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CANADIAN FORCES COLLEGE

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EXERCISE

MASTER OF DEFENCE STUDIES

**Square Pegs, Round Holes:
the Responsiveness of Law Enforcement and Military Action to Contemporary Terrorism.**

By Major Ian Davis
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ABSTRACT

The attacks by al Qaeda against the United States on September 11, 2001, have highlighted the seriousness of the threats posed by transnational terrorism. Terrorism is a crime, but it may also be viewed as an armed threat. Thus, there two natural responses to terrorism: law enforcement and military action. However, neither response is particularly well-suited to respond to the contemporary terrorist threat. Law enforcement is reactive and defensive, and it not sufficiently capable of preventing or deterring acts of terrorism. The strict rules of liberal-democratic criminal justice systems challenge the effectiveness of a law enforcement response. The transnational nature of terrorism may limit the ability of governments to respond to terrorism with law enforcement beyond their own borders. Transnationality also poses difficulties for the military response to contemporary terrorism. International humanitarian law (IHL) largely assumes that armed conflicts are waged between states. This complicates the ability of states to use force in self-defence against attacks by non-state terrorists. Transnationality also makes it difficult to characterize the nature of the conflict, which is important for determining the laws that will apply. As well, the duality of combatants and civilians under IHL means that terrorists are ostensibly civilians. As a result, there is a lack of clarity surrounding the circumstances under which terrorists may be targeted. As well, there is confusion about the extent of the application of human rights law in armed conflicts against terrorists. Some of these challenges could be addressed by adjustments to the law. However, states may resist proposals to adjust IHL that would recognize non-state actors and legitimize terrorism.

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	3
What Is Terrorism?	3
Tactics of Terrorism	6
Transnationalism	7
The “War” On Terror	9
Responses	11
THE LIMITATIONS OF LAW ENFORCEMENT	16
REACTIVE AND DEFENSIVE	16
STRICT RULES	21
THE CHALLENGES OF TRANSNATIONALITY	31
LAW ENFORCEMENT	31
INTERNATIONAL HUMANITARIAN LAW	33
Jus Ad Bellum	33
Characterizing the Conflict	40
THE LIMITATIONS OF INTERNATIONAL HUMANITARIAN LAW	44
STATUS OF TERRORISTS	44
TARGETING	49
APPLYING HUMAN RIGHTS LAW	53
Non-Canadian Cases	60
Canadian Cases	62
Accountability Framework	67
ADJUSTING THE LEGAL FRAMEWORKS	69
LAW ENFORCEMENT	69
INTERNATIONAL HUMANITARIAN LAW	71
CONCLUSION	76
BIBLIOGRAPHY	80

INTRODUCTION

Shortly after the attacks by al Qaeda on the World Trade Center and the Pentagon on September 11, 2001, the government of the United States (U.S.), under the leadership of President George W. Bush, placed itself on a war footing. According to Bush, the U.S. had been attacked. On September 20, 2001, in his address to Congress, Bush stated that “the enemies of freedom committed an act of war against [the U.S.].”¹ Similarly, the United Nations characterized these attacks as a threat to international peace and security.² Whereas in the past, the U.S. may have treated terrorism as a law enforcement matter, in response to the attacks on September 11, the U.S. “quickly moved beyond a criminal law enforcement paradigm.”³ The U.S. chose to respond to terrorism with military action, and a large component of its response to terrorism since that timeframe has involved the military. Even though the U.S. government has since employed other elements of its national power to counter the threats to terrorism, it continues to invoke a law enforcement response as well. Other states, including Canada, have followed the U.S. path.

The struggle against terrorism after September 11 “has been multifaceted involving non-military and military aspects.”⁴ The non-military aspects include a variety

¹United States, “Address to a Joint Session of Congress and the American People, 20 September 2001,” (Washington, D.C.: The White House, 2001); available from <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>; Internet; accessed 13 February 2008

² United Nations Security Council Resolution 1368, U.N. Doc. S/RES/1368 (2001); available from <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>; Internet; accessed 10 April 2008.

³Michael N. Schmitt, “Counter-Terrorism and the Use of Force in International Law,” *George C. Marshall European Center for Security Studies, The Marshall Center Papers* 5 (November 2002): 5.

⁴ Dominic McGoldrick, *From “9-11” to the “Iraq war 2003”: International Law in an Age of Complexity* (Oxford: Hart Publishing, 2004), 30.

of measures, including economic sanctions against terrorist groups and development aid to confront the root causes of terrorism,⁵ as well as immigration measures and criminal prosecution. Governments seemed to appreciate that they must leverage all aspects of their national power in order to counter the threat of terrorism. That said, there is a natural tendency to emphasize two means of national power in the struggle against terrorism. The first means is law enforcement, in which case an act of terrorism is treated as a crime. The second means is the military, in which case terrorism is treated as an armed threat or attack.

Conceptually, each of these approaches is governed by a completely different body of law. Governments must therefore understand the difficulties inherent in each approach, as well as the limitations under the law that correspond with the approaches that they take in their counter-terrorism efforts. Law enforcement measures will be governed by international human rights law, while military action will normally be governed by international humanitarian law (IHL) (sometimes referred to as the law of armed conflict).

This paper examines law enforcement and military action as both complementary and contradictory responses to the struggle against contemporary terrorism. Today's terrorism is committed by individuals who do not act as agents of any state, and whose actions transcend state boundaries. This transnationality poses challenges to the two approaches of law enforcement and military action. Neither approach is by itself fully responsive to transnational terrorism. A law enforcement response is limited in its ability to prevent or deter acts of terrorism, and there are jurisdictional challenges associated

⁵ *Ibid.*, 30.

with the transnational nature of contemporary terrorism. It may seem natural for governments to look to a military response for its world-wide reach and its preventative or deterrent effects. However, transnationality also poses difficulties and causes confusion under the military response. Interestingly, these two paradigms sometimes meet and interact with one another in the struggle against terrorism.

This paper begins with an examination of the contemporary terrorist threats and describes the recent responses of the U.S. and Canada. The second chapter examines the limits of the law enforcement paradigm, particularly in respect of its preventative or deterrent effect. This paper argues that the reactive nature of law enforcement, as well as the liberal-democratic criminal justice systems of Western democracies, challenges the effectiveness of law enforcement action as a response to terrorism. The third chapter discusses the challenges that transnationality poses to both the law enforcement and the military paradigm. This paper argues that both paradigms are less effective against non-state actors. Chapter four analyzes the suitability of IHL—which governs the military response—to address transnational terrorism. This paper argues that IHL is not a neat fit with the struggle against terrorism and is therefore prone to confusion. The concluding chapter suggests the possibility of modifying the two legal frameworks that govern the paradigms in order to make them more suitable in responding to contemporary terrorism.

BACKGROUND

What Is Terrorism?

There is no universally accepted definition of terrorism. It has been observed that “[d]isagreement dogs the best efforts to come to a common definition of ‘terrorism.’”⁶

⁶ Laura K. Donohoe, “Terrorism and the Counter-Terrorist Discourse,” in *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), 15. See also Odette Jankowitsch-Prevor,

Indeed, some commentators suggest that there are more than one hundred definitions of terrorism.⁷ In the international sphere, efforts to conclude a comprehensive terrorist convention have been impeded by the inability of states to agree on a definition of terrorism.⁸ Instead of one comprehensive convention, there are more than ten international legal instruments that relate to terrorism.⁹ These conventions or protocols represent a “sectoral” or “piecemeal” approach to regulating terrorism internationally. Each convention “deal[s] with a specific crime, involving indiscriminate violence, which [is] most likely to be committed by terrorists.”¹⁰ Those crimes include such activities as hostage taking, hijacking, other criminal acts against civil aviation and the safety of

“United Nations Measures against Terrorism: Introductory Remarks,” in *Anti-Terrorist Measures and Human Rights* (Lieden, Netherlands: Martinus Nijhoff Publishers, 2004), 38: “agreement on a definition, and establishment of a single convention on the legal control of international terrorism remains elusive. It is unlikely that this will change in the foreseeable future.”

⁷ Jose Lui Rodrigues-Villasant y Prieto, “Terrorist Acts, Armed Conflicts and International Humanitarian Law,” in *The New Challenges of Humanitarian Law in Armed Conflicts* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2005), 15-16 (noting that Yves Sandoz counts 109 definitions).

⁸ Christiane Bourloyannis-Vrailas, “United Nations Human Rights Standards as Framework Conditions for Anti-Terrorist Measures,” in *Anti-Terrorist Measures and Human Rights* (Lieden, Netherlands: Martinus Nijhoff Publishers, 2004), 13-14 ; Michael Postl, “The Ad Hoc Committee on Terrorism,” in *Anti-Terrorist Measures and Human Rights* (Lieden, Netherlands: Martinus Nijhoff Publishers, 2004), 48; A.R. Perera, “Reviewing the UN Convention on Terrorism: Towards a Comprehensive Terrorism Convention,” in *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue* (Lieden, Netherlands: Martinus Nijhoff Publishers, 2004), 567-568.

⁹ Bourloyannis-Vrailas, “United Nations Human Rights Standards as Framework Conditions for Anti-Terrorist Measures,” 13. These conventions or protocols are: 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; 1979 International Convention against the Taking of Hostages; 1979 Convention on the Physical Protection of Nuclear Material; 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection; 1997 International Convention for the Suppression of Terrorist Bombings; and 1999 International Convention for the Suppression of the Financing of Terrorism. These documents may be found at <http://untreaty.un.org/English/Terrorism.asp>.

¹⁰ Perera, “Reviewing the UN Convention on Terrorism: Towards a Comprehensive Terrorism Convention,” 569.

maritime navigation, violence against internationally protected persons, bombings, and financing of terrorism, among other things.¹¹

In addition to the crimes set out in the international conventions and protocols, the United Nations Secretary General's High-level Panel on Threats, Challenges and Change has recommended the following as an international definition:

...any action...that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.¹²

Canada's definition of terrorism is found in the *Criminal Code*.¹³ The definition of "terrorist activity" was introduced into the *Criminal Code* with the enactment of the *Anti-Terrorism Act* in 2001.¹⁴ The definition incorporates the offenses set out in ten of the "sectoral" or "piecemeal" international terrorism conventions.¹⁵ It also includes other prescribed acts or omissions that are intended to cause harm, and that are intended to intimidate the public with regard to its security, or compel a person or a government to do or to refrain from doing any act.¹⁶

¹¹ Bourloyannis-Vrailas, "United Nations Human Rights Standards as Framework Conditions for Anti-Terrorist Measures," 14.

¹² United Nations, "A More Secure World: Our Shared Responsibility," (New York: United Nations, 2004); available from "<http://www.un.org/secureworld/report.pdf>"; Internet; accessed 16 February 2008.

¹³ *Criminal Code*, R.S.C. 1985, c. C-46; as am. by S.C. 2001, c. 41, s. 83.01; available from <http://laws.justice.gc.ca/en/showdm/cs/C-46>; Internet; accessed 17 February 2008.

¹⁴ *Anti-Terrorism Act*, S.C. 2001, c. 41; available from http://laws.justice.gc.ca/en/showdoc/cs/A-11.7/bo-ga:l_1/en#anchorbo-ga:l_1; Internet; accessed 17 April 2008.

¹⁵ The conventions that are not included are: 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; and 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection.

¹⁶ The definition of "terrorist activity" in the *Criminal Code* is lengthy. For the complete definition, see section 83.01. One further aspect of the Canadian definition is the requirement that the act or omission be committed "in whole or in part for a political, religious or ideological purpose, objective or

There are similarities between the definition of terrorism proposed by the United Nations Secretary General's High-level Panel and Canada's definition contained in the *Criminal Code*. First, both definitions incorporate terrorism-related offences found in international treaties and protocols. Second, both definitions include a requirement that the act be committed with the intent to harm. Finally, both definitions include a requirement that the act be committed for the purpose of intimidation or compulsion. Suffice it to say that, at its barest, terrorism involves criminal acts in order to intimidate the public or compel governments or organizations to do something.¹⁷

Thus, terrorism is clearly a crime. In Canada, this is obvious, because Canada's definition of terrorism is embodied in its *Criminal Code*. Internationally, individuals who commit acts of terrorism also commit crimes. This allows governments to respond to terrorism with law enforcement measures.

Tactics of Terrorism

It is not surprising to find that terrorist acts are criminal in nature. Unlawful violence is inherent to terrorism. Indeed, one essential tactic of terrorists is violence or the threat of violence in order to further their cause.¹⁸ Because the capabilities of terrorist organizations will typically be unequal to the capabilities of states, especially in

cause." This aspect of the definition of terrorism, in particular, remains subject to debate and scrutiny. For example, in the case of *R. v. Khawaja* [2006] O.J. No. 4245 (S.C.) (QL), the Ontario Superior Court of Justice ruled that the motive clause of this definition violated the *Charter of Rights and Freedoms*. The court therefore struck down the political, religious or ideological requirement of the definition on the basis that it was not consistent with the freedom of conscience, religion, thought, belief, opinion, expression and association under the *Charter*.

¹⁷ Jonathan R. White, *Terrorism and Homeland Security*, 5th ed. (Belmont, CA: Thomson Wadsworth, 2006), 4: "...the illegitimate use of force to achieve a political objective by targeting innocent people." See also Kevin Boyle, "Terrorism, States of Emergency and Human Rights," in *Anti-Terrorist Measures and Human Rights* (Lieden, Netherlands: Martinus Nijhoff Publishers, 2004), 113+.

¹⁸ Pamala L. Griset and Sue Mahan, *Terrorism in Perspective* (Thousand Oaks, California: Sage Publications Inc., 2003), 191.

respect of the capability to conduct armed conflicts, terrorists will often be reluctant to wage a conventional-style war. Instead, they will rely on asymmetric tactics.¹⁹ Indeed, it is for this reason that the most common tactics of terrorism are assassination and murder, hijacking, kidnapping and hostage taking, and bombing and armed assaults.²⁰ Often, terrorists target civilians in order to intimidate the public or compel a government. Al Qaeda, for example, believes that it is entitled to target civilians because the civilians support the governments that al Qaeda opposes.²¹

Transnationalism

Contemporary terrorism has evolved beyond a phenomenon that poses a threat to the internal security of one state. Terrorism has become an international security issue. The activities of the Irish Republican Army (IRA) serve as just one example of this evolution. The IRA was an Irish nationalist movement that initially conducted its terrorist activities against the British only in Northern Ireland. However, by the mid-1970s, it expanded its activities to the British mainland and continental Europe.²² In the 1970s and 1980s, other terrorist entities expanded geographically as well, and international terrorism was born. Sometimes, this international terrorism was supported

¹⁹ Program on Humanitarian Policy and Conflict Research, “Transnationality, War and the Law: A Report on a Roundtable on the Transformation of Warfare, International Law, and the Role of Transnational Armed Groups,” (April 2006): 5 [on-line]; available from http://www.hpcr.org/pdfs/HPCR_-_Transnationality_Roundtable_-_April_2006.pdf; Internet; accessed 20 April 2008.

²⁰ Griset and Mahan, *Terrorism in Perspective*, 197.

²¹ Mohammad-Mahmoud Ould Mohamedou, “Non-Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States,” (Cambridge, MA: Program on Humanitarian Police and Conflict Research Harvard University, July 2005), 4.

²² Doron Zimmermann and Andreas Wenger, “Toward Efficiency and Legitimacy,” in *How States Fight Terrorism: Policy Dynamics in the West* (London: Lynne Rienner Publishers Inc., 2007), 204. For example, the IRA attacked the British Army on the Rhine in 1989 and 1996.

by states. For example, during the Cold War, some states facilitated and exploited terrorism as a form of “surrogate warfare.”²³

More recently, terrorist entities have been less reliant on the support of states.²⁴ In this era of “globalization,” where individuals are more mobile, communications are instantaneous, and goods—including weapons—are available on a world-wide market place, terrorists are more able to act on their own. As Becker notes, terrorists may be capable of committing “large-scale” acts of terrorism without the “active sponsorship of a State that shares their ideology or interests.”²⁵ According to Becker, “[terrorists] may not even need formal ties, directions and material support from a structured terrorist organization. They just need to be left alone.”²⁶ So, contemporary terrorists are capable of operating independently of states; they are also capable of operating across the territorial boundaries of states.

Contemporary terrorists are also more separate from one another. Although terrorists groups may be connected by ideology, they may nonetheless “operate in virtual isolation engaging in local initiatives without belonging to at terrorist organization in the way that terrorism experts have traditionally assumed.”²⁷ Thus, terrorist organizations today can be diffuse and autonomous, and substantially free from ties to any state. These terrorists, who may be small in numbers, are nevertheless capable, by themselves, of

²³ Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford: Hart Publishing, 2006), 250-251. Zimmermann and Wenger, “Toward Efficiency and Legitimacy,” 203-205.

²⁴ Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, 251.

²⁵ *Ibid.*, 255.

²⁶ *Ibid.*

²⁷ *Ibid.*, 252.

inflicting significant harm against states.²⁸ The serious threats that transnational terrorists pose is evident from the attacks by al Qaeda on September 11.

The “War” On Terror

During his speech to Congress on September 20, 2001, and frequently thereafter, President Bush has referred to the U.S. struggle against al Qaeda as the “war on terror.” The use of the word “war” has been criticized. First, it fails to take into account the comprehensive response to the threat of terrorism that is often required.²⁹ Second, the term is awkward and perhaps unhelpful. Some commentators have noted that word “war” is misplaced because terrorism is merely a tactic.³⁰ *Monty Python’s* Terry Jones has observed that waging “war” on terror is like waging war on an abstract noun.³¹ Arguably, the use of the term “war on terror” serves no useful analytical purpose. As well, there are practical difficulties with language of this kind. For example, as Ackerman notes, it is difficult to determine when the “war” on terror has ended. Unlike war between states, there is “no decisive act of capitulation, armistice, or treaty [that] takes place for all the world to see.”³²

²⁸ *Ibid.*, 254.

²⁹ William Rosenau, “US Counterterrorism Policy,” in *How States Fight Terrorism: Policy Dynamics in the West* (London: Lynne Rienner Publishers Inc., 2007), 133.

³⁰ *Ibid.*, 133. Mark S. Hamm, *Terrorism as Crime: From Oklahoma to Al-Qaeda and Beyond* (New York: New York University Press, 2007), 222.

³¹ Terry Jones, “Why Grammar is the First Casualty of War,” *Daily Telegraph*, 12 January 2002 [on-line]; available from <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/12/01/nterry01.xml>; Internet; accessed 13 February 2008. “[w]hat really alarms me about President Bush’s ‘war on terrorism’ is the grammar. How do you wage a war on an abstract noun? It’s rather like bombing murder.”

³² Bruce Ackerman, “The Emergency Constitution,” *The Yale Law Journal* 113, no. 5 (2003-2004): 1033; <http://heinonline.org/HOL/Page?handle=hein.journals/ylr113&id=1049&collection=journals&index>; Internet, accessed 2 March 2008.

More recently, U.S. officials have begun to use another term: the “global struggle against violent extremism.” This shift in language appears to reflect the notion that the struggle against terrorism cannot succeed through military action alone. Indeed, news reports quote the U.S. Chairman of the Joint Chiefs of Staff, General Richard G. Byers, as saying that he had “objected to the use of the term ‘war on terrorism’ before, because if you call it a war, then you think of people in uniform as being the solution.”³³ As indicated earlier, the U.S. government has not focused exclusively on military action. Rosenau notes that the “U.S. counterterrorism strategy involves “[k]ey elements of national power—military, political, economic, intelligence, and law enforcement.”³⁴

Officials in the Government of Canada have been less inclined to use the term “war on terror,” although it has appeared in at least one official statement of the Department of National Defence.³⁵ More often, Canadian officials have characterized Canada’s responses to terrorism as the “campaign against terrorism”³⁶ Canada’s use of the word “campaign” as opposed to “war” is perhaps a reflection of the view that governments should take a more holistic, or multi-faceted approach to terrorism. Like

³³Eric Schmitt and Thom Shanker, “U.S. Officials Retool Slogan for Terror War,” *New York Times*, 26 July 2005; available from

the U.S., Canada's response to the terrorism threat is not limited to the military. Canada's response is also a multifaceted one that includes law enforcement as well as the military.³⁷ This is in keeping with Canada's "all hazards" approach to national security.³⁸

Responses

As indicated above, terrorism is a crime, and governments therefore have the option of invoking a law enforcement response to terrorism. There has been a natural inclination for governments to turn towards the law enforcement model when faced with threats of terrorism. Indeed, "[t]he first instinct of many Western governments and populations is to treat such violence as crime and to invoke criminal justice models in response."³⁹ For example, after the bombing of U.S. embassies in Kenya and Tanzania by al Qaeda in 1998, the response of the U.S. government was largely a law enforcement response—although the U.S. did launch cruise missiles at training camps in Afghanistan.⁴⁰ At that time, "law enforcement, and specifically the practice of apprehending terrorists and bringing them to trial, remained Washington's preferred instrument for combating Al-Qaida [sic]."⁴¹ In response to the bombing of the

³⁷ Margaret Purdy, "Canada's Counterterrorism Policy," in *How States Fight Terrorism: Policy Dynamics in the West* (London: Lynne Rienner Publishers Inc., 2007), 109.

³⁸ *Ibid.*, 127.

³⁹ Dominic D. McAlea, "Post-Westphalian Crime," in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsley, NY: Transnational Publishers, 2005), 114.

⁴⁰ Michael Byers, *War Law: Understanding International Law and Armed Conflict* (Vancouver: Douglas and McIntyre Ltd, 2005),

embassies, U.S. authorities preferred 224 counts of murder against Osama bin Laden, (which is perhaps telling of the practical effectiveness of the law enforcement model in many circumstances).⁴²

After September 11, the U.S. government felt the need to move beyond the law enforcement paradigm in its response to the attacks by al Qaeda, and treated terrorism as an armed threat or attack. An act of terrorism may also be treated as an armed attack and trigger a military response.⁴³ As Schmitt notes, it is the “‘scale and effects’ of the act that are determinative in assessing whether an armed attack is taking place such that a right to respond in self-defence vests.”⁴⁴ This threshold is not particularly high.⁴⁵ Clearly, the administration of President Bush took the view that the scale and effects of the attacks on September 11 required a military response. As discussed, the U.S. government had characterized its struggle against terrorism as “war,” and launched *Operation Enduring*

⁴² *Ibid.*, 138. It is interesting that the U.S. indicted bin Laden on charges of murder. This is a conventional criminal charge that need not be associated with terrorism, although it is certainly appropriate to charge terrorists with murder when their actions cause death. The laying of conventional criminal charges is in keeping with the past practice of law enforcement authorities—in the U.S., anyway. As Hamm notes, “U.S. prosecutors have historically indicted terrorists, not on terrorism charges, but on criminal charges.” Hamm, *Terrorism as Crime: From Oklahoma to Al-Qaeda and Beyond*, 18. In Canada, the individuals accused of involvement in the bombing of *Air India* flight 182 were charged with murder and conspiracy to commit murder: *R. v. Malik*, [2005] B.C.J. No. 521 (S.C.) (QL); available from <http://www.courts.gov.bc.ca/Jdb-txt/SC/05/03/2005BCSC0350.htm>; Internet; accessed 20 April 2008. Certainly, normal criminal law that prohibits murder, or kidnapping, for example, may be sufficient to allow a law enforcement response to terrorism. As Roach notes, before the enactment of Canada’s *Anti-Terrorism Act*, “most acts of terrorism were already punished as serious crimes such as murder, hijacking and the use of explosives.” Kent Roach, “Canada’s Response to Terrorism,” in *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), 528.

⁴³ Schmitt, “Counter-Terrorism and the Use of Force in International Law,” 64. Schmitt argues that terrorist groups can conduct an armed attack.

⁴⁴ *Ibid.*, 18.

⁴⁵ J. Wouters and F. Naert, “Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism.” in *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue* (Lieden, Netherlands: Martinus Nijhoff Publishers, 2004), 430.

Freedom, the initial U.S. military response to al Qaeda's attacks on the World Trade Center and the Pentagon.

Immediately after September 11, Canada reexamined its counter-terrorism policies and implemented an anti-terrorism plan, which set out five broad objectives:

- Preventing terrorists from entering Canada;
- Protecting Canadians from terrorism;
- Taking measures to identify, prosecute, convict and punish terrorists;
- Securing the Canada-US border to facilitate trade; and
- Cooperating with the international community.⁴⁶

Some of these objectives reflect a law enforcement paradigm. For example, the goal of identifying, prosecuting, convicting and punishing terrorists was enabled by the enactment of the *Anti-Terrorism Act*, which “provided the police with new investigative tools and authorities.”⁴⁷ As well, the goal of cooperating internationally in order to “bring terrorists to justice”⁴⁸ was enabled when Canada ratified the Suppression of Terrorist Financing Convention and the Suppression of Terrorist Bombings Convention, which were the two of the international conventions and protocols relating to terrorism that Canada had not yet ratified before September 11, 2001.⁴⁹

⁴⁶ Foreign Affairs and International Trade Canada, “Backgrounder—Canada’s Actions Against Terrorism Since September 11,” (Ottawa: Foreign Affairs and International Trade Canada, 2003); available from <http://www.dfait-maeci.gc.ca/anti-terrorism/canadaactions-en.asp>; Internet; accessed 7 February 2008. Purdy, “Canada’s Counterterrorism Policy,” 116-117.

⁴⁷ Purdy, “Canada’s Counterterrorism Policy,” 119

⁴⁸ Foreign Affairs and International Trade Canada, “Backgrounder—Canada’s Actions Against Terrorism Since September 11.” Purdy, “Canada’s Counterterrorism Policy,” 116-117.

⁴⁹ Department of Justice Canada, “Backgrounder—Highlights of Anti-Terrorism Act,” (Ottawa: Department of Justice Canada, 2001); available from http://www.justice.gc.ca/eng/news-nouv/nr-cp/2001/doc_27787.html; Internet; accessed 17 February 2008.

Canada also sought to achieve these broad objectives through a variety of other measures. The Canadian government increased security-related spending by \$7.7 billion.⁵⁰ As well, Canada created a new Department of Public Safety and Emergency Preparedness (now referred to as Public Safety Canada), which “allows Canada to meet vital national security obligations under the coordinated leadership of a single Cabinet minister.”⁵¹ It is evident that Canada’s response to the terrorism threat, like the U.S response, involves a number of elements of national power. As suggested above, Canada has adopted an “all hazards” approach to the safety of Canadians. The all-hazards approach is one that “is not terrorism-centric, but rather takes into account the full range of serious threats and hazards facing the country.”⁵²

Part of Canada’s multi-faceted approach to the threat of terrorism is military action. As indicated above, one of the five broad objectives of Canada’s Anti-Terrorism Plan is protecting Canadians. One means of protecting Canadians from terrorist acts is to confront the terrorist threat abroad. This is one reason why the Canadian Forces have been deployed outside Canada since September 11, 2001. Thus far, for Canada, the focus of military action in the struggle against terrorism has been in Afghanistan and the Arabian Gulf.

⁵⁰ Foreign Affairs and International Trade Canada, “Backgrounder—Canada’s Actions Against Terrorism Since September 11,”

⁵¹ In particular, this new department amalgamated a number of organizations that deal with national security, emergency management, and public safety, including the Royal Canadian Mounted Police, the Canadian Security Intelligence Service, the Office of Critical Infrastructure Protection and Emergency Preparedness, and a new Canadian Border Services Agency. See, Purdy, “Canada’s Counterterrorism Policy,” 118. See, also, Foreign Affairs and International Trade Canada, “Campaign Against Terrorism.”

⁵² Purdy, “Canada’s Counterterrorism Policy,” 127.

Canada's military response to terrorism after September 11 began with the deployment of maritime, air and land forces as part of the U.S.-led *Operation Enduring Freedom*. Canada's military contribution to this campaign against terrorism included the deployment of ships to the Arabian Gulf as part of a coalition fleet, the deployment of ground troops to Kandahar, Afghanistan in early 2002 as part of a U.S. Army task force, and the deployment of air forces to the Arabian Gulf region in support of Canadian and multi-national forces. These deployments were part of Canada's *Operation Apollo*.⁵³

Canada later deployed other military forces to Afghanistan in support of the International Security Assistance Force (ISAF) mission led by the North Atlantic Treaty Organization (NATO). The ISAF mission was set up to assist the Afghan Government with security, stability and reconstruction.⁵⁴ This deployment is referred to by Canada as *Operation Athena*. As well, Canada continues to support the U.S.-led *Operation Enduring Freedom*.⁵⁵ Since 2001, more than 18,000 Canadian soldiers have served in Afghanistan in various operations.⁵⁶

In February 2008, Canada's Minister of National Defence announced that Canada would lead a naval coalition task force as part of "Canada's contribution to the maritime

⁵³ Department of National Defence, "Backgrounder—The Canadian Forces' Contribution to the International Campaign Against Terrorism," (Ottawa: Department of National Defence, 2004); available from http://www.forces.gc.ca/site/Newsroom/view_news_e.asp?id=490; Internet; accessed 16 February 2008.

⁵⁴ North Atlantic Treaty Organization, "International Security Assistance Force," on-line; available from <http://www.nato.int/issues/isaf/index.html>; Internet; accessed 4 April 2008.

⁵⁵ Department of National Defence, "Canadian Expeditionary Force Command: Current Operations," (Ottawa, Department of National Defence, 2008); available from http://www.cefcom.forces.gc.ca/site/ops/index_e.asp; Internet; accessed 4 April 2008.

⁵⁶ Government of Canada, "Rebuilding Afghanistan: Canada's Approach: Security," (Ottawa, 2008); available from http://www.canada-afghanistan.gc.ca/cip-pic/afghanistan/library/afgh_security-en.asp; Internet; accessed 3 March 2008.

portion of the global war on terrorism.”⁵⁷ The operation is scheduled to take place from June until September 2008. In this announcement, the Minister stated that “[d]enying terrorists the use of the maritime environment as a venue for illicit operations translates into added security for Canadians at home and abroad.”⁵⁸ Like previous deployments to the Arabian Gulf, this one falls under *Operation Apollo*.

In summary, Canada’s counter-terrorism strategy incorporates a number of elements of national power, and clearly contemplates law enforcement measures. It also contemplates military action, as is evident by the deployment of the Canadian Forces in support of the U.S.-led *Operation Enduring Freedom*.

THE LIMITATIONS OF LAW ENFORCEMENT

As discussed, terrorists are criminals, and may be dealt with under a law enforcement regime. However, law enforcement measures may not always be well-suited to respond to terrorism in all circumstances. Practically, a law enforcement response is largely reactive, making it less effective to prevent terrorist acts from occurring in the first place. In short, the model is not well-designed to preempt acts of terrorism. As well, the rules of evidence of a liberal-democratic criminal justice system present difficulties to the law enforcement response to terrorism.

REACTIVE AND DEFENSIVE

Applying a law enforcement regime means applying human rights law to the actions taken by governments.⁵⁹ Human rights law protects individuals from excessive

⁵⁷ Department of National Defence, “News Release—Canada to lead Combined Task Force 150.”

⁵⁸ *Ibid.*

⁵⁹ Program on humanitarian Policy and Conflict Research, “On the Legal Aspects of ‘Targeted Killing’: Review of the Judgment of the Israeli Supreme Court.” Policy Brief, May 2007, at 6-7.

actions of their governments. Thus, “a state may now be internationally responsible for acts done in its own territory to its own citizens.”⁶⁰ Significantly, “core” human rights include the right to life.⁶¹ The right to life is contained in article 6 of the *International Covenant on Civil and Political Rights*, a key international human rights instrument.⁶² Article 6 states that, “[n]o one shall be arbitrarily deprived of his life.” Article 4 provides that the right to life cannot be derogated from, even during a “public emergency which threatens the life of the nation.”

Under the international human rights law framework, governments should first make attempts to arrest criminals, including terrorists. Doswald-Beck explains further: “human rights law requires a state’s forces to effect an arrest where possible and to plan operations in such a way as maximize the possibility of being able to arrest persons.”⁶³ Thus the use of force is a last resort. This is clearly articulated in the United Nations’ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.⁶⁴

Paragraph 9 of that document provides:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or

⁶⁰ Martin Dixon, *Textbook on International Law*, 5th ed. (Oxford: Oxford University Press, 2005), 322.

⁶¹ *Ibid.*, 324.

⁶² International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171; available from <http://www2.ohchr.org/english/law/ccpr.htm>.

⁶³ Louise Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?” *International Review of the Red Cross* 88, no 864 (December 2006): 890 [journal on-line]; available from <http://www.icrc.org/web/eng/siteeng0.nsf/html/review-864-p881>; Internet; accessed 21 November 2007.

⁶⁴ United Nations Basic Principles on the Use of force and Firearms by Law Enforcement Officials. On-line; available from <http://www2.ohchr.org/english/law/firearms.htm>; Internet; accessed 20 April 2008.

serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

Because the use of force must be limited to these exceptional circumstances involving imminent death or serious injury, governments under the law enforcement model will be limited in the manner in which they address threats of terrorism.

In comparison, if governments are able to treat terrorists as combatants under an armed conflict model, then a fuller spectrum of response may become available to them under IHL. Watkin explains the latitude that may be afforded to governments under the armed conflict model:

...international humanitarian law recognizes the non-culpable homicide of members of an opposing force during armed conflict. Lawful combatants may be targeted regardless of whether they are unarmed or out of uniform as long as they are not *hors de combat*. Further, such targeting is not temporally limited, with combatants being valid targets even when they are in retreat or not posing an immediate threat to the attacking armed force [footnotes omitted].⁶⁵

So, if governments are able to take military action against terrorists, then they may have a greater ability to preempt and prevent acts of terrorism by targeting terrorists before they commit acts of terrorism. That said, IHL poses its own challenges to a government's response using military force, as this paper discusses in the next two chapters.

As suggested, it may be difficult for law enforcement authorities to prevent acts of terrorism from occurring. The International Committee of the Red Cross notes that there is a perception that "the law enforcement model is geared towards punitive, rather than

⁶⁵ Kenneth Watkin "Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing," *Duke Journal of Comparative and International Law* 15, no. 2 (Spring/Summer 2005): 309-310.

preventive action.”⁶⁶ Indeed, law enforcement measures are, by their nature, generally “reactive” and “defensive.”⁶⁷ Yet, public safety concerns may require that governments act to prevent terrorist activities before a criminal offence can be properly investigated and prosecuted. In other words, national security may require governments to act to defeat threats before they “crystallize” and become criminal offences. National security may also require governments to defeat the threats far away from their own territory. This may be difficult to achieve under the law enforcement model, not only because of the reactive nature of law enforcement, but also because of the limited jurisdiction of states beyond their own borders. These jurisdictional issues are discussed in the next chapter.

That is not to say that policing can never be preventative. According to Hamm, everyday law enforcement “may preempt more disastrous events.”⁶⁸ Hamm provides one example that has relevance to Canada: Ahmed Ressam. A routine border inspection at the Canada-U.S. border led to the arrest of Ressam, who was “plotting to bomb the Los Angeles International Airport during the 2000 millennium celebrations.”⁶⁹ This case illustrates Hamm’s view that “the most effective method of detecting and prosecution cases of terrorism is through the pursuit of conventional criminal investigations.”⁷⁰

⁶⁶ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,” *International Review of the Red Cross* 86, no. 853 (March 2004): 232 [journal on-line]; available from <http://icrc.org/Web/eng/siteeng0.nsf/html/5ZBHH7>; Internet; accessed 2 March 2008.

⁶⁷ Caleb Carr, *The Lessons of Terror: A History of Warfare against Civilians* (New York: Random House, 2002), at 8.

⁶⁸ Hamm, *Terrorism as Crime: From Oklahoma to Al-Qaeda and Beyond*, 210.

⁶⁹ *Ibid.*, 5.

⁷⁰ *Ibid.*, 16.

According to Hamm, in order to be effective against terrorism, law enforcement officials should focus primarily on the crimes that finance and support terrorist operations, such as robbery and theft, drug smuggling, counterfeiting, and money laundering.⁷¹ Hamm argues that terrorists are, above all, inexperienced criminals who are unskilled at committing crimes without detection. This inexperience presents opportunity for routine law enforcement activity to serve as an effective response to terrorism.⁷²

It is nonetheless fair to question whether law enforcement mechanisms are capable of providing a sufficient deterrent effect upon terrorists.⁷³ As McAlea notes, terrorists have “an ability to project force that approaches a level that was heretofore restricted to states.”⁷⁴ It is questionable whether law enforcement authorities are capable of responding to those threats. For example, it is not clear that law enforcement authorities have the capability to respond to the “military methods and equipment” of terrorists; law enforcement authorities may be unable to physically arrest members of terrorist groups.⁷⁵ A good illustration of the practical difficulty of taking law enforcement action against a suspected terrorist is the deadly attempt to arrest Ali Qaed Senyan al-Harhi in Yemen. Al Harhi was a member of al Qaeda in Yemen who was believed to have been involved in the terrorist attack against *U.S.S. Cole* in October 2000. Yemeni security forces suffered eighteen deaths and dozens more wounded in their

⁷¹ *Ibid.*, 16-17.

⁷² *Ibid.*, 17.

⁷³ McAlea, “Post-Westphalian Crime,” 126.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

attempt to arrest him.⁷⁶ Later, al Harthi was dealt with by military action, quite possibly because earlier law enforcement measures were not an effective response. He was killed by a Hellfire missile launched by a Predator drone operated by the U.S. Central Intelligence Agency. Thus, there may continue to be practical limits on the ability of a law enforcement model to effectively respond to contemporary terrorism.

STRICT RULES

The strict rules of evidence in a liberal-democratic criminal justice system also present significant challenges in the struggle against terrorism. The criminal justice systems of many states, including Canada, demand high standards for the admissibility of evidence.⁷⁷ Thus, the prosecution of terrorists is challenged by issues of witness availability, the requirement to disclose evidence, and establishing offences “beyond a reasonable doubt.”

The first challenge is the availability of evidence to establish the case for the prosecution. Physical evidence that is required to establish a terrorism-related offence may be located in other countries, or even destroyed. Similarly, witnesses may be missing or dead, or may be located in other countries. Therefore, crucial evidence may be beyond the reach of law enforcement authorities. As a consequence, prosecutors will be forced to make a case based on “hearsay” evidence. One example of hearsay evidence is the statements of witnesses that are introduced without the witness being called to

⁷⁶“CIA ‘Killed al-Qaeda suspects’ in Yemen,” *BBC News*, 5 November, 2002; on-line; available from http://news.bbc.co.uk/2/hi/middle_east/2402479.stm; Internet; accessed 14 November 2007. “Missile Takes Out Cole Attack Suspect,” *USATODAY.com*, November 5, 2002; on-line; available from http://www.usatoday.com/news/world/2002-11-04-yemen-side-usat_x.htm; Internet; accessed 14 November 2007.

⁷⁷ McAlea, “Post-Westphalian Crime,” 129.

testify in the courts. In Canada, hearsay evidence may not be admissible in a court, on the basis that it is not consistent with the adversarial system of justice: a trial “rests upon the calling of witnesses, who give their evidence under oath, whose demeanour can be observed, and who are subject to cross-examination.”⁷⁸ Thus, to be most effective, law enforcement authorities in Canada must be able to identify witnesses and arrange for them to testify in Canadian courts. This may be difficult to accomplish in cases of terrorist activity that occur in a variety of countries far from Canada.

The second challenge related to the rules of evidence is the obligations for disclosure that are placed upon prosecutors. For example, in Canada, under *Stinchcombe*, prosecutors must disclose to the accused all relevant information that they possess.⁷⁹ This duty of disclosure exists to ensure “full answer and defence” for an individual who is accused of committing a criminal offence. The disclosure requirement will be particularly difficult in the context of terrorism because of the sensitivity of the intelligence apparatus that is often associated with countering the threat of terrorism. Governments may be unwilling to reveal sensitive intelligence sources, or other means and methods of their intelligence gathering capabilities.⁸⁰ Governments take this sensitivity very seriously. In the past, they have often been prepared to accept an unsuccessful prosecution of a terrorist case in order to protect intelligence sources: “[e]ven before 9/11, governments often preferred covert surveillance or infiltration of

⁷⁸ David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto, Irwin Law, 2005), 96.

⁷⁹ *Ibid.*, 236; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; available from <http://scc.lexum.umontreal.ca/en/1991/1991rcs3-326/1991rcs3-326.html>; Internet; accessed 10 April 2008.

⁸⁰ McAlea, “Post-Westphalian Crime,” 130.

terrorist groups to criminal charges and prosecutions.”⁸¹ The protection of sensitive intelligence becomes an even bigger issue in circumstances where one government has information that was provided by another government, because it may be obliged to keep the information secret under the inter-governmental information-sharing arrangement. That said, some governments have enacted anti-terrorism legislation that allows “restriction on the disclosure of relevant evidence to the accused in an attempt to protect intelligence sources and other national security information.”⁸² For example, following September 11, 2001, Canada amended the *Canada Evidence Act* to take into account the possibility that disclosure requirements might “threaten another country’s vital interests or jeopardize intelligence networks.”⁸³ Section 38 of the *Canada Evidence Act* provides the mechanism for a court to prohibit the disclosure of information in a trial that would be “injurious to international relations or national defence or national security.”⁸⁴

The third challenge that the law enforcement model faces as a result of the liberal-democratic criminal justice system is the standard of proof placed on prosecutors. In Canada, for example, prosecutors must “prove the guilt of the accused beyond a reasonable doubt.”⁸⁵ This standard is crucial to the notion that individuals charged with crimes are innocent until proved guilty. It is not enough for prosecutors to prove that the

⁸¹ Kent Roach, “The Criminal Law and Terrorism,” in *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), 145.

⁸² *Ibid.*, 141.

⁸³ Department of Justice Canada, “Background—Highlights of Anti-Terrorism Act.”

⁸⁴ *Canada Evidence Act*, R.S.C 1985, c. C-5, as am. by S.C. 2001, c. 41; available from <http://laws.justice.gc.ca/en/showtdm/cs/C-5>; Internet; accessed 6 April 2008.

⁸⁵ Paciocco and Lee Stuesser, *The Law of Evidence*, 482.

accused terrorist is “probably guilty” or “likely guilty.”⁸⁶ Obviously, this is a strict standard to meet. The International Committee for the Red Cross has recognized that this is an issue that is raised by those that are critical of the law enforcement paradigm’s ability to respond to terrorism: “[i]t is said that standards of evidence required in criminal proceedings would not allow the detention or trial of a majority of persons suspected of terrorist acts.”⁸⁷ However, any suggestion that the standard of proof should be modified to better suit the purposes of counter-terrorism would be misguided and unfortunate. Indeed, the requirement of proof beyond a reasonable doubt is fundamental to the criminal justice system. This is acknowledged by the British Columbia Supreme Court in the *Air India* bombing case. The court made the following comments about the importance of the standard of proof beyond a reasonable doubt:

I began by describing the horrific nature of these cruel acts of terrorism, acts which cry out for justice. Justice is not achieved, however, if persons are convicted on anything less than the requisite standard of proof beyond a reasonable doubt. Despite what appears to have been the best and most earnest efforts by the police and the Crown, the evidence has fallen markedly short of that standard.⁸⁸

Thus the standard of proof must be adhered to in the interests of justice even in the cruelest and most horrific case of terrorism.

The case of Omar Khadr may serve to illustrate some of the problems associated with a law enforcement response to terrorism. Khadr is a Canadian citizen who has been detained by U.S. authorities in Guantanamo Bay, Cuba, for the last six years. He

⁸⁶ *Ibid.*, 483.

⁸⁷ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [March 2004],” 232.

⁸⁸ *R. v. Malik*, [2005] B.C.J. No. 521 (S.C.) (QL); available from <http://www.courts.gov.bc.ca/Jdb-txt/SC/05/03/2005BCSC0350.htm>; Internet; accessed 20 April 2008.

currently faces prosecution before a U.S. military commission. He was seized by U.S. forces in Afghanistan in 2002. It is alleged that Khadr killed a U.S. soldier in a firefight. The U.S. government has taken the position that Khadr was not a lawful combatant at the time, and he is therefore not entitled to combatant immunity under IHL. One of the charges against him is “murder in violation of the laws of war.”⁸⁹

Khadr still remains in U.S. custody. However, it is interesting to consider the challenges that would face Canadian prosecutors if they were faced with a similar case. Such a case could illustrate the challenges surrounding witness availability, disclosure requirements, and the burden of proof beyond a reasonable doubt.

To start, Canadian law enforcement authorities would be at an immediate disadvantage in light of the fact that the alleged crimes were committed in Afghanistan in the midst of an armed conflict. It would likely be very difficult to investigate the crime scene and collect all of the physical evidence that would be necessary to establish an offence in the criminal courts. Moreover, it would likely be difficult to identify and interview all the witnesses. Prosecutors would have to rely on the cooperation of U.S. and Afghan authorities to construct the case against Khadr. Significantly, it appears that the U.S. authorities are sensitive to the disclosure of evidence in the case.⁹⁰ It is possible that Canadian authorities would have difficulty obtaining information from the U.S.

⁸⁹ Michelle Shephard, "Soldier hurt in Khadr capture in 'shock' over leaked report; Ex-U.S. Green Beret believed 15-year-old Canadian was only survivor of attack, contrary to new claim," *Toronto Star*, 7 February 2008; available from <http://proquest.umi.com/pqdweb?did=1425049611&sid=6&Fmt=3&clientId=1711&RQT=309&VName=PQD>; Internet, accessed 21 February 2008.

⁹⁰ Steven Edwards, "Khadr Interrogator Court-Martialed for Abuse," *Ottawa Citizen*, 14 March 2008; Isabel Teotonio, "Defence to Target Khadr Interrogation," *thestar.com*, 13 March 2008; available from <http://www.thestar.com/printArticle/345323>; Internet; accessed 13 March 2008; Omar El Akkad, "Khadr's Lawyers Granted Access to More Information," *Globe and Mail*, 15 March 2008.

Recent developments in the Khadr case may ultimately illustrate the difficulties of satisfying the standard of proof beyond a reasonable doubt. The U.S. government position has been that Khadr killed the U.S. soldier by throwing a hand grenade. However, it appears that no one witnessed Khadr throw the grenade, so the evidence against him would be circumstantial. Recent news reports have questioned the cogency of this circumstantial evidence. One report identifies the possibility that another fighter threw the grenade. A more recent report identifies the possibility that the U.S. soldier was killed accidentally by a grenade that was thrown by another U.S. soldier.⁹¹ Thus, this case may highlight the difficulty of the reliability of witness testimony, which may be affected by what Clausewitz has referred to as the “fog and friction” of combat. It may also highlight the difficulty for prosecutors of meeting the standard of proof with this circumstantial evidence and a possible defence by Khadr. It remains to be seen whether U.S. prosecutors will be able to prove beyond a reasonable doubt that Khadr threw the grenade. Undoubtedly, Canadian prosecutors would face the same challenges with a similar case.

Obviously, the most problematic cases for the prosecution will be cases where the events occur outside Canada and in the context of an armed conflict. However, problems

⁹¹ Again, it appears that no one witnessed Khadr throw the grenade. One eye-witness had claimed that Khadr was the only survivor in a compound in Afghanistan where the fighting took place. It is on that basis that it has been alleged that Khadr was the one who killed the soldier—as he was the only one alive to do so. However, the claims of a second witness have recently been revealed by news reports. The evidence of the second witness suggests that another fighter was also alive in the compound at the time the grenade was thrown. Although the second witness did not see Khadr throw the grenade, he nonetheless concludes that Khadr was the one who threw it on the basis of “his position and the trajectory of the grenade.” Even more recently, it was revealed that other U.S. soldiers were throwing grenades at the time of the firefight, which raises the possibility that the soldier Khadr was accused of killing was killed by “friendly fire.” This could provide Khadr with the argument that he is not the one who threw the grenade. Shephard, “Soldier hurt in Khadr capture in 'shock' over leaked report...;” Michelle Shephard, “Defence Chips Away at Military Prosecution,” *thestar.com*, 12 April 2008; available from <http://www.thestar.com/printArticle/413807>; Internet; accessed 12 March 2008.

remain for events of terrorism that occur within Canada as well. Canada's ability to respond to domestic terrorism through the law enforcement model has not truly been tested so far. A key case, involving what was initially referred to as the "Toronto 18," is ongoing. It is has been alleged that the group of eighteen, inspired by al Qaeda, was plotting to attack the Parliament buildings and kill Canada's Prime Minister. The suspects were arrested in the summer of 2006.⁹² Crown prosecutors have since stayed the charges against seven of the accused.⁹³ The reasons why the prosecutors have stayed charges against the individuals have not been explained to the public. However, there is some public speculation that prosecutors do not have sufficient evidence for certain aspects of the case. The reaction of Stribopoulos, a law professor, to the developments in this case is interesting to note: "[i]t's not uncommon with the passage of time, with the ability of defence to gain access to full disclosure, with the testing of evidence at a preliminary inquiry, for the truth to emerge that the Crown's case isn't quite as strong as originally thought."⁹⁴ It is entirely possible that there is insufficient evidence to establish offences in this case. Another possibility is that the conduct of the accused individuals

⁹² Isabel Teotonio, "Give us a trial or let us go,' terror suspect pleads; Mississauga man behind bars for nearly 19 months wants to hear evidence in case against 'Toronto 18,'" *Toronto Star*, 26 December 2007; available from <http://proquest.umi.com/pqdweb?did=1403648091&sid=2&Fmt=3&clientId=1711&RQT=309&VName=PQD>; Internet; accessed 21 February 2008; Melissa Leong, "Release raises doubts about terrorism case; Eldest of 18 suspects granted bail after 17 months in jail," *National Post*, 7 November 2007; available from <http://proquest.umi.com/pqdweb?did=1380524891&sid=2&Fmt=3&clientId=1711&RQT=309&VName=PQD>; Internet; accessed 21 February 2008.

⁹³ Ian MacLeod, "Toronto Terroris

does not amount to a terrorist-related crime under Canadian law. David Charters, who advises Prime Minister Harper's Cabinet on national security issues, has also publicly speculated that only two or three of the accused will be "convicted of serious crimes." Charters has warned that, "[t]o anyone the least bit familiar with security, their so-called 'plans' were scarcely credible... While not calling into question their desire to do something dramatic, it is clear their reach exceeded their grasp."⁹⁵ Again, it remains to be seen whether Canadian prosecutors will be successful in securing convictions in these cases, under the law enforcement paradigm.

As has been illustrated, the characteristics of Canada's liberal-democratic criminal justice system challenge the effectiveness of a law enforcement response to terrorism. Certainly, those characteristics should not be abandoned because of the threat of terrorism. The rules of evidence are a cornerstone of democracy and the rule of law. To disregard the liberal-democratic process would represent a step backwards in the struggle against terrorism.

Canadian officials, cognizant of the limitations of the criminal justice system, have looked to Canada's immigration system as another tool in the struggle against terrorism. Canada's immigration laws provide significant—and controversial—measures to enable Canada to counter terrorist threats. Indeed, Roach suggests that immigration law is "perhaps the prime instrument to counter international terrorism since 9/11."⁹⁶ According to Roach, immigration measures are attractive to Canadian officials because

⁹⁵ Ian MacLeod, "Toronto Terrorism Suspects 'Wannabe Jihadists.'"

⁹⁶ Roach, "The Criminal Law and Terrorism," 142. See also, Roach, "Canada's Response to Terrorism," 521: "[i]mmigration law has been attractive to the authorities because it allows procedural shortcuts and a degree of secrecy that would not be tolerated under even an expanded criminal law."

the rules are less strict than those of the criminal justice system. Immigration measures employ “what in criminal law would be seen as problematic status-based offences and standards of proof well below the criminal law standard of proof beyond a reasonable doubt.”⁹⁷ As well, the immigration law regime provides a mechanism for protecting sensitive information and intelligence gathering methods with “closed hearings based on evidence not disclosed to the non-citizen.”⁹⁸ Thus, Canadian authorities have the option of using immigration law measures to avoid some of the difficulties of the liberal-democratic criminal justice system.

A key measure in the immigration law realm is the security certificate process, which has existed since 1978. Since 1991, twenty eight security certificates have been issued. Six security certificates have been issued since September 11, 2001.⁹⁹ A security certificate is a means for Canadian authorities to remove permanent residents and foreign nationals from Canada where those individuals pose a threat to Canada or Canadians. The Ministers of Public Safety and Citizenship and Immigration may issue a warrant to arrest and detain a person named in a security certificate.¹⁰⁰ It is possible for an individual to be retained in custody until such time as he or she is removed from Canada. However, it is also possible for a Federal Court judge to release the individual under the

⁹⁷ Roach, “The Criminal Law and Terrorism,” 142.

⁹⁸ *Ibid.*, 143.

⁹⁹ House of Commons, Standing Committee on Public Safety and National Security, “Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues,” (Ottawa: House of Commons, 2007); available from http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2798914/sterrp07/06_Honour_Eng.htm; Internet; accessed 2 March 2008. Purdy, “Canada’s Counterterrorism Policy,” 123.

¹⁰⁰ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as am. by S.C. 2008, c. 3, ss. 76-82.4; available from <http://laws.justice.gc.ca/en/showtdm/cs/1-2.5>; Internet; accessed 6 April 2008.

judicial review process set out in the legislation.¹⁰¹ Obviously, security certificates are powerful tools for Canadian authorities to use in the struggle against terrorism.¹⁰²

The case of Mohamed Harkat is one example of the use of immigration law measures to respond to threats of terrorism. Harkat was arrested in 2002 under a security certificate that alleged that he was a member of al Qaeda. He remained in detention until 2006, when he was released under conditions that constitute “one of the strictest bail conditions in Canadian history.”¹⁰³

So, governments may invoke a law enforcement response to terrorism. This is a natural response in light of the fact that terrorist acts are crimes. However, the law enforcement model may lack preventative or deterrent effects. As well, the rules of evidence of liberal-democratic criminal justice systems—although crucial to a fair and just system typical of democracy and the rule of law—will not always be fully responsive to terrorist threats. It is for this reason that governments, including Canada, also use the immigration law process as part of a multi-faceted response to terrorism. The benefit of immigration measures is that they may compensate for the challenges associated with law enforcement measures.

¹⁰¹ *Ibid.*

¹⁰² The security certificate process was recently scrutinized by the courts, and was found to be unsatisfactory. On February 23, 2007, in the case of *Charkaoui v. Canada*, the Supreme Court of Canada ruled that the security certificate process violated the *Canadian Charter of Rights and Freedoms*. The court held that the use of closed proceedings in the process, which excluded the person subject to the security certificate as well as his or her lawyer, offended the *Charter* on the basis that it was not consistent with the right to life, liberty and security of the person. The court gave Parliament one year to amend the process's enabling legislation to make it consistent with the *Charter*: see *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350; available from <http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html>; Internet; accessed 10 April 2008. New legislation was enacted in early 2008.

¹⁰³ Andrew Duffy, “Ottawa Terror Suspect Released From Jail,” *Ottawa Citizen*, 2 February 2008.

THE CHALLENGES OF TRANSNATIONALITY

As discussed earlier, contemporary terrorism is transnational. Terrorists are autonomous from states, and operate across and around state borders. This transnationality presents challenges to governments that wish to invoke law enforcement mechanisms against terrorism, because a government's law enforcement authority and capability may often be limited beyond its own borders. Transnationality also poses challenges to governments that wish to invoke a military response to terrorism, because the IHL that governs military action in situations of armed conflict is not well-suited to transnational or non-state actors.

LAW ENFORCEMENT

It is difficult for governments to apply their law enforcement mechanisms beyond their own borders. As a starting point, the effectiveness of a law enforcement model is fundamentally tied to the jurisdiction of the law enforcement authorities. Typically, the jurisdiction of law enforcement authorities corresponds with the territorial limits of their governing states. One state cannot exercise its law enforcement powers in the territory of another state, absent the express permission of the other state.¹⁰⁴ Transnational terrorists, with their structure of autonomous cells located in many different countries, may not fall under the jurisdiction of one government's law enforcement system. For example, terrorists who threaten Canada may not be present in Canada, therefore making it more difficult for Canada to arrest or detain a suspect. If the terrorists are present in another state, then Canada will require the assistance of the other state for the investigation, apprehension and ultimate prosecution. Cooperation of this kind may be difficult. As

¹⁰⁴ Dixon, *Textbook on International Law*, 132-133, citing the Permanent Court of International Justice in the *Lotus Case* (1927), P.C.I.J. Ser. A. No 10.

Schmitt notes, “the complexity of coordinating law enforcement efforts in the face of widely divergent capabilities, domestic law and national attitudes [of different countries becomes] daunting.”¹⁰⁵ The cooperation of the other state may not be forthcoming for two reasons. First, the terrorists may be harboured and supported by the other state. Ruys and Verhoeven note that states may be complicit in the activities of terrorists: “it is clear that law enforcement will not always be a viable option, especially in the case of states providing support to private groups carrying out attack abroad.”¹⁰⁶ Of course, under United Nations Security Council Resolution 1373, states must refrain from supporting terrorism.¹⁰⁷ Additionally, as indicated earlier, the majority of the sectoral or piecemeal conventions or protocols that address terrorism require states to either prosecute or extradite terrorists within their jurisdictions.¹⁰⁸ Regardless of these obligations, there is always the risk that a state will be uncooperative. Second, the other state may not be capable of assisting Canada, even if it is willing to.¹⁰⁹ The state may not

¹⁰⁵ Schmitt, “Counter-Terrorism and the Use of Force in International Law,” 29.

¹⁰⁶ Tom Ruys and Sten Verhoeven, “Attacks by Private Actors and the Right of Self-Defence,” *Journal of Conflict and Security Law* 10, no. 3 (2005): 290; <http://proquest.umi.com/pqdweb?index=1&did=957453641&SrchMode=3&sid=1&Fmt=6&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1208478695&clientId=1711&aid=1>; Internet; accessed 13 December 2007. International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [March 2004],” 232.

¹⁰⁷ United Nations Security Council Resolution 1373, U.N. Doc. S/RES/1373 (2001); available from <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>; Internet; accessed 10 April 2008.

¹⁰⁸ United Nations Office on Drugs and Crime, “United Nations Counter-Terrorism Conventions;” <http://www.unodc.org/unodc/en/terrorism/conventions.html>; Internet, accessed 14 April 2008.

¹⁰⁹ David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” *The European Journal of International Law* 16, no. 2 (2005): 179; <http://proquest.umi.com/pqdweb?index=9&did=857800841&SrchMode=3&sid=1&Fmt=6&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1200101418&clientId=1711&aid=1>; Internet; accessed 13 December 2007.

be capable of assisting in arrest and apprehension because the terrorists may reside in areas within their territory but beyond their effective control. A real-life example of this is the case of al Harthi, the al Qaeda member (referred to earlier) who was killed by the Predator strike in Yemen. It has been observed that the Yemeni government did not have effective control over the area in which al Harthi stayed.¹¹⁰

Ultimately, invoking a law enforcement response to transnational terrorism presents significant challenges, on the basis that a state's authority and capability is very limited outside its own borders. Therefore, states that wish to exercise law enforcement measures in response to transnational terrorism must rely on the cooperation of other states. That cooperation may not be granted.

INTERNATIONAL HUMANITARIAN LAW

Transnationality also poses challenges to a military response to terrorism, as IHL, which governs the armed conflict model, is not well suited to non-state actors.

Jus Ad Bellum

In order to invoke a military response to terrorism, the tenets of *jus ad bellum* must first be satisfied. *Jus ad bellum* governs the right to resort to the use of force under international law. It is meant to regulate the conduct of hostilities between states. The difficulty with conducting this analysis in the context of terrorism is that the terrorist actors will often be non-state entities. The attacks of September 11, for example, were

¹¹⁰ "...American counterterrorism officials have expressed frustration with Yemen's apparent inability to exert much control over its remote and largely lawless border region with Saudi Arabia, which the Americans say serves the country's main sanctuary for Al Qaeda." James Risen and Judith Miller, "Threats and Responses: Hunt for Suspects; C.I.A. is Reported to Kill a Leader of Qaeda in Yemen," *New York Times*, 5 November 2002; available from <http://query.nytimes.com/gst/fullpage.html?res=9E07E0D7123EF936A35752C1A9649C8B63>; Internet; accessed 21 April 2008.

conducted by al Qaeda. It therefore becomes difficult to translate the tenets of *jus ad bellum* to transnational, non-state terrorism.

There is a general prohibition in international law against the use of force. Article 2(4) of the *Charter of the United Nations* provides that “states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”¹¹¹ That said, a state may use force under the authority of a United Nations Security Council resolution.¹¹² Of course, states will also have the right to use force in self-defence. This is recognized in article 51 of the *Charter of the United Nations* and customary international law.¹¹³ Article 51 recognizes the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”¹¹⁴ It is clear, then, that a state may use force to defend itself from an armed attack from another state. In the context of the struggle against terrorism, however, the question that follows is whether “an ‘armed attack’ can be carried out by a terrorist group.”¹¹⁵ In other words, may states exercise self-defence against non-state, terrorist actors?¹¹⁶ Ruys and Verhoeven note that article 51 “has traditionally been interpreted as excluding measures of self-defence against private attacks, unless a certain degree of state involvement could be inferred.”¹¹⁷ Whether or not a state may use force

¹¹¹ United Nations Charter, article 2(4).

¹¹² *Ibid.*, article 2(7).

¹¹³ Byers, *War Law: Understanding International Law and Armed Conflict*, 56.

¹¹⁴ United Nations Charter, article 51.

¹¹⁵ Schmitt, “Counter-Terrorism and the Use of Force in International Law,” 25.

¹¹⁶ *Ibid.*, 25.

¹¹⁷ Ruys and Verhoeven, “Attacks by Private Actors and the Right of Self-Defence,” 290.

in self-defence against non-state actors remains a matter of some debate.¹¹⁸ That said, Schmitt argues that states do have the authority to exercise self-defence against non-state actors under article 51. In support of his conclusion, Schmitt points to the wording of article 2(4) of the *UN Charter*, which restricts the use of force by “states.” Article 51 differs in its wording: there is no requirement that the armed attack be committed by a state.¹¹⁹ Ultimately, Schmitt argues that “[i]t would make no sense to limit the authorization to attacks by States because at the time the Charter was drafted, that was the greatest threat.”¹²⁰ Thus, a broad interpretation that takes into account the realities of present-day threats is required to permit states to use force in self-defence against non-state actors.

The U.S.-led military response to September 11 serves as a good illustration of the complexities associated with *jus ad bellum* in the struggle against terrorism. Ultimately, the initial legal basis for the military intervention in Afghanistan under *Operation Enduring Freedom* is rooted in self-defence. This legal basis was premised on the fact that the Taliban regime permitted the al Qaeda organization to use Afghanistan as a base of operations.¹²¹ As Byers notes, “the right of self-defence now includes military responses against countries that willingly harbour or support terrorist groups, provided

¹¹⁸ *Ibid.*, 319: “self-defence against private attacks has been a controversial issue ever since the inception of the UN Charter. In recent years, shifts in state practice, security doctrines and legal literature seem to support a loosening of the conditions hereof. The exact nature of these conditions nevertheless continues to be governed by a great amount of uncertainty. In the present study, the authors have argued that self-defence against private attacks is lawful either when the attack can be attributed to a state, or (in the absence of state attributability) whenever a state is substantially involved in the armed acts.”

¹¹⁹ Schmitt, “Counter-Terrorism and the Use of Force in International Law,” 25-26.

¹²⁰ *Ibid.*, 26.

¹²¹ Byers, *War Law: Understanding International Law and Armed Conflict*, 66.

that the terrorists have already struck the responding state.”¹²² Following this logic, under the right of self-defence, the U.S. could use force against the Taliban in Afghanistan in response to the September 11 attacks by al Qaeda. Because NATO invoked the collective self-defence provisions of the 1949 North Atlantic Treaty, Canada was justified in its military contribution to the U.S. *Operation Enduring Freedom*.¹²³ Therefore, Canada’s authority for its initial operations in Afghanistan is collective self-defense.

Of course, another sound basis for a state to use force in international law is an authorization by the UN Security Council. Certainly, in the case of Afghanistan, the UN Security Council passed Resolution 1368 on September 12, 2001, which condemned the attacks on September 11, and characterized them, “like any act of international terrorism, as a threat to international peace and security.” Resolution 1368 also affirmed “the inherent right of individual or collective self-defence” under Article 51 of the UN Charter.¹²⁴ Resolution 1373, which was passed on September 28, 2001, contained the same language.¹²⁵ Soon after, the Security Council passed Resolution 1386, which authorized the ISAF mission.¹²⁶

¹²² *Ibid.*, 67.

¹²³ North Atlantic Treaty, article 5; available from <http://www.nato.int/dovu/basicxt/treaty.htm>; Internet; accessed 13 April 2008; article 5: “The Parties agree that an armed conflict against one or more of them in Europe or North America shall be considered an attack against them all....”

¹²⁴ United Nations Security Council Resolution 1368.

¹²⁵ United Nations Security Council Resolution 1373, U.N. Doc. S/RES/1373 (2001); available from <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>; Internet; accessed 10 April 2008.

¹²⁶ United Nations Security Council Resolution 1386, U.N. Doc. S/RES/1386 (2001); available from <http://daccessdds.un.org/doc/UNDOC/GEN/N01/708/55/PDF/N0170855.pdf?OpenElement>; Internet; accessed 10 April 2008.

It is interesting to note that none of the resolutions that were passed by the Security Council in the period following September 11, 2001, provided an explicit authorization for the use of force against Afghanistan. That said, the Security Council reaffirmed the right of self-defence on two separate occasions. As well, it is significant that the Security Council did not condemn the use of force after the fact.¹²⁷ As Schmitt notes, “there has been *de minimus* controversy about the lawfulness of the operations conducted within Afghanistan under the *jus as bellum*.”¹²⁸ It appears that the overall consensus of the international legal community is that the use of force was justified.

A third legal basis for the more recent operations in Afghanistan is the consent of the government of Afghanistan. As Gaja notes, the new government of Afghanistan provided its consent to the military operations in its territory: “[o]nce a new government came into being in Afghanistan, the continuation of the *Operation Enduring Freedom* could be viewed as lawful on the basis of that Government’s consent.”¹²⁹

As indicated at the outset, the two paradigms of law enforcement and military action sometimes meet and interact in the struggle against terrorism. This interface occurs in the *jus ad bellum* aspect of the struggle against terrorism, and it occurs in two ways. First, the authority of governments to use force under *jus ad bellum* will be affected by the availability and adequacy of a law enforcement response. Second, the extent of any force will also depend on the law enforcement response.

¹²⁷ Schmitt, “Counter-Terrorism and the Use of Force in International Law,” 8-9.

¹²⁸ *Ibid.*, 11.

¹²⁹

As indicated earlier, states will be justified in using force in self-defence. This right of self-defence applies in respect of an actual armed attack. Moreover, it also applies in respect of imminent attacks. The test for imminent or anticipatory self-defence originates from *The Caroline* case, which essentially provides that anticipatory self-defence is permitted if it is necessary and proportionate.¹³⁰ Dixon summarizes the test succinctly: use of force will be justified if “it is made in response to an immediate and pressing threat, which could not be avoided by alternative measures and if the force used to remove that threat [is] proportional to the danger posed.”¹³¹ The necessity to use force will be satisfied “when no other reasonable options remain.”¹³² The force used will be proportionate when it is “no more than necessary to defeat the armed attack and remove the threat.”¹³³ So, the possibility of law enforcement is significant for the anticipatory self-defence test under *jus ad bellum*.

The determination of whether or not a state may use force in self defence against a terrorist threat may depend on the availability and adequacy of a law enforcement response. In particular, the adequacy of a law enforcement response is relevant for determining whether military action is necessary and proportionate. If law enforcement

¹³⁰ The test in *The Caroline* case was the result of an exchange of correspondence between Daniel Webster, the Secretary of State for the U.S. and Lord Ashburton, a British Minister. Insurgents based in New York had used *The Caroline*, a steamboat, to bring arms and insurgents into Canada. In response, the British forces entered the U.S. and destroyed the steamboat. In his correspondence, Webster stated: “Undoubtedly, it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that self-defence is instant, overwhelming, leaving no choice of means, and no moment of deliberation.” Byers, *War Law: Understanding International Law and Armed Conflict*, 53-54.

¹³¹ Dixon, *Textbook on International Law* 295.

¹³² Schmitt, “Counter-Terrorism and the Use of Force in International Law,” 19.

¹³³ *Ibid.*, 20.

action is sufficient to address the terrorist threat, then military action is not necessary and will not be justified as a matter of self-defence. As Schmitt notes, “the question is generally whether law enforcement operations are likely sufficient to forestall continuation of the armed attack [by terrorist actors].”¹³⁴ Schmitt explains further:

...the State may only act against the terrorists if classic law enforcement reasonably appears unlikely to net those expected to conduct further attacks *before* they do so. One must be careful here. There is no requirement for an expectation that law enforcement will fail; rather, the requirement is that success not be expected to prove timely enough to head off a continuation of the terrorist campaign. Of course, if no further attacks are anticipated, the necessity principle would preclude resort to armed force at all, since self-defence contains no retributive element.¹³⁵

Like necessity, proportionality is also affected by the prospect of law enforcement activities. In other words, the amount of force that may be used in military engagements will be affected by any law enforcement measures that have been or will be undertaken. As Schmitt notes, “[i]n counter-terrorism operations, law enforcement and military force can act synergistically, thereby reducing the level of force that needs to be applied.”¹³⁶ Thus, the availability and adequacy of a law enforcement response is also relevant for determining whether military action will be proportionate. Thus there is a synergy between the two paradigms of military action and law enforcement in *jus ad bellum*.

In sum, the tenets of *jus ad bellum* do not match-up easily with the struggle against non-state terrorists. There has been some debate about whether or not a non-state actor can conduct an “armed attack” that would trigger the right of self-defence under article 51 of the United Nations Charter. However, the scale and effects of the attacks on

¹³⁴ *Ibid.*, 19-20.

¹³⁵ *Ibid.*, 28.

¹³⁶ *Ibid.*, 29.

September 11 demand that the right of self-defence be interpreted in a way that allows states to respond to terrorist attacks as a matter of self-defence. As well, it is permissible to use force in self-defence against a state that harbours or supports the non-state terrorist actor.

Characterizing the Conflict

There is some debate and confusion about how to characterize a conflict in the struggle against terrorism. This is important for determining the extent to which IHL and international human rights law will apply. A conflict can be characterized one of two ways: as an international armed conflict (i.e., between states), or as a non-international armed conflict. States may also experience situations of internal disturbance and tensions, which will not amount to an armed conflict. Only in an international armed conflict does the full body of IHL apply. For example, the four Geneva Conventions and Additional Protocol I only apply to international armed conflicts.¹³⁷ Human rights law applies to internal disturbances and tensions. In non-international armed conflicts, IHL and human rights law may both apply,¹³⁸ although the treaty law that provides for IHL in non-international armed conflict is “rudimentary.”¹³⁹ The interaction between IHL and human rights law is discussed in the next chapter.

¹³⁷ Geneva Convention (III) Relative to the Treatment of Prisoners of War, 1949, article 2. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, (Protocol I), 1977, article 1(3).

¹³⁸ Kenneth Watkin, "Humanitarian Law and 21st-Century Conflict: Three Block Wars, Terrorism, and Complex Security Situations," in *Testing the Boundaries of International Humanitarian Law* (London : British Institute of International and Comparative Law, 2006), 6, 25.

¹³⁹ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts,” *International Review of the Red Cross* 89, no. 867 (September 2007): 742; [journal on-line]; available from <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/review-867-p719>; Internet; accessed 2 March 2008.

How should the conflict between a state and a non-state terrorist organization (for example, the U.S. and al Qaeda) be characterized? It is clear that there is a difference between a state and a non-state actor. As Wippman notes, it is difficult to characterize a “global conflict with a transnational non-state actor” as an armed conflict between states.¹⁴⁰ However, Watkin cautions that the view that an “international armed conflict only occurs between states has been further eroded in the face of the post-11 September campaign against terrorism.”¹⁴¹ Although there may be confusion and debate, the majority view appears to be that a conflict between a state and a non-state terrorist group such as al Qaeda is not an international armed conflict, because the terrorist group is not a state entity.¹⁴² As Kretzmer notes, “[a]n armed conflict between a state and a transnational terrorist group is not an international armed conflict.”¹⁴³

What remains to be determined, then, is whether or not the conflict can be characterized as a non-international armed conflict. Again, there is debate about whether the conflict against non-state terrorist groups should be characterized as non-international—particularly where the military action takes place outside the territory of

¹⁴⁰ David Wippman, “Introduction: Do New Wars Call For New Laws?” in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsey, NY: Transnational Publishers, 2005), 10.

¹⁴¹ Kenneth Watkin, “Combatants, Unprivileged Belligerents and Conflict in the 21st Century: Background Paper Prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, June 27-29, 2003,” 13 [on-line]; available from <http://www.ihlresearch.org/ihl/pdfs/Session2.pdf>; Internet; accessed 10 April 2008.

¹⁴² Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” 202. International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [September 2007],” 725.

¹⁴³ Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” 202. See also International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [September 2007],” 725: “IHL does not envisage an international armed conflict between States and non-State armed groups for the simple reason that States have never been willing to accord armed groups the privileges enjoyed by members of regular armies.”

the states that takes the action (e.g., where the U.S. takes military action against terrorists in Afghanistan rather than the U.S.). If a state wages a conflict outside its own territory, then it may be difficult to conceive of it as “non-international.” However, some scholars have argued that the interpretation of a “non-international armed conflict” should be extended to include a conflict “between a state and nonstate actors outside the state’s own territory.”¹⁴⁴

As a result, it is not immediately obvious how a conflict in the context of the campaign against terrorism should be characterized. As indicated, the character of the conflict is important for determining the extent to which IHL and international human rights law apply. Certainly, the conflict in Afghanistan could have been—and was—initially characterized as an international armed conflict, particularly in light of the fact that the Taliban regime was the effective governing authority in Afghanistan at the time.¹⁴⁵ However, once a new government was installed in the Islamic Republic of Afghanistan in 2002, it seems clear that any conflict in Afghanistan lost its international character. Indeed, the International Committee for the Red Cross takes the view that the current conflict between the Afghanistan government, with the support of the coalition, against the remnants of Taliban and al Qaeda is a non-international armed conflict.¹⁴⁶

¹⁴⁴ Peter M. Cullen, "Role of Targeting Killing in the Campaign Against Terror," *JFQ: Joint Forces Quarterly* 48 (2008): 23 [journal online]; available from http://www.ndu.edu/inss/Press/jfq_pages/editions/i48/10.pdf; Internet; accessed 13 December 2007. Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” 191.

¹⁴⁵ Gaja, “Combating Terrorism: Issues of Jus ad Bellum and Jus in Bello...,” 169: “the ensuing conflict [under Operation Enduring Freedom] was in any case an international armed conflict.”

¹⁴⁶ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [September 2007],” 725.

That said, the fact that fighters cross the border between Afghanistan and Pakistan may bewilder that characterization somewhat.

Other military action in a foreign state that is not directed at the foreign state, but is instead directed at a terrorist entity within that state also appears to be a non-international armed conflict. For example, Dworkin argues that “[t]he confrontation between the United States and al Qaeda must therefore be understood as a non-international armed conflict—but one that is being fought not within a single country but on a worldwide battlefield.”¹⁴⁷ As discussed below, non-international armed conflicts introduces additional complexities into the struggle against terrorism.

In summary, the transnational nature of terrorism makes it difficult for governments to invoke a law enforcement response, as their law enforcement powers are very limited outside their territorial boundaries. Transnationality also poses difficulties for a military response under IHL. This is because the existing international legal regime is premised on the notion that armed conflicts occurs between states. However, the reality of the struggle against transnational, non-state terrorism is that it does not resemble the traditional symmetry of state versus state warfare. It is therefore difficult to fit a conflict between a state and a transnational, non-state terrorist actor into this existing legal framework. As Watkin notes, “[a]ttacks by nonstate actors challenge the view of a neat division of armed conflict into the two spheres of international and noninternational.”¹⁴⁸ As a consequence, the law governing the armed conflict model

¹⁴⁷Anthony Dworkin, “Military Necessity and Due Process: The Place of Human Rights in the War on Terror,” in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsey, NY: Transnational Publishers, 2005), 60.

¹⁴⁸ Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,” *The American Journal of International Law* 98, no. 1: 5.

does not match-up well with non-state actors. First, some debate lingers about whether states have a right to use force in self-defence against non-state actor. Second, there is a lack of clarity about how to characterize conflicts between states and non-state terrorist actors. In the end, neither the law enforcement model nor the armed conflict model is fully responsive to the transnational nature of contemporary terrorism.

The two paradigms of law enforcement and military action meet and interact in the context of the right to use force under international law. The availability and adequacy of a law enforcement response to respond to threats of terrorism will affect the test for self-defence under *jus ad bellum*. This is one instance of the interface that may occur between the two paradigms. Another instance is discussed in the next chapter.

THE LIMITATIONS OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law is not abundantly clear on the *jus in bello* aspects of the struggle against terrorism. The tenets of *jus in bello* govern the actual conduct of hostilities. There is a lack of clarity surrounding issues such as how to characterize terrorists and the circumstances under which they may be targeted. As well, there is confusion about the extent of the application of human rights law in conflicts against terrorists.

STATUS OF TERRORISTS

One of the biggest challenges in applying IHL to the context of terrorism is determining the legal status of terrorists. Are they “civilians,” “combatants,” or something else? This characterization has important legal consequences that affect how governments may respond to terrorism. First, this status dictates whether individuals are entitled to participate in hostilities. Only combatants have a right to take a direct part in

hostilities. As well, combatants receive combatant immunity and prisoner of war status.¹⁴⁹ Second, combatant status is relevant for determining the circumstances under which individuals can be targeted.

Under IHL, combatants who are not *hors de combat* may be targeted at any time. Civilians, on the other hand, must be protected. International humanitarian law provides that civilians “shall not be the object of attack”—“unless and for such time as they take a direct part in hostilities.”¹⁵⁰ So, how should terrorists be characterized? Are they “civilians,” who can only be attacked for such time as they take direct part in hostilities? Or, should they be afforded something akin to “combatant” status that would make them liable to be targeted at any time?

Combatants are members of armed forces party to a conflict.¹⁵¹ By definition, non-state terrorists will not be a member of the armed forces party to a conflict. In addition, there are four criteria that determine whether a person is a “lawful” combatant. Those four criteria are:

- “being commanded by a person responsible for his subordinates;”
- “having a fixed distinctive sign recognizable at a distance;”
- “carrying arms openly;” and

¹⁴⁹ Additional Protocol I, article 43(2) and article 44(1).

¹⁵⁰ *Ibid.*, article 51. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 1977, article 13.” The rule that civilians must not be attacked reflects customary international law: A.P.V. Rogers, *Law on the Battlefield*, 2nd ed. (Manchester: Manchester University Press, 2004), 227.

¹⁵¹ Additional Protocol I, article 43.

- “conducting...operations in accordance with the laws and customs of war.”¹⁵²

Terrorists will rarely satisfy these four conditions of combatant status. First, the tactics that they employ do not comply with the laws and customs of war. In particular, terrorists typically attack civilians and civilian objects. Directing violence towards civilians is “a core element of the [terrorist] groups’ *modus operandi*.”¹⁵³ Carr also notes that terrorism is “warfare deliberately waged against civilians with the purpose of destroying their will to support either leaders or policies that the agents of such violence find objectionable.”¹⁵⁴ In fact, al Qaeda, for example, has publicly declared that they will target civilians because they hold them responsible for their governments’ policies.¹⁵⁵

If terrorists may never satisfy the conditions for combatant status, then what are they? Are they “civilians,” or something else? There is an abundance of terms in the arena of international law that may suggest a tendency towards a third category. Those terms include “belligerent,” “non-combatant,” “illegal combatant,” “unprivileged belligerent,” and “unlawful belligerent.”¹⁵⁶ However, when it comes to the right to participate in hostilities and targeting, it appears that there is no third category. For

¹⁵² Geneva Convention (III), article 4.

¹⁵³ Program on Humanitarian Policy and Conflict Research, “Transnationality, War and the Law: A Report...,” 14.

¹⁵⁴ Carr, *The Lessons of Terror: A History of Warfare against Civilians*, 6. See also Watkin, “Combatants, Unprivileged Belligerents and Conflict in the 21st Century...,” 10.

¹⁵⁵ Mohamedou, “Non-Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States,” 4.

¹⁵⁶ Watkin, “Combatants, Unprivileged Belligerents and Conflict in the 21st Century...,” 4. Barbara Falk, “The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III,” *Journal of International Law and International Relations* 3, no. 1: 42.

example, in *The Public Committee against Torture in Israel v. The Government of Israel*,¹⁵⁷ the Israeli High Court of Justice considered whether there is a third category of “unlawful combatant” under IHL. This issue was examined in the context of Israel’s policy of launching preventative strikes against terrorists in Judea, Samaria and the Gaza Strip. The court characterized the conflict as an international armed conflict, and then determined that the terrorists were not combatants, because they did not satisfy the four criteria of combatant status. The court then went on to consider other ways to characterize the terrorists. The position of the Israeli government was that terrorists who fight against Israel should be characterized as “unlawful combatants,” rather than “civilians”. The court refused to recognize this third category:

The question before us is not one of desirable law, rather one of existing law. In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category. That is the case according to the current state of international law, both international treaty law and customary international law....¹⁵⁸

The court ruled that the terrorists were civilians. The effect of the Israeli High Court of Justice ruling is that there are only two categories of individuals: combatants and civilians. The International Committee of the Red Cross would agree with this ruling. That organization has stated that it “does not believe that there is an ‘intermediate’ category between combatants and civilians in international armed conflict.”¹⁵⁹

¹⁵⁷ *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.* H.C.J. 769/02 (December 11, 2005); available from http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm; Internet; accessed 2 January 2008.

¹⁵⁸ *Ibid.*, paragraph 28.

¹⁵⁹ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [March 2004],” 221.

If the classes of individuals under IHL are limited to combatants and civilians only, and if terrorists are not combatants, then they must by default be characterized as civilians.¹⁶⁰ This duality has led commentators to observe that IHL may be premised on an outdated style of warfare: “it seems to be an unsettling outcome under application of the current law that all the enemies in the war in Afghanistan and more generally in the global war on terror are ostensibly ‘civilians.’”¹⁶¹ The absence of a third category suggests that IHL is not well-suited to respond to terrorism.

The dualism of “combatants” and “civilians” is also important for determining prisoner of war status. Combatants are entitled to combatant immunity and prisoner of war status. The most significant implication of prisoner of war status is that the detained combatants must be released after active hostilities have ceased.¹⁶² On the other hand, civilians who take a direct part in hostilities are liable to arrest, detention and prosecution in the criminal justice system. Thus, terrorists, who will ostensibly be characterized as “civilians,” will not be entitled to prisoner of war status. Moreover, they may be prosecuted in the domestic and international criminal courts for any terrorist acts that they have committed.

The notion that conflicts between states and non-state terrorist actors will likely be characterized as non-international armed conflicts adds an additional dimension to the

¹⁶⁰ Michael Newton, “Unlawful Belligerency after September 11: History Revisited and Law Revised,” in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsley, NY: Transnational Publishers, 2005), 104- 105. Newton also notes this duality: “a civilian is anyone who is not a combatant. An unlawful combatant would therefore be legally equated to a ‘civilian.’”

¹⁶¹ Dale Stephens and Michael W. Lewis, “The Law of Armed Conflict—A Contemporary Critique,” *Melbourne Journal of International Law* 3 (2005); [journal on-line]; available from <http://search.austlii.edu.au/au/journals/MelbJIL/2005/3.html>; Internet; accessed 19 December 2007.

¹⁶² Geneva Convention (III), article 118.

analysis. In non-international armed conflicts, there is no provision for “combatant.” As Doswald-Beck notes, “IHL does not formally recognize the status of ‘combatant’ in non-international conflicts.”¹⁶³ There is no combatant immunity for armed groups in non-international armed conflicts.¹⁶⁴ The rationale for this position is that states were unwilling to provide formal recognition to armed insurgents under international law.¹⁶⁵ In sum, as a consequence of the tactics that they employ, and the nature of the conflicts in which they conduct their operations, terrorists will most often be characterized as civilians.

TARGETING

The requirement that terrorists be characterized as civilians results in one of the biggest challenges to any military response to terrorism—particularly in relation to the principle of distinction. Under IHL, civilians must be protected. Parties to an armed conflict must “distinguish between the civilian population and combatants.”¹⁶⁶ If terrorists are ostensibly civilians, then how is it possible for governments to take military action against them? Again, international humanitarian law provides that civilians “shall not be the object of attack”—“unless and for such time as they take a direct part in

¹⁶³ Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?” 889. Rogers, *Law on the Battlefield*, 224: “[t]he law of armed conflict does not allow for combatant or prisoner-of-war status in internal armed conflict unless either belligerency has been recognized or the parties have agreed, or decided, to accord that status or apply the law of armed conflict in full.”

¹⁶⁴ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [September 2007],” 724, 728

¹⁶⁵ Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?” 889.

¹⁶⁶ Additional Protocol I, article 48. This rule reflects customary international law. See Rogers, *Law on the Battlefield*, 8.

hostilities.” This language appears in article 51 of Additional Protocol I and article 13 of Additional Protocol II.¹⁶⁷ The rule that civilians must be protected unless they take a direct part in hostilities reflects customary international law.¹⁶⁸ Thus, civilians may undertake activities that will cause them to lose the protections that would normally be afforded to them under international law.¹⁶⁹

There is no precision surrounding the circumstances under which civilians may be attacked. Indeed, there is a “considerable lack of clarity” surrounding this issue.¹⁷⁰ The lack of clarity exists on both functional and temporal grounds. Functionally, it is often difficult to determine the activities that constitute “taking a direct part in hostilities.” What are “hostilities,” and under what circumstances are they “direct?” What must a combatant be doing in order to satisfy this test? The commentaries of the International Committee of the Red Cross simply states that “‘hostilities’ covers not only the time that the civilian actually make use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.”¹⁷¹ The International Committee of the Red Cross has also provided comments

¹⁶⁷ Additional Protocol I, article 51. Additional Protocol II, article 13. Common article 3 of the Geneva Conventions prohibits violence against [p]ersons taking no active part in hostilities.” Some would argue that there is no difference between an “active” and a “direct” part in hostilities. See International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict: With Commentary* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2006), 4, stating that there is no substantive distinction between “active participation” and “direct participation” in hostilities.

¹⁶⁸ Rogers, *Law on the Battlefield*, 225-227.

¹⁶⁹ Kenneth Watkin, “Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict,” in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsey, NY: Transnational Publishers, 2005), 161: “civilians who participate in hostilities lose their protection, but not their status.”

¹⁷⁰ Watkin, “Combatants, Unprivileged Belligerents and Conflict in the 21st Century...,” 11.

¹⁷¹ International Committee of the Red Cross, “International Humanitarian Law: Treaties and Documents: 1949 Conventions and Additional Protocols, and their Commentaries;” on-line; available from

on the meaning of “direct participation.” According to the Committee, taking a “direct part” involves “acts which by their nature and purpose are intended to cause harm to the personnel and equipment of the armed forces.”¹⁷² Based on this guidance, the extremes may not be difficult to identify. For example, it is not difficult to determine that a civilian employee of a munitions factory is not taking a direct part in hostilities,¹⁷³ while a person who opens fire at opposing armed forces is.¹⁷⁴ But, there is far less clarity about the activities that fall between these extremes.

Temporally, it is difficult to apply the “for such time” requirement of the “direct part in hostilities” test. Under this test, after the passage of “such time,” the civilian cannot be targeted. It is not clear when terrorists lose the protections afforded civilians. Must the terrorists be in the midst of fighting? What if they are between engagements, or have taken a pause? Under one interpretation of this temporal limitation, civilians who have taken part in hostilities in the past, and who may very well take part in the future, are nonetheless protected in moments when they are not taking part in hostilities. This is sometimes referred to as “the ‘revolving door’ of protection.”¹⁷⁵ In its commentary on article 43 of Additional Protocol I, which provides for combatants in international armed

<http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>; Internet; accessed 14 April 2008. See commentary to article 51, at paragraph 1942: <http://icrc.org/ihl.nsf/COM/470-750065?OpenDocument>; Internet; accessed 14 April 2008.

¹⁷² *Ibid.*

¹⁷³ Rogers, *Law on the Battlefield*, 8-9: “[t]aking a direct part in hostilities must be more narrowly construed than making a contribution to the war effort....”

¹⁷⁴ *Ibid.*, 11.

¹⁷⁵ Watkin, “Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict,” 156. See, also, Watkin, “Combatants, Unprivileged Belligerents and Conflict in the 21st Century ...,” 12: “[a] concern has been expressed that it might raise a “revolving door” zone of immunity for civilian participants who could participate in hostilities, drop their weapon and claim they...are privileged civilians.”

conflicts, the International Committee of the Red Cross observes that it would be an unfortunate interpretation of international law if combatants were permitted to shift from combatants to civilians at will in order to gain the protections afforded to civilians. According to the International Committee of the Red Cross, combatants should not be able to “return to their status as civilians and to take up their status as combatants once again, as the situation changes or as military operations require.”¹⁷⁶ Similar arguments could be made in respect of civilians who take a direct part in hostilities. However, without clear guidance, confusion remains. Ultimately, it is difficult to identify when civilians are liable to be targeted under the “for such time as they take a direct part in hostilities” test. As discussed, the test is imprecise “on both temporal and functional grounds.”¹⁷⁷

Recent operations by the Canadian Forces in southern Afghanistan serve to highlight the challenges of applying the test for targeting civilians. The commanding officer of the Canadian battle group that was involved in heavy fighting during the period of August 2006 to February 2007 has observed the difficulty of identifying insurgents who are liable to be targeted. This commanding officer describes how enemy fighters could disengage from a fire fight, disarm, and escape without being targeted:

I had a sub-unit screening my left flank 15-20 kilometres away and their job was to contain the seepage [i.e., prevent the fighters from escaping].... [However, the sub-unit] could just report that 30 fighting age farmers were leaving the area, but in accordance with [Canada’s] rules of engagement,

¹⁷⁶ International Committee of the Red Cross, “International Humanitarian Law: Treaties and Documents: 1949 Conventions and Additional Protocols, and their Commentaries.” See commentary to article 43, at paragraph 1678: <http://www.icrc.org/ihl.nsf/com/470-75053?OpenDocument>; Internet; accessed 14 April 2008.

¹⁷⁷ Watkin, “Combatants, Unprivileged Belligerents and Conflict in the 21st Century, 12.

because [the fighting age farmers] were unarmed, [the Canadian soldiers] couldn't engage them.¹⁷⁸

The suggestion from the comments of the commanding officer is that the fighting age farmers had just passed through the “revolving door;” one moment, they were fighting against Canadian soldiers and, soon after, they dropped their weapons to enjoy the protections afforded to civilians. This is a real-life illustration of the difficulty of applying the rule that civilians may only be targeted “for such time as they take a direct part in hostilities.”

As we have seen, there are only two classes of individuals under IHL: combatants and civilians. Terrorists are ostensibly civilians and must therefore be protected “unless and for such time as they take a direct part in hostilities.” This test for targeting civilians is horribly unclear. These difficulties raise questions about the ability of IHL, as it exists today, to deal with transnational terrorism. As Newton notes, “September 11 did serve to highlight a gap in the law between lawful combatants...and innocent civilians.”¹⁷⁹

Transnational terrorists fall into this gap.

APPLYING HUMAN RIGHTS LAW

It is not just the “direct part in hostilities” test that is unclear. The body of law that will apply to a military response to terrorism is not always abundantly clear. In particular, there are questions about the degree to which human rights law will govern military action in the struggle against terrorism. This adds further confusion to the

¹⁷⁸ Horn, Bernd, *The Buck Stops Here: Senior Military Commanders on Operations* (Kingston: Canadian Defence Academy Press, 2007), 241.

¹⁷⁹ Newton, “Unlawful Belligerency after September 11: History Revisited and Law Revised,” at 84.

circumstances under which terrorists may be targeted, especially in non-international armed conflicts.

As we have seen, international human rights law applies to the law enforcement regime. That body of law protects the “core” right to life. Thus, states that invoke the law enforcement model to respond to terrorism must first make attempts to arrest terrorists. The use of deadly force will be a last resort, as reflected in the UN’s *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.

Deadly force is not a last resort under the IHL framework. As indicated earlier, under the IHL regime, it remains possible to take the life of a combatant (who is not *hors de combat*, of course) during an armed conflict, notwithstanding the “core” right not to be arbitrarily deprived of life under human rights law. Yet, IHL does not apply in isolation: “[i]t is now generally recognized, even by the most skeptical, that international human rights law continues to apply during all armed conflicts alongside international humanitarian law.”¹⁸⁰ How can the right-to-life principle under international human rights law be reconciled with the liability of a combatant to be targeted under IHL? This tension is resolved by considering what it means to be deprived of life “arbitrarily.” In the *Advisory Opinion on the Legality of the Threat of Nuclear Weapons*¹⁸¹ the International Court of Justice has ruled that the taking of a combatant’s life is not arbitrary during an armed conflict: “what is an arbitrary deprivation of life... falls to be

¹⁸⁰ Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?” 881.

¹⁸¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Rep. 1996 (July 8), p. 226; available from <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=unan&case=95&k=e1&PHPSESSID=f6d71e262a89f6c754803f9c5be77760>; Internet; accessed 15 April 2008.

determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”¹⁸²

In light of this International Court of Justice opinion, arbitrariness is not determined by reference to international human rights law as reflected in instruments such as the *International Convention on Civil and Political Rights*. Instead, reference must be made to the law of armed conflict, to determine whether or not the deprivation of life is arbitrary in situations of armed conflict. Thus, the targeting of a combatant who is not *hors de combat* is not arbitrary. Indeed, this reflects the reality of armed conflict: members of armed forces that are in opposition during an armed conflict are entitled to target one another. The law of armed conflict, ever pragmatic, takes this reality into account, and simply seeks to “reduce the horrors inherent [in war] to the greatest extent possible.”¹⁸³ In short, a killing that is lawful under the law of armed conflict is not an arbitrary deprivation of life under international human rights law.¹⁸⁴

So, human rights law, the *lex generalis*, will be interpreted in a manner consistent with IHL, the *lex specialis*. It is perhaps arguable that the use of force in armed conflicts will therefore be governed without reference to human rights law. However, Doswald-Beck cautions that some legal scholars would disagree. She notes that international

¹⁸² *Ibid.*

¹⁸³ Leslie Green, *The Contemporary Law of Armed Conflict*, 2nd ed (Manchester, Manchester University Press, 2000), 15.

¹⁸⁴ Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” 186.

human rights law may apply in situations of armed conflict to supplement IHL where IHL lacks clarity.¹⁸⁵

One reason why IHL is unclear in the context of the struggle against terrorism is because non-international armed conflicts are complex. Non-international armed conflicts are confusing because there is no provision for “combatant.” Thus, the circumstances under which fighters may be targeted is not clear. As noted earlier, there is no formal recognition of “combatant” status in non-international armed conflicts.¹⁸⁶ Additional Protocol II, which applies to non-international armed conflict, provides for “civilians”, and “dissident armed forces” and “organized armed groups” instead of “combatants” and “civilians.” Because this protocol makes a distinction between “armed forces” and “armed groups,” and civilians, some would argue that deadly force can be used against the members of the armed forces and groups unconditionally.¹⁸⁷ The basis of this argument would be that only civilians are protected, not armed forces and groups. The International Committee of the Red Cross appears to support this view in its commentaries.¹⁸⁸ Others reject this view, and would argue that members of “armed forces” and “armed groups” may only be targeted if they are taking a “direct part in

¹⁸⁵ Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?” 882-883.

¹⁸⁶ *Ibid.*, 889.

¹⁸⁷ *Ibid.*, 889-891.

¹⁸⁸ “Those who belong to armed forces or armed groups may be attacked at any time.” International Committee of the Red Cross, “International Humanitarian Law: Treaties and Documents: 1949 Conventions and Additional Protocols, and their Commentaries.” See commentary to article 13, at paragraph 4789: <http://www.icrc.org/ihl.nsf/com/475-760019?OpenDocument>; Internet; accessed 14 April 2008.

hostilities”—essentially treating those members as civilians.¹⁸⁹ Rogers appears to support this other view.¹⁹⁰

Although Additional Protocol II governs non-international armed conflicts, its scope is very narrow. This protocol only applies where the armed force or group “exercises such control over a part of [a High Contracting Party’s] territory as to enable them to carry out sustained and concerted military operations.”¹⁹¹ This threshold will be very difficult to meet in the context of the struggle against terrorism.

Common Article 3 to the Geneva Convention also governs non-international armed conflicts.¹⁹² Certainly, its scope is broad, as there is no requirement for fighters to have control over a part of the territory. Like Additional Protocol II, it also avoids any “hint” of combatant status.¹⁹³ Unlike Additional Protocol II, however, it does not provide for “dissident armed forces” or “organized armed groups.” Thus, there is no language to support the argument—however debatable—that dissident armed forces and organized armed groups may be targeted unconditionally. For all these reasons, the

¹⁸⁹ Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?” 889-890.

¹⁹⁰ Rogers, *Law on the Battlefield*, 224: “...a person may not be attacked simply because he belongs to an armed faction, though that would not preclude the use of necessary force to effect an arrest, but there is a case for arguing that he is taking an active part in hostilities if he is deploying to, or withdrawing from, the place of attack [emphasis added].”

¹⁹¹ Additional Protocol II, article 1.

¹⁹² Common Article 3 reflects customary international law. See, Wouters and Naert, “Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism,” 478.

¹⁹³ Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?” 889.

circumstances under which fighters may be targeted in a non-international armed conflict are unclear.

Doswald-Beck suggests that, if there is confusion about what international human rights law allows, then reference should be made to international human rights law to determine the circumstances under which deadly force may be used against fighters. Supplementing IHL with international human rights law would mean that individuals who would otherwise be liable for targeting under IHL “must not be if they could be easily arrested.”¹⁹⁴ As stated previously, deadly force is a last resort under human rights law. As Kretzmer notes, supplementing IHL with the requirements of human rights law in a non-international armed conflict is seen as necessary to prevent states from enjoying “almost unlimited power to target persons it claims to be active members [of a terrorist] group.”¹⁹⁵

Dworkin has examined the application of human rights law in the context of the struggle against terrorism. Dworkin believes that human rights law should govern U.S. forces in situations of non-international armed conflict:

Except when the war on terror overlaps with an international armed conflict, the test of necessity should govern the use of lethal force by U.S. forces.... In considering the use of force in other circumstances, U.S. forces would be obliged to weigh carefully the necessity of shooting to kill, bearing in mind such factors as the imminent danger posed by the individual, the degree of certainty with which the target could be identified as a member of al Qaeda, and the degree of his contribution to the organization, as well as the possibility of detaining him without shooting

¹⁹⁴*Ibid.*, 890.

¹⁹⁵ Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?”, 202. Dworkin, “Military Necessity and Due Process: The Place of Human Rights in the War on Terror,” 69: “...a blanket license for military commanders to kill or detain anyone they allege to be taking part in hostilities would be both dangerous and unnecessary. Instead, human rights principles demand that the necessity of any individual action be satisfied on a case-by-case basis.”

to kill. Under any circumstances where an arrest was possible, human rights principles would require that lethal force not be used.¹⁹⁶

If this view is accepted, then the test of necessity should be applied for the use of force in non-international armed conflicts against terrorists. According to Dworkin, deadly force would be limited to exceptional circumstances.

Although there is a great deal of controversy and debate over this issue, in non-international armed conflicts, the ability of governments to use deadly force under IHL could be tempered by their requirement to respect the right to life under human rights law. This blend of legal regimes is more likely to appear in the struggle against terrorism, where governments may be targeting terrorists who are ostensibly civilians and where the conflicts are more likely to be non-international. However, this blend of legal regimes is a recipe for confusion. First, there are questions about whether and to what extent the two legal regimes will apply simultaneously. Second, any insertion of international human rights law into the armed conflict regime creates further confusion about the circumstances under which terrorists may be targeted.

Again, the law enforcement paradigm and the military paradigm sometimes meet and interact in the struggle against terrorism. The blending of IHL and human rights law—which govern military action and law enforcement action, respectively—represents the second instance of this interface. In the struggle against terrorism, a military response to terrorism may be affected by international human rights law in the same way as law enforcement action. As Dworkin notes, “[t]he boundary between military operations and

¹⁹⁶ Dworkin, “Military Necessity and Due Process: The Place of Human Rights in the War on Terror,” 70.

ordinary policing function is likely to be blurred”, particularly in a non-international armed conflict.¹⁹⁷

Non-Canadian Cases

There are a number of cases that have examined the blending of IHL and international human rights law. In the context of terrorism, an interesting case is the Israeli targeted killing case, *The Public Committee against Torture in Israel v. The Government of Israel*. As indicated earlier, the Israeli High Court of Justice examined Israel’s targeted killing policy against terrorists in Judea, Samaria and the Gaza Strip. As suggested earlier, this case examined the extent to which the Israeli government could use deadly force against terrorists. The court determined that the conflict between Israel and the terrorists was a “continuous situation of armed conflict.” The court then dealt with the issue of which normative system applies to that conflict: international law or Israeli public law. The court ruled that “[t]he normative system which applies to the armed conflict between Israel and the terrorist organizations in [Judea, Samaria and the Gaza Strip] is complex. In its center stands the international law regarding international armed conflict.”¹⁹⁸ The court also noted that IHL did not apply in isolation, however: “[w]hen there is a gap (*lacuna*) in [international humanitarian] law, it can be supplemented by human rights law.”¹⁹⁹ According to the court, Israeli public law follows Israeli soldiers wherever they may go: “[a]longside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier ‘carries in his

¹⁹⁷ *Ibid.*, 69.

¹⁹⁸ *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, paragraph 18.

¹⁹⁹ *Ibid.*

pack' and go along with him wherever he may turn, may apply."²⁰⁰ Thus, the Israeli High Court of Justice recognized that, in the context of Israel's struggle against terrorism, there is a blending of human rights law and IHL—the two legal regimes that govern law enforcement and military action in an armed conflict.

The European Court of Human Rights, in *Bankovic*,²⁰¹ has also considered the extent to which human rights law may apply to the actions of governments in an armed conflict. The case involved the bombing by NATO of the headquarters of Radio-Television Serbia, in Belgrade. The bombing was conducted as part of NATO's air campaign against the Federal Republic of Yugoslavia during the Kosovo conflict in 1999. Some victims of the bombing or their families sued the seventeen NATO states that were also party to the *European Convention of Human Rights* (ECHR), alleging among other things that the bombing violated the right to life provisions of the ECHR. Thus, the court was faced with the issue of whether the ECHR could apply outside the territory of the states who have signed on as parties to it (referred to by the court as "Contracting States"). Ultimately, the court ruled that "[t]he Convention [ECHR] was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."²⁰² Thus, according to the decision of this court, the human rights provisions of the ECHR do not follow soldiers wherever they may go. The court suggested that its findings may

²⁰⁰ *Ibid.*

²⁰¹ *Bankovic and Others v. Belgium and 16 Other Contracting States*, [GC], no. 52207/99 (ECHR 2001-XII); available from <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=prof&highlight=bankovic&sessionid=7034484&skin=hudoc-en>; Internet; accessed 15 April 2008.

²⁰² *Ibid.*, paragraph 80.

have differed, however, if the Contracting States had “effective control” over the area of operations.

Bankovic was recognized by the Federal Court of Canada as the “pre-eminent authority on the issue of the extraterritorial application of human rights legislation and conventions.”²⁰³ This case has drawn some criticism from Kretzmer, however. He takes the view that the decision is “incompatible with the very notion of the universality of human rights, which lies at the foundation of international human rights law.”²⁰⁴

Canadian Cases

As noted, in *The Public Committee against Torture in Israel*, the Israeli High Court of Justice stated that an Israeli soldier carries Israeli public law “in his pack” wherever he may go. Justice Binnie, in a concurring judgment of the Supreme Court of Canada decision in *R. v. Hape*,²⁰⁵ used similar language to evoke a similar idea. In that case, Justice Binnie observed that the question of whether “a constitutional bill of rights follows the flag when state security and police authorities operate outside their home territory” was a live issue. The *Hape* case involved a money laundering investigation of a Canadian businessman who owned an investment company in the Turks and Caicos. The Royal Canadian Mounted Police traveled to the Turks and Caicos and, with the assistance of local law enforcement authorities, conducted a number of searches of the accused businessman’s company without any warrant. The accused businessman argued

²⁰³ *Amnesty International Canada et al v. Attorney General of Canada et al* 2008 FC 336; available from <http://decisions.fct-cf.gc.ca/en/2008/2008fc336/2008fc336.html>; Internet; accessed 14 March 2008, paragraph 215.

²⁰⁴ Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?” 184.

²⁰⁵ *R. v. Hape*, [2007] 2 S.C.R. 292; available from <http://scc.lexum.umontreal.ca/en/2007/2007scc26/2007scc26.html>; Internet; accessed 10 April 2008.

that documents that were the ultimate product of the search were inadmissible on the basis that the search offended his “right to be secure against unreasonable search or seizure” under section 8 of the *Charter*.²⁰⁶ Ultimately, the court decided that Canada’s *Charter* did not apply in the Turks and Caicos in this case. The court’s reasoning was based on the principle of comity: all states are sovereign and equal under international law, and one state should not be able to exercise jurisdiction over matters that fall within another state’s jurisdiction by virtue of its territorial sovereignty.²⁰⁷

Justice Binnie’s comments in *Hape* about whether Canada’s Constitution “follows the flag” were made in light of the proceedings related to *Amnesty International Canada v. Attorney General of Canada*. That case involved a lawsuit by Amnesty International Canada and the British Columbia Civil Liberties Association against the Government of Canada. The lawsuit sought to have the human rights protections of Canada’s *Charter of Rights and Freedoms* extended to “individuals detained by the Canadian Forces operating in Afghanistan.”²⁰⁸ At the time of Justice Binnie’s decision, he was not prepared to address that issue when it was not necessary to do so, because the *Amnesty International Canada* case was still proceeding through the courts. Justice Binnie noted that “the Court should decline to resolve such important questions before they are ripe for decision.”²⁰⁹

The Federal Court of Canada released its decision in the *Amnesty International Canada* case on March 12, 2008.²¹⁰ As indicated, Amnesty International Canada and the

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, paragraph 65.

²⁰⁸ *Ibid.*, paragraph 184.

²⁰⁹ *Ibid.*, paragraph 189.

²¹⁰ *Amnesty International Canada et al v. Attorney General of Canada et al.*

British Columbia Civil Liberties Association sought judicial review of Canada's policy for the transfer of individuals detained by the Canadian Forces in Afghanistan. Essentially, these organizations were challenging the ability of the Canadian Forces to transfer detainees to Afghanistan. The basis of the challenge was that insufficient safeguards existed to ensure that the detainees were not mistreated. Amnesty International argued that the *Charter* applied to individuals detained by the Canadian Forces in Afghanistan, and that the transfers offended their *Charter* rights.²¹¹ Ultimately, the Federal Court held that the *Charter* does not apply.

Ultimately, the Federal Court relied heavily on the Supreme Court of Canada's decision in *Hape*. The Federal Court applied the two-part test for the extra-territorial application of the *Charter* that was set out by the Supreme Court of Canada in *Hape*. The first part of the test is whether the conduct in issue is that of a Canadian state actor.²¹² The second part of the test is whether the other state has consented to the application of Canadian law in their territory.²¹³ Applying this test, the Federal Court accepted that the Canadian Forces is a Canadian state actor.²¹⁴ However, the court found that there was no consent from Afghanistan to allow the *Charter* to apply. This finding is based on the text of the relevant international arrangements such as the *Afghan Compact*, the Technical Arrangement between Canada and Afghanistan, and the Detainee Arrangement, all of

²¹¹ In particular, Amnesty International Canada argued that the detainee transfer policy offended section 7 ("life, liberty and security of the person"), section 10 (rights on arrest or detention), and section 12 ("the right not to be subjected to any cruel and unusual treatment or punishment").

²¹² *Amnesty International Canada et al v. Attorney General of Canada et al*, paragraph 143.

²¹³ *Ibid.*, paragraph 144-145.

²¹⁴ *Ibid.*, paragraph 143

which show that Afghanistan “has not agreed to the wholesale forfeiture of its sovereignty.”²¹⁵ Thus, the two-part test for extra-territorial jurisdiction was not satisfied.

The Federal Court also addressed the argument put forward by Amnesty that “the rigid application of the general test set out by the Supreme Court of Canada in *Hape* is inappropriate in the military context.”²¹⁶ Of course, the Federal Court notes that the court in *Hape* allowed that the *Charter* could apply extra-territorially even in the absence of consent—but on an exceptional basis.²¹⁷ Therefore, the Federal Court considered the other arguments put forward by Amnesty supporting the proposition that the *Charter* could apply extraterritorially. Amnesty’s first argument was that the *Charter* should apply when an individual (for example, a detainee) is in the effective control of Canada. The court was not prepared to accept that argument, observing that a “control of the person” test would be problematic because of the practical difficulties that it would present in the context of a multi-national military environment:

...an Afghan insurgent detained by...the Canadian Forces...could end up having entirely different rights than would Afghan insurgents detained by soldiers from other NATO partner countries in other parts of Afghanistan. The result would be a hodgepodge of different foreign legal systems being imposed within the territory of a state whose sovereignty the international community has pledged to uphold.²¹⁸

In the view of the court, “the appropriate legal regime to govern military actions currently underway in Afghanistan is the law governing armed conflict—namely international

²¹⁵ *Ibid.*, paragraph 156.

²¹⁶ *Ibid.*, paragraph 185.

²¹⁷ *Ibid.*, paragraph 186 and 188.

²¹⁸ *Ibid.*, paragraph 275.

humanitarian law.”²¹⁹ As indicated, in the court’s view, Canadian human rights law does not apply.

Amnesty’s second argument was that the *Charter* should apply extraterritorially—even without the consent of Afghanistan—“if the fundamental human rights of the detainees are at stake.”²²⁰ The fundamental human right that Amnesty was concerned about is the right to be free from torture. The Federal Court did not accept this argument either. According to the court, the *Charter* either applies extraterritorially or it does not: “it cannot be that it is the nature or quality of the *Charter* breach that creates extraterritorial jurisdiction, where it does not otherwise exist.”²²¹ To apply the *Charter* on the basis of the nature or quality of the breach would result in “tremendous uncertainty” for Canadian state actors conducting their duties abroad.²²² Once again, the Federal Court held that this argument is also not consistent with the *Hape* decision.

By dismissing the applicability of the *Charter* and stating that the applicable legal regime was IHL, the Court has effectively refused to blend Canadian human rights law with IHL. In this way, the legal regime would be certain and coherent.²²³ It is almost certain that Amnesty International will appeal the decision.²²⁴

²¹⁹ *Ibid.*, paragraph 276.

²²⁰ *Ibid.*, paragraph 303.

²²¹ *Ibid.*, paragraph 311.

²²² *Ibid.*, paragraph 314.

²²³ *Ibid.*, paragraph 280.

²²⁴ Murray Brewster, “Judge: Afghan detainees not covered by Charter,” *The Canadian Press*, 12 March 2008; available from http://cnews.canoe.ca/CNEWS/War_Terror/2008/03/12/pf-4982121.html; Internet; accessed 13 March 2008: “The court victory, which Champ says will almost certainly be appealed....”

These decisions of the Canadian courts help to clarify the extent to which Canadian human rights law—as embodied in the *Charter of Rights and Freedoms*—may apply to military engagements outside Canada. But, they do not address the effects of Canada’s obligations under international human rights law. Obviously, in light of the particular facts of these cases, the decisions do not provide any guidance on Canada’s international human rights obligations in respect of targeting in situations of armed conflict.

Accountability Framework

As we have seen, the courts in Canada and elsewhere have examined the extent to which human rights law will apply in situations of armed conflict. This represents part of a trend for more oversight into the military engagements of governments. There is a school of thought that suggests that the actions of government in situations of armed conflict are not justiciable. That is to say, governments’ actions are matters of “high policy” that are beyond the purview of the courts. The Israeli High Court of Justice did not accept this argument by the Israeli government in *The Public Committee against Torture in Israel v. The Government of Israel*.²²⁵ Similarly, Canada’s Federal Court in the court proceedings of the *Amnesty International Canada v. Attorney General of Canada* case also dismissed the argument of the government that the issue of detainee transfers in Afghanistan was not justiciable.²²⁶

This willingness to judge may signal a trend in which the armed conflict model increasingly falls under an accountability framework that is normally associated with

²²⁵ *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, paragraph 47+.

²²⁶ *Amnesty International Canada et al v. Attorney General of Canada et al*, paragraph 87+.

human rights law and the law enforcement model. As Watkin notes, the use of force in situations of armed conflict is no longer “the exclusive domain of international humanitarian law”; instead, the use of force is increasingly becoming encompassed by “human rights norms and their associated accountability structure.”²²⁷

The idea of accountability mechanisms to ensure that states conduct their operations appropriately in situations of armed conflict appears to be gaining prominence. Experts at a meeting organized by the University Centre for International Humanitarian Law in 2005 have emphasized the need for public and credible investigations to determine “whether the state’s use of force was lawful.”²²⁸ It is argued that these investigations are particularly important for non-international armed conflicts, where the circumstances under which individuals may be targeted is very complex.²²⁹ As an example, an investigation would therefore be required to attempt to determine whether the individual that was targeted was taking a direct part in hostilities.

The Israeli High Court of Justice is also in favour of this sort of accountability mechanism. In *The Public Committee against Torture in Israel v. The Government of Israel*, the court ruled that the Israeli government must follow-up its targeted strikes against terrorists with an independent investigation “regarding the precision of the identification of the target and the circumstances of the attack upon him.”²³⁰ Inserting an

²²⁷ Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,” 9.

²²⁸ Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?” 897.

²²⁹ *Ibid.*

²³⁰ *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, paragraph 40+.

accountability framework, which is normally associated with human rights law, into the armed conflict model is another illustration of how IHL and human rights law will meet and interact.

In summary, IHL does not provide sufficiently clear guidance to governments on how they should conduct their counter-terrorism activities in the struggle against contemporary terrorism. There is a lack of clarity about how to characterize terrorists. More significantly, the circumstances under which deadly force may be used against terrorists—particularly in situations of non-international armed conflict—are horribly unclear. There is also a lack of clarity about the extent to which human rights law will govern military action in the struggle against terrorism.

ADJUSTING THE LEGAL FRAMEWORKS

It is evident that neither the law enforcement model nor the armed conflict model is particularly well-suited to address the threats of terrorism. The transnational nature of contemporary terrorism poses challenges for law enforcement authorities beyond the territorial boundaries of their states. The armed conflict model is also an imperfect match for transnational terrorism. This chapter examines the possible adjustments that could be made to the legal frameworks to ameliorate the difficulties highlighted in this paper.

LAW ENFORCEMENT

As indicated earlier, it may be difficult for states to invoke the law enforcement response to terrorism for cases beyond their own territorial limits. As it stands, states must rely on the cooperation of other states. Some adjustments could be made to the law enforcement system to respond to the challenges posed by the international community's Westphalian order. In the right set of circumstances, it may be possible to overcome the

difficulties of the territorial limits of national courts and criminal justice systems by prosecuting terrorist in international courts such as the International Criminal Court. There is some debate about whether the International Criminal Court has jurisdiction over terrorist acts. States were reluctant to include terrorism-related offenses in the *Rome Statute of the International Criminal Court* on the basis that those kinds of offenses “were better dealt with by national systems operating in cooperation with other states.”²³¹ Thus, there is no explicit provision for terrorism under the *Rome Statute*. However, under article 7 of the statute, the court has jurisdiction over “crimes against humanity.”²³² Some scholars have taken the view that that the “crimes against humanity” provisions are broad enough to include the crime of terrorism. As Proulx concludes, “it is clear that acts of international terrorism fit under the Article 7 framework.”²³³ The United Nations High Commissioner for Human Rights appears to agree, as she has characterized the September 11 attacks on the World Trade Centre as “crimes against humanity.”²³⁴ The International Criminal Court may therefore provide a venue for the prosecution of acts of terrorism in circumstances where the victimized state’s own criminal justice system cannot be engaged.

Another option could be the development of an International Terrorism Tribunal that would try cases of terrorism. This option, proposed by William Carmines, envisions

²³¹ McGoldrick, *From “9-11” to the “Iraq war 2003”*..., 20.

²³² Rome Statute of the International Criminal Court – 1998, article 7.

²³³ Vincent-Joel Proulx. “Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?” *American University International Law Review* 19, no. 5 (2004): 1084-1085; available from <http://www.heinonline.org/HOL/Page?handle=hein.journals/amuilr19&id=1&size=2&collection=journals&index=journals/amuilr>; Internet; accessed 18 February 2007).

²³⁴ McGoldrick, *From “9-11” to the “Iraq war 2003”*..., 20.

a court that is similar to the International Criminal Court. The main difference of Carmines' proposed court would be that states would not have complementary jurisdiction that is provided for in the Rome Statute. Thus, jurisdiction would not reside with the national jurisdiction. Instead, the proposed International Terrorism Tribunal would have sole jurisdiction to hear the case.²³⁵

Although these options would alleviate the problems of the jurisdiction of the courts, they would not obviate the practical need for the close cooperation of national law enforcement authorities for the investigation of offences, or for the apprehension of suspected terrorists. It is doubtful that international law enforcement officials would be successful without the close cooperation and support of the state in which they conduct their investigation. That said, these options would provide an alternate venue for prosecution in circumstances where states are not willing to effectively prosecute or extradite terrorists that fall under their criminal jurisdiction.

INTERNATIONAL HUMANITARIAN LAW

There are some challenges associated with adjusting IHL to include terrorism. There may be reluctance on the part of states to adjust IHL to take into account non-state actors. It is states that craft international law. Moreover, the international legal system governs "the relations of states amongst themselves."²³⁶ Therefore, it is questionable whether states will ever be willing to reform IHL so that it "grants greater protections to non-state actors unless they perceive such evolution as being in their interest."²³⁷

²³⁵ Barbara Falk, "The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III," 55-56.

²³⁶ Dixon, *Textbook on International Law*, 105.

²³⁷ Program on Humanitarian Policy and Conflict Research, "Transnationality, War and the Law: A Report...", 12.

States may believe that the reform of international law is very much against their interests. Thus, states may oppose reform because of their belief that attempts to adjust IHL will ultimately weaken its benefits for states. Amendments to the law could open up a Pandora's box. In particular, states may be concerned that revisiting international law to adjust *jus in bello* will precipitate adjustments to *jus ad bellum*. The concern is that some non-state actors would be granted "legitimate means of entering into armed conflict" this way.²³⁸ Perhaps the risk of adjusting *jus ad bellum* is not great, however—especially in light of the fact that states, as crafters of international law, would have to agree. It is doubtful that states would be willing to allow non-state actors to use force against them under international law.

If IHL remains unchanged, then states would not be required to grant equal status to non-state terrorist actors. Terrorists would not be afforded any rights available to states under international law. For example, there would be no combatant immunity or prisoner of war status.²³⁹ This may provide an incentive for states to maintain the existing laws. That said, placing non-state terrorist on an equal footing with states could engender a respect for IHL as well as predictability of behaviour.²⁴⁰ Under existing law, transnational terrorist "enjoy no immunity from domestic criminal prosecution for mere participation in hostilities (even if they respect IHL)".²⁴¹ Thus, there is no practical

²³⁸ *Ibid.*, 16.

²³⁹ International Committee of the Red Cross, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [March 2004]," 235.

²⁴⁰ This equality "provides a predictability of behaviour and thus maintain[s] the parties interests in abiding by humanitarian law norms." Jakob Kellenberger, "Protection Through Complementarity of the Law," 27th Annual Round Table on Current Problems of International Law (San Remo, Italy: 6 September 2003); available from <http://www.icrc.org/web/eng/siteeng.nsf/html/5RFGAZ>, accessed 2 December 2007.

incentive “for better IHL compliance” by terrorists.²⁴² Providing some form of amnesty to terrorists who take a direct part in hostilities so long as they conduct hostilities in compliance with IHL could give rise to a greater respect for the principles of the law. Of course, history demonstrates that states are reluctant to recognize non-state actors. For example, Additional Protocol II did not confer equal status on armed forces and groups because states insisted that “rebels must not in any shape or form benefit from any kind of international recognition.”²⁴³ Thus the prospect for adjustments may not be good.

There may also be a concern amongst states that any reform to IHL that takes into account terrorists actors will serve to legitimize terrorism. For example, states will be reluctant to introduce a sub-category of combatant that includes terrorists. As one author notes, there is a “certain prejudicial nobility to the terms *soldier* and *warrior*.”²⁴⁴ States will be reluctant to associate terrorists—who deliberately target civilians—with that kind of nobility or legitimacy. At the end of the day, so long as transnational terrorists continue to reject the principle of distinction, states will not likely be prepared to create “more space within the IHL regime for expanded recognition.”²⁴⁵

There is a risk if states fail to take steps to adjust the existing law: judges may adjust it for them. As discussed above, it is clear that courts are not reluctant to examine

²⁴¹ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [March 2004],” 242. Although, article 6(5) of Additional Protocol II encourages states to “grant the broadest possible amnesty to persons who have participated in the armed conflict....”

²⁴² *Ibid.*

²⁴³ Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?” 889.

²⁴⁴ Carr, *The Lessons of Terror: A History of Warfare against Civilians*, 10.

²⁴⁵ Program on Humanitarian Policy and Conflict Research, “Transnationality, War and the Law: A Report...,” 14.

the actions of states in situation of armed conflict. The decisions of these courts could affect the development of international law. States, as the crafters of international law, have the opportunity to decide for themselves what that law should be. If states fail to come to a consensus because, for example, the issues are so politicized that states cannot address them, then an active judiciary may fill the void.

There would certainly be some benefits to clarifying IHL in the context of the contemporary terrorist threat. As indicated, the struggle against terrorism has tested the framework of IHL, which is “state centered.”²⁴⁶ As a consequence, it is not obvious how conflicts between states and non-state, transnational terrorists should be characterized. Often, these conflicts do not easily fall into either of the two kinds of armed conflict: international and non-international. Indeed, there is “difficulty in categorizing today’s armed conflicts in the same way as might have been appropriate at the end of the Second World War.”²⁴⁷ Accordingly, some experts have asked whether other categories of conflict that are waged “out-side and across states” should be recognized.²⁴⁸ Indeed, there may be “a need for agreed international norms on how to regulate the very notion of transnationality itself.”²⁴⁹ International humanitarian law could benefit from the introduction of a third kind of armed conflict that takes into account transnationality.

As indicated, characterizing terrorists as civilians who may only be targeted for such time as they participate directly in hostilities is problematic. First, there is the lack of clarity surrounding the “direct participation” test. Second, the line between terrorists

²⁴⁶ *Ibid.*, 17.

²⁴⁷ *Ibid.*, 6.

²⁴⁸ *Ibid.*, 7.

²⁴⁹ *Ibid.*, 17.

and other civilians may become blurred. The dualism of “combatant” and “civilian” under IHL risks “undermin[ing] the protection that true non-participants in conflict have and require during armed conflict.”²⁵⁰ As Watkin notes, “[i]t would be more prudent to move unprivileged belligerents out of the category of civilians and provide them their own status or make them a sub-category of combatants.”²⁵¹ Of course, introducing a third category may complicate the practice of IHL even more. If the law becomes more complicated, then there is a risk that it will not be followed.²⁵²

The International Committee of the Red Cross seems less prepared to introduce a sub-category of combatant. However, the Committee recognizes that there is a lack of clarity surrounding the issue of “what constitutes ‘direct’ participation in hostilities and how the temporal aspect of participation should be defined.”²⁵³ The Committee is studying the possibility of developing a legal definition of “direct participation,” along with a “non-exhaustive list of examples.”²⁵⁴ In particular, the Committee would like international law to clearly address the following three questions:

- “Who is considered a civilian for the purpose of conducting hostilities?”
- “What conduct amounts to direct participation in hostilities?”

²⁵⁰ Watkin, “Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict,” 162. See, also, Stephens and Lewis, “The Law of Armed Conflict—A Contemporary Critique:” “[r]econsideration of the legal means and methods of engaging non-state actors/terrorists under the aegis of a new framework would be advantageous not only to protect ‘true civilians’ but also to provide commanders with a higher level of confidence in their decision-making.”

²⁵¹ Watkin, “Humans in the Cross-Hairs: Targeting and Assassination in Contemporary Armed Conflict,” 162.

²⁵² Rogers, *Law on the Battlefield*, 9.

²⁵³ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [March 2004],” 221.

²⁵⁴ *Ibid.*

- “What are the precise conditions under which civilians directly participating in hostilities lose their protection against direct attack?”²⁵⁵

Thus, the Committee proposes an alternative to introducing a third category into international law. Instead, it seeks to clarify IHL by introducing a definition of “direct participation.”

Either of these two options could also be made to address the confusion surrounding the extent of the application of human rights law to targeting in situations of armed conflict, as well as the confusion surround whether armed groups and armed forces are liable for targeting unconditionally. For example, a third category or a definition of “direct participation” could clarify whether or not governments should first make attempts to arrest terrorists before targeting them with deadly force.

CONCLUSION

There are two natural responses to terrorism: law enforcement action and military action. Canada has invoked both responses in the struggle against terrorism, as part of its comprehensive, all-hazards approach to national security. As we have seen, there are difficulties surrounding the law enforcement response. One of the difficulties of law enforcement is that it is not sufficiently capable of preventing or deterring acts of terrorism. The national security concerns of governments may not be satisfied with a reactive and defensive law enforcement response. As well, the transnational nature of contemporary terrorism may limit the ability of governments to respond to terrorism with law enforcement beyond their own borders. Finally, the strict rules of liberal-democratic criminal justice systems challenge the effectiveness of a law enforcement response to

²⁵⁵ International Committee of the Red Cross, “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts [September 2007],” 736.

terrorism. This is evident in the Canadian context by the use of immigration law measures by government officials to avoid some of the strict requirements of the criminal justice system.

There are also difficulties surrounding the military response to contemporary terrorism. First, the transnational nature of the contemporary terrorist threat does not match-up easily with IHL, which assumes that armed conflicts are waged between states. Therefore, a broad interpretation of the law is required to permit states to use force in self-defence against “armed attacks” by non-state actors. Second, this transnationality makes it difficult to characterize the nature of the conflict. The existing framework of characterizing an armed conflict as either international or non-international is not well-suited to transnational terrorism—although it appears that many conflicts between states and non-state terrorist groups outside the states’ own borders will be characterized as non-international armed conflicts. As noted, the complexity of non-international armed conflicts adds to the confusion with its absence of “combatants.” Third, IHL is not sufficiently clear to guide the actions of governments, particularly in terms of the status of terrorists. Certainly, it is relatively clear that terrorists are not “combatants.” The duality of combatants and civilians means that terrorists must therefore be civilians. As one expert notes, “the global war on terror appears to have highlighted a category of persons not explicitly regulated by the international law of armed conflict.”²⁵⁶ It may not be satisfactory to characterize terrorists as civilians, in light of the protections that are afforded to civilians under international law. The circumstances under which civilians

²⁵⁶ William Lietzau, “Combating Terrorism: The Consequences of Moving from Law Enforcement to War,” in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (Ardsley, NY: Transnational Publishers, 2005), 44-45.

lose their protection and become liable for targeting is entirely unclear. The “taking a direct part in hostilities” test is difficult to apply in the struggle against terrorism.

Another problem for governments is determining the extent to which human rights law applies to their counter-terrorism operations—particularly in non-international armed conflicts. There is some debate and confusion about the extent to which human rights law will govern military action in the struggle against terrorism. If human rights law supplements IHL in situations of armed conflict, then governments would be required to attempt to apprehend terrorists, and deadly force could only be used as a matter of last resort. Governments need clearer guidance on this interface between law enforcement and military action.

All in all, neither the law enforcement model nor the armed conflict model is particularly well-suited to respond to the contemporary terrorist threat. Some of these challenges could be addressed by adjustments to the law. For example, to overcome some of the jurisdictional issues of domestic criminal courts, the international community could mandate an international court to provide an international venue to prosecute terrorists. To overcome the difficulties associated with the armed conflict model, a new kind of armed conflict could be introduced that takes into account transnationality. As well, a third class of individual could be introduced to address the difficulty associated with the duality of “combatant” and “civilian” under IHL. Another option would be to adopt the International Committee of the Red Cross’s proposal to provide a definition in the law that clearly explains what the meaning of the phrase “for such time as they take a direct part in hostilities.” Of course, there may be resistance from states to any adjustments to the law that would recognize non-state actors or legitimize terrorists.

Nonetheless, ultimately, governments need better guidance for their responses to contemporary terrorism.

This paper has highlighted two instances where the law enforcement paradigm will meet and interact with the military paradigm in the struggle against terrorism. The first instance occurs in the *jus ad bellum* aspect of IHL, where the right of anticipatory self-defence may be affected by the availability and adequacy of law enforcement to prevent a terrorist attack from far away. The second interface occurs in the *jus in bello* aspect, where a military response to terrorism may be affected by international human rights law in the same way as law enforcement action.

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