

ORIGINAL ARTICLE

Targeted Killing of Drug Lords: Traffickers as Members of Armed Opposition Groups and/or Direct Participants in Hostilities

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ABSTRACT

In 2009, the United States announced that it had placed fifty Afghan drug traffickers with links to the Taliban on a 'kill list.' This controversial proposal essentially weds the counter-narcotics effort with the mission to defeat the Taliban, and challenges a cornerstone of international humanitarian law, the principle of distinction. This article argues that drug traffickers, even those who support the Taliban, are not legitimate targets according to the rules applicable to non-international armed conflict. It explores the notions of membership in armed groups, civilian status and acts that result in the loss of protection, and argues that the US plan violates international humanitarian law.

Introduction

In the summer of 2009, the US Pentagon announced that it had placed fifty Afghan drug traffickers on a list of people 'to be killed or captured',¹ essentially wedding the mission to defeat the Taliban with the counter-narcotics effort in Afghanistan.² One implication of this decision

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¹ *Afghanistan's Narco War: Breaking the Link between Drug Traffickers and Insurgents, A Report to the Committee on Foreign Relations United States Senate*, 10 August 2009, p. 1. [hereinafter referred to as 'Senate Report']

² *ibid.*

is that by placing ‘no restrictions on the use of force with these selected targets’,³ it appears to have given those drug traffickers an equal legal status as insurgents in the eyes of the US military.⁴

While the decision inspired some international discussion,⁵ considering its implications it is surprising that it did not arouse more. After all, targeted killing is a contentious proposal even for those who sporadically partake in acts of violence (i.e., attacks) on behalf of an insurgency, much less the criminal associates of those actors. One can only imagine the backlash if a Western government proposed killing every person suspected of donating money to the Taliban, which is in fact what is being proposed, although in this instance it is being limited to those engaged in a certain method of fundraising.

The issue ultimately comes down to determining who is a legitimate target in the war against the Taliban, and the factors leading to such a determination. This article will explore these questions with specific reference to the US policy of targeting Afghan drug traffickers. It will consider the issue of membership in armed groups, civilian status and acts that result in the loss of protection, namely through direct participation in hostilities.⁶ Theories on direct participation in hostilities will be explored in the context of the armed conflict in Afghanistan, as well as the relationship between this notion and the drug trade. Finally, the article will examine whether drug traffickers in Afghanistan are engaged in the armed conflict to a degree making them legitimate targets.

The article concludes that the answer to this question is no. Financially supporting an insurgency is not an activity that costs civilians their protected status, thus it cannot justify landing them on a ‘kill list’.⁷ Drug trafficking is not synonymous with combat, and therefore coalition troops cannot equate such acts with direct participation.

The principle of distinction in non-international armed conflict

It makes for a counter-intuitive analogy to liken the leaders of the austere Taliban – holed up in desert-hideouts – with the neurotic fictional television Mafiosi, Tony Soprano. Yet that is precisely how Afghanistan’s insurgency was described to an American congressional

³ *ibid*, p. 15.

⁴ James Risen, ‘U.S. to Hunt Down Afghan Drug Lords Tied to Taliban’, *The New York Times*, 9 August 2009. The New York Times, which broke the story, wrote that the proposal, ‘means [traffickers] have been given the same target status as insurgent leaders, and can be captured or killed at any time.’

⁵ Dapo Akande, ‘US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?’, *EJIL: Talk*, 13 September 2009, <http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent> (accessed 14 April 2010); Christopher M. Blanchard, *Congressional Research Service, Afghanistan: Narcotics and U.S. Policy*, 12 August 2009, p. 16.

⁶ This essay uses the term direct and active participation in hostilities interchangeably.

⁷ *Senate Report* (n 1) p. 15.

committee when journalist Gretchen Peters, an authority on the relationship between the insurgency and the drug trade, told Senate staff, ‘The Sopranos are the real model for the Taliban. They are driven by economic factors.’⁸

In the Senate report that emerged from these hearings, the Taliban was described as a fractured assortment of armed posses rather than as an organised ‘monolith’.⁹ As such, their range of activities vary from the combat-oriented to the strictly criminal, potentially causing confusion between which deeds are acts of greed and which are acts of war, and muddling an already complex conflict.

The current situation in Afghanistan is usually classified as a civil war, also known as internal or non-international armed conflict, between the Taliban and the Afghan state.¹⁰ Since Afghan President Hamid Karzai took power in 2002, the US military’s role has been to support the government’s effort to defeat the Taliban insurgency with the agreement of the Afghan state.¹¹

Afghanistan is clearly not the traditional battlefield nor is the conflict’s insurgent party a uniformed army marching towards the frontlines. However, this hardly makes the situation unique. In most civil wars, government armed forces are compelled to confront guerrillas who rarely distinguish themselves from the civilian population. Furthermore, it is commonplace for rebels to rely on illegal activities to fund their operations.

The laws of war¹² have always aimed to distinguish combatants from civilians in order to protect the latter from the consequences of combat.¹³ This tenet, known as the principle of distinction, is a cornerstone of international humanitarian law.¹⁴ The most basic rules governing internal armed conflict are found in Article 3 common to the Four Geneva Conventions of 1949 (also known as common Article 3).¹⁵ According to the International Court of Justice, its rules reflect ‘elementary considerations of humanity’ applicable to

8 *ibid.*, p. 9.

9 *ibid.*

10 *GS (Existence of Internal Armed Conflict) Afghanistan v. Secretary of State for the Home Department*, CG [2009] UKAIT 00010, United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, 23 February 2009.

11 Afghanistan Independent Human Rights Commission, *From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan*, December 2008, p. 7.; Human Rights Watch, “*Enduring Freedom? Abuses by U.S. Forces in Afghanistan*”, vol. 16, no. 3(C), March 2004, pp. 47–48.

12 The terms ‘laws of war’ and international humanitarian law are used interchangeably in this article.

13 Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, UK, 2005, p. 400.

14 Frits Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, International Committee of the Red Cross, 2001, pp. 14, 138.

15 Geneva Convention of August 12, 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1950) 75 UNTS 31, Article 3; Geneva Convention of August 12, 1949 for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, (1950) 75 UNTS 85, Article 3; Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135, Article 3; Geneva Convention of August 12, 1949 Relative to the Protection of Civilians, (1950) 75 UNTS 287, Article 3.

any situation reaching the threshold of armed conflict.¹⁶ The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (known as Additional Protocol II) is also applicable to internal armed conflict, and includes more detailed stipulations on the distinction between civilians and combatants, specifically under Article 13.¹⁷ The United States has signed but not acceded to the treaty,¹⁸ while Afghanistan acceded to the Protocol in the summer of 2009.¹⁹ Nevertheless, both states are bound by the rules envisaged by the Protocol. The principle of distinction, as formulated under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) has reached the status of customary law applicable to both international and non-international armed conflicts.²⁰ Article 51(2) makes clear that, “The civilian population as such, as well as individual civilians, shall not be the object of attack.”²¹

However, the rules for internal armed conflict leave many subjects unclear, including those of individual status and who is meant to receive protection.²² For example, when armed groups operate in secret, how are the ‘members’ of that group supposed to be distinguished from the civilian population? The question of how widely one can interpret ‘membership’ in an armed group could be centred on the combatant/civilian distinction. However, the law is unfortunately vague when it comes to differentiating ‘civilians’ and ‘members’ (i.e., combatants²³) of a party to the armed conflict in civil war. Neither term – combatant nor civilian – has much clarity in the rules governing internal armed conflict.²⁴ Common Article 3 only asserts that, ‘Persons taking no active part in the hostilities ... be treated humanely.’²⁵ However, exactly what this means, or how to define those not taking part in hostilities, was never thoroughly discussed during the drafting of common Article 3.²⁶

16 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice, 27 June 1986, p. 114.; Cassese (n 13) p. 431.

17 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 Jun 1977) 1125 UNTS 609.

18 International Committee of the Red Cross, ‘International Humanitarian Law - Treaties & Documents’, 2010, <http://www.icrc.org/ihl> (accessed 15 April 2010).

19 International Committee of the Red Cross, ‘Afghanistan accedes to Additional Protocols I and II in historic step to limit wartime suffering’, news release, 24 June 2009.

20 *Prosecutor v. Struger (judgment) IT-01-42-T*, Trial Chamber II, 31 January 2005, para. 220.; Louise Doswald-Beck & Jean-Marie Henckaerts, *Customary International Humanitarian Law: Rules Vol. 1*, Cambridge University Press, UK, 2005.; Jean-MarieM Henckaerts, ‘Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict’, 857 *International Review of the Red Cross* 175, 2005, p. 189.

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3.

22 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, International Committee of the Red Cross, May 2009, p. 27. [hereinafter referred to as ‘ICRC Final Interpretive Guidance’]

23 Though it has been written, ‘Combatants in the strictly legal sense are members of the *regular armed forces of states*.’ Toni Pfanner, ‘Editorial – ICRC December 2008’, 872 *The International Review of the Red Cross* 819, 2008.

24 Michael Bothe, *International Committee of the Red Cross, Second Expert Meeting on the Notion of Direct Participation in Hostilities in Non-International Armed Conflict*, The Hague, 25–26 October 2004, p. 4.

25 Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, Geneva Convention III, Third Geneva Convention.

26 Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, UK, 2002, p. 58.

The laws of international armed conflict provide definitions for the terms ‘civilian’ and ‘armed forces’ under Additional Protocol I, applicable to international armed conflict.²⁷ However, ‘[t]he distinction between the first and the second category ... is a negative one: all persons who are not combatants are civilians.’²⁸ Yet the term ‘combatant’ is not found under common Article 3.²⁹ Rather, it uses the term ‘members of armed forces’, but even then only in reference to *hors de combat*.³⁰ How then to determine how to differentiate between civilians and armed groups or, for that matter, whether to differentiate them?³¹ There has never been a clear opinion over whether or not ‘members’ of non-state armed opposition groups, such as the Taliban, should be considered civilians.³²

Membership in armed groups in internal armed conflict

There are precious few sources that offer substantive and definitive guidance on the principle of distinction in non-international armed conflict. Article 13(1) of Additional Protocol II states that civilians must be protected ‘against the dangers arising from military operations’, but adds in paragraph three that the protection exists ‘unless and for such time as they take a direct part in hostilities.’³³ This clearly means that the loss of protection is temporary and hinges on conduct.³⁴ However, the Commentary on the Additional Protocol states that, ‘Those who belong to armed forces or armed groups may be attacked at any time’,³⁵ which establishes a group of people who take part in hostilities ‘in an organised form [who] may always be the object of attacks.’³⁶

The International Criminal Tribunal for the former Yugoslavia also made reference to the status of an ‘individual who cannot be considered a traditional “non-combatant” because he is actively involved in the conduct of hostilities by membership in some form of resistance group.’³⁷ Some authorities refer to this category as ‘fighter’, a word that ‘does not appear in any binding treaty.’³⁸ However, it seems that this category of ‘fighter’ is understood to be a permanent status, defined as ‘members of armed forces and dissident armed forces

27 Additional Protocol I (n 21) arts. 43(1), 50(1).

28 Bothe (n 24) p. 3.

29 The ICRC group of experts notes in its final report (n 22) that ‘Common Article 3 GC I-IV generally is not considered to govern the conduct of hostilities, its wording allows certain conclusions to be drawn with regard to the generic distinction between the armed forces and the civilian population.’

30 Bothe (n 24) p. 4.

31 Nils Melzer, *Background Document Working Sessions IV and V, Direct Participation in Hostilities and Membership in Organized Armed Groups*, International Committee of the Red Cross, 23–25 Oct 2005, p. 3. [hereinafter referred to as ‘ICRC Background Document’]

32 *ibid.*; Moir (n 26) p. 58.

33 *Additional Protocol II* (n 17).

34 Bothe (n 24) p. 9.

35 International Committee of the Red Cross, *Commentary 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, para. 4789.

36 Bothe (n 24) p. 9.

37 *Prosecutor v. Duško Tadić (Judgement) [“Tadić Trial Chamber Judgment”]* IT-94-I-T, Trial Chamber, 7 May 1997, para 639; Bothe (n 24) p. 15.

38 International Institute for Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict with Commentary*, San Remo, 2006, p. 4.

or other organized armed groups, or [those] taking an active (direct) part in hostilities’³⁹ Consequently, anyone trying to understand who can be lawfully targeted in an internal armed conflict must wrestle with competing notions of ‘membership’⁴⁰ in an armed group versus a strictly ‘conduct-based approach’.⁴¹ While under the former a person may be subject to attack at any time simply by virtue of membership in a resistance group, under the latter the person is only considered a legitimate target during those specific periods of time when he or she is actually involved in the fighting.

Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law

The ambiguity between the article and the Commentary has recently received a much-needed clarification by the International Committee of the Red Cross (ICRC), in consultation with a panel of renowned legal experts. The Interpretive Guidance provided by the ICRC is not a legally binding instrument, but is intended to be a good-faith interpretive tool for an extremely complex topic.⁴² Furthermore, it is not intended to be a remaking of the law but rather an analysis within the existing legal framework.⁴³ The experts spent several years discussing the meaning of direct participation in hostilities and produced multiple reports on the status of their deliberations.

An early focus of their discussions was the definition of ‘civilian’. One fairly straightforward view is that civilians are people ‘who are neither members of state armed forces nor of organised armed groups and who do not otherwise participate in hostilities.’⁴⁴ A potential implication of this is that a person who is, and remains, actively involved with an armed group could be said to have become a ‘member’ of that armed group, and in so doing loses their civilian status.⁴⁵ The Commission of Experts debated this as ‘the membership approach’. Supporters of ‘the membership approach’ argued that the act of joining a group that carried out sustained attacks against its enemy ought to be considered a form of direct participation.⁴⁶ After all, it is not implausible to presume that a person joining an insurgent group will likely commit acts of violence.

In order to distinguish the military faction of a non-state party to an armed conflict from

39 *ibid.*

40 Nils Melzer, *Third Expert Meeting on the Notion of Direct Participation in Hostilities Summary Report*, 23–25 Oct 2005 International Committee of the Red Cross and TMC Asser Institute, 2005, p. 48. [hereinafter referred to as ‘Third Expert Meeting’]

41 *ibid.*, pp. 41–51.; *ICRC Final Interpretive Guidance* (n 22) p. 28.

42 *ICRC Final Interpretive Guidance* (n 22) p. 10.

43 *ibid.*

44 *ICRC Background Document* (n 31) p. 8.

45 *ibid.*

46 *Third Expert Meeting* (n 40) p. 48.

its civilian support component, some experts devised a notion dubbed ‘continuous combat function’.⁴⁷ These ‘functional’ ‘armed forces’ of the non-state party lose protection from direct attack for as long as their combat function in the group lasts.⁴⁸ This membership is meant to describe circumstances when ‘individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict’.⁴⁹ Once this is established, these individuals lose civilian status and its associated protection, according to the ICRC.⁵⁰ Among the relevant determining factors in this situation are that a person has been ‘recruited, trained and equipped’ by the armed group to hold an ongoing combat function.⁵¹

In applying this definition to the question of drug traffickers, it is possible that the United States could argue that a trafficker’s ‘nexus’ to the Taliban makes that person a ‘member’ of the organisation, and hence a legitimate target. However, evidence or criteria of such a nexus has not been made clear.⁵² The Senate report indicates the Taliban’s relationship to the drug trade includes charging farmers a ten percent tax, protection fees for labs, imposing a tariff on traffickers to collect and transport opium paste, fighters moonlighting as poppy farmers to earn extra money and those who simply make regular payments to the Taliban’s central governing body in Pakistan.⁵³

Most of these activities would make the Taliban’s relationship to the drug trade predatory, and none could reasonably be considered a combat function. The ICRC’s Interpretive Guidance explicitly states that ‘recruiters, trainers, *financiers* and propagandists’ cannot be said to have combat roles ‘unless their function additionally includes activities amounting to direct participation in hostilities’⁵⁴ (emphasis added). In other words, unless they have a job that entails direct participation in hostilities, the parameters of which will be examined below, they cannot be considered a ‘member’ of the armed group.

Yet despite this guidance from the ICRC, the killing of financiers of the Taliban is precisely what is being proposed in the US policy in Afghanistan. As the Senate report states specifically, ‘No longer are U.S. commanders arguing that going after the drug lords is not part of their mandate. In a dramatic illustration of the new policy, major drug traffickers who help *finance* the insurgency are likely to find themselves in the crosshairs of the

47 ICRC Final Interpretive Guidance (n 22) pp. 33, 70.

48 *ibid.*

49 *ibid.*, p 72.

50 *ibid.*

51 *ibid.*, p. 34.

52 Blanchard (n 5) p. 16.

53 Senate Report (n 1) p. 9.

54 ICRC Final Interpretive Guidance (n 22) p. 34.

military'⁵⁵ (emphasis added).

Besides simply receiving or extorting money from the drug trade,, the United Nations Office on Drugs and Crime (UNODC) suggests that the Taliban is also assuming the functions of traffickers directly. Warning of the 'birth of Afghan narco-cartels', the UNODC writes, 'After years of collusion with criminal gangs and corrupt officials, some insurgents are now opportunistically moving up the value chain: not just taxing supply, but getting involved in producing, processing, stocking and exporting drugs.'⁵⁶ However, none of these acts are synonymous with combat either.

This is not to say that the nexus between trafficker and Taliban never reaches hostilities. Peters outlines a number of ways the Taliban and drug traffickers collaborate on the battlefield. For example, she has written of armed Taliban fighters accompanying drug consignments to ensure protection.⁵⁷ Other examples she cites include instances of insurgents striking at checkpoints to open up routes for traffickers, as well as initiating attacks as a diversion for shipments.⁵⁸ However, in most of these particular instances, it is the attackers' violent conduct that makes them legitimate targets, whether they identify themselves as traffickers or Taliban.

While distinguishing between traffickers and Taliban may be challenging, the fact remains that the former are criminal suspects. Should they employ violence to resist search and seizure, coalition troops would be perfectly within the law to employ lethal force. But if there is any uncertainty on the part of coalition troops about how to classify the target, the individual must receive the benefit of the doubt, and be considered protected.⁵⁹ Therefore, if the person is entitled to the presumption of civilian status, targeting him or her for assassination when not actively participating in hostilities is a violation of international humanitarian law. This analysis may be what prompted the then UNODC Executive Director, Antonio Maria Costa to caution, 'Major traffickers should be reported to the Security Council and brought to justice – not executed in violation of international law or pardoned for political expediency.'⁶⁰

If there is a distinction between the traffickers who are financing the insurgency and the Taliban-cum-trafficker, the United States seems to be indifferent or unaware. An unnamed

55 *Senate Report* (n 1) p. 1.

56 United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2009 Summary Findings*, September 2009, commentary by the executive director.

57 Gretchen Peters, *Seeds of Terror: How Heroin in Bankrolling the Taliban and al Qaeda*, Oneworld Publications, UK, 2009, p. 116.

58 *ibid.*

59 *ICRC Commentary, Additional Protocol II* (n 35) para. 4789.; *ICRC Final Interpretive Guidance* (n 22) p. 71.

60 *ibid.*

military officer told the Senate committee, ‘Our long-term approach is to identify the regional drug figures and corrupt government officials and persuade them to choose legitimacy or remove them from the battlefield’,⁶¹ a statement that raises the question of what constitutes a ‘battlefield’? ,On this matter, the Senate report is alarmingly vague. It states that two generals asserted that,

[T]he [Rules of Engagement] and the internationally recognised Law of War have been interpreted to allow them to put drug traffickers with proven links to the insurgency on a kill list, called the joint integrated prioritized target list. The military places no restrictions on the use of force with these selected targets, which means they can be killed or captured on the battlefield; it does not, however, authorize targeted assassinations away from the battlefield.⁶²

This statement seems to concede that killing someone outside of a combat situation could be legally dubious, yet there is no indication how broadly the term ‘battlefield’ is being interpreted. Could it be interpreted to mean the entire Afghan territory?

This is not to say that civilians may never be lawfully targeted. In some circumstances, civilians may also be lawfully targeted based on their conduct.⁶³ As stated in Additional Protocol II, if civilians are actively engaged in hostilities they lose their protection for as long as that participation lasts.⁶⁴ This is the separate but related notion of direct participation in hostilities.

Direct participation in hostilities

In its final draft on the Interpretive Guidance on the Notion of Direct Participation in Hostilities, the ICRC wrote, ‘The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.’⁶⁵ Although the term ‘hostilities’ is sometimes mistakenly used in lieu of ‘armed conflict’, it should be understood more narrowly to mean ‘offensive or defensive acts and military operations’ in an armed conflict.⁶⁶ The acts that constitute hostilities have nothing to do with ‘membership’ and everything to do with conduct.⁶⁷ This topic spurred

61 *Senate Report* (n 1) p. 15.

62 *ibid.*

63 *Third Expert Meeting* (n 40) p. 49–50.

64 *ICRC Final Interpretive Guidance* (n 22) p. 70.

65 *ibid.*, p. 43.

66 Program on Humanitarian Policy and Conflict Research at Harvard University, *Direct Participation in Hostilities under International Humanitarian Law* (Working Paper by J. Quéguiner), November 2003.

67 *ICRC Final Interpretive Guidance* (n 22) p. 44.

lengthy discussions among the experts during the drafting of the Interpretive Guidance. A lively point of contention was how to interpret ‘hostilities’ in a way that honoured the principle of distinction, yet also covered the range of activities that might benefit one of the parties.⁶⁸

In the final document, the ICRC laid out three cumulative conditions that must be met for an act to be direct participation in hostilities.⁶⁹ The first criterion is the ‘threshold of harm’, meaning the impact on military operations/capacity of a party to the armed conflict ‘or, alternately, to inflict death, injury, destruction on persons or objects protected against direct attack.’⁷⁰ The second is the ‘direct causation’ or ‘direct causal link between the act and the harm likely to result either from the act, or from a coordinated military operation of which that act constitutes an integral part.’⁷¹ Lastly, there must be a ‘belligerent nexus’ which is to say the act must be performed in support of one party over another.⁷²

Threshold of Harm

The term ‘threshold of harm’ refers to the harm that an act may cause to military operations of a party to the conflict or to protected categories such as civilians.⁷³ For acts that are specifically directed at the military, they need not cause the death and destruction of soldiers to be direct participation in hostilities.⁷⁴ Disrupting communications, sabotaging equipment and guarding captured personnel may reach the threshold.⁷⁵ The ability to impair the enemy is clearly not limited to acts of armed aggression or, as the experts described it, ‘traditional war fighting scenarios.’⁷⁶ At the same time, this does not mean that every action with a beneficial result for one party makes the actor an enemy of that armed group’s rival.⁷⁷ For instance, providing food and clothing to fighters is decidedly not direct participation.⁷⁸ The Inter-American Commission on Human Rights wrote of this distinction

[I]ndirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to

68 *Third Expert Meeting* (n 40) pp. 17–20.

69 *ICRC Final Interpretive Guidance* (n 22) p. 46.

70 *ibid.*

71 *ibid.*

72 *ibid.*

73 *ICRC Final Interpretive Guidance* (n 22) p. 47.

74 *ibid.*, p. 49.

75 *ibid.*

76 *Third Expert Meeting* (n 40) p. 14.

77 *ICRC Final Interpretive Guidance* (n 22) p. 45.

78 *ibid.*, pp. 11–12.

the adverse party.⁷⁹

Outside of harm directed at the military, the threshold can also be reached by committing acts that are ‘likely to inflict death, injury or destruction’ on civilians or civilian objects.⁸⁰ This should be taken to mean targeted assaults on civilians or civilian objects, such as the kind of shelling of villages or sniper attacks that occurred in the former Yugoslavia.⁸¹

It is usually understood that the manifestation of harm is not necessary to meet the threshold, but rather the potential to cause harm or the ‘objective likelihood that the act will result in such harm’.⁸² It would require an absurdly broad reading of the threshold of harm to conclude that trafficking in narcotics presents such a threat to a rival party to the conflict that it makes the trafficker a legitimate target. The drug trade’s harm is not specifically military, and though the civilian population may suffer as a result of illegal narcotics, the production, sale and transport of illicit drugs hardly qualifies as an attack.

Harm is not the same as inconvenience, and there are numerous examples of behaviour that may bother the state and even encourage its rival without amounting to direct participation in hostilities. Afghan citizens who voice support for the Taliban may in some circumstances be breaking domestic laws, but such behaviour does not place them on the ‘battlefield’ or make them legitimate targets for armed attack. If supporting the enemy makes one a legitimate target, why limit the definition of such aid to finance? It could be argued that ideological support plays a role in mobilising opposition to US forces in Afghanistan. Would the US military argue for the targeting of those who spray-paint anti-American graffiti, for example?

Direct Causation

‘Direct causation’ refers to the link between the act, or the operation that the act is part of, and the harm it would likely cause.⁸³ It is a term articulated in the commentary on Additional Protocol I, which reads, ‘Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.’⁸⁴

79 Inter-American Commission on Human Rights, *Third Report on Human Rights in Colombia*, 1999, Chap 4A, para. 56.

80 ICRC *Final Interpretive Guidance* (n 22) pp. 49–50.

81 *ibid.*, p. 50.

82 *ibid.*, p. 47.

83 *ibid.*, p. 51.

84 International Committee of the Red Cross, *Commentary, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, para. 1679.

This requirement separates direct from indirect participation in hostilities.⁸⁵ Direct participation must be distinguished from taking part in the ‘war effort’, which entails a wide range of activities from working in a munitions factory to preparing food for soldiers, and hence a broader array of potential victims who are not active participants.⁸⁶ The commentary on Additional Protocol II states that direct participation means ‘acts of war that by their nature or purpose struck at the personnel and “matériel” of enemy armed forces.’⁸⁷ However, this raises a related issue that lacks clarification in the commentary, namely the ‘causal proximity’ between the harm and the act. How far removed from the harm must an act be for it to qualify as direct participation?⁸⁸ A problem that the experts encountered in this regard was that “‘hostilities’ did not necessarily have to “harm” the enemy’.⁸⁹ Intelligence gatherers, minesweepers and truck drivers, could each qualify as directly participating in hostilities in some circumstances.⁹⁰

It is difficult to consider direct participation in hostilities without considering a broad array of acts, in part because participation is relative to the parties’ operations and conduct.⁹¹ For instance, remote-controlled devices could involve people who are nowhere near the battlefield, and thus understanding who among them is directly responsible for the harm the operation causes is a difficult task.⁹² The ICRC’s final analysis states that, ‘where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.’⁹³

Under this analysis, are drug traffickers an ‘integral part’ of an operation that reaches the threshold of harm? It is clear the Taliban would be greatly weakened financially without proceeds from the drug trade, but the final ICRC Guidance separate the act from the harm by ‘one causal step’.⁹⁴ For example, a person planting a landmine may be divorced from the harm temporally, but not causally, and is therefore participating in hostilities. Although the poppy fields of Afghanistan provide significant funding for the insurgency,⁹⁵ the distance between trafficking in heroin and the harm caused by the Taliban’s military activities is well beyond ‘one causal step’. During deliberations, the experts explicitly stated that if direct participation in hostilities were broadened to include acts related to the enemy’s financial

85 ICRC *Final Interpretive Guidance* (n 22) p. 51.

86 ICRC *Commentary to Additional Protocol I* (n 84) para. 1670.

87 ICRC *Commentary to Additional Protocol II* (n 35) para. 4788.

88 *Third Expert Meeting* (n 40) p. 28.

89 *ibid.*, p. 29.

90 *ibid.*, pp. 29–32.

91 ICRC *Final Interpretive Guidance* (n 22) p. 56.

92 *ibid.*, p. 54.

93 *ibid.*, p. 56.

94 *ibid.*, p. 58.

95 Dexter Filkins, ‘Poppies a Target in Fight Against Taliban’, *The New York Times*, 29 April 2009.

assets, it ‘would amount to opening a Pandora’s box’.⁹⁶ If such a definition were to be accepted, the New York Stock Exchange could be considered to be directly participating in hostilities on the US side.

Belligerent Nexus

The final requirement the ICRC identified for an act to be considered direct participation in hostilities is ‘belligerent nexus’. This pertains to the benefit an act is intended to provide for one party to the conflict over another. As the ICRC wrote, ‘an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict to the detriment of another’.⁹⁷

There may be evidence that some traffickers are providing financing exclusively to the Taliban with the intent of helping the insurgency defeat the Karzai government. In this circumstance, there may actually be a belligerent nexus. However, absent the other two conditions above, it simply is not enough to make that trafficker a legitimate target. There is also another problem. The establishment of belligerent nexus must be set apart from subjective, or even hostile, intent.⁹⁸ Its determination must rely on objective criteria.⁹⁹ The Final Guidance states, ‘belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual’.¹⁰⁰

Therefore, even though the ‘design of the act or operation’ of drug trafficking tends to be profit, it is irrelevant to the decision to target. The experts almost unanimously agreed that it would be impossible to ascertain subjective motives in the heat of battle.¹⁰¹ Belligerent nexus cannot be equated with ‘subjective intent and hostile intent’.¹⁰² In most circumstances, it does not matter whether the actor *intends* to harm coalition forces or their goals, but rather whether the act in some objective sense is meant to support the Taliban. A pickpocket may support the Taliban whole-heartedly but, on the face of the act, it is difficult to see how snatching billfolds is performed in the service of the enemy. Therefore it would be blatantly unlawful to target the pickpocket under the pretence of direct participation in hostilities.

96 *Third Expert Meeting* (n 40) p. 15.

97 *ICRC Final Interpretive Guidance* (n 22) p. 46.

98 Michael N. Schmitt, ‘Direct Participation in Hostilities and 21st Century Armed Conflict’ in *Crisis Management and Humanitarian Protection*, ed. H Fischerr, et al, BWV, Berlin, 2004.

99 *ICRC Final Interpretive Guidance* (n 22) p. 59.

100 *ibid.*

101 *ibid.*

102 *ibid.*

Common article 3

Under common Article 3, those not taking direct part in hostilities must ‘be treated humanely’, which includes a prohibition on ‘violence to life and person.’¹⁰³ This prohibition is on directly targeting civilians. If in the course of attacks on the Taliban civilians are killed, be they law abiding or drug trafficking, it could be measured as collateral damage and would not necessarily be a violation of international humanitarian law, as long as the principles of proportionality were respected.¹⁰⁴ But at the same time, these civilians, even if they are criminals, may not be targeted for attack (unless of course they take direct part in hostilities).¹⁰⁵

Furthermore, Common Article 3 expressly forbids ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’¹⁰⁶ While the Senate report never identified the people the US military intends to target, it would seem unlikely that the drug traffickers have been given the opportunity to challenge the evidence that resulted in their being placed on the list. Moreover, as the International Court of Justice declared in its decision on the *Legality of the Threat or Use of Nuclear Weapons*, international human rights norms do not cease in times of armed conflict.¹⁰⁷ Therefore, targeted killing of suspected drug traffickers in an environment where (as the US military admits) it is difficult to establish reliable evidence¹⁰⁸ creates a landslide of human rights concerns, among them, potential violations of the right to life. As the Inter-American Commission on Human Rights stated,

[T]he contours of the right to life may change in the context of an armed conflict, but the prohibition on arbitrary deprivation of life remains absolute. The Convention clearly establishes that the right to life may not be suspended under any circumstances, including armed conflicts and legitimate states of emergency.¹⁰⁹

103 International Institute for Humanitarian Law (n 38) p. 23.

104 *ibid.*

105 *ibid.*; Akande (n 5).

106 Article 3(i)(d) Geneva Convention relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, Geneva Convention III, Third Geneva Convention.

107 ‘The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion’, *ICJ Report 2*, 8 July 1996, p 240, para. 25.

108 *Senate Report* (n 1) pp. 14–15. The report said generals have said that in order to be placed on the list, it ‘require[s] two verifiable human sources and substantial additional evidence’.

109 Inter-American Commission on Human Rights, *Third Report on Colombia*, Doc. No. OEA/Ser.L/V/II.102, 26 February 1999, chap. IV, para. 18.

Targeted killing and the 'war on terror'

Targeted killings¹¹⁰ were debated at length when the United States and Israel began assassinating their enemies in their respective wars on terror. In 2002, the US Central Intelligence Agency assassinated al-Qaeda operative Qaed Salim Sinan al Harethi in Yemen using an unmanned Predator drone.¹¹¹ Sweden's then foreign minister, Anna Lindh, made an argument that seemed to foretell the current predicament when she stated that 'Even terrorists must be treated according to international law. Otherwise, any country can start executing those whom they consider terrorists.'¹¹²

Targeted killings have continued under the new US administration, with fresh strikes in Pakistan occurring just a few days into the Obama presidency.¹¹³ Exactly how the US justifies these acts is difficult to determine, because its evidence and legal reasoning have been kept from public view.¹¹⁴ Interestingly, while the CIA was hunting al-Harethi, the State Department was vocally criticising Israel's 'policy of targeted frustration' of terrorism,¹¹⁵ which allowed 'security forces [to] act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel'¹¹⁶—in other words, targeted killings.

Scholars, policymakers, activists and human rights advocates hotly debated the legitimacy of these acts. Analysing the situation through the lens of international humanitarian law, Amnesty International roundly criticised Israel (and later the United States) for its use of targeted assassinations.¹¹⁷ Some advocates warned of the potential danger that 'literalizing' the war on terror could have on peacetime protections.¹¹⁸ Many scholars, however, also noted that it was the aforementioned gaps in the law that made it such a difficult issue.¹¹⁹ In fact, the importance of the ICRC Guidance was commonly emphasised by authorities wrestling with the matter, because it was precisely these types of questions related to

¹¹⁰ It has been noted elsewhere that targeted killing is lacking a precise definition in international law. For the purposes of this paper, it will use the meaning as given by Anderson, 'the intentional, direct targeting of a person with lethal force intended to cause his death'. It is also used interchangeably with targeted assassination.

¹¹¹ Eben Kaplan, 'Background: Targeted Killings', *Council on Foreign Relations*, 2 March 2006, <http://www.cfr.org/publication/9627> (accessed 16 November 2009).

¹¹² Kenneth Anderson, *Targeted Killing in US Counterterrorism Strategy and Law: A Working Paper of the Series on Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution*, 11 May 2009, p. 15.

¹¹³ *ibid.*, p. 2.

¹¹⁴ *ibid.*, p. 17; Associated Press, 'U.N. Investigator Warns U.S. on Drone Killings', 28 Oct 2009.

¹¹⁵ BBC News, 'US "Still Opposes" Targeted Killings', 6 November 2001, http://news.bbc.co.uk/1/hi/world/middle_east/2408031.stm (accessed 16 November 2009).

¹¹⁶ *The Public Committee Against Torture in Israel v. the Government of Israel*, HC 769/02, 11 December 2005, para. 2. [hereinafter *Targeted Killings Case*]

¹¹⁷ Amnesty International, 'Israel and the Occupied Territories: Israel must end its policy of assassinations', AI Index: MDE 15/056/2003, 4 July 2003.

¹¹⁸ Kenneth Roth, 'The Law of War and the War on Terror', *Foreign Affairs*, vol. 83, 2004.

¹¹⁹ For example, David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', *European Journal of International Law*, vol. 16, no. 171, 2000, pp. 199–200.

distinction that it intended to answer.¹²⁰

In 2005, the Supreme Court of Israel ruled on the policy of targeted killing. Though the court's decision is controversial, its deliberations are revealing about the policy, and how some states might defend the practice. The court accurately pinpointed the vital questions regarding terrorists in armed conflict.

Are terrorist organizations and their members combatants, in regards to their rights in the armed conflict? Are they civilians taking an active part in the armed conflict? Are they possibly neither combatants nor civilians? What, then, is the status of those terrorists?¹²¹

The court determined that the conflict in question was international in nature, unlike Afghanistan. Nevertheless, many of the principles it dealt with are still relevant to the issue of targeted killing. The court recognised the customary nature of the principle that 'the civilian population as such, as well as individual civilians, shall not be the object of attack'.¹²² Yet it also noted that its adversaries were not 'commanded by a person responsible for his subordinates', did not 'have a fixed distinctive emblem recognizable at a distance' or 'carry arms openly', nor did they obey the laws of war. In other words, they do not meet the conditions to be combatants in an international armed conflict.¹²³

Therefore, the judges turned to the principle of direct participation in hostilities to navigate what it calls 'unlawful combatants'. The court defined legitimate targets from this group as

[P]eople who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war.¹²⁴

This raises all the questions that the ICRC document was intended to clarify. The court did not attempt to label terrorists 'combatants', but chose instead to define them as civilians

120 Program on Humanitarian Policy and Conflict Research at Harvard University, 'IHL and Civilian Participation in the OPT', Harvard University, October 2007.; Schmitt (n 98).

121 *Targeted Killings Case* (n 116) para. 23.

122 *ibid.*, para. 26.

123 *ibid.*, para. 24.

124 *ibid.*, para. 27.

taking direct part in hostilities who may be ‘treated as combatants’.¹²⁵

The justices interpreted ‘direct part’ and the temporal scope of ‘for such time’ in such a way as to establish a distinction between what are sometimes called ‘one-off terrorists’ and ‘a civilian who has joined a terrorist organization which has become his “home”’.¹²⁶ The latter, according to the decision, may be targeted at any time since his or her participation represents a ‘chain of acts’ with only intermittent respite.¹²⁷ In some respects, this idea has parallels with the notion of ‘continuous combat function’, although the Israeli version is potentially more permissive, especially as the court argued that

the ‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part’. The same goes for the person who decided upon the act, and the person who planned it.¹²⁸

Setting aside broader analysis of the quality of the court’s arguments in this case, it is clear that the contention it made for the targeting of terrorists is not transferrable to drug traffickers. First, the court’s decision defines ‘hostilities’ as ‘acts which by [their] nature and objective are intended to cause damage to the army’.¹²⁹ The court then adds, ‘It seems that acts which by [their] nature and objective are intended to cause damage to civilians should be added to that definition’.¹³⁰ Therefore, even as the court broadens legitimate targets to include the entire chain of command, it limits the hostile acts they are involved in to targeting civilians or the military. This part is consistent with the ICRC Guidance and, as already noted above, the actions of drug traffickers simply do not meet either definition.

Furthermore, the Israeli Supreme Court explicitly excluded those ‘who aid the unlawful combatants by general strategic analysis, and grants them logistical, general support, including *monetary aid*’¹³¹ (emphasis added). Therefore, while the court deems some cases of targeted killings lawful, it drew a very clear distinction between what it views as legitimate targeting and what is being proposed for these fifty drug traffickers in Afghanistan.

The United States has offered far less detailed reasoning on its use of targeted killing of al Qaeda operatives. But a discussion between the US and the Special Rapporteur for

125 Hilly Moodrick-Even Khen, ‘Can We Now Tell What “Direct Participation in Hostilities Is?”’, *Israel Law Review*, vol. 40, no. 213, 2007, p. 223.

126 *Targeted Killings Case* (n 116) para. 39.

127 *ibid.*

128 *ibid.*, para. 37.

129 *ibid.*, para. 33.

130 *ibid.*

131 *ibid.*, para. 35.

extrajudicial, summary, or arbitrary executions, revealed at least some insight to the US view of its rights and obligations regarding the practice. Although the government largely dismissed the special rapporteur's competence to consider the issue, it nevertheless argued that

The continuing military operations undertaken against the United States and its nationals by the Al Qaida organization both before and after September 11 necessitate a military response by the armed forces of the United States. To conclude otherwise is to permit an armed group to wage war unlawfully against a sovereign state while precluding that state from defending itself. The law of armed conflict (also known as international humanitarian law) is the applicable law in armed conflict and governs the use of force against legitimate military targets ... Under that body of law, enemy combatants may be attacked unless they have surrendered or are otherwise rendered *hors de combat*. Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.¹³²

The United States makes mention of 'military operations' being taken against the US and its citizens as well as 'terrorists who continue to plot against the United States'. Like Israel, this view quite clearly limits attacks against to those participating in hostilities, rather than the overall war effort, or 'nexus' targets as it were. While this statement from the US does not rely on detailed legal arguments, it is nonetheless very clear that *terrorists* are the intended targets and not their supporters or financiers. According to the arguments above, the US seems intent on targeting those who present a direct threat. Thus one can only conclude that this more recent proposal to target drug traffickers signifies an expansion of its definitions and the creation of a different category of persons it considers to be legitimate targets, a category that clearly falls afoul of international humanitarian law.

Citing the US military's internal manuals, it has been written that the government defines lawful targets as those who 'effectively contribute to the enemy's war-fighting/war sustaining capability'.¹³³ However this view is so potentially destructive to the principle of distinction that it is has been repudiated by scholars as well as allied governments.¹³⁴ In fact, when the notion of targeting drug traffickers was first proposed in early 2009, many German lawmakers angrily condemned the proposal as unlawful.¹³⁵ However, unlike the latest plan,

¹³² Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Summary of cases transmitted to Government and replies received* (12 March 2007) UN Doc. No. A/HRC/4/20/Add.1, pp. 343, 360.

¹³³ Akande (n 5).

¹³⁴ *ibid.*

¹³⁵ Matthais Gebauer & Susanne Koebel, 'Orders to Kill Angers German Politicians', *Spiegel Online*, 29 January 2009, <http://www.spiegel.de/international/world/0,1518,604430,00.html> (accessed 18 November 2009).

the earlier scheme did not apparently require there be any proven link to the insurgency.¹³⁶ Thus the more recent proposal has raised fewer vocal condemnations from elected officials than before.

Conclusion

Drug traffickers are clearly not ‘combatants’ or ‘fighters’ in the sense intended by international humanitarian law. They remain civilians, and as such are subject to arrest and prosecution. Organised criminals plague any number of societies around the world, but the vast majority of them should not be in the line of fire of state militaries, even when operating in an armed conflict. As such, the US military’s policy to kill *suspected* drug traffickers is inconsistent with multiple principles of international humanitarian and human rights law.

There is no argument over the nexus between the drug trade and the Taliban. The insurgency has clearly exploited Afghanistan’s lucrative heroin trade to subsidise its efforts to topple the Karzai government. Yet legitimate targeting hinges on membership in an armed group or direct participation in hostilities. While these topics are notoriously nebulous areas of international law, they have received much-needed clarification from the ICRC. The conditions articulated in that document would plainly not allow for the killing of drug traffickers due to their financial support for the Taliban.

However, even before the ICRC released its interpretive guidance, the killing of financiers was established to be unlawful. There is nothing in the treaties relevant to non-international armed conflict that makes targeting sponsors of an insurgency permissible. Even the Israeli Supreme Court decision supporting the assassination of those who directly participate in hostilities explicitly removed financiers from the list of legitimate targets.

Targeting people for death is not an appropriate or legal means for holding those involved in criminal activities accountable for their actions.¹³⁷ If a mode of liability can be established, civilian criminals could be prosecuted domestically or even theoretically be brought before the International Criminal Court.¹³⁸ As Luis Moreno-Ocampo, the prosecutor of the ICC, once said, ‘Investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed.’¹³⁹

¹³⁶ Akande (n 5).

¹³⁷ *Third Expert Meeting* (n 40) p. 44.

¹³⁸ Fabricio Guariglia, ‘Prosecutorial Discretion-Selection of Situations and Cases’ presented at the *Summer Course on the International Criminal Court at the Irish Centre for Human Rights*, 24 June 2009.

¹³⁹ Stéphanie Maupas, ‘The Prosecutor’s Strategy Revealed’, *Crimes of War Project: The Magazine*, December 2003, http://www.crimesofwar.org/icc_magazine/icc-maupas.html (accessed 30 July 2009).

