

Targeting the ‘Terrorist Enemy’: The Boundaries of an Armed Conflict Against Transnational Terrorists

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Abstract

Following the terrorist attacks of 11 September 2001, the US declared Al-Qaeda and its associates as ‘the terrorist enemy’. Under the previous and current Administrations, the US’s security strategies have focused on combating this ‘terrorist enemy’ in various ways including the so-called ‘war on terror’ or ‘war with Al-Qaeda’: an armed conflict against transnational terrorists to which international humanitarian law (IHL) supposedly applies. This article considers the notion of targeting transnational terrorists under IHL. The article addresses the issue of whether an armed conflict against terrorists exists and what sort of armed conflict it may be. It then examines whether terrorists are legitimate targets in and outside an armed conflict, drawing on the recent ‘Interpretive Guidance on Direct Participation in Hostilities’ by the International Committee of the Red Cross. The article concludes that terrorist attacks in general do not give rise to armed conflict; that there is no legitimate war against transnational terrorists; and, therefore, that military targeting of such transnational terrorists can only occur in limited circumstances.

Introduction

Following the terrorist attacks of 11 September 2001 (‘September 11’) on the World Trade Center and the Pentagon in the United States of America (‘US’), the US declared Al-Qaeda and its associates¹ as ‘the terrorist enemy’² and launched attacks against them. In so doing, they also launched an attack against Afghanistan, where Al-Qaeda was based with support of the Taliban, the de facto Government of Afghanistan. Since September 11, under the

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¹ There is a debate as to what Al-Qaeda is in terms of an organisation, whether it is really a functioning organisation or a series of splinter groups and whether it is truly responsible for terrorist attacks across the globe. See, eg, Mohammad-Mahmoud Ould Mohamedou, ‘Non-Linearity of Engagement, Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States’ (Policy Brief, Program on Humanitarian Policy and Conflict Research, Harvard University, July 2005) <http://www.hpcr.org/pdfs/Non-Linearity_of_Engagement.pdf>. For ease of reference, this article shall refer to ‘Al-Qaeda’ as the entity against which the US is determined to fight, because it is the organisation that the US has identified as its main ‘enemy’. See also Marco Sassöli, ‘Transnational Armed Groups and International Humanitarian Law’ (Occasional Paper Series, Winter 2006, No 6, Program on Humanitarian Policy and Conflict Research, Harvard University, February 2006) 1, <<http://www.hpcr.org/pdfs/OccasionalPaper6.pdf>>.

² US Department of State, *The Terrorist Enemy* <<http://www.state.gov/s/ct/enemy/index.htm>>.

previous Administration, the US's security strategies have focused on combating this 'terrorist enemy' in various ways.³ While several different approaches were taken, including immigration policies, freezing finances, and mutual assistance and police cooperation,⁴ one major approach was the so-called 'war on terror':⁵ an armed conflict against transnational terrorists to which international humanitarian law ('IHL') supposedly applies.

Under the new Administration of President Obama, the approach to terrorism is multifaceted and varied, including improving food security, greater diplomacy, strengthening partnerships and addressing the underlying causes of terrorism.⁶ The approach is more nuanced than a 'war on terror', and specifically, the Administration has rejected the use of this term and the term 'global war'.⁷ However, the language remains that of conflict, and the need to combat terrorism. The 'war on terror' has now become a 'war with Al-Qaeda'.⁸ Indeed, in his inaugural speech, President Obama said: '[o]ur nation is at war against a far-reaching network of violence and hatred'.⁹

The Administration also maintains the rhetoric of the 'terrorist enemy'.¹⁰ The Office of the Coordinator for Counterterrorism under the US Department of State states that the 'terrorist enemy' is in the process of creating a 'global insurgency', employing 'subversion, sabotage, open warfare and, of course, terrorism'.¹¹ The US State Department *Country Report on Terrorism 2008* notes that 'Al-Qa'ida and associated networks continued to lose ground, both structurally and in the court of world public opinion, but remained the greatest terrorist threat to the United States ... in 2008'.¹² One of the approaches to the 'terrorist enemy' threat has been to increase the size of the Army and Marines.¹³ Further, while the Administration no longer uses the term 'unlawful enemy combatant', it continues to use military commissions to try those accused of committing terrorist offences outside the US and in the wars in Afghanistan and Iraq. Although, on 22 January 2009, President Obama issued an executive order to close the detention facilities at Guantánamo Bay, which, at the time of writing, had not yet happened.

The US has argued that this proposed war or armed conflict against transnational terrorists, and now specifically Al-Qaeda, would give the US the ability to target terrorists

³ See, eg, US Department of State, *National Security Strategy of the United States of America* (March 2006) <<http://www.state.gov/documents/organization/64884.pdf>>.

⁴ See, eg, US Department of State, *National Strategy for Combating Terrorism of the United States of America* (February 2003) <<http://www.state.gov/documents/organization/60172.pdf>>.

⁵ US Department of State, *National Defense Strategy of the United States of America* (2005) <http://www.globalsecurity.org/military/library/policy/dod/nds-usa_mar2005_ii.htm>.

⁶ John O Brennan, 'A New Approach to Safeguarding Americans' (Speech delivered at the Center for Defense and Strategic Studies, Washington DC, 6 August 2009) <http://www.whitehouse.gov/the_press_office/Remarks-by-John-Brennan-at-the-Center-for-Strategic-and-International-Studies/>.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ President Barack Obama, 'Inaugural Address' (Speech delivered at US Capitol, Washington DC, 21 January 2009) <http://www.whitehouse.gov/the_press_office/President_Barack_Obamas_Inaugural_Address/>.

¹⁰ US Department of State, *Office of the Coordinator for Counterterrorism* <<http://www.state.gov/s/ct/>>.

¹¹ US Department of State, above n 2.

¹² US Department of State, *Country Reports on Terrorism 2008, Chapter One: Strategic Assessment* (30 April 2009) <<http://www.state.gov/s/ct/rls/crt/2008/122411.htm>>.

¹³ Brennan, above n 6.

with military force when they are planning, or have performed, terrorist attacks against US interests.¹⁴

Military targeting can only occur during an armed conflict against a legitimate target. It involves identification of a particular person or military object that is part of an existing armed conflict, and directing military force against that person or object for the purpose of killing or putting out of action that person or object.¹⁵ The policy arguments behind targeted killings include that the persons carrying out the targeting are not killed and that there is less risk of 'collateral damage' of persons protected from the conflict. In other words, it generally meets requirements of proportionality and military necessity.¹⁶

The war in Afghanistan is such an armed conflict and was entered into on the basis of self-defence, against the September 11 attacks, under the international law on the use of force.¹⁷ Beyond any controversy around the legitimacy of the conflict and reasons for the armed conflict, the conflict in Afghanistan now represents an armed conflict to which IHL applies. The US Government under the previous Administration had, however, proposed that the 'war on terror' was an extension of this war in Afghanistan,¹⁸ an armed conflict in which they could target Al-Qaeda and associated terrorist organisations under IHL.¹⁹

The notion, continued under the current Administration, of a 'legal armed conflict' arises out of the fact that the US considers itself engaged in a war against Al-Qaeda since the September 11 attacks, outside of the territorial boundaries of Afghanistan and separate to the war fought against the Taliban.²⁰ In other words, there is an armed conflict against the 'global insurgency' that is Al-Qaeda.²¹ The 'war' is fought across borders against transnational terrorists who are non-State actors, for which a State is not legally responsible.

¹⁴ See Bob Woodward, 'CIA Told to Do "Whatever Necessary" to Kill bin Laden; Agency and Military Collaborating at "Unprecedented" Level; Cheney Says War Against Terror "May Never End,"' *The Washington Post* (Washington DC), 21 October 2001.

¹⁵ Amos Guiora, 'Targeted Killing as Active Self-Defense' (2004) 36 *Case Western Reserve Journal of International Law* 319, 322.

¹⁶ Jonathan Ulrich, 'The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism' (2005) 45 *Virginia Journal of International Law* 1029, 1053.

¹⁷ See, eg, Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), 327, 335; Ruth Wedgwood, 'Al Qaeda, Terrorism, and Military Commissions' (2002) 96 *American Journal of International Law* 328, 330; SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (12 September 2001); SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001). See also Organisation of American States, 'Terrorist Attacks on United States Are an Attack on All Countries of the Americas, Foreign Ministers Declare' (Press Release, 21 September 2001) <<http://www.oas.org/OASpage/press2002/en/press2001/sept01/194.htm>>; North Atlantic Treaty Organisation, 'Statement by the North Atlantic Council' (Press Release, 12 September 2001) <<http://www.nato.int/docu/pr/2001/p01-124e.htm>>.

¹⁸ As the US refers to the war in Afghanistan as a starting point for an extension of their armed conflict, this is the example that this article will consider. It is worth noting, however, that Al-Qaeda is also fighting against the US and vice versa in Iraq. See US Department of State, *Country Reports on Terrorism 2004* (April 2005), 62 <<http://www.state.gov/documents/organization/45313.pdf>>.

¹⁹ Ulrich, above n 16, 1046.

²⁰ US Former Administration, *The War on Terrorism: The Military Response* <<http://georgewbush-whitehouse.archives.gov/response/militaryresponse.html>>; US Department of State, National Security Strategy (May 2010) p 4: <http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf>. See also *Hamdan v Rumsfeld* 548 US (2006), 65 ('*Hamdan*').

²¹ Brennan, above n 6.

Al-Qaeda is considered by the US to be such a terrorist. It is a collection of individuals and groups that operate across national borders inside and outside of Afghanistan.²² This so-called legal armed conflict²³ would allow the US to use military force against such 'transnational terrorists'²⁴ wherever they are in the world: 'mountains in Afghanistan, a village ... in Pakistan, the streets of Milan'.²⁵ However, it is essentially a policy of targeting terrorists with military force in the context of an armed conflict, rather than engaging in an armed conflict involving armed forces on the ground.

The rhetoric surrounding military targeting and the 'war on terror' has confused the two areas of law around the use of force – the *jus ad bellum*, which applies to when the use of force is permitted to begin, and the *jus in bello* (or IHL), which determines how the force is to be applied when the initial use of force results in an armed conflict. It has been said that military targeting can be performed under *jus ad bellum* notions of self-defence, but such force can only be used in response to an actual or imminent armed attack.²⁶ With military targeting under IHL, there does not need to be any initial use of force engaging a right of self-defence, the person who is targeted merely needs to be a legitimate target in the course of an existing armed conflict. The law relevant to military targeting is IHL, not *jus ad bellum*.²⁷

At least two examples of where the US has already attempted to use military targeting (albeit through the CIA, not the US military, and increasingly through the use of private military contractors)²⁸ occurred in 2002, after the attacks of September 11 and while the US was engaged against Al-Qaeda in Afghanistan as an international armed conflict. In February 2002, a CIA unmanned predator drone fired a missile at three suspected Al-Qaeda leaders on the Pakistan-Afghanistan border.²⁹ In November 2002, a CIA-operated plane launched a missile into Yemen specifically targeting and killing Abu

²² Barry A Feintin, 'A Paradigm for the Analysis of the Legality of the Use of Armed Force against Terrorists and States that Aid and Abet Them' (2004) 17 *Transnational Lawyer* 51, 54.

²³ Thomas McK Sparks and Glenn M Sulmasy, 'Preface' in Thomas McK Sparks and Glenn M Sulmasy (eds) *International Law Challenges: Homeland Security and Combating Terrorists* (2006) vol 81, xiv; Robert F Turner in Kenneth Roth and Robert F Turner, 'Debating the Issues' in Thomas McK Sparks and Glenn M Sulmasy (eds) *International Law Challenges: Homeland Security and Combating Terrorists* (2006) vol 81, 404; Letter from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva to the Secretariat of the Commission on Human Rights, 14 April 2003 (UN Doc E/CN.4/2003/G/80, 22 April 2003) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/138/04/PDF/G0313804.pdf?OpenElement>>.

²⁴ US Department of State, above n 20.

²⁵ Luc Reydam, 'A La Guerre Comme À La Guerre: Patterns of Armed Conflict, Humanitarian Law Responses and New Challenges' (2006) 88 *International Review of the Red Cross* 729, 751.

²⁶ *Charter of the United Nations* art 51. See, eg, *Military and paramilitary action in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, [194] ('*Nicaragua v United States*').

²⁷ David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extrajudicial Executions or Legitimate Means of Defence?' (2005) 16 *European Journal of International Law* 171, 186.

²⁸ The CIA is a non-military organisation; it engages in subterfuge, using unmanned missile launchers and does not wear military uniforms, suggesting that it could be acting contrary to IHL if it were to target terrorists: see Mary Ellen O'Connell, 'To Kill or Capture Suspects in the Global War on Terror' (2003) 35 *Case Western Reserve Journal of International Law* 325. Additionally, it has been reported that the CIA employs private military contractors to operate the drones, but not to select the targets, raising issues of accountability and direct participation in hostilities: see James Risen and Mark Mazzetti, 'CIA said to Use Outsiders to Put Bombs on Drones' *The New York Times* (New York), 20 August 2009.

²⁹ O'Connell, above n 28, 325.

Ali al-Harithi, an Al-Qaeda member, allegedly Osama bin Laden's body guard and implicated in the 2000 attack on a US destroyer off the coast of Yemen.³⁰ In the second case, Yemeni forces had already tried to arrest Ali al-Harithi and had been killed. He was alleged to be 'an active combatant engaged in ongoing plans against the United States'.³¹ The US has stated that it considered it had the right to target terrorists anywhere in the world under IHL.³²

This article considers the notion of targeting transnational terrorists, such as Al-Qaeda, under IHL, and, in so doing, rejects the notion that 'war on terror', now dubbed 'the war with Al-Qaeda', is a real war. It is a rhetorical war, under which there may be elements of armed conflict, but not all aspects of terrorism create an armed conflict, and not all terrorists are legitimate targets. The first section of the article addresses the issue of whether an armed conflict against terrorists exists and what sort of armed conflict it may be. This analysis is necessary to consider what aspects of IHL apply to the armed conflict. The second section examines whether terrorists are legitimate targets in and outside an armed conflict, drawing on the recent 'Interpretive Guidance on Direct Participation in Hostilities' by the International Committee of the Red Cross (ICRC).³³ The article concludes that terrorist attacks in general do not give rise to armed conflict; that there is no legitimate war against transnational terrorists; and, therefore, that military targeting of such transnational terrorists can only occur in limited circumstances.

I. Framing the scope of the 'transnational' armed conflict

In order to determine whether the US can militarily target terrorists, it is important to consider the circumstances under which military force can be used. The use of military force is regulated by IHL³⁴ and IHL only applies when there is an armed conflict. Thus, to begin to determine whether the use of military force to target terrorists is lawful, it is necessary to ask two questions. First, does an armed conflict exist? Second, if it is an armed conflict, what sort of armed conflict is it? The answers to these questions depend on how terrorist activities generally and the specific contexts of the armed conflict in Afghanistan are framed.

A. Is there an armed conflict between the US and Al-Qaeda?

The previous US Administration sought to use an expanded notion of an armed conflict under the 'war on terror' to destroy terrorist cells around the world under IHL. The purpose would be to prevent Al-Qaeda from committing further terrorist attacks against

³⁰ Kretzmer, above n 27, 171; Anthony Dworkin, 'The Yemen Strike: The War on Terrorism Goes Global' (14 November 2002) Crimes of War Project <<http://www.crimesofwar.org/onnews/news-yemen.html>>.

³¹ Kenneth Roth in Kenneth Roth and Robert F Turner, 'Debating the Issues' in Sparks and Sulmasy (eds), above n 23, 398.

³² Letter from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights, above n 23.

³³ International Committee of the Red Cross (ICRC), 'Interpretive Guidance on Direct Participation in Hostilities under International Humanitarian Law (Adopted by the Assembly of the ICRC on 26 February 2009)' (2008) 90(872) *International Review of the Red Cross*; 991 (hereafter 'Guidance on Direct Participation').

³⁴ Ingrid Detter De Lupis, *The Law of War* (2nd ed, 2000), 156–8.

US interests, but the methods would have to fall under IHL, and therefore be performed in the context of an armed conflict. The ICRC has rejected the notion that a global war exists against terrorism,³⁵ as have many other commentators.³⁶ Under IHL, as the International Criminal Tribunal for the Former Yugoslavia (ICTY) has identified, an armed conflict is a military conflict where there is armed force between two or more parties (either States or non-State actors such as rebel groups).³⁷ The fighting must reach a certain level of intensity and be protracted,³⁸ and the parties must be organised into a military structure and represent an identifiable group.³⁹ The following subsections consider these issues in relation to the 'war with Al-Qaeda'.

(i) Is there a level of intensity in the conflict to make it armed conflict?

For the US to be able to militarily target Al-Qaeda, there must be an armed conflict between them. The US and some commentators consider that there is such an armed conflict stemming from attacks in 1996 and thereafter by Al-Qaeda against US interests, and that the war in Afghanistan is merely another part of that war.⁴⁰ This view ignores the fact that the continuing existence of an armed conflict is determined by IHL or *ius in bello*, not the declaration of a war under *ius ad bellum*.

Terrorism is prohibited under IHL as '[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population'.⁴¹ These could include acts that terrorist groups are known to perpetrate, such as beheadings killing UN and humanitarian personnel.⁴² While they are prohibited during armed conflict, the existence of terrorist attacks does not necessarily demonstrate an armed conflict. Usually, terrorist acts will not reach the threshold for an armed attack⁴³ or to establish the existence of an armed conflict, and therefore IHL will not apply to the situation of an isolated terrorist attack.

³⁵ International Committee of the Red Cross (ICRC), 'International humanitarian law and the challenges of contemporary armed conflicts (Document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007)' (2007) 89(867) *International Review of the Red Cross* 719, 724.

³⁶ See Mary Ellen O'Connell, 'The Legal Case against the Global War on Terror' (2004) 36 *Case Western Reserve Journal of International Law* 349; Marko Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: comparing the *Hamdan* and the Israeli *Targeted Killings* case' (2007) 89(867) *International Review of the Red Cross* 373.

³⁷ *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (ICTY, Appeals Chamber, Case No IT-94-1-A, 2 October 1995), [70] ('*Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*').

³⁸ *Prosecutor v Tadić* (ICTY, Trial Chamber, Case No IT-94-1-T, 7 May 1997), [562] ('*Tadić (Trial Chamber)*').

³⁹ *Prosecutor v Haradinaj* (ICTY, Trial Chamber, Case No IT-04-84-T, 3 April 2008), [60] ('*Haradinaj*'). See also *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), art 8(2)(f) ('*Rome Statute*').

⁴⁰ *Hamdan* 548 US (2006), 65; Thomas McK Sparks and Glenn M Sulmasy, 'Preface' in Sparks and Sulmasy (eds) above n 23; Mohamedou, above n 1, 2, 12, 17.

⁴¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), art 51(2) ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ('Additional Protocol II')*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), arts 4(2)(d), 13(2), (collectively, '*1977 Additional Protocols*').

⁴² Ben Saul, *Defining Terrorism in International Law* (2006), 298.

⁴³ Gabor Rona, 'Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"' (2003) 27(2) *The Fletcher Forum of World Affairs* 55, 63.

Common article 3 of the 1949 *Geneva Conventions*⁴⁴ applies to 'the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties', but does not provide a definition of 'armed conflict'. As stated above, the ICTY, extrapolating from common article 3, has said that an armed conflict exists whenever there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.⁴⁵ *Additional Protocol II* to the 1949 *Geneva Conventions* also applies to non-international armed conflicts, but it has a higher threshold. It provides that an armed conflict exists when there are 'sustained and concerted military operations'. It also provides that 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are not armed conflict, and IHL does not apply to them.⁴⁶ This test has been adopted in the *Rome Statute of the International Criminal Court* to demonstrate lack of an armed conflict.⁴⁷ The ICTY has also said that a conflict under common article 3 should be distinguished from 'banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law'.⁴⁸ The International Criminal Tribunal for Rwanda (ICTR) has also approved the criteria that armed conflicts must meet a certain level of intensity for common article 3 conflicts.⁴⁹ The ICTY has noted, however, that the test merely provides guidance as to how to determine an existence of an armed conflict and does not provide set requirements.⁵⁰

On the one hand, the September 11 attacks were called armed attacks by the US and by many other States with the UN Security Council also invoking the right to self-defence against armed attacks.⁵¹ The war in Afghanistan is certainly proceeding against transnational terrorists such as Al-Qaeda. Similarly in Iraq, insurgent forces conduct suicide attacks and explode improvised explosive devices (IEDs) with such regularity and intensity as to create an armed conflict between the insurgents and the coalition forces.⁵²

If the terrorist attacks by Al-Qaeda outside of these theatres of war were linked and demonstrated a pattern of violence and attacks, or if they reached a certain intensity, it could be possible to demonstrate that the attacks are part of an armed conflict.⁵³ Common

⁴⁴ *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 31, 85, 135, 287 (entered into force on 21 October 1950) (collectively, '1949 Geneva Conventions')*.

⁴⁵ *Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* [70].

⁴⁶ *Additional Protocol II* art 1(2).

⁴⁷ *Rome Statute* art 8(2)(f).

⁴⁸ *Tadić* (Trial Chamber) [562]; *Prosecutor v Limaj* (ICTY, Trial Chamber, Case No IT-03-66-T, 30 November 2005), [84] ('*Limaj*').

⁴⁹ *Prosecutor v Akayesu* (ICTR, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998), [602], [625] ('*Akayesu*').

⁵⁰ *Limaj* [86].

⁵¹ Letter from the Permanent Representative of the United States of America to the United Nations to the President of the Security Council, 7 October 2001 (UN Doc S/2001/946); Letter from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations to the President of the Security Council, 7 October 2001 (UN Doc S/2001/947; SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368, 12 September 2001); SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).

⁵² US Department of State, above n 18.

⁵³ Emmanuel Gross, 'Fighting Terrorism: Bringing Democratic Regime to Non-democratic Countries – The Legal Implications' (2007) 16 *Tulane Journal of International and Comparative Law* 17, 31.

article 3 is supposed to be applied as widely as possible.⁵⁴ Attacks over a period of time that may themselves be relatively minor, if carried out in a systematic way, can result in their being determined part of an armed conflict or establishing an armed conflict,⁵⁵ particularly if the other element of organisation by the armed group perpetrating the attacks exist and the State's military is required to respond.⁵⁶ Similarly, if terrorist attacks were to be continuous and they were responded to with force by an opposing side, they could be termed protracted and be a sustained military effort that amounts to an armed conflict. It will depend, however, on the circumstances of each attack and how States deal with it.⁵⁷

On the other hand, terrorist attacks are, by their nature, usually sporadic acts of violence. They are seemingly random attacks of a political or ideological nature and not attacks serious enough to constitute an armed attack leading to an armed conflict.⁵⁸ The terrorist attacks that have occurred around the world in the last 10 years and generally unrelated, although often linked in the public's mind to the 'war on terror'. The 2009 attacks in Jakarta were unrelated to the 2005 London bombings, which were unrelated to the 2004 Madrid bombings. The Jakarta bombings were also conducted by a group that has separated itself from the perpetrators of the 2002 Bali bombings. Terrorist attacks are usually specifically excluded from representing armed conflict,⁵⁹ even if they may extend over time. The ICTY has emphasised that the intensity of attacks is of greater weight than the duration in determining the existence of an armed conflict.⁶⁰ Reviewing their previous jurisprudence, in *Haradinaj*, the ICTY held that factors indicative of a non-international armed conflict include:

the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.⁶¹

The terrorist attacks and involvement in the armed conflict of Al-Qaeda in Afghanistan and Iraq meet these indicators, but aside from the September 11 attacks, no other terrorist attack has since been called an 'armed attack', nor has one prompted a war.⁶² Nor has any terrorist attack since — whether in Indonesia, Spain, London, Morocco, Russia, Egypt or

⁵⁴ International Committee of the Red Cross (ICRC), *Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949 <<http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument>>.

⁵⁵ *Tadić* (Trial Chamber) [566].

⁵⁶ ICRC, above n 54.

⁵⁷ ICRC, above n 35, 726.

⁵⁸ There is considerable opinion to the effect that armed attacks can only be carried out by, or be attributable to, states: *Nicaragua v United States* [195]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, [139].

⁵⁹ *Tadić* (Trial Chamber) [562].

⁶⁰ *Haradinaj* [49].

⁶¹ *Ibid.*

⁶² Sassòli, above n 1, 10.

elsewhere⁶³ — demonstrated military engagement or weaponry, military-type organisation or intensity required to demonstrate an armed attack. In the current situation, terrorist attacks meet the test of internal disturbance or short-lived acts of violence, but this puts them outside the boundaries of IHL.⁶⁴ While serious, they do not meet the required seriousness for armed conflict, nor has there been an escalation of violence;⁶⁵ the acts have been sporadic, without any apparent organisation between them.⁶⁶

Usually IHL will not operate in the context of the fight against terrorists, but only where there is an armed conflict.⁶⁷ Criminal law will apply to prevent and punish terrorist attacks when the perpetrators are apprehended.⁶⁸ The US will have to rely on an existing armed conflict to which the planned terrorist attacks can be linked, where there is a 'regularity and level of intensity to the violence such that it is fair to characterise the overall campaign as one of war',⁶⁹ to justify targeting of transnational terrorists under IHL.

The international or non-international nature of the conflict is discussed below. The next question to address before that issue is whether there are two or more parties to the conflict,⁷⁰ including the main protagonists for the purposes of the US's military targeting: Al-Qaeda and the US.

(ii) Are there two or more parties to the conflict?

In an armed conflict that would allow the US to target Al-Qaeda with military force transnationally, the two parties would have to include the US and Al-Qaeda because the US wants to use military force and wants Al-Qaeda to be a target of that force. In order for there to be an armed conflict involving a State and a non-State actor, there must be two or more parties and they must both or all be engaged in military action.⁷¹ The parties must exhibit a certain amount of organisation and military structure to be identifiable as a party to the armed conflict.⁷² Common article 3 provides no specific guidance as to how the parties must conduct themselves, but the Commentary on this article states that the rebel party should be 'an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention'.⁷³

In *Haradinaj*, the ICTY held that indicative factors of whether an organisation can be a party to an armed conflict include:

⁶³ See US Department of State, above n 18.

⁶⁴ *Tadić* (Trial Chamber) [562].

⁶⁵ *Limaj* [90].

⁶⁶ Mohamedou, above n 1, 14.

⁶⁷ Marcin Marcinko, 'Terrorists in Armed Conflicts: The Question of Combatancy' in Michael Glennon and Serge Sur (eds) *Terrorism and International Law* (2008) 367, 381.

⁶⁸ CH Powell and Garth Abraham, 'Terrorism and International Humanitarian Law' (2006) *African Yearbook on International Humanitarian Law* 118, 130.

⁶⁹ Kenneth Roth in Kenneth Roth and Robert F Turner, 'Debating the Issues' in Sparks and Sulmasy (eds), above n 23, 400. See also *Haradinaj* [49].

⁷⁰ *Tadić* (Trial Chamber) [562].

⁷¹ Marcinko, above n 67, 379.

⁷² *Tadić* (Trial Chamber) [562]; *Haradinaj* [50]; Sassòli, above n 1, 11.

⁷³ ICRC, above n 54.

the existence of a command structure ...; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, ... recruits and military training; its ability to plan, coordinate and carry out military operations, including ... logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire ... accords.⁷⁴

These are not all essential criteria. In *Limaj*, the ICTY held that the Kosovo Liberation Army's level of organisation was 'fluid and developing and not all zones had the same level of organisation and development'.⁷⁵ There was a general command structure, but with few levels, and generally the different commanders took orders from General Staff.⁷⁶ General Staff made statements about the organisation's activities and organised weapons.⁷⁷ They had no consistent place of location⁷⁸ and regulations were not necessarily enforced.⁷⁹ Further, they lacked a consistent uniform.⁸⁰ However, the ICTY looked at the organisation's ability to attract new members,⁸¹ and its provision of military training,⁸² command structure and ability to engage in negotiations and in intense armed conflict, as representative of their organisation's status as a party to the conflict.⁸³

The ICRC's 'Guidance on Direct Participation' recognises that while non-State actors involved in armed conflict might often be indistinguishable from the civilian population, they should not necessarily be classified as civilians and can be classified as being a member of a party to the armed conflict.⁸⁴ Their continuous engagement in conflict is what distinguishes them from the civilian population and demonstrates their membership of an irregular armed forces — it is a functional determination, rather than affiliation or ties to a group.⁸⁵

The status of the US in the conflict is straightforward. States are presumed to be proper parties to armed conflicts.⁸⁶ They also generally fall under the recognisable categories of parties to non-international armed conflicts by wearing a distinctive uniform and by carrying arms openly.⁸⁷ The US has declared that it is at war with Al-Qaeda and has indicated its intention to use military force against Al-Qaeda. Its national armed forces are well-established in a military hierarchy and it is engaged fully in the war in Afghanistan.

Al-Qaeda forces in Afghanistan are engaged in the armed conflict. In the conflict, Al-Qaeda soldiers do not wear uniforms; they use techniques that are in many cases

⁷⁴ *Haradinaj* [60].

⁷⁵ *Limaj* [95].

⁷⁶ *Ibid* [98].

⁷⁷ *Ibid* [100]–[101].

⁷⁸ *Ibid* [104].

⁷⁹ *Ibid* [116].

⁸⁰ *Ibid* [123].

⁸¹ *Ibid* [118].

⁸² *Ibid* [119].

⁸³ *Ibid* [125], [129], [134], [173].

⁸⁴ ICRC, above n 33, 1002.

⁸⁵ *Ibid* 1007.

⁸⁶ *Haradinaj* [60].

⁸⁷ ICRC, above n 33, 1005.

considered underhand; and they do not necessarily abide by IHL.⁸⁸ Nonetheless, they could be termed a party to the conflict in Afghanistan as they engage in war-like acts in Afghanistan and appear to be organised into some form of army. They provide training to their forces; they obtain weapons; they have been known to negotiate; they issue orders from a central command within Afghanistan; and the majority of them can be said to be engaged in continuous combat against the US (and Afghanistan).⁸⁹ They appear to meet the test to be parties to the conflict in Afghanistan.

On the other hand, internationally, aside from the conflicts in Iraq and Afghanistan, Al-Qaeda as an organisation is loosely held together and does not display a well-established hierarchy.⁹⁰ The groupings of Al-Qaeda outside Afghanistan are held together by an ideological belief, but have little contact with each other and appear to have autonomy in making decisions as to attacks and planning those attacks.⁹¹ They do receive training and do have a common goal, but they do not negotiate, they have no central command structure, they do not have a unified military strategy and they do not engage in military acts, as demonstrated above. Al-Qaeda as an organisation might have ideological appeal to such terrorist groups, but each attack has been performed by home-grown terrorists, without any commanding control by Al-Qaeda in Pakistan and Afghanistan for example. Similarly, none of the 'terrorists' outside of Afghanistan and Iraq are engaged in continuous combat functions. Within any perceived 'war on terror', outside of Afghanistan and Iraq it appears that Al-Qaeda lacks the ability to be recognised as a party to any such conflict.

(iii) Is there an armed conflict between the US and Al-Qaeda?

The above analysis has demonstrated the limited nature of an armed conflict existing between Al-Qaeda and the US. Terrorist attacks of the kind undertaken by Al-Qaeda or other terrorist groups do not amount to armed conflict outside the theatre of war in Afghanistan. Outside Afghanistan, Al-Qaeda does not display the minimum requirements to be a party to an armed conflict. On the other hand, where the armed conflict is occurring within and as a result of the war in Afghanistan, Al-Qaeda and the US are parties to that armed conflict, with the conflict being a non-international armed conflict to which IHL applies.

Without the link to the war in Afghanistan, the terrorist acts the US alleges Al-Qaeda has perpetrated and will perpetrate amount to acts of violence, but not to armed conflict. For an armed conflict to exist between the US and Al-Qaeda, which would potentially allow the US to militarily target Al-Qaeda wherever it may be operating, there must be a link established to the conflict in Afghanistan.

⁸⁸ Brett Shumate, 'New Rules for a New War: The Applicability of the Geneva Conventions to Al-Qaeda and Taliban Detainees Captured in Afghanistan' (2005) 18 *New York International Law Review* 1, 57–9.

⁸⁹ See Donna Miles, 'Gates, Mullen Discuss Far-Ranging Defense Issues', *American Forces Press Service*, 1 June 2008, <<http://www.defenselink.mil/news/newsarticle.aspx?id=50063>>; Jim Garamone, 'Petraeus Discusses Challenges in Central Command Area', *American Forces Press Service*, 22 May 2008, <<http://www.defenselink.mil/news/newsarticle.aspx?id=49977>>.

⁹⁰ Mohamedou, above n 1, 14.

⁹¹ *Ibid.*

B. If there is an armed conflict, what is the nature of the armed conflict?

The US has attempted, in its rhetoric, to establish a new type of armed conflict, spreading across borders and timeframes.⁹² However, the conflict envisaged could fit into one of the two already established types of armed conflict: international and non-international armed conflict. An international armed conflict is a conflict between two or more States, or between a State and an armed group that has substantial links to another State.⁹³ A non-international armed conflict is between a State's armed forces and one or more armed groups, or between two armed groups on the territory of one State.⁹⁴ IHL applies to both these situations in varying degrees and under different treaties.

Having established that an armed conflict against transnational terrorists must maintain substantial links to the conflict in Afghanistan for targeting of terrorists to be legitimate under IHL, it is useful to consider the type of armed conflict constituted by the war in Afghanistan.⁹⁵ It is also useful to look at the temporal and geographical aspects of the conflict, so as to determine the extent of an armed conflict against Al-Qaeda as transnational terrorists.

(i) Is the conflict in Afghanistan an international or non-international armed conflict?

It is necessary to consider what type of armed conflict exists in which both parties would be engaged in order to determine what principles of IHL apply to the targeting of Al-Qaeda by the US. The primary treaties regulating international armed conflicts are the *1949 Geneva Conventions* and the *1977 Additional Protocols*. Non-international armed conflicts are subject to common article 3 and *Additional Protocol II*. The US has not ratified either *Additional Protocol I* or *Additional Protocol II*, so only common article 3 and customary international law apply to the US's activities in non-international armed conflicts.⁹⁶

Originally, when the US and its allies attacked Afghanistan in 2001, the conflict was an international armed conflict: a number of States (the US and its allies) were attacking another State (Afghanistan).⁹⁷ The Government of Afghanistan was not recognised by many of the attacking States. But the existence of the Taliban as a de facto government brought the conflict within common article 2 of the *1949 Geneva Conventions*, therefore making it an international armed conflict.⁹⁸ Al-Qaeda and associated groups, and the Northern Alliance, were engaged in the armed conflict.⁹⁹

⁹² See Robert M Gates, 'Remarks to the Fort Bliss Community (Fort Bliss, TX)', (Speech delivered at Fort Bliss Officers' Club, Fort Bliss, Texas, 1 May 2008) <<http://www.defense.gov/speeches/speech.aspx?speechid=1235>>; Lisa Daniel, 'Cheney Praises Fort Hood Troops, Pledges Perseverance in Iraq', *American Forces Press Service*, 26 February 2008, <<http://www.defenselink.mil/news/newsarticle.aspx?id=49082>>.

⁹³ *1949 Geneva Conventions* common art 2; *Tadić* (Trial Chamber) [569].

⁹⁴ *1949 Geneva Conventions* common art 3; *Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [70].

⁹⁵ An armed conflict against terrorists and insurgents exists in Iraq as well, but for the purposes of this argument and for the reason that this example is the most widely quoted, the example of Afghanistan will continue to be the example analysed here.

⁹⁶ In the case of *Hamdan*, the US Supreme Court held that it did not need to determine whether an international or non-international armed conflict existed, but that common article 3 at any rate applied to the conflict in Afghanistan: *Hamdan* 548 US (2006), 66.

⁹⁷ *1949 Geneva Conventions* common art 2.

⁹⁸ *Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [70].

⁹⁹ *Additional Protocol I* art 43(1); cf Yoram Dinstein, *War, Aggression and Self-defence* (4th ed, 2005), 7.

Now that Afghanistan is a US ally and the conflict is going on within the territory of Afghanistan, the war in Afghanistan is, for practical and legal purposes, a non-international armed conflict.¹⁰⁰ The State of Afghanistan is now involved, with the support of the US and others, in a war against several different armed groups within Afghanistan, primarily Al-Qaeda and the Taliban.

Technically, any armed conflict between Al-Qaeda and the US will be a non-international armed conflict as it is between a State and an armed group. As already shown, any military targeting of Al-Qaeda under IHL by the US will have to have a link to the conflict in Afghanistan or to another armed conflict (for example Iraq), otherwise it cannot be considered to be an armed conflict at all and there will not be two recognisable parties to the conflict. The original armed conflict on which the extension of the conflict must be based is now a non-international armed conflict. Therefore, the targeting by the US of Al-Qaeda would appear to be governed by IHL as it relates to a non-international armed conflict, but not to an international armed conflict.

(ii) What is the geographical scope of the armed conflict?

The concept of using military force under IHL against Al-Qaeda, wherever it is operating in the world, moves away from the traditional idea of a non-international armed conflict within the territory of a single State. In this case, the relevant conflict to which all use of military force against Al-Qaeda must be related to be legitimate is a non-international armed conflict. Nonetheless, the US's plan is not to limit the geographical scope of the armed conflict to the territory of Afghanistan, but to use force wherever Al-Qaeda members exist. The conflict could be going on far away from the source of the original armed conflict, but this might not necessarily prevent an armed conflict against transnational terrorists from being a legitimate armed conflict, provided the other criteria for armed conflict are met.

Common article 3 provides that a non-international armed conflict is one 'occurring in the territory of one of the High Contracting Parties'. As has been pointed out by the ICRC, since all States are 'High Contracting Parties' to the *1949 Geneva Conventions*, 'any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention'.¹⁰¹ The ICTY has said that the geographical and temporal scope of a conflict is broad; it is not limited to the area in a territory where hostilities are taking place, but applies to the whole of the territory.¹⁰² There still exists, however, some requirement that there be a territorial nexus to a particular geographic State or region for a conflict to exist.¹⁰³ Every State in the world may be a party to the *1949 Geneva Conventions* and be bound by them, but this does not mean that an armed conflict will exist anywhere where parties to a conflict may be planning or training or even conducting attacks. For example, can an armed conflict extend to small instances of violence well away from the main conflict?

¹⁰⁰ ICRC, above n 35, 725.

¹⁰¹ ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* (ICRC Opinion Paper, March 2008), 3 <[http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf)>.

¹⁰² *Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* [69].

¹⁰³ Marcinko, above n 67, 377.

The geographical scope of an armed conflict is of course not limited to the area in which fighting is taking place.¹⁰⁴ International conflicts between two States can be fought in many other places outside those States¹⁰⁵ and in non-international armed conflict, cross-border activities and targeting sites which are in a neighbouring country may be part of that non-international armed conflict when linked to an existing conflict. In an era of technology that extends to use of space satellites, internet and remote-controlled weapons,¹⁰⁶ the person who controls a weapon or engages in fighting could be geographically remote from the territory on which there is an armed conflict. Nonetheless, the actions of that person would still be directed to the territory of the conflict and have a direct causal impact on the conduct of the armed conflict.¹⁰⁷

The territorial nexus is not that the non-international armed conflict must occur on the territory of one State, but rather that there should be continuity of territory with each act being linked to the next and connected to a particular territory where the armed conflict occurs.¹⁰⁸ If actions occur as part of an armed conflict directly, which are not in the particular vicinity of the armed conflict, IHL will still apply.¹⁰⁹ Conversely, IHL will not apply if the actions outside a territory in which the armed conflict is ongoing do not occur as a direct part of that armed conflict.

The nature of terrorist activities is that they are seemingly random, conducted against various different groups of people and in different States. Al-Qaeda has allegedly conducted attacks in the US, UK, Kenya, Spain, Pakistan, Yemen and elsewhere.¹¹⁰ They are also operating in Afghanistan as part of an armed conflict, as discussed above. But an armed conflict that is conducted on several different, unrelated territories by both parties (as a hypothetical example: Al-Qaeda attacks in the UK, so the US attacks Al-Qaeda bases in Sudan) moves away from the territorial link to the existing armed conflict. Also, each act has no direct impact on the armed conflict taking place in Afghanistan.¹¹¹ Again, each attack becomes an act of sporadic violence, and therefore unrelated to the conflict.¹¹² In other words, the recent attacks in these different countries unrelated to the actual conflicts had no direct impact on the conduct of hostilities in Afghanistan and, therefore, are not linked to the existing armed conflicts.

(iii) What is the temporal scope of the armed conflict?

As discussed above, relying on common article 3, the ICTY has said that '[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond

¹⁰⁴ *Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* [68].

¹⁰⁵ For example, World War II was not fought in the territories of the US or Japan for the most part, although these were major parties to the international armed conflict.

¹⁰⁶ See Jackson Maogoto and Steven Freeland, 'The Final Frontier: The Law of Armed Conflict and Space Warfare' (2007) 23 *Connecticut Journal of International Law* 165.

¹⁰⁷ ICRC, above n 33, 1023.

¹⁰⁸ The question of 'acts' is discussed in Part 3.

¹⁰⁹ *Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* [68].

¹¹⁰ Mohamedou, above n 1, 6.

¹¹¹ There could be an indirect impact with the withdrawal of troops from Afghanistan by International Security Assistance Force (ISAF) members in response to home grown terrorist attacks, but this does not directly affect the conduct of the armed conflict.

¹¹² Rona, above n 43, 62.

the cessation of hostilities until a general conclusion of peace is reached'.¹¹³ The requirement of the protracted nature of a conflict generally excludes terrorist acts.¹¹⁴ If the terrorist attacks are prolonged and intense, as seen above, they could amount to an armed conflict and the armed conflict would endure for the length of the hostilities. However, the concept of the 'war on terror' or a war 'with Al-Qaeda' is indeterminate in time; there was no specified beginning and there can be no specific end.¹¹⁵ In this case, currently, the attacks by Al-Qaeda members outside of the theatre of war in Afghanistan and Iraq do not amount to armed conflict.

Any military targeting that the US may undertake (provided that it meets the other conditions above) may be legal if it occurs during the conflict in Afghanistan. However, once hostilities have ceased there, the ability to conduct military targeting will cease. There can be no extension of time to encompass a more general war against transnational terrorists unrelated to the war in Afghanistan.

2. Framing the role of transnational terrorists in an armed conflict

The previous section has shown that the US potentially could conduct military targeting of Al-Qaeda, but only in situations linked to an existing conflict — whether created by a series of terrorist attacks or as part of an existing armed conflict (probably only Afghanistan or Iraq in the current situation). Having determined that a limited scope of an armed conflict exists temporally and geographically as a non-international armed conflict, the question of whether such military targeting of Al-Qaeda would be legal depends upon the participants themselves: where they are operating, what they are doing and how closely linked they are to the armed conflict.

The need to distinguish between those who are engaged in military operations and are, therefore, legitimate targets and civilians, and those not engaged in military operations, is called the 'principle of distinction' and is a fundamental tenet of IHL¹¹⁶ that the US and other States are obliged to respect as customary international law¹¹⁷: 'distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, to the effect that the latter be spared as much as possible'.¹¹⁸ Only persons who are actively engaged in the fighting should be the subject of targeting. All other persons are to be spared as far as military necessity and proportionality dictates (as discussed below).

In an international armed conflict, IHL distinguishes between combatants and civilians. In non-international armed conflict this distinction does not exist, rather the distinction is

¹¹³ *Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* [70].

¹¹⁴ *Prosecutor v Delalić* (ICTY, Trial Chamber, Case No IT-96-21-T, 16 November 1998) ('*Čelebići*'), [184].

¹¹⁵ *Hamdi v Rumsfeld* 542 US 507 (2004), 12; Mohamedou, above n 1, 23.

¹¹⁶ Rona, above n 43, 66; *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel* (High Court of Justice, Supreme Court of Israel HCJ 769/02, 11 December 2005) [23] ('*Israeli Targeted Killing Case*'); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004), 82.

¹¹⁷ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (2005) vol 1, Rule 1, 3.

¹¹⁸ Jean Pictet, International Committee of the Red Cross (ICRC), *The Principles of International Humanitarian Law* (1966), 53.

between combatants and non-combatants, or protected and non-protected persons.¹¹⁹ Nonetheless, for the purposes of this discussion, the terms combatant and civilian will be used, in accordance with the ICRC's 'Guidance on Direct Participation'.¹²⁰ When targeting persons in an armed conflict, only those persons designated as non-protected persons and, therefore, 'legitimate targets' can be militarily targeted.¹²¹

Common article 3 provides that in a non-international armed conflict the following people have protection: '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause'. Conversely, civilians who are taking 'direct part in the hostilities' in a non-international armed conflict for a distinct time, such as in the present case, can be subject to military targeting. The ICRC's 'Guidance on Direct Participation' is of great use here in clarifying what is meant by directly participating in hostilities.¹²²

The US is fighting in Afghanistan against Al-Qaeda. It states that Al-Qaeda members are legitimate targets in the conflict against the terrorist enemy wherever they are operating in the world, and have demonstrated this by targeting Al-Qaeda members in Yemen and on the borders of Pakistan.¹²³

The first question in relation to whether the US can target Al-Qaeda members is whether they are protected or non-protected persons. There is also the question of whether their membership of Al-Qaeda renders them legitimate targets. The next question is whether they are directly participating in hostilities and whether they have a continuous combat function. The geographical and temporal scope of the conflict also must be examined again when considering these actors and their roles in hostilities. Finally, the question of whether it is necessary and proportionate to target terrorists in general must be addressed.

The discussion here is solely centred on military targeting of persons directly engaged in hostilities, where they are singled out for targeting due to their involvement in the conflict. It is also possible to target buildings and other property; including any installation that constitutes a military objective and is not protected.¹²⁴ If a person indirectly involved in hostilities, or even supposed to be protected from the conflict, is also hit and injured or killed, depending on the military necessity, this would be collateral damage; it would not constitute direct targeting of the person killed. Issues along these lines are drawn out briefly below.

¹¹⁹ ICRC, above n 35, 728.

¹²⁰ ICRC, above n 33, 997.

¹²¹ *Additional Protocol I* art 51(3); Hans-Peter Gasser, 'Acts of terror, "terrorism" and international humanitarian law' (2002) 84 *International Review of the Red Cross* 547, 554.

¹²² ICRC, above n 33.

¹²³ Letter from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights, above n 23; US Department of State, above n 4; O'Connell, above n 28; Dworkin, above n 30.

¹²⁴ See *Additional Protocol I* arts 53, 55, 56.

A. What is the status of Al-Qaeda members under IHL?

As argued above, Al-Qaeda in Afghanistan is a party to the conflict because of its participation in the conflict, but individual members are hard to classify as they are not members of regular armed forces and do not fall easily into the 'combatant' category. The US started fighting Al-Qaeda in Afghanistan under an international armed conflict, therefore the distinction between combatants and non-combatants/civilians has been retained in the US's approach.¹²⁵ However, the US had classified Al-Qaeda members in Afghanistan as 'unlawful combatants', being between civilian and combatant, which gives them a particular legal status.¹²⁶ This definition has since been abandoned by the current Administration, but it is worth discussing Al-Qaeda's status in relation to whether those operating under its network can be targeted. The persons captured in the conflict in Afghanistan (and many captured outside Afghanistan) in the context of the war in Afghanistan were invariably sent to Guantánamo Bay as 'unlawful combatants', even if they were not charged with any crimes related to a breach of IHL.¹²⁷ The definition of 'unlawful combatants' was applied to prevent the detainees from accessing prisoner of war protections under *Geneva Convention (III)*, but the question of what status Al-Qaeda members have under IHL is also relevant to whether they can be targeted with military force.

The argument for the definition of 'unlawful combatant' was that 'terrorists' in an armed conflict do not conform to the definitions in IHL for combatants in an international armed conflict. They are not soldiers readily identifiable by their uniforms and military structure; they are not soldiers *hors de combat*, nor do they constitute a '*levée en masse*'.¹²⁸ They appear to be civilians. However, they are engaged in hostilities.¹²⁹ As noted above, Al-Qaeda members in Afghanistan do not wear uniforms, they engage in subterfuge tactics and they often switch between the appearance of civilian status and combatant status at different points. The argument is that because terrorists do not identify as combatants under IHL, and yet engage in combat, they should not enjoy the protection of IHL in relation to treatment as prisoners of war or as protected from targeting — they are therefore called 'unlawful combatants'.¹³⁰

The US Supreme Court in *Hamdan v Rumsfeld* was asked to agree with the US Government's contention that the 1949 *Geneva Conventions* do not apply to Al-Qaeda members as they are not 'Contracting Parties' to the Conventions and therefore cannot be,

¹²⁵ See discussion in Gabor Rona, 'Legal Issues in the "War on Terrorism" – Reflecting on the Conversation between Silja NU Voneky and John Bellinger' (2008) 9 *German Law Journal* 711, 716.

¹²⁶ Thomas Geraghty, 'The Criminal-Enemy Distinction: Prosecuting a Limited War against Terrorism Following the September 11, 2001 Terrorist Attacks' (2002) 33 *McGeorge Law Review* 551, 582; Steven Donald Smith, 'Guantanamo Detainees Being Held Legally, Official Says', *American Forces Press Service*, 15 February 2006.

¹²⁷ See, eg, US Department of Defense, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations* (4 April 2003) <<http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf>>; *Hamdan* 548 US (2006), 36.

¹²⁸ See, eg, *Geneva Convention (III)* arts 4(2), 4(6). See *Čelebići* [268].

¹²⁹ Marcinko, above n 67, 408; Sassòli, above n 1, 16.

¹³⁰ See *Ex parte Quirin*, 317 US 1 (1942), 28; *Hamdi v Rumsfeld* 542 US (2004), 2–3; John C Dehn 'Why Art 5 Status Determinations are Not "Required" at Guantanamo' (2008) 6 *Journal of International Criminal Justice* 371, 381; Jeffrey F Addicott, 'Legal and Policy Implications for a New Era: The "War on Terror"' (2002) 4 *The Scholar: St Mary's Law Review on Minority Issues* 209, 239; Christopher J Mandernach, 'Warriors Without Law: Embracing a Spectrum of Status for Military Actors' (2007) 7 *Appalachian Journal of Law* 137, 138–9; cf *Čelebići* [271].

and are not, obliged to abide by its principles — meaning that the US is also not obliged to apply IHL to the treatment of such persons.¹³¹ While the Court declined to engage on that issue, they held that common article 3 does apply as a minimum standard. There is a non-international armed conflict (even if arguably there was also an international armed conflict going on at the same time) and Al-Qaeda members who are captured are persons who have participated in hostilities. Although they are non-protected persons, they should be subject to minimum guarantees.¹³² The Court implicitly made the distinction between the roles of participants in non-international and international armed conflicts. It identified common article 3 as applying the correct test for identifying what role a person plays in a non-international armed conflict and what protections they derive, but it did not expressly state what role it considered terrorists or Al-Qaeda members to play.¹³³

The Government of Israel has also sought to create this new legal class of ‘unlawful combatant’, but the Israeli Supreme Court was more explicit in rejecting this as a new category of persons under IHL,¹³⁴ although it retained the language of ‘unlawful combatant’ to talk about civilians participating directly in hostilities.¹³⁵ The Israeli Court was dealing with military targeting of terrorists in what it termed an international armed conflict,¹³⁶ but its analysis is useful in the context of combating terrorists. It found that in international armed conflicts there are civilians or combatants; no other legal category exists.¹³⁷ It held that terrorists in Israel are civilians, but they are civilians who are ‘not protected from attack as long as [they are] taking a direct part in hostilities’.¹³⁸

In essence as outlined above, in an international armed conflict there are only civilians and combatants;¹³⁹ and in non-international armed conflict there are only protected and non-protected persons. The ICTY has explicitly said there is ‘no gap’ between these categories when discussing prisoner-of-war status.¹⁴⁰ Those who act outside IHL, without identifying themselves, and not necessarily organised into a coherent structure, remain protected persons.¹⁴¹ When they engage in armed conflict, however, they are taking a direct part in hostilities, which makes them non-protected persons for the time that they are engaged in the hostilities.¹⁴² Al-Qaeda can be seen either: as an irregular armed force in which the members are legitimate targets as members of that force; or as civilians who might be directly participating in hostilities. However, often Al-Qaeda members in

¹³¹ *Hamdan* 548 US (2006), 65.

¹³² *Ibid* 66–9.

¹³³ Hamdan was later charged as an ‘unlawful enemy combatant’ for crimes related to training as a terrorist and providing material support to Al-Qaeda: *Charge Sheet against Salim Ahmed Hamdan* (5 April 2007) <http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf>.

¹³⁴ *Israeli Targeted Killing Case* [28].

¹³⁵ See, eg, *ibid* [26].

¹³⁶ *Ibid* [21].

¹³⁷ *Ibid* [28].

¹³⁸ *Ibid* [26]. See also Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law* (2005) [26] <<http://www.stoptorture.org.il/files/cassese.pdf>>.

¹³⁹ Marcinko, above n 67, 409.

¹⁴⁰ *Čelebići* [271].

¹⁴¹ Kretzmer, above n 27, 191–2. See also ICRC, *Commentary on Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949* <<http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument>>; *Akayesu* [582].

¹⁴² ICRC, above n 33, 997.

non-international armed conflicts such as Afghanistan more readily fall into the latter category. This leads to the question of to what extent Al-Qaeda members are involved in the armed conflict.

B. Are Al-Qaeda members combatants by reason of their membership of a terrorist organisation?

The question whether Al-Qaeda are combatants is particularly difficult when Al-Qaeda members conduct terrorist attacks outside of Afghanistan. The section below will address the acts of Al-Qaeda members when they are directly participating in hostilities, but it is useful to examine whether mere membership of Al-Qaeda, as a terrorist organisation, makes those members legitimate targets.

On the one hand, when a member of a regular armed force attempts to target a person who poses no threat and is outside a situation of open combat, such targeting would be illegal under IHL.¹⁴³ On the other hand, as suggested by one expert at the ICRC's experts meeting on direct participation in hostilities,¹⁴⁴ merely being a member of a group that engaged in hostilities would qualify that person to be directly participating in hostilities.¹⁴⁵ It seems the US would favour this approach in targeting Al-Qaeda members when there is no direct link by individuals to the armed conflict. The argument would be that Al-Qaeda members are engaged in hostilities in Afghanistan, and that other Al-Qaeda members, as members of the group, are supporting the effort in the armed conflict through their membership and are, thus, able to be targeted.

Membership is difficult to determine, particularly with terrorist organisations. They do not meet the general test for membership of an armed group, rarely control territory and have changing structures.¹⁴⁶ Al-Qaeda is a disparate organisation. It has a limited command structure and relies on individual groups to plan and organise terrorist attacks.¹⁴⁷ It would be difficult to determine whether particular groups are members of Al-Qaeda and have equal control over activities within the armed conflict. The 'membership' approach does not take into account the need under IHL for an element of directness in any participation. People can be members of a group external to the conflict, such as reservist soldiers or military instructors, but where they are removed from the actual conflict; they are not directly participating in hostilities and are, therefore, not legitimate targets, despite membership of the group that is engaged in hostilities.¹⁴⁸

The ICRC's 'Guidance on Direct Participation' looks at membership of an irregular armed group for the purposes of whether a person is a civilian or a combatant. It states that membership of an irregular armed group 'can only be reliably determined on the basis of functional criteria'.¹⁴⁹ In other words, 'membership must depend on whether the

¹⁴³ Nils Melzer, 'Third Expert Meeting on the Notion of Direct Participation in Hostilities' (Summary Report, Meeting co-organised by the ICRC and the TMC Asser Institute, October 2005) <[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct_participation_in_hostilities_2005_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf)>.

¹⁴⁴ Ibid 48–9.

¹⁴⁵ Ibid 48.

¹⁴⁶ See *ibid* 47, 54; Sassòli, *above n* 1, 17.

¹⁴⁷ Mohamedou, *above n* 1, 14; Shumate, *above n* 88, 57–8.

¹⁴⁸ Melzer, *above n* 143, 35, 50.

¹⁴⁹ ICRC, *above n* 33, 1005.

continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict'.¹⁵⁰ Civilian or combatant status is not related to mere membership of the group. Under this reasoning, members of Al-Qaeda cannot be targeted for being members of Al-Qaeda, per se. Rather, members of Al-Qaeda might be able to be targeted as members of an irregular armed force only if they are continually engaged in a fighting function or directly participating in hostilities. Only those members continually engaged directly in hostilities will be able to be targeted legitimately under IHL. This leads to the question of direct participation in the next section.

C. Are Al-Qaeda members civilians who are directly participating in the conflict?

The question of whether particular Al-Qaeda members are directly participating in hostilities is central to whether the US can legitimately target them under IHL. How to determine whether a person is taking an 'active' or 'direct part' in hostilities is a question that is much debated.¹⁵¹ The ICRC's 'Guidance on Direct Participation', as already mentioned, sought to clarify this issue.¹⁵²

A distinction is sometimes drawn between 'hostilities' and 'direct participation' for the purposes of analysis.¹⁵³ The ICRC Experts Meeting prior to the ICRC's Guidance being adopted was unanimous in stating that 'the qualification of an act as direct participation in hostilities required a link to military activities'.¹⁵⁴ The Commentary on *Additional Protocol I* says that, in the context of an international armed conflict, "'hostilities'" covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon'.¹⁵⁵ They equate 'hostile acts' to 'direct participation'.¹⁵⁶ The Commentary further states: '[h]ostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces'.¹⁵⁷ The ICTR has held that the terms 'active participation' and 'direct participation' in hostilities mean the same thing.¹⁵⁸

Drawing these elements together, the 'Guidance on Direct Participation' sets out three criteria for direct participation in hostilities:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack ...;

¹⁵⁰ Ibid 1007.

¹⁵¹ Sassòli, above n 1, 18.

¹⁵² ICRC, above n 33.

¹⁵³ See *Israeli Targeted Killing Case* [33].

¹⁵⁴ Melzer, above n 143, 9, 21.

¹⁵⁵ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 618–19.

¹⁵⁶ Ibid 619.

¹⁵⁷ Ibid 618.

¹⁵⁸ *Akayesu* [629].

2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part ...;
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.¹⁵⁹

While the direct hostile acts must reach a certain threshold of directly harming the military operations of the other side, direct hostile acts do not necessarily need to include the use of armed force or to cause 'death, injury or destruction'.¹⁶⁰ They can include attacks on computer networks, capturing military personnel, or denying military personnel access to territory.¹⁶¹ The Israeli Supreme Court has said that transporting combatants or weapons from one area of hostilities to another, operating or servicing weapons, or supervising the operation of weapons constitutes direct participation in hostilities.¹⁶² The 'Guidance on Direct Participation' suggests that '[a]dverse effects may also arise from capturing or otherwise establishing control over military personnel, objects and territory'.¹⁶³ This could include guarding military personnel to stop them escaping, or clearing landmines that the enemy has laid.¹⁶⁴ The requirement is that they have an adverse effect on the conduct of operations by the other side. Manipulating computer networks, cutting electricity supply or building road blocks will not be actions amounting to direct participation in hostilities if they do not have an adverse effect on the other side.¹⁶⁵

The Commentary to the 1977 *Additional Protocols* says that '[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort'.¹⁶⁶ General support from the population for those participating in hostilities cannot amount to those supporters also being involved in hostilities. A guard or a cook for an armed group is not necessarily engaging directly in hostilities, depending on his or her particular roles in supporting the military operations.¹⁶⁷ The Israeli Supreme Court has said that 'a civilian who sells food or medicine to unlawful combatants is ... taking indirect part in the hostilities',¹⁶⁸ as are people who provide logistical or financial support to the combatants,¹⁶⁹ but such persons cannot be targeted because their involvement is indirect, not direct. War sustaining efforts might indirectly harm the other side because they assist the one party to the conflict and prolong hostilities, but they are not directly the cause of adversity to the enemy.¹⁷⁰ Under IHL, any acts one step removed from the actual organisation of the operations and participation in the hostilities means that any

¹⁵⁹ ICRC, above n 33, 995–6.

¹⁶⁰ Melzer, above n 143, 14.

¹⁶¹ Ibid; Michael N Schmitt, 'Wired Warfare: Computer network attack and jus in bello' (2002) 84 *International Review of the Red Cross* 365, 375.

¹⁶² *Israeli Targeted Killing Case* [35].

¹⁶³ ICRC, above n 33, 1017.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 1019.

¹⁶⁶ Sandoz, Swinarski and Zimmermann, above n 155, 619.

¹⁶⁷ Melzer, above n 143, 16.

¹⁶⁸ *Israeli Targeted Killing Case* [34].

¹⁶⁹ Ibid [35].

¹⁷⁰ ICRC, above n 33, 1020.

participation is indirect and those persons engaging indirectly remain protected persons and not legitimate targets.

The Israeli Supreme Court has also said that those sending persons into attack and those who plan attacks take a direct part in hostilities,¹⁷¹ significantly broadening the test of ‘actual harm’. The Court said that the military should be able to target persons further down the chain of command.¹⁷² In his Expert Opinion on the *Israeli Targeted Killing Case*, Cassese explicitly rejected the notion that persons planning and preparing an attack could be targeted.¹⁷³ He suggested a different test: that if a person planning an attack was not operating in military premises nor carrying arms openly, the person could not be targeted. Cassese’s rejection of planners of attacks as legitimate targets on this basis ignores the realities of acts by Palestinians in this case and by Al-Qaeda in the context of this article.¹⁷⁴ A balance should be reached between the positions of the Israeli Supreme Court and of Cassese. As outlined in the ‘Guidance on Direct Participation’, there should be a causal link between the participation in hostilities by a protected person and the harm (although, not necessarily loss of life) to their adversary for that participation to constitute ‘direct participation’.¹⁷⁵ Applying this test to those who plan attacks: there will usually not be a direct causal link from the planning to the actual carrying out of the attack because many factors can break the causal link and there will not be a direct threat in planning an attack. Moreover, persons planning an attack may be well out of range of the hostilities and it may not be proportionate to target them. On the other hand, if a person is planning an attack and organising the weapons and training near or in the theatre of war, there will be the element of directness needed in a causal link to the harm.

In Afghanistan, Al-Qaeda members are generally classified as engaging directly in hostilities when they are engaging directly in fighting, bearing arms, planting IEDs, building IEDs, or engaging in sniping tactics. These acts cause a direct threat to the opposing side and are direct acts of aggression. Al-Qaeda members would be able to be legitimately targeted under such circumstances.¹⁷⁶ If they engage in night jobs (after their usual work during the day) — such as making bombs, collecting the equipment to make IEDs, guarding premises or keeping a look-out — the question becomes more complicated.

Such tasks as making a bomb might be directly related to the conflict, if the threat that it will be laid is imminent. Guarding facilities will be more difficult to determine. If the purpose of guarding is to protect fighters or bomb equipment that will be directly used in hostilities, the guard will be a legitimate target because his or her actions will have a direct causal link to the projected harm to the other party. A guard might not be a legitimate target if he or she is: guarding premises for a different reason than opposing the enemy; merely providing support to the group; or is guarding goods that might one day be used to prepare a bomb in an unspecified location and timeframe. If the facilities were targeted and the guard was killed, this could be legitimate as a form of collateral damage in the pursuit of the military objective of destroying the factory. In each particular case, the test will be to

¹⁷¹ *Israeli Targeted Killing Case* [37].

¹⁷² *Ibid.*

¹⁷³ Cassese, above n 138, [15].

¹⁷⁴ He acknowledges this issue, but does not provide a realistic response to the problem: *Ibid* [16].

¹⁷⁵ ICRC, above n 33, 1021.

¹⁷⁶ Daniel Statman, ‘Targeted Killing’ (2004) 5 *Theoretical Inquiries in Law* 179, 186.

determine, in the context of the armed conflict: whether the acts in which Al-Qaeda members are engaged at the particular time are military related; whether they pose a threat; and whether they are causally linked to the armed conflict.

In Afghanistan, many of the acts of Al-Qaeda members will be determined to be directly participating in hostilities, such as making bombs, laying IEDs, and engaging in direct fire. But many other activities, particularly those outside of the armed conflict — such as training, planning separate bomb attacks, and inciting violence — will lack any direct causal relationship to the conflict and to direct harm to the opposing party that is the US.

D. Are Al-Qaeda acting within the geographical scope of the conflict?

The question then remains whether Al-Qaeda members outside of Afghanistan are directly participating in hostilities. It is demonstrated above that there is no armed conflict in relation to the 'war on terror' aside from the conflicts in Afghanistan and Iraq. However, the acts that Al-Qaeda members might be preparing and committing beyond these two States could conceivably constitute direct participation in hostilities. The acts would need to be directly related to the hostilities in those States and be more than logistical and financial support. The acts that terrorists outside Afghanistan and Iraq have been accused of range from separate terrorist attacks, killing hundreds of people, to providing financial support, strategic support, weapons and other equipment. The separate terrorist attacks that occur outside of the armed conflict are potentially unrelated to that conflict; they could be terrible acts of violence, but not armed attacks for the purposes of international law.¹⁷⁷ With technology, it is possible that Al-Qaeda members outside of Afghanistan could fly an unmanned plane into Afghanistan and launch attacks from outside the region.¹⁷⁸ They could also use satellite and other remote and "space" technology to launch weapons¹⁷⁹ and to hack into military databases and systems.¹⁸⁰ In such cases, the persons controlling the plane could be classed as directly participating in hostilities and, therefore, as legitimate targets. The fact that those persons are geographically separate from the conflict would not prohibit their being directly involved (although the geographical remoteness may raise questions of the proportionality of targeting such persons).

E. Are Al-Qaeda members acting within the temporal scope of the armed conflict?

The purpose of the US's approach would be to target Al-Qaeda members wherever they are operating to prevent terrorist attacks, as it has attempted to do in instances already mentioned. However, the test for whether a person is a non-protected person and, thus, able to be targeted under customary international law includes the fact that persons are only non-protected persons 'for such time' as they take a direct part in hostilities.¹⁸¹ As soon as they stop participating in hostilities, they regain their protection as civilians, although they might be able to be prosecuted for committing war crimes or other

¹⁷⁷ Mark Weisburd, 'Al-Qaeda and the Law of War' (2007) 11 *Lewis and Clark Law Review* 1063, 1075.

¹⁷⁸ See ICRC, above n 35, 735.

¹⁷⁹ See Maogoto and Freeland, above n 106, 169.

¹⁸⁰ See Schmitt, above n 161, 375–9.

¹⁸¹ See *Additional Protocol I* art 51(3), in the context of international armed conflicts.

crimes.¹⁸² If protected persons participate in hostilities and then stop, they return to being protected persons at the end of that particular period of hostilities and cannot be targeted for previous acts.¹⁸³ Having articulated that test, the Israeli Supreme Court went on to say that ‘a civilian who has joined a terrorist organisation which has become his “home”, and in the framework of his role in that organisation he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts’.¹⁸⁴ Dinstein has said likewise that persons carrying out ‘military raids by night, while purporting to be an innocent civilian by day ... can be lawfully targeted’.¹⁸⁵ This approach appears to contradict the notion that terrorists are generally protected persons and it is only when they are engaged in hostilities that they become targets.¹⁸⁶ The test should be not how far away they are and whether they have ‘gone home’ for a short while; rather, it is whether the person targeted ‘still constituted an immediate “threat” in terms of engagement in hostilities’.¹⁸⁷

For Al-Qaeda members who engage in seasonal fighting, they fight for one season and then return home for the harvest or for the planting. They are directly engaged in hostilities during the time that they are engaged in fighting. When they return to the base camp, they might be engaged in activities that are directly related to their next attack (such as preparing weapons or training), and constitute legitimate targets. If they are engaged in nothing more than eating and sleeping in the base, if they remain a threat at this point, because they have simply stopped for one night, they will remain legitimate targets. If they rest for a week, without engaging in any preparations, they might not be directly participating in hostilities. The timeframe must be considered in each separate case.¹⁸⁸ The moment they leave their base to return home, having given up fighting for one season, they are no longer directly participating in hostilities and become protected persons once again.¹⁸⁹ The ICRC’s ‘Guidance on Direct Participation’ states that a ‘revolving door’ of civilian protection applies. If civilians who have directly participated in hostilities no longer constitute a military threat, they cannot be targeted with lethal force: ‘IHL restores the civilian’s protection against direct attack each time his or her engagement in a hostile act ends’.¹⁹⁰

It is demonstrated above that Al-Qaeda members outside of Afghanistan are not usually legitimate targets because they will not be participating directly in hostilities in Afghanistan. The question of timing also affects their legitimacy as targets. Even if there are moments when they are directly participating in hostilities, they then stop and resume other activities after carrying out that one act. If a person performs one act of hostilities and then stops, they become a protected person once again.¹⁹¹ Therefore, even if Al-Qaeda members are said to be directly participating in hostilities from outside Afghanistan at a certain point, the issue of time will usually prevent their being legitimate targets.

¹⁸² Cassese, above n 138, [15].

¹⁸³ *Israeli Targeted Killing Case* [39].

¹⁸⁴ *Ibid.*

¹⁸⁵ Dinstein, above n 116, 29.

¹⁸⁶ Cassese, above n 138, para 14.

¹⁸⁷ Melzer, above n 143, 65.

¹⁸⁸ *Israeli Targeted Killing Case* [38].

¹⁸⁹ Cassese, above n 138, [14].

¹⁹⁰ ICRC, above n 33, 1035.

¹⁹¹ *Ibid.*

F. Is it militarily necessary and proportionate to target Al-Qaeda members?

One of the justifications for military targeting of terrorists is that it saves the lives of soldiers who would otherwise be sent in on the ground to fight the opposing side. It is also expected to save the lives of the protected persons who live in the area used by the terrorists, because the precision of the targeting should ensure that 'collateral damage is kept to a minimum'.¹⁹² If it works in this way, then military targeting should be proportionate to the aim of preventing further attacks by persons directly engaged in hostilities. The central purpose of IHL is to balance the military necessity of war and the need to protect humans from disproportionate harm.¹⁹³ Therefore, one of the principles of IHL is that military force can only be used when it is militarily necessary and will be proportionate to achieving a military objective.¹⁹⁴

Attacks are only legitimate when directed against military objectives whose total or partial destruction would constitute a definite military advantage.¹⁹⁵ If military targeting of individuals is disproportionate to the military objective, it will be contrary to law.¹⁹⁶ Commanders should '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'.¹⁹⁷ The 'Guidance on Direct Participation' recommends that '[i]n case of doubt, the person must be presumed to be protected against direct attack'.¹⁹⁸ A good faith determination as to whether a person has civilian status or is a civilian directly participating in hostilities must be made using all available intelligence to determine whether the person is a legitimate target.¹⁹⁹ Once the determination that the person is a legitimate target has been made, the amount of force used should not exceed that which is necessary to achieve the military objective.²⁰⁰

In the case of terrorism, it has been stressed that lethal force against terrorists must be 'strictly proportionate' and necessary to achieve the goal of stopping a terrorist attack.²⁰¹ The Israeli Supreme Court has set out useful criteria to determine the necessity and proportionality of targeting. First, there should be direct evidence that the person is engaged directly in hostilities; second, if less harmful means can be employed than killing, they should be; third, after a targeting attack, an investigation into the reasons and means should be undertaken; and, fourth, if protected persons are harmed in the attack, this must be proportionate to the military objective.²⁰²

¹⁹² Ulrich, above n 16, 1054.

¹⁹³ ICRC, above n 35, 721; ICRC, above n 33, 1041.

¹⁹⁴ *Additional Protocol I* art 51(5)(b); International Committee of the Red Cross (ICRC), 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (Excerpt of the Report prepared by the ICRC for the 28th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, December 2003)' (2004) 86(853) *International Review of the Red Cross* 213, 223.

¹⁹⁵ Pictet, above n 118, 54.

¹⁹⁶ *Rome Statute* art 8(2)(e)(i); Ulrich, above n 16, 1052.

¹⁹⁷ *Additional Protocol I* art 57(2)(a)(i).

¹⁹⁸ ICRC, above n 33, 1037.

¹⁹⁹ *Ibid* 1038.

²⁰⁰ *Ibid* 1040.

²⁰¹ *McCann v United Kingdom* (1995) 21 EHRR 97, [149]; Judith G Gardam, 'A Role for Proportionality in the War on Terror' (2005) 74 *Nordic Journal of International Law* 3, 4–5; *Israeli Targeted Killing Case* [40].

²⁰² *Israeli Targeted Killing Case* [40].

Military targeting involves limited military operations:²⁰³ selecting the person or group of people who are to be killed and bombing them or shooting them. It is premeditated to a great extent and does not usually occur in the heat of battle. One of its purposes is to protect the soldiers of the other side from becoming directly engaged in exchange of fire.²⁰⁴ In that sense, it could be said that targeting is proportionate to the protection of one side's forces. However, it must also protect, as far as possible, protected persons under IHL. The method that is used must be proportionate. Indiscriminate attacks, such as shelling a town or sniping at civilians will never be proportionate to the military advantage.²⁰⁵ Similarly, the purpose for the targeting must be carefully examined. If it is known that a suicide attack is to be committed within the boundaries of the armed conflict, targeting could be militarily necessary to prevent such an attack.²⁰⁶ If there is training going on that might lead to attacks in the future, but none have yet taken place, it might not be militarily necessary to target the training camp or the trainers. If the threat exists within the territory under the control of the targeting party, it may be possible to arrest the target, rather than using lethal force against him or her.²⁰⁷ With targeting, there is greater scope, and also greater necessity, to determine whether the military targeting of opponents in an armed conflict — in this case of the US against Al-Qaeda — is militarily necessary and will be proportionate to the military objective. There is a greater need for good intelligence of activities of the terrorists, their identity, the nature of their activities and any danger to civilians, before targeting can be effected.²⁰⁸

Each case of targeting will require examination on a case-by-case basis, having taken into account all other requirements of targeting in an armed conflict situation, including the military objective and the proportionality of any military force against the terrorist. This examination must occur on each occasion when terrorists are planned to be targeted, particularly given the difficult nature of the other questions in relation to targeting terrorists which have been addressed above.

Conclusion

The previous US Administration categorically stated that 'Al-Qaida terrorists who continue to plot attacks against the US may be lawful subjects of armed attack in appropriate circumstances'.²⁰⁹ The current US Administration continues to consider itself engaged in a legal war against Al-Qaeda that will not end until the 'terrorist enemy' has been destroyed.²¹⁰ The US, in putting forward its argument on the military targeting of terrorists, is seeking to manipulate IHL on two bases: first, that the war in Afghanistan is a new form of armed conflict against transnational terrorists extended across geographical borders and

²⁰³ Milanovic, above n 36, 374.

²⁰⁴ Ariel Colonomos, 'Precision in uncertain times: Targeting as a mode of justification for the use of force' in David Chandler and Volker Heins (eds) *Rethinking Ethical Foreign Policy: Pitfalls, Possibilities and Paradoxes* (2007) 206, 217.

²⁰⁵ ICRC, above n 35, 723.

²⁰⁶ Kretzmer, above n 27, 202.

²⁰⁷ ICRC, above n 33, 1043.

²⁰⁸ See Melzer, above n 143, 61; Cassese, above n 138, [18].

²⁰⁹ Letter from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva to the Secretariat of the Commission on Human Rights, above n 23.

²¹⁰ *Ibid.* See also Brennan, above n 6.

timeframes; and second, that the terrorist or Al-Qaeda member is not protected and is, thus, a legitimate target for armed force wherever and however they are acting. However, as argued here, armed conflict and the laws of armed conflict cannot be used to combat all forms of terrorism. Terrorists can only be subject to military targeting, when they are acting in the course of an armed conflict.

This article has considered these two aspects of IHL in relation to whether the military targeting of terrorists is legitimate under IHL in the context of a broad 'war with Al-Qaeda'. It concludes that this war is a rhetorical war and is not an armed conflict, in this general sense, under which military targeting is permitted. Generally, terrorist attacks do not rise to the level of intensity required for an armed conflict and, certainly in the current context, aside potentially from attacks in the non-international armed conflicts in Iraq and Afghanistan, there have been no terrorist attacks that would create a prolonged and serious situation that legally justifies the title of 'armed conflict'. The geographical and temporal boundaries of a non-international armed conflict would also prevent the expansion of one of these existing conflicts into other or all areas of the world in which terrorists such as Al-Qaeda may be acting.

In the context of an existing armed conflict, Al-Qaeda members are generally civilians, who may often lose their protection and be targeted if they are directly participating in hostilities. The ICRC's 'Guidance on Direct Participation' can provide assistance in determining what acts constitute directly participating in hostilities and for how long a person is said to be doing so. Al-Qaeda members are generally non-protected civilians, not because of their membership in Al-Qaeda, but because their actions lead to the conclusion that often they are engaged in a continuous combat function or else they directly affect the conduct of hostilities in a causal way. In these circumstances they become legitimate targets as non-protected persons. When planning to target such persons, however, their involvement in the hostilities should be carefully analysed, both to determine the nature of their involvement and how direct it is, and to determine whether it is militarily necessary and proportionate to be using the strategy of military targeting.

The boundaries of an armed conflict against transnational terrorists are narrow. Under the terms of the US Administration, military targeting of terrorists such as Al-Qaeda will only be able to occur legally in limited circumstances, constrained by IHL and the existence of an actual armed conflict in which so-called 'terrorists' are directly participating in hostilities. In most cases in the rhetorical 'war with Al-Qaeda', the US Government will have to look to other solutions, rather than the military targeting of the 'terrorist enemy'.