13. Terrorism and international humanitarian law

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1. INTRODUCTION

Terrorism has long presented challenges for both states and humanitarian protection in armed conflict. Debates have taken place for over a century about irregular combatant status, the legitimacy of non-state armed groups, violence motivated by politically ‘just’ causes, terrorist means and methods of warfare, and the regulatory challenges of asymmetrical conflict. Many of these issues resurfaced or assumed a new complexion after 9/11, with stark challenges to international humanitarian law (IHL) presented by a particularly powerful victim of terrorism, the United States. Purported gaps or inadequacies in IHL have stimulated much discussion, whether from the perspective of state militaries, ‘terrorists’, or civilians.

Others chapters in this book explore different facets of the relationship between terrorism and IHL, including detention, interrogation and torture, irregular rendition, military trials, targeting killings, and the nexus with international human rights law. This chapter focuses on the fundamental threshold issue when IHL applies to violence involving terrorism or terrorist groups, in the context of international or non-international armed conflicts. It includes a discussion of the particularly complex problem of ‘transnational’ violence and the geographical and temporal scope of hostilities. The chapter then briefly considers the legal consequences of the classification of conflicts, as regards targeting, detention, substantive criminal liabilities, and the procedure of criminal trials. It concludes with some observations about the impact of international counter-terrorism law on the effectiveness of IHL, including its balance between military necessity and humanitarian protection.

This chapter argues that the challenge of contemporary terrorism has principally impelled a clarification of existing IHL norms but without generating terrorism-specific rules or refashioning the basic norms of IHL. Assertions after 9/11 that new rules were necessary to deal with terrorism were not met favourably by most states, not least because the chief proponents of new norms sought to undermine, rather than strengthen, existing
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protections. Terrorists thus remain ‘within’ the law and have not been legally recast as ‘outlaws’.

This is not to underestimate the extent to which certain states have not respected, and continue to violate, their IHL obligations in some areas, presenting ongoing challenges for IHL. Certainly if IHL cannot command the adherence of the world’s most powerful military actors, its ability to protect civilians is jeopardised and reforms may be necessary to bring such actors back into the fold. However, one of the constructive ways in which IHL has responded to the challenges after 9/11 has been through the progressive interpretation of norms in certain areas, which has sharpened its capacity to effectively regulate competing interests – even if consensus remains to be achieved on some key issues.

2. CLASSIFICATION OF TERRORISM AS ARMED CONFLICT

The rhetoric and practice of the post-9/11 ‘war on terror’ has focused attention on whether violence by and against ‘terrorists’ can constitute ‘armed conflict’ regulated by IHL, and if so how such conflict should be classified. The basic issue is not new, given that earlier internal insurgencies often exhibited ‘terrorist’ characteristics, and national liberation struggles for self-determination during post-war decolonisation were often treated as ‘terrorist’ problems. Some of these situations had cross-border dimensions (particularly in Africa, but also in Asia and Latin America), so that current debates about ‘transnational’ non-international armed conflicts are also not novel, even if there have been changes in form and scale and the actors involved. The problems of over-classifying, under-classifying, or failing to classify conflicts are also historically well known. The applicable IHL norms have, however, been overlaid by new international counter-terrorism norms after 9/11, which adds a new legal dimension. Also, interpretive and policy challenges to the application and adequacy of IHL norms have arisen.

A. International Conflicts

In principle, terrorist groups may be involved in various types of international and non-international armed conflicts under IHL. An international

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1 See, e.g., Elizabeth Wilmshurst (ed), International Law and the Classification of Conflicts (OUP, 2012); Andrea Bianchi and Yasmin Naqvi, International Humanitarian Law and Terrorism (Hart, 2011), 55–163.
armed conflict foremost exists under IHL where there is military violence between two states, as provided by common Article 2 of the four Geneva Conventions 1949. Descriptive mention of ‘state terrorism’ in this context adds little to the legal classification; what matters is that a state engages in armed violence against another. Where force is applied by conventional armed forces, any ‘terrorist’ means or methods used will be regulated by the IHL rules on the conduct of hostilities and international criminal law, discussed below.

An international armed conflict may also exist where a state deploys irregular forces against another state, as provided under Article 4(2) of the Third Geneva Convention 1949. The provision non-exhaustively mentions ‘militias’, ‘volunteer corps’ and ‘organized resistance movements’, but the principle equally covers other armed groups however described (whether as paramilitaries, private military companies, guerrillas, insurgents, terrorists or something else).

The description of such groups is largely immaterial. Legally what is decisive is whether these are forces ‘belonging’ to a state under Article 4(2), meaning that the state exercises ‘overall control’ over them (but without requiring a higher degree of ‘effective control’ over their operations). The provision expressly applies to forces ‘operating in or outside their own territory’, including occupied territory. While autonomous terrorist groups (such as Al-Qaeda) do not ‘belong’ to any state, it is conceivable for a terrorist group to be sufficiently connected to and commanded by state authorities in a given situation.

In addition, such forces must comply with four minimum conditions of combatancy under the same provision, namely that they are under responsible command, display a fixed distinctive sign recognisable at a distance, carry arms openly, and conduct their operations in accordance with IHL. Even where a terrorist group ‘belongs’ to a state, most will fail to satisfy all of these cumulative conditions, whether because their operations by their nature do not respect IHL norms of distinction or proportionality,
or because they do not comply with the ‘procedural fair play’ requirement of showing themselves to the adversary as fighters (instead mingling with civilians or committing criminally pernicious attacks). A harder case is where an armed group sometimes respects IHL and sometimes violates it, making it difficult to determine whether the group as a whole should not be recognised.

An international conflict may also exist where civilians spontaneously resist the invading forces of a foreign state (a levée en masse), a situation which may trigger accusations of ‘terrorist’ conduct. A further situation is where a state occupies another state’s territory without initially meeting armed resistance, whether from the military or irregular forces of the occupied state or a levée en masse. Subsequent ‘terrorist’ violence by civilian resistance forces of occupied territory may still be classified as part of the international conflict brought about by occupation.

Likewise, there may be an international conflict involving civilian resistance forces which succeed any national armed forces that resisted an invading military but dissolved upon the establishment of the occupation. Israel’s conflict against Palestinian terrorist organisations is one such international conflict, albeit with sui generis characteristics. A distinction should be drawn between non-state groups comprised of inhabitants of occupied territory and foreign terrorist groups which fight an occupying power; only the latter may be characterised as part of an international conflict, while the former may form part of a separate non-international conflict.

A fourth situation of international armed conflict potentially involving ‘terrorist’ groups is where a national liberation movement is recognised under Article 1(4) of Additional Protocol of 1977. The effect of that provision is to transform what might otherwise be classified as a non-international conflict into an international one. This is because self-determination struggles are unlike ordinary civil wars between a people and its own government, but are instead assimilable to an international conflict between two states (the colonised people, and the colonial authority suppressing self-determination and the realisation of statehood).

While Protocol I dispenses with the earlier legal fiction, states which

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5 Public Committee against Torture in Israel v Government of Israel (Targeted Killings case) (Israeli Supreme Court, HCJ 769/02, 11 December 2005), [18] (President Barak).
6 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978 (‘Protocol I’)).
are not parties to it (relevantly including Israel, occupying Palestine, and Morocco, occupying Western Sahara) remain free to treat liberation fighters as domestic rebels, including to criminalise them as ‘terrorists’ under domestic law (for attacks on the state’s own territory) or the military law applicable in occupied territory (to the extent that the prior domestic law of the occupied territory has been displaced for security reasons).

B. Non-international Conflicts

Much of the focus after 9/11 shifted to whether violence involving terrorist groups can be classified as non-international conflict. Historically in many states terrorism was treated primarily as crime rather than war. This was also the dominant approach of the UN and in its various transnational criminal cooperation treaties. Even high intensity terrorist campaigns, as in Northern Ireland (controlled by the UK), tended to be downplayed by affected states as law enforcement emergencies rather than armed conflicts, even if military forces were sometimes deployed to aid the civilian policing authorities.

A minimum threshold of intensity is required to distinguish non-international armed conflicts from lesser violence under both common Article 3 of the four Geneva Conventions 1949 and Article 1(2) of Additional Protocol II of 1977. Article 1(2) of Protocol II expressly excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. The same exclusion is understood to apply when interpreting common Article 3 of the Geneva Conventions. Thus terrorist acts which are isolated, sporadic, low-level, or in the nature of ordinary crime, and which do not provoke intense and sustained military responses by the victim state, will not cross the threshold of a non-international conflict.

This does not mean, however, that terrorist violence can never trigger or be part of a non-international conflict. The central legal question is whether there exists sufficiently intense armed violence between an organised armed group and a state or another organised armed group. Again, the description of the group (as guerrilla, insurgent, rebel, or terrorist) is

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7 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978 (‘Protocol II’)).
8 ICRC Commentary on Protocol II (1978), art 1(4), [4473].
9 Prosecutor v Tadić (Interlocutory Appeal on Jurisdiction) (ICTY, Case No IT-94–1, 2 October 1995), [70]; Prosecutor v Limaj et al (ICTY, Case No
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not decisive, particularly since after 9/11 many armed groups acquired a dual characterisation (as ‘terrorist’ under Security Council measures and as armed groups under IHL). Terrorist activity may also possess a dual legal character as both crime and conflict; the categories (as well as the legal approaches to combating them) are not mutually exclusive.

Accordingly, there will be a non-international armed conflict where terrorism-related violence is sufficiently intense and the group is sufficiently organised. Various indicia have been recognised in the jurisprudence to aid in determining whether the intensity and organisation criteria are met, including the scale, nature, duration and spread of hostilities; the number of fighters and casualties; the weapons used; the extent of human displacement; and the capabilities of the group (in terms of recruitment, training, financing, command and so on). Non-international conflicts involving terrorist groups are less likely to also arise under Protocol II, given that it additionally requires territorial control by the group (though some groups have held extensive territory for protracted periods, such as the LTTE in Sri Lanka or FARC in Colombia).

Conventional examples – those where the ‘terrorist’ groups are based in the territory of the victim state – abound. They include, for instance, the conflicts between Sri Lanka and the LTTE; Colombia and FARC; Peru and Shining Path; Russia and Chechen groups; Turkey and Kurdish groups (such as the PKK); India and Naxalite or Maoist groups; the Philippines and Islamists in Mindanao; Somalia and Al-Shabaab; Afghanistan and Al-Qaeda; and Iraq and Islamist or sectarian groups. Again, whether such groups are legally or politically designated as ‘terrorists’ is not legally determinative of the existence of an armed conflict.

Nor is the motivation of a non-state group a vital factor in the existence of a conflict. Many terrorist groups have mixed motives, pursuing both criminal as well as political, ideological, or religious agendas. Thus groups such as the IRA, FARC and Al-Qaeda were all funded in part through organised crime; over time some groups, such as FARC, moved further away from their original political rationale and increasingly embraced a criminal raison d’être. Yet other groups are principally criminal and lack a coherent political vision, such as the various militarised drug cartels responsible for thousands of deaths in Mexico in recent years, triggering a high intensity response from the authorities.

IT-03-66-T, 30 November 2005), [83]; Prosecutor v Boskoski (ICTY, Case No IT-04-82-T, 10 July 2008).


11 See above n 9.
Regardless of motive, what matters legally is whether the violence is sufficiently intense and organised. In practice, however, motive can influence the approach of the victim state, other states and international organisations in evaluating whether the violence is treated as armed conflict. (Practice does not always follow the law on other issues too; in retrospect, there are good arguments that the violence in Northern Ireland was a low-intensity non-international conflict, despite never being recognised as such by the UK or most other actors.)

A final caveat is that not all acts of terrorism in a territory affected by armed conflict will comprise part of that conflict. It remains necessary to distinguish ordinary criminal acts of terrorism committed by other individuals or organisations from violence committed by the parties to the conflict or which has a ‘nexus’ to the conflict. The former is subject to the application of ordinary domestic law enforcement measures.

(i) ‘Transnational’ situations
The most controversial issue in characterising conflicts with terrorists is where such violence has a transnational dimension. Common Article 3 was drafted on the understanding that non-international conflicts were chiefly conventional civil wars by (citizen) rebels against their government on the territory of that state. Yet, even during decolonisation, in practice that understanding was tested by liberation movements based in sympathetic neighbouring states and which launched attacks on the authorities of colonial territories (as well as, for example, the apartheid regime in South Africa). Resort to ‘hot pursuit’ across borders by the victim state was, however, often seen as aberrant and temporary and not necessarily viewed as an extension of such non-international conflict as may have existed in the colony itself.

After 9/11 there was much hand-wringing about whether the conflict classification scheme of IHL was adequate to accommodate the challenges of contemporary ‘transnational’ conflicts against terrorist groups such as Al-Qaeda (and its global affiliates). The US Supreme Court took an elegantly simple but principled approach in *Hamdan v Rumsfeld*.12 Common Article 2 provides that international conflicts are those between two or more states. Common Article 3 residually provides that non-international conflicts are those ‘not of an international character’, that is, not covered by common Article 2. Common Article 3 was thus held to

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apply to any conflict not between two states, regardless of where it takes place.

The conflict between the US and Al-Qaeda on the territory of Afghanistan was accordingly determined to be a non-international conflict. The Court rejected the US Government’s view that the war against Al-Qaeda in Afghanistan fell into a lacuna in IHL, as neither an international conflict between two states, nor a non-international conflict (as not a traditional civil war in the US). The virtue of its finding is that it extended the minimum humanitarian protections of common Article 3 even to non-citizen ‘terrorists’ on a foreign battlefield.

On the facts it was unnecessary for the Court to further consider whether there existed a separate parallel international conflict between the US and the government of Afghanistan (the Taliban), but the prevailing legal view is that this was the case. Such conflict ended with the subsequent re-establishment of an independent Afghan Government, which itself then became engaged in a non-international conflict with remnants of the Taliban and Al-Qaeda.

The Hamdan decision nonetheless raises certain difficulties. The Court did not consider the widely accepted Tadić criteria of intensity and organisation in determining the existence of a non-international conflict under common Article 3 (though these were likely satisfied on the facts). Nor did it consider the view that common Article 3 presupposes that the non-state group must be capable of complying with IHL; given the nature of Al-Qaeda, that approach however risked creating a gap in the applicability of IHL.

It sounds instinctively strange to say that a state fighting a non-state group abroad is non-international, given that the attacking state must necessarily fight that group on another state’s territory (but for exceptional and unlikely situations of hostilities on the high seas or in international airspace). In that sense the conflict seems intuitively international. State practice is equivocal and in flux. The correct legal answer arguably depends on how common Articles 2 and 3 of the Geneva Conventions should be interpreted in the light of one another.

Common Article 2 provides that an international conflict is one arising ‘between two or more of the High Contracting Parties’. The Hamdan approach implicitly takes this to mean that there must be hostilities between the forces of two states, and this is a fairly conventional understanding of the provision. However, an alternative interpretation, also based in the text, is that the phrase extends to conflict arising because

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13 Bianchi and Naqvi, above n 1, 106–7.
one state conducts hostilities on the territory of another without the latter's consent. This would include even where the hostilities are limited to attacks on the terrorist group and there are no hostilities between the armed forces of the two states.

There is then still an international conflict between two High Contracting Parties, rather than a mere non-international conflict between one state and the terrorist group, because of the unwanted military interference by one state in the other’s territory. Indeed common Article 2 refers to conflict between ‘High Contracting Parties’, that is, the legal entity of the state (including its territory), and is not textually limited to conflict between state ‘armed forces’.

This interpretation is also plausible because common Article 2 expressly recognises that situations of so-called ‘bloodless invasion’ are still international conflicts: ‘The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.’ Actual or active hostilities between state forces are thus not indispensable in cases of occupation, yet an international conflict is still generated. The question is whether a lack of consent by the territorial state to the entry of foreign state forces pursuing terrorists is also enough to establish a ‘conflict’ between two states.

This problem of classification prominently arose in respect of the hostilities between Israel and Hezbollah in Lebanese territory in 2006. There were no hostilities between Israeli and Lebanese armed forces; the Lebanese Government did not exercise overall control over Hezbollah such as to establish an international conflict through proxy forces; and Lebanon did not consent to Israel’s incursion. Israel’s objective was to target Hezbollah, but in doing so it attacked not only Hezbollah fighters, bases and equipment in southern Lebanon near the border, but also a wide range of military objectives which were dual-use Lebanese civilian infrastructure (such as bridges, roads, ports, airfields and so on). Such targets were also geographically dispersed throughout Lebanon, far from active hostilities.

The US-based organisation Human Rights Watch publicly stated that this was a non-international armed conflict, presumably following Hamdan. Others contended that the spread of attacks to Lebanese infrastructure transformed the conflict into an international one. That view is

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15 See Rule of Law in Armed Conflicts Project, ‘Qualification of Armed Conflicts’ (Geneva Academy of International Humanitarian Law and Human
rather subjective and impractical given the difficulties in determining when such threshold is crossed (for instance, how many infrastructure targets, of what kind, and where, before the conflict is transformed from a limited engagement against terrorists to a conflict against the state?). Yet others suggested that the absence of consent by Lebanon is decisive, thus characterising the conflict as ‘between’ two states and thus as international. The latter view may be preferable from a humanitarian standpoint because it brings into play the fullest corpus of IHL rules, namely those applicable in international conflict.

Whether the territorial state is required to consent to defensive operations by a victim state (for instance, where the territorial state is unable to repress a terrorist group by itself) is a separate question governed by the international law on the use of force (jus ad bellum), state responsibility, and counter-terrorism. It does not affect the objective IHL (jus in bello) question whether military force has been used against the state, thus triggering common Article 2. (A further possibility, on different facts, is where an international conflict is triggered by partial occupation of territory under common Article 2, where the state attacking a terrorist group displaces the victim state’s authority and replaces it with its own effective administration.)

(ii) Geographical scope of hostilities
The assertion of a ‘global war on terror’ after 9/11 has raised other legal problems for conflict classification. The US claimed that Al-Qaeda and its affiliates are a global network active in numerous states, such that it may be necessary to conduct hostilities wherever Al-Qaeda fighters (or military objectives) are present. An opposing view is that any non-international conflict is limited to Afghan territory, or that any conflicts elsewhere are distinct and must independently satisfy the IHL test for the existence of a conflict.

Common Article 3 in terms applies to non-international conflicts ‘in the territory of one of the High Contracting Parties’. In the jurisprudence it is accepted that it ‘extends beyond the exact time and place of hostilities’\(^\text{16}\) to apply throughout the territory of the state party. Its text does not appear to contemplate a non-international conflict spread over the territory of more than ‘one’ state party. As common Article 3 was traditionally conceived of as limited to civil wars in a state’s own territory, the

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\(^{16}\) Tadić, above n 9, [67].
characterisation of hostilities in foreign territory seldom arose (subject to the reality that neighbouring states have sometimes harboured rebel fugitives, and cross-border raids have occurred).

The question now arises whether a non-international conflict rooted in a particular state can extend into neighbouring territories, or even discontinuous territories. It is necessary to look beyond the strict text and drafting of common Article 3 to determine whether there has been a shift in the interpretive practice of, or agreement among, states.

A number of different legal possibilities may arise. First, a conflict in one territory may ‘spill over’ into an adjacent territory and constitute an extension of the same conflict involving the same parties. This is one way of characterising hostilities between the US and Al-Qaeda in parts of Pakistan in relation to the primary locus of conflict in Afghanistan; or attacks by Al-Shabaab, based in Somalia, on targets in neighbouring Kenya.

Whether such situations are classed as two separate non-international conflicts (one in each territory), or aggregated as a single geographically contiguous conflict, depends on whether the terrorists involved are factually part of the same group, or are separate, autonomous groups. Pakistani forces may form part of the US–Al-Qaeda conflict to the extent that they cooperate with US forces, or be engaged in their own conflict(s) with such groups.

Secondly, it is possible that Al-Qaeda or affiliated groups are engaged in separate non-international conflicts in other territories with states other than the US, whether in Yemen, Somalia, the Sahel, North Africa and so on. These situations must be assessed according to the usual criteria of intensity and organisation and are distinct from conflicts with the US. It may be that the US enters such conflicts by, for instance, conducting targeted killings with the consent of the territorial state.

A third situation is the most complicated. Imagine that an Al-Qaeda fighter from Afghanistan travels to Somalia or Yemen (or Sweden or Australia), on Al-Qaeda business directed against the US (whether to plan or prepare operations there or in Afghanistan, to recruit or train fighters, or to resupply or obtain weapons and funding). In those other places, examined in isolation, terrorist activities by or against Al-Qaeda may not be sufficiently intense to constitute a conflict, yet may be connected

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17 A more difficult question is whether intensity may be assessed by reference to the combined level of violence in two territories, establishing a conflict even if the violence in one territory would not be enough.
to furthering the existing conflict with the US. The US may respond by targeting such operatives in drone strikes in other states.

As already noted, common Article 3 historically assumed that a conflict would be confined to the territory of the state experiencing civil war. On that restrictive approach, hostile acts by Al-Qaeda fighters outside the primary territory of the conflict (and which by themselves are not sufficiently intense to create a separate conflict) would not constitute part of the existing conflict. They could only be dealt with by domestic law enforcement measures, and transnational criminal cooperation through extradition and mutual assistance. Targeted killings by the US would not be authorised by IHL because in the absence of an armed conflict there, IHL does not apply.

In state practice, strong opposition to US drone strikes within the UN Human Rights Council\(^{18}\) may indicate that many states oppose the extension of non-international conflicts to such situations, and prefer the conventional restriction of common Article 3 to a single state’s territory. Also, the assumption underlying IHL is that it applies to non-international conflicts chiefly because the state has lost control of part of its territory and people. This is not the case in third states on whose territory an Al-Qaeda fighter (or other terrorist) is occasionally found. Law enforcement will ordinarily be sufficient to address such threats – assuming the state in question is willing and able to respond appropriately.

This scenario can, however, be approached in a rather different way. If a common Article 3 conflict involving the same parties can ‘spill over’ into a geographically adjacent territory, it is hard to see why it cannot further spill over into more distant territories, given contemporary modes of transport, technology and so on. An analogy with the more generous geographical frame of international armed conflict is apposite.

In international conflict, if a combatant travels outside the ‘hot’ battlefield, the combatant may still be a military target and cannot simply step out of the war by moving elsewhere. IHL follows the action so to speak, even outside the warring states’ own territories. Just because a state is fighting on the ground in Europe does not mean the state cannot launch a surprise air raid on enemy targets in the Pacific or Africa, or be attacked in Latin America or Asia. This does not imply anything about the legitimacy or prudence of extending the fighting elsewhere; it means only that the law

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attaches to the conduct of the parties and is not delimited solely by geographical considerations (subject to the law on neutral states’ territories in international conflict). This is for good reason: it gives humanitarian protections their widest possible application wherever the conflict spreads.

This analogy is one possible answer to the equivalent problem in non-international conflict, and avoids imposing arbitrary geographical parameters on the application of IHL.19 In principle, if the US fires a drone missile at an Al-Qaeda fighter in Australia, IHL applies if the fighter is part of the same organised group which is engaged overall in a sufficiently intense violent confrontation against the victim state. The intensity criterion applies to the violence between the group and the state as a whole, and cannot be judged by reference to the level of hostilities in a single territorial location – just as throughout Afghanistan after 9/11, the fighting was intense in some places, minor in others, and non-existent in yet others, without affecting the overall existence of the conflict.

The necessity, prudence, or diplomatic impacts of firing a missile at an Al-Qaeda fighter in Australia or anywhere else, particularly without the local state’s consent, are separate questions. IHL ordinarily permits the targeting of military objectives where civilian casualties would not be excessive. There is no further requirement that attacking the target is necessary to respond to an imminent threat, or that less invasive means (such as arrest) should first be exhausted (as is common on a human rights or law enforcement approach). Likewise jus ad bellum issues are technically distinct (including whether self-defence excuses the breach of another state’s territorial sovereignty).

The application of IHL in such cases is a double-edged sword. On the one hand, it extends humanitarian protections to those targeted by the state wherever they may be. This includes protections against unlawful killings or detentions, which may also constitute war crimes. This is particularly important in respect of states which otherwise deny the extraterritorial application of their own international human rights law obligations such as the US and Israel.

On the other hand, the application of IHL potentially authorises the lethal targeting of members of non-state groups performing continuous combat functions, displacing what would otherwise be the application of a human rights and law enforcement paradigm. The difference between the regimes can be stark in such situations: a fighter may not present an imminent threat so as to permit their killing (as opposed to their arrest).

on a policing approach, whereas IHL confers a wider latitude in targeting individuals on account of their presumptive dangerousness as members of armed groups.

Perhaps the best answer is to accept that IHL may indeed follow terrorists who rove abroad, as part of the established armed conflict, but that the targeting or other applicable rules of IHL should be moderated according to the circumstances.  

Thus, for instance, the lethal targeting of an Al-Qaeda member in Sweden would not be permitted where arrest is feasible and it is thus unnecessary to apply the full ambit of the belligerent state’s IHL rights.

(iii) Temporal duration of conflict

A final legal problem of classification concerns the temporal duration of a non-international conflict against a terrorist group. The US suggested that the war against Al-Qaeda may persist for decades – far longer than either of the first or second world wars. (It should be noted, however, that quite a few non-international conflicts since 1945, involving rebel, liberation, or secessionist groups, persisted for many decades; long wars are not unique to terrorism.) The US view has been much criticised since it appears to license an indeterminate military response to terrorism, including the potential for indefinite administrative detention without charge or trial of captured terrorist fighters and the ongoing lethal targeting of suspects.

The legal starting point is that an armed conflict exists for as long as the violence remains sufficiently intense and the parties organised, allowing in the usual way for flux of hostilities (which may be discontinuous for strategic, seasonal or other reasons). The conflict thus ends with the cessation of hostilities, which may or may not be marked by a formal ceasefire, peace agreement, or other modalities recognising the factual situation on the ground.

The difficulty with terrorism is that it can be sporadic and low level but rapidly flare up (as was the case on 9/11), before falling back to a lower background intensity. Yet, this does not necessarily imply that the group’s capacity to wage ‘war’ at the requisite level of intensity has disappeared, but may reflect operational, strategic or timing choices. Even a small rump of terrorists may be capable of launching a large attack on a ‘soft’ civilian target, even if the bulk of the group has been destroyed. It then becomes difficult to disentangle the possibility of perpetual war from a true de-escalation and resumption of ordinary crime. In practice, the views of states and the international community will be influential in

\[20\] Ibid.
evaluating whether claims that a conflict remains on foot are accepted or rejected.

3. CLASSIFICATION OF THE STATUS OF ‘TERRORISTS’ IN ARMED CONFLICT

There was heated debate, and much litigation, after 9/11 about the proper legal status or classification of ‘terrorists’ in armed conflict. The initial US approach was to claim that its opponents were ‘unprivileged belligerents’ or ‘unlawful combatants’ not entitled to IHL protections, since they did not come within the existing categories. Even if the US position was legally incorrect, it also stimulated further legal debate about whether the existing categories or norms were adequate in the light of the contemporary challenge of terrorism.

The short ‘black letter’ answer is fairly straightforward. There is neither any special legal status for ‘terrorists’, nor any lacuna excluding them, in IHL. In international conflict, a person is generally either a combatant or a civilian. Those described as ‘terrorists’ may be combatants if they meet the conditions of irregular forces under Article 4(2) of the Third Geneva Convention (discussed earlier), are national liberation forces under Protocol I, or meet the more liberal conditions of ‘guerrilla’ combatancy under Article 44(3) of Protocol I (namely, by carrying their arms openly during and preceding a hostile act).

Certain states have not signed Protocol I in part because they believe the latter condition gives an unfair advantage to terrorists, by allowing them to blend back in with civilians when not deployed on military operations. Debate over terrorists’ status and rights in armed conflict thus long precedes 9/11, and reflects different policy judgments of states about how

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to best protect civilians, encourage non-state groups to comply with IHL, and avoid legitimising the cause of such groups.

In non-international conflict, there is no combatant status, unless a state chooses to recognise non-state combatancy as a matter of policy, and subject to IHL’s encouragement to states to confer amnesties at the end of a conflict. States are reluctant to legally recognise non-state combatant status for fear of legitimising such groups. However, the failure to accord combatant privileges reduces incentives for ‘terrorist’ groups to comply with IHL. Some have accordingly argued for the extension of combatant status to certain non-state groups, though certain terrorist actors are unlikely to commit to respect IHL’s basic norms.

If a person is not a combatant, by default he or she is a civilian. A civilian may, of course, choose to take part in the conflict, whether by committing direct acts of violence or indirect acts in support of violence or an armed group. Such person may also be a constant or episodic member of such groups, or commit sporadic or isolated hostile acts loosely affiliated with the cause of the group. The treatment of such persons is governed less by category-based statuses and more by functional rules of IHL, particularly in the key areas of targeting and detention. By and large, with distance from 9/11, the challenges of terrorism have not led to any fundamental revision of the applicable IHL rules, or their displacement. Rather, there has been a refinement of the rules through interpretation, state practice, and policy-oriented consensus building.

A. Targeted Killings

Another chapter of this book is devoted to targeted killing. In brief, similar legal principles apply in international and non-international conflict. A person who takes a direct part in hostilities may be targeted for the duration of such participation; once out of combat, such person regains their protected civilian status. There is a spectrum of participation, from those performing a continuous combatant function as members of armed groups to those who commit occasional hostile acts. The purpose of the rule is to maximise civilian protection, by confining

23 Additional Protocol II, art 6(5).
targeting to those who are truly dangerous and giving immunity to all others.

The difficulty arises over the meaning and scope of ‘direct’ participation and its temporal duration, and whether such concepts should be defined restrictively or expansively. These issues matter a great deal in relation to terrorists because of the extensive support networks which enable frontline terrorists to mount attacks, the abuse of civilian status by terrorists to commit hostile acts, and the ‘revolving door’ phenomenon whereby terrorist ‘civilians’ move in and out of hostilities to manipulate civilian immunity and gain an unfair advantage. Recent efforts by the International Committee of the Red Cross to clarify the meaning of ‘direct participation’ have gone some way towards building international consensus on the content of the rule, but there remains considerable policy disagreement over its interpretation.

B. Detention of Terrorists in Armed Conflict

Where it is not possible to prosecute, IHL provides other security powers for dealing with terrorist threats. In international conflict, IHL permits states to administratively detain civilians where ‘absolutely necessary’ for security or for ‘imperative reasons of security’. Detention must be subject to a regular procedure and periodic independent review (at least six monthly) and satisfy minimum conditions of humane treatment. There are also constraints on transferring inhabitants of occupied territory out of such territory, although the same restrictions do not apply to nationals of third (neutral) states.

The picture is less clear in non-international conflict, leading some to identify gaps in the law. Common Article 3 does not expressly authorise

27 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (entered into force 1949) (‘Fourth Geneva Convention’), arts 42 and 78 respectively.
28 Ibid, art 78.
29 Ibid, arts 43 and 78.
32 John B Bellinger III and Vijay M Padmanabhan, ‘Detention Operations in
or stipulate the grounds of detention, although its guarantees of a fair trial and humane treatment implicitly acknowledge that detention may be necessary. It primarily falls to national law to regulate the grounds and procedures of detention. As in international conflict, persons may be detained for a range of security reasons: as members of armed groups performing a continuous combat function; for past participation in hostilities; on suspicion of an international or national criminal offence; or for other dangerous activities (including for ‘indirect’ participation in hostilities, such as by providing various kinds of non-combat support for terrorist operations or organisations).

International human rights law applies concurrently in armed conflict (as modified by any lawful derogation in a declared public emergency), including to detention, and even to extraterritorial conduct. Human rights law requires that detention must be prospectively authorised by law; based on sufficiently certain and precise legal criteria; necessary for security reasons (including that less invasive means would not be effective); proportionate to the legitimate security objective; non-discriminatory; and subject to independent judicial review. In transnational conflicts, national law must be given extraterritorial effect to ensure the legality of detention. Notwithstanding these guarantees, administrative security detention may endure for a protracted period where a person remains dangerous and the conflict remains on foot; there is no strict obligation to charge or release.

4. PROHIBITIONS ON AND CRIMINAL LIABILITIES FOR TERRORISM IN ARMED CONFLICT

A. Substantive Provisions

Most terrorist-type conduct committed in any type of armed conflict is already criminalised as various war crimes. This is because IHL prohibits...
and criminalises deliberate attacks on civilians or civilian objects, including by indiscriminate attacks; reprisals; the use of prohibited weapons (including incendiaries); attacks on cultural property, objects indispensable to civilian survival, or works containing dangerous forces; or through illegal detention, torture or inhuman treatment. In addition, the suite of crimes against humanity also applies concurrently in armed conflict to protect civilian populations against widespread or systematic attack.

In addition to such protections for civilians, IHL specially prohibits terrorism. Article 33(1) of the Fourth Geneva Convention 1949 prohibits ‘collective penalties and likewise all measures of intimidation or of terrorism’ against protected persons ‘in the hands of a Party’ (as in detention or occupied territory) to an international conflict. The provision was a response to the mass intimidation of civilians in occupied territory in the Second World War.

All civilians in international conflict (including those not ‘in the hands of’ a party) are protected by Article 51(2) of Protocol I of 1977, which prohibits ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’. The same acts are prohibited in non-international conflict by Article 13(2) of Protocol II. Both provisions are part of wider prohibitions on attacking civilians. Article 4(2)(d) of Protocol II further prohibits ‘acts of terrorism’ in non-international conflicts.

In the Galić case, the International Criminal Tribunal for the former Yugoslavia found that a violation of Article 51(2) of Protocol I attracts individual criminal responsibility, despite the article not being listed as a ‘grave breach’ provision. The war crime of spreading terror against a civilian population was committed by a campaign of sniping and shelling of civilians in the besieged city of Sarajevo, by deliberately targeting the routines of everyday life and thereby intending to put civilians in ‘extreme fear’. The crime requires that the perpetrator possess the primary purpose to spread terror, but the infliction of actual terror is not required. While all civilians caught in conflict are likely to be incidentally afraid, the prohibition on spreading terror targets the special intention (dolus specialis) to spread terror.

37 Fourth Geneva Convention, art 4.
38 Additional Protocol I (1977) art 51(2) and Additional Protocol II (1977), art 13(2).
39 Prosecutor v Galić (ICTY, Case No IT-98–29-T, 5 December 2003) [65]–[66]; affirmed in Prosecutor v Galić (Appeals Chamber Judgment) (ICTY, Case No IT-98–29-A, 30 November 2006), [87]–[90].
40 Prosecutor v Galić (2003), ibid, [137].
The war crime of terror is not, however, the same as certain peacetime legal conceptions of terrorism, namely violence committed to compel a government to do or refrain from doing something, or to advance a political, religious or ideological cause.41 The meaning of terrorism in IHL is thus more limited.

For this reason, certain terrorism offences within the jurisdiction of post-9/11 US military commissions were not IHL offences as the US claimed. A crime of ‘terrorism’ was defined in a 2003 military instruction as violence ‘intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation and coercion’.42 The first two Guantánamo Bay detainees charged in 2004 were accused of this offence,43 which appears influenced by the definition in the (peacetime) Terrorist Financing Convention 1999.44

This offence was abandoned when the executive military commissions were reconstituted by the US Congress after the US Supreme Court’s 2006 decision in Hamdan v Rumsfeld. However, the 2006 military commissions were given jurisdiction over a new offence of providing ‘material support for terrorism’,45 ostensibly as a pre-existing war crime under international law. In reality this offence was derived from earlier US domestic law,46 with certain jurisdictional differences. The new offence was among the principal charges brought against the few convicted in the military commissions after 2006.47

The problem was that such an offence was unknown to international law at the time of the alleged conduct, since it imposed liabilities beyond the limited circumstances recognised by the ICTY in Galić. In Hamdan v United States in 2012, a US civilian appeals court found that the offence

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41 See Ben Saul, Defining Terrorism in International Law (OUP, 2006), chs 3–4.
46 18 US Code, ss 2339A and 2339B.
47 Including an Australian (David Hicks), a Canadian (Omar Khadr), two Sudanese (Ibrahim Ahmed Mahmoud al Qosi and Noor Uthman Muhammed) and two Yemenis (Salim Ahmed Hamdan and Ali Hamza Ahmed Suleiman Al Bahlul).
was not a war crime under international law at the time of its commis-
sion, and that the US law did not authorise retrospective prosecution of
offences which were not war crimes at the time. An Australian citizen,
David Hicks, has also argued that his conviction for material support is
unlawfully retrospective, contrary to the principle of legality under Article
15 of the International Covenant on Civil and Political Rights. (More
broadly, ‘material support’ offences in US domestic civilian law have also
adversely affected the ability of humanitarian organisations to work with
non-state armed groups defined by the US as terrorist, as discussed in
another chapter of this book.)

In addition to IHL offences, domestic criminal (and/or military) law
may apply to certain terrorist acts in armed conflict. In international
conflicts, the criminal law of the occupied territory will still apply to civil-
ians (including those participating in hostilities), subject to any necessary
modifications to ensure the security of the occupying power. In non-
international conflict, the state party’s domestic criminal law remains
applicable, such that non-state actors may find themselves criminalised
for terrorism, rebellion, revolution, treason, treachery, sedition, or other
extant national security offences. One qualification is that IHL encour-
ages states to confer amnesties at the end of a conflict for participation in
hostilities (but not for war crimes and the like).

In ‘transnational’ non-international conflicts, two domestic legal
systems may potentially apply: that of the (non-belligerent) territorial
state (which may not be able to practically enforce it), as well as the state
whose forces are fighting extraterritorially. In the latter case, the state’s
domestic criminal law will only lawfully apply if two conditions are met.
First, it must have been given prospective extraterritorial effect. Secondly,
the offences must be defined with sufficient precision so as to give fair
advance notice of the scope of the liability in question. (In this respect,
the residents of foreign territory are hardly likely to be au fait with their
liabilities under the law of an interloping foreign state.) Both conditions
are required so as to comply with the international human rights principles

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48 *Hamdan v United States*, US Court of Appeals (DC Circuit), 16 October 2012. The case is subject to appeal.
49 *Hicks v Australia*, UN Human Rights Committee Communication under the First Optional Protocol to the ICCPR, lodged 20 September 2010.
51 Fourth Geneva Convention, art 64; Hague Regulations concerning the Laws and Customs of War, as annexed to Hague Convention (IV) respecting the Laws and Customs of War on Land, adopted 18 October 1907, 205 CTS 227 (entered into force 26 January 1910), art 43.
of legality and non-retrospective punishment. Thirdly, the offences must come within the competence of the state to criminalise conduct extraterritorially, namely by reference to the international principles of prescriptive criminal jurisdiction; particularly important may be protective, nationality, and passive personality jurisdiction.

B. Trial and Prosecution of Terrorists

Some criminal trials since 9/11 have not conformed to the minimum fair trial guarantees of IHL and/or international human rights law. Even before 9/11, military trials of ‘terrorists’, such as by ‘faceless’ tribunals in Latin America, raised serious human rights problems. There are extensive guarantees of a fair trial in international conflicts, consolidated in Article 75 of Protocol I, and which approximate the human rights guarantees in Article 14 of the ICCPR.

In non-international conflicts, common Article 3 of the Geneva Conventions provides for a fair criminal trial by ‘a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples’. While vaguely worded, that provision should be interpreted dynamically in the light of the explicit guarantees set out in Article 75 of Protocol I and/or Article 14 of the ICCPR.

Another chapter in this book examines the US military commissions after 9/11. In brief, attempts to deviate from minimum international guarantees, as through the US President’s first military commissions, were rejected by the US Supreme Court.52 There were particular concerns about the admission of evidence obtained by coercion or hearsay evidence, restrictions on access to evidence and lawyers, executive interference in trials, and the lack of structural independence and impartiality from the political branch. While the Military Commissions Act 2006 (US) made some improvements, the new trials remained dogged by procedural irregularities.53 The third system of trials, constituted by President Barack Obama under the Military Commissions Act 2009 (US) was also not free of basic defects.

That is not to suggest that a fair criminal procedure has a static content. Many national legal systems have developed mechanisms for protecting security sensitive intelligence information while balancing the concerns

of a fair criminal trial, in particular the right of an accused to see and test the evidence. The problem was that the US military commissions transgressed these outermost boundaries of a fair trial.

5. CONCLUSION: IHL AND INTERNATIONAL COUNTER-TERROISM LAW

This chapter showed that by and large IHL is capable of adequately addressing the challenge of terrorism. Certain terrorist violence may be regulated by the rules of international or non-international armed conflict, including where it has a transnational dimension. There is no need for any special status of ‘terrorist’ in IHL, which would only serve to diminish existing humanitarian protections. Terrorists can be targeted for direct participation in hostilities; administratively detained where they are dangerous; and prosecuted for war crimes. Human rights law applies alongside the lex specialis of IHL to supplement its rules in certain areas, particularly as regards detention in non-international conflict.

The rapid growth of new international counter-terrorism law after 9/11 has also raised potentially serious conflicts with IHL. In general the international treaties adopted prior to 9/11 tended to avoid any collision with IHL norms, by carving out from their scope hostile acts committed by parties to an armed conflict, thus leaving such acts to be regulated by IHL.

This separation of regimes has been blurred by post-9/11 measures. In UN Security Council Resolution 1371 (2001), the Security Council authorised states to criminalise terrorism in domestic law but without providing a definition. Many states duly enacted their own terrorism offences or unilaterally banned terrorist organisations. Little difficulty arises where such measures reinforce war crimes against civilians under IHL, or are otherwise limited to protecting civilians (such as by criminalising the preparatory financing of attacks on civilians).

However, some laws have also criminalised acts which are not prohibited by IHL (such as proportionate attacks on military objectives by non-state forces or proscribed terrorist groups that are parties to such

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54 See, e.g., A and others v United Kingdom App No 3455/05 (ECHR, 19 February 2009); Canada (Prime Minister) v Khadr [2010] SCR 44 (Supreme Court of Canada).
56 As under the laws of the UK (R v Mohammed Gul [2012] EWCA Crim 280) and Australia (Commonwealth Criminal Code 1995, s 100.1 and Division 101).
conflicts (such as the LTTE in Sri Lanka). A similar concern has arisen in the drafting of a UN comprehensive terrorism convention since 2000. In both cases such laws may serve as a basis for transnational criminal cooperation to suppress terrorism connected with armed conflict.

One adverse consequence may be to undermine the effectiveness of IHL and its humanitarian purposes. If non-state groups find themselves branded and delegitimised internationally as terrorist criminals, the incentive for them to comply with IHL is lost. For it then makes sense to fight as long and as viciously as possible to avoid defeat, which would bring only severe criminal punishment (rather than security detention, amnesties and eventual demobilisation).

In contrast, where non-state groups are not criminalised, but treated as parties to a conflict, there is greater reason for them to comply with humanitarian principles. Of course, more must be done to induce terrorist groups themselves to comply with IHL. As non-parties to IHL treaties, their commitment to norms they did not formulate or agree to can be encouraged by, for example, special agreements under common Article 3(2), unilateral declarations or deeds of commitment, codes of conduct, training, and the creation of disciplinary systems (including ‘courts’, like those of the LTTE).

Unlike global counter-terrorism law, IHL was not developed yesterday, but through a gradual and delicate process of codification and consensus building over more than a century. While it is resilient and flexible enough to accommodate new challenges, it is also fragile – and capable of unraveling if powerful states are no longer willing to support it. Only terrorists, not states or civilians, will ultimately benefit from the fraying or disintegration of IHL.

57 For example, in the European Union (Declaration of the Presidency of the European Council of 31 May 2006 about the Council Decision of 29 May 2006 [9962/06 (Presse 163)]) and the United States (designated by the Secretary of State on 8 October 1997, pursuant to § 219 of the Anti-Terrorism and Effective Death Penalty Act).

58 The draft convention is discussed in another chapter of this book.