 28; Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 8, p. 76-77. If this is so, there may be questions as to whether it has been met; see below in relation to NIAC, Intensity.

<sup>267</sup> Article 1(4) AP I includes 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in their exercise of the right of self-determination' within the definition of international armed conflict within the meaning of Common Article 2 of the 1949 Geneva Conventions.

<sup>268</sup> While these exceptions are at least conceivably relevant to some armed groups that may be labelled 'terrorist', they do not appear relevant to the situation in respect of al-Qaeda.

<sup>269</sup> On legal standards for attributing the conduct of private actors to states, see Chapter 3.1.1.

immediate aftermath of 9/11, when many allegations were levelled at the Taleban, there was little suggestion that Afghanistan was legally responsible for the September 11 attacks or that the criteria whereby acts are attributable to states were satisfied through that state (or any other's) relationship of control over al-Qaeda or its conduct.

Members of terrorist groups may, however, constitute irregulars fighting alongside state forces in an IAC, provided they meet certain conditions and are under the states command and control.<sup>270</sup> Some suggest this may have been the case for certain al Qaeda associates in Afghanistan in 2001, depending on their relationship with Taleban forces.<sup>271</sup> The overwhelming weight of opinion would however suggest that they cannot themselves constitute a party to an international conflict against the US absent such state support.<sup>272</sup> Despite the first glance attraction of the original US position that if there is a conflict arising out of acts of 'international terrorism', it should be considered 'international' in nature,<sup>273</sup> there is decreasing reliance on such an argument, either by the administration or others,<sup>274</sup> and it finds little support in the criteria for international armed conflict under current international law.<sup>275</sup> Whether there might be a conflict with al Qaeda or others depends therefore on it falling within the definition of a non-international armed conflict.

#### 6B.1.1.2 A 'non-international armed conflict' with al-Qaeda and associated groups?

As regards the criteria for the existence of a non-international armed conflict set out in Part A above, the first is that the use of force employed must reach a certain threshold of intensity and be distinguishable from sporadic or isolated acts of violence. If, in accordance with the weight of international practice,

270 See Chapter 6A.2.1 above referring to criteria to constitute a combatant under Art. 4 GCIII and AP I.

271 See generally, Dworkin, *supra* note 265; see also A2.1 on the definition of combatant and of 'armed forces' as comprising also armed groups that meet certain conditions and fight alongside a party to a conflict.

272 Cross ref to definition in part A.1. As noted, this no longer even appears to be the US position. Nor can al Qaeda and associates be a party to a NIAC for reasons set out below.

273 See, e.g., 'Humane Treatment of al Qaeda and Taliban detainees', *supra* note 248, §2c; Pejic, 'Protective scope of CA3', *supra* note 11, p. 195.

274 The view now advanced by the US administration appears to be that there is a 'non-international' armed conflict, albeit of global reach, with al-Qaeda and associates. Both administrations have at times conflated the Afghan conflict which was international at the outset with this broader alleged conflict so it can be difficult to discern into which category the administrations would put the conflict at various stages.

275 See part A.1.1.1 'p. 32 for a minority view that such conflict is international and the 'more common view' is that such a conflict would be international, in Wilmschurst, Classification, p. 32.

the attack were measured in intensity, without regard to duration,<sup>276</sup> the scale of the September 11 attacks would have comfortably reached the intensity threshold. More difficult, however, is the question whether violence by 'al-Qaeda and associates' continues to meet the intensity threshold many years later, and in light of developments since then. It has been questioned whether the frequency, scale and nature of al-Qaeda attacks is such that the force involved can be considered sufficient to amount to an armed conflict rather than sporadic – albeit deadly – violence.<sup>277</sup>

It has been observed that it would be necessary to amalgamate, and consider as one conflict, all acts attributed to al-Qaeda and associates in its diverse forms in recent years, including the attacks in Madrid, Bali, London, Denmark, Glasgow and elsewhere to meet the threshold. Yet, despite occasional reference to a 'conflict with the United States and its allies',<sup>278</sup> such an approach is belied by the fact that the governments in those states – unlike the US – very much rejected the idea of the attacks as acts of armed conflict.<sup>279</sup> Moreover, as explored further before (in relation to the parties to the conflict), it must be doubted to what extent the various attacks can meaningfully be said to have emanated from the same source, so as to constitute an attack that might meet the intensity threshold of hostilities.

It is, in any event, the second prong of the test, regarding the nature of the 'parties' to an armed conflict that is perhaps more problematic for proponents of the 'war with al-Qaeda and associates' paradigm. It is to be seriously doubted that an entity such as al-Qaeda could possess the characteristics of an 'armed group' as understood by IHL, such that it can be a party to a non-international armed conflict. As set out in Part A, the jurisprudence of the ICTY makes clear that an armed conflict can only exist with non-state actors that enjoy a certain level of organisation, which may be assessed by reference to

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276 See Part 6A.1.1.2 above. See also ICTY intensity 'indicators', e.g., number of confrontations, the actors involved, types of weaponry used and extent of injuries and destruction in *Haradinaj*, supra note 55, paras. 49, 60. *Haradinaj* also notes the criterion of protracted violence refers *more* to the intensity than duration.

277 See, e.g., Eminent Jurists Panel Report, supra note 262, p. 54; see generally Pejic, 'Protective scope of CA3', supra note 10; see also the 'Intensity' threshold and *Haradinaj*, ibid..

278 Eg '[t]hese forces continue to fight the United States and its allies ...' and '[t]o succeed, we and our friends and allies must reverse the Taliban's gains'. See Bush, Executive Order 13440, and Obama, 'Remarks by the President on a New Strategy for Afghanistan and Pakistan', 27 March 2009, available at: [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-on-a-New-Strategy-for-Afghanistan-and-Pakistan/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-a-New-Strategy-for-Afghanistan-and-Pakistan/).

279 See Eminent Jurists Panel, supra note 262, p. 54, '[t]he Panel, however, received no information indicating that any of these [ally] States consider themselves to be engaged in an armed conflict with these [terrorist] groups'. However, in response to the kidnapping and murder of a French citizen by al-Qaeda forces, France's Prime Minister Francois Fillon did recently state: 'We are at war with al-Qaeda and that's why we have been supporting Mauritanian forces fighting al-Qaeda for months... the fight against terrorism will continue and will be reinforced.' P. Taylor, 'PM Fillon says France "at war" with al-Qaeda', *Reuters*, 27 July 2010, available at: <http://af.reuters.com/article/worldNews/idAFTRE66Q1B920100727>.

'indicative' factors.<sup>280</sup> These include whether the group has sufficiently identifiable scope and membership, sufficient organisation and structure, and the capability of abiding by the rules of IHL.<sup>281</sup>

Since 9/11, al-Qaeda has variously been described as an organisation, a 'network of networks',<sup>282</sup> 'a series of loosely connected operational and support cells',<sup>283</sup> an 'ideology' or even 'a far-reaching network of violence and hatred'.<sup>284</sup> There is little in what is known about the entity, or movement, that is al-Qaeda, still less 'associates' that would suggest it meets the requirements of structured organisation, under military command and control, as envisaged by the legal standards.<sup>285</sup>

Moreover, in this context, identifying the alleged 'party' is itself problematic; it is unclear whether al-Qaeda should be conceived of as one organisation, or as disparate regional, national, local or individual manifestations of a broadly similar ideology.<sup>286</sup> To borrow the phrase of the Director of the FBI, would all the 'al-Qaeda franchises' form part of the party to the conflict?<sup>287</sup> The matter is clearly further complicated by the consistent assertion of being in conflict also with the unidentified 'affiliates' or 'associates' of al-Qaeda.<sup>288</sup> The identification of parties to a conflict is essential to the rationale of IHL,

280 See A.1.1.2 for indicative factors. In *Haradinaj*, supra note 55, para. 49, 60.

281 *Haradinaj*, supra note 55, para. 60; see the factors in *Boškoski*, supra note 7, para. 194; see generally Sassòli, 'Non-International Armed Conflict', supra note 48.

282 N. Lubell, 'Classification of Conflicts', in Wilmshurst, *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2013), p. 424.

283 The UK Government relies on this definition, first provided in the letter of 19 September 2002 from the Chairman of the Security Council Committee established pursuant to Resolution 1267 of 1999; see 'SIAC "Generic Determination"', 29 October 2003, cases SC/1/2002; SC/6/2002; SC/7/2002; SC/9/2002; SC/10/2002, para. 130: *Ajouaou and others v. Secretary of State for the Home Department*, available at <http://www.courtservice.gov.uk/judgments/siac/outcomes/Generic-Determination.htm>.

284 'Our nation is at war, against a far-reaching network of violence and hatred.' B. Obama, 'Inaugural Address', supra note 253.

285 See, e.g., M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', *Nordic Journal of Int'l Law*, Vol. 78, No. 4, 2009, p. 508: 'While Al-Qaida may be able to issue statements and claim responsibility for different attacks, its coherence and grip are arguably not at a level that allows for meticulous planning of each and every attack, as these are increasingly left for autonomous action by groups that are only loosely if at all connected to wider regional or global networks. Scholars and experts debate the degree of organisation versus autonomy within Al-Qaida, but there is a fairly general perception that a distinction must be made between the structure of the movement during the period from 1996 to 2001 and its structure today.'

286 As reflected in Obama's May 2013 speech, the diffuse and individualised nature of the evolving threat counters the notion of al-Qaeda as a party to an armed conflict as such..

287 R. Mueller, Director FBI, 'From 9/11 to 7/7: Global Terrorism Today and the Challenges of Tomorrow', Chatham House, 7 April 2008, available at: [http://www.chathamhouse.org.uk/files/11301\\_070408mueller.pdf](http://www.chathamhouse.org.uk/files/11301_070408mueller.pdf).

288 There is emerging evidence of U.S. attacks on persons associated with other groups, such as al-Shabaab in Somalia (see below B.2.2.1) or the Islamic Movement of Uzbekistan (in Lubell, 'Classification of Conflicts', supra note 282, p. 427).

yet the identity of these associates is shrouded in secrecy. The US has maintained a long list of quite disparate 'terrorists and terrorist groups' whose affiliates are classified as 'enemy combatants', signalling the potential breadth of those that may be covered, and raising further doubts as to the identification of the precise parameters of the putative party to the conflict.

Related uncertainties concern how one can define and identify with sufficient clarity the relationship between particular individuals and their membership, support or sympathy for this group or groups. Judicial inquiries following the attacks in Madrid in March 2004 and London in July 2005 revealed that 'their authors were perhaps not linked to Al Qaeda by anything other than consulting the same websites and harbouring the same hate against Western societies as Al Qaeda apparently does'.<sup>289</sup> Yet the logic, structure and effective operation of IHL depend precisely on the ability to identify and distinguish the opposing party, with critical implications for targeting and humanitarian protection.<sup>290</sup>

While these doubts were already present in 2001, they have increased in recent years, as knowledge of al-Qaeda has grown on the one hand, and as its capacity and core structure have apparently been depleted on the other.<sup>291</sup> While some reports have raised concerns about swelling numbers of individual terrorist volunteers in the wake of controversial 'counter-terrorist' practices and the conflict in Iraq,<sup>292</sup> indications are that the higher ranks and resources have been greatly depleted,<sup>293</sup> further diminishing the claim to military organisation, control or coordination. One commentator recently described 'a new generation of Islamic terrorists who act alone, abetted by Jihadi web

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289 M. Sassòli, 'Transnational Armed Groups and International Humanitarian Law', *HPCR Occasional Paper Series*, Winter 2006, No. 6, p. 10, available at: [www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf](http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf). This was true of numerous smaller attacks since then e.g. the Boston marathon attacks in early 2013.

290 See 'ICRC Report on IHL and Contemporary Armed Conflicts', *supra* note 48, p. 19; see generally, Paust, 'There is No Need to Revise the Laws of War in Light of September 11', ASIL Task Force Papers, November 2002, available at: <http://www.asil.org/taskforce/paust.pdf> last visited 7 December 2012.

291 See, e.g., M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', *supra* note 289, p. 508: '... there is a fairly general perception that a distinction must be made between the structure of the movement during the period from 1996 to 2001 and its structure today.'

292 Eg P. Reynolds, 'Iraq War Helped al Qaeda Recruit', *BBC*, 19 October 2004, available at: [news.bbc.co.uk/2/hi/middle\\_east/3756650.stm](http://news.bbc.co.uk/2/hi/middle_east/3756650.stm); M. Mazzeti, 'Spy Agencies Say Iraq War Worsens Terrorism Threat', *New York Times*, 24 September 2006, available at: [http://www.nytimes.com/2006/09/24/world/middleeast/24terror.html?pagewanted=and&U.S.National Security Strategy, May 2010, pp. 21-22, 36](http://www.nytimes.com/2006/09/24/world/middleeast/24terror.html?pagewanted=and&U.S.National%20Security%20Strategy,%20May%202010,%20pp.%2021-22,%2036), available at: [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

293 See Obama, 'Address on the War in Afghanistan', 1 December 2009, available at: <http://www.nytimes.com/2009/12/02/world/asia/02prexy.text.html?pagewanted=all> last noting 'Within a matter of months [of sending troops to Afghanistan], al Qaeda was scattered and many of its operatives were killed...'. See also 23 May 2013 speech.

sites ...',<sup>294</sup> which bears no relation to the requirements of structure and control implicit in IHL. The image that prevails is of an al-Qaeda that is increasingly disparate and decentralized, embodied in individual, sporadic, unpredictable and largely uncoordinated attacks.<sup>295</sup> While the threat may be no less real, and the need for concerted international measures of prevention no less pressing, its claim to constitute an identifiable, organised party to an armed conflict is surely less compelling.

There is, therefore, good reason for the widespread view among governments, IGOs, international experts and commentators alike, that al-Qaeda and related groups lack the characteristics of armed groups under IHL, and that there is no armed conflict with al-Qaeda and associates.<sup>296</sup> While al-Qaeda may have had a role in the NIAC in Afghanistan alongside the Taleban, and may on some views have constituted a party to the conflict at that point, it has been noted that 'this legal status would have certainly been lost as a consequence of Al Qaeda's subsequent transformation into a rather loosely connected network of terrorist cells. And most certainly, individual terrorist action all over the globe carried out on the basis of an "Al Qaeda franchise model" cannot be attributed to Al Qaeda as a non-State party to a non-international armed conflict of global reach'.<sup>297</sup>

Despite re-packaging the 'war on terror,' the US has consistently maintained the right to wage war on suspected terrorists and terrorist groups. However, treating them as parties to an armed conflict, rather than organised criminals

294 In light of the terrorist attack against a Jewish school in Toulouse in March 2012, French counter-terrorist analyst John-Louis Bruguière referred to a 'new generation of Islamic terrorists who act alone, abetted by jihadi Web sites and their own anger'. D. Bilefsky and M. de la Baume, 'French Gunman Seen as Homegrown Militant', *The New York Times*, 21 March 2012, available at: <http://www.nytimes.com/2012/03/22/world/europe/mohammed-merah-france-shooting-suspect-seen-as-home-grown-militant.html?pagewanted=all>.

295 See M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', *supra* note 285, pp. 509-10. 'The infrastructure of Al-Qaida in Afghanistan, according to most accounts, was largely destroyed by the US-led military campaign in 2001-2002 ... It is not always possible to ascertain whether a particular terrorist act has been directed, facilitated or just inspired by Al-Qaida ... [I]t is hard to see how Al-Qaida, in particular in its present decentralized and dispersed form, could qualify as a party to an armed conflict.'

296 See, e.g., Eminent Jurists Panel Report, *supra* note 262, p. 54 that '[t]he dominant view seems to be that al-Qaeda is a loosely connected network rather than a single transnational organisation. However, even if al-Qaeda were considered to be a cohesive and well-ordered collective that shared common strategies and tactics, it is still difficult to conceive of it as a unitary armed force and, as such, a party to the conflict. The inclusion of indeterminate "associated groups" makes it even more difficult ... Both practically and legally, there is no identifiable party to the conflict with which negotiation, defeat or surrender can occur.' See also the many voices cited above.

297 C. Kreâ, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', *Journal of Conflict & Security Law*, Vol. 15, No. 2, 15 July 2010, p. 8; on the analysis of al-Qaeda as a 'franchise model', see also 'America and al-Qaeda: The killing of Osama bin Laden', *The Economist*, 2 May 2011, available at: [www.economist.com/blogs/lexington/2011/05/america\\_and\\_al-qaeda](http://www.economist.com/blogs/lexington/2011/05/america_and_al-qaeda).

that resort to the use of force, has little support in the international legal framework. As the ICRC has noted:

“‘Terrorism’ is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted ‘fight against terrorism’ rather than a ‘war on terrorism.’”<sup>298</sup>

#### 6B.1.1.3 The ‘Global’ War: Territorial Limits and Armed Conflict?

One of the most novel aspects of the US government’s claim to be engaged in an armed conflict with al-Qaeda *et al* is the assertion that there can be an armed conflict that is territorially limitless – a conflict against a non-state actor of ‘global’ reach.<sup>299</sup> This adds a further layer of controversy to the assertion of being at war with al-Qaeda and associated groups. Is there, in the language of one commentator, a ‘legal geography of war’,<sup>300</sup> a territorial dimension to the definition of armed conflict? Does IHL only apply in a particular state where the criteria for ‘armed conflict’ are met, or can it travel with those participating in a conflict from afar? Or indeed as the US appears to suggest, can IHL apply on a global scale to a potentially limitless conflict with no territorial nexus at all?

The US government’s position is that its armed conflict with al-Qaeda is not limited to any specified territory, but ‘follows’ the members and associates of al-Qaeda, thus providing a basis to invoke ‘law of war’ rules on targeting and detention anywhere in the world.<sup>301</sup> This has been described as a ‘funda-

298 ICRC, ‘International Humanitarian Law and Terrorism: Questions and Answers’, supra note 52. See also Pejic, ‘Armed Conflict and Terrorism’, supra note 10.

299 See, e.g., Press Gaggle by Ari Fleischer, supra note 248; see also Bush, ‘State of the Union Address’, supra note 4; Statement by Ambassador at Large, Pierre Prosper, supra note 4; ‘Johnson Speech on National Security’, supra note 256 (reiterating argument that US has the right under the AUMF to the use of force against al-Qaeda and associated forces, and not all terrorists, but reaffirmed the right to do so ‘without a geographic limitation’); A. Deeks, ‘Pakistan’s Sovereignty and the Killing of Osama bin Laden’, *ASIL Insights*, 5 May 2011, Vol. 5, Iss. 11, p. 2, available at: <http://www.asil.org/insights110505.cfm>.

300 K. Anderson, ‘Targeted Killing and Drone Warfare: How We Came to Debate Whether there Is a Legal Geography of War’, *Hoover Institution Online Volume Essay ‘Future Challenges’*, forthcoming, SSRN Working Paper Version 26 April 2011, pp. 3-15. The author describes the view that ‘there is no legal geography of war beyond the conduct of hostilities’.

301 Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendant’s Motion to Dismiss at 1, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469). See also Deeks, ‘Pakistan’s Sovereignty and the Killing of Osama bin Laden’, supra note 303, p. 2: ‘For the United States (and others that adopt this position), once a state is in an armed conflict with a non-state armed group, that conflict follows the members of that group wherever they go, as long as the group’s members continue to engage in hostilities against that state (either on the “hot battlefield” or from their new location).’

mentally new aspect to the arguments' concerning armed conflict with non-state groups.<sup>302</sup>

As the legal framework set out in Part A made clear,<sup>303</sup> developments in practice have lead to a flexible approach to the territorial scope of armed conflict, whereby it is well accepted, for example, that a NIAC can 'spill over' – or occur across – territorial borders.<sup>304</sup> Yet the US assertion that there are *no* geographic limits has caused international consternation,<sup>305</sup> and has been described as 'perhaps the most controversial aspect' of the US position.<sup>306</sup> Perhaps this is because the notion of a limitless global conflict jars with the inherently limited, definable and exceptional nature of armed conflict (and applicable law).<sup>307</sup> Or it may be the increased vulnerability of states to the use of force on their territories, and the potential for escalation of conflict which the international community committed through the UN Charter to avoid, that brings with it a particular degree of international caution.<sup>308</sup>

Proponents of the 'global' armed conflict suggest that it is necessary to ensure that individuals forming part of an armed conflict, but operating outside of the zone of conflict, cannot escape the consequences of applicable IHL.<sup>309</sup> If the reality is that individuals are engaged in hostilities (e.g., ordering or planning) from another state's territory, the law must allow them to be targeted on the same basis as those participating in a traditional zone of battle.<sup>310</sup>

302 M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', *supra* note 285, p. 505-06.

303 See 6A.1.3 on the evolving approach to territorial scope of conflict in IHL and examples.

304 Pejic, 'Protective scope of CA3', *supra* note 11, p. 195.

305 See *ibid.* Pejic suggests there must be a 'hook' to a national territory to constitute a NIAC under current IHL, and that support for the opposite view is limited to the US. The ICRC like many others appears to reject the 'global' war notion: 'ICRC Report on IHL and Contemporary Armed Conflicts', *supra* note 48, p. 10; see also M. Lehto, 'War on Terror – Armed Conflict with Al Qaeda?', *supra* note 285, p. 508: '[A]lthough a non-international conflict can extend to the territory of several states, the geographical scope of the conflict must be defined.' See, e.g., G. Rona, 'Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"', in the Fletcher Forum of World Affairs, vol. 27:2, Summer/Fall 2003, p. 64. See also Schrijver and Herik, 'Leiden Policy Recommendations', *supra* note 74.

306 Deeks, 'Pakistan's Sovereignty and the Killing of Osama bin Laden', *supra* note 303, p. 2.

307 It is the existence of armed conflict that carries with it the applicable rules on IHL and affects at least some of the applicable rules of IHRL, with important consequences: see Chapter 7A.3.4 and 7B3.

308 UN Charter Arts 1 and 2(4).

309 See, e.g., M. Lewis, 'The Boundaries of the Battlefield', *Opinio Juris*, 15 May 2011, para. 5, available at: <http://opiniojuris.org/2011/05/15/the-boundaries-of-the-battlefield/> last visited 8 December 2012. Lewis expresses concern that individuals should not be 'immune from targeting based purely on geography'; see also K. Anderson, "'Ten Years In" Conference at BU Law School', 15 October 2011, available at: <http://volokh.com/2011/10/15/ten-years-in-conference-at-bu-law-school/>.

310 *Ibid.*

On the other hand, others note that while conflicts undoubtedly can extend beyond one state's borders, the legal definition of armed conflict still requires that for IHL to be invoked in any state, the threshold of conflict would need to be met *within that particular state*.<sup>311</sup> Otherwise, IHL standards may be brought to bear in states where the threshold is not met, in response to threats or sporadic attacks, which are precisely the sort of situations intended to be covered by law enforcement and excluded from the ambit of IHL. Increased difficulties arise in identifying one organised armed group that might meet the criteria of a party to a conflict where the entity operates, in various incarnations, on a global scale. In this respect it may be that concerns raised in relation to the global battlefield are closely related to the need to meet the legal criteria for the definition of armed conflict (of threshold and parties) mentioned above.

At a minimum, it would seem that there must be at least *some* nexus to a particular locus of an armed conflict where the legal criteria are met, for IHL to apply.<sup>312</sup> If individuals are to be targeted remotely, it must be in accordance with the rules regarding legitimate targeting in respect of that conflict. A greater onus may rest with a state to establish that individuals' thousands of miles from a conflict in fact belonged to a party to the conflict or were direct participants in hostilities from afar. Moreover, it should be noted that even if one accepts the application of IHL in principle, the geographic locus far from the 'battlefield' scenario may, in certain circumstances, make it more likely that capturing rather than killing the individual is feasible, which IHL may therefore require.<sup>313</sup> The applicability of IHL may therefore not have the effect in all situations that some suggest of entitling the state to engage in the use of lethal force anywhere in the world.<sup>314</sup>

The wide-ranging notion of a world at war without any geographic definition causes clear legal and policy discomfort and has been described as having little support outside the US.<sup>315</sup> In this respect, in testimony to the US House of Representatives, one American commentator noted that the US is 'remarkably indifferent to the increasingly vehement and pronounced rejection' of the view

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311 Schrijver and Herik, 'Leiden Policy Recommendations', para. 63: '[I]t is possible for an armed conflict involving non-state actors to extend to the territory of more than one state ... subject to IHL applicable to non-international armed conflicts. This will, however, depend on whether, *within any particular state*, the factual conditions are met for an armed conflict to exist.'

312 *Ibid.*

313 See 'direct participation in hostilities' 'ICRC DPH Guidance', supra note 124, p.7, and 7B3 on IHL and IHRL.

314 This is true even under the rules of IHL (or of course the law *ad bellum* or IHRL that co-applies alongside IHL addressed in the next chapter).

315 Proponents of a global war with al-Qaeda are described as 'almost exclusively in the US'. Pejic, 'Protective scope of CA3', supra note 11, p. 195.

that the US can 'simply follow combatants anywhere and attack them'.<sup>316</sup> Undoubtedly, however, the debate concerning the extent to which armed conflict is territorially linked or limited are questions of increasing international attention, and areas where the law is likely to continue to be debated and potentially developed.<sup>317</sup>

The significance of interpreting IHL to permit attacks on the basis of conflicts 'travelling' in this way goes beyond US practices. In 2012, a court in Qatar convicted two Russian intelligence agents for the assassination of the former Chechen separatist leader Zelimkhan Yandarbiyev, whose car exploded outside a mosque in Doha, Qatar.<sup>318</sup> Counter-terror legislation in the Russian Federation has been criticized for enshrining in law a broad reaching authority to use force to eliminate the terrorist threat wherever it arises around the globe.<sup>319</sup> Serious concern regarding such 'international assassinations' by Russian intelligence agents – of individuals considered by the authorities to be supportive of Chechen rebels – is a reminder of the dangers of opening up the possibility of resort to force anywhere in the world on the basis of a connection to an armed conflict states or continents away.

#### 6B.1.1.4 The 'War without End'?

A further concern that is often voiced in this context is the indefinite, or interminable, nature of what has been described as the 'long war'.<sup>320</sup> The Bush administration characterized the position with over-reaching declarations that the war would not end 'until until every terrorist group of global reach

316 K. Anderson, 'Rise of the Drones: Unmanned Systems and the Future of War', Written Testimony to the U.S. House of Representatives Subcommittee on National Security and Foreign Affairs, 23 March 2010, p. 5, para. 11, available at: [http://www.fas.org/irp/congress/2010\\_hr/032310anderson.pdf](http://www.fas.org/irp/congress/2010_hr/032310anderson.pdf) (hereinafter 'Anderson Written Testimony'). P. Alston, 'Statement of U.N. Special Rapporteur on U.S. Targeted Killings Without Due Process', 3 August 2010, available at: <http://www.aclu.org/national-security/statement-un-special-rapporteur-us-targeted-killings-without-due-process>; see, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). US Attorney General Eric Holder responded to concerns regarding geographic scope by stating that they only target in states which are unwilling or unable to stop the terrorists, though as noted this is relevant to the *jus ad bellum* of Chapter 5, not to IHL. 'Holder Speech on Targeted Killing'.

317 See, e.g., Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6.

318 S.L. Myers, 'Qatar Court Convicts 2 Russians in Top Chechen's Death', *The New York Times*, 1 July 2004, available at: <http://www.nytimes.com/2004/07/01/world/qatar-court-convicts-2-russians-in-top-chechen-s-death.html?pagewanted=all&src=pm>.

319 See generally, S. Bridge, 'Russia's New Counteracting Terrorism Law: The Legal Implications of Pursuing Terrorists beyond the Borders of the Russian Federation', 3 *Colum. J. E. Eur. L.* 1 (2009).

320 See, e.g., D. Roper, 'Global Counterinsurgency: Strategic Clarity for the Long War', *Parameters*, Autumn 2008, available at: [http://usacac.army.mil/cac2/coin/repository/Global\\_COIN.pdf](http://usacac.army.mil/cac2/coin/repository/Global_COIN.pdf).

has been found, stopped and defeated'.<sup>321</sup> The Obama administration may have been mindful of the disquiet concerning the end point of his alleged armed conflict with al-Qaeda and others when he shifted the language employed, from the 'long war' to 'overseas contingency operations',<sup>322</sup> and warned against seepage into a 'perpetual war'.<sup>323</sup> But the continuing proposition that there is a potential global armed conflict with al-Qaeda, associated forces and others, raises questions as to when and how such a conflict – and the lethal use of force model or indefinite detention justified pursuant to it – might ever end.

Armed conflicts end when the conditions that qualify as conflict cease to exist. In practice, armed conflicts often last an extremely long time: it would be absurd to suggest that the decades-long conflicts in Guatemala, the Philippines or Congo for example were any less armed conflicts for their duration. But one question is whether this is distinguishable from a situation that may not, realistically, be *capable* of being brought to a definitive end. Terrorism has always been a feature of human existence and as President Obama acknowledged, his predecessor's promised day when it comes to an end will never materialise.<sup>324</sup> As regards the alleged conflict with al-Qaeda and 'associates' or related 'terrorist networks of violence', doubts as to its nature as a loose ideological network rather than an organised armed group, discussed above, compound doubts as to when, if ever, it can be definitively quashed, and if it were, how would we know?

The political determination to end any conflict, real or perceived, is critically important.<sup>325</sup> In legal terms, however, armed conflict ends when hostilities of a certain threshold (for NIAC) between identifiable parties no longer exist; the key questions are therefore same as for establishment of conflict in the first place. Rather than constituting separate legal criteria, the concerns regarding 'war without end' are perhaps additional policy reasons for rejecting the notion of an amorphous armed conflict with al-Qaeda in the first place.

Uncertainty and obfuscation as to the existence and scope of the 'war(s)', and against whom they are being fought, spills over, inevitably, into confusion as to when, if ever, they will end, which are critical determinations for applicable law and those affected for example by detention powers.<sup>326</sup> Understand-

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321 Bush, 'Address to a Joint Session of Congress and the American People', 20 September 2001, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

322 Kamen, 'The End of the Global War on Terror', *supra*.

323 Obama, National Defense University speech, 23 May 2013.

324 See recognition of this in President Obama's 23 May 2013 speech, note 244 and Bush note 1.

325 Obama 23 May 2013. See Bush at note 1 above.

326 As noted above, persons detained in the context of an international conflict in Afghanistan are entitled to release upon the cessation of the international conflict, so implications for prisoners are serious. The IHL framework in armed conflict (which modifies the IHRL framework that normally applies), is by its nature exceptional and for a limited period of time, with a potentially identifiable and verifiable end-point.

ing the parameters of the conflict, as arising between identifiable parties in the particular context of Afghanistan (or Iraq), rather than against terrorism more broadly in the world at large, is the first step towards meaningful implementation of, and monitoring of respect for, IHL.<sup>327</sup>

## 6B.1.2 Real armed conflicts post 9/11: Afghanistan, Iraq and beyond?

### 6B.1.2.1 Nature of the conflict in Afghanistan

By contrast to the uncertainty surrounding ambiguous notions as to the 'war on terror' or being at war with terrorists, relative clarity attends the fact that an international armed conflict arose in Afghanistan, with the military action that commenced on 7 October 2001, if not before. The parties to the conflict in Afghanistan on and following 7 October 2001 were the armed forces of the US and its allies on the one hand, and Afghanistan represented by the Taleban and its supporters (including elements of al-Qaeda), on the other.<sup>328</sup>

There was also an armed conflict in Afghanistan before the 2001 intervention, between the Northern Alliance and the Taliban, though it was probably non-international in nature since the Russian withdrawal from Afghanistan many years before 2011.<sup>329</sup> The intervention of several allied states on that date resulted in an international conflict, albeit one that appears to have been waged alongside, and in connection with, the continuing non-international conflict between the Northern Alliance and the Taleban.

Somewhat more difficult questions relate to the nature of the conflict as it evolved in the later stages. It should be noted that murkiness often stems in part from assertions concerning a broader conflict with al-Qaeda and associates, discussed above, and its uncertain relationship with the conflict in Afghanistan. Successive US administrations, and to some extent the US Supreme Court, have contributed to this by intermingling references to an 'armed conflict with al-Qaeda, the Taliban and associated forces,' in Afghanistan and beyond.<sup>330</sup> While it is at times unclear to what extent the Afghan conflict

<sup>327</sup> See Chapter 7, para. 7A.3.4 on the relationship between IHL and IHRL during armed conflict.

<sup>328</sup> Questions arise as to the relationship between al Qaeda in Afghanistan and the Taliban – whether the former fell under the overall control of the latter, or vice versa, and whether they were one and the same party to the conflict or not. Francoise Hampson suggests that for all intents and purposes there was one international conflict at this time. F. J. Hampson, 'Afghanistan 2001-2010', in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 242.

<sup>329</sup> Contentions that Pakistan fought alongside the Taleban prior to 7 October 2001, if true, suggest the conflict may already have been internationalised. Paust, 'There is No Need to Revise the Laws of War in Light of September 11', p. 3. Note, however, the difference of view on international vs. non-international nature of a conflict where an intervening state fights alongside government as opposed to insurgents, above.

<sup>330</sup> See above Bush, Obama and Koh's references to the conflict discussed previously.

is considered to have been subsumed by the broader claim of global armed conflict with al-Qaeda, or vice versa, as noted above there is little support for such a broader conflict with al-Qaeda as a matter of law in any event. Legally, therefore, the question is the nature of the conflict – or conflicts – in Afghanistan, and whether military action that purports to be taken against al-Qaeda operatives worldwide can be justified as a ‘spillover’ from, and arguably the remote engagement in, such an armed conflict.<sup>331</sup>

On 19 June 2002, once the Taliban government had been definitively removed from power and the *Loya Jirga* constituted,<sup>332</sup> the state of Afghanistan came to be represented by a government and forces friendly to the US and allied states, Afghanistan’s erstwhile opponent in the international armed conflict. From that point, rebel forces on the one hand (presumably a mixture of al-Qaeda and remnants of the Taliban which had transformed from de facto government to non-state armed group) fought against the state of Afghanistan and other states.

As such, the net result was armed conflict(s) between states and armed groups, apparently therefore of the non-international variety.<sup>333</sup> Some suggest that there have been, and at time of writing still are, three related but distinct non-international conflicts that have unfolded in Afghanistan since 2002.<sup>334</sup> One is the conflict between the government of Afghanistan established in June 2002 and the remnants of the Taliban and, perhaps, al-Qaeda.<sup>335</sup> The situation in Afghanistan where a non-international armed conflict existed before the military intervention of 7 October 2001, appears to have reverted to a situation of non-international armed conflict post-June 2002, albeit with the rebels and government forces having changed face. A second conflict is the continuation of Operation Enduring Freedom launched by the US on 7 October 2001 and which continues to the present time, with the aim of preventing attacks ‘from Al-Qaeda and Taliban remnants.’<sup>336</sup> The third is conflict in which the ISAF

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331 See examples below in relation to ‘Targeting’ of al-Qaeda worldwide at 6B.3.1.

332 See ‘Karzai sworn in as president’, *BBC News*, 19 June 2002, available at: [http://news.bbc.co.uk/1/hi/world/south\\_asia/2052680.stm](http://news.bbc.co.uk/1/hi/world/south_asia/2052680.stm).

333 It is a question of fact whether the remnants of the Taliban meet the requirements of a ‘party’ to a conflict, set out above, though it seems very likely that they would. Their relationship with al-Qaeda also remains unclear. See Hampson, ‘Afghanistan 2001-2010’, supra note 334, p. 256.

334 Hampson, ‘Afghanistan 2001-2010’, supra note 334. The extent to which they form one conflict with various parties or separate conflicts may be a matter of dispute, but the parties appear to recognize the very different nature of the interventions by Operation Enduring Freedom and the ISAF forces for example.

335 ‘Al-Qaeda’s Diminished Role Stirs Afghan Troop Debate’, *The Wall Street Journal*, 5 October 2009, available at: <http://online.wsj.com/article/SB125469118585462615.html>.

336 Secretary of State for the Defence to UK House of Commons, 20 June 2002, cited in Hampson, ‘Afghanistan 2001-2010’, supra note 334, p. 255

forces are engaged, mandated under SC Resolution 1386 and subsequent resolutions, against the Taleban and related non-state party.<sup>337</sup>

While a certain degree of controversy arises concerning the impact on the classification of conflict of the engagement of outside states, there is little support in current international law and doctrine for the continuing involvement of the US or others beyond June 2002 meaning that the conflict remains international.<sup>338</sup> A related question is when the Afghan conflict might end.<sup>339</sup> As noted, the international armed conflict in Afghanistan appears to have ended on 19 June 2002 when Hamid Karzai was sworn in as President of Afghanistan. If the international conflict is over, another legal basis for detaining persons originally held pursuant to IHL applicable in international conflicts, under IHL applicable in non-international conflicts or IHRL, must be relied upon.<sup>340</sup> POWs, for example, should be released at the end of the international conflict, unless prosecuted, or some other legal basis exists to justify their continued detention.<sup>341</sup>

As regards the non-international armed conflict(s) post-June 2002, the question whether the relevant criteria for armed conflict continue to be satisfied must be assessed on an on-going basis, including following the US withdrawal in 2014.<sup>342</sup> At a certain point the requirement of on-going violence of significant intensity (as opposed to isolated or sporadic acts of violence) will no

337 As noted in Chapter 5, the International Security Assistance Force (ISAF) was established by the U.N. Security Council at the end of December 2001, and NATO assumed responsibility for the force as of 2003. Over forty nations have committed personnel. It operates alongside Operation Enduring Freedom led by the U.S. Some uncertainty and differences of approach from within ISAF are reported to surround the identification of the nature of the opposing 'party,' which has had an effect on disputes regarding targeting discussed further below. See A. Cole, 'Legal Issues in Forming the Coalition', in M. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, (2009) Vol. 85, US Naval War College International Law Studies, p. 146; see also Hampson, 'Afghanistan 2001-2010', supra note 334, p. 260.

338 Part 6A.1.1. on limited dispute remaining over whether the support of outside states on the side of state forces (as in Mali in 2013) automatically renders a conflict international. See Hampson, 'Afghanistan 2001-2010', supra note 334.

339 The official position of the US Government is that the war *against* Afghanistan ended, though its role in Afghanistan continues: see, e.g., 'In coordination with the government of Afghanistan, the coalition here continues to train the Afghan National Army, provide civil affairs support, and disrupt, deny, and destroy terrorist and anti-government forces in order to establish a stable and secure Afghanistan.' Press release of the US Department of Defense, 10 January 2004, available at: <http://www.defendamerica.mil/afghanistan/update/feb2004/au022804.html>. It is clear, however, in practice that military operations conducted by coalition forces are very much on-going as of 2012, often justified by reference to the prevention of terrorism. See Koh, 'ASIL Speech', supra note 248; 'Johnson Speech on National Security', supra note 254.

340 See Chapter 7, part B.3 on 'Interplay' as to what this legal basis might be.

341 On lawful bases for detention see Chapter 8B.4.1. Once international armed conflict ends, and becomes non-international, prisoners can no longer be held as POWs. They should then be released or put on trial, unless there is another basis for their detention (in accordance with IHRL).

342 E.g. President Obama, State of the Union address, 2013.

longer be satisfied. At a certain point the Taleban may also be definitively defeated in such a way that the party to the conflict may cease to exist and (as there is unlikely to be any conflict with al-Qaeda as such, as discussed above) what was an armed conflict will revert to acts of violence regulated not by IHL but by other areas of law, notably criminal and human rights law.

*6B.1.2.2 The conflict in Iraq and obligations of occupying forces*

International forces intervened militarily in Iraq on 19 March 2003, giving rise to an international armed conflict.<sup>343</sup> Shortly thereafter there ensued a situation of occupation, also governed by the law of IHL applicable to international armed conflict.<sup>344</sup> The existence and nature of the Iraqi belligerent occupation was relatively straightforward, with controversy focusing instead on compliance with such obligations<sup>345</sup> and when the coalition forces' 'occupier's obligations' ceased.<sup>346</sup> On 1 May 2003, then US President George Bush declared that 'major combat operations in Iraq have ended'.<sup>347</sup> The institution of a new government in Iraq took effect in June 2004, but as noted above, the transfer of formal authority does not necessarily end the occupier's responsibilities, unless an alternative functioning government has assumed *de facto* control over its population and territory and the determination of the point at which effective control was assumed by the new Iraqi government is a question of fact.<sup>348</sup> The law of occupation applies, moreover, until one year after there

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343 See SC Res. 1483 (2003), 22 May 2003, UN Doc. S/RES/1483, recognising the Iraq situation as an international armed conflict. For more detailed analysis of the background, classification of the conflict at various stages, see M. N. Schmitt, 'Iraq (2003 onwards)' in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 356.

344 Applicable IHL includes specific obligations incumbent on occupying forces, described above, 6A.3.4.

345 Many questions arise as to the satisfaction of those obligations by coalition forces, which are not explored here. See torture and ill-treatment, Chapter 7B6, and procedural rights of detainees, below and Chapter 8.

346 The test for occupation is a factual one based on the effective control of territory or persons. However, IHL provides that the rules continue to apply to occupation one year after withdrawal. See Article 6 GC IV. Schmitt suggests that as of June 2004 and SC Resolution 1546 (referring to looking forward to the end of the occupation), the occupation ceased. Schmitt, 'Iraq (2003 onwards)', supra note 343, p. 369.

347 Bush, 'President Bush Announces Major Combat Operations in Iraq Have Ended', 1 May 2003, para. 1, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html>.

348 See ICRC, 'Iraq: civilians continue to pay the highest price in the conflict', Press Briefing, 30 November 2006, available at: <http://www.icrc.org/eng/resources/documents/press-briefing/iraq-briefing-301106.htm>. For dispute regarding the nature of the conflict in Iraq, see Bianchi and Naqvi, *International Humanitarian Law and Terrorism*, supra note 5, p. 114. ICRC statements in respect of the situation in Iraq long after the 2004 handover indicated that IHL continued to apply to the situation in Iraq.

is a general close of military operations or the occupying power ceases to exercise such effective control.<sup>349</sup>

In assessing the law applicable to the conduct of the occupying forces during that period, it should be borne in mind that the parallel application of human rights law alongside these rules of IHL is particularly essential in occupation, where the state assumes responsibility for a broad range of aspects of civilian life.<sup>350</sup> At a certain point, following Security Council resolution and the acceptance by the legal community of the sovereign responsibilities of the new Iraqi government, the conflict came to be recognised as a non-international armed conflict with external involvement.<sup>351</sup>

The existence of armed conflict is a legal question to be addressed on the basis of ever evolving facts. In addition to the two large scale post 9/11 military interventions highlighted above, questions frequently arise regarding the existence of conflicts in other states and areas affected by the war on terror, notably Pakistan, but also Yemen, Somalia, and beyond, of relevance to the lawfulness of measures taken against international terrorism in recent years. Whether there are conflicts, and if so their nature and applicable law, are issues on which there are differing views, as will be noted further in relation to particular issues of IHL below.<sup>352</sup>

## 6B.2 PARTICULAR ISSUES OF IHL IN THE POST 9/11 “WARS”

### 6B.2.1 ‘Enemy Combatants’

The status of individuals is critical under IHL, as set out in Part A. It determines applicable law, governing whether (and if so when) the individuals can lawfully be attacked, and to some extent the rights to which they are entitled upon capture.<sup>353</sup> Departures from the existing legal framework in relation to the particular issues addressed below, on targeting and detention for example, has to a large extent been foreshadowed by the rejection of established categories of persons, and confusion and obfuscation as to whether there are ‘new’ categories, or gaps in the categorization of persons caught up in an armed

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349 As noted above, it continues for longer where the occupying power continues to exercise control in the territory. See Article 6(3) GC IV and Article 3(b) AP I.

350 See, e.g., *Case of al-Skeini v. The United Kingdom*, ECHR Grand Chamber, Judgment, 7 July 2011.

351 Schmitt describes the Security Council and the legal community embracing the ‘legal fiction’ of Iraqi control, and the end of occupation. Schmitt, ‘Iraq (2003 onwards)’, supra note 343, p. 369. The conflict became non-international, as recognised by the ICRC, despite not being explicitly referred to as such by the US or UK. ICRC ‘protecting Persons Deprived of Freedom Remains a Priority’ ICRC, June 2004.

352 See below 6B2.2.

353 Eg Chapter 7B3 and Chapter 9.

conflict.<sup>354</sup> Invariably these putative gaps or uncertainties have been relied upon to justify broader approaches to who may be targeted and narrowed approaches to the protections to which individuals are entitled upon capture.

The introduction of a novel category of 'unlawful enemy combatants' was promoted by the US post-9/11 and remains in force.<sup>355</sup> It has been noted that the term 'enemy combatant' is confusing, not least because 'combatants' is a term of relevance only in IAC (which, as noted above, is not generally considered relevant to the alleged conflict with al-Qaeda or to the situation in Afghanistan post 2002 for example). More significantly, the notion of 'unlawful' participation in conflict, or 'unprivileged belligerency', as it is more traditionally called, is not in fact new to IHL but is regulated by it in some detail.<sup>356</sup> Persons who engage in hostilities without the 'privilege' to do so are considered civilians directly participating in hostilities. As reflected above, IHL allows such individuals to be targeted, subject to certain constraints, for as long as they engage in hostilities. They can also be prosecuted for that engagement. Finally, they can be detained if 'imperative reasons of security so require', which is a threshold likely to be met for those actively engaged in hostilities. It has thus been questioned why a 'new' category, or indeed additional measures beyond those permitted by current IHL, could be necessary, at least without 'a complete departure from the values that underpin international humanitarian law'.<sup>357</sup>

However, the introduction of a novel category of 'unlawful enemy combatants' was promoted in support of the view that such persons were not adequately covered by existing IHL; this accorded with the controversial view of the legal adviser that 'there is a category of behaviour not covered by the

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354 See Chapter 8 for discussion of the lack of 'gaps' between categories of persons: as the Pictet Commentary makes clear, all have some status under IHL.

355 The term 'unlawful enemy combatant' was first put into legislation in Section 948a of The Military Commissions Act of 2006: 'The term "unlawful enemy combatant" means – (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.'

356 Pejic, "'Unlawful/Enemy Combatants': Interpretations and Consequences', supra note 257, p. 341.

357 'Unless one is advocating a complete departure from the values that underpin international humanitarian law, it is difficult to see why the current rules, inadequate in some aspects as they may be, present an obstacle to dealing with civilians who have taken a direct part in hostilities. It has yet to be explained what additional measures could be implemented with respect to "unlawful combatants" that would not run the risk of leading to violations of the right to life, physical integrity and human dignity that lie at the core of humanitarian law.' *Ibid.*, p. 342.

legal system.<sup>358</sup> The enemy combatant label provided the pretext, as will be seen, for targeting individuals as ‘combatants’, but providing none of the privileges or protections associated with that or any other status under IHL upon capture. Although the Obama administration changed the nomenclature in some contexts to ‘unprivileged belligerent’, it retained the approach to the implications of this classification, namely susceptibility to attack on the same basis as a combatant but without the protections associated with that status in international law.<sup>359</sup> The rules on targeting and detention, and their application, interpretation and/or disregard in practice, are addressed further below.

### 6B.2.2 Targeting and the Lethal Use of Force

As noted in the legal framework section above, one of the most important consequences of armed conflict and the applicability of IHL is the potential for the lawful use of force against the adversary. IHL rules that permit targeting of particular groups of individuals engaged in conflict stand in sharp distinction to the human rights framework governing in time of peace, under which the use of force will only very exceptionally be lawful.<sup>360</sup> The determination of whether a situation is genuinely an armed conflict, the status of individuals and whether they are legitimate targets within it, is therefore literally life or death determinations of fundamental importance. In many of the circumstances in which the lethal use of force has been used in the ‘war on terror’ or ‘war with al Qaeda and associated groups’, including many of those addressed below, the critical question is whether the IHL framework applies at all, in light of the issues highlighted in the previous section.

Additional questions arise, addressed below, concerning whether particular policies and practices are consistent with that ‘law of war’ framework on which protagonists seek to rely to justify their conduct. The following are among the many practices that have brought into question respect for rules on targeting under IHL.

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358 ‘Why is it so hard for people to understand that there is a category of behaviour not covered by the legal system?’ J. Yoo, legal counsel to former US President George W. Bush, quoted in J. Mayer, ‘Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program’, *The New Yorker*, 8 February 2005.

359 In Guantanamo litigation the Obama administration preferred ‘unprivileged enemy belligerent’. This is mirrored in The Military Commissions Act of 2009, amending the 2006 version, and providing: ‘The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who – (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.’ H. R. 2647-385, 28 October 2009, Sec. 948a(6)-(7).

360 Chapter 7A5.1 ‘The Right to Life’ and 7B.3 The ‘War’ and Human Rights’.

#### 6B.2.2.1 Targeted Killings and Drone Attacks on Terrorist suspects worldwide?

Among the most contentious measures against suspected terrorists is the lethal targeting, beyond zones of hostilities, of 'those persons who [the US considers] were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners'.<sup>361</sup> In particular, the widespread use of remotely operated weapons systems – 'unmanned aerial vehicles' (UAVs) commonly referred to as 'drones,' has been the subject of a considerable, and growing, body of international legal analysis.<sup>362</sup>

Drones were originally developed for intelligence gathering and surveillance purposes, but have been adapted as weapons systems. Their benefits are said to include their surveillance capability, ability to attack remote inaccessible areas, and their relative accuracy and precision.<sup>363</sup> Their unique feature and perhaps their primary appeal for states lies in their remote operation, hence involving little or no risk to the state's own forces when carrying out attacks. The CIA operates 'Predator' and 'Reaper'<sup>364</sup> drones from its head-

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361 In 2012 Jeh Charles Johnson, the General Counsel of the Department of Defense, sought to clarify the Obama administration's targeting practice in these terms, to reassure that the unidentified "'associated force'" is not any terrorist group in the world that merely embraces the al Qaeda ideology,' though as noted many questions remain regarding the parties to the putative conflict. See full speech, Johnson Speech on National Security', supra note 254. See also speech by Obama's National Defense University speech, May 2013, supra.

362 Government positions, and numerous NGO and UN reports, are referred to below. See eg. 'Advisory Report on Armed Drones', Advisory Committee on Issues of Public International Law to the Dutch government and parliament, Report No. 23, July 2013. Among the academic commentary see e.g. T.M. McDonnell, 'Sow What You Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists', 44 *Geo. Wash. Int'l L. Rev.* 243, 253 (2012); See also M. E. O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009', in S. Bronitt (ed.), *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force* (Hart, 2012). J. Masters, 'Targeted Killings', *Council on Foreign Relations*, 8 January 2013, available at: <http://www.cfr.org/counterterrorism/targeted-killings/p9627>. Issues also arise regarding targeted operations by special forces – see also Chapter 9 on the killing of bin Laden.

363 Leon Panetta asserted in 2009 that drone attacks are 'precise and cause only limited collateral damage'; see also 'A Defense of Drones', Editorial (Anonymous), *Wall Street Journal* (Eastern Edition), 2 April 2010, p. A.16. On the potential 'humanitarian law' advantages of drones, see B. Emmerson, Special Rapporteur on Terrorism, 'Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations' ('Interim Report') 18 September 2013, A/68/389. Cf. Counter-terrorism experts David Kilcullen and Andrew Exum estimated that for every one intended fatal target there are 50 unintended deaths. O'Connell, 'Unlawful Killing with Combat Drones', *ibid*; see also reports on civilian casualties below.

364 The Reaper is newer, 'larger and more powerful than the MQ-1 Predator'. *U.S. Air Force*, 'MQ-9 Reaper', 5 January 2012, available at: <http://www.af.mil/information/factsheets/factsheet.asp?id=6405>.

quarters in Langley, Virginia, though reports indicate the expansion of its drone bases to various states around the world.<sup>365</sup>

Since the first use of drones in the war on terror in 2002, attacks have expanded in geographic scope and grown exponentially in their numbers and impact. Drones were employed by the armed forces of the US and UK in Afghanistan and Iraq,<sup>366</sup> but gave rise to greatest concern as information emerged as to their widespread use by the CIA to kill targeted individuals beyond zones of armed conflict.<sup>367</sup> Thus far, drones have killed in Pakistan, Yemen and Somalia, though the potential geographic scope of the 'capture or kill' programme has been made clear by US representatives open assertion of the right to kill persons who 'attack US interests' whoever, or wherever, they may be.<sup>368</sup>

As regards the extent of lethal strikes by drones or otherwise, reliable estimates vary and there is a dearth of official information.<sup>369</sup> Extensive emerging media, NGO and academic studies, and to some extent official information, renders beyond reasonable dispute, however, the massive scale of operations in recent years. Credible reports put the number killed in

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365 See e.g. 'US Building Secret Drone Bases in Africa, Arabian Peninsula', *Washington Post*, 20 September 2011, available at: [http://articles.washingtonpost.com/2011-09-20/world/35273162\\_1\\_undeclared-drone-wars-seyelles-president-james-michel-unmanned-aircraft](http://articles.washingtonpost.com/2011-09-20/world/35273162_1_undeclared-drone-wars-seyelles-president-james-michel-unmanned-aircraft) (reporting new bases in Africa and the Arabian Peninsula). Another report suggests that the US operates 57 drone bases: N. Turse, 'Mapping America's Shadowy Drone Wars', *Tom Dispatch*, 16 October 2011, cited in McDonnell, 'Sow What You Reap?', *supra* note 374, p. 253.

366 R. Evans and R. Norton-Taylor, 'RAF "relying" on drones in Afghanistan Guardian', *The Guardian*, 7 February 2010, available at: <http://www.guardian.co.uk/uk/2010/feb/07/raf-drones-afghanistan>; see 'Alston Study on Targeted Killings', *supra* note 109, p. 7; L. Ure, 'Armchair pilots striking Afghanistan by remote control', *CNN*, 9 July 2008, available at: [http://articles.cnn.com/2008-07-09/tech/remotefighters\\_1\\_unmanned-aircraft-uavs-pilots?\\_s=PM:TECH](http://articles.cnn.com/2008-07-09/tech/remotefighters_1_unmanned-aircraft-uavs-pilots?_s=PM:TECH) last visited 13 December 2012.

367 See 'Alston Study on Targeted Killings', *supra* note 109, p. 7; see also M. Hosenball, 'Secret panel can put Americans on "kill list"', *Reuters*, 5 October 2011, available at: <http://www.reuters.com/article/2011/10/05/us-cia-killlist-idUSTRE79475C20111005> "There is no public record of the operations or decisions of the panel...Neither is there any law establishing its existence or setting out the rules by which it is supposed to operate." See also G. Miller, 'U.S. citizen in CIA's cross hairs', *The Los Angeles Times*, 31 January 2010, available at: <http://articles.latimes.com/2010/jan/31/world/la-fg-cia-awlaki31-2010jan31> last visited 13 December 2012.

368 Statement by Brennan June 2010, in E. Lake, 'Dozens of Americans believed to have joined terrorists', *The Washington Times*, 24 June 2012, available at: <http://www.washingtontimes.com/news/2010/jun/24/dozens-from-us-on-list-of-targets-as-terrorists>. 'If an American person or citizen is in a Yemen or in a Pakistan or in Somalia or another place, and they are trying to carry out attacks against U.S. interests, they will also face the full brunt of a U.S. response'.

369 See further below on Drones, transparency and accountability.

Pakistan alone by 2012 at around three thousand.<sup>370</sup> According to one report at least 174 of the 'militants' attacked have been children,<sup>371</sup> while some of those have been mistakes (as illustrated by the killing of Pakistani soldiers for example).<sup>372</sup> As information emerges it becomes clearer that the nature and numbers of those dead goes far beyond the select, high level and highly dangerous terrorists that are referred to in government statements.<sup>373</sup>

Although remote from the intensity of strikes in Pakistan, Yemen was the site of the first drone attack of this nature, against al-Harithi and others in 2002,<sup>374</sup> followed by the killing of US citizen Al-Aulaqi (described as 'the leader of external operations for Al Qaeda in the Arabian Peninsula')<sup>375</sup> and his 16 year old son in 2011,<sup>376</sup> and of numerous attacks thereafter.<sup>377</sup> In Somalia, it would appear that numerous attacks have also been lodged, against

370 The Bureau of Investigative Journalism (TBIJ), an independent journalist organization, reports that available data indicate that drone strikes killed 2,562-3,325 people in Pakistan from June 2004 through mid-September 2012. See TBIJ, available at: <http://www.thebureauinvestigates.com/category/projects/drones> last visited 5 December 2012; see likewise the thorough reports 'Living Under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan', Stanford Law School and NYU Law School, September 2012, ('Living Under Drones') and Amnesty International, 'Will I be next? US Drone Strikes in Pakistan,' ASA 33/013/2013, October 2013. On the dramatic increase under Obama's administration, see e.g. P. Bergen and K. Tiedemann, 'Washington's Phantom War: The Effects of the U.S. Drone Program in Pakistan', *The Council on Foreign Affairs*, July/August 2011, available at: <http://www.foreignaffairs.com/articles/67939/peter-bergen-and-katherine-tiedemann/washingtons-phantom-war>.

371 *Ibid.*

372 See also e.g. 'Obama maintains NATO drone strike that killed 24 Pakistani soldiers was not deliberate... but stops short of offering apology', *The Daily Mail*, 5 December 2011, available at: <http://www.dailymail.co.uk/news/article-2070067/Obama-maintains-NATO-drone-strike-killed-24-Pakistani-soldiers-deliberate.html#ixzz1ryJDpoHO>. On significant drone failure rates, see McDonnell, 'Sow What You Reap?', *supra* note 374, p. 258 (noting that government reports indicate that 'unmanned aerial systems experience a failure rate 100 times greater than that of manned aircraft).

373 C. Stafford Smith, 'Sleepwalking into the Drone Age', *The Observer*, 3 June 2012, p. 31. See also part 6B.3.1.2, below.

374 Qaed Senyan al-Harithi, a former bin Laden security guard, was killed, along with six others, in Yemen when his car was attacked with a missile from a Predator drone. 'Sources: US kills Cole suspect', *CNN*, 4 November 2002, available at: [http://articles.cnn.com/2002-11-04/world/yemen.blast\\_1\\_cia-drone-marib-international-killers](http://articles.cnn.com/2002-11-04/world/yemen.blast_1_cia-drone-marib-international-killers).

375 M. Mazzetti, E. Schmitt and R. Worth, 'Two-Year Manhunt Led to Killing of Awlaki in Yemen', *The New York Times*, 30 September 2011, available at: <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html>. See also 'Holder Speech on Targeted Killing', *supra* note 254.

376 P. Finn and G. Miller, 'Anwar al-Awlaki's family speaks out against his son's death in airstrike', *The Washington Post*, 17 October 2011. See also 'Holder Speech', *ibid.*

377 TBIJ puts Yemen casualties since 2002 at between 362-1,052 (reported) with between 53-63 confirmed US operations in Yemen over this time. See <http://www.thebureauinvestigates.com/category/projects/drones> last visited 5 December 2012. See Human Rights Watch, 'Between a Drone and Al-Qaeda: The Civilian Cost of US Targeted Killings in Yemen', October 2013 which examines a series of strikes it suggests were unlawful during 2012/13.

al-Qaeda targets and militant group al Shabaab that is reported to have links with al-Qaeda.<sup>378</sup>

Controversy and uncertainty surrounds most aspects of the drone programme. This includes: who is subject to attack, whether in fact it is limited to the high-level leaders that some but not all government accounts suggest and who are the unidentified “associated” forces that the US is targeting,<sup>379</sup> what ‘threat’ those targets represent (to the US, its nationals, its interests or those of its allies); what is the extent of the impact, direct or indirect, on the civilian population; what is the broader strategic impact on terrorism and counter-terrorism,<sup>380</sup> by whom are they employed, or might they be employed in the future;<sup>381</sup> and is there meaningful oversight and accountability.<sup>382</sup> Despite this, the programme is described as one of the successes of President Obama’s counter-terror strategy and the US President has acknowledged that he personally approves each incidence of lethal killing.<sup>383</sup>

International reaction to the resort to and increase in drone killings post-9/11 has been neglectfully slow. Media and human rights groups have been accused of focusing on Guantanamo and detentions policy to the neglect of a policy of targeted killings that has spread stealthily throughout the war on terror.<sup>384</sup> To some extent this has changed over time, so far as drone killings have moved centre stage as matters of international attention and concern. States have, individually and collectively, continued to show extreme reluctance to outspoken condemnation, the implications of which, for the practice by a

378 ‘Qaeda leader says Somalia’s Shabaab joins group’, *Reuters*, 9 February 2012, available at: <http://www.reuters.com/article/2012/02/09/ozatp-qaeda-shabaab-idAFJOE8180BP20120209>. See also E. Schmitt and J. Gettleman, ‘Qaeda Leader Reported Killed in Somalia’, *The New York Times*, 2 May 2008. TBIJ has reported that 170 people have been killed since 2007, and 23 US strikes and 9 drone strikes between 2007 and 2012.

379 Obama’s 23 May 2013 speech does not limit targeting to high level officials but the leaked White paper, note 106, did.

380 See e.g. *Living Under Drones*, p125-146.

381 Special operations forces can also be involved in targeted killings: see e.g. N. Davies, ‘Afghanistan war logs: Task Force 373 – special forces hunting top Taliban’, *The Guardian*, 25 July 2010, available at: <http://www.guardian.co.uk/world/2010/jul/25/task-force-373-secret-afghanistan-taliban> and Chapter 9. Reports also suggest that private contractors may have some role in implementing the CIA programme though the extent of this remains unclear. See, e.g., ‘Alston Study on Targeted Killings’, *supra* note 109, p. 7.

382 Although the Obama administration originally refused to comment on targeting policy, under increasing pressure it has acknowledged their use, that the president personally approves the list and the parameters of its legal position, while refusing to release legal advice. Obama has also stated the government is considering safeguards for their use. See e.g. White Paper and Obama 23 May 2013 speech, *supra* note 106. Koh notes there is no obligation to provide judicial process under IHL before using lethal force. Koh, ‘ASIL Speech’, *supra* note 245.

383 ‘Secret Kill List Tests Obama’s Principles and Will’, *The New York Times*, 29 June 2012, available at: <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>.

384 McDonnell, ‘Sow What You Reap?’, *supra* note 362, p. 261.

range of states in the future and for international standards, is a matter of speculation.<sup>385</sup> These muted responses have been coupled with emergent questions regarding other states cooperation with, and potentially shared responsibility in, the US drone programme.<sup>386</sup>

In the absence of clear state responses, those of international entities become all the more important in clarifying where practices fall foul of the legal framework. Several UN experts have, to varying degrees, expressed their concern over the lawfulness of drone killings,<sup>387</sup> and suggested that while there may be 'no need for new law',<sup>388</sup> there is a need for a "comprehensive overview by the international community" of targeted killings.<sup>389</sup> There is growing concern that, in the words of a former Special Rapporteur on extra-judicial, summary or arbitrary executions:

"The United States' assertion of ill-defined license to commit targeted killings against individuals around the globe, without accountability, does grave damage to the international legal frameworks designed to protect the right to life."<sup>390</sup>

Targeted killings are, of course, neither new<sup>391</sup> nor unique to the US.<sup>392</sup> While the scale of the CIA attacks, and muted responses to them, may set them apart, the practice is echoed in that of other states which employ force against those they label terrorist, such as the notorious practice of Israeli targeted

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385 Eg. A Dworkin, *Drones and Targeted Killing: Defining a European Position*, ECFR/84 July 2013.

386 Information remains elusive, though see emerging allegations in e.g. *Drone Strike Prompts Suit, Raising Fears for U.S. Allies*, R. Somaiya, NY Times, 30 Jan 2013; *Drone Killing Debate: Germany Limits Information Exchange with US Intelligence*, H. Stark, *de Speigal*, 27 May 2011. Amnesty International mentions Germany, UK and Australia in 'Will I be Next', *supra*, p. 54.

387 Statement to UN by C. Heyns and B. Emmerson, Special Rapporteurs on Extra-judicial executions and Terrorism respectively, 25 Oct 2013, 'Drone attacks: UN rights experts express concern about the potential illegal use of armed drones' <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13905&LangID=E>. Ben Emmerson's report on drones is pending publication, expected in 2014, but see Interim Report 2013. 'UN launches Inquiry into Drone Killings', *BBC*, 24 January 2013, available at: <http://www.bbc.co.uk/news/world-21176279>; and B. Emmerson, Interim Report, 18 September 2013.

388 B. Emmerson, Interim Report, *ibid*.

389 Christof Heyns, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions 20 October 2011, GA/SHC/4016, available at: <http://www.un.org/News/Press/docs/2011/gashc4016.doc.htm>.

390 'If other states were to claim the broad-based authority that the United States does, to kill people anywhere, anytime, the result would be chaos.' Alston, 'Statement of U.N. Special Rapporteur on U.S. Targeted Killings without Due Process', *supra* note 322.

391 McDonnell refers to examples such as the unsuccessful attempt on Castro's life by the US or the assassination of Harai, allegedly by Syria. McDonnell, 'Sow What You Reap?', *supra* note 362, p. 263.

392 See 'Alston Study on Targeted Killings', *supra* note 109, p. 5.

killings,<sup>393</sup> the killings of members of Jeemaah Islamiyah in Indonesia and other South East Asian countries,<sup>394</sup> or the Russian Federation's policy of targeted killings of those it identifies as Chechen terrorists.<sup>395</sup> As one UN Expert noted: 'The problems caused by terrorism and asymmetrical warfare are real and cannot be ignored. However, part of the concern about a State killing its opponents in other countries halfway around the world, far from any armed conflict, is the precedent it sets for all States to act in this way...'.<sup>396</sup> In this respect it is chilling to reflect that over 50 states reportedly already possess drones or the technology to produce them,<sup>397</sup> heightening further the importance of clarity as regards the legal framework and strict adherence to it.

#### 6B.2.2.2 Legal Justifications for the Use of Drone Killings?

The US administration purports to justify the lawfulness of such killings by reference to self-defence and IHL.<sup>398</sup> This is one of numerous examples of the blurring of the boundaries of *jus ad bellum* and *in bello*; the criteria for lawful use of force in self defence, addressed in Chapter 4,<sup>399</sup> are distinct from the legal question whether drone killings can be justified by a strict

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393 *Ibid.* See Emmerson Interim Report for examples.

394 See, e.g., 'Indonesia: Police Kill 5 Suspects in Terrorist Ring', *The New York Times*, 20 March 2012, available at: <http://www.nytimes.com/2012/03/20/world/asia/indonesia-police-kill-5-suspects-in-terrorist-ring.html>; F. Whaley, 'Philippine Officials Say Raid Killed Militants', *The New York Times*, 2 February 2012, available at: <http://www.nytimes.com/2012/02/03/world/asia/philippines-says-raid-killed-senior-militants.html>. Jeemaah Islamiyah is described as a radical Islamic organization based in Indonesia with 'links to Al Qaeda', which was responsible for, inter alia, the notorious attack on a Bali nightclub that killed 202 people in October 2002.

395 'Alston Study on Targeted Killings', supra note 109, p. 8.

396 Statement by Christof Heyns, Special Rapporteur on Extra Judicial executions; Alston, note 387.

397 'Alston Study on Targeted Killings', supra note 109, p. 9. Alston noted that many states have or are acquiring this technology, which may also become available to non-state actors. See also, 'UN launches Inquiry into Drone Killings', supra note 402. The Special Rapporteur on counter-terrorism and human rights, Ben Emmerson, stated that 51 states had the technology to use drones. See e.g., W. Wan and P. Finn, 'Global Race on to Match U.S. Drone Capabilities', *The Washington Post*, 4 July 2011, available at: [http://www.washingtonpost.com/world/national-security/globalrace-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH\\_story.html](http://www.washingtonpost.com/world/national-security/globalrace-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html).

398 See Koh, 'ASIL Speech', supra note 248; 'Holder Speech on Targeted Killing', supra note 248; 'Johnson Speech on National Security', supra note 254.

399 Self-defence is an exception to the prohibition on the use of force against another state, but requires that the force be necessary and proportionate to a threat being defended against. See Chapter 5.

application of IHL.<sup>400</sup> It also illustrates the selective reference to the legal framework by neglecting the relevance of international human rights law. As discussed in Chapter 7, if the attacks are in fact carried out in the context of armed conflict, IHRL remains relevant alongside (and must be interpreted in light of) IHL.<sup>401</sup> More significantly perhaps, to the extent that those targeted are not in fact killed in the context of an armed conflict, the distinct rules of IHRL govern, under which the targeting of individuals could rarely, if ever, be lawful.<sup>402</sup>

A preliminary question on which lawfulness depends, which must be answered in relation to any operation, is therefore whether IHL is applicable at all. If so, it must be established that the individuals identified and targeted were legitimate targets, as party to a conflict in which the US is engaged, or as civilians taking a direct part in hostilities when they are attacked. There must have been sufficient and reliable information to establish the lawfulness of the target and its context, including the nature and extent of civilian casualties anticipated. Civilian losses must have been proportionate to concrete military advantage and minimized. It may also be essential to determine whether the lethal use of force was militarily necessary, or whether there were, in any of these cases, circumstances in which it may have been feasible to detain rather than kill the target.<sup>403</sup> Allegedly unlawful strikes should be investigated, and where appropriate victims offered a remedy for their wrongs.

In light of the legal framework, some question whether these weapons might be considered inherently unlawful.<sup>404</sup> This question will undoubtedly be the subject of future legal attention, taking into account the weapons systems capabilities and limitations, and whether necessary military assess-

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400 Eg. President Obama's National Defense University speech of May 2013 stated that members of Al-Qaeda and undefined "associated forces" would be targeted if they were part of a "continuous and imminent threat" to the United States. This may be relevant to whether there is a right to act in self defence under Chapter 4, but not to whether particular actions were justified under IHL.

401 See e.g., IHRL on the right to life in Chapter 7A.5.1 and practice at Chapter 7B.3.

402 *Ibid.* Chapter 7 will explain why it is difficult, or perhaps impossible, to justify the systematic targeted killings of terrorist suspects, by drones or otherwise, outside genuine armed conflict.

403 Obama has stated, in his May 2013 speech that drones would only be used where capture was not feasible, though an on the spot assessment of this is precluded by the nature of the weapons system. On this controversial area of international law, see Part A above e.g. 6A2.1.2 and 7B3.

404 M. Wardrop, 'Unmanned drones could be banned, says senior judge', *The Telegraph*, 6 July 2009, available at: <http://www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html>. Former Attorney General Ramsey Clark has stated that '[d]rones inherently violate the laws of the United States and international law'. [http://www.syracuse.com/news/index.ssf/2011/11/former\\_us\\_attorney\\_general\\_ram.html](http://www.syracuse.com/news/index.ssf/2011/11/former_us_attorney_general_ram.html).

ments and responses are possible from a remote location?<sup>405</sup> There may well be calls for legal development in response to the expanding reality of drone warfare, as there have been in response to other technological developments and emerging weapons systems in the past. For the time being, however, it may be doubtful that the weapons system is inherently unlawful<sup>406</sup> with the more fruitful question is how these weapons technologies are being employed in practice and whether or not, in each particular case, the existing framework of law is being respected.

#### 6B.2.2.3 Drone Killings as part of Armed Conflicts in Pakistan, Yemen and beyond?

Pakistan has been the hotbed of drone activity in recent years, giving rise to a controversial preliminary question whether there is an armed conflict in Pakistan to which IHL applies, and if so, between which parties? The existence of armed conflict(s) in Pakistan is a matter of some dispute,<sup>407</sup> as is the question whether, if there is an armed conflict, the US is a party to it. While these are questions of fact, to be assessed at any particular point in time, there is reason to doubt whether the US could be said to be engaged in a separate conflict with the Tehrik-i-Taliban Pakistan (TTP),<sup>408</sup> or whether (especially given the formally condemnatory position of the Pakistani authorities) the US might be intervening (on the side of Pakistan) in a NIAC between Pakistan and the TTP.<sup>409</sup> If not, another possibility may be that parts of the state, notably north-western Pakistan, may be in conflict as a result of a spillover from the

405 Eg drones are necessarily directed towards killing not capturing; while hardly a unique feature of a weapons system, it contrasts to forces on the ground (in e.g. Chapter 9). This raises legal issues in light of the framework above, and at a minimum militates further in favour of an exceptional rather than the expansive approach.

406 See Dutch Advisory Committee on Drones, *supra*.

407 'At the time of writing, the situation [in Pakistan and Yemen] is yet to reach the one of armed conflict, which is why drone attacks, as well as other acts of violence, are to be assessed under the law enforcement model' in S. Breau, M. Aronsson, R. Joyce, 'Discussion Paper 2: Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict', Oxford Research Group, June 2011, p. 9, available at: <http://www.oxfordresearchgroup.org.uk/sites/default/files/ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf> ('Oxford Research Group'). Cf., B. Saul, 'Delivered from Evil... to a minefield of law and consequence', *ABC*, 6 May 2011, available at: <http://www.abc.net.au/unleashed/1433114.html>.

408 Whether there is a conflict between the Pakistan authorities and the group is separate from whether there is a conflict in which the US is engaged. There is relatively little support for such a view but see, e.g., Saul, *ibid*.

409 The extent of the government's criticism of the attacks casts serious doubt on this scenario. While some question the transparency of the government's protestations (e.g. Khatchadourian, 'Bin Laden: The Rules of Engagement', *The New Yorker*, 4 May 2011, citing Pakistan's Prime Minister telling the American ambassador "I don't care if they do it as long as they get the right people ...We'll protest in the National Assembly and then ignore it"), this is plainly different from being jointly engaged in a conflict. See also, e.g., Waraich, *supra* note 380.

conflict in Afghanistan.<sup>410</sup> Although notably not the justification advanced by the US, in such a spillover situation, there may well be a basis for legitimate use of lethal force under IHL, but naturally only against individuals participating in the Afghan conflict against the US.<sup>411</sup>

A different scenario arises in relation to Yemen, due to its greater relative distance, geographically and otherwise, from the Afghan conflict. The drone killing of American Mr Al-Aulaqi and his son brought the controversy surrounding drone strikes in Yemen into sharp focus,<sup>412</sup> though reports of the wide-reaching effects of numerous attacks since have intensified this.<sup>413</sup> While Mr al-Aulaqi's infamous exhortations of violence would have rendered him susceptible to criminal charges, questions arise as to whether his alleged role in al-Qaeda would render him an active participant in a genuine armed conflict.<sup>414</sup>

A key question of fact, to be assessed on an on-going basis, is whether the intensity threshold would be met for a conflict in Yemen itself. While opinion varies, it has been suggested that the level of unfolding violence in Yemen may have reached the threshold for non-international armed conflict between Al Qaeda and in the Arabian Peninsula and the Yemeni government, perhaps since 2011.<sup>415</sup> There would appear to be little force to the claim that there was an armed conflict therefore in relation to the first known use of drone targeted killings by the CIA in the Harithi case in 2002, or for other attacks resumed in 2009. An outstanding question however is whether the US is a party to any conflict, which it does not appear to have claimed is the case.<sup>416</sup> The

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410 N. Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford: Oxford University Press, 2010), p. 225; 'Oxford Research Group', supra note 416, p. 12: 'The drone attacks conducted by the United States in north-west Pakistan are a 'spillover' effect from the conflict in Afghanistan ... the drone attacks taking place outside north-western Pakistan (FATA and NWFP) shall be assessed under the rules of the law enforcement model.'

411 Lubell, 'Classification of Conflicts', supra note 281, p. 255 on the Afghan conflict 'crossing borders' and noting that 'if the individual or group are continuing to engage in the armed conflict from their new location, then operations taken against them could be considered to be part of the armed conflict.'

412 Part of this controversy and attention was political, related to his U.S. nationality.

413 Between a Drone and al Qaeda, HRW, October 2013, supra.

414 See background to *Al Aulaqi* in US litigation, supra; for another view, see Chesney, 'Who May Be Killed?', Anwar al-Awlaki as a Case study in the International Legal Regulation of Lethal Force', 2 February 2011, Yearbook of International Humanitarian Law, Vol. 13, M.N. Schmitt et al, eds., 2010, p. 32; supra note 343 and targeting criteria in A6.2.1 and further in the next section.

415 Human Rights Watch, 'Between a Drone and al Qaeda', p.84; cf. Oxford Research group, supra.

416 'Between a Drone and al Qaeda, ibid, p. 84-85.

same doubts regarding the nature of the – parties to the broader putative global conflict addressed above – would arise.<sup>417</sup>

6B.2.2.4 *Drones and questions of Lawful Targeting: Identification, Capture and ‘Signature Strikes’?*

If there is reliable information that the individual is fighting in an armed conflict against the US, he may well be a legitimate target. Much remains unknown about the basis on which targets for drone killings are identified. Reports indicate that targets are identified by a range of means, which include the use of local informants, who are paid for information,<sup>418</sup> which perhaps inevitably has given rise to allegations of dubious reliability.<sup>419</sup> It has repeatedly been recalled that it is critical that states have procedural safeguards to ensure intelligence is accurate and verifiable.<sup>420</sup>

One noteworthy feature of drone strikes has been so-called ‘signature strikes’ against people not known and identified as targets individually, but targeted on a ‘pattern of life’ analysis or otherwise.<sup>421</sup> Lawful targeting on the basis that the person is directly participating in hostilities must however be based on the individual’s conduct,<sup>422</sup> which must in turn be based on verifiable and reliable information. In conflict situation where individuals are not identified by their uniforms, it is undoubtedly more challenging, but also all the more important, to make careful assessments of individual involvement, not least given the grave and irreversible nature of the stakes. While some

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417 See criteria for parties to the conflict issue addressed above in 6A.1.1. The question is whether Al Qaeda in the Arabina Peninsula (active in Yemen) meets the criteria for a party to a NIAC are different questions of fact from whether al Qaeda and associates globally do so. The US conflict with the latter is more readily dismissed, as set out in earlier sections.

418 See also below Section B.2.3 on bounties.

419 ‘Drones wars and state secrecy – how Barack Obama became a hardliner’, *The Guardian*, 2 June 2012, available at: <http://www.guardian.co.uk/world/2012/jun/02/drone-wars-secrecy-barack-obama>. See also C. Stafford Smith, ‘Sleepwalking into the Drone Age’, *The Observer*, 3 June 2012, p. 31.

420 Alston, *ibid*.

421 ‘Pattern of life’ analysis used by CIA means that unidentified persons are targeted for killing based on patterns of behaviour. G. Miller, ‘At CIA, a convert to Islam leads the terrorism hunt’, *The Washington Post*, March 24 2012, available at: [http://www.washingtonpost.com/world/national-security/at-cia-a-convert-to-islam-leads-the-terrorism-hunt/2012/03/23/gIQA2mSqYS\\_print.html](http://www.washingtonpost.com/world/national-security/at-cia-a-convert-to-islam-leads-the-terrorism-hunt/2012/03/23/gIQA2mSqYS_print.html). See also ‘US offered advanced warnings, limits for drone strikes’, *The Tribune*, 27 March 2012, available at: <http://tribune.com.pk/story/355884/us-offered-advanced-warnings-limits-for-drone-strikes-report/>; ‘Signature strikes target groups of men believed to be militants ... but whose identities aren’t always known. The bulk of CIA’s drone strikes are signature strikes’ in A. Entous, S. Gorman and J. Barnes, ‘U.S. Tightens Drone Rules’, *The Wall Street Journal*, 4 November 2011, available at: <http://online.wsj.com/article/SB10001424052970204621904577013982672973836.html>

422 See Pejic, ‘Conflict Classification’, *supra* note 57, for a response to the criticism of Alston. Despite differences, both Alston and Pejic emphasise that the targeting of persons directly participating must be based on the conduct of the individual.

have suggested use of force in this context depends on an assessment of imminent harm from an individual, this is open to question,<sup>423</sup> but it clearly does involve an assessment that the particular individual is in fact directly engaged in hostilities. They may be targeted so long as they are directly so engaged, or, if the flexible standard of the ICRC Guidance is to be followed, so long as they are personally engaged in a 'continuous combat function'.<sup>424</sup>

The sheer scale of drone attacks, and the apparent references to broad categorizations of groups of individuals based on 'pattern of life' analysis bring into question whether there has been a rigorous application of targeting rules in each case. If there is any doubt as to an individual's civilian status, presumptions must operate in favour of the individual.

In addition, assuming the individual is in principle a legitimate target in a real armed conflict, an assessment must still be made of whether all the conditions for lawful targeting were met.<sup>425</sup> These include the critical question of whether the least onerous measures were adopted, and the controversial obligation to capture rather than kill, or to harm rather than kill, where feasible.<sup>426</sup>

Significantly, the Obama administration appears to have accepted that lethal force should only be used as a last resort, where "capture is not feasible."<sup>427</sup> While questions remain as to what renders capture 'feasible,' and respect for this in practice,<sup>428</sup> this acknowledgment by the administration is significant, and may make a contribution to evolving standards in this field.<sup>429</sup> However, the use of drones, like other forms of aerial attack, by their nature precludes the possibility of capturing rather than killing proving feasible in the particular

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423 'In armed conflicts against non-state armed groups who do not wear uniforms and are often difficult to distinguish from the civilian population, targeting determinations rightfully require a higher threshold of imminent harm.' G. Rona, 'US Targeted Killing Policy Unjustified', *JURIST*, 24 February 2011, available at: <http://jurist.org/hotline/2012/02/gabor-rona-targeted-killing.php>.

424 '[Targeting determinations] must be based on conduct: either that the suspect is "directly participating in hostilities" (DPH), or that he or she performs what the International Committee of the Red Cross (ICRC) calls a "continuous combat function" (CCF) in the armed conflict.' *Ibid.*

425 See part A.3. 'Specific aspects of IHL', above. This factual assessment to be made in all the circumstances is impeded by the lack of information concerning targets and the circumstances in which they have been killed. On the lack of transparency, or investigation, see below in this section on drones and part B.2.4 below.

426 Note 106 above.

427 DOJ leaked White Paper and National Defense University 23 May 2013 speech, note 106.

428 See e.g. S. Knuckey and R. Goodman, 'What Obama's New Killing Rules Don't tell You', *Esquire*, <http://www.esquire.com/blogs/politics/obama-counterterrorism-speech-questions-052413>. The government's position appeared at odds with information that it accelerated drone killings to avoid politically costly detentions.

429 See also Chapter 7B3 for the influence of IHRL, and related developments in this area.

moment.<sup>430</sup> A UN report presented to the General Assembly notes questions arising from the “the extent to which an advance decision, ruling out the possibility of offering or accepting an opportunity to surrender, renders such operations unlawful.”<sup>431</sup> This is one of a number of difficult issues of international law raised by drone attacks, deserving of further legal analysis, where the framework of international law may evolve in light of responses to international terrorism.

#### 6B.2.2.5 Drones and Civilian Casualties

While originally touted for their accuracy, as noted above, drone attacks have given rise to serious concern as regards large numbers of reported civilian casualties.<sup>432</sup> Despite denials by the US administration, including stating in 2010 that there had been not a single collateral casualty,<sup>433</sup> civilian casualty numbers resulting from drone strikes have grown exponentially, and reliable reporting puts the fact of such casualties beyond plausible deniability.<sup>434</sup> Beyond troubling reports of thousands of civilians dead, are others that indicate devastating broader effects of drone campaign on civilians and civilian life.<sup>435</sup>

An assessment must be made whether drones can, and in practice in each situation do, meet the legal requirements of distinction and proportionality. Considerations of the strengths and inherent limitations of the weapons system – the surveillance capability of drones on the one hand, and suggestions by some that the remotely-operated nature of these weapons necessarily make

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430 The killing of bin Laden, although ultimately resulting in his death, shows the feasibility of ground operations. See Chapter 9.

431 Note by the Secretary General, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, 30 August 2011, UN Doc. A/66/330, paras. 65-85; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns – Addendum – Follow-up to country recommendations – United States of America Human Rights Council, 20<sup>th</sup> Session, 29<sup>th</sup> March 2012, A/HRC/20/22/Add.3, para. 77.

432 Numerous reports document this e.g. ‘Living under Drones’ (Stanford), ‘Will I be Next’ (Amnesty) and ‘Between Drones and al Qaeda’ (HRW). See also Smith, ‘Sleepwalking into the Drone Age’.

433 President Obama’s top counterterrorism adviser, John O. Brennan, and other officials claimed there were no ‘collateral death[s] because of the exceptional proficiency, precision of the capabilities we’ve been able to develop.’ S. Shane, ‘C.I.A. Is Disputed on Civilian Toll in Drone Strikes’, *The New York Times*, 11 August 2011, available at: <http://www.nytimes.com/2011/08/12/world/asia/12drones.html> *ibid.* Obama, ‘Your Interview with the President – 2012’, 30 January 2012, available at: <http://www.youtube.com/watch?v=eeTj5qMGTAI>. Obama Defense University speech, 23 May 2013, note 106.

434 ‘Oxford Research Group’, *supra* note 416, p. 12; ‘Alston Study on Targeted Killings’, p. 25; ‘Living Under Drones’.

435 Eg *Living Under Drones*, p. 73 et seq.

on-the-spot assessments more difficult on the other,<sup>436</sup> will contribute to on-going debate as the role of these weapons within an IHL responsive framework. In face of the mounting evidence of civilian casualties, the onus must lie with the state to demonstrate that distinction and proportionality were respected, and the obligations to protect civilians from the effects of conflict have been met, in each situation.<sup>437</sup> However, as noted below, rather than discharge this onus, the US has shrouded the programme, including their own casualty figures and possible explanations that would assist assessments of lawfulness, in secrecy. Whether due to the nature of the weapon system, the poor intelligence on which attacks are based or other reason, the fact is that drone attacks have cost thousands of civilian lives, strained relations between the US and Pakistani and Afghan governments, and given rise to growing international concern.<sup>438</sup>

In addition to incidental civilian deaths, particular controversy attends 'follow-up strikes', which have been criticized as leading to the death of rescuers, and as having no justification under IHL.<sup>439</sup>

Civilian casualties through drone killings have been described as having 'replaced Guantánamo as the recruiting tool of choice for militants',<sup>440</sup> with necessary implications for the effectiveness of the use of drone in combating terrorism.<sup>441</sup> As noted in the COIN manual, 'an operation that kills five in-

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436 For a discussion on the 'video-game control' aspect of drone use and intelligence failings, see J. Mayer, 'The Predator War: What are the risks of the C.I.A.'s covert drone program?', *The New Yorker*, 26 October 2009, available at: [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer).

437 Eg. the TBIJ found that between 2,429-3,097 individuals were killed in Pakistan drone attacks, of which between 479-811 were civilians. C. Woods and C. Lambs, 'Obama terror drones: CIA tactics in Pakistan include targeting rescuers and funerals', at <http://www.thebureauinvestigates.com/category/projects/drone-data/>.

438 J. Boone, 'Pakistani MPs say US drone strikes must end before relations improve', *The Guardian*, 20 March 2012, available at: <http://www.guardian.co.uk/world/2012/mar/20/pakistani-us-drone-strikes-relations>; T. Wright, 'Pakistan Seeks End to Drones', *The Wall Street Journal*, 20 March 2012, available at: <http://online.wsj.com/article/SB10001424052702304636404577292792576081400.html>; M. Zenko, 'What Happens if Afghanistan Shuts Down the U.S. Drone Program There?', *The Atlantic*, 9 December 2012, available at: <http://www.theatlantic.com/international/archive/2012/04/what-happens-if-afghanistan-shuts-down-the-us-drone-program-there/255602/>. 'Alston Study on Targeted Killings', p. 25; 'Living Under Drones'.

439 See statement by Christof Heyns, the United Nations special rapporteur on extrajudicial killings, in June 2012 criticising 'double tap' drone strikes, in which a second missile is fired at people coming to aid the wounded. Heyns suggested that this could constitute a war crime. See also D. Akande, 'US Drone Strikes in Pakistan: Can it be Legal to Target Rescuers & Funeralgoers?', *EJIL Talk*, 12 February 2012, available at: <http://www.ejiltalk.org/us-drone-strikes-in-pakistan-can-it-be-legal-to-target-rescuers-funeralgoers>.

440 'Drones have replaced Guantánamo as the recruiting tool of choice for militants; in his 2010 guilty plea, Faisal Shahzad, who had tried to set off a car bomb in Times Square, justified targeting civilians by telling the judge, "When the drones hit, they don't see children."' *Ibid.*

441 See e.g. 'Between Drones and al Qaeda', HRW, 'AQAP surge and backlash', p.24 et seq.

surge is counterproductive if collateral damage leads to the recruitment of fifty more insurgents'.<sup>442</sup>

#### 6B.2.2.6 Transparency, Accountability and Drones

While transparency around targets and the use of force in allegedly conflict situations will always be necessarily curtailed, the lack of transparency and accountability for IHL violations in the war on terror generally has been particularly controversial, and all the more so in relation to drone killings.<sup>443</sup>

The US administration has been sharply criticised, by people on different sides of the debate on the lawfulness of the targeted killings of al-Qaeda operatives<sup>444</sup> and by successive Special Rapporteurs,<sup>445</sup> for secrecy around that programme that extended to refusing to acknowledge its existence until 2010, and continuing resistance to clarifying its legal basis. In response perhaps to growing international and domestic pressure, it has presented greater information on its broad legal justification, representing an important move towards transparency, though not the details of legal advice on which the programme is purportedly based.<sup>446</sup>

Concerns regarding weak positive identification procedures, and the lack of independent post-strike reviews and where appropriate investigations conducted afterwards, remain.<sup>447</sup> Reports that, instead, journalists have been

442 Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, Counterinsurgency, (2006), available at: <http://www.usgcoin.org/library/doctrine/COIN-FM3-24.pdf> (hereinafter COIN Manual), cited in Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, pp. 309-310; Hampson, 'Afghanistan 2001-2010', *supra* note 8, p. 259.

443 On the lack of transparency, or investigation, *see* below in this section on drones and B.2.4 below; *see also* Chapter 7B.14 on 'Justice and Accountability'.

444 Anderson Written Testimony, *supra* note 322, p. 2; *Al-Aulaqi v. Obama*, *supra* note 322. *See* C. Savage, 'Secret U.S. Memo Made Legal Case to Kill a Citizen', *The New York Times*, 8 October 2011, available at: <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-acitizen.html>.

445 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston – Addendum – Mission to the United States of America [Human Rights Council] 11<sup>th</sup> Session, 28<sup>th</sup> May 2009. Interim report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Philip Alston, UN GA, 65<sup>th</sup> Session, 23<sup>rd</sup> August 2010, A/65/321 at para 87. C. Heyns, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 439, para. 76; Emmerson, Interim Report, 18 September 2013 emphasises the need for greater disclosure.

446 Knuckey and Goodman, What the Killing Rules Don't Tell, note 436

447 'Alston Study on Targeted Killings', note 109; Lewis, 'The Boundaries of the Battlefield', note 315.

punished for reporting on drone attacks puts a particularly dark face on the lack of transparency around drone killings.<sup>448</sup>

The fact that such strikes are carried out not only by the military, but also by civilian intelligence agencies, heightens concerns both as to the lawfulness of these attacks under IHL, the absence of the normal framework of command and control enshrined in IHL, and further undermines the prospect of oversight and accountability.<sup>449</sup> It remains to be seen whether the US decision to shift responsibility for such killings from the CIA to Department of Defense will alter the approach to transparency in practice.<sup>450</sup> Thus far, requests and legal measures in pursuit of a degree of information for those affected by the policy, and ultimately the opportunity to challenge, have been summarily dismissed.<sup>451</sup> While developments in relation to other terror lists have gone a long way to ensuring the rights of those whose movement, property or other rights are affected,<sup>452</sup> these death lists remain beyond the pale of legal or judicial oversight.

#### 6B.2.3 'Wanted Dead or Alive:' Rewards and the Bounty Hunter in IHL

Speaking with reporters after a Pentagon briefing on 17 September 2001, then President George Bush stated of Osama bin Laden: 'I want justice. And there's an old poster out West I recall, that said, "Wanted, Dead or Alive."' <sup>453</sup> The same terminology has been used in respect of other high-level targets who, as noted above, appear on controversial 'kill or capture' CIA lists.<sup>454</sup>

448 A Yemeni journalist was arrested for exposing U.S. military intervention in Yemen, including information regarding drone strikes. J. Scahill, 'Why Is President Obama Keeping a Journalist in Prison in Yemen?', *The Nation*, 13 March 2012, available at: <http://www.thenation.com/article/166757/why-president-obama-keeping-journalist-prison-yemen>

449 Actions by intelligence agencies have often been criticised as undermining transparency. See M. Scheinin, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', UN Doc. No. A/HRC/10/3, 4 February 2009, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/106/25/PDF/G0910625.pdf>; and 'Alston Study on Targeted Killings', supra note 109, p.26.

450 Obama, National Defense University speech, May 2013; on the implications of the CIA role, see B. Emmerson, Special Rapporteur on Terrorism's Interim Report, para 46.

451 See, e.g., *Al-Aulaqi v. Obama*, supra note 322 where the family of al-Aulaqi sought information regarding the grounds for putting someone on a 'kill-list' and the lawful basis for the asserted authority to use lethal force; the case was dismissed on state's secrets grounds. See Chapter 11 on litigation.

452 See e.g. Chapter 7B.8 on terrorism sanctions lists, and Chapter 11.'on the 'Role of the Courts'.

453 'Bush: bin Laden "Wanted Dead or Alive"', *CNN*, 17 September 2001, available at: [http://articles.cnn.com/2001-09-17/us/bush.powell.terrorism\\_1\\_bin-qaeda-terrorist](http://articles.cnn.com/2001-09-17/us/bush.powell.terrorism_1_bin-qaeda-terrorist).

454 'Secretary Napolitano Confirms Al-Awlaki Is Wanted Dead Or Alive', *CNN*, 21 July 2011, available at: <http://www.youtube.com/watch?v=hSOFGIGoDCo>.

The practice of offering financial rewards for those that assist the United States towards the killing or capturing of suspected members of al-Qaeda or associated groups has characterised the war on terror in Afghanistan and, on occasion, beyond. After 9/11, a pre-existing US scheme to solicit information on international terrorists known as 'Rewards for Justice' was revamped in the counter-terrorism context.<sup>455</sup> Often large sums of money have been awarded for individuals, information or contributions towards capture or killing of 'most-wanted' individuals.<sup>456</sup> Examples of the 'wanted dead or alive' mantra and US assisted bounties have arisen in relation to alleged terrorists in other states also.<sup>457</sup>

This practice raises a range of serious concerns in light of the framework of IHL. The scope for mistaken identities and abuse is obvious where individuals sell information for financial reward. In practice, the intelligence gathered in this way has been criticised for its unreliability, often leading to erroneous targeting or mistaken capture,<sup>458</sup> as revealed in the case of many early Guantanamo inmates detained on this basis.<sup>459</sup>

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<sup>455</sup> "Washington initiated its bounty program in 1984...The program was enhanced significantly under the 2001 Patriot Act, which, among other things, increased the overall funding, and, in particular, boosted the total available in certain individual cases, such as bin Laden, to \$25 million... In most cases, rewards are capped at \$5 million and are often considerably smaller..." 'US Bounty Scheme Targets Terrorist', *Forbes*, 21 February 2008, available at: [http://www.forbes.com/2008/02/20/terrorism-bounty-taliban-cx\\_0221oxford.html](http://www.forbes.com/2008/02/20/terrorism-bounty-taliban-cx_0221oxford.html). The Rewards for Justice program is described as "one of the most valuable U.S. Government assets in the fight against international terrorism....Since the inception of the Rewards for Justice program in 1984, the United States Government has paid more than \$100 million to over 70 people who provided actionable information that put terrorists behind bars or prevented acts of international terrorism worldwide." 'Program Overview', Rewards for Justice, 12 December 2012, available at: <http://www.rewardsforjustice.net> notes that

<sup>456</sup> 'US/INTERNATIONAL: Counter-terror bounties', *The New York Times*, 5 December 2008, available at: <http://www.nytimes.com/2008/02/25/news/25iht-20oxan-terrorbounties.10376135.html>; US bounty Scheme, *ibid*, details amounts offered for various individuals.

<sup>457</sup> See, e.g., in the Philippines in February 2012, two individuals were killed who carried a \$50,000 and a \$5 million reward from the United States respectively; see F. Whaley, 'Philippine Officials Say Raid Killed Militants', *The New York Times*, 2 February 2012, available at: <http://www.nytimes.com/2012/02/03/world/asia/philippines-says-raid-killed-senior-militants.html>; see also 'Wanted, Zulkifli bin Hir, Up to \$5 Million Reward', Rewards for Justice, available at: <http://www.rewardsforjustice.net/index.cfm?page=zulkifli&language=English>.

<sup>458</sup> 'Perhaps the most problematic aspect of the scheme is a tendency to attract false information, which has led to deleterious strategic effects in the past.' 'US/INTERNATIONAL: Counter-terror bounties', *supra* note 463; see also M. Samari, 'Bounties paid for terror suspects', *Amnesty International*, 16 January 2007, available at: <http://www.amnesty.org.au/hrs/comments/2167>. See also C Stafford Smith, *Sleepwalking into Drones*, *supra* 6B2.3.

<sup>459</sup> 'More than 85 percent of detainees at Guantanamo Bay were arrested, not on the Afghanistan battlefield by US forces, but by the Northern Alliance fighting the Taliban in Afghanistan, and in Pakistan at a time when rewards of up to US\$5,000 were paid for every 'terrorist' turned over to the United States.'

To the extent that the policy directly or indirectly encourages individuals to themselves engage in unlawful activity, including ultimately killing or capturing listed individuals, it is antithetical to the basis of IHL, with its careful attention to rules on belligerency, status and the principle of distinction.<sup>460</sup> Private individuals do not have belligerents privilege, nor any right to engage either in combat under IHL or in law enforcement under that paradigm. The obligations, safeguards and oversight that would at least in principle arise for parties to conflict under IHL are absent.

Although it has perhaps had less attention than other issues, it is submitted that the public 'bounties' placed on the head of individuals, on uncertain legal basis and with no accountability or possibility of challenge, is a graphic reminder of the extent to which the WOT has become, in the language of George Bush, the Wild West of international practice. The 'wanted dead or alive' approach, so far as it incites or induces private actors to commit crimes, could constitute not only acts for which the state has responsibility under international law, but also crimes both under international and domestic law.<sup>461</sup>

#### 6B.2.4 'War on Terror' Detentions and IHL

The widespread detention of individuals in relation to the war on terror is notorious, and has given rise to the historic anomaly of Guantanamo Bay addressed in Chapter 8, and the rule of law nadir of the Extraordinary Rendition programme, discussed in Chapter 10. Issues related to detention have also given rise to difficult issues concerning the interplay of legal regimes, notably the inter-relationship between IHL and IHRL and its bearing on safeguards in detention addressed in Chapter 7B.3. Myriad legal issues have therefore arisen in the course of what has been described as the 'legal and political disaster' of the US detention policy, which will not be developed here as they are addressed in those chapters.<sup>462</sup>

No chapter on IHL would be complete, however, without brief regard to three of the key questions that have arisen regarding the IHL framework. Notably, these issues go far beyond Guantanamo or the CIA secret prisons to affect the detainees (estimated at more than one hundred thousand)<sup>463</sup> who have been, and continue to be, detained without charge by the US since 2001, including in Afghanistan and Iraq, as well as beyond.

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460 The principles at stake are reflected in the rules governing mercenaries. 'ICRC Study on Customary IHL', *supra* note 78, Vol. I, Rule 108.

461 See Art. 25 ICC Statute and Chapter 4.

462 D. Cole, 'Out of the Shadows, Preventative Detention, Suspected Terrorist and War', 97 *Cal. L. Rev.* 693, 727 (2009).

463 R. Chesney, 'Who May Be Held? Military Detention Through the Habeas Lens', 52 *B.C. L. Rev.* 769, 770 (2011).

#### 6B.2.4.1 Lawful Basis for Detention

On November 13, 2001, President Bush signed the Military Order 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', providing the authorizing the detention of non-US citizens with respect to whom:

'(1) there is reason, to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harboured one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order.'<sup>464</sup>

Over time, and across administrations, the US has continued to assert and act upon a broad reaching right to detain 'enemy combatants' including those that 'were part of, or substantially supported Taliban or al-Qaida forces or associated forces'.<sup>465</sup> It has been suggested that 'more than one hundred thousand individuals have been detained without criminal charge' by the US in Afghanistan, Iraq and Guantanamo since 2001, giving rise to an immense amount of scholarship, advocacy, and litigation while 'the question of who lawfully may be detained remains unsettled in important respects'.<sup>466</sup> The lack of clarity or consensus as to who may be detained has been identified on several levels, notably on a group level – as to which groups could be detained and whether it covered only the Taleban and al-Qaeda or also others – and on an individual level, as to 'the mix of conditions that are necessary or sufficient to justify the detention of a particular person'.<sup>467</sup>

The US administration has persistently justified its detention policy as lawful under the regime applicable to 'law of war detentions'. IHL does provide a lawful basis for detention of certain categories of individuals in the context of, and for reasons associated with, an armed conflict. Afghanistan and Iraq were such conflicts, and many of the detainees held by the US were captured

464 Bush, Military Order of November 13, 2001, 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', Sec. 1.

465 'Substantial' has not been defined, although the brief states: 'It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of "substantial support," or the precise characteristics of "associated forces," that are or would be sufficient to bring persons and organizations within the foregoing framework....' See Hamdan, 'Respondents' memorandum regarding the Government's detention authority relative to detainees held at Guantanamo Bay', supra note 249, p. 2.

466 Chesney, supra note 463, p. 770.

467 *Ibid.*

at least in those geographic areas, although numerous others were captured at various locations around the globe and with no apparent connections to those recognised armed conflicts. There is strong reason to doubt therefore whether many of the particular individuals were detained in relation to an armed conflict, as opposed to the broader fight against international terrorism, al-Qaeda or others.<sup>468</sup>

In an armed conflict, the power to detain for reasons associated with the conflict is explicit in IHL in relation to IAC and, while not uncontroversial, it may be considered implicit in case of NIAC.<sup>469</sup> As set out above, combatants and fighters may be detained until the end of the conflict – members of the armed forces, such as Taliban fighters referred to above, would thus appear detainable and entitled to POW status. Civilians may also be detained but so long as ‘absolute necessity’<sup>470</sup> or ‘imperative reasons of security’<sup>471</sup> so require, a standard which has been referred to as a ‘minimum legal standard that should inform internment decisions in all situations of violence, including NIACS’.<sup>472</sup>

Available information concerning categories of detainees, such as those referred to in the Obama administration’s Guantanamo Task Force Report, illustrate the range of individuals who have been subject to the emergency detention measures in practice, and suggest many that go beyond the IHL parameters.<sup>473</sup> They consist of: (a) ‘Leaders, operatives, and facilitators involved in terrorist plots against US targets’, (b) others who ‘may not have been directly involved in terrorist plots against US targets’ but who are believed to have had ‘organizational roles within al-Qaida or associated terrorist organizations’, including for example, persons who provide ‘logistical support to al-Qaida’s training operations’ and ‘facilitators who helped move money and personnel’, (c) Taliban leaders and members of anti-Coalition militia groups, (d) ‘low-level foreign fighters’ who have ‘varying degrees of connection to al-Qaida, the Taliban, or associated groups, but who lacked a significant

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468 See 6B.1.1 ‘Armed conflict with al-Qaeda, associates and “terrorist groups of global reach”?’ for a discussion on armed conflict with al-Qaeda.

469 NIAC does not provide an explicit power to detain, though it has been argued with some force that this power may be inherent in the nature of armed conflict – just as parties can use force, so must they be able to detain as an alternative: see Pejic, ‘Conflict Classification’, supra note 58, p. 10. See also US Supreme Court *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion); see also (Thomas, J.) (dissenting opinion).

470 GC Art. 42(1).

471 GC Art. 78(1).

472 Pejic, ‘Conflict Classification’, supra note 58, p. 15.

473 Executive Order 13492, 22 January 2009, called for an interagency review of the status of all Guantanamo detainees.

leadership or other specialized role',<sup>474</sup> and (e) 'miscellaneous others' who do not fit into any of the groups.<sup>475</sup>

Clearly those directly participating in hostilities could be detained in either type of conflict. However, it must be highly doubtful in relation to those rendering looser forms of 'support' to a broad range of groups, whether imperative reasons of security genuinely require their detention. While a very small number of the detainees could be considered 'fighters' in any sense the US acknowledged that most had not themselves engaged in hostile acts.<sup>476</sup> One can only speculate about the undefined 'miscellaneous' group that falls beyond any of these categories. Assessments of risk posed, and the necessity of detention, should be made in relation to the individual, based on his or her own conduct.<sup>477</sup> Yet it has been suggested that the detainee report indicates that more than half of the detainees were detained on grounds unrelated to their personal conduct.<sup>478</sup> Many were considered 'members' of a broad range of groups, going far beyond even the groups on US terrorism lists, while the vast majority were associated in some more remote way with international terrorism.<sup>479</sup>

The assessment of whether imperative reasons of security exist must be made on an on-going basis, and the person released once there is no longer a compelling need for detention. The fact that individuals may 'have been' members of prohibited groups in the past is insufficient, other than as relevant to a careful assessment of the real security imperative requiring the individual at the present time.

Notably, in light of the focus of much of the war on terror detentions,<sup>480</sup> IHL does not envisage detention under these provisions for interrogation or

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474 The report notes that this majority group 'do[es] not appear to have been among those selected for more advanced training geared toward terrorist operations abroad'. Guantanamo Review Task Force Final Report, 22 January 2012, p. 14 available at: <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

475 *Ibid.* 13-14.

476 Note the US administration maintains there is no need to be linked to a hostile act. See *al Bahini v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

477 Cf the position for members of the armed forces in IAC who may be detained as POWs.

478 Chapter 8. M. Denbeaux and J. Denbeaux, 'The Guantanamo Detainees: The Government's Story', Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data, p. 2, available at: [http://law.shu.edu/publications/guantanamoReports/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf)

479 *Ibid.* at p.2. 'The Government has detained numerous persons based on mere affiliations with a large number of groups that in fact, are not on the Department of Homeland Security terrorist watch list. Moreover, the nexus between such a detainee and such organizations varies considerably. Eight percent are detained because they are deemed "fighters for;" 30% considered "members of;" a large majority – 60% – are detained merely because they are "associated with" a group or groups the Government asserts are terrorist organizations. For 2% of the prisoners their nexus to any terrorist group is unidentified.'

480 See Chapter 10 on intelligence gathering by the CIA and Chapter 7B7 on torture in Iraq.

intelligence gathering purposes.<sup>481</sup> Nor does IHL allow detention as punishment.<sup>482</sup> IHL detention is not an alternative to criminal law, where it is considered not practicable or 'feasible' for whatever reason to prosecute. While the official US position has, at various stages, referred to 'security' alongside 'US interests' and 'foreign policy' considerations as justifying detentions,<sup>483</sup> the latter categories provide no apparent basis for detention under IHL.

In conclusion, IHL does provide a broad basis for detention of various categories of persons considered to pose a threat during armed conflict, notably fighting forces and in limited situations where imperative reasons of security so demand, civilians. The detention of many of those captured since 9/11 may well be justified under IHL. Uncertainties stem, however, from a refusal to operate within, and apply consistently, established categories of IHL. Concerns in this respect are closely linked to concerns regarding the absence of meaningful and rigorous individualised assessments and the importance of respect for the safeguards enshrined in IHL, addressed below.

#### 6B.2.4.2 Procedural Safeguards

The detention of 'war on terror' detainees without legal safeguards has been a notorious feature of post-9/11 practice. Other chapters elaborate on this phenomenon in the context of the Guantanamo detentions and the Extraordinary Rendition programme (ERP), which together epitomize the consequences of procedural protection voids. The hard-won litigation that led to acknowledgement of the right of Guantanamo detainees to habeas corpus is discussed in relation to the role of courts in Chapter 11. Yet many detainees elsewhere continue to be held without due process or meaningful review of the lawfulness of their detention, including in Afghanistan where the right to challenge the lawfulness of that detention through habeas proceedings, was consistently denied by the administration, and by US courts.<sup>484</sup>

IHL does not provide explicit rules regarding the safeguards to which detainees are entitled in non-international conflicts, and as discussed in Chapter 7B3, there is an area where genuine uncertainties and significant disagreement arises as regards the applicable framework. On one view, as there are no rules – no 'lex specialis' – of IHL, human rights law continues to apply. On another,

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481 'The indefinite detention of prisoners of war and civilian internees for purposes of continued interrogation is inconsistent with the provisions of the Geneva Conventions.' Commission on Human Rights, Joint Report 'Situation of detainees at Guantánamo Bay', 27 February 2006, UN Doc. E/CN.4/2006/120, para. 23.

482 Pejic, 'Conflict Classification', *supra* note 58.

483 Bush, Military Order of November 13, 2001, Sec. 1.13. Obama's Executive Order 13492 creates and charges the Task Force with finding 'lawful' means '... consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of the detainee'.

484 See Baghram litigation, Chapter 11.

the gap should be filled by principles of IHL, applied by analogy.<sup>485</sup> On any view, certain minimum standards common to both fields of law must surely apply. As the ICRC's 'Minimum Guidelines' suggest, this must include reasons, effective opportunity to challenge (which must include access to evidence against them), and periodic review as to the continued existence of the imperative reasons that made such detention necessary.<sup>486</sup> The facts and circumstances of detentions and the lack of meaningful review of all detentions fall significantly short of even these basic minimum requirements of international law.

#### 6B.2.4.3 *End of the Conflict and Detention*

Finally, as noted in relation to the 'War without End' discussion above, when an armed conflict comes to an end the lawful basis for detention under IHL also ends, and detention must end with it, or another legal basis must be provided. If the conflict shifts in nature from international to non-international, as happened in both Afghanistan and Iraq for example, different legal considerations apply and the detention must be justified in accordance with the law that then applies. The ICRC suggests that the minimum standard of 'imperative reasons of security' may still justify detention, and the relevant minimum safeguards continue to apply, while others suggest a greater role for human rights law in non-international conflicts settings, where less prescriptive rules of IHL apply.<sup>487</sup> When armed conflict ceases, undoubtedly it is the provisions of human rights law that then apply, as the Parliamentary Assembly of the Council of Europe (PACE) has noted: 'since that IAC [in Afghanistan] ceased, however, IHRL standards have applied in the normal fashion'.<sup>488</sup> IHL provides for detention to come to an end and relocation of detainees.

Despite many detainees having been detained in relation to the conflict in Afghanistan in 2001 and 2002, the 'ending of combat in Afghanistan and

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<sup>485</sup> See discussion in Chapter 7B3.

<sup>486</sup> See generally, Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', ICRC, Vol. 87 No. 858, June 2005 (hereinafter 'ICRC Minimum Guidelines').

<sup>487</sup> See the ECtHR decision in *Al-Jedda v. United Kingdom*, Appl. No. 27021/08, Judgment, ECtHR, 7 July 2011, on detention in armed conflict situation in Iraq, and the critique thereof in J. Pejic, 'The European Court of Human Rights' Al-Jedda judgment: the oversight of international humanitarian law', 93(883) 2011 *International Review of the Red Cross* 837 (stressing the importance of having regard to the inherent right to detain under IHL); see also 7B.3 'The "war" and human rights'.

<sup>488</sup> PACE, 'Lawfulness of detentions by the United States in Guantánamo Bay', Res.1433 (2005), para. 4.

Iraq appears to have no consequences for the ending of detention'.<sup>489</sup> The defence secretary, Leon E. Panetta, announced that the US hoped to end its combat mission in Afghanistan in 2013 as it did in Iraq in 2011, yet apparently maintained the right to continue to hold enemy detainees 'for the duration of hostilities'.<sup>490</sup> A media report recently encapsulated the situation in these terms: 'By asserting, for political purposes, that the nation's two wars are ending while planning behind the scenes for a longer-term war against al-Qaeda terrorists, the man who pledged to bring America's wars to an end has instead laid the basis for an endless battle.'<sup>491</sup>

### 6B.3 THE AFGHAN CONFLICT AND PARTICULAR ISSUES OF IHL COMPLIANCE

Many issues of compliance with IHL have arisen in the course of the 'war on terror', in relation to the genuine armed conflicts that followed 9/11, in Afghanistan and Iraq, some of which have been addressed above or in other chapters.<sup>492</sup> The US's assertions concerning the existence of a broad conflict with al Qaeda, rejected as a matter of law above, is often conflated with the conflict against the Taliban in Afghanistan. It may be assumed that the approaches it takes to, for example, target identification in relation to the conflict in Afghanistan, would hold true as part of its purported broader war on al Qaeda. This section highlights three groups of IHL issues to have arisen by reference to examples from the military action in Afghanistan that commenced on 7 October 2001. The first group raises questions of targeting and the principle of distinction. The second relates to the methods and means of warfare employed. The third concerns the humanitarian protection afforded to those who have fallen into the power of the Coalition and its Northern Alliance allies.

#### 6B.3.1 Targeting

##### 6B.3.1.1 *Drug Lords, Financiers and other 'nexus targets': identifying the targets for legitimate lethal force in Afghanistan*

Several questions have arisen in the Afghan conflict concerning the legitimacy of selected targets. Some relate to not uncommon controversies, such as the

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489 M. L. Dudziak, 'This War Is Not Over Yet', *The International Herald Tribune*, 15 February 2012, available at: <http://www.nytimes.com/2012/02/16/opinion/this-war-is-not-over-yet.html>.

490 *Ibid.*

491 *Ibid.*

492 Eg Chapter 7B.7, 8 and 11.

bombardment on 11 October 2001 of the Afghan radio station,<sup>493</sup> which was reminiscent of the attack on the television station during the Kosovo conflict, provoking considerable controversy in this context as in others, as to the legitimacy of target selection.<sup>494</sup> US Defense Secretary Rumsfeld sought to justify the attack on the basis that the radio station was 'the propaganda machine of the opposing forces', while others question the legitimacy of targeting civilian radio and television stations, even where they are used for propaganda purposes.<sup>495</sup>

More novel, and more controversial, were other issues around target identification in Afghanistan. Reports indicate that, differences of view between the states engaged in conflict in Afghanistan as to who were the parties to the conflict, discussed above,<sup>496</sup> translated into differences of views as to who were legitimate targets.<sup>497</sup>

Particular controversies arose when the US purported to broaden the categories of persons considered legitimate targets for lethal force, including specifically the targeting of drug lords, financiers and other 'nexus targets' who provide support for insurgency. In August 2009, the United States Senate Committee on Foreign Relations confirmed that US forces in Afghanistan are now mandated to kill or capture drug traffickers in Afghanistan with links to the Taliban.<sup>498</sup> The Committee was informed of the considerable impact of drug trafficking on the financing of the insurgency,<sup>499</sup> and that the Rules of Engagement and IHL have therefore been 'interpreted' so as to include drug traffickers with proven links to the insurgency on the so-called joint inte-

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493 See Amnesty International, 'Afghanistan: Accountability for Civilian Deaths', News Release, 26 October 2001, AI Index: ASA/11/022/2001.

494 See e.g. 'Final Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', supra note 177; Report of the Prosecutor on the NATO Bombing Campaign, supra note 177; see also M. Cottier, 'Did NATO Forces Commit War Crimes during the Kosovo Conflict? Reflections on the Prosecutor's Report of 13 June 2000' in H. Fischer, C. Kreâ and S.R. Lüder (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* (Berlin, 2001), pp. 505, 516-30.

495 See Amnesty International, 'Afghanistan: Accountability for Civilian Deaths', supra note 493.

496 6B.1.2 'The Real Armed Conflicts: The nature of the Afghan conflict'.

497 See Cole, 'Legal Issues in Forming the Coalition', supra note 344, p. 146; Hampson, 'Afghanistan 2001-2010', supra note 334, p. 260.

498 'Afghanistan's Narco-War: Breaking the Link Between Drug Traffickers and Insurgents', A Report to the US Senate Committee on Foreign Relations, 10 August 2009, available at: <http://www.gpoaccess.gov/congress/index.html> (hereinafter 'Afghanistan's Narco-War'); see also D. Akande, 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?', *EJIL Talk*, 13 September 2009, available at: <http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent/>.

499 The Taliban is estimated to receive between \$70 and \$500 million annually from the drug trade, which clearly has a critical role in financing the insurgency. 'Afghanistan's Narco-War', supra note 498, p. 10.

grated prioritised target list.<sup>500</sup> The result was 'a list of 367 "kill or capture" targets, including 50 nexus targets who link drugs and insurgency'.<sup>501</sup>

Media reports indicate that guidance originally provided by NATO's Supreme Allied Commander in Europe, General Craddock, stated that drug traffickers and narcotics facilities could be treated as legitimate targets,<sup>502</sup> and that it was 'no longer necessary to produce intelligence or other evidence that each particular drug trafficker or narcotics facility in Afghanistan meets the criteria of being a military objective'.<sup>503</sup> In an interesting example of the transatlantic legal tussle, however, this approach was reportedly challenged, *inter alia* on grounds of inconsistency with IHL, by at least some NATO members.<sup>504</sup> Various solutions were reported, one of which was for certain member states to 'opt-out' of certain operations,<sup>505</sup> Though there also appears to have been a shift in position as a result, with the policy ultimately being limited to targeting drug lords and financiers 'on the battlefield',<sup>506</sup> while the NATO website had indicated targeting of those 'with a link' to the insurgency.<sup>507</sup>

These changes may reflect at least some passing regard to the legal framework that governs target identification, but do they amount to consistency with it? The framework requires that in a non-international conflict such as Afghanistan, only those fighters (in a 'continuous combat function'), or civilians directly participating in hostilities at the time, can be deemed to have lost their immunity from attack.<sup>508</sup> One requirement of 'direct participation,' that it adversely affects the military operations or capabilities of the adversary, may well be satisfied by financing, but far less clear is whether it might be said to amount to a 'direct causal link between the act and the harm'. This is particularly clear in light of the ICRC guidance which states that this causation

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500 *Ibid.* pp. 15-16.

501 *Ibid.*

502 Eg. M. Gebauer and S. Koelbl, 'Battling Drugs in Afghanistan: Order to Kill Angers German Politicians', *Der Spiegel*, 29 January 2009, available at: <http://www.spiegel.de/international/world/0,1518,604430,00.html>.

503 *Ibid*; see also Akande, *supra* note 498.

504 S. Koelbl, 'NATO High Commander Issues Illegitimate Order to Kill', *Der Spiegel*, 29 January 2009, available at: <http://www.spiegel.de/international/world/0,1518,604183,00.html>. On the internal political repudiation of this approach in the German parliamentary debate, see, e.g., M. Gebauer and S. Koelbl, 'Battling Drugs in Afghanistan: Order to Kill Angers German Politicians', *supra*.

505 'P. Finn, 'NATO to Target Afghan Drug Lords Who Aid Taliban', *The Washington Post*, 11 October 2008, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/10/AR2008101001818.html>. The report notes that the agreement was for some states to opt out of operations, adding that the US and UK supported striking drug traffickers, while 'some European countries, including Germany and Spain' questioned this on mandate and policy grounds.

506 This is how the policy was expressed to the Foreign Affairs Select Committee.

507 Akande, 'US/NATO Targeting of Afghan Drug Traffickers', *supra* note 506.

508 See Chapter 6A.2.1.2

arises 'in one causal step', and that 'an act must be specifically designed to directly cause the required threshold of harm'.<sup>509</sup>

More fundamentally perhaps, while there are undoubtedly areas of uncertainty and scope for interpretation as to the meaning of 'direct participation', it is generally understood that the individual should be engaged in some way in 'hostilities', not in the many other forms of support on which any insurgency or conflict may depend. Indeed, the ICRC Guidance specifically excludes 'war sustaining' efforts or 'economic support' or 'financial' transactions from the scope of its definition of 'direct participation in hostilities'.<sup>510</sup> Likewise, the Israeli Supreme Court has rejected, the notion that financing insurgency can amount to direct participation that displaces the immunity from attack.<sup>511</sup> While some argue that those who finance attacks can be subject to attack, this has been described as 'definitely a rare minority viewpoint that has not been accepted by the international community'.<sup>512</sup>

The references to targeting the drug lords 'on the battlefield' or 'with links' to the insurgency may seek to draw the targeting practice closer to the legal framework. Absent evidence of a more direct role in hostilities,<sup>513</sup> the targeting practice appears out of sync with current IHL and a potentially dangerous attempt to broaden the circumstances in which the lethal use of force can be invoked: 'To permit anyone who is involved in the war sustaining effort to be a direct target is to allow for unrestricted warfare – practically everyone could be a target'.<sup>514</sup>

Criminal activity often sustains armed conflict, and the criminal law framework set out in Chapter 4, as well as the broader law enforcement and prevention framework reflected in human rights law, continue to operate alongside that of IHL. The lack of authority to target these individuals under IHL does not therefore mean that the legal framework does not contemplate action to be taken against drug lords and others that fund the unlawful use of force, and where appropriate and effective, the destruction or seizure of factories and fields.

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509 'ICRC DPH Guidance', supra note 124, p. 59.

510 See Chapter 6A.2.1.2; 'ICRC DPH Guidance', supra note 124, p. 51.

511 Decision on Targeted Killings, supra note 7, para 35.

512 J. Paust, 'The United States' Use of Drones in Pakistan', *EJIL Talk*, 29 September 2009, available at: <http://www.ejiltalk.org/the-united-states-use-of-drones-in-pakistan/>.

513 The question, which remains unanswered, is whether these references envisage a factual scenario in which drug lords do in fact directly participate in hostilities.

514 Akande, 'US/NATO Targeting of Afghan Drug Traffickers', supra note 498.

*6B.3.1.2 Civilian casualties and targeting in Afghanistan*

Reports appear to indicate that thousands of civilians were killed (and many civilian objects destroyed) during the early stages of the military campaign<sup>515</sup> by the United States and its allies, originally referred to 'Operation Infinite Justice' and later as 'Operation Enduring Freedom'.<sup>516</sup> The heavy reliance on airstrikes has been criticized as responsible for large numbers of civilian casualties and a consistent matter of concern by observers.<sup>517</sup>

Numbers of civilian deaths do not themselves add up to violations of IHL. The key question to be addressed in relation to any particular incident is whether the underlying conduct of hostility rules were fully respected. In relation to the majority of controversial aerial bombardment incidents, where persons or property attacked were clearly not *per se* legitimate targets, the question is not target selection as such, but whether there is an IHL justification for hitting what is, on its face, an unlawful target. Such justification may be based, for example, on mistaken identity or proportionality.<sup>518</sup> Among the reported incidents of aerial bombardment that raise such questions are several attacks on wedding parties, where reportedly traditional celebrations with gunfire have been misinterpreted and led to multiple deaths.<sup>519</sup> The purported justification in such cases may be mistaken identity as to the nature of targets. Like the proportionality of any anticipated civilian losses, the assessment of targets must be made in light of information available at the time, taking into account the conditions of the conflict, though particularly

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515 Professor M. Herold's independent study on civilian casualties in Afghanistan, for example, which was widely cited by the media, states that at least 3,767 civilians were killed by US bombs between 7 October and 10 December, a figure which has recently been revised to nearing 4,000. See 'A Dossier on Civilian Victims of United States' Aerial Bombing of Afghanistan: A Comprehensive Accounting', most recent edition of study available at: <http://pubpages.unh.edu/%7Emwherold> last visited 12 December 2012. A more conservative report places the number of civilian deaths due to aerial bombardment between 1,000 and 1,300. See C. Conetta, 'Strange Victory: A critical appraisal of Operation Enduring Freedom and the Afghanistan war', Project on Defense Alternatives, 30 January 2002, available at: <http://www.comw.org/pda/0201strangevic.pdf>.

516 Following protests, principally by the Muslim community in the US, 'Operation Infinite Justice' was renamed 'Operation Enduring Freedom' on 25 September 2001.

517 According to the United Nations Assistance Mission in Afghanistan (UNAMA), airstrikes were responsible for 25% of all civilian casualties in 2008, and 63% of PGF-caused civilian casualties; see 'From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan', Afghanistan Independent Human Rights Commission (AIHRC), December 2008, p. 2, available at: <http://www.unhcr.org/refworld/pdfile/4a03f60e2.pdf>.

518 At no time has it been the official policy of the Coalition to target civilians, and few commentators would contend that attacks on civilians were intentional; the emphasis in the following is thus on the more pertinent questions regarding the obligations in place to safeguard the principle of distinction.

519 See Amnesty International, 'Afghanistan: Accountability for Civilian Deaths'; see also 'From Hope to Fear', p. 12.

over time a certain degree of local knowledge might reasonably be assumed.<sup>520</sup>

In a number of cases, there were reportedly legitimate military targets in the vicinity,<sup>521</sup> and the question is whether there were sufficient attempts to distinguish the two, the proportionality of foreseeable civilian losses as against the military advantage anticipated, and whether all feasible steps were taken to minimise such losses,<sup>522</sup> including the use of methods and means of warfare which are not inherently unreliable or indiscriminate but as precise as possible, and which limit as much as possible collateral losses.<sup>523</sup> While the proportionality assessment is not a numbers game, involving simple balancing of military casualties against numbers of civilians, in the presence of heavy civilian casualties, a weighty onus rests with the party responsible for ensuring compliance with IHL, and in possession of the relevant information, to account for the lawfulness of the action. Contrary to suggestions that have on occasion been made in the war on terror context, civilian losses might be judged as excessive in relation to the concrete military advantage in the particular situation (not the conflict as a whole).

Other types of targeting issues have arisen in the course of the Afghan conflict, which involve conduct that is on its face plainly unlawful, apparently caused by individual soldiers or groups acting without and beyond the scope of their orders. Examples include egregious accounts in early 2012 of a rampage leading to the massacre of an Afghan family,<sup>524</sup> or the burning of Korans by soldiers,<sup>525</sup> provoking tensions between the authorities and intervening forces. Other examples include the incident in which a suicide attack blowing up a US marine's vehicle prompted indiscriminate shooting at vehicles and pedestrians at the site of the attack and along the next 16 kilometres of road,

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520 See 'Afghanistan Civilian Casualties' the Guardian, 12 April 2013. <http://www.guardian.co.uk/news/datablog/2010/aug/10/afghanistan-civilian-casualties-statistics>. For egs see 'Afghanistan: New Civilian Deaths Due to U.S. Bombing', 30 October 2001 'Afghanistan: U.S. Bombs Kill Twenty-three Civilians: Rights Group Urges Immediate Investigation', 26 October 2001, available at: <http://www.hrw.org/press/2001/10/afghan1026.htm>.

521 Where the military target was not hit, the question becomes accuracy and the considerations are those in relation to error, set out below.

522 As noted above, the situation must be appraised from the point of view of the reasonable commander at the time of the attack, taking into account conditions of conflict.

523 See this chapter, 6A.3.2. This may involve choosing to employ precision-guided weapons. See HRW, 'International Humanitarian Law Issues', *supra* note 175.

524 T. Shah and G. Bowley, 'An Afghan Comes Home to a Massacre', *International Herald Tribune*, 12 March 2012, available at: <http://www.nytimes.com/2012/03/13/world/asia/us-army-sergeant-suspected-in-afghanistan-shooting.html>.

525 A. Rubin, 'Afghan Protests Over the Burning of Korans at a U.S. Base Escalate', *International Herald Tribune*, 22 February 2012, available at: <http://www.nytimes.com/2012/02/23/world/asia/koran-burning-in-afghanistan-prompts-second-day-of-protests.html>.

resulting in multiple deaths and injuries.<sup>526</sup> For these issues, the questions that arise may be less legal questions regarding targeting and proportionality, but rather how much is being done within the forces to prevent such incidents and, most significantly, whether a thorough investigation and accountability ensues.<sup>527</sup>

A final issue of continuing concern that emerged several years into the military campaign in Afghanistan is the widespread resort to – and the handling of – night raids, which in many documented cases has led to deaths of civilian adults and children, and allegations of lack of cultural sensitivity on one level and serious ill treatment on another. While the US has on occasion admitted causing civilian deaths – including in one case of six children – through night raids, it also engenders a particularly extreme lack of transparency and accountability. It is reportedly often difficult to ascertain – at the time, or after the fact – who the raiders are (some of whom are reportedly private contractors) and under which authority they act, still less to obtain investigation, redress or accountability.<sup>528</sup> On the contrary, disclosed documents suggest that allegations of civilian deaths in Afghanistan have been met with cover up from within the armed forces.<sup>529</sup>

### 6B.3.2 Methods and means: cluster bombs in Afghanistan

As noted in Part A, the use of weapons that are indiscriminate, or which cause cruel and unnecessary suffering or superfluous injury, is a violation of IHL. The use of drones, and particular issues arising in the context of Afghanistan, were addressed above.<sup>530</sup>

In the Afghan conflict, as in the Iraqi conflict that followed, particular controversy has also surrounded the use of cluster bombs. It has been reported that in the early part of Operation Enduring Freedom, between October and the end of 2001, 1,210 cluster bombs were employed by allied forces in

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526 See Afghanistan Independent Human Rights Commission – Investigation, ‘Use of indiscriminate and excessive force against civilians by US forces following a VBIED attack in Nangahar province on 4 March 2007’, p. 1. The AIHRC investigation of the incident found that the large majority, if not all of the victims were civilians. 12 people were killed and 35 injured, including several women and children.

527 See discussion on accountability, above.

528 A. Rubin, ‘U.S. Transfers Control of Night Raids to Afghanistan’, *International Herald Tribune*, 8 December 2012, available at: [www.nytimes.com/2012/04/09/world/asia/deal-reached-on-controversial-afghan-night-raids.html](http://www.nytimes.com/2012/04/09/world/asia/deal-reached-on-controversial-afghan-night-raids.html). See, e.g., ‘Alston Study on Targeted Killings’, supra note 109.

529 D. Walsh, ‘Afghanistan war logs: How US marines sanitised record of bloodbath’, *The Guardian*, 4 March 2007, available at: <http://www.guardian.co.uk/world/2010/jul/26/afghanistan-war-logs-us-marines>.

530 B2.2, above.

Afghanistan.<sup>531</sup> Each aerial cluster bomb contains a significant amount of smaller 'bomblets' which, when deployed, cover an extensive area.<sup>532</sup> As the framework section of this chapter indicates, cluster bombs are controversial as they disperse submunitions over a wide area and cannot therefore be directed with precision or confined within the parameters of a military target.<sup>533</sup> In Afghanistan UN reports give examples of US cluster bombs targeting a military compound near the city of Herat, but striking only a mosque used by the military but also a village some 500 to 1,000 metres away.<sup>534</sup> Cluster bombs are also controversial for their initial failure rate; unsurprisingly then, reports record bomblets lying dormant in Afghanistan long after military attacks, until disturbed at some future point causing random civilian deaths.<sup>535</sup>

Indications of shifting policy towards cluster bombs by the US in other contexts<sup>536</sup> did not lead to the avoidance of the use of these controversial weapons in Afghanistan. As noted above, cluster bombs are of increasingly doubtful legality.<sup>537</sup> In respect of incidents where these controversial weapons have been employed and heavy civilian casualties have resulted, the party should bear the burden of justifying their use and demonstrating that the duty of care to protect civilians from the effects of these weapons was satisfied.

Finally, other circumstances attending the use of such weapons compound concerns as to unlawfulness. These are given dramatic illustration by the statement issued by US 'Psychological Operations' to the people of Afghanistan in 2001:

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531 See Human Rights Watch Report, 'Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan', December 2002, available at: <http://hrw.org/reports/2002/us-afghanistan>; HRW, 'Cluster Bomblets' supra note 173. The former notes that 1,228 cluster bombs containing 248,056 bomblets were dropped during the aerial bombardment campaign and the latter notes that in the first few weeks of November 2001, the US had deployed 350 cluster bombs. Human Rights Watch notes that the use of such weapons was more restricted than in the past, and that their accuracy was improved by new technology, but to an insufficient degree to alleviate concerns. See, however, Conetta, 'Strange Victory', supra note 522.

532 For the controversy around the use of cluster bombs by the US military, see also 'US Deploys Controversial Weapon', *The Guardian*, 12 October 2001, available at: <http://www.guardian.co.uk/world/2001/oct/12/afghanistan.terrorism7>. The 1,210 cluster bomb units reportedly deployed between October to December 2001 gave rise to the dispersal of a total of 244,420 bomblets. See further Conetta, 'Strange Victory', supra note 522.

533 See 6A.3.2 above.

534 See R. Norton-Taylor and R. Carroll, 'US Cluster Bombing Provokes Anger', *The Guardian*, 25 October 2001, available at: <http://www.guardian.co.uk/world/2001/oct/25/afghanistan.terrorism1>.

535 See S. Goldenberg, 'Long After the Air Raids, Bomblets Bring More Death', *The Guardian*, 28 January 2002, available at: <http://www.guardian.co.uk/world/2002/jan/28/afghanistan.suzannegoldenberg>. See also Amnesty International, 'Afghanistan: Accountability for Civilian Deaths'.

536 See statement regarding US policy in Bosnia, mentioned in Chapter 6A above.

537 See 6A.3.2 above.

Noble Afghan people: as you know, the coalition countries have been air-dropping daily humanitarian rations for you. The food ration is enclosed in yellow plastic bags. They come in the shape of rectangular or long squares. The food inside the bags is Halal and very nutritional ... In areas away from where food has been dropped, cluster bombs will also be dropped. The colour of these bombs is also yellow ... Do not confuse the cylinder-shaped bomb with the rectangular food bag.<sup>538</sup>

In these circumstances it may be doubtful that the duty of care owed to the civilian population has been discharged in respect of the facts and circumstances surrounding resort to the use of cluster bombs in Afghanistan.

### 6B.3.3 Humanitarian protection of prisoners

It is perhaps surprising that many of the most controversial aspects of the application of the IHL framework post 9/11 have arisen in relation to humanitarian protection, designed to protect basic human dignity with which few would take open exception.<sup>539</sup> Yet questionable compliance with these norms has arisen in many contexts post 9/11 including in relation to the detentions in Guantanamo Bay, 'enhanced interrogation techniques' and torture by proxy in multiple contexts worldwide, discussed elsewhere,<sup>540</sup> as well as repeatedly in the conflicts in Iraq and Afghanistan.

Many examples of the ill-treatment treatment of prisoners, disregarding international humanitarian law, arise in the form of allegations of, *inter alia*, summary executions, torture, sexual abuse and other forms of ill-treatment. These issues have captured international attention most sharply – and graphically – in relation to the widely reported torture and mistreatment of prisoners by US troops at Abu Ghraib prison in Iraq.<sup>541</sup> Evidence has also emerged

538 US Psychological Operations Radio, 28 October 2001, quoted in *BBC News*, 'Radio Warns Afghans over Food Parcels', 28 October 2001, available at [http://news.bbc.co.uk/hi/english/world/monitoring/media\\_reports/newsid\\_1624000/1624787.stm](http://news.bbc.co.uk/hi/english/world/monitoring/media_reports/newsid_1624000/1624787.stm).

539 While the focus is on treatment of prisoners, many other humanitarian issues arise, such as the obligations to allow humanitarian relief to affected civilians that has been criticised by UN agencies and others which has been described as perhaps the most serious issue of IHL compliance in relation to Afghanistan: S. Kapferer, 'Ends and Means in Politics: International Law as Framework for Political Decision-making', in P. Eden and T. O'Donnell (eds.), *September 11, 2001: a Turning Point in International and Domestic Law* (2005), pp. 25-84.

540 See Chapters 7B7, 8 and 10.

541 See, e.g., 'America's shame', *The Guardian*, 1 May 2004, available at: <http://www.guardian.co.uk/world/2004/may/01/usa.iraq>; S. Chan and M. Amon, 'Prisoner Abuse Probe Widened. Military Intelligence at Center of Investigation', *Washington Post*, 2 May 2004, available at: [http://www.washingtonpost.com/wp-dyn/articles/A59750-2004May1\\_2.html](http://www.washingtonpost.com/wp-dyn/articles/A59750-2004May1_2.html) and Chapter 7B7.

recurrently of serious violations by or with the collusion of UK troops in Iraq.<sup>542</sup>

In Afghanistan, reports of torture and ill treatment by the US relate to interrogation techniques ranging from the issuance of death threats against prisoners to the imposition of other forms of gross physical and psychological duress. One early such case involved the widely reported allegations of ill treatment of detainees in United States custody at the Baghram Air Base north of Kabul.<sup>543</sup> In December 2002, two men being held for questioning died in circumstances where official autopsies concluded that they had suffered 'blunt force injuries' and that their deaths were homicides;<sup>544</sup> despite an official undertaking to investigate the matter, no information was made public.<sup>545</sup> As information on extraordinary renditions emerged, the involvement of this and other Afghan detentions centres as one of the stations for torture and ill-treatment has also become clear.<sup>546</sup>

Other examples of mistreatment relate to abysmal conditions of detention and transfer, resulting in death and serious injuries at the hand of the Northern Alliance.<sup>547</sup> Numerous allegations have emerged of the extra-judicial execution of prisoners by Northern Alliance fighters.<sup>548</sup> These allegations highlight particular issues that arise in respect of irregular forces, such as the Northern Alliance, and the legal relationship between those acts and the US

542 See e.g. 'British personnel reveal horrors of secret US base in Baghdad', *Guardian* 1 April 2013 accessed at <http://www.guardian.co.uk/world/2013/apr/01/camp-nama-iraq-human-rights-abuses> last viewed 27 April 2013 on torturous interrogation techniques in a camp run by the US but with the involvement of the UK. On allegations concerning UK troops see e.g. 'High Court Challenge over Iraqi Civilian Deaths', *The Guardian*, 28 July 2004, available at <http://www.guardian.co.uk/Iraq/Story/0,2763,1270930,00.html>; see also Baha Mousa Public Inquiry Report, available at: [www.bahamousainquiry.com](http://www.bahamousainquiry.com) and Chapter 7B7.

543 See S. Goldenberg, 'CIA Accused of Torture at Baghram Base', *The Guardian*, 27 December 2002, available at: <http://www.guardian.co.uk/world/2002/dec/27/usa.afghanistan;T.Wagner>, 'Amnesty Criticizes U.S. for Afghan Deaths', *Associated Press*, 30 November 2003.

544 D. Campbell, 'Afghan Prisoners Beaten to Death at US Military Interrogation Base. "Blunt Force Injuries" Cited In Murder Ruling', *The Guardian*, 7 March 2003, available at: <http://www.guardian.co.uk/world/2003/mar/07/usa.afghanistan>. See also J. Turley, 'Rights on the Rack. Alleged Torture in Terror War Imperils U.S. Standards of Humanity', *Los Angeles Times*, 6 March 2003 and C. Gall, 'U.S. Military Investigating Death of Afghan in Custody', *New York Times*, 4 March 2003, available at: <http://articles.latimes.com/2003/mar/06/opinion/oe-turley6>.

545 See Chapter 7.B.14.

546 See Chapter 10.

547 See 'Slow Death on the Jail Convoy of Misery', *Daily Telegraph*, 19 March 2002, available at: <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1388204/Slow-death-on-the-jail-convoy-of-misery.html>, on hundreds of deaths due to transporting Taleban prisoners for days in crammed freight containers, without sufficient air.

548 See e.g. R. McCarthy and N. Watt, 'Alliance accused of brutality in capture of Kunduz', *The Guardian*, 27 November 2001, available at: <http://www.guardian.co.uk/world/2001/nov/27/afghanistan.rorymccarthy>; L. Harding and R. McCarthy, 'Hundreds of Pakistanis Believed Massacred', *The Guardian*, 13 November 2001, available at: <http://www.guardian.co.uk/world/2001/nov/13/pakistan.afghanistan>.

and its allies in Afghanistan. The US Defense Secretary Donald Rumsfeld has stated that US policy has been to 'have the forces on the ground that have been opposing the Taliban and Al-Qaida take prisoners themselves and then allow us to do whatever interrogating might be appropriate'.<sup>549</sup>

Executions, torture and ill-treatment do not raise complex legal questions regarding the application of the IHL framework. If established, they are straightforwardly violations of IHL. In light of parallel allegations arising from Guantanamo Bay, Iraq, Afghanistan and elsewhere, others have emerged as to these practices revealing a systematic policy of encouraging, justifying and/or turning a blind eye to, such abuse.<sup>550</sup> Questions arise regarding criminal responsibility of those that ordered or, under the doctrine of superior responsibility, failed to prevent such practices may also arise, though with little effect on accountability thus far.<sup>551</sup> At an absolute minimum, questions arose as to whether those in positions of responsibility are doing sufficient to discharge their duty to ensure that their troops respect IHL, and the extent of 'institutional and personal responsibility' at 'high levels'.<sup>552</sup> Likewise, the 'message' sent to those on the ground, including through memoranda of legal advice advocating the lawfulness of measures amounting to torture or ill-treatment, provide a veneer of legitimacy to plainly unlawful behaviour.<sup>553</sup> Similar questions arise with renewed intensity in relation to those one step removed, whether irregulars such as the Northern Alliance or private foreign contractors and security companies active in Afghanistan,<sup>554</sup> who lack much of the training and preparation enjoyed by regular troops, but who nonetheless are invited to act in consort with coalition forces in Afghanistan.

Finally, questions relate to respect for the broader responsibility incumbent on other states party to the Geneva Conventions, as a result of the positive duties to ensure respect for IHL.<sup>555</sup> This implies a duty to refrain from collaborating and cooperating with those that flout IHL standards, and a duty to

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549 Department of Defence, News Briefing, Secretary Rumsfeld and General Myers, 26 November 2001, available at <http://www.defenselink.mil/news/Nov2001/g011126-D-6570C.html>.

550 See Chapter 7B7.

551 On individual responsibility for ordering, aiding and abetting or for failure of superiors to take reasonable measures to prevent serious violations of IHL, see Chapter 4A1.2. See Chapter 7B14.

552 See, e.g., the Final Report of the Independent Panel to Review DoD Detention Operations, the 'Shlessinger report', available at: <http://www.defenselink.mil/news/Aug2004/d20040824/finalreport.pdf>, on 'both institutional and personal responsibility at higher levels' for Abu Ghraib. The ICC prosecutor's office annual report of 2012 notes allegations in relation to the situation in Afghanistan.

553 See, e.g., M. Mazzetti and S. Shane, 'Interrogation Memos Detail Harsh Tactics by the C.I.A.', *The New York Times*, 17 April 2009, available at: <http://www.nytimes.com/2009/04/17/us/politics/17detain.html>.

554 Swisspeace Report, *infra* 565, on the US military working with an estimated 2-3,000 former Afghan militia fighters as auxiliaries and the influx of private security companies in a range of non-combat roles, including intelligence, interrogation and surveillance; see Chapter 33.2.

555 Common Article 1 of the Geneva Conventions, see Chapter 3.31.

make reasonable inquiries into the activities of potential allies before forging alliances; the duty plainly cannot be reconciled with the formation of alliances with notorious leaders, renowned for past violations, as in Afghanistan.<sup>556</sup>

#### 6B.3.4 Transparency, inquiry and accountability?

Assessing the lawfulness of many of these controversial measures highlighted above depends on information, including of an intelligence nature, to which the public does not, generally, have access. This was particularly so during a military campaign that was characterised by a relative lack of transparency, both in terms of information briefings from the states involved and the absence of media on the territory of the conflict.<sup>557</sup> In such circumstances, and in the face of widespread casualties, the onus shifts to the responsible armed forces to demonstrate that the prerequisites of IHL were satisfied in the particular case.

It has been noted that in the putative war on terror “one of the greatest challenges in the analysis of this conflict stems from the lack of available information about virtually every aspect under examination.”<sup>558</sup> Calls for explanations and, as appropriate, independent inquiries into apparent violations have often gone unheeded, or met with responses that have been criticised as tardy and inadequate.<sup>559</sup> In one exceptional case, following the deaths of prisoners in US custody at the Bagram Air Base in Afghanistan, the US authorities stated that an inquiry would be conducted,<sup>560</sup> but the progress or findings of the investigation were then never made public, despite repeated requests for a full and public criminal investigation and explana-

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556 See, e.g., ‘Slow Death on the Jail Convoy of Misery’, supra note 547 reporting that ‘the captors owe allegiance to Gen Abdul Rashid Dostum, the northern warlord whose men committed similar atrocities in 1997’.

557 The Afghan conflict contrasts unfavourably in this respect with the Kosovo campaign of 1999, wherein NATO held daily briefings, and the Iraq conflict where media presence was considerable. See Amnesty International, ‘Afghanistan: Accountability for Civilian Deaths’, supra note 501 (describing as ‘disturbing’ the lack of public information, and noting the lack of access given to impartial observers).

558 Lubell, ‘The War (?) against al Qaeda’, in Wilmshurst, *International Law and the Classification of Conflicts*, supra note 6, p. 451.

559 See ‘From Hope to Fear’, supra note 517, emphasizing the lack of transparency and importance of accountability. On threats against journalists who sought to investigate indiscriminate civilian deaths, see Targeting Civilians, above.

560 Chapter 7B.14.

tion.<sup>561</sup> Reports also suggest cover-up operations including threats to journalists in an attempt to suppress information.<sup>562</sup>

In turn, as discussed in other chapters, the Obama administrations consistently oppose judicial oversight of its conduct in Afghanistan, through habeas corpus review, on the basis that 'federal courts should not thrust themselves into the extraordinary role of reviewing the military's conduct of active hostilities.'<sup>563</sup> It has employed this rationale in relation to persons not detained in Afghanistan in relation to that conflict at all (but captured elsewhere and transferred in to a situation of unlawful detention), a fact which the government in its pleadings describes as 'immaterial'.<sup>564</sup>

The responsibility of states, parties to the conflict and individuals should be given effect in respect of crimes and violations in Afghanistan. The landscape for responsibility and accountability was complicated – whether deliberately or not – by the multiple actors, including non-state armed groups, private security companies<sup>565</sup> and intelligence agencies of various states<sup>566</sup> engaged in detention and alleged ill-treatment in Afghanistan.

Accountability has been identified as a key concern in Afghanistan,<sup>567</sup> yet this area remains much neglected in Afghanistan as in the putative 'war with al Qaeda' more broadly.<sup>568</sup> The Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions has reiterated obligations to respect, and ensure respect of, IHL, which entail an obligation effectively to investigate suspected violations, using impartial and independent procedures, and to prosecute and punish violations:

... the support of both the people in Afghanistan and the international community is dependent upon a sense that the international forces are doing what they think the people of Afghanistan should be doing – being held to account.<sup>569</sup>

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561 See e.g. also Wagner, 'Amnesty Criticizes U.S.'

562 The AIHRP condemned the refusal to provide information or access to the site in the aftermaths of the attack by US marines following the suicide attack, and journalists being threatened and forced to delete all pictures and videos they had taken; see Afghanistan Independent Human Rights Commission, *supra* note 534.

563 US Justice Department response to the habeas motion of al Bakri, 8 September 2008, cited in Hampson, 'Afghanistan 2001-2010', *supra* note 334, p. 268. See more detail on the case in Chapter 11.

564 *Ibid.*

565 See generally, 'Private Security Companies and Local Populations: An exploratory study of Afghanistan and Angola', Swisspeace, Ulrike Joras and Adrian Schuster (eds.), 2008 and Chapter 3.3.2.

566 Philip Alston noted that '[t]hese issues of accountability are exacerbated by the operation of forces within this country that are not accountable to any military but appear to be controlled by foreign intelligence services'. See P. Alston, 'Press Statement'.

567 See Alston, 'Press Statement'; see also 'From Hope to Fear'.

568 On measures of accountability thus far see Ch. 7.14.

569 See Alston, 'Press Statement'.

## 6B.4 CONCLUSION

By suggesting that the 'war on terror' is an armed conflict of global reach, of which Afghanistan was but a part, the implication is that the rules of IHL applicable in armed conflict govern all aspects of the counter-terrorist measures taken post September 11. This chapter has addressed how the 'war on terror' may include the military action taken in Afghanistan, but it certainly goes far beyond armed conflict in any legal sense. While the Afghan and Iraq interventions led to armed conflicts between identifiable parties, with identifiable end points, neither the September 11 attacks nor the subsequent multi-faceted fight against terrorism meets the legal criteria of armed conflict.

The proposition that there is an armed conflict between states and al-Qaeda has been as tenaciously defended by the US since 9/11 as it has been increasingly robustly rejected by other international actors. The result is a regrettable transatlantic rift of significant proportions and import, on the fundamental question of whether and when the armed conflict paradigm applies. The question of the existence and scope of armed conflicts post-9/11 is critical and defining. It underpins the proper identification of the legal framework, an essential precursor to its observance. IHL has been relied upon to apply to situations beyond genuine armed conflicts, with an impact on other areas of law, notably human rights law addressed in the following chapter. Its content has been overstretched to purportedly justify exceptional powers, then under-applied by ignoring the responsibilities that IHL imports.

Despite occasional and surprising assertions by the US of a new conflict paradigm garnering international acceptance, it is highly doubtful in light of the schism in practice and approaches to the law, that the international legal framework has been transformed as regards the definition of conflict or the emergence of new categories of conflict.<sup>570</sup> The practice explored in this chapter has undoubtedly fostered acute international attention to the legal framework, and development on certain aspects may well unfold over time. Areas of intense debate and potential future development that have been highlighted include certain issues around classification of conflicts,<sup>571</sup> whether persons can be targeted on the basis of their membership of an armed group that does constitute a party to a non-international conflict, the scope of 'direct participation in hostilities,' novel issues emerging from the specific nature of drone technology,<sup>572</sup> as well as some issues concerning the inter-relationship between IHL and human rights law in the next chapter.<sup>573</sup>

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570 See Part A 'The Legal Framework' for a discussion on how the legal framework changes. E. Wilmschurt, 'Conclusions', in Wilmschurt, *International Law and the Classification of Conflicts*, supra note 6, pp. 499-501.

571 Chapter 6A1.1.2.

572 Chapter 6B.2.2 on drones, above.

573 Chapter 7B.3 on the Interplay between IHL and IHRL.

There can be little doubt that IHL has been shaken and undermined post 9/11, including by assertions that the legal framework is quaint and outmoded, ill-equipped to address the 'new challenges' and the 'new kind of war'. The examination of the legal framework set out in this chapter casts doubt on that proposition.

IHL allows for the use of force against non-state actors when they engage in an armed conflict, but a high threshold is deliberately placed on when such a conflict arises, given the profound implications on international norms and human peace and security. Where an armed group, whether using the name of al-Qaeda or another, meets the criteria of party to conflict and engages in hostilities in any particular part of the world, IHL may well govern. On the facts available, however, the legal criteria is simply not met for an armed conflict, still less one of global reach, with 'al Qaeda and associates.' Likewise, the manufacture of the enemy combatant criteria with its broad reaching implications is not the result of a gap in the law: IHL envisages and provides for unprivileged belligerents, for example, and provides rules consistent with the principles of IHL.<sup>574</sup> If individual members of terrorist groups take up arms in an armed conflict, IHL provides rules on their status, the scope of the right to target them, the possibility of prosecuting them, and their treatment upon detention.<sup>575</sup> The persistence of torture and ill-treatment contrasts to uncontroversial clarity as regards the legal framework governing humanitarian protections.

The challenge that emerges appears to be less related to the adequacy of the legal framework as to the refusal to be constrained by its terms, or to apply it consistently – and not only (in the words of then US president Bush) to the extent deemed 'appropriate' or 'consistent with military necessity' by the state itself.<sup>576</sup> While there are areas of legitimate dispute as regards the legal framework, and areas where it will continue to develop in the future, in part in response to the practice of the war on terror, there is an abundance of violations of the letter and the spirit of IHL the war on terror. The full impact of novel approaches to the use of IHL as justifications for conduct – such as its approach to detention or treatment of 'enemy combatants', drone killing of alleged terrorists anywhere in the world or targeting so called 'nexus targets' – remains to be seen. The potential for war on terror practices to be replicated elsewhere is already clear.<sup>577</sup>

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574 Pejic, "'Unlawful/Enemy Combatants': Interpretations and Consequences', supra note 256, p. 341.

575 Chapter B.2.1 'Enemy Combatants', above.

576 See, e.g., Bush's order that the Geneva Conventions would be applied 'the extent appropriate'. 'Humane Treatment of al Qaeda and Taliban detainees', supra note 117.

577 Eg. 'enemy combatant' nomenclature being used elsewhere, see e.g. calls for the Boston bomber in 2013 to be held as an enemy combatant, rejected by the US government; see debate at <http://blogs.reuters.com/great-debate/2013/04/23/boston-bomber-acted-as-enemy-combatant>, visited 30 April 2013. Eg drones and targeted killings by the US and

Allegations of violations have been coupled by the failure to conduct thorough investigations and, subject to genuine and compelling security concerns, to make the findings of such investigations public, to restore the national and international confidence in the lawfulness and hence legitimacy of military action. Critical questions moving forward will be the commitment of states parties – those directly responsible and others – to ensure that effective measures are taken to avoid repetition and to hold to account those individuals directly and indirectly responsible for IHL violations amounting to war crimes.

Several concluding distinctions may be worthy of emphasis as regards the unravelling of the relationship between IHL and terrorism. First, the terrorist label, always of doubtful relevance in international law given the ambiguity surrounding its meaning and scope, is not legally significant, still less decisive, to the application of IHL.<sup>578</sup> To assess the existence of an armed conflict and application of IHL, the question is not whether there can be a conflict with ‘terrorist’ organisations *in abstracto* but whether, in relation to a particular and defined set of facts, the requirements regarding use of force and nature of the parties are met.<sup>579</sup>

Second, organisations labelled terrorist may well constitute parties to a conflict, as the Lebanon conflict showed, but the assessment has to be case-by-case in light of the evolving facts concerning the nature of particular groups and particular situations of violence. Criminal networks, like any other groups of individuals, may become *involved* in an armed conflict by fighting alongside, or in connection with, a party that meets the criteria set out above.<sup>580</sup> Only very exceptionally will financial or political support by terrorist organisations render them participants in the armed conflict. The resort to armed force, even of a significant scale, does not constitute armed conflict despite the challenges that it poses, some of which may be comparable to armed conflict. IHL is not the legal framework governing organised criminal activity beyond armed conflict, which the human rights and criminal law frameworks were intended to address.

Third, where there is an armed conflict, state or non-state parties to it may be responsible for ‘terrorism’<sup>581</sup> or conduct that may be considered to exploit

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Israel being relied upon in Russian, at 6B.2.2, above. Eg resort to military commissions being relied upon by President Mubarak of Egypt, Chapter 8.

578 See 6A.1: in conflict situations, one party may not infrequently refer to another as a terrorist or as resorting to terror tactics, while many deny the existence of NIACs within their state, preferring to label it terrorism. This does not preclude the application of IHL.

579 The question, as sometimes posed, whether there can be an armed conflict with a ‘terrorist’ organisation is not therefore the most helpful and cannot be answered in the abstract.

580 See, e.g., the Afghan conflict in which components of al-Qaeda appear to have fought with the Taliban. See ‘Active and Direct Participation’ in Hostilities, Section A above

581 Article 33(1) GC IV on collective penalties and prohibits ‘all measures ... of terrorism’ against civilians, while the Additional Protocols I and II prohibit ‘[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population’; Article 51(2) AP I; Article 13(2) AP II; *Galić*, supra note 117.

'terrorist' tactics, under IHL, such as attacks against civilians or civilian objects<sup>582</sup> or perfidy.<sup>583</sup> However, the commission of 'terrorism' by parties to a conflict should not be confused with the key question whether particular groups meet the necessary criteria to constitute parties to a conflict in the first place.

In conclusion, great emphasis has been placed by some on the novel features of the international landscape post 9/11 with particular emphasis on the new kind of war raising new kinds of challenges. Implicitly and explicitly, the relevance of IHL and its capacity to meet the challenges of contemporary conflict has been attacked following 9/11. Debate around the need, or not, to revise IHL has consumed considerable attention. To the extent that this leads to clarifying the content of IHL content, it may yet prove of long-term benefit. However, considered reflection by international experts has tended to reject the idea that 9/11 or its aftermath reveal the need for radical revision of IHL.<sup>584</sup> Behind the smoke screen the real challenges continue to lurk, only reinforced by the putative 'wars' on terror or on al-Qaeda and associates, which relate not to the normative content of IHL but to the need to strengthen the effectiveness of its implementation.

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582 AP I, Article 85.

583 Article 37 AP I. The ICRC Report on IHL and Contemporary Armed Conflicts, *supra* note 48, p. 7, notes that 'suicide actions' against civilians are prohibited. Attacks in which individuals engaging in hostilities pose as civilians, of which numerous examples emerge post 9/11, amount to perfidy, and the use of human shields, for example, is also prohibited.

584 See Schrijver and Herik, 'Leiden Policy Recommendations', *supra* note 74; 'ICRC Report on IHL and Contemporary Armed Conflicts', *supra* note 48; Wilmshurst, *International Law and the Classification of Conflicts*, *supra* note 6, p. 500 (discussing specifically classification of conflicts); ICJ Eminent Jurists panel 2009; Dutch Advisory Report on Drones, note 362; B Emmerson, Interim Report on Drones, September 2013.

