

# Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?

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## **Abstract**

*The armed conflict in Afghanistan since 2001 has raised manifold questions pertaining to the humanitarian rules relative to the conduct of hostilities. In Afghanistan, as is often the case in so-called asymmetric conflicts, the geographical and temporal boundaries of the battlefield, and the distinction between civilians and fighters, are increasingly blurred. As a result, the risks for both civilians and soldiers operating in Afghanistan are high. The objective of this article is to assess whether – and if so how much – the armed conflict in Afghanistan has affected the application and interpretation of the principles of distinction, proportionality, and precaution – principles that form the core of legal rules pertaining to the conduct of hostilities.*

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For almost a decade the armed conflict in Afghanistan has been posing many challenging questions for military personnel, international lawyers, and the humanitarian community alike. Even today, hardly a day passes without news about civilian casualties or losses among Afghan, International Security Assistance Force (ISAF), and Operation Enduring Freedom (OEF) forces, or those of the armed opposition.<sup>1</sup> While it is in the nature of armed conflict that soldiers and fighters are injured or killed, it should not be the case for civilians. One factor that has greatly affected warfare in Afghanistan is the huge disparity of technological capacity and military power between the parties to that conflict. The military might of the United States and its allies has forced the armed opposition to adopt guerrilla warfare geared to an endurance and attrition strategy.<sup>2</sup> In accordance with this strategy, the armed opposition tries to evade the classical battlefield by shifting the hostilities from one location to another – often in proximity to civilians, and thus blurring the lines of distinction between those who fight and persons taking no active part in the hostilities. At the same time, an important part of contemporary counterinsurgency strategy is to focus on, and to be in as close proximity as possible to, the civilian population.<sup>3</sup> The blurring of distinctions goes hand in hand with increased challenges for the parties to the conflict in identifying military objectives and applying the principles of proportionality and precaution. All this has at times prompted attempts either to broaden certain concepts of international humanitarian law (IHL), such as the definition of direct participation in hostilities,<sup>4</sup> or to otherwise limit its protective scope.<sup>5</sup> Over time and with increasing

- 1 The armed opposition operating against the Government of the Islamic Republic of Afghanistan and the international military presence is commonly referred to as the ‘Taliban’, who describe themselves as the Islamic Emirate of Afghanistan. This is a shorthand for a fragmented alliance between different groups such as the Quetta Shura Taliban in Southern Afghanistan, Hezb-i Islami Gulbuddin (HiG) and Hezb-i Islami Khalis in the east, and the Haqqani Network. See a description of non-state armed groups operating in Afghanistan by the Human Security Report Project (HSRP), Afghanistan Conflict Monitor, available at: <http://www.afghanconflictmonitor.org/armedgroups.html> (last visited 22 March 2011).
- 2 Patrick Quinn, ‘Taliban leader: insurgents waging war of attrition’, in *The Seattle Times*, 15 November 2010, available at: [http://seattletimes.nwsourc.com/html/nationworld/2013436796\\_apasafghantalianmessage.html](http://seattletimes.nwsourc.com/html/nationworld/2013436796_apasafghantalianmessage.html) (last visited 15 March 2011). See also Ehsan Mehmood Khan, ‘A strategic perspective on Taliban warfare’, in *Small Wars Journal*, 22 March 2010, available at: <http://smallwarsjournal.com/blog/2010/03/a-strategic-perspective-on-tal/> (last visited 15 March 2011).
- 3 See, e.g., Canadian Army, ‘Troops get close to Afghans’, 15 February 2011, available at: <http://www.army.forces.gc.ca/land-terre/news-nouvelles/story-reportage-eng.asp?id=5024> (last visited 15 March 2011); David Axe, ‘US-led alliance concentrates on Afghan population centers’, in *Voice of America*, 9 May 2011, available at <http://www.voanews.com/english/news/asia/US-led-Alliance-in-Concentrates-on-Afghan-Population-Centers-121518749.html> (last visited 27 June 2011).
- 4 See Kenneth Watkin, ‘Opportunity lost: organized armed groups and the ICRC “Direct participation in hostilities” interpretative guidance’, in *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 641–695; Michael N. Schmitt, ‘Deconstructing direct participation in hostilities: the constitutive elements’, in *ibid.*, pp. 697–739; Bill Boothby, ‘“And for such time as”: the time dimension to direct participation in hostilities’, in *ibid.*, pp. 741–768.
- 5 For instance, with regard to combatant status of Taliban and Al Qaeda fighters and their detention see, e.g., W. Hays Park, ‘Combatants’, in Michael N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, US Naval War College International Law Studies, Vol. 85, Naval War College Press, Newport, RI, 2009, pp. 269–275. For a critique of the collective denial of prisoner-of-war status and an analysis of the legal bases of detention see Stéphane Ojeda, ‘US detention of Taliban fighters: some legal considerations’, in *ibid.*, pp. 360–369.

civilian casualties, however, it has turned out that the tendency to limit the protective scope of IHL has proved contrary to the achievement of the long-term strategic goals. As a result, policy and operational considerations have led to the adoption of rules of engagement that in some aspects are more restrictive than what would be required by IHL.<sup>6</sup>

The article proceeds in several steps. First, the different stages of the armed conflict taking place in Afghanistan since 2001 are classified. This step is important for identifying the legal framework governing the ongoing hostilities. Second, it assesses whether the asymmetric nature of the armed conflict in Afghanistan has affected IHL, in particular the interpretation and application of the rules relative to the conduct of hostilities. This analysis focuses on the concepts of distinction, proportionality, and precautions, and uses the challenges faced by the international military forces as a case study. Third, the article sheds some light on the sometimes difficult distinction between the law enforcement paradigm and the paradigm of hostilities in certain operations. One example where these two paradigms potentially overlap is provided by (vehicle) checkpoints, which are an important security measure in Afghanistan. Finally, the article looks at possible challenges, and advantages, that new technologies may present in the conduct of hostilities. Especially in recent years, unmanned aerial vehicles (UAVs) – that is, drones – have been employed in Afghanistan for surveillance purposes but also increasingly for the actual conduct of hostilities, namely in the context of so-called targeted killings.

## The legal qualification of the Afghan conflict, 2001–2011

The situation in Afghanistan is complex, not only from a factual but also from a legal perspective. Several parties have been involved in the conflict since 2001 and it is today widely accepted that this conflict can be divided into a phase of international armed conflict between the US-led Coalition (OEF) and the Taliban governing Afghanistan, lasting from 7 October 2001 to 18 June 2002,<sup>7</sup> followed by an ‘internationalized’ non-international armed

6 For instance: ‘Prior to the use of fires, the commander approving the strike must determine that no civilians are present. If unable to assess the risk of civilian presence, fires are prohibited, except under [one] of the following two conditions (specific conditions deleted due to operational security; however, they have to do with the risk to ISAF and Afghan forces).’ See ISAF, *General Petraeus issues updated tactical directive: emphasizes ‘disciplined use of force’*, News Release, 2010-08-CA-004, Kabul, 4 August 2010, available at: <http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html> (last visited 15 March 2011).

7 See S. Ojeda, above note 5, pp. 358–359. In accordance with the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), an international armed conflict exists ‘whenever there is a resort to armed force between States’. See ICTY, *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70. According to the commentary to the Geneva Conventions of 1949, an international armed conflict takes place whenever there is ‘Any difference arising between two States and leading to the intervention of armed forces’. Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, ICRC, 1952, p. 32.

conflict<sup>8</sup> since 19 June 2002, in which the new Afghan government, supported by ISAF and OEF forces, fights the armed opposition.<sup>9</sup> This conflict phase still continues today.

## International armed conflict before 19 June 2002

Active hostilities in Afghanistan began with air strikes against the Taliban on 7 October 2001 as part of ‘Operation Enduring Freedom’, a US-led military campaign directed against the Taliban and Al Qaeda in Afghanistan as a response to the 11 September 2001 terrorist attacks on the United States.<sup>10</sup> Although only a few states recognized the Taliban as the legitimate government of Afghanistan at the time, it is widely agreed that they represented the *de facto* Afghan government<sup>11</sup> because they controlled the majority of Afghanistan’s territory, passed and enforced decrees, and provided a certain (however questionable) degree of ‘security’ in the areas that they controlled.<sup>12</sup> The fall of Mazar-i Sharif on 9 November 2001 marked the decline of the Taliban rule, and when Northern Alliance forces entered Kabul on 13 November,<sup>13</sup> followed by the fall of Kandahar on 7 December,<sup>14</sup> the majority of the Taliban were believed to have disbanded.<sup>15</sup> This decline of the

8 Note that this expression does not depict a ‘third’ type of armed conflict but covers non-international armed conflicts with an ‘international’ dimension. The expression is used in situations where a state (or a multinational force) becomes a party to a pre-existing non-international armed conflict. Such an intervention may result in three outcomes: (1) the existing armed conflict remains a non-international armed conflict if a state or multinational force supports another state against the armed opposition; (2) the armed conflict is transformed into an international armed conflict if the acts of the armed opposition can be attributed to the intervening state or multinational force; or (3) it develops into a ‘mixed conflict’, where the relations between the parties are governed in part by the rules of international armed conflict and in part by those of non-international armed conflict.

9 S. Ojeda, above note 5, pp. 359–360.

10 Operation Enduring Freedom was based upon UN Security Council resolution 1368 of 12 September 2001, recognizing the individual and collective right of self-defence in accordance with the UN Charter, condemning the ‘terrorist attacks’ in the United States, and regarding them as a threat to international peace and security. In addition, NATO invoked Article 5 of the North Atlantic Treaty, which considers an armed attack against one or more NATO parties as an attack against all of them. See Article 5 of the North Atlantic Treaty of 4 April 1949; NATO Update, ‘Invocation of Article 5 confirmed’, 2 October 2001, available at: <http://www.nato.int/docu/update/2001/1001/e1002a.htm> (last visited 14 March 2011). See also ‘7 October 2001: US launches air strikes against Taleban’, in *BBC*, ‘*On this day*’, 7 October 2001, available at: [http://news.bbc.co.uk/onthisday/hi/dates/stories/october/7/newsid\\_2519000/2519353.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/october/7/newsid_2519000/2519353.stm) (last visited 22 March 2011).

11 Only Pakistan, Saudi Arabia, and the United Arab Emirates recognized the Taliban as *de jure* government. For a discussion of their recognition, see Rüdiger Wolfrum and Christine E. Phillip, ‘The status of the Taliban: their obligations and rights under international law’, in J. A. Frowein and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, pp. 571–577 and 584–586.

12 *Ibid.*, p. 566; see also Report of the Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, 17 August 2001, UN Doc. S/2001/789.

13 John Simpson, ‘Eyewitness: the liberation of Kabul’, in *BBC News*, available at: [http://news.bbc.co.uk/2/hi/south\\_asia/1654353.stm](http://news.bbc.co.uk/2/hi/south_asia/1654353.stm) (last visited 10 March 2011).

14 ‘7 December 2001: Taleban surrender Kandahar’, in *BBC* ‘*On this day*’, available at: [http://news.bbc.co.uk/onthisday/hi/dates/stories/december/7/newsid\\_4031000/4031711.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/7/newsid_4031000/4031711.stm) (last visited 22 March 2011).

15 See Barbie Dutter and Stephen Robinson, ‘Reign of the Taliban is over’, in *The Telegraph*, 7 December 2001, available at: <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1364622/Reign-of-the-Taliban-is-over.html> (last visited 22 March 2011).

Taliban then cleared the way for the establishment of a new transitional government. The legal discussion during this conflict phase focused mainly on questions relating to the status of enemy fighters and the status and treatment of detainees.<sup>16</sup>

### Non-international armed conflict from 19 June 2002 onwards

In accordance with the Bonn Agreement of 5 December 2001, the emergency *Loya Jirga* established the Afghan Transitional Administration on 19 June 2002 and elected Hamid Karzai as the new head of government recognized by the international community.<sup>17</sup> At this point, the international armed conflict came to an end because it no longer opposed two or more states.<sup>18</sup> However, hostilities soon resumed as the armed opposition adapted to the new situation.<sup>19</sup> Since then the hostilities have been taking place in various locations and to various degrees between the new Afghan government with the support of ISAF<sup>20</sup> and OEF forces on the one hand, and the armed opposition on the other. The organisation of the armed opposition, and the hostilities, have reached such a level that one can safely admit the existence of a non-international armed conflict to which Common Article 3 to the four Geneva Conventions of 1949 (Common Article 3) and customary IHL (relevant to this threshold) apply.<sup>21</sup>

Since Afghanistan ratified Additional Protocol II on 10 November 2009, the hostilities between the Afghan National Army and the armed opposition could

- 16 On this discussion see, *inter alia*, Jelena Pejic, “‘Unlawful/enemy combatants’: interpretation and consequences”, in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Yoram Dinstein*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 335–336; Gabor Rona, ‘Legal issues in the “war on terrorism”: reflecting on the conversation between Silja N.U. Voneky and John Bellinger’, in *German Law Journal*, Vol. 9, No. 5, 2008, pp. 711–736.
- 17 See UN Security Council resolution 1419 (2002), of 26 June 2002, welcoming the election of Hamid Karzai. See also Report of the Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, 11 July 2002, UN Doc. S/2002/737. The International Conference on Afghanistan held in December 2001 led to the ‘Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (“Bonn Agreement”)', S/2001/1154, of 5 December 2001, establishing an interim authority and calling for the establishment of an emergency *Loya Jirga*. See Lucy Morgan Edwards, ‘State-building in Afghanistan: a case showing the limits?’, in *International Review of the Red Cross*, Vol. 92, No. 880, 2010, pp. 967–991; Norah Niland, ‘Impunity and insurgency: a deadly combination in Afghanistan’, in *ibid.*, pp. 931–950.
- 18 For the opinion expressed in 2009 that the nature of the conflict between the Coalition states and the armed opposition has not changed, i.e. that the conflict remains an international armed conflict, see, e.g., Yoram Dinstein, ‘Terrorism and Afghanistan’, in M. N. Schmitt, above note 5, pp. 51–53.
- 19 See Report of the Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, 18 March 2002, UN Doc. S/2002/278, paras. 45–54.
- 20 For the mandate of ISAF see in particular UN Security Council resolution 1386 of 20 December 2001; UN Security Council resolution 1510 of 13 October 2003; and UN Security Council resolution 1890 of 8 October 2009.
- 21 A clear and uniform definition of what constitutes a non-international armed conflict does not exist in international law. However, it is generally accepted that the existence of such a conflict is based on objective criteria, namely the intensity of the violence and the organization of the parties. For a description of the threshold criteria, see International Committee of the Red Cross (ICRC), *How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?*, ICRC Opinion Paper, March 2008, available at: <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (last visited 22 March 2011).

possibly be governed by this Protocol also. This would require the armed opposition to control at least part of Afghanistan in a way that enables them to ‘carry out sustained and concerted military operations and to implement [Additional Protocol II]’.<sup>22</sup> The armed opposition seems to have succeeded in establishing a ‘shadow government’ throughout Afghanistan, where they control parts of the Afghan population and are operating courts.<sup>23</sup> This factual background militates in favour of applying Additional Protocol II between the armed opposition and the Afghan government armed forces.

In this regard it is questionable whether other states are bound by the provisions of Additional Protocol II with respect to the conflict in Afghanistan. Certainly, the Protocol cannot directly bind states that, like the US, have not ratified it.<sup>24</sup> Furthermore, the wording of Article 1(1) of Additional Protocol II suggests that it applies only to armed conflicts between the contracting state and opposing non-state parties that control part of that state’s territory.<sup>25</sup> It thus seems that states other than Afghanistan that are party to the armed conflict are not directly bound by Additional Protocol II either, even if they have ratified it. Notwithstanding, every party to the conflict has to comply with those rules that have attained customary law status.<sup>26</sup>

The legal framework applicable to all parties to the armed conflict in Afghanistan is thus Common Article 3, as well as customary IHL applicable in non-international armed conflicts. In addition, the armed conflict between the government of Afghanistan and the armed opposition is governed by the rules of Additional Protocol II. The discrepancy that results from the application of Additional Protocol II only between the armed opposition and Afghanistan is, however, relatively marginal. Most provisions of Additional Protocol II have acquired customary law status and therefore apply also to other states party to the armed conflict in Afghanistan. With regard to the geographical scope of application of IHL it is important to stress that these rules are not limited to the area where active hostilities take place and hence apply to the entire Afghan territory.<sup>27</sup>

22 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 1.

23 See David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*, Oxford University Press, Oxford, 2009, pp. 47–48 and 49–50. See also Griff Witte, ‘Taliban shadow officials offer concrete alternative’, in *The Washington Post*, 8 December 2009; Anand Gopal, ‘Some Afghans live under Taliban rule – and prefer it’, in *The Christian Science Monitor*, 15 October 2008, available at: <http://www.csmonitor.com/World/Asia-South-Central/2008/1015/p01s01-wosc.html> (last visited 22 March 2011).

24 See Article 34 of the Vienna Convention on the Law of Treaties of 23 May 1969, expressing the general rule that ‘a treaty does not create either obligations or rights for a third State without consent’.

25 See Article 1(1) of Additional Protocol II, stating: ‘This Protocol ... shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between *its* armed forces and ... organized armed groups which ... exercise ... control over a part of *its* territory ...’ (emphasis added).

26 See Article 38 of the Vienna Convention on the Law of Treaties.

27 See, e.g., ICTY, *Prosecutor v. Dusko Tadić*, above note 7, paras. 86 and 89; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision of 2 September 1998, paras. 635 and 636.

## Afghanistan: an asymmetric armed conflict

One of the major challenges of the armed conflict in Afghanistan is the significant discrepancy of military power and technological capacity between the international military/ISAF forces on the one hand and the armed opposition on the other. Afghanistan has thus become the paradigmatic example of an asymmetric armed conflict.<sup>28</sup>

Of course, 'asymmetric warfare' is a multifaceted notion. No common understanding exists, much less a clear-cut definition of what 'asymmetric warfare' means. Some have even argued that the concept of asymmetry has been 'twisted beyond utility'.<sup>29</sup> Be that as it may, in legal doctrine the phrase 'asymmetric warfare' is commonly used as descriptive shorthand for the changing structures of modern armed conflicts and for the corresponding challenges that this development poses for the application of IHL. In this context, the term 'asymmetric warfare' is used to describe inequalities and imbalances between belligerents involved in modern armed conflicts that can reach across the entire spectrum of warfare.<sup>30</sup> Most often, reference is made to a disparate distribution of military power and technological capacity.<sup>31</sup> The power imbalances between the parties involved may be so pronounced that from the outset the inferior party is bereft of any realistic prospect of winning the conflict militarily. Military victory in the classical sense may not even be the objective of the parties involved.<sup>32</sup>

The situation in Afghanistan is a conspicuous example, showing that there is an evident chain of cause and effect between such power imbalances and what is called guerrilla warfare.<sup>33</sup> The military strength of the multinational forces in Afghanistan induces the armed opposition to adopt so-called guerrilla tactics so as

- 28 See Claus Kress and Georg Nolte, 'Im ungleichen Krieg', in *Frankfurter Allgemeine Zeitung*, available at: <http://www.faz.net/s/RubD5CB2DA481C04D05AA471FA88471AEF0/Doc~E0AAA1FCF923947BEB8C20C7D45EFA2DC~ATpl~Ecommon~Scontent.html> (last visited 22 March 2011); Andreas Paulus and Mindia Vashakmadze, 'Asymmetrical war and the notion of armed conflict: a tentative conceptualization', in *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 108. Generally, see Herfried Münkler, 'The wars of the 21st century', in *International Review of the Red Cross*, Vol. 85, No. 849, 2003, p. 7.
- 29 Stephen J. Blank, *Rethinking Asymmetric Threats*, U.S. Army War College, Strategic Studies Institutes, September 2003, available at: <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=103> (last visited 22 March 2011).
- 30 See Michael N. Schmitt, 'Asymmetrical warfare and international humanitarian law', in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges*, Springer Science and Business Media, Berlin and Heidelberg, 2007, pp. 11–48.
- 31 Robin Geiß, 'Asymmetric conflict structures', in *International Review of the Red Cross*, Vol. 88, No. 864, 2006, pp. 757–777; Toni Pfanner, 'Asymmetrical warfare from the perspective of humanitarian law and humanitarian action', in *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 149–174.
- 32 William C. Martel, *Victory in War: Foundations of Modern Military Policy*, Cambridge University Press, Cambridge, 2007.
- 33 See, for instance, D. Kilcullen, above note 23, p. 39 onwards. Traditionally, especially in military theory, asymmetric warfare has often been equated with guerrilla and partisan warfare. See Stephen Metz and Douglas V. Johnson II, *Asymmetry and U.S. Military Strategy: Definition, Background, and Strategic Concepts*, US Army War College, Strategic Studies Institute, January 2001, available at: <http://www.au.af.mil/au/awc/awcgate/ssi/asymmetry.pdf> (last visited 3 January 2011).



to evade direct military confrontation with a superior enemy and to level out their inferiority. Some authors also suggest that the armed opposition in Afghanistan primarily adopts an exhaustion strategy to gain control over the Pashtun regions, instead of seeking a direct overthrow of the Afghan government.<sup>34</sup> This simple logic is not new; it has a long history in warfare.<sup>35</sup> In the twentieth century, the wars of national liberation and the vast majority of non-international armed conflicts were all inherently asymmetric in this sense.

Notwithstanding their limited military means, the armed opposition has shown itself to have the capacity to obstruct the strategic aims of its superior adversaries in the furtherance of its own.<sup>36</sup> The duration of the non-international armed conflict in Afghanistan is testament to this reality. To date the conflict has lasted almost ten years.<sup>37</sup> The conflict in Afghanistan is highly dynamic. It tends to evade clear-cut spatial and temporal demarcations. The level of violence is fluctuating; hostilities erupt at any time and potentially anywhere. Thus battle space is everywhere and traditional conceptions of a distinct 'battlefield' often seem rather obsolete in this constellation.<sup>38</sup> The Taliban in Afghanistan appears to consist of a core of guerrilla fighters that move from one valley to another (especially when their security is threatened), mounting ambushes, placing mines or improvised explosive devices (IEDs – either person- or vehicle-activated, or remote-controlled), using snipers, and even committing suicide attacks.<sup>39</sup> These moving fighters are often supported by local 'part-time' guerrillas and village cells (acting as a co-ordinating and intelligence mechanism).<sup>40</sup>

34 See, e.g., D. Kilcullen, above note 23, pp. 50 and 52.

35 Andrew J. R. Mack, 'Why big nations lose small wars: the politics of asymmetric conflict', in *World Politics*, Vol. 27, No. 2, 1975, pp. 175–200.

36 Ivan Arreguín-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, Cambridge University Press, Cambridge, 2005.

37 'Is the Afghan War really the longest in U.S. history?', in *The Week*, 10 June 2010, available at: <http://theweek.com/article/index/203842/is-the-afghan-war-really-the-longest-in-us-history> (last visited 22 March 2011).

38 H. Münkler, above note 28, pp. 7–22; Herfried Münkler, *Der Wandel des Krieges: Von der Symmetrie zur Asymmetrie*, 2nd edn, Velbrück Wissenschaft, Weilerswist, 2006.

39 D. Kilcullen, above note 23, p. 55. Note that the armed opposition uses the expression 'martyrdom attacks'. See the unofficial ICRC translation in this issue (pp. 000–000) of, 'The Islamic Emirate of Afghanistan: the laiha [code of conduct] for mujahids', version of 29 May 2010, Art. 57. For examples of recent suicide and other attacks see, *inter alia*, Heidi Vogt and Mirwais Khan, 'Afghanistan suicide bomber kills 6 NATO troops', in *The Huffington Post*, 12 December 2010, available at: [http://www.huffingtonpost.com/2010/12/12/afghanistan-suicide-bomber\\_n\\_795588.html](http://www.huffingtonpost.com/2010/12/12/afghanistan-suicide-bomber_n_795588.html) (last visited 22 March 2011); Alissa J. Rubin, '31 killed in suicide attack on Afghan census office' in *The New York Times*, 21 February 2011, available at: <http://www.nytimes.com/2011/02/22/world/asia/22afghanistan.html> (last visited 22 March 2011); and 'Taliban attack Afghanistan Nato bases', in *RFI*, 28 August 2010, available at: <http://www.english.rfi.fr/asia-pacific/20100828-taliban-attack-afghanistan-nato-bases> (last visited 22 March 2011). According to a report by the UN Secretary-General, there were about three suicide attacks per week in 2010, mainly targeting international military forces. See Report of the Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, 10 December 2010, UN Doc. S/2010/630, para. 15.

40 D. Kilcullen, above note 23, pp. 83–86.



Asymmetric conflict structures raise an array of different (legal) problems.<sup>41</sup> As far as the actual conduct of hostilities is concerned, discussions centre on the impact of increasingly blurred lines of distinction on the application and adequacy of the respective humanitarian rules. The constant evasion of direct military confrontation, the deliberate shifting of hostilities from one location to another, the adoption of population-centric approaches – all strategies frequently bringing hostilities into the proximity of urban and civilian surroundings – all aggravate the distinction between those who fight and protected civilians. In practice, determining who or what may be attacked is increasingly difficult. As a result, the risks for the civilian population are increased. At the same time, soldiers operating on the ground also face greater security challenges as they cannot always discern the difference between those who are participating in hostilities and those who are not. This deplorable trend is well known.<sup>42</sup> Time and again international fora have expressed concern that civilians continue to bear the brunt of modern armed conflicts.<sup>43</sup> Less attention, however, has been devoted to the various ‘follow-up’ questions that blurred lines of distinction raise when it comes to the identification of legitimate military objectives, the application of the proportionality principle, and the precautionary measures prescribed by virtue of Article 57 of Additional Protocol I and customary law. Asymmetric conflicts, it seems, bring to the fore a number of long-standing questions and ambiguities pertaining to the humanitarian rules regarding the conduct of hostilities. This article analyses these questions against the backdrop of the prolonged conflict in Afghanistan, mainly by using the challenges faced by the international military forces as a case study.

## The conduct of hostilities in asymmetric conflicts

The evasion of direct confrontation and the preservation of one’s own forces become compelling priorities, especially for a militarily inferior belligerent. This may particularly challenge the fundamental principle of distinction. Direct attacks may easily be evaded by assuming civilian guise. Feigning protected status, mingling with the civilian population, and launching attacks from objects that enjoy special protection are all most deplorable but seemingly inevitable consequences of this logic. Protection of military objectives that cannot so readily be concealed may be sought by the use of human shields, thereby manipulating the enemy’s

41 The notion and definition of armed conflict under international humanitarian law has consequentially received considerable attention in the recent literature. See A. Paulus and M. Vashakmadze, above note 28, pp. 95–125.

42 *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, 30IC/07/8.4, October 2007, available at: <http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf> (last visited 22 March 2011).

43 See *ibid.*; UN Security Council, ‘Despite progress, civilians continue to bear brunt of conflict, says Under-Secretary-General in briefing to Security Council’, press release of 26 June 2009, SC/9692, available at: <http://www.un.org/News/Press/docs/2009/sc9692.doc.htm> (last visited 22 March 2011).

proportionality assessment, in addition to violating the precautionary principle laid out in Article 58 of Additional Protocol I and part of customary IHL applicable in both international and non-international armed conflict.<sup>44</sup>

## Reciprocity and other incentives for compliance

Repeated violations of humanitarian rules by one side are likely to influence the other side's behaviour also. The theoretical worst-case scenario is a dynamic of negative reciprocity, that is, a spiral-down effect that ultimately culminates in mutual disregard for the rules of IHL. If one belligerent constantly violates humanitarian law and if such behaviour yields a tangible military advantage, the other side may eventually also be inclined to disregard these rules in order to enlarge its room for manoeuvre and thereby supposedly the effectiveness of its counter-strategies.

The vicious circle of forthright reciprocal disregard of humanitarian rules, however, has remained largely theoretical.<sup>45</sup> Experience, especially in Afghanistan, has shown that strict adherence to fundamental humanitarian precepts is conducive to the achievement of long-term strategic objectives. Conversely, repeated violations of humanitarian law, even if they seem to promise short-term military gains, in the long run may undermine the credibility and reputation of a party to the conflict, with potentially detrimental consequences for its ability to pursue diplomatic, humanitarian, developmental, and other strategies that may be vital for achieving long-term strategic goals.<sup>46</sup> Even the short-term military advantages that may be hoped to be gained by violating humanitarian rules are often negligible. Superfluous injury and unnecessary suffering are just that: superfluous and unnecessary. They hardly further the (military) objectives pursued.<sup>47</sup> Thus far, the central lesson in Afghanistan has been that the conflict will not be won solely by military force or even primarily by that strategic instrument. Rather, winning the 'hearts and minds' of the Afghan population has become the overall strategic priority. Thus, since 2009, ISAF has operated on the premise that civilian casualties and damages are to be minimized as much as possible.<sup>48</sup> This doctrine appears to have led to rules of engagement that partially exceed, to some extent, the

44 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Cambridge, 2005, Rule 15, p. 51.

45 The ICTY has aptly noted that: 'After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy. The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals qua human beings'. ICTY, *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 518.

46 Robert D. Sloane, 'Prologue to a voluntarist war convention', in *Michigan Law Review*, Vol. 106, December 2007, p. 481.

47 *Ibid.*

48 Gregor Peter Schmitz and Gabor Steingart, 'Generäle gegen Obama', in *Der Spiegel*, 26 September 2009, pp. 107–109.

limitations imposed by IHL.<sup>49</sup> The multinational forces thus frequently act within a framework that puts stricter limitations on them and that seems necessary in a context where casualties and destructions, even when within the limits of IHL, could endanger the primary strategic goals.<sup>50</sup> It therefore seems safe to conclude that, in Afghanistan, frequent disregard of humanitarian rules has not led to a forthright race to the bottom in terms of compliance with humanitarian rules. The predominant realization is rather that compliance with IHL continues to serve vital (state) interests even in the absence of traditional conceptions of reciprocity.<sup>51</sup>

### The principle of distinction

Other strategies often adopted in asymmetric war situations may result in far more diversified and subtle challenges to IHL than an outright disregard of that law in direct response to preceding violations. These asymmetric situations may lead to blurring the distinction between civilians and fighters and between civilian objects and military objectives. In the context of Afghanistan this is exemplified by the following two examples: first, the 2010 Code of Conduct for the Mujahideen recommends, *inter alia*, that the ‘Mujahids should adapt their physical appearance such as hairstyle, clothes, and shoes in the frame of Sharia and according to the common people of the area. On one hand, the Mujahids and local people will benefit from this in terms of security, and on another hand, will allow Mujahids to move easily in different directions.’<sup>52</sup> Second, in the pursuit of ‘winning hearts and minds’ and of a population-centric counterinsurgency (COIN) strategy,<sup>53</sup> proximity to the local population is sought, use of provincial reconstruction teams (PRTs) – co-locating civilian and military components – for relief activities is made,<sup>54</sup> or soldiers dress in civilian clothing.<sup>55</sup> While no IHL rule relative to non-international armed conflict explicitly prohibits such practices *per se*, this raises

49 For unclassified excerpts of a new Tactical Directive of 1 August 2010 (replacing the 1 July 2009 version), see ISAF, above note 6. It is from these excerpts that one can draw some conclusions as to the rules of engagement that were in force.

50 *Ibid.*

51 See also R. D. Sloane, above note 46, p. 481.

52 See ‘The Islamic Emirate of Afghanistan: the laiha [code of conduct] for mujahids’, above note 39, Art. 81.

53 See US Department of the Army, *FM 3-24.2: tactics in counterinsurgency*, Washington, DC, 21 April 2009, in particular on clear-hold-build operations, para. 3-106 *et seq.*

54 See, e.g., Save the Children, *Provincial Reconstruction Teams and Humanitarian: Military Relations in Afghanistan*, London, 2004. In addition, for at least the period between 11 September 2001 and 1 May 2003, US and/or Coalition forces sometimes wore ‘indigenous clothing to blend in with the forces that they were supporting’ or ‘civilian clothes while engaged in humanitarian relief efforts’. Center for Law and Military Operations, The Judge Advocate General’s Legal Center and School, *Legal Lessons Learned from Afghanistan and Iraq, Volume I: Major Combat Operations (11 September 2001–1 May 2003)*, United States Army, 2004, pp. 64–69.

55 See, e.g. ISAFMEDIA, ‘Meet a Marine Sergeant who blends in with the Afghan people to do his job’, 02 May 2011, available at: [http://www.youtube.com/watch?v=VoTH5tTHIQ&feature=youtube\\_gdata](http://www.youtube.com/watch?v=VoTH5tTHIQ&feature=youtube_gdata) (last visited 5 May 2011).

great concern with regard to the respect of the principle of distinction. The sheer inconceivability of an often unfathomable and indistinguishable enemy has sparked debate about where to draw the line between protected and unprotected persons, and civilian and military objects, and whether this binary categorization inherent in the principle of distinction is still adequate on the modern battlefield and in highly dynamic combat situations.

### *Distinguishing persons who are protected against direct attack from persons who may be attacked*

Blurred lines of distinction have occasionally led some authors to argue in favour of rather lenient interpretations of those legal criteria that are determinative for a loss of protection from direct attack. Put simply, in response to an increasingly difficult distinction between fighters and protected persons in practice, proponents of this view suggest a widening of the legal category of persons who may be legitimately attacked. Generally speaking, this line of argument is often based on the premise that the modern battlefield has become ever more dangerous for the soldiers operating therein and that therefore their margin of discretion regarding the use of lethal force should be enlarged. Contemporary debate surrounding the interpretation of the notion of ‘direct participation in hostilities’ – an activity that temporarily deprives civilians of their protection from direct attack – particularly the endorsement of rather generous interpretations of this notion and its temporal scope, are reflective of this tendency.<sup>56</sup> For example, the assumption that so-called voluntary ‘human shields’ are *per se* directly participating in hostilities, thereby losing their protection from direct attack as well as the suggestion that in case of doubt there should be a presumption that ‘questionable’ activity amounts to a ‘direct participation in hostilities’, are symptomatic of this trend.<sup>57</sup>

In the same vein, there have been proposals to define membership in organized armed groups rather broadly.<sup>58</sup> Members of organized armed groups cease to be civilians and therefore lose protection against direct attack for as long as their membership lasts.<sup>59</sup> They no longer benefit from the so-called ‘revolving

56 For an in-depth discussion, see the various contributions in the *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, available at: <http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/index.htm> (last visited 22 March 2011).

57 M. N. Schmitt, above note 4, p. 737 and n. 123 citing Michael N. Schmitt, “Direct participation in hostilities” and 21st century armed conflict’, in Horst Fischer *et al.* (eds), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, p. 509. The author argues that ‘[g]ray areas should be interpreted liberally, i.e., in favour of finding direct participation’.

58 K. Watkin, above note 4, p. 691.

59 In non-international armed conflicts, the membership approach is not uncontested: see e.g. Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors*, Oxford, Oxford University Press, 2010, pp. 148–155. In its study on direct participation, the ICRC adopted a membership approach based on continuous combat function. See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009, pp. 31–36.

door' of civilian protection, meaning that – unlike civilians – they do not automatically regain their protection from direct attack the moment they stop directly participating in hostilities. Rather, as fighters, they may be directly attacked at any time according to the same principles as members of the armed forces, that is to say, independently from any actual direct participation in hostilities at the time of the attack. However, identification of members of an organized armed group can be extremely difficult. The situation in Afghanistan clearly demonstrates the difficulties in distinguishing between a peaceful civilian and an armed opposition fighter or a civilian directly participating in hostilities.<sup>60</sup> The carrying of weapons alone can certainly not be taken as a sign of direct participation in hostilities and even less as a sign of membership in an organized armed group because Afghan civilians traditionally have weapons in their homes to protect themselves and their families.<sup>61</sup> Moreover, reports suggests that intelligence gathering is rendered more complicated because Afghan informants occasionally dupe the international military forces into killing personal rivals rather than high-ranking members of the armed opposition.<sup>62</sup> Evidently, if membership in an organized armed group was to be determined merely on the basis of a person's support for or sympathy with such a group – for instance, logistical support not related to military operations, out of tribal solidarity – the category of unprotected persons ('fighters') would be enlarged considerably. What is more, any such determination would probably be prone to arbitrariness in the absence of objectively ascertainable criteria for a person's affiliation with an armed group.<sup>63</sup>

A diametrically opposed tendency however, rejects any attempts to further broaden the categories of those who may legitimately be attacked.<sup>64</sup> Proponents of this trend, in view of the diffuse structures of asymmetric (non-international)

60 Note that civilians also include members of the Taliban without continuous combat function and who are not directly participating in hostilities. At least in the period between 11 September 2001 and 1 May 2003, the Operation Enduring Freedom rules of engagement did not declare any forces hostile. Instead, they relied upon the notion of 'likely and identifiable threat (LIT)' and positive identification (PID) thereof, which caused confusion among the troops. The forces were trained for the usual three-pronged approach, including declaration of hostile forces (targetable at any time), addressing direct participation in hostilities, and, for situations not connected to hostilities, incorporating the concept of self-defence. See Center for Law and Military Operations, above note 54, pp. 96–103; Michael N. Schmitt, 'Targeting and international humanitarian law in Afghanistan', in M. N. Schmitt, above note 5, p. 314.

61 It is estimated that about a million guns are held by Afghan civilians, which equates to about 4.4 firearms per 100 people. See data compiled by GunPolicy.org, available at: <http://www.gunpolicy.org/firearms/region/afghanistan> (last visited 22 March 2011).

62 See, e.g., Allan Hall, 'US troops "tricked into killing Afghan drug clan's rival"', in *The Telegraph*, 30 March 2009, available at: <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/5079429/US-troops-tricked-into-killing-Afghan-drug-clans-rival.html> (last visited 22 March 2011); Kim Sengupta, 'Taliban factions may be using British forces to assassinate rival commanders', in *The Independent*, 25 July 2008, available at: <http://www.independent.co.uk/news/world/asia/taliban-factions-may-be-using-british-forces-to-assassinate-rival-commanders-876801.html> (last visited 22 March 2011).

63 For an in-depth overview of the discussion, see Nils Melzer, 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities*', in *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, p. 831.

64 See *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum: study on targeted killings*, UN Doc. A/HRC/14/24/Add. 6, 28 May 2010, para. 65. See also

conflicts tend to perceive the binary code of IHL – that is, the categorical distinction between fighters on the one hand and protected civilians on the other – as overly rigid and inflexible.<sup>65</sup> Some have even claimed that IHL's status categories have outlived their utility altogether. For example, it has been suggested that one should refer to human rights law, disregarding the principle of distinction, as the applicable law in times of non-international armed conflict also.<sup>66</sup> In particular, the *Isayeva* judgments of the European Court of Human Rights (ECtHR) of 2005 sparked debate as to whether, especially in non-international armed conflicts, a higher but still realistic degree of protection could not possibly be achieved through the (exclusive or preferential) application of human rights law.<sup>67</sup>

Leaving aside the question of whether international human rights law is binding on armed groups as well as the problem of the extraterritorial application of human rights law that arises whenever third states intervene in a non-international armed conflict such as that in Afghanistan (note that it is undisputed that IHL is binding on armed groups and that it applies extraterritorially in case of an international or an internationalized non-international armed conflict), as far as the conduct of hostilities is concerned predominant recourse to human rights law rather than IHL would mark a paradigm shift that, at least for the time being, finds little support in state practice. Unlike IHL, human rights law would allow the use of potentially lethal force only in response to an imminent and sufficiently grave threat. In particular, human rights law requires the taking into consideration of the concrete circumstances of a given situation, irrespective of any binary distinction between targetable combatants or fighters and protected civilians.<sup>68</sup> The force employed must be proportionate in relation to the acute threat posed.<sup>69</sup> This standard is more protective. Most importantly, it is threat-proportionate and case-specific.

Derek Jinks, 'Protective parity and the laws of war', in *Notre Dame Law Review*, Vol. 79, 2004, pp. 1524–1528.

- 65 Rosa Ehrenreich Brooks, 'War everywhere: rights, national security law, and the law of armed conflict in the age of terror', in *University of Pennsylvania Law Review*, Vol. 153, 2004, pp. 675 and 757: 'It would be far better to make combatant status a purely functional question, one that hinges not on technicalities, but on the degree to which a person is directly, actively, and primarily involved in knowingly or intentionally planning or carrying out acts of violence'; Larry May, 'Killing naked soldiers: distinguishing between combatants and noncombatants', in *Ethics and International Affairs*, Vol. 19, No. 3, 2005, p. 39.
- 66 See William Abresch, 'A human rights law of internal armed conflict: the European Court of Human Rights in Chechnya', in *The European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 758–760 and 767.
- 67 European Court of Human Rights (ECtHR), *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, App. Nos. 57947–49/00 (24 Feb. 2005); *Isayeva v. Russia*, ECtHR, App. No. 57950/00 (24 Feb. 2005).
- 68 In its country report on Colombia (1999), the Inter-American Commission of Human Rights (IACHR) emphasized that, under Article 4 ACHR, the use of lethal force in law enforcement operations could not lawfully be based on mere suspicion or on collective criteria, such as membership in a group. According to the report: 'the police are never justified in depriving an individual of his life based on the fact that he belongs to a "marginal group" or has been suspected of involvement in criminal activity. Nor may the police automatically use lethal force to impede a crime or to act in self-defence. The use of lethal force in such cases would only be permissible if it were proportionate and necessary'; IACHR, Report Colombia 1999, Chapter IV, para. 213.
- 69 Moreover, the justification of so-called collateral damage, while it is not illegal *per se* under international human rights law, would be far more difficult than it is under IHL.



In practice, however, it is still widely perceived as battlefield-inadequate, risky to implement, and therefore unrealistic. Consequently, it is submitted that in Afghanistan the principle of distinction, in spite of its inherent deficiencies in asymmetric conflict situations, has not been put into question as a fundamental legal precept of the humanitarian legal order, even though some authors have proposed rather lenient interpretations. IHL's categories of those who may legitimately be attacked thus continue to remain central to states operating in modern asymmetric armed conflicts such as Afghanistan.

The two strains of argument are reflective of the diametrically opposed impulses on which IHL is based: military necessity and humanity. The former line of reasoning, which argues in favour not only of the maintenance of IHL's categories based on the binary distinction but at least partially also of their extension, seems to be predominantly concerned with the minimization of risks for operating soldiers – at times apparently without giving due regard to the protection of civilians. Conversely, the latter opinion, while rightly aiming to enhance the protection of the civilian population – as mentioned before, civilians continue to bear the brunt in modern armed conflicts – at times seems to neglect the realities in which soldiers operate. Of course, a middle way might allow us to strike a more subtle balance between the impulses of military necessity and humanity without according categorical predominance to one or the other. Theoretically, such a middle way could be sought by increasing the flexibility of humanitarian legal standards towards greater protectiveness, or by increasing the flexibility of human rights standards towards greater permissiveness, which is what the ECtHR seemed to be doing in *Isayeva*, or by combining elements of both legal regimes.<sup>70</sup>

The International Committee of the Red Cross (ICRC)'s *Interpretive Guidance on the Notion of Direct Participation in Hostilities* also pursues a middle way, based on the interpretation of the law as it currently stands. On the one hand, the *Interpretive Guidance* reconfirms the application of the principle of distinction in modern armed conflicts and clarifies its application. Especially with regard to non-international armed conflicts, the group of persons ('fighters') who are not civilian and who may lawfully be attacked is defined on a functional basis, by reference to their 'continuous combat function'.<sup>71</sup> On the other hand, the *Interpretive Guidance* reiterates an important constraint in relation to the use of force against persons who are not protected against direct attack. The kind and degree of force that is permissible against such persons must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.<sup>72</sup> Concern has been expressed that this standard imposes an overly restrictive 'law enforcement paradigm' that aims to subject wartime military operations 'to an unrealistic use-of-force continuum beginning with the least-injurious action before resorting to "grave injury" in attack of an enemy combatant

70 See also Francisco Forrest Martin, 'Using international human rights law for establishing a unified use of force rule in the law of armed conflict', in *Saskatchewan Law Review*, Vol. 64, 2001, pp. 347–396.

71 ICRC, above note 59, pp. 27–36.

72 *Ibid.*, pp. 77–82.

or a civilian taking a direct part in hostilities'.<sup>73</sup> The obligation to employ the least harmful among equally effective means or methods, however, does not amount to an extension of a 'law enforcement paradigm' or, in other words, the application of the human rights principle of proportionality vis-à-vis fighters in an armed conflict. The principle of distinction already entails the prescription that, during an armed conflict, the relative 'value' inherent in the rendering *hors de combat* of enemy combatants/fighters or civilians directly participating in hostilities outweighs the right to life, physical integrity, and liberty of these persons. This alleviates individual soldiers of intricate value-balancing judgements in the heat of combat. The necessity-restraint, by contrast – without interfering with this value judgement – merely implies that there is no categorical relaxation of the purely factual and in any case situational assessment whether less harmful measures of equal effectiveness are available in a given situation.<sup>74</sup> If an enemy can already be rendered *hors de combat* by way of capture he must not be killed. Of course, in the frontline of combat capture will almost always be impossible without taking a considerable risk for one's own troops, whereas in other situations – for example, in the context of house searches<sup>75</sup> or road blocks – this risk is often likely to be mitigated to a level where capture instead of killing becomes obligatory. The *Interpretive Guidance's* prescription that force 'must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances' is flexible enough to accommodate these different scenarios.<sup>76</sup>

### *Distinguishing military objects from civilian objects: The problem of 'dual use'*

Challenges regarding the application of the principle of distinction exist not only with regard to persons but also in relation to objects. Of course, debate about the definition and identification of military objectives is not new. It existed long before the term asymmetric warfare was coined and popularized. Yet the shift of hostilities into the proximity of urban population centres and increasing possibilities of using civilian objects to make an effective contribution to military action are pushing this particular problematic more and more to the fore. Discussions about which objects constitute a legitimate military objective, particularly in relation to so-called 'dual-use' and war-sustaining objects, are

73 W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" study: no mandate, no expertise, and legally incorrect', in *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, p. 815.

74 See US Department of the Air Force, Air Force Pamphlet (AFP 110-31), *International Law: The Conduct of Armed Conflict and Air Operations*, Judge Advocate General Activities, 19 November 1976, para. 1-3(1), pp. 1–5 recalling that: 'Armed conflict must be carried on ... within the limits of the prohibitions of international law, including the restraints inherent in the principle of necessity'.

75 For statistics of civilian casualties see United Nations Assistance Mission in Afghanistan (UNAMA), *Annual Report 2010: Protection of Civilians in Armed Conflict*, Kabul, March 2011, p. 29.

76 ICRC, above note 59, p. 77.

ongoing.<sup>77</sup> Generally speaking, it is not disputed that power grids, industrial and communication facilities, computer and cell-phone networks, transportation systems, and other infrastructure including airports and railways – all of which primarily fulfil civilian functions – can become lawful military targets if they meet the criteria laid out in Article 52 paragraph 2 of Additional Protocol I, also reflecting customary IHL applicable in non-international armed conflicts.<sup>78</sup> In fact, each and every civilian object could theoretically become a military objective, provided that it cumulatively fulfils the respective criteria. For instance, even religious sites, schools, or medical units may temporarily become military objectives if 1) they make an effective contribution to military action by being used as a firing position, to detonate improvised explosive devices, or to take cover; and 2) their total or partial destruction offers a definite military advantage. ‘Dual-use’ is the colloquial, non-legal denomination given to those civilian objects that serve both military and civilian purposes. Thus, with regard to these so-called ‘dual-use’ objects, the problem is not whether such objects can theoretically become military objectives but under what circumstances (and for how long) an attacker may conclude that they are legitimate military objectives.

Broadly speaking, the discussion focuses on whether only actual or also potential military benefit may qualify an object as a legitimate military objective.<sup>79</sup> Evidently, if a so-called ‘dual-use object’ is visibly being used to make an effective contribution to military action, then its legal classification will raise no particular problems. However, if it is not being so used, the object’s status determination will turn on its nature, purpose, or location. This is problematic because the distinction between the two criteria of nature and purpose in particular remains somewhat ambiguous. The criterion of purpose is problematic because of the difficulty in determining at what point it becomes sufficiently clear or sufficiently reasonable to assume that an object’s purpose is to contribute effectively to military action. It is ambiguous because it is not entirely clear whether the criterion aims to encapsulate an object’s inherent purpose – which would seem to denote the object’s design or an intrinsic characteristic and therefore render redundant the distinction between ‘nature’ and ‘purpose’ in Article 52 paragraph 2 of Additional Protocol I – or the purpose that a person has (individually) accorded to the object. The ICRC Commentary speaks of the ‘intended future use’ of an object, thereby apparently invoking the latter

77 W. Hays Parks, ‘Asymmetries and the identification of legitimate military objectives’, in W. Heintschel von Heinegg and V. Epping, above note 30, pp. 65–116.

78 Although there is discussion about the interpretation of Article 52 of Additional Protocol I, the wording itself is undisputed and it is not contested that the definition has customary law status: see J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 8.

79 Françoise J. Hampson, ‘Proportionality and necessity in the Gulf conflict’, in *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 86, 1992, pp. 45 and 49; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 93; Michael Bothe, ‘The protection of the civilian population and NATO bombing on Yugoslavia: comments on a report to the prosecutor of the ICTY’, in *European Journal of International Law*, Vol. 12, No. 3, 2001, p. 534.

interpretation.<sup>80</sup> The criterion of nature is problematic because if applied to ‘dual-use’ objects it would categorically and automatically render these objects legitimate military targets irrespective of their actual use or purpose. Evidently, this would render redundant the very idea of ‘dual use’ because these objects would categorically amount to military objectives.<sup>81</sup> Indeed, some authors argue that, for example, bridges and railway tracks should be considered military objectives by nature.<sup>82</sup> In the same vein, the commentary to the recently released HPCR *Air and Missile Warfare Manual* refers to an opinion expressed during the deliberations of the *Manual* according to which military objectives are by nature to be divided into two subsets consisting of ‘military objectives by nature at all times’ and objects that become ‘military objectives by nature only in light of the circumstances ruling at the time’.<sup>83</sup> The ICRC strongly disagreed with this reading. It argued that the nature criterion by definition refers to intrinsic attributes that are permanent. Therefore, for the ICRC, there cannot be any subsets of temporary ‘military objectives by nature’.<sup>84</sup>

The suggestion of such broadened interpretations of the definition of military objects is again reflective of attempts to remedy practical difficulties in identifying legitimate military targets through the expansion of the corresponding legal concepts. Evidently, the ‘nature criterion’ is far more categorical and abstract, whereas the criterion of an object’s actual use is more flexible and case-specific; that is, it takes into consideration how a given object is actually being used at the time of the attack. Conversely, the criterion of an object’s nature denotes the intrinsic characteristics of the object. The object by way of its design must have an inherent attribute that, *eo ipso* and irrespective of its actual use, makes an effective contribution to military action.<sup>85</sup> Thus, the conception of a category of ‘temporary military objectives by nature’ or, in other words, ‘military objectives by nature ... in light of the circumstances ruling at the time’ would seem irreconcilable with this common understanding of the ‘nature criterion’. Still, up until now, some ambiguity has remained as to which intrinsic characteristics would count in this regard. Traditionally, the category of objects that are considered to be military objectives by nature has been interpreted rather narrowly and was understood to encompass, for example, tanks, fixed military fortifications, weapon systems, military aircraft, and stockrooms for the storage of weapons and munitions. If bridges and railway tracks – that is, objects that commonly and overwhelmingly serve civilian purposes – were to be considered as having intrinsic characteristics

80 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*, Martinus Nijhoff, Geneva, 1987, para. 2022.

81 Program on Humanitarian Policy and Conflict Research (HPCR), Harvard University, *Manual on International Law Applicable to Air and Missile Warfare*, Commentary, 2009, p. 109, available at: <http://www.ihlresearch.org/amw/manual/> (last visited 22 March 2011).

82 Y. Dinstein, above note 79, p. 93.

83 HPCR, above note 81, p. 109.

84 *Ibid.*, p. 109, note 261.

85 Y. Dinstein, above note 79, p. 88.

that render them permanent military objectives by nature irrespective of their actual use, the remaining criteria of Article 52 paragraph 2 of Additional Protocol I – namely location, purpose, and use – would be largely redundant. Put simply, if a bridge was considered to have intrinsic military characteristics, basically any object could be defined as a military object by nature. This was neither the intention of the drafters of Article 52 paragraph 2 of Additional Protocol I nor does it correspond to the traditional interpretation of the ‘nature’ criterion, and ultimately such an interpretation would erode the principle of distinction. Instead, so-called ‘dual-use’ objects in particular, because they are not by their nature military, should only be attacked once they actually effectively contribute to the party’s military action.<sup>86</sup>

It seems, therefore, that the law defining when objects constitute a legitimate military objective has not been directly challenged or changed,<sup>87</sup> perhaps because the relevant rule acknowledges that every civilian object may temporarily become a military objective under the circumstances described above.

### The humanitarian proportionality principle<sup>88</sup>

In view of the blurred lines of distinction in asymmetric armed conflicts, carefully assessing the proportionality of an attack is ever more important and often ever more difficult. In practice, the application of the humanitarian proportionality principle requires the following test. First, a factual assessment must be conducted in order to determine whether a planned attack on a military objective ‘may be expected to cause incidental loss of civilian life, injury to civilians, and damage to civilian objects’. Second, it has to be determined what ‘concrete and direct military advantage’ may be anticipated from the attack. If civilian casualties and/or damages may be expected, the military commander deciding upon the attack, in a third step, must determine the value of the anticipated military advantage, on the one hand, and the value attributed to the damage on the civilian side, on the other. In a final step, a balancing decision is required, where a judgement is made about which

86 With regard to dual-use objects the ICTY Prosecutor’s report emphasized that the criteria laid out in Article 52 of Additional Protocol I must be met in each individual case and that ‘[a] general label is insufficient’. ‘Final report to the prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia’, 8 June 2000, pp. 47 and 55, available at: [http://www.icty.org/x/file/About/OTP/otp\\_report\\_nato\\_bombing\\_en.pdf](http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf) (last visited 22 March 2011).

87 In the application of joint fires in Afghanistan, for instance, several factors need to be taken into account before an attack is permitted. This includes, *inter alia*, an assessment as to whether or not the target makes an effective contribution to the enemy military action and as to whether its destruction offers a definite military advantage (i.e. whether it is a military objective). Guidance for the Application of Joint Fires, Annex B to HQ ISAF SOP, Dated 06, extract presented at the Rules of Engagement Workshop, International Institute of Humanitarian Law, Sanremo, 13–17 September 2010. According to Joint Pub 3-09, *Doctrine for Joint Fire Support*, 12 May 1998, p. I–1, joint fires are ‘fires produced during the employment of forces from two or more components in coordinated action toward a common objective’.

88 For the application of the proportionality principle in non-international armed conflicts, see J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 14, p. 48.

value takes precedence over the other.<sup>89</sup> Despite the fact that IHL pursues the overall aim of limiting civilian casualties and damages as far as possible, it does not prescribe any absolute limit in relation to ‘collateral damage’. Thus, a very considerable military advantage could potentially justify significant civilian damages and even casualties – that is, extensive as opposed to excessive ‘collateral damage’.<sup>90</sup>

### *Factors to be considered within the proportionality assessment*

The humanitarian proportionality principle’s deficiencies are well known. The main difficulty lies in the balancing of such unequal factors as civilian life and injury against an anticipated military advantage. Notwithstanding, there is still widespread agreement that in times of armed conflict a better, equally realistic alternative simply does not exist.<sup>91</sup> While that may be true, it should also be clear that the details of the proportionality principle and its application in practice could still be worked out more concretely than they have been to date. In this regard, the ‘Final report to the prosecutor by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia’ raised an array of instructive questions relevant for the application of the humanitarian proportionality principle. The Report asked, *inter alia*: ‘a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants or the damage to civilian objects? b) What do you include or exclude in totaling your sums? [and] c) What is the standard of measurement in time or space?’<sup>92</sup> The report was published on 13 June 2000 but even ten years later the questions it raised with regard to the proportionality principle remain as pertinent as they were at the time.

IHL’s answers to these questions are rather abstract. As noted above, the military commander deciding upon the attack must determine the relative value given to the military advantage against that attributed to the anticipated damage on the civilian side. Normative guidance regarding the margin of discretion in the identification of the military advantage and its relative value is rather frail. The adjectives ‘concrete’ and ‘direct’ in Article 51 paragraph 5(b) of Additional Protocol I limit the advantages to be considered to finite ones, in order to prevent the inclusion of abstract considerations such as the global aim of winning the war, which as the highest military aim would *per se* trump almost all civilian interests. But there seems to be widespread agreement that the military advantage need not necessarily or exclusively be derived from the destruction of the specific object of

89 Asbjørn Eide, ‘The laws of war and human rights: differences and convergences’, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet*, Martinus Nijhoff, Dordrecht, 1984, p. 681.

90 Note that the ICRC commentary rejects this argument because very high civilian losses and damages would be contrary to the fundamental rules of the Protocol. See Y. Sandoz *et al.*, above note 80, para. 1980.

91 Y. Dinstein, above note 79, p. 122.

92 ‘Final report to the prosecutor’, above note 86, para. 49.



the attack and that the assessment of the military advantage may be conducted by taking into consideration the larger operational picture.<sup>93</sup> On the basis of Article 8 paragraph 2(b)(iv) of the Rome Statute of the International Criminal Court, some authors argue in favour of the consideration of the overall military advantage anticipated from an attack as a matter of general law.<sup>94</sup> The overall military advantage would encapsulate military advantages derived from temporally and geographically distant occurrences. In this context it seems noteworthy that during the Rome Conference the ICRC stated that the insertion of the word 'overall' to the definition of the crime could not be interpreted as changing existing law.<sup>95</sup>

A corollary to the debate about the scope of the military advantage is the question of how far indirect civilian damages resulting from an attack are to be taken into consideration. The spectrum of opinion is wide. Moderate positions do not exclude the consideration of indirect civilian damages but try to sketch out where to draw the line between indirect damages that may be considered and those that should not.<sup>96</sup> The wording of Article 51 paragraph 5(b) and Article 57 paragraph 2(b) of Additional Protocol I would seem to suggest that the concept of anticipated civilian casualties and damages is to be interpreted at least as broadly as the notion of the military advantage. Otherwise the proportionality assessment would be distorted from the outset in favour of military considerations. Moreover, these two articles explicitly require that the anticipated military advantage is 'concrete' and 'direct', whereas no such limiting qualifiers were added to the expected incidental civilian damages; the word 'incidental' is certainly broader than the adjectives 'concrete' and 'direct'. Similarly, it would seem that the conception of what 'may be expected' (incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof) from an attack is broader than what is actually 'anticipated' (military advantage). Thus, in line with the fundamental tenet that the civilian population enjoys general protection arising not only from attacks but from military operations in general, foreseeable long-term repercussions on the civilian population are to be taken into account in the context of the proportionality assessment.

In the context of the armed conflict in Afghanistan, the US in particular has apparently developed an intricate set of rules for pre-planned (deliberate)

93 Almost all NATO member states ratifying Additional Protocol I (and also other states when signing or ratifying the Protocol) made identical declarations according to which 'military advantage' is to be understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.

94 Y. Dinstein, above note 79, p. 123; William J. Fenrick, 'The rule of proportionality and Protocol I in conventional warfare', in *Military Law Review*, Vol. 98, 1982, pp. 111–112; Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, Martinus Nijhoff, Leiden, 2009, p. 200 ('the assessment can include a military advantage that will not crystallize until sometime in the future').

95 'Document A/CONF.183/INF/10 – International Committee of the Red Cross: Statement of 8 July 1998 Relating to the Bureau Discussion Paper in Document A/CONF.183/C.1/L.53', in *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998*, Official Records, Vol. III: Reports and other documents, p. 225, point 2.

96 I. Henderson, above note 94, p. 208.

targeting, taking into account counterinsurgency objectives.<sup>97</sup> Prior to an engagement, a target must be identified (positive identification, or PID)<sup>98</sup> and authorized for engagement in accordance with the rules of engagement in force.<sup>99</sup> The so-called CARVER (criticality, accessibility, recuperability, vulnerability, effects, and recognizability) tool sets out factors assisting in evaluating and selecting targets. The factors are given a numeric value, representing the desirability of attacking the target, which then are placed in a decision matrix.<sup>100</sup> Before the deliberate engagement of a target may be authorized, a collateral damage estimate (CDE) must be conducted.<sup>101</sup> This consists of a sophisticated methodology including ‘computer-assisted modeling, intelligence analysis, weaponeering and human vetting to assess likely collateral damage and determine the level at which a preplanned strike must be approved’.<sup>102</sup> Further Details of CDE methodology applied in Afghanistan remain classified. However, it appears that modern technologies make it possible to calculate the likely impact of an airstrike on buildings and other objects in the vicinity of the target. The effects can then be shown through an ellipse on a surveillance image and colour codes indicate the degree of damage expected.<sup>103</sup>

### *The standard of a ‘reasonable military commander’*

The value judgement inherent in the proportionality analysis is difficult to scrutinize. Controversy continues as to whether this judgement is to be evaluated on the basis of a subjective or of an objective standard. The ICTY ‘Final report to

97 For a detailed description of targeting in counterinsurgency in general and in Afghanistan in particular, see M. N. Schmitt, above note 60, pp. 309–326. See also a description of the Joint Targeting Cycle and Collateral Damage Estimation Methodology (CDM) attached to United States District Court for the District of Columbia, *Nasser Al-Aulaqi v. Barack H. Obama, et al.*, Declaration of Jonathan Manes, No. 10-cv-1469 (JDB), 8 October 2010.

98 Positive identification is ‘a reasonable certainty that the proposed target is a legitimate military target’. Center for Law and Military Operations, above note 54, p. 96.

99 *Ibid.*, p. 103. Note that, while the rules of engagement must remain within IHL limits, i.e. can only permit the targeting of military objectives, they may impose greater targeting restrictions for political or operational reasons.

100 The CARVER tool was initially developed as a target analysis methodology for US Special Operations Forces. It is used to assess mission validity and requirements throughout the targeting and mission planning cycle and assists in selecting the best targets. For a definition of the factors, see Joint Pub 3-05.5, *Joint Special Operations Targeting and Mission Planning Procedures*, 1993, p. II-8 and glossary. See also US Field Manual FM 34-36, *Special Operations Forces Intelligence and Electronic Warfare Operations*, Department of the Army, 1991, Appendix D, superseded by FM 3-05.102, *Army Special Operations Forces Intelligence*, Department of the Army, 2001, para. 2–68. An example of a modified CARVER tool was presented at the Rules of Engagement Workshop, International Institute of Humanitarian Law, Sanremo, 13–17 September 2010.

101 Extract of Joint Forces Command Brunssum OPLAN 30302, presented at the Rules of Engagement Workshop, International Institute of Humanitarian Law, Sanremo, 13–17 September 2010. The formal CDE methodology need not be conducted in self-defence situations. However, the principles of proportionality and necessity still have to be observed in such situations. See Center for Law and Military Operations, above note 54, p. 104.

102 M. N. Schmitt, above note 60, p. 311.

103 See, e.g., Public Prosecutor General of the Federal Court of Justice, Einstellungsvermerk, 3BJs 6/10-4, Karlsruhe, 16 April 2010, p. 22, available at: <http://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf> (last visited 22 March 2011).

the prosecutor' emphasized that the assignment of relative values under the proportionality equation 'may differ depending on the background and values of the decision maker', that consequently a 'human rights lawyer and an experienced combat commander' or 'military commanders with different doctrinal backgrounds and differing degrees of combat experience' were unlikely to 'assign the same relative values to military advantage' and the anticipated damages.<sup>104</sup> It is in view of this value judgement and not – as one might suspect – in view of the fact that in operational theatres of conflict the environment may not lend itself to rigorous factual assessments that the report as well as the Trial Chamber in the Kupreškić case arrived at the conclusion that grey zones exist between 'indisputable legality and unlawfulness in which one may not yet determine that a violation of the principle of proportionality has indeed occurred'.<sup>105</sup>

In the realm of international criminal law, footnote 36 of the elements of crime of Article 8 paragraph 2(b)(iv) of the Rome Statute explains that the 'military advantage' refers to the advantage foreseeable by the perpetrator, and footnote 37 requires that the perpetrator personally makes the required value judgement.<sup>106</sup> The 'Final report to the prosecutor' of the ICTY, however, rightly endorsed a more objectified standard. According to the Report, the decisive yardstick for such far-ranging decisions as the assignment of the relative value of a military advantage and the relative value of the anticipated civilian losses is that of a 'reasonable military commander'.<sup>107</sup> Indeed, operational requirements in an armed conflict neither demand nor justify a purely subjective decision-making standard. Of course, IHL must provide for fluctuating circumstances and the myriad uncertainties that are prevalent in an armed conflict, and it must – in order to be realistic – leave a margin of discretion to soldiers operating on the ground. However, the actual

104 'Final report to the prosecutor', above note 86, para. 50.

105 *Ibid.*, para. 52; ICTY, *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-T, Judgment of 14 January 2000, para. 526.

106 Footnote 37 of the elements of crime of Article 8 para. 2(b)(iv) of the Rome Statute contains an exception to the mental requirements laid out in paragraph 4 of the 'General Introduction', according to which, with respect to mental elements associated with elements involving value judgment, such as those using the terms 'inhuman' or 'severe', it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated. See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003, p. 161. Different views have been expressed on the interpretation of footnote 37. However, on the whole a rather subjective standard seems to be endorsed in this regard. There appears to be agreement between states that this footnote should not lead to the result of exonerating a reckless perpetrator who knows the anticipated military advantage and the expected incidental damage or injury but gives no thought to evaluating the possible excessiveness of the incidental injury or damages; *ibid.*, p. 165.

107 'Final report to the prosecutor', above note 86, para. 50, states: 'Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to noncombatants or the damage to civilian objects was clearly disproportionate to the military advantage gained'. In the Kupreškić case, the ICTY relied on the Martens Clause as a minimum reference and argued on this basis that the prescriptions – in this case the prescriptions of Articles 57 and 58 of Additional Protocol I – must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians; ICTY, *Prosecutor v. Zoran Kupreškić et al.*, above note 105, para. 525.

margin of discretion and the standard relevant for the evaluation of individual decision-making are to be distinguished. An objectified decision-making standard – the standard of the ‘reasonable military commander’ – does not curtail a soldier’s margin of discretion in the assessment of situational realities but simply forestalls arbitrariness in the exercise of this discretion.

### Risk minimization for one’s own forces

In conflict scenarios such as Afghanistan, the question of risk minimization for one’s own forces is particularly pertinent to all parties involved. Indistinguishable enemies render ground operations particularly dangerous. Naturally, a party to an armed conflict will be inclined to minimize risks for its own forces as much as possible. Risk minimization for soldiers, however, may increase the risk of civilian casualties. This is particularly evident if a choice has to be made, for example, between the employment of aerial power or ground forces, or between low- and high-altitude aerial operations. Again, ten years ago the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia raised the issue of whether risk minimization can be taken into consideration as a relevant factor when conducting a proportionality assessment.

Generally speaking, the protection and preservation of one’s own forces is a legitimate consideration under IHL. Anything else would contradict the realities of armed conflict. It is for this reason that different modern military manuals define military necessity as requiring measures to defeat the enemy with the ‘least expenditure of time, means or personnel’ or a ‘minimum expenditure of life and resources’.<sup>108</sup> But this does not answer the question whether, and if so to what extent, the contemporary humanitarian legal framework leaves room to take into consideration the protection of one’s own forces in the context of a concrete proportionality assessment conducted prior to a specific attack.

IHL bars any attempts to take into account general considerations that could trump the protection of the civilian population or individual civilians *per se*. Article 51 paragraph 5(b) of Additional Protocol I shows that a balancing decision is required on a case-by-case basis and in view of each and every attack. Sweeping assumptions that any particular consideration – such as the security of one’s own forces – could *per se* override civilian interests are not allowed. In view of IHL’s general tenet to protect and in any event to minimize civilian casualties and damages, the protection of one’s own forces cannot be regarded or invoked as categorically overriding the protection of the civilian population or the lives of individual civilians. However, this does not exclude the consideration of risks as far

108 United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, section 2.2; United States Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12-1/COMDTPUB P5800.7A, July 2007, para. 5.3.1. It has been pointed out that the criterion of minimum expenditure of time, life, and physical resources should be understood to apply not only to the assailant but also to the party attacked; see Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, para. 1397.

as the planning of a concrete attack and the determination of a concrete military advantage is concerned. In this regard, two issues must be distinguished: the security of one's own forces in general and the security of the attacking forces in particular. If 'A' is attacking the ground forces of 'B' and if 'B' therefore calls in aerial support to stop the attack and to protect its ground forces, the preservation of 'B's' ground forces is a military advantage that may be taken into consideration in addition to the military advantage derived from the destruction of 'A's' troops. The reason is that both advantages (the destruction of 'A's' troops and the preservation of 'B's' troops) will directly result from the attack; neither will materialize until after the attack has been carried out.

The enhanced security of the 'attacking forces', however, would not, strictly speaking, be a result of the attack. It materializes not from the actual attack but rather from the strategic decision (prior to the attack) to attack in one way (e.g. high-altitude) rather than in another way (e.g. ground forces). If in such a scenario the security of the attacking forces could be taken into consideration within the proportionality equation – *quid non* – the fact that a commander has chosen a very secure and therefore ostensibly 'militarily advantageous method' (e.g. aerial bombardment) would mean that, in view of the heightened military advantage of this particular form of attack, higher numbers of civilian casualties could be justified. Evidently, this is an extremely slippery slope. In the scenario provided, the consideration of the security of the attacking forces would distort the proportionality assessment in favour of military considerations and to the detriment of the civilian population it intends to protect. This does not mean that military commanders would be barred from taking into consideration the security of their attacking forces when planning an attack. Clearly, they may. But, whatever the outcome of their planning may be, each and every attack that they intend to carry out must be in accordance with humanitarian law. If an aerial bombardment would cause excessive civilian casualties it must not be carried out. In this case, a military commander may either decide not to attack at all, to resort to alternative means and methods of attack (for which he would again have to carry out a proportionality assessment), or to wait for circumstances on the ground to change. However, under no circumstances could a high-altitude aerial bombardment – in spite of an initial, negative proportionality assessment – be justified on the basis of arguing that it is 'safer' and therefore of a higher military advantage than hypothetical alternative forms of attack such as a low-altitude sortie or an attack with ground forces. It is widely accepted that hypothetical military advantages must not count in the proportionality calculus.<sup>109</sup>

## Precautions in attack

Modern armies have unprecedented surveillance possibilities. Surveillance drones, for example, can monitor any given area without interruption over significant

109 Y. Dinstein, above note 79, p. 93.

periods of time, and they can provide real-time visual footage to those who plan and decide upon the attack.<sup>110</sup> These technological possibilities notwithstanding, blurred lines of distinction in asymmetric conflict situations often impede an accurate analysis of the target area, as well as reliable predictions of potential civilian damages. The detection and identification of legitimate targets, as well as the maintenance of such identification in realistic battlefield conditions, has been described as one of the most difficult problems facing modern armies involved in combat.<sup>111</sup> This section is limited to two specific precautions in attack, namely target verification and effective warnings. The analysis focuses particularly on the capabilities of the international military forces.

### *Target verification*

What quantity and quality of information about a military objective is an attacker required to obtain before executing an attack? Is it sufficient to rely exclusively on aerial surveillance or is on-the-spot human intelligence required? IHL does not, and cannot, provide a clear-cut, generic answer to these questions. According to Article 57 paragraph 2(a)(i) of Additional Protocol I, those who plan or decide upon an attack are required to do everything feasible to verify that the objectives to be attacked are military objectives.<sup>112</sup> It follows that the answers to the questions raised above depend on what is ‘feasible’ under the given circumstances of a specific attack. For instance, as long as military personnel are not in imminent danger, the July 2009 ISAF Tactical Directive seems to require a ‘48-hour “pattern of life” analysis with on-the-ground or aerial surveillance, to ensure that civilians are not in a housing compound before ordering an airstrike’.<sup>113</sup> During the drafting stages of Additional Protocol I the phrase ‘everything feasible’ was discussed at length.<sup>114</sup> The initial draft put forward at the 1971 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts had foreseen the word ‘ensure’, but ultimately did not succeed.<sup>115</sup> The word ‘feasible’ was preferred over the term ‘reasonable’ and it was understood to denote ‘that which is practicable or

110 Jack M. Beard, ‘Law and war in the virtual era’, in *American Journal of International Law*, Vol. 103, No. 3, 2009, p. 433.

111 I. Henderson, above note 94, p. 164.

112 For the application of this rule in non-international armed conflicts, see J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 16.

113 Rajiv Chandrasekaran, ‘Petraeus review directive meant to limit Afghan civilian deaths’, in *The Washington Post*, 9 July 2010. See also, ISAF, *Tactical Directive*, 6 July 2009, available at: [http://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf) (last visited 22 March 2011). A ‘pattern of life’ analysis including Predator coverage was also conducted in the targeting of a senior HiG commander in November 2006. Case study presented at the Rules of Engagement Workshop, International Institute of Humanitarian Law, Sanremo, 13–17 September 2010.

114 Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, para. 2198.

115 ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume III: Protection of the Civilian Population Against Dangers of Hostilities*, 1971, p. 136.



practically possible'.<sup>116</sup> To this some delegations added that, when assessing what was practicable or practically possible, 'all the circumstances at the time of the attack, including those relevant to the *success* of military operations' would have to be taken into account.<sup>117</sup> Understood in this way, the feasibility requirement would seem to denote not only that which is objectively practicable or practically possible but also what is militarily sound from the perspective of the military commander. Such an extended reading of the feasibility requirement would add another rather subjective element to the assessment. A comparison with Article 57 paragraph 2(c) of Additional Protocol I, however, shows that, where such a far-reaching caveat was intended, it is expressed in explicit terms. This paragraph requires effective advance warnings 'unless circumstances do not permit'. No such explicit caveat was included within the obligation to verify the status of an anticipated target contained in Article 57 paragraph 2(a)(i) of the Protocol. The ICRC Commentary therefore rejects an interpretation of the feasibility criterion that would include 'all circumstances relevant to the *success* of military operations' as too broad and as a possible avenue to opt out of the precautionary obligation prescribed by Article 57 paragraph 2(a)(i) of the Protocol.<sup>118</sup> This must be right. After all, target verification is a fundamental prerequisite for any application of the principle of distinction.

Irrespective of this particular debate, the formulation 'do everything feasible to verify' seems to imply that if everything practically possible has been done, but doubt remains as to the status of the envisaged target, a military commander, in spite of the remaining uncertainty, would be allowed to attack. The ICRC *Commentary* rejects such a lenient reading of the obligation to verify an object's status prior to an attack. According to the *Commentary*, a commander planning an attack must 'in case of doubt, even if there is only a slight doubt ... call for additional information and if need be give orders for further reconnaissance'.<sup>119</sup> This standard, which requires the elimination of doubt about an object's status, has been criticized as too high.<sup>120</sup> However, allowing attacks in spite of remaining doubt about an object's status would significantly undermine the principle of distinction. For as long as doubt remains, IHL stipulates certain presumptions in favour of a protected status (Article 50 paragraph 1 and Article 52 paragraph 3 of Additional

116 ICRC, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1974–1977), Vol. 15, p. 285. A feasibility assessment is necessarily contextual and what is feasible also hinges on the reconnaissance resources available to the attacker. It is therefore generally accepted that, in practice, technologically advanced parties may be bound to a higher standard than those parties who lack similarly advanced reconnaissance means. See also Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980, Article 3(4). Accordingly, '[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations'.

117 See, e.g., the statements made by the UK, Turkey, Germany, Canada, and the US, ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1974–1977), Vol. 6, pp. 211, 214, 224, 226, and 241 respectively.

118 Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, para. 2918.

119 *Ibid.*, para. 2195. Moreover, the ICRC *Commentary* requires that the evaluation of the information obtained must include a serious check of its accuracy.

120 I. Henderson, above note 94, p. 163.

Protocol I).<sup>121</sup> These presumptions would be rendered meaningless if attacks were to be allowed in cases of doubt.

This is even more important because the ‘no doubt’ criteria in itself cannot guarantee that only military objectives are targeted, as was demonstrated, for instance, by the Kunduz airstrike of 4 September 2009 on two fuel tankers captured by the armed opposition. The German Public Prosecutor General came to the conclusion that the accused Colonel was convinced (in accordance with the ‘reasonable military commander’ standard) that no civilians were present in the vicinity of the fuel tankers. He consulted multiple times, over several hours, the available videos from ISAF aircraft and information given by an informant whose credibility was not challenged. In addition, he ordered a PID by the aircraft crew for weapons. Since he did not expect any civilians to be present at the time of the airstrike (01:49 am), he declined a ‘show-of-force’ manoeuvre to disperse the people on the ground, all supposedly armed opposition fighters.<sup>122</sup> It eventually turned out that a large proportion of the casualties were civilians.<sup>123</sup>

Of course, it is true – and perhaps in asymmetric conflicts even more so – that targeting decisions often have to be made in the ‘fog of battle’ and that ‘clinical accuracy’ may not always be possible.<sup>124</sup> But the ‘fog of battle’ is risky not only for soldiers operating therein but also for the civilians who are often trapped in it. Nothing in the humanitarian legal framework indicates that factual uncertainties would require a lowering of civilian protection as a matter of law. Thus, while the ‘fog of battle’ may not always allow ‘clinical accuracy’ in decision-making, it may well be argued that it is precisely for the fog of battle, precisely because conflicts are highly dynamic and circumstances change rapidly, that IHL requires target verification and disallows attacks in case of doubt.

### *Effective warnings*

According to Article 57 paragraph 2(c) of Additional Protocol I and customary law, effective advance warning shall be given of ‘attacks which *may affect the*

121 The presumptions entailed in Article 51 para. 1 and Article 52 para. 3 of Additional Protocol I have remained the subject of controversy, however. Particularly in the case of non-international armed conflicts, no clear rule regulates situations where the character of a person is in doubt. Nevertheless, it seems appropriate to demand the same careful and balanced approach in deciding upon the status of people as is required in international armed conflicts. See J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 6, pp. 23–24.

122 Public Prosecutor General of the Federal Court of Justice, above note 103. Note that airstrikes seem to have been limited to troops-in-contact (TIC) situations. The German commander eventually classified the situation as an imminent threat, on the ground that he feared that the fuel tanks could be used against the Provincial Reconstruction Team (PRT) in Kunduz or be prepared for later attacks. *Ibid.*, p. 23.

123 See, e.g., *ibid.*, p. 36 et seq.; Christoph Reuter, ‘Entschädigung für die Kundus-Opfer steht’, in *Stern*, 5 August 2010, available at: <http://www.stern.de/politik/ausland/tanklaster-angriff-in-afghanistan-entschaedigung-fuer-die-kundus-opfer-steht-1590279.html> (last visited 22 March 2011); James Sturcke and David Batty, ‘Nato air strike in Afghanistan kills scores’, in *The Guardian*, 4 September 2009.

124 Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Convention of 1949*, Martinus Nijhoff, The Hague, 1982, p. 279.

*civilian population, unless circumstances do not permit*.<sup>125</sup> The obligation to warn, in view of increasingly blurred lines of distinction, is constantly growing in importance and humanitarian impact. Leaving aside the questions as to which kinds of warning amount to an ‘effective’ advance warning and how the caveat ‘unless circumstances do not permit’ is to be interpreted, the obligation prescribed by Article 57 paragraph 2(c) of Additional Protocol I stands and falls with the determination whether an attack ‘may affect the civilian population’. In the context of the Kunduz incident of 4 September 2009, the Office of the German Federal Prosecutor did not consider the existence of an obligation to warn, on the premise that the attack had not been expected to affect any civilians.<sup>126</sup> Consequentially, the Federal Prosecutor did not have to deal with any of the questions laid out above, namely whether the circumstances would have permitted a warning or not. In the same vein, the US *Air Force Pamphlet* states that no warning is required if civilians are unlikely to be affected by the attack.<sup>127</sup> The UK *Military Manual*, arguably somewhat more narrowly, considers that no warning is required if no civilians are left in the area to be attacked.<sup>128</sup> But in view of the dynamics of modern asymmetric armed conflicts and in light of increasingly blurred lines of distinction, could one ever realistically exclude the possibility that an (aerial) attack ‘may affect the civilian population’? Especially in the case of aerial attacks and bombardments, it seems that this could hardly ever be ruled out with any degree of certainty. The Kunduz incident, viewed from an *ex post* perspective, is testament to this reality. Certainly, the word ‘may’ in Article 57 paragraph 2(c) of the Protocol does not require any degree of certainty as to whether an attack will indeed affect civilians; the mere possibility suffices. Thus, the criterion of ‘attacks which may affect the civilian population’ should be interpreted broadly. Unless it can be ruled out that an attack will affect the civilian population, the obligation to warn is triggered. This can hardly be perceived as an overly onerous standard. After all, Article 57 paragraph 2(c) of the Protocol still explicitly allows for the consideration of situational circumstances including military considerations.<sup>129</sup> Thus, even on the basis of a broadened understanding of when an attack ‘may affect the civilian population’, this Article would not categorically require a warning prior to each and every attack. Military commanders would still be granted a considerable margin of discretion in determining whether the circumstances actually permit a warning or not.

125 J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 20, p. 62, emphasis added.

126 See Statement of the Office of the Federal Prosecutor of 19 April 2010, para. 2, available at: <http://www.generalbundesanwalt.de/de/showpress.php?searchstring=Klein&newsid=360> (last visited 22 March 2011).

127 United States, *Air Force Pamphlet* (1976), para. 5–3(c)(2)(d).

128 United Kingdom, *Military Manual* (1958), para. 291.

129 The ICRC *Commentary* provides that giving a warning may be inconvenient when the element of surprise in the attack is a condition of its success: see Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, para. 2223.

## The different paradigms of law enforcement and the conduct of hostilities: vehicle checkpoints in Afghanistan as a case in point

In contemporary armed conflicts (and Afghanistan is a particular case in point), it often seems difficult to assess whether certain operations are governed by the ‘paradigm of law enforcement’ or ‘the paradigm of hostilities’.<sup>130</sup> The distinction is especially relevant because the constraint on the use of force may differ significantly. Whereas the paradigm of hostilities is primarily governed by the specific rules relative to the conduct of hostilities, the paradigm of law enforcement is primarily governed by human rights standards, provided that the application of human rights norms is established under the specific circumstances.<sup>131</sup> In the context of an armed conflict, IHL may prevail over or influence the interpretation of these standards.<sup>132</sup>

One conspicuous example in the context of Afghanistan where the two paradigms potentially overlap is provided by (vehicle) checkpoints. These are an important security measure in Afghanistan: ISAF, OEF, and Afghan forces all use them as a method to control people, to seize weapons and drugs, and to arrest suspected members of the armed opposition.<sup>133</sup> At the same time, checkpoints can also be regarded as a means to impede enemy movement and they may become the

130 For this terminology and definition of these paradigms, see Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, in particular pp. 85–90 and 269–298 respectively.

131 Considerable debate exists regarding the extraterritorial application of human rights. See, *inter alia*, Jann K. Kleffner, ‘Human rights and international humanitarian law: general issues’, in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, p. 69 onwards; and N. Lubell, above note 59, pp. 193–235. For instance, according to Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the rights and freedoms of the convention must be secured ‘to everyone within their [the High Contracting Parties’] jurisdiction’. In its case law, the European Court of Human Rights (ECtHR) particularly relies on the criterion of ‘effective control’ in order to affirm the extraterritorial applicability of human rights. See, ECtHR, *Loizidou v. Turkey*, Preliminary Objections (Grand Chamber), 23 February 1995, paras. 61–64; ECtHR, *Ocalan v. Turkey*, Judgment (Grand Chamber), 12 May 2005, para. 91; ECtHR, *Al-Saadoon and Mufdhi v. UK*, Admissibility Decision, 30 June 2009, paras. 87–88. Contrary to the ECHR, the wording of the International Covenant on Civil and Political Rights (ICCPR) is more ambiguous, as its Article 2(1) requires a state party to ‘respect and ensure to all individuals within its territory and subject to its jurisdiction the rights’ set out in the convention. However, the Human Rights Committee (HRC) has affirmed the possible extraterritorial application in several instances. See, most prominently, HRC, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10; HRC, *Concluding Observations: United States of America*, 2006, UN Doc. CCPR/C/USA/CO/3, para. 10; HRC, *Lopez Burgos v. Uruguay* (Communication No. 52/1979), 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, para. 12. Finally, the rights and freedoms in the American Convention on Human Rights must be respected and ensured ‘to all persons subject to their [the state parties’] jurisdiction’ (Article 1). See, e.g., Inter-American Commission on Human Rights, *Armando Alejandro, Jr., et al. v. Republic of Cuba*, Case Report No. 86/99, 29 September 1999, para. 23.

132 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, para. 106. See also Orna Ben-Naftali and Yuval Shany, ‘Living in denial: the application of human rights in the Occupied Territories’, in *Israel Law Review*, Vol. 37, No. 1, 2003–2004, pp. 103–105.

133 Brian Hutchinson, ‘Assignment Kandahar: checkpoint 5-1’, in *National Post*, 10 August 2010; Mandy Clark, ‘Afghan checkpoints key in battle for Kandahar’, in *CBS News*, 3 August 2010.

actual target of enemy attacks.<sup>134</sup> This raises the question whether the use of force at vehicle checkpoints is governed by the paradigm of hostilities, or, given that they at least partially if not primarily also amount to security measures, by the paradigm of law enforcement, or both. A similar ambiguity may be present in the cases of convoys or patrols and house searches.

In Afghanistan, as mentioned before, IHL applies in the entire territory, irrespective of where fighting is taking place.<sup>135</sup> Thus it potentially also applies to and regulates checkpoints. Although IHL makes no explicit mention of checkpoints there is no doubt that parties to an armed conflict are allowed to set up checkpoints and to carry out similar security measures such as house searches under that law. Some rules of IHL implicitly include the establishment of checkpoints as security measures. In international armed conflicts, for instance, IHL allows for security and control measures with regard to protected persons<sup>136</sup> and, in the case of occupation, requires an occupying power to take measures to restore and ensure public order and safety.<sup>137</sup> In non-international armed conflicts, the possible legal basis for checkpoints will mostly stem from domestic law. What is more, in the particular context of Afghanistan, the resolutions of the UN Security Council permit the use of ‘all necessary measures’ to address, *inter alia*, the security concerns in Afghanistan.<sup>138</sup>

Moreover, in accordance with the principle of distinction, military operations related to the conduct of hostilities shall only be directed against legitimate military objectives and consequently attacks shall not be directed at civilians or civilian objects.<sup>139</sup> At the same time, it is accepted that hostilities and related military operations may affect civilians, which is why the latter ‘shall enjoy general protection against dangers arising from military operations’.<sup>140</sup> From this it would follow, *a majore ad minus*, that, since IHL permits security measures in certain situations and even military operations related to hostilities that may affect civilians, under IHL it must also be possible to set up checkpoints affecting civilians, as long as they do not constitute a direct attack against them and comply with other humanitarian rules.

134 See, e.g., ‘Rebuilding an Afghan military checkpoint’, in *OUT On The Porch*, 29 November 2010, available at: <http://outontheporch.org/2010/11/29/rebuilding-an-afghan-military-checkpoint/> (last visited 22 March 2011).

135 See ICTY, *Prosecutor v. Dusko Tadić*, above note 7, paras. 68 and 69; ICTR, *The Prosecutor v. Jean-Paul Akayesu*, above note 27, para. 635.

136 See Article 27(4) of the Fourth Geneva Convention.

137 See Article 43 of the Hague Regulations of 1907.

138 See, in particular, UN Security Council resolution 1943 of 13 October 2010, and UN Security Council resolution 1890 of 8 October 2009. For the mandate of ISAF, see UN Security Council resolution 1386 of 20 December 2001 and UN Security Council resolution 1510 of 13 October 2003.

139 See Articles 48, 51(2), and 52(2) of Additional Protocol I; and Article 13(2) of Additional Protocol II. See also J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rules 1 and 7. For a commentary on attacks, see Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, paras. 4783 and 1882, defining attacks as simply referring to ‘the use of armed force to carry out a military operation’.

140 See Article 51(1) of Additional Protocol I and Article 13(1) of Additional Protocol II. See also Y. Sandoz, C. Swinarski, and B. Zimmermann (eds), above note 80, paras. 1935–1936 and 4761–4771.

The decision whether the use of force at (vehicle) checkpoints is governed by the standards of the law enforcement paradigm or by those of the paradigm of hostilities should be made by relying on the principle of *lex specialis*, according to which the rules offering a more detailed and specific regulation should take precedence.<sup>141</sup> Consequently, if it is clear that fighters with a continuous combat function or civilians who are directly participating in hostilities are approaching a checkpoint or a convoy, they are legitimate military objectives and hence may be targeted in accordance with the special rules relative to the conduct of hostilities.<sup>142</sup> However, outside the conduct of hostilities – for instance, when the Afghan, ISAF, or OEF forces exercise authority or power over persons protected against direct attacks at checkpoints or during house searches, or act in individual self-defence, or when the status of the person in question is doubtful – the use of force is governed by the law enforcement paradigm, that is, human rights law and also IHL.<sup>143</sup> IHL governing non-international armed conflicts prohibits the killing of persons not directly participating in hostilities and those *hors de combat*.<sup>144</sup> Outside the conduct of hostilities, however, IHL and its general principles do not provide sufficient guidelines regarding the legitimate use of force in security operations related to a non-international armed conflict. Recourse to human rights law in order to describe the modalities of the use of force may thus be justified.<sup>145</sup>

While the distinction in accordance with the *lex specialis* principle seems straightforward from a legal perspective, in practice there may be situations where it is admittedly much harder to evaluate which paradigm takes precedence. In the case of an approaching car failing to slow down, or even accelerating towards a (vehicle) checkpoint, it will be very difficult – if not altogether unrealistic – to assess whether the driver is a fighter, a civilian directly participating in hostilities, or a civilian protected against direct attack, and thus whether the rules on the conduct of hostility or the more restrictive law enforcement standards apply. The decision to resort to potentially lethal force has to be made within a few seconds only. If, for instance, the first sign (to stop) is 200 metres away from the checkpoint and a car arrives at approximately 90 km/h, a soldier has only instants to go through escalation of force procedures and to decide whether or not to resort to potentially

141 Nils Melzer, 'Law enforcement and the conduct of hostilities', in T. D. Gill and D. Fleck, above note 131, p. 42.

142 *Ibid.*, pp. 43 and 44.

143 N. Melzer, above note 130, pp. 174–175 and 277. For an argument that checkpoints in occupied territory are governed by domestic law and human rights law, see Marco Sassòli, 'Legislation and maintenance of public order and civil life by occupying powers', in *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 665–666. Afghanistan ratified the ICCPR of 23 March 1976 on 24 April 1983 and it is thus binding for all Afghan forces maintaining a checkpoint. For Coalition forces, the applicable human rights obligations will depend on the treaties that they have ratified, which raises the question whether and to what degree these human rights instruments are applicable extraterritorially. In addition, status and rights of ISAF are detailed in the 'Military technical agreement: between the International Security Force (ISAF) and the interim administration of Afghanistan ("Interim Administration")' of 4 January 2002, in *International Legal Materials*, Vol. 41, No. 5, 2002, p. 1032.

144 See Common Article 3; Article 4(2)(a) of Additional Protocol II; J.-M. Henckaerts and L. Doswald-Beck, above note 44, Rule 89.

145 See O. Ben-Naftali and Y. Shany, above note 132, pp. 104–105.



lethal force. However, it seems questionable whether in such a scenario the standards of human rights law and IHL really differ that much.

As described above, IHL requires that everything feasible must be done to verify that the targets are fighters or civilians directly participating in hostilities (i.e. military objectives). Only if a careful assessment leaves no doubt about the status of the person as a legitimate military objective may they be directly targeted in accordance with the rules relative to the conduct of hostilities. If doubt remains, or if it is concluded that an approaching car and/or its occupants are not a military objective, the use of potentially lethal force is governed by law enforcement standards. In accordance with human rights law – provided it applies<sup>146</sup> – potentially lethal force against an approaching car can only be used if it presents an imminent threat under the circumstances of the given situation. The use of force must then be strictly necessary to protect troops (of a convoy or manning a checkpoint) or any other person from serious injury or death, or to arrest or to prevent the escape of a person suspected of having committed a serious crime.<sup>147</sup> In addition to the criterion that the use of force must be proportionate to the acute threat posed, a deprivation of life is also considered ‘arbitrary’ if reasonable precautionary measures could have avoided or minimized the use of force.<sup>148</sup> These precautions include, *inter alia*, warnings and giving the opportunity to surrender,<sup>149</sup> adequate equipment,<sup>150</sup> and training.<sup>151</sup>

Escalation of force procedures, which seemingly already contain a vast array of non-lethal precautionary measures,<sup>152</sup> are thus very important, and are

146 See above note 131.

147 Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/ser.L/V/II.116, Doc. 5 rev 1 corr., 22 October 2002, paras. 86–92; *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 64, para. 32; HRC, *Suarez de Guerrero v. Colombia*, No. 45/1979, 31 March 1982, CCPR/C/15/D/45/1997, para. 13.2.

148 See, e.g., HRC, *Suarez de Guerrero v. Colombia*, above note 147, paras. 13.2–3. While similar, the ECHR has set out a slightly different system. Article 2(2) of the ECHR is violated if a deprivation of life is not ‘absolutely necessary’ to achieve one of the listed justification purposes. Like the other human rights systems, the ECHR also requires that the use of force is proportionate and that precautions be taken in order to ‘avoid or minimise, to the greatest extent possible’ any risk to life or the recourse to lethal force. See, e.g., ECtHR, *Case of Ergi v. Turkey*, No. 66/1997/850/1057, 28 July 1998, paras. 79–81, stating that government forces setting up an ambush in the vicinity of a village, and thus exposing the villagers to the risk of crossfire, should have taken adequate precautions. For the requirements on the organization and control of an anti-terrorist operation, see ECtHR, *McCann and others v. The United Kingdom*, No. 17/1994/464/545, 27 September 1995, paras. 194 and 202–213.

149 HRC, *Suarez de Guerrero v. Colombia*, above note 147, para. 13.2.

150 ECtHR, *Case of Güleç v. Turkey*, No. 54/1997/838/1044, 27 July 1998, para. 71.

151 ECtHR, *McCann and others v. The United Kingdom*, above note 148, paras. 211–212.

152 Escalation of force (EoF) procedures seem to include, *inter alia*, standardized warning signs, speed bumps, spike/tyre-shredder strips, pen flares, traffic cones, and bull horns. See, e.g., John Stevens, ‘A vignette: Coalition casualties, vehicle control points/cordons & CIVCAS’, in *COIN Common Sense*, Vol. 1, No. 1, February 2010, ISAF-Afghanistan, p. 6. See also Center for Army Lessons Learned (CALL), *Escalation of Force Handbook: Tactics, Techniques, and Procedures*, 07–21, July 2007. The need for more non-lethal weapons in the context of Afghanistan has recently been acknowledged by a senior US Marine commander. See Dan Lamothe, ‘2-star supports more use of nonlethal weapons’, in *Marine Corps Times*, 2 February 2011, available at: <http://www.marinecorpstimes.com/news/2011/02/marine-corps-afghanistan-tasers-nonlethal-weapons-020110/> (last visited 22 March 2011). For a compilation of available and future non-lethal weapons, see DoD Non-Lethal Weapons Program, *Non-Lethal Weapons*

feasible precautions that help to assess whether or not an approaching car represents a threat that may be answered with potentially lethal force.

## New technologies on the battlefield: the use of drones in Afghanistan

The use of drones in Afghanistan – most significantly combat drones that are able to launch attacks in remote areas – has received much media attention.<sup>153</sup> Unmanned aerial vehicles are a means of decreasing the risk to one's own forces and of reaching even the most remote locations in the mountainous area of Afghanistan. Their increased use, often associated with incidental civilian casualties, has triggered debate, mostly related to the legality of how they are being used.<sup>154</sup>

Drones, which are usually operated hundreds or thousands of miles away from their actual operative location,<sup>155</sup> can remain in the air for around twenty hours and provide live videos (including infrared and synthetic aperture radar).<sup>156</sup> Initially designed for surveillance purposes, the combat models currently used (the MQ-1 Predator and the MQ-9 Reaper) may be equipped with 100-pound Hellfire missiles and, in the case of the Reaper, even with 500-pound bombs.<sup>157</sup> Currently, the decision to launch an attack remains with the 'pilot', who reportedly needs to go through up to seventeen steps of approval before being allowed to fire a missile.<sup>158</sup> However, new challenges could arise if more automated programs are introduced, potentially no longer requiring a human being to make the decision.

Considering the weaponry of the MQ-1 Predator and MQ-9 Reaper drones, it is difficult to imagine their utility as law enforcement tools outside

*for Today's Operations*, 2011, available at: <https://www.jnlwp.usmc.mil/misc/publications/AR2011.PDF> (last visited 22 March 2011).

153 See, e.g., Jane Mayer, 'The predator war: what are the risks of the C.I.A.'s covert drone program?', in *The New Yorker*, 26 October 2009, available at: [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer) (last visited 22 March 2011).

154 Note that drones are not outlawed as a weapons platform. It is mainly their use for targeted killings that has been the subject of debate. See, e.g., *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 66, p. 24. For a discussion of their legality under international law see, e.g., Chatham House, *International Law and the Use of Drones: Summary of the International Law Discussion Group Meeting Held at Chatham House on Thursday, 21 October 2010*, Mary Ellen O'Connell and Michael N. Schmitt (speakers), and Elizabeth Wilmshurst (chair).

155 Christopher Drew, 'Drones are weapons of choice in fighting Qaeda', in *The New York Times*, 16 March 2009.

156 Michael N. Schmitt, 'Precision attack and international humanitarian law', in *International Review of the Red Cross*, Vol. 87, No. 859, 2005, p. 448.

157 See US Air Force, *MQ-1B Predator*, Factsheet, 20 July 2010, available at: <http://www.af.mil/information/factsheets/factsheet.asp?fsID=122>; and US Air Force, *MQ-9 Reaper*, Factsheet, 18 August 2010, available at: <http://www.af.mil/information/factsheets/factsheet.asp?fsID=6405> (both last visited 22 March 2011); Mary Ellen O'Connell, 'The international law of drones', in *The American Society of International Law Insights*, Vol. 14, No. 36, 12 November 2010; Matthias Gebauer *et al.*, 'Accident-prone wonder weapons: Afghanistan war logs reveal shortcomings of US drones', in *Der Spiegel*, 27 July 2010.

158 C. Drew, above note 155.

situations of armed conflict.<sup>159</sup> If drones are used on the ‘battlefield’, attacks must comply with the pertinent rules of IHL as outlined in the present article (i.e. distinction, proportionality, and precautions), just as any other battlefield delivery system not explicitly outlawed by IHL.

While the drones’ technology may permit enhanced aerial surveillance and precise attacks, thus potentially enhancing compliance with the principles of precautions in attack and proportionality, the question remains how the distinction between civilian and military objectives is to be achieved in a context in which it may be very challenging to gather reliable intelligence. This becomes particularly worrying when drones are used to target persons figuring on a targeting list<sup>160</sup> or to identify people as directly participating in hostilities. For instance, can a person digging in the vicinity of a road really be distinguished as a person planting an IED solely based on a video analysis?

The oft-criticized fact that the person controlling the UAV is far away from the battlefield eventually does not constitute a challenge for IHL.<sup>161</sup> However, some authors caution that the use of drones may lead to a “Playstation” mentality’ if operators are untrained in IHL and uninformed by the ‘risks and rigors of battle’, and that the greater security of the attacking forces could lead to a more ‘light-hearted’ resort to lethal force.<sup>162</sup>

## Conclusion

The prolonged conflict in Afghanistan has not led to a visible change in IHL. Initial calls for a new or reformed legal framework have faded but significant challenges remain. As far as the humanitarian rules relating to the conduct of hostilities are concerned, currently the greatest challenge derives from the blurred lines of distinction that are so characteristic of asymmetric conflict scenarios. Notwithstanding, thus far the fundamental precepts of the humanitarian legal order have not been put into question. Despite all discussion about IHL’s potential

159 Operations and cross-border attacks in Pakistan present manifold challenging questions not only from a human rights or IHL angle but also from a *jus ad bellum* perspective that are beyond the scope of this article. See, e.g., *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 66, pp. 10–15 and 25.

160 See Chatham House, above note 154, p. 5, where O’Connell notes that there are about six to seven casualties per attack, out of which usually only one person was on the hit list. This also raises concern about how those planning or deciding upon an attack carry out proportionality assessments. For an argument that the advanced technological capabilities of UAVs allowing for virtual ‘persistent surveillance’ (and thus making more relevant information available) lead to stricter requirements for targeting decisions, proportionality, and precautions, see J. M. Beard, above note 110, especially pp. 420, 428–442, and 444.

161 In cases where the drone is operated, in the context of an armed conflict, by a civilian contractor or by intelligence agencies (e.g. the CIA), the pilot would participate directly in hostilities and could potentially be targeted. In addition, the pilot’s participation could raise issues regarding criminal liability and detention status.

162 See most prominently *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, above note 66, pp. 24–25.

need of reform, almost ten years after the beginning of Operation Enduring Freedom in Afghanistan in October 2001 no compelling reform proposal for the rules relating to the conduct of hostilities has yet been made. On the contrary, especially during the second phase of the conflict the strategy of the international military forces in Afghanistan was focused on a strict adherence to existing rules, in order to achieve the overall strategic priority of winning the ‘hearts and minds’ of the Afghan population.

Nevertheless, controversy has increasingly arisen over the interpretation of existing rules. As conflict structures become more and more diffuse, legal certainty and clarity of humanitarian law prescriptions become ever more important. It is no coincidence that a number of so-called expert clarification processes with regard to the notion of direct participation in hostilities or air and missile warfare have been organized in recent years. All of these processes have touched upon important conduct of hostilities issues. At the same time, a number of long-standing questions and ambiguities, inherent for example in the proportionality principle or the definition of military objectives, remain unresolved and insufficiently discussed. Of course, some of these issues are difficult and, it seems, eternally disputed. Unsurprisingly, these controversies have been part and parcel of the modern humanitarian legal framework almost since its birth. Many can be traced back to the negotiations leading to the adoption of Additional Protocol I in 1977. Increasingly asymmetric conflict structures have not made their solution any easier in 2011, but the need for legal clarity in relation to the conduct of hostilities is clearly increasing.