

November 1, 2011

Volume 15, Issue 28

## Targeting Versus Deprivation of Liberty Under the International Law of Armed Conflict

By Ramin Mahnad



### Introduction

Earlier this year, as the National Defense Authorization Act started making its way through the U.S. Congress, its proposed counterterrorism provisions sparked renewed discussions on the scope of authority conferred by the 2001 Authorization for Use of Military Force (“AUMF”). More recently, the detention of

Ahmed Warsam and the killing of Anwar al-Awlaki have brought the significance of that authority into sharp focus. The debates over the AUMF, Warsame, and al-Awlaki have raised issues about targeting and detention in armed conflict that involve fundamental principles of international humanitarian law (“IHL”).<sup>[1]</sup> This *Insight* seeks to clarify those principles and explain how they interrelate.

As a matter of U.S. domestic law, the AUMF authorizes the use of force against certain individuals and entities.<sup>[2]</sup> In defining who may be the object of military action, the AUMF does not distinguish on its face between who may be detained and who may be the target of lethal force. As a matter of international law, however, the rules governing conduct in warfare take different approaches to targeting versus detention, and separate criteria apply when determining who falls within the scope of each activity. While there may be significant overlap between the two, the spheres of who may be detained and who may be targeted under IHL are by no means coextensive.

A domestic statute authorizing military action without distinguishing between the two categories could certainly conform to international law—as long as persons falling within its scope also fall within IHL’s criteria of who may be targeted—and the purpose here is not to call into question the compatibility of the AUMF with IHL. Rather, this overview seeks to recall IHL principles differentiating between targeting and detention that may have become obscured by the focus of courts and policy-makers on the single set of criteria established by the AUMF.

### RELATED ASIL INSIGHTS

[Pakistan's Sovereignty and the Killing of Osama Bin Laden](#)

[The International Law of Drones](#)

[Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld](#)

[Who can be detained in the "War on Terror"? The Emerging Answer](#)

[Is Bagram the New Guantánamo? Habeas Corpus and Maqaleh v. Gates The Torture Memos and Accountability](#)

[Supreme Court Holds that Noncitizens Detained at Guantanamo Have a Constitutional Right to Habeas Corpus Review by Federal Civilian Courts](#)

[D.C. Circuit Upholds Constitutionality of Military Commissions Act Withdrawal of Federal Habeas Jurisdiction for Guantanamo Detainees](#)

[The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and US Law](#)

[A Conundrum Posed by U.S. Anti-Terrorism Policy](#)

[The Committee Against Torture Urges an End to Guantánamo Detention](#)

[Alleged Secret Detentions of Terrorism Suspects](#)

[Prisoner Transfers Out of Iraq](#)

[The United States before the UN Human Rights Council](#)

[Counterinsurgency, Rule of Law Operations, and International Law](#)

[Acts of Non-State Armed Groups and the Law Governing Armed Conflict](#)

## The Law Governing the Targeting of Persons

In the conduct of hostilities, the warring parties may generally direct attacks against members of the armed forces of a party to the conflict, but they may not direct attacks against civilians.<sup>[3]</sup> This apparently straightforward statement of the principle of distinction between two mutually exclusive categories—civilians versus armed forces—comes with several significant exceptions.<sup>[4]</sup>

First, members of the armed forces exclusively assigned to medical and religious duties may not be directly attacked and are entitled<sup>[5]</sup> to identify themselves using one of the recognized protective emblems: the red cross, red crescent, or red crystal.<sup>[6]</sup> They lose this protection, however, if they commit acts hostile to the enemy outside their humanitarian function.<sup>[7]</sup> Second, civilians can lose their own protection from attack if they directly participate in hostilities. However, unlike members of the armed forces, who, regardless of the immediate threat they pose, may be targeted for the duration of their membership in those forces, civilians who lose their protection because of direct participation in hostilities may only be targeted *while they directly participate*.<sup>[8]</sup> Third, regardless of their status as civilians or members of the armed forces, IHL protects all persons *hors de combat*. Treaty law defines this category as persons in the power of the adverse party, persons expressing a clear intention to surrender, or persons incapacitated by wounds or sickness.<sup>[9]</sup> Fourth, in carrying out attacks against lawful targets, IHL prohibits ordering, threatening, or conducting operations on the basis that there be no survivors.<sup>[10]</sup> Finally, when it comes to the tactics and weapons used against lawful targets, IHL more generally prohibits the infliction of superfluous injury or unnecessary suffering.<sup>[11]</sup>

Related to the question of who may be directly targeted is the issue of incidental harm, or what is commonly referred to as “collateral damage.” In carrying out an attack against a lawful target, especially when high explosive munitions are involved, the possibility exists that persons, other than the intended targets, will be injured or killed. IHL addresses this issue by prohibiting the launching of an attack if it may be expected to cause incidental harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated.<sup>[12]</sup> Even where the collateral damage would not be disproportionate, the 1977 Additional Protocol I to the Geneva Conventions (“AP I”) requires that the attacking party take all feasible precautions to avoid, or in any event minimize, such harm.<sup>[13]</sup>

The principle of distinction naturally begs the question of who exactly is a civilian and who is a member of the armed forces. In the context of international armed conflict (“IAC”), i.e. a conflict between two or more states, AP I defines a party’s armed forces as “all organized armed forces, groups and units under a command responsible to that party for the conduct of its subordinates.”<sup>[14]</sup> It then defines civilians in the negative as all persons who are not members of the armed forces of a party to the conflict.<sup>[15]</sup> In cases of non-international armed conflict (“NIAC”), i.e. conflict between a non-state armed group and a state, or between non-state armed groups, IHL treaties also reflect a distinction between armed forces of the parties and civilians, but they do not clearly define these terms.<sup>[16]</sup>

Insofar as the regular armed forces of states are concerned, identifying members is relatively uncomplicated. Those serving in the military are formally integrated into a system regulated by law, and they visibly distinguish themselves through uniforms and insignia. However, the notion of armed forces under IHL is not limited to the regular armed forces of

[Some Proportionality Issues Raised by Israel's Use of Armed Force in Lebanon](#)

[The ASIL Centennial Annual Meeting Adopts a Resolution on the Use of Armed Force and the Treatment of Detainees](#)

[Israel's Targeted Killings of Hamas Leaders](#)

[Pre-emptive Action to Forestall Terrorism](#)

[U.S.-British Air Strikes on Targets in Iraq](#)

[Cruise Missile Strikes in Afghanistan and Sudan](#)

[Insights Archive>>](#)

### DOCUMENTS OF NOTE

[Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field \(Geneva I\)](#)

[Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea \(Geneva II\)](#)

[Geneva Convention relative to the Treatment of Prisoners of War \(Geneva III\)](#)

[Geneva Convention relative to the Protection of Civilian Persons in Time of War \(Geneva IV\)](#)

[Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts \(Protocol I\)](#)

[Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts \(Protocol II\)](#)

[Authorization for the Use of Military Force](#)

[ASIL EISIL>>](#)

### ORGANIZATIONS OF NOTE

[United Nations](#)

[International Committee of the Red Cross](#)

[U.S. Department of Defense](#)

[U.S. Department of State](#)

Copyright 2011 by The American Society of International Law ASIL

The purpose of ASIL Insights is to provide concise and informed background for developments of interest to the international community. The

states. It also includes other forces belonging to the state, such as paramilitaries, militia, and volunteer corps. Importantly, it includes groups fighting *against* the state (or against other armed groups) in NIACs. When it comes to these forces, formal indicators of membership are not always available, and the factors to consider when determining whether an individual is a member of an organized armed group are the subject of ongoing discussion and debate.[17]

Whatever the criteria for membership, it bears keeping in mind that an individual may be affiliated with either a state or non-state party to an armed conflict without being a member of its armed forces. IHL treaties consistently envisage a difference between a “party to the conflict” on the one hand and that party’s “armed forces” on the other.[18] Applied to governments, this distinction often falls along the line formally separating the uniformed military from the rest of the civilian government.[19] Applied to non-state actors, this distinction might not always be as visible, but conceptually it does exist. Indeed, many of the world’s most sophisticated non-state warring parties have distinct political and military wings.

In sum, setting aside ambiguities regarding specific criteria for membership and direct participation, IHL generally permits direct attacks only against the actual fighting forces of the adversary or civilians who are directly participating in hostilities at the time they are targeted. All others are protected from direct attack.

### **The Law Governing Deprivation of Liberty**

IHL contemplates three categories of persons deprived of liberty for reasons related to an armed conflict: Prisoners of War (“POWs”), internees, and persons detained on penal offenses.

The POW category applies only in situations of IAC and generally consists of members of an adversary state’s armed forces, members of certain irregular armed groups fighting for that state, and certain authorized civilians who accompany the armed forces, such as members of military aircraft crews, war correspondents, and supply contractors.[20] The Third Geneva Convention (“Geneva III”) specifically provides that POWs may be placed in internment camps—subject to a host of detailed protections—and may be held until the end of active hostilities.[21] Conversely, the law provides members of state armed forces captured in IACs with immunity from criminal prosecution for their participation in the conflict to the extent that they complied with the laws of war.

Unlike the POW regime, the internment of civilians is contemplated in both IAC and NIAC. Internment is an exceptional, non-punitive measure of control taken to protect the security of the detaining party. In IAC, the Fourth Geneva Convention (“Geneva IV”) permits civilian internment on a State’s own territory when “the security of the Detaining Power makes it absolutely necessary” and on occupied territory “for imperative reasons of security,” subject to certain procedural safeguards necessary to prevent arbitrary detention.[22] According to the commentary to Geneva IV, subversive activity, direct assistance to the enemy, sabotage, and espionage are some examples of acts that might justify internment of civilians. [23] In NIAC, by contrast, IHL recognizes internment as a possibility, but the grounds and procedural safeguards for internment are not clearly spelled out and have been the subject of extensive discussion and debate.[24] Nonetheless, there seems to be growing international acceptance by experts, certain governments, and others—including the International Committee of the Red Cross—that “imperative reasons of security” is an

American Society of International Law does not take positions on substantive issues, including the ones discussed in this Insight. Educational and news media copying is permitted with due acknowledgement.

The Insights Editorial Board includes: [Cymie Payne](#), UC Berkeley School of Law; [Amelia Porges](#); and [David Kaye](#), UCLA School of Law. [Djurdja Lazic](#) serves as the managing editor.

appropriate standard for internment in NIAC.[25]

Finally, IHL in both IAC and NIAC contemplates arrest and detention for penal offenses related to the armed conflict.[26] Insofar as the *grounds* for detention on criminal charges are concerned, however, IHL mostly focuses on general prohibitions against the passing of *ex post facto* laws, not the scope or substance of the offenses themselves.[27] Most of the attention to criminal detention in IHL is devoted to certain fundamental rights, such as protection against self-incrimination and the right to a fair trial. [28]

### **Comparing the Scope of Targeting and Detention Authority**

States have developed the law of armed conflict to reflect a careful balance between what is militarily necessary and what is required by the dictates of humanity, and the rules differ depending on the severity of action to be taken against an individual. As a result, the standards for the use of lethal force are less permissive than those for the deprivation of liberty.

Nonetheless, there is an overlap between those who may be targeted and those who may be detained under IHL. A warring party in an IAC can direct attacks against members of the armed forces of the enemy state, as well as hold them in POW camps upon capture. A party to either an IAC or NIAC can target civilians directly participating in hostilities or, upon seizing them, could conceivably determine they are a sufficient threat to justify internment. And both categories of lawful targets—civilians directly participating in hostilities and members of the armed forces—are capable of committing a host of crimes related to the conflict for which they could be arrested and prosecuted.

In spite of these commonalities, however, each category of persons who *can be deprived of liberty* also encompasses persons who *cannot be attacked*. Civilians accompanying the armed forces as crew, journalists, and contractors in an IAC, for example, may be captured and detained as POWs, but they cannot be targeted in the conduct of hostilities. They are by definition civilians and can only be the object of attack if and for such time as they directly participate in hostilities.

Medical and religious personnel similarly enjoy protection from attack, but they too may find themselves lawfully in the hands of the adversary. Although it would not amount to detention as the term is ordinarily understood, if the state of health, spiritual needs, and number of POWs requires, the First Geneva Convention permits the detaining authorities to “retain” medical and religious personnel in an internment camp for their services.[29]

Persons engaged in espionage or otherwise assisting the adversary might also qualify for detention without being lawful targets. These activities might amount to an imperative threat to security justifying internment, but that is not to say that the individuals carrying them out are necessarily functional members of the armed forces, or even that their actions amount to direct participation in hostilities.

Finally, and most evidently, the notion of penal offenses related to the armed conflict encompasses a broad spectrum of potentially criminalized activities, some of which might also qualify the individual as a lawful target, but many of which will have nothing to do with hostilities. Thus, some criminal detainees, for example those accused of criminal homicide for attacks on government forces, may have also been lawful targets before their arrest; but many, such as persons accused of general propaganda or financial support to an armed group, may have not.

## Conclusion

The framework outlined here applies to detention or targeting in the context of an ongoing armed conflict. Part of the debate surrounding the specific operations against Warsame and al-Awlaki has focused on how far this framework should extend beyond so-called hot battlefields and consequently whether IHL should have governed those operations to begin with. In other words, before assessing whether Awlaki met the criteria above for targeting, or whether Warsame met the criteria above for detention, any international law analysis of those operations would have to make a threshold determination of whether the law of armed conflict applies in the first place.

That said, insofar as operations do fall within the framework of an armed conflict, it can be concluded that lawful targets under IHL comprise a narrower group of individuals than those who may be detained. This distinction makes sense if one accepts that the sole objective of hostilities in armed conflict is to “weaken the military forces of the enemy,”<sup>[30]</sup> while the various objectives of detention can range from maintaining security, to preventing POWs from returning to the battlefield, to punishing petty crimes. Keeping this distinction in mind when contemplating the criteria for targeting or detention will help ensure that the underlying balance between military necessity and humanity will remain best reflected in the law.

**About the Author:** Ramin Mahnad, an ASIL member, is Deputy Legal Advisor for the International Committee of the Red Cross (ICRC) Regional Delegation to the United States and Canada. The views expressed in this ASIL *Insight* are those of the author and do not necessarily reflect those of the ICRC.

## Endnotes:

[1] IHL is also known as the law of armed conflict.

[2] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts arts. 48, 50 & 51(2), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter AP I]. See also Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law 79 (2005) (discussing Rule 25 relating to medical personnel), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [hereinafter ICRC Customary IHL Study]. The United States is not a party to AP I but takes the official position that much of its content reflects customary international law. See Michael Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U.J. Int'l L. & Pol'y 419-31 (1987); see also White House, Off. of the Press Sec'y, Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

[4] IHL actually contemplates a third category of person as well—the rarely seen *levee en masse*. See Geneva Convention relative to the Treatment of Prisoners of War art. 4(A)(6), 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva III]. A *levee en masse* occurs when inhabitants of a non-occupied territory, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units. Due to its rarity, it will not be covered in detail here.

[5] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 39-40, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter Geneva I], and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to

the Protection of Victims of Non-International Armed Conflicts art. 21, June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter AP II] (requiring medical personnel in international armed conflict and certain non-international armed conflicts to wear the distinctive emblem). Note, however, that failure to display the emblem does not justify an attack against medical personnel who are recognized as such. See ICRC Customary IHL Study, *supra* note 3 (commentary to Rule 30).

[6] Geneva I arts. 24-26, §§ 6-8; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 36, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter Geneva II]; Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 20, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 15, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter AP I]; AP II, *supra* note 5, art. 9. The United States has signed AP II and submitted it to the Senate for advice and consent.

[7] ICRC Customary IHL Study, *supra* note 3 (Rule 25).

[8] AP I, *supra* note 6, art. 51(3); AP II, *supra* note 5, art. 13(3); see also ICRC Customary IHL Study, *supra* note 3, (Rule 6).

[9] AP I, *supra* note 6, art. 41; Common Article 3; see also ICRC Customary IHL Study, *supra* note 3, (Rule 47).

[10] AP I, *supra* note 6, art. 40; AP II, *supra* note 5, art. 4; see also ICRC Customary IHL Study, *supra* note 3, (Rule 46).

[11] AP I, *supra* note 6, art 35(2); see also ICRC Customary IHL Study, *supra* note 3, (Rule 70).

[12] See AP I, *supra* note 6, art. 51(5)(b); see also ICRC Customary IHL Study, *supra* note 3, (Rule 14).

[13] AP I, *supra* note 6, art. 57(2)(a)(ii); see also ICRC Customary IHL Study, *supra* note 3, (Rule 15).

[14] AP I, *supra* note 6, art. 43; see also ICRC Customary IHL Study, *supra* note 3, (Rule 4).

[15] AP I, *supra* note 6, art. 50(1). As noted above, the definition of civilian also excludes participants in a *levee en masse*. It also excludes certain other individuals falling under the scope of protection provided by Geneva III, but those individuals would in any case be included in the definition of armed forces set forth in art. 43.

[16] See Common Article 3; AP II, *supra* note 5, art. 1(1). For a discussion of the terms “armed forces,” “dissident armed forces,” and “organized armed groups,” see Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law 29-30 (ICRC 2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

[17] See Melzer, *supra* note 16; Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. Int'l L. & Pol. 637 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. Int'l L. & Pol. 641 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. Int'l L. & Pol. 697 (2010); Bill Boothby, “And for Such Time As”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. Int'l L. & Pol. 741 (2010); W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. Int'l L. & Pol. 769(2010); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. Int'l L. & Pol. 831 (2010).

[18] See Melzer, *supra* note 16, at 32.

[19] However, this distinction is not black-and-white as states often do assign civilian ministries or agencies operational military roles.

[20] Geneva III, *supra* note 4, art. 4(A). Other persons who may be entitled to POW treatment include members of the merchant marine, crews of civil aircraft, and participants in a *levee en masse*.

[21] *Id.* arts. 21 & 118.

[22] *Id.* arts. 42 & 78.

[23] Jean S. Pictet, Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 258 (ICRC 1958), *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/GC\\_1949-IV.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-IV.pdf).

[24] See AP II, *supra* note 5, art. 5.

[25] Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict, Chatham House & ICRC, London, Meeting Summary (Sept. 22-23, 2008), *available at* <http://www.icrc.org/eng/assets/files/other/security-detention-chatham-icrc-report-091209.pdf>. See also Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 858 Int. Rev. Red Cross 375 (June 2005) (representing the institutional position of the ICRC); John Bellinger III, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 Am. J. Int'l L. 201 (2011).

[26] See, e.g., AP I, *supra* note 6, arts. 75(4) & (7); and AP II, *supra* note 5, art. 6.

[27] Geneva III, *supra* note 4, art. 99; Geneva IV, *supra* note 6, art. 67; AP I, *supra* note 6, art. 75(4) (c); AP II, *supra* note 5, art. 6(2)(c). Note the exception that Geneva IV does address the substantive aspects of laws that can be enacted and enforced by an occupying power. See Geneva IV, *supra* note 6, art. 64.

[28] See generally Geneva III, *supra* note 4, arts. 82-108; Geneva IV, *supra* note 6, arts. 62-77; AP I, *supra* note 6, art. 75; and AP II, *supra* note 5, art. 6.

[29] Geneva I, *supra* note 5, art. 28; see also Geneva IV, *supra* note 6, art. 33.

[30] 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *available at* <http://www.icrc.org/ihl.nsf/FULL/130>.