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Ndi, George

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TOPIC:
LEGAL CHALLENGES OF COMBATING TERRORISM:
International Humanitarian Law Implications of ‘Signature Strikes’ by Drones

Author/ Presenter:

Dr George K. Ndi

Programme Director, LLM in Legal Practice Course

School of Law, University of Huddersfield, HD1 3DH

West Yorkshire, England, United Kingdom

Tel. +44 1484 473080; Email: g.ndi@hud.ac.uk

Abstract

Terrorism has become the main international security challenge of the 21st century. From a historical perspective, terrorism has always been a serious concern for governments and nation states. The modern threat posed by terrorism has a much wider scope because of its international character. The much bigger threat posed by modern terrorism can also be explained by technological innovations and the reliance of terror networks on social networks both to propagate their message and as a recruitment tool. Modern terrorism also tends to be much more indiscriminate in targeting its victims, and employs methods aimed at maximising the psychological and global impact of its attacks. Combating this global threat requires a coordinated international approach. However, the international response has been fragmentary. A preliminary legal challenge is that of finding a universally accepted definition for terrorism. This paper has as its main objective to critically assess the international legal framework for combating terrorism and the legal challenges involved in fighting terrorism. The main focus of the discussion will be on the international humanitarian and criminal law implications of the fight against terrorism. The concluding part of the paper will seek to make recommendations aimed at improving the international legal framework.

1. Introduction

Random acts of terrorism have become commonplace in today's world. Most often the victims are innocent people who happen to be in the wrong place at the wrong time. Terrorist acts are calculated not just to kill, maim or to destroy property. They are also intended by the perpetrators as a way of sending out a message. That message is one of inspiring fear in the minds of members of the public. From the terrorist's point of view this psychological element is very important and terrorist acts are often planned and executed in such a way as to maximise the element of fear. It is through the psychological element of fear that the perpetrators of acts of terror hope to achieve their stated objectives by influencing a change in government policy. Combating this modern day problem is in the interest of all nations and has become part of the global agenda. The search for effective solutions has been at the forefront of the agenda of the United Nations (UN) for quite some time. Under the auspices of the UN, Member States have negotiated and adopted the Terrorist Bombing Convention of 1997, the Terrorist Financing Convention of 1999, and the 2005 Acts of Nuclear Terrorism Convention. The UN Sixth Legal Committee and the Ad Hoc Committee which was established pursuant to UNGA Resolution 51/210 of 1996 are still working towards the negotiation and future adoption of a draft Comprehensive Convention on International Terrorism.

Although States agree in principle on the pressing need and importance of eradicating international terrorism, there are still some disagreements on a number of important issues. These disagreements have turned out to be an obstacle in the search for a comprehensive approach. From a legal and political point of view, such differences concern:

- The legal definition of terrorism;
- The relationship between terrorism and freedom fighters or national liberation movements; and
- The relationship between terrorism and the activities of States' armed forces during armed conflicts and in exercise of their official duties in defending the State from attack.

Terrorism is, first and foremost, a method. It is a method of belligerency which used in times of peace as well as in times of conflict. But it is not considered to a legal method of conducting warfare. A terrorist organisation can therefore be defined as an illicit or

clandestine group which generally consists of planners, financiers, trainers, combatants and bombers. From the point of view of internal organisation, a terrorist group can have various structures such as an identifiable vertical hierarchy of command or a horizontal structure where leaders are not easily identifiable. It could equally have a cell structure where the perpetrators of terrorist acts can operate as so-called 'lone wolves'. Terrorism employs as its main method of combat the concept of asymmetric warfare. Asymmetric warfare refers to the use of random and unpredictable patterns of violence by a weak group (i.e., one with a smaller force) against a stronger power (i.e., military, government or even society in general). The strategy employed is based on the element of surprise.

Asymmetrical warfare is therefore fought between grossly unequal sides in terms of resources and manpower. It is for this reason that the less powerful force does not subscribe to the conventional rules of warfare. It knows fully well that it cannot win by conventional means or tactics. The underlying philosophy of asymmetric warfare is thus based on the use of unexpected and unconventional tactics in combat. This is similar to the notion of war without front lines. From the point of view of governments it is a war waged in the shadows against an unidentifiable and shadowy enemy. Despite all the information gathering efforts by the intelligence agencies, there is never any clear understanding on the part of governments of where the next strike will take place or where the war will lead or how it would end.¹

2. Combating International Terrorism: Legal Obstacles to Developing an Effective Enforcement System.

2.1 Historical Perspective

One of the key obstacles standing in the way of the development of an effective legal and enforcement framework for combating international terrorism lies in the difficulty of defining the term 'terrorism'. Within the term 'terrorism' resides the word 'terror'. Terror comes from the latin term '*terrere*', which literarily means to 'frighten' or to 'tremble'. When coupled with the French suffix '*isme*' which means 'to practice', the word 'terrorism' becomes akin to 'causing fright' or 'to cause trembling'. Trembling and frightening here are synonyms for fear, panic, and anxiety- in other words, terror. The word 'terror' is deemed to be over 2,100

¹ Hoge, James F., Jr., & Rose, Gideon (2001), *How Did This Happen? Terrorism and the New War*. New York: Public Affairs; Mansdorf, Irwin J., & Kedar, Mordechai (2008), *The Psychological Asymmetry of Islamist Warfare*. *Middle East Quarterly*, 15(2), 37–44; White, Jonathan R. (2011), *Terrorism & Homeland Security* (7th ed.). Belmont, CA: Wadsworth.

years old and can be sourced to ancient Rome. In ancient Rome, the *'terrre cimbricus'* described the general panic following the state of emergency which was decreed in response to the savage invasion of Rome by the Cimbri tribe in 105 BCE.²

The modern version of the word terrorism can be traced to period of the French Revolution's Reign of Terror which lasted from 1793 to 1794. During this period of the French Revolution a group of rebels known as the Jacobeans used the term 'reign of terror' to describe their own actions. It would seem that their motive was to instill fear in their political opponents, especially with their proclamation through the National Convention in September 1793 that terror was going to be the 'order of the day'.

The Reign of Terror was in effect a campaign of large-scale State-sponsored violence which claimed the lives of more than 16,000 in a period of just one year. However, its perpetrators may not have seen it that way. Presaging the thinking of modern day terrorists, the Jacobean leader Maximilien Robespierre declared in 1794 that *'terror is nothing other than justice, prompt, severe, [and] inflexible'*. This view was in effect the definition of terrorism according to the Jacobeans. The very first official definition of terrorism in French was provided several years later. In 1798, the Académie Française issued the first official definition of terrorism as the *'système, régime de la terreur'* (i.e., method or system for causing terror). The English version of the word terrorism or terrorist can be attributed to Sir Edmund Burke who, having witnessed personally some of the excesses of the French revolution while he was in France, warned about "thousands of those hell hounds called terrorists."³

2.2 The Problem of Attaining a Generally Accepted Definition for 'Terrorism'

Whereas the Reign of Terror was a product of the French government, modern terrorism denotes the killing of humans by non-government political actors for various reasons - usually as a way of making a political statement. Beyond this generic view it is difficult to

² Burgess, Mark (2003), A Brief History of Terrorism. Washington, D.C.: Center for Defense Information (CDI); Tuman, Joseph S. (2009), Communicating Terror: The Rhetorical Dimensions of Terrorism (2nd ed.). Thousand Oaks, CA, Sage.

³ Burke, Edmund (1790), Reflections on the Revolution in France (Ed. C. C. O'Brien, 1969, London: Penguin Books); Shane, Scott (2010, April 3). Words as Weapons: Dropping the "Terrorism" Bomb. The New York Times, p. WK1; Tuman, Joseph S. (2003). Communicating Terror: The Rhetorical Dimensions of Terrorism. Thousand Oaks, CA, Sage.

pinpoint a precise definition of the modern term 'terrorism'. Many governments are reluctant to agree on a precise definition of the term. This is because they are concerned about the potential implications and likely political ramifications of adopting a precise or specific definition. In certain countries, the word 'terrorism' has even become synonymous or associated with political opposition to the State. For instance, the Chinese government press frequently refers to Tibetan Buddhists as 'vicious terrorists', even though the group is largely known to be pacifist. In Zimbabwe, the ruling party and State owned press has a similar view of the opposition party.⁴

The problem of finding a precise legal definition has thus been confounded and made more difficult by the fact that politically the word 'terrorism' has become a pejorative or derogatory term which is frequently employed as a disapproving label aimed at discrediting political enemies. In using the term 'terrorism' for political ends, some governments aim to categorize the actions of the opposition and political dissidents as evil and lacking human compassion. The psychological element of fear has itself raised terrorism to a status which is considered worse than war, torture or murder,⁵ hence the frequent use of the term to gain political dividends.

One of the unfortunate by-products of the misuse of the word 'terrorism' for political ends is that it has led to a proliferation of definitions for the term. Studies have found at least 212 definitions of the word 'terrorism' which are in use around the world, with 90 of these recurrently used by governments and other institutions.⁶ It is against this background that Schmid and Jongman decided to adopt a social scientific to finding a definition for terrorism by collating over a hundred academic and official definitions of the term and examining them in order to identify the main components – in other words, a 'content analysis' of the definitions of terrorism.⁷ They discovered that the concept of 'violence' was present in 83.5% of the definitions; the achievement of 'political goals' featured in 65% of definitions, with the

⁴ International Bar Association (2003), *International Terrorism: Legal Challenges and Responses*. Ardsley, NY: Transnational Publishers; Moeller, Susan D. (2002). *A Hierarchy of Innocence: The Media's Use of Children in the Telling of International News*. *The International Journal of Press/Politics*, 7(1), 36–56.

⁵ White, Jonathan R. (2011), *Terrorism & Homeland Security* (7th ed.). Belmont, CA: Wadsworth.

⁶ Simon, Jeffrey D. (1994), *The Terrorist Trap*. Bloomington: Indiana University Press.

⁷ Schmid, Alex, & Jongman, Albert (1988), *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature*. Amsterdam: North Holland, Transaction Books.

8. Berg, Bruce L. (2009), *Qualitative Research Methods for the Social Sciences* (7th ed.). Boston: Allyn & Bacon.

causing of 'fear and terror' in 51%; arbitrariness and indiscriminate targeting featured in 21% of definitions, and the victimization of civilians, noncombatants, neutrals, or outsiders in 17.5%. Taking this process further, Merari found that in the United States, Britain and Germany there are three common elements that exist in the legal definitions of terrorism of those countries. These are: (1) the use of violence, (2) political objectives, and (3) the aim of propagating fear in a target population.⁸

2.3. Definitions by various Institutions

From an institutional perspective, the U.S. Department of Defense defines terrorism as “the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”⁹ The U.S. Department of State, on the other hand, refers to terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents.”¹⁰ The Arab Convention for the Suppression of Terrorism defines terrorism is “any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resource.”¹¹ The UK approach, which is contained in the Terrorism Act of 2000, is quite detail and includes references to threats or actions which can lead to serious risk of harm to public safety or damage to property, with the motivation behind such threats or actions consisting of an attempt to influence the policies of governments or those of international organisations.¹²

What these various definitions illustrate is that there are problems in attaining an all-inclusive definition for terrorism, even within the same jurisdiction such as the United States where

⁸ Merari, Ariel (1993), *Terrorism as a Strategy of Insurgency*. *Terrorism and Political Violence*, 5(4), 213–251.

⁹ Joint Chiefs of Staff DOD (2008), *Department of Defense Dictionary of Military and Associated Terms*. Washington, D.C.: DOD.

¹⁰ U.S. Department of State (1996), *Patterns of Global Terrorism: 1995*. Washington, D.C.: U.S. Department of State.

¹¹ Arab Convention for the Suppression of Terrorism (1998), *Arab Convention on Terrorism*. Cairo: Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice.

¹² Terrorism Act 2000, Section 1.

government departments such as the Department of Defense and the US State Department have each formulated their own definitions. Attempts to define terrorism can therefore become a complicated and politically inclined exercise. Terrorism is a concept that defies objective definition. This in turn means that it can be difficult to objectively and specifically identify who is a terrorist especially where it cannot be proven that the suspect has committed an act of terror. And while some definitions seem to satisfy the requirements of clarity and precision, others are lacking important criteria such as global connections, ideological roots, etc.

The discussion above illustrates that when viewed from a global perspective of the current ‘war against terror’, there is no universally accepted definition of terrorism. What we have at best is a ‘most generally accepted’ definition. From a generally accepted point of view, terrorism can be said to be the use of violence to create fear and anxiety (i.e., terror, psychic fear) for political, religious, or ideological reasons. The intended or preferred targets of terrorists are most often non-combatant civilian populations and iconic symbols of the State – i.e. ‘soft targets’ in line with their preferred strategy of asymmetrical warfare. The objective is usually to achieve the greatest attainable publicity for a group or its cause, and to create long term fear among the population in the process.

3 The Potential Impact of International Humanitarian Law on the Fight Against Terrorism: ‘Signature Strikes’

From a strategic and military point of view, the ‘war against terror’ has been conducted, and is still being conducted, both openly and covertly. When used on the international stage as a tool to fight terrorism, covert operations raised a number of questions relating to the international humanitarian laws governing armed conflict. Such operations also have implications for international criminal law if covert actions are considered to amount to war crimes. Foremost amongst the covert operations which have raised the most concern among jurists are strikes carried out by drones against militant targets. From a legal point of view such strikes can be classified into two categories: (a) direct or ‘personality’ strikes where the identity of the target or victim is known to the assailant; and (b) ‘signature strikes’ in which the identity of the target is not known but the suspect is deemed to exhibit the ‘signature behaviour’ of a combatant or terrorist – in other words, the target displays suspicious patterns of behaviour which are deemed to correspond to the behaviour of a terrorist.

Signature strike targets are usually males between 20-40 years of age (i.e. males of combat age). The problem with ‘signature policies’ is that there have been a number of high profile cases in Afghanistan and Pakistan in which the victims of US signature strikes have turned out not to be combatants or terrorists but civilians. In a well-publicised incident which took place on 17 March, 2011, a meeting of tribal leaders or ‘*jirga*’ was targeted in the town of Datta Khel in the Waziristan province of Pakistan with the loss of 42 lives. The question then is whether such incidents which involve the killing of civilians who have been mistaken for terrorists amount to a breach of international humanitarian law, and therefore a possible war crime. It has to be said that the design, planning and execution of signature policies in the war against terror is of itself an exercise fraught with great difficulty from a strategic, military and technical point of view. There are also political considerations and legal obstacles which need to be addressed before signature policies can be implemented. The international legal implications of the use of signature strikes in the ‘war against terror’ will be examined in detail in the sections below.

3.1. The International Humanitarian Law Principle of ‘Distinction’

The overwhelming view, especially amongst human rights lawyers, is that signature strikes are tantamount to illegal targeting, and that civilian deaths are the inevitable consequence of

such signature policies. This conclusion is based on the occasionally erroneous assumptions that can be made in the course of executing signature policies. There is also the problem relating to the technical limitations of drone operations, especially in relation to correctly identifying legitimate military targets or objectives.¹³ A combination of these two facts and their contribution towards erroneous targeting of civilians thus raises the question as to whether signature strikes are potentially a breach of one of the most fundamental principles of international humanitarian law, the ‘principle of distinction’ which has at its main objective the protection of civilians in times of armed conflict. In an advisory opinion the International Court of Justice¹⁴ has expressed the view that the principle of distinction is fundamental to international humanitarian law and is considered to be a cardinal rule.

The principle of distinction requires belligerents to distinguish between military targets and civilian objects. Article 3 (which is common to the Geneva Conventions¹⁵) is considered to be a miniature convention in itself. This article provides basic protections for civilians and individuals who are *hors de combat*¹⁶ and applies similarly to international and non-international armed conflicts. The principle of distinction thus requires that civilians and civilian targets must not be the object of an attack. It is therefore a principle of importance and relevance when considering the legality or otherwise of signature strikes with the use of drones within the context of international humanitarian law.

3.2. The Protection of Civilians under the Principle of Distinction

During armed conflict individuals who may be directly attacked or targeted are either members of an organised armed group or civilians who for such a time take a direct part in hostilities (DPH).¹⁷ The International Committee of the Red Cross (ICRC) takes the position that members of an organised armed group are considered as maintaining a continuous combatant function (CCF). Such is the case where an individual has a longstanding assimilation into or association with an organised armed group in that they have been

¹³ International Secretariat, “*Will I Be Next?*” *US Drone Strikes In Pakistan*’ (Amnesty International Publications, 2013) <<http://www.amnesty.org/en/library/asset/ASA33/013/2013/en/041c08cb-fb54-47b3-b3fe-a72c9169e487/asa330132013en.pdf>>

¹⁴ ‘*Legality of the Threat or Use of Nuclear Weapons*’ (Advisory Opinion), ICJ Reports 1996 <<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=09&case=95>>

¹⁵ Article 3 Common to the Geneva Conventions of 12 August 1949

¹⁶ Meaning ‘Outside the fight’

¹⁷ International Committee of the Red Cross (‘ICRC’) ‘*Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*’ (2008) 90 International Review of the Red Cross 872, 991 at 1002.

recruited, trained and equipped for purposes of direct engagement in hostilities in a continuous manner on behalf of the armed group as opposed to spontaneous, sporadic and unorganised participation. Members of an armed group may be the object of an attack anytime and anywhere.¹⁸ They are generally regarded as legitimate military targets unless they surrender, become *hors de combat*, retire or re-integrate back into civilian life.¹⁹ It is thus important to distinguish individuals taking a direct part in hostilities (who are considered to have civilian status when they cease to take such a part) from members of an organised armed group with a continuing combatant function (who at all times can be subject to an attack).

US military policy has historically and in practice held that all the participants of terrorist organisations such as Al-Qaeda and its associated forces are factually exercising a continuing combatant function and that by virtue of this membership status they are targetable anywhere and at any time.²⁰ However, depending on the organisation and its nature, membership criteria requirements can be differentiated into various categories. In traditional state armed forces, membership is based on the employment of a uniformed individual within the organisation. As such members are easily identifiable. However in non-state, non-uniformed combatant groups, a more appropriate criterion for identifying membership would be a functional one in that an individual takes and/or gives orders in a central and hierarchical chain of command.²¹ If the group is purely a military organisation similar to a traditional state army in that their main role is militant in nature, it shall be a lawful military objective. An example of this type of group would be Islamic State. Even so direct targeting of such a group will be limited to exclusively military objects and installations that are not civilian objects.

¹⁸ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2008) 90 International Law Review of the Red Cross 872, 991 at 1006 – 1007: See; Geoffrey S Corn and others *The Law of Armed Conflict: An Operational Approach* (Wolters Kluwer Law and Business, 2012), Chapters 5-6.

¹⁹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2008) 90 International Law Review of the Red Cross 872, 991

²⁰ Jens David Ohlin *Is Jus in Bello in Crisis* JICJ 11(1) (2013) 27-45.

²¹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2008) 90 International Law Review of the Red Cross 872, 991.

Article 51(3) of API provides that civilians are not targetable unless at a time when they are taking a direct part in hostilities.²² The ICRC guide provides that a civilian can be considered to be taking a direct part in hostilities if the act he is performing is likely to significantly affect the military operations or capacity of a party to the armed conflict, or if his actions inflict harm on persons or objects protected from direct attack. This does not require the materialisation of harm, but an objective likelihood of it, so the threshold must be determined on the harm likely to occur or reasonably expected to occur from an act in such a situation. When an act is reasonably expected to adversely affect military operations or the military capacity of a party to the conflict it would have satisfied the threshold requirement and the person engaging in the said act can thus become a legitimate target of a signature policy.²³

In order to be taking a direct part in hostilities the action must have a direct causal link between a specific act and the harm expected from the act. The act must form an essential part of such an organised military operation. It should be noted that one can take a 'direct' part in hostilities or an 'indirect' part. Participation on an indirect basis involves taking part in war sustaining activities as opposed to directly contributing to the general war effort. With direct participation an individual actually conducts hostilities which bring about the materialisation of the threshold of harm required, whereas indirect participation only contributes to a mere maintenance or build-up of the capacity required.²⁴ For direct participation there should be a sufficiently close causal link between the act and resulting harm. It should be in one causal step as opposed to a gradual build-up of actions.

In order to be taking a direct part in hostilities there must be a belligerent nexus or connection. This requirement is met when an act is specifically designed to cause the required direct harm in support of one belligerent to the detriment of another. To establish the belligerent nexus is a difficult task but one should deduce from objectively verifiable factors or evidence whether the conduct of a civilian under any given circumstances, time and place can reasonably be seen to be an act in support of one party to the detriment of another by directly causing harm to the latter, and thus meeting the

²² 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 ('API')

²³ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2008) 90 *International Law Review of the Red Cross* 872, 991 at 1016 – 1019.

²⁴ Note: Empirically both the general war effort and war sustaining activities may ultimately result in the harm required to attain the threshold required.

required threshold.²⁵ When applied together, the three requirements based on the threshold of harm, direct causation and belligerent nexus enable an effective distinction to be made between purely civilians and civilian objects, as opposed to civilians and civilian objects which are taking a direct part in hostilities (i.e. civilian DPH). Where the former is protected under the international humanitarian law principle of distinction, the latter is not and can thus become the target of a signature policy when embarking on a DPH function.

As seen above the principle of distinction is a cardinal rule of international humanitarian law which provides protection for civilians from attack. Article 57(2) of API provides that if a belligerent plans or decides to attack a target, there is a duty to ensure that the object of the attack is not a civilian or a civilian object.²⁶ If there is any doubt whatsoever as to whether an individual is a civilian, Article 50(1) of API lays down a presumption to the effect that the individual should be considered to be a civilian and therefore not subject to an attack.²⁷ Similarly this presumption applies to objects such as places of worship, houses or other dwellings and facilities which are habitually used in a civilian capacity.²⁸

One of the legal problems in this area concerns the difficulty of defining who a civilian or civilian object is in the context of armed conflict. So far the focus has been on defining what a military objective is for the purposes of providing clarity as to what may be legally targeted.²⁹ Article 52(2) of API provides that attacks are strictly limited to military objectives. Military objectives are limited to objects that by their "... nature, location, purpose or use... [make an effective contribution to the military action] ...and whose total or partial destruction, capture or neutralization... [would offer] ...a definite military advantage."³⁰

Viewed from the perspective of the principle of distinction, the problem with 'signature strikes' policies stems from the fact that the US, for instance, views all of Al-Qaeda

²⁵ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2008) 90 International Law Review of the Red Cross 872, 991 at 1025 - 1030

²⁶ API, article 57(2)

²⁷ API, article 50(1)

²⁸ API, article 52(3)

²⁹ Geoffrey S Corn *Targeting Command Judgement, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness* (2012) 77 Brook L Rev 2, 437.

³⁰ API, article 52(2): Note; See API, article 43 - members of an armed force are military objects for the purposes of IHL.

operatives and its associated forces as purely military objectives regardless of the requirement to distinguish individuals who hold a continuing combatant function membership status and civilians or civilian objects that come under the category of taking a direct part in hostilities.³¹ Al-Qaeda at its core is widely regarded to be an exclusively military or combatant organisation. However, some Al-Qaeda affiliated groups such as the Somali group Al-Shabaab are not. Al-Shabaab engages in Islamic insurgencies mainly in Somalia. Al-Shabaab also engages in civil matters, governance and has a mix of civilian and military functionalities.³² There are many Al-Shabaab operatives who hold exclusively administrative or judicial offices and functions – civilian membership of the group.

In line with the principle of distinction, Article 50(3) of API provides that the presence of a military objective does not deprive the civilian population within the area of its civilian status and protection from direct attack.³³ However, Article 51(7) of API does not confer immunity on an area in order to protect it from being targeted due to the presence of a civilian population in the area.³⁴ Read together there seems to be an inherent contradiction in these two provisions. However, it ought to be noted that there are some in-built precautionary measures in Article 57(2) of API which stipulate that an attack should be cancelled or suspended where such an attack would be excessive to the direct military advantage expected because it would cause incidental loss of life, injury to life, or damage to objects that hold civilian status³⁵ - i.e. if the potential for collateral damage is seen to outweigh the military gains from an attack, then such an attack ought to be aborted.

The principle of distinction thus clearly establishes the threshold for what kinds of attacks are acceptable when dealing with different categories of persons or with a mix of civilian and military organisations. The principle of distinction, through its objective which is to protect civilians in times of conflict, requires civilian status presumptions and verifications of targets when in doubt. This implies that assailants must gather sufficient and reliable evidence

³¹ Jens David Ohlin, 'Is Jus in Bello in Crisis' JICJ 11(1) (2013) 27- 45

³² John Rollins, 'Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy' Congressional Research Service R41070, East Africa Chapter at 18-22

³³ API, article 50(3).

³⁴ API, article 51(7): See; ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 International Law Review of the Red Cross 872, 991 at 1024 – 1025, Presence of civilians do not confer immunity on a location especially when they are voluntarily acting as human shields.

³⁵ API, article 57(2).

regarding the groups being targeted and must exercise the utmost duty of care towards the civilian population.

4. The Degree of Evidence Required

A commander³⁶ is not expected to have personal knowledge of a military objective that is about to be the object of an attack, and must rely on information provided to him or her from another source. In case the commanding officer is in doubt as to the precise nature of an object, he or she should request additional information in order to determine whether the object is of military interest.³⁷ However, the selection of an object of attack remains the decision of the commanding officer, based on his knowledge and the information available to him. The value to be placed on the information provided to him is to be left to the expertise and discretion of the commanding officer as long as he exercises this discretion reasonably on the basis of the available evidence.³⁸

When deciding whether a decision was reasonable, a minimum amount or quantum of information is required on the basis of which such a decision can be made. However, there is no defined standard for determining the amount of evidence or information which would suffice as the basis for making a reasonable decision by a commander. This raises the question as to what amount of ‘minimum’ information or evidence is required in order to render a decision reasonable for the purposes of establishing a target as a military objective.³⁹

Under international criminal law if an attack is perpetrated on civilians or civilian objects knowingly and intentionally, then clearly it is illegal under Article 8 of the Rome Statute of the International Criminal Court 1998 (‘ICCSt’).⁴⁰ Any commander who wilfully chooses, or closes his eyes to information about directly targeting civilians or civilian objects, has in effect violated principle of distinction. The prosecution must prove beyond a reasonable

³⁶ Note: use of ‘commanding officer’ or ‘operational commander’ or ‘commander’ should be interpreted as any individual within an organised armed force’s operational chain of command with the capability to give orders and make decisions pertaining to the battlefield on their own objective prerogative.

³⁷ Subject to verification and doubt precautions- API, article 57(2) and API, article 50(1)

³⁸ Geoffrey S Corn ‘*Targeting Command Judgement, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*’ (2012) 77 Brook L Rev 2, 437 at 450-453.

³⁹ Geoffrey S Corn ‘*Targeting Command Judgement, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*’ (2012) 77 Brook L Rev 2, 437 at 453-459.

⁴⁰ The Rome Statute of the International Criminal Court 1998 (‘ICCSt’), Article 8.

doubt⁴¹ that there is no rational justification for viewing the target as a lawful military objective. Proof of intent will require establishing that the decision to attack the target was unreasonable and amounted to improper conduct on the part of the commanding officer.⁴²

5. Signature Strike Policies

Under the ‘signature policy’ concept an individual may be lawfully targeted based on their behaviour.⁴³ This is because international humanitarian law has recently taken a shift from status-based targeting to conduct-based targeting.⁴⁴ Signature policies can thus be said to be broadly in line with international humanitarian law. However, the failure of international humanitarian law to address issues regarding the amount or quantum of information for required for distinguishing targets means that even when individuals are targeted, the determination of whether the decision was reasonable does not rest on a precise amount of evidence. This dilutes the process of pinpointing when there is sufficient evidence to relinquish any civilian protection for the purpose of certifying that the target is exclusively or at such a time engaged in direct military activity and therefore is legally subject to attack.

As seen above, the view of the US government is that Al-Qaeda and its associated forces are exclusively military organisations by nature. The assumption, therefore, is that these organisations only consist of members who are performing a continuing combat function. Such a broad assumption creates the potential for some of the signature policies for drone strikes carried out by the US to be considered illegal under international humanitarian law.⁴⁵ It is important to recall that any individual who holds the status of continuing combat function (CCF) can be the object of attack anywhere at any time subject to the precautionary measures applied to protected individuals. On the other hand, individuals holding a DPH status can only be the subject of an attack when they are in the process of taking a direct part

⁴¹ Practice has shown there to be a reduced culpability: See; *Prosecutor v. Blaskić*, 2004 (ICTY-95-14-A), dissenting opinion Judge Nieto-Navia.

⁴² Geoffrey S Corn ‘*Targeting Command Judgement, and a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*’ (2012) 77 Brook L Rev 2, 437 at 450-459.

⁴³ ICRC, ‘*Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*’ (2008) 90 International Law Review of the Red Cross 872, 991

⁴⁴ Jens David Ohlin, ‘*Is Jus in Bello in Crisis*’ JICJ 11(1) (2013) 27- 45; this was implemented in order to tip back the balance from non-state actors who may have only been identified based on conduct as opposed to traditional state armies who were easily identifiable based on their status in the Law of Armed Conflict.

⁴⁵ Dieter Fleck, ‘*The Handbook of International Humanitarian Law*’ (2nd edn, Oxford University Press, 2013), p.182.

in hostilities (i.e. signature behaviour). In other words, the DPH status combines within it the character of both a combatant and a civilian depending on what the individual is doing at any given point in time. Under their civilian status they are protected from attack in view of the principle of distinction.

Signature policies are based on certain behaviours, traits, and characteristics that are associated with terrorist activity or conduct. When assessing the legality of such policies there are two questions to satisfy: first, was the particular signature policy sufficient from a legal perspective to establish an acceptable object or target? Secondly, was the evidence sufficient to verify that the individual or object targeted was engaging in the signature behaviour? It must therefore be shown that the signature policy is legal under international humanitarian law subject to the aforementioned distinction requirements. Once satisfied that the policy is legal the next step must be to examine the factual question. The factual question requires that verification must be attained and the commanding officer must ensure that the action taken is against a military objective. These two questions are also subject to precautionary measures, presumptions and protections afforded to civilians and civilian objects. Failure to prove the legality of the first question or the evidentiary burden of the second would make any attack illegal.

The scholar Kevin J. Heller has carried out a comprehensive review of 14 different US signature policies that government officials have indicated are in accordance with international humanitarian law and the principle of distinction.⁴⁶ Some of these policies will now be assessed in light of the principle of distinction.

⁴⁶ Kevin Jon Heller, '*One Hell of a Killing Machine*' *Signature Strikes and International Law*' JICJ 11(1) (2013) 89-119.

6. Legal Signature Policies: Case Studies

6.1 Individuals who are in the process of planning attacks:

Such individuals or groups of individuals have been targeted under US signature policies.⁴⁷ The US routinely targets men whose identities are unknown while they plot attacks against US interests or the interests of its allies. Under international humanitarian law such a policy is legal because such targets satisfy the elements for taking a 'direct part in hostilities'. The purpose of a signature strike or attack in this case is to adversely affect the military operations of the terrorists, thus satisfying the threshold of harm required. There is a direct causal link between planning a strike which is aimed at stopping a terrorist attack and the adverse effect it would have, in that strike is specifically designed to have an adverse effect to the detriment of one belligerent against another (i.e. by disrupting terrorist activity). Such pre-emptive strikes are used by the US in order to prevent imminent attacks from terrorist groups.⁴⁸ As such they can be considered to be a legal signature policy.

6.2 Persons transporting weaponry:

The US has also targeted individuals transporting weapons.⁴⁹ When surveillance reveals the transportation of weaponry, the vehicle may be directly targeted. However, if a civilian is transporting the weapons they would not be considered to be directly taking part in hostilities. This is because the act of transporting weapons from one point to another (except transporting them to the frontline) will not have satisfied the direct causal link requirement because there are too many steps from the transportation to the use of the weapons.⁵⁰ However, the transportation of weapons is considered to be a military objective under Article 52(2) of the API. These weapons and vehicles by their nature, location, purpose or use make

⁴⁷ Adam Entous, Siobhan Goram and Julian E Barnes, 'US Relaxes Drone Rules: Obama Gives CIA, Military Greater Leeway in Use Against Militant in Yemen' (*The Wall Street Journal*, 26 April 2012) <http://online.wsj.com/news/articles/SB10001424052702304723304577366251852418174?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304723304577366251852418174.html>

⁴⁸ 'The National Security Strategy of the United States of America 2002' 41 International Legal Matters 1478 (2002)

⁴⁹ Adam Entous, Siobhan Goram and Julian E Barnes, 'US Relaxes Drone Rules: Obama Gives CIA, Military Greater Leeway in Use Against Militant in Yemen' (*The Wall Street Journal*, 26 April 2012) <http://online.wsj.com/news/articles/SB10001424052702304723304577366251852418174?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702304723304577366251852418174.html>

⁵⁰ ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 International Law Review of the Red Cross 872, 991 at 1023-1024.

an effective contribution to the military action and its total or partial destruction, capture or neutralisation would create a definite military advantage to the attacker.⁵¹ The weapons make an effective contribution to military action by their nature, and the trucks transporting the weapons through their use make a contribution to the military action. Hence such an attack would be considered under international humanitarian law to be a legal signature policy.

6.3 Individuals handling explosives:

Such persons have been targeted by the signature policies of the US. People who make or assemble bombs⁵² and individuals loading or unloading explosives from vehicles are targeted.⁵³ Similar to weapons which are being transported, individuals handling explosives would only be taking a direct part in hostilities if their actions are not too remote or if the bombs are about to be used in carrying out an attack, thereby establishing a direct causal link between their activities and harm. By virtue of their very nature, explosives (like weapons) make an effective contribution to military action and their destruction is therefore permissible. Targeting this group of persons is thus considered to be a legal signature policy.

6.4 Terrorist compounds and military facilities:

Compounds and facilities belonging to terrorist organisations such as Al-Qaeda have also been the target of US signature policies. In order for such an attack to be considered legal the compound must be known to be an Al-Qaeda compound or a facility used for the purposes of conducting terrorist activities;⁵⁴ this should be supported by evidence which identifies the object as a compound or facility belonging to Al-Qaeda or other terrorist organisation. In principle facilities or objects that are by their nature used exclusively for military purposes may be attacked at any time. However, if they are civilian objects occasionally used for military purposes they can only be attacked at such a time when they are in use for a direct military purpose. This is because at a time when they are not being used for a military

⁵¹ API, article 52(2)

⁵² David S Cloud, 'CIA Drones Have Broader List of Targets: The agency since 1008 has been secretly allowed to kill unarmed suspects in Pakistan' (*Los Angeles Times*, 05 May 2010) <<http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506/2>> accessed 24 May 2014

⁵³ Greg Miller, 'CIA Seeks New Authority to Expand Yemen Drone Campaign' (*The Washington Post*, 18 April 2012) <http://www.washingtonpost.com/world/national-security/cia-seeks-new-authority-to-expand-yemen-drone-campaign/2012/04/18/gIQAsaumRT_story.html?tid=pm_world_pop>

⁵⁴ David S Cloud, 'CIA Drones Have Broader List of Targets: The agency since 1008 has been secretly allowed to kill unarmed suspects in Pakistan' (*Los Angeles Times*, 05 May 2010) <<http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506/2>>

purpose they do not make an effective contribution to military action. If such a facility is attacked when it is being used for military or combat purposes, the attack would thus be considered to be a legal signature policy.

6.5 Terrorist training camps:

Training camps belonging to terrorist organisations have been targeted by the US.⁵⁵ Similarly to compounds, evidence must clearly show that the camps or facilities in question are terrorist` training camps. Training camps make an effective contribution to military action by providing recruits with the combat skills they need to fight effectively. The destruction of such facilities would provide a military advantage to the attacker and for this reason such an attack is considered to be legal.

7 Illegal Signature Policies

Having examined examples of what would amount to legal signature policies under the rules of international humanitarian law which govern armed conflict, it is now proposed to progress the discussion on to illegal signature policies, their nature and some pertinent examples.

7.1 Military Aged Male (‘MAM’)

Men of military age (20-40 years old) in an area known for terrorist activity have in the past been the target of drones armed with hellfire missiles. Under US signature policies, all men of military or combat age who are inside a strike zone area are presumed to be combatants and are therefore targeted unless intelligence proves otherwise. The rationale or reason for this signature policy is based on the simple logic that men of military age in an area under the control of militants are ‘...probably up to no good.’⁵⁶

However, the basis for this logic is very questionable in that it seems to be far too presumptuous. It is for this reason that many commentators have been highly critical of such

⁵⁵ ‘*Munter Found Drone Strikes Unacceptable*’ (Dawn, 30 May 2012)

<<http://www.dawn.com/news/722439/munter-found-drone-strikes-unacceptable>>

⁵⁶ Jo Becker and Scott Shane, ‘*A Measure of Change: Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*’ (The New York Times, 29 May 2012)

<<http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>>

a signature policy.⁵⁷ The status of an individual cannot, and should not, be inferred simply due to their geographical location at any particular point in time. Other criteria used for the ‘MAM’ signature policy such as the gender, age or any other abstract affiliations of the targeted individual appear to be both arbitrary and subjective. There is also the technical problem relating to a drone operator’s ability to accurately determine the age group of a target simply from the video streaming of images relayed to the base station by a drone. It could thus be argued that such a policy is inconsistent with the international humanitarian law principle of distinction which requires that status-based targeting of an individual should be based on clear evidence which identifies the target as having membership of an organised armed group. Furthermore, for such a signature policy to be considered legal, the targeted individual must come under the category of someone who is in a continuing combatant function. It is therefore for this reason that a status-based signature policy which relies exclusively on criteria such as geographical location, gender and age of the targeted individual (without further evidence to show that the individual in question is taking a direct part in hostilities or is in a continuing combatant function) is widely considered to be unlawful under the rules of international humanitarian law which apply to armed conflicts.

7.2 Consorts

Individuals who regularly associate themselves or ‘consort’ with known militants have been the target of US signature policies in the ‘war against terror’.⁵⁸ Similar to ‘MAM’, targeting people who are consorting with known militants or terrorists can be considered to be illegal. It is clearly the case that associating or consorting does not qualify as taking a direct part in combat activities or hostilities. It could be argued that association or consorting with known terrorists is unlikely to adversely affect efforts or military operations aimed at combating terrorism. From a legal point of view there is no causal link between consorting and an adverse effect on said military operations. Furthermore, consorting is not specifically intended or designed to have any adverse impact on one belligerent against another.

⁵⁷ See: ‘*Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*’ Stanford International Human Rights and Conflict Resolution Clinic and Global Justice Clinic at NYU School of Law (2012) <http://www.livingunderdrones.org/report/#_ftn162>

⁵⁸ Dexter Filkins, ‘*Letter from Islamabad; The Journalist and The Spies, The murder of a reporter who exposed Pakistan’s secrets*’ (*The New Yorker*, 19 September 2011) <http://www.newyorker.com/reporting/2011/09/19/110919fa_fact_filkins> accessed 26 May 2014

Consorting does not contribute in any way to the terrorist effort. As such only war or terrorism sustaining activities such as supporting the movement or hiding of weapons, or civil disobedience which may amount to indirect participation can justify a strike under signature policies. Association with known terrorist or consorting, even if it amounts to sympathising with the terrorists' cause, does not make an individual targetable although they could be the subject of a prosecution under relevant national laws.⁵⁹ The UN has confirmed that as long as individuals do not participate directly in combat they maintain their civilian status and protections.⁶⁰ In the case of *Fofana v. Kondewa* the Special Court for Sierra Leone ruled that collaborating with armed groups does not make an individual targetable. Likewise, indirectly supporting or failing to resist an invading force does not make someone a participant in hostilities.⁶¹ It is on these grounds that a signature policy which targets associates and consorts of terrorist would be considered to be illegal and a breach of the principles of international humanitarian law.

7.3 Armed convoys of men

Armed men travelling in a convoy of vehicles in an Al-Qaeda controlled area are considered to be targetable under US signature policies.⁶² This signature policy is similar to that of MAM (above); unless there is additional information to prove the individual's participation status they are not targetable. Being armed in an Al-Qaeda controlled area or as part of a convoy does not qualify as a continuing combatant function or as taking a direct part in hostilities. This means that unless there is additional information or evidence of individual or group participation in a combat function, armed convoy is not targetable from a legal point of view. This is because the simple fact of a convoy consisting of armed men does not satisfy the criteria or threshold of harm, direct causality, or belligerent nexus requirements. Individuals or groups of armed men in conflict areas could be armed for self-protection or self-defence. In the case of *Simic* it was held that possession of weapons in itself does not establish reasonable doubt as to civilian status of the possessor.⁶³ It can therefore be deduced from the judgement in this case that civilian status presumption would apply to men in an

⁵⁹ Kevin Jon Heller, 'One Hell of a Killing Machine' *Signature Strikes and International Law* JICJ 11(1) (2013) 89-119.

⁶⁰ UNCHR, 'Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Thirty-Eighth Session' (4 November 1985) UN Doc E/CN.4/Sub.2/1985/57

⁶¹ *The Prosecutor v. Moinina Fofana, Allieu Kondewa* 2007 (SCSL-04-14-T)

⁶² Bill Roggio, 'US Predators Strike Again in Southern Yemen' (The Long War Journal, 16 April 2012) <http://www.longwarjournal.org/archives/2012/04/us_predators_strike_35.php#>

⁶³ *The Prosecutor v Blagoje Simic, Miroslav Tadic, Simo Zaric* 2003 (IT-95-9-T)

armed convoy. The targeting of such a convoy under a signature strike policy would thus be illegal and therefore a breach of international humanitarian law.

7.4 Suspicious camps or facilities in areas under the control of terrorists:

These are also viewed as legitimate signature targets under US policy on the war against terror.⁶⁴ However, it could be argued that a policy based on suspicion alone without any further substantial or corroborating evidence is not in line with the international humanitarian law principle of distinction. Furthermore, international humanitarian law requires that when an object which is usually used for a civilian purpose comes under suspicion and the opposing belligerent is in doubt of its participation in military activities then there is a presumption that it has civilian status.⁶⁵ The mere ‘suspicion’ of the use of an object does not provide sufficient evidence to make it a military object which may be subject to a legitimate attack. In cases of a mere suspicion the commanding officer should request additional information or evidence. Attacking such an object without additional reconnaissance would be against the API’s requirement of verification and the taking of precautionary measures.

Such an attack would therefore be considered *prima facie* to be an illegal signature policy and a breach of the protection principle of international humanitarian law.

8 Signature Policies which are Potentially Illegal

Armed men travelling towards an active conflict zone or war theatre may be the subject of an attack under the signature policies operated by the US in the war against terror.⁶⁶ This is a variant of the signature policies which targets military aged men or armed men travelling in a convoy in a conflict zone. A person or persons travelling towards an active combat zone or towards the presumed target of a terrorist attack can only be considered as taking a direct part in hostilities if such travel is integral to a specific military act or terrorist operation. In other words, an attack on such a person or persons under a signature policy will only be legal if it can be proven that they are travelling towards a particular destination for the purpose of engaging in a specific hostile act. On the other hand, if the person or persons in question are

⁶⁴ ‘Munter Found Drone Strikes Unacceptable’ (Dawn, 30 May 2012) <<http://www.dawn.com/news/722439/munter-found-drone-strikes-unacceptable>>

⁶⁵ API, article 52(3)

⁶⁶ Bill Roggio, ‘US Predators Strike Again in Southern Yemen’ (The Long War Journal, 16 April 2012) <http://www.longwarjournal.org/archives/2012/04/us_predators_strike_35.php#> accessed 27 May 2014

suspected of having an intention to participate in combating operations or in a terrorist act only at some time in the future, a signature strike on them would be potentially illegal. In light of the civilian status presumption, when in doubt, it would require extra information, evidence or intelligence on the basis of which a signature strike may be justified.

Individuals operating a terrorist training camp may be a target under a signature policy.⁶⁷

In principle, trainers can be attacked anywhere at any time if they can be proven to be exercising a continuing combat function in as much as they are members of the terrorist group. However, the training of terrorists does not automatically confer on the trainer the status of a continuing combat function. There must be further evidence or proof that the trainer is involved in additional activities which constitute direct participation in hostilities, coupled with extra evidence to prove their membership of the terrorist organisation. Training individuals for a specific hostile act amounts to taking a direct part in hostilities as there is a direct causal link with the harm intended and such training is specifically designed in support of one belligerent against another. The precise nature of the combatant status of ‘taking a direct part in hostilities’ means that a person may be targeted only at such a time when they are engaging in hostilities. This means that when acting as a trainer a person may only be directly targeted when deploying to training, when returning from training or while at training because at this time they would be directly engaging in hostilities.⁶⁸ This signature policy would thus be legal if the signature strike is launched within the timeframe constraints imposed by the DPH concept (i.e. if the trainer can be proven to be actively taking part in hostilities through his training functions). Any signature strike conducted on a trainer outside the timeframe constraint would render such a signature policy potentially illegal and a breach of the international humanitarian law principle of distinction.

Persons undergoing training for the purpose of joining a terrorist group are sometimes targeted under US signature policies.⁶⁹ When an individual is recruited, continuously trained and equipped by a terrorist group to participate directly in hostilities on behalf of the group,

⁶⁷ Dexter Filkins, ‘Letter from Islamabad; The Journalist and The Spies, The murder of a reporter who exposed Pakistan’s secrets’ (The New Yorker, 19 September 2011)

<http://www.newyorker.com/reporting/2011/09/19/110919fa_fact_filkins>

⁶⁸ ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’ (2008) 90 International Law Review of the Red Cross 872, 991

⁶⁹ David S Cloud, ‘CIA Drones Have Broader List of Targets: The agency since 1008 has been secretly allowed to kill unarmed suspects in Pakistan’ (Los Angeles Times, 05 May 2010)

<<http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506/2>>

these individuals can be considered to have the status of a continuing combatant function together with their membership of a terrorist organisation. However, such individuals ought to be distinguished from reservist who after basic training leave active duty and reintegrate themselves into civilian life. Reservists are considered civilians until such a time that they re-enter active duty.⁷⁰ For a signature attack on a trainee outside the training camp to be legal, it must be shown that the individual was training for a specific military operation and the individual has previously taken direct part in hostilities

US signature policies include the targeting of **individuals who facilitate terrorist activity**.⁷¹ However, persons who raise money for terrorist organisations such as Al-Qaeda are not targeted through signature policies.⁷² US policy in this regard therefore appears to be contradictory and inconsistent in its practice, as it could be argued that raising funds for a terrorist organisation is equivalent to facilitating the activities of such an organisation. In any event, under international humanitarian law if facilitators are targeted, such an attack could be potentially unlawful. Facilitation which may qualify as taking a direct part in hostilities (such as providing ammunition to fighters during hostilities, or acting as a guide) could provide the basis for a lawful signature strike.⁷³ However, it could be argued that other facilitations in the form of sustaining activities do not qualify as taking a direct part in hostilities. This will include persons with a media or publicity role, engaging in international political or diplomatic relations on behalf of a terrorist group, engaging in hostage/ ransom negotiations for the group, supplying fighters with food, providing lodging, or financial support. However it seems that the US considers such actions as amounting to taking direct part in hostilities.⁷⁴ Such a view, if embedded as part of a signature policy, would be considered to be too broad and could potentially render the signature policy illegal under

⁷⁰ ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 *International Law Review of the Red Cross* 872, 991

⁷¹ David S Cloud, 'CIA Drones Have Broader List of Targets: The agency since 1008 has been secretly allowed to kill unarmed suspects in Pakistan' (Los Angeles Times, 05 May 2010) <<http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506/2>>

⁷² Barbara Starr, 'US Official: Greater use of Drones Goes Back to Bush Era' (CNN, 4 May 2010) <<http://afghanistan.blogs.cnn.com/2010/05/04/obama-administrations-greater-use-of-drones-goes-back-to-bush-era/>>

⁷³ ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 *International Law Review of the Red Cross* 872, 991

⁷⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, 'Customary International Humanitarian Law' (2nd edn, Cambridge University Press, 2005) at 113

international humanitarian law.⁷⁵ This is in view of the fact that such facilitators are most likely to satisfy the criterion of civilian status and are therefore subject to protection under the international humanitarian law principle of distinction. The right action to take would be to prosecute them under relevant national anti-terror laws rather than to target them with a signature strike.

Under the signature policies operated by the US government, any **locations which are classified as ‘rest areas’ for combatants** are equally considered to be legitimate targets for signature strikes. However, from an objective point of view, very much would depend on the precise meaning of ‘rest areas’ and nature of the facility involved. If the rest facilities take the form of military barracks, then it could be argued that these are by their very nature used for military purposes as they contribute to military action. Their destruction would therefore provide a decisive military advantage. Hence they can be legally targeted. However, if the facility in question is a civilian dwelling which is occasionally used by militants as a rest or recreational area, it could be argued that it should not be targeted. The targeting of rest areas under a signature policy can therefore be said to be potentially illegal.

9 Conclusion

The global war against terror is one of the most important challenges facing humanity in the modern era. Terrorism has the potential to cause significant damage to human society and to international economic and political relations. Finding a solution to this modern day scourge requires effective military and political strategies as well as effective legal responses. From a legal perspective, two main problems have been identified in this paper as posing potential obstacles to the effectiveness of the global war against terror. The first of these is the problem of definition. The successful prosecution of terror suspects requires as a pre-requisite a universally accepted definition of the words ‘terrorism’ and ‘terrorist’. Without this different countries and different national jurisdictions will continue to operate by different and sometimes conflicting standards.

The second challenge is associated with the military strategy which is currently being deployed in the war against terror. This challenge relates to the international humanitarian

⁷⁵ Barbara Starr, ‘US Official: Greater use of Drones Goes Back to Bush Era’ (CNN, 4 May 2010) <<http://afghanistan.blogs.cnn.com/2010/05/04/obama-administrations-greater-use-of-drones-goes-back-to-bush-era/>>

law and international criminal law implications of military operations conducted under signature strike policies. It has to be acknowledged that drone operators have a very difficult task to perform. Saddled with the heavy burden of protecting society from terror attacks, they have to make very quick and difficult decisions. Quite often they are working under a great deal of pressure trying to take preventative action with a view to disrupting terrorist activity while operating under the inquiring shadow of international humanitarian law. They know fully well that many commentators (armed with the benefit of hindsight which they, the drone operators, do not have), will call into question particular incidents which have resulted from the execution of signature policies. They must therefore strike a delicate balance between taking action to foil what they believe to be terrorist activity and compliance with the rules of armed conflict as laid down under international humanitarian law. It is for this reason that they ought to be given recognition and credit for the difficult job which they do. Finally, there is a pressing need for uniform, consistent and universally accepted rules and standards for the use of signature policies in the global war against terror. The challenge posed by terrorism requires effective response from the international community. In the conception, design and implementation of policies aimed at providing this response, the potential impact of the war against terror on human rights and religious freedoms also needs to be carefully considered.