

The Impact of the Selective Interpretation of the Provisions on Military Necessity on the Reality of Armed Conflicts “*The American War on Terror as a Case Study*”

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Abstract

The selective interpretation of legal provisions has become a tool employed by certain parties to evade their obligations under international humanitarian law, in the service of narrow, undisclosed interests. Following the events of 11 September 2001, the United States adopted this approach, declaring a “war on terror” under the justification of “military necessity.” The absence of international consensus surrounding these two concepts was exploited, and their meanings distorted, to serve narrow political ends, with severe consequences for the effectiveness of humanitarian protection during periods of armed conflict. This deviation has since been replicated in a number of recent armed conflicts, posing a serious threat to the future of this body of law.

Keywords: Deviation; conventions; necessity; terrorism; humanitarian law.

Introduction

The selective interpretation of certain provisions of international humanitarian law is one of the most significant, yet largely unaddressed, challenges confronting the reality of armed conflicts today, insofar as this approach has become a means employed by certain actors to free themselves from their peremptory obligations to respect, and to ensure respect for, the provisions of this body of law.

The close correlation between the deterioration of humanitarian conditions in recent armed conflicts and the persistence of these same actors in deliberately engaging in the selective interpretation of certain contested and contradictory concepts implicitly confirms an intent to disengage from these obligations.

There can be no doubt that the subject of the selective interpretation of international humanitarian law texts, despite its considerable importance and the serious consequences it carries for humanitarian protection, has not received the scholarly attention it deserves, save for a few passing references.

This is because the tendentious reformulation of certain concepts has become a cover behind which unlawful acts serving narrow interests and objectives are concealed and justified.

Contrary to the spirit of the 1969 Vienna Convention on the Law of Treaties, which requires objectivity and good faith in the interpretation of treaties during their implementation, and the

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avoidance of any interpretation that would defeat the purpose for which a treaty was concluded, the United States exploited the events of 11 September 2001 as a favourable opportunity to consolidate its dominance over the world, declaring a “war on terror” under the justification of “military necessity.”

The absence of international consensus surrounding these two concepts was exploited, and their meanings distorted, to serve undisclosed objectives, through isolated, unilateral interpretations far removed from the true purposes of international conventions and radically at odds with established international jurisprudence and case law.

Afghanistan was invaded amid an unprecedented pattern of grave violations of international humanitarian law, and yet, on every occasion, American officials continue to claim their unwavering commitment to complying with the provisions of this body of law.

Amid all these contradictions, a question arises as to the validity of the American interpretation of both military necessity and terrorism, and its effect on the reality of international humanitarian law.

Answering these questions requires reliance on the analytical method to demonstrate the extent to which the American viewpoint and its practices conform to the rules of international humanitarian law and human rights law, together with the descriptive and historical methods to establish, trace, and verify the relevant facts. This is undertaken through the following two axes:

- The first addresses the conceptual difficulties surrounding both military necessity and terrorism.
- The second examines how successive American administrations have engaged with the rules of international humanitarian law in their global war on terror, and the effect of this engagement on the humanitarian protection afforded by this body of law.

Axis One: Conceptual Difficulties Surrounding Military Necessity and Terrorism

Military necessity and terrorism share the characteristic of being concepts that have generated, and continue to generate, considerable controversy in military and political circles and among legal scholars, owing to the ambiguity surrounding them as a result of their extensive instrumentalization in the political and military domains. Every scholar who has examined military necessity has noted this ambiguity (I), and every attempt to define terrorism has likewise run into difficulty (II).

I. The Ambiguity of the Concept of Military Necessity

Neither international treaty law nor international case law has provided a definition of military necessity, and international legal scholarship has therefore attempted to undertake this task.

Although scholars agree that it is linked to danger and exceptional circumstances, they differ over its precise meaning, and much of what has been said about military necessity applies almost equally to terrorism.

With respect to military necessity, the traditional school, led by German legal doctrine, regards it as a right justified by law — a “right of necessity” — on the premise that State sovereignty is superior to all other entities. On this view, necessity is “an objective situation in which a State faces an actual or imminent danger threatening its international existence, such that it cannot avoid this danger except by violating foreign interests protected by international law” (Fouad, 1987).

The majority of international legal scholarship, however, does not endorse this position linking necessity to a right, since doing so amounts to an explicit denial of the rights of other States, including the right to survival, in addition to serving as a justification for aggression against sovereignty and a tool for legitimizing invasion or occupation (Henry, 2016).

The realist school takes the opposite view, holding that the law itself does not confer any right justifying the violation of others' rights; rather, it is the reality of grave and present danger threatening a State's interests that compels it to remove such danger. On this view, a state of necessity arises from

a conflict between two interests — one factual and the other legal — such that factual circumstances tip the balance in favour of sacrificing the legal interest.

From this standpoint, necessity is defined as “the situation in which a State's interests are threatened in a manner affecting its very existence, should it comply with the rules of international law” (Abu Haif, 1987).

Proponents of this concept are likewise criticized for failing to establish precise, applicable criteria for the factual circumstances on which a State may rely in invoking necessity when violating the rules of international law.

As a result of the remarkable development of international law following the two world wars — which revealed that the greatest burden of the effects of war falls on vulnerable groups who take no part in the hostilities — a new trend emerged, in harmony with the prohibition on the use of force in international relations enshrined in the United Nations Charter, calling for humanitarian considerations to be taken into account when invoking necessity during periods of armed conflict, given that the matter concerns a necessity of a special kind — “military necessity” — which was later given a legal framework within the four 1949 Geneva Conventions and their two Additional Protocols.

However, the drafters of these instruments avoided including the terms “wartime necessity” or “military necessity” when formulating the provisions relating to exceptional circumstances and situations of necessity during armed conflict, using instead other terms, in the plural, such as “necessities,” “requirements,” and “reasons,” which were then linked to further descriptive terms such as “urgent,” “exceptional,” “imperative,” “absolute,” and “unavoidable.” In this way, more than one form of necessity has effectively been created, which has only added to the ambiguity surrounding this term (Kolb, 2007).

All of this has thrown the door wide open to distorted interpretation by certain parties, allowing them to instrumentalize this concept in whatever way they consider serves their immediate, narrow interests.

II. The Multiplicity of the Concept of Terrorism

As with military necessity, the concept of terrorism has never been the subject of agreement among international legal scholars, nor among members of the international community. What some regard as a terrorist crime requiring condemnation and suppression, others view as legitimate self-defence or a noble moral act deserving of support and backing.

One school of thought adopts a material approach, defining terrorism by describing certain specific acts — and no others — as terrorist, on the grounds that they are intended to spread terror and intimidation.

In this regard, Abdul Aziz Sarhan considers terrorism to be “any attack on life or on public or private property that contravenes the provisions of international law in all its sources” (Sarhan, 1973).

The objective school, by contrast, looks to the legitimacy of the causes and motives underlying such acts: if the aim of committing them is to achieve an unlawful end, they are then characterized as terrorist acts; conversely, if the aim rests on a legitimate basis, the terrorist character is removed.

On this basis, the jurist Eric David defines terrorism as “any act of armed violence committed in pursuit of narrow political, philosophical, ideological, or religious objectives” (David, 1974).

Departing from both of these approaches, some scholars rely on a criterion of international values and ethics to judge such acts and practices, thereby denying the label of terrorism to many acts of armed violence which they regard as stemming from noble principles and ideas expressing honour and virtue — such as the struggle of liberation movements and the fight of peoples for freedom and

independence, or what is described as “revolutionary armed violence,” which they consider a reaction to oppression and exploitation (Ghazal, 1990).

All these conflicting scholarly positions on the questions of military necessity and terrorism are, in reality, a reflection of the positions of the international community in times of peace and war, instrumentalized by certain parties through distorted interpretations that align with their undisclosed objectives, in an attempt to conceal their implicit disengagement from their peremptory obligations to respect, and ensure respect for, international humanitarian law, or to justify the grave violations committed against it.

III. The Intersection Between Provisions on Military Necessity and Counter-Terrorism in International Treaty Law

Certain international conventions dealing with both military necessity and the war on terror contain provisions with mutual references or cross-references concerning a number of issues. Although the use of violence in all its forms is an accepted feature of periods of armed conflict, certain provisions of international humanitarian law prohibit all forms of violence intended to spread terror and intimidation among those who take no part in hostilities.

Common Article 3 of the four 1949 Geneva Conventions, for instance, even though it does not expressly use the term “terrorism,” prohibits, under sub-paragraphs (a), (b), and (c) of its first paragraph respectively, all acts of intimidation, such as murder, mutilation, cruel and degrading treatment, all forms of torture, hostage-taking, and outrages upon personal dignity (ICRC, 1949).

Article 33 of the Fourth Geneva Convention, Article 51(2), and Article 13(1) of Additional Protocols I and II respectively, all expressly prohibit any act aimed at spreading fear and terror among the civilian population — of the kind set out in Common Article 3 — or even the mere threat thereof.

Articles 50, 41, 130, and 147 of the four 1949 Geneva Conventions, for their part, oblige the High Contracting Parties to search for, prosecute, and punish those who commit such acts.

What is particularly striking, however, is that certain provisions of international conventions on counter-terrorism expressly refer to the rules of international humanitarian law or to concepts derived from it. Article 12 of the 1979 International Convention against the Taking of Hostages, for example, provides that its provisions do not apply to acts of hostage-taking covered by the four 1949 Geneva Conventions and their Additional Protocols (United Nations, 1979).

Similarly, Article 19(2) of the 1997 International Convention for the Suppression of Terrorist Bombings (United Nations, 1997) excludes from the provisions prohibiting the use of explosive devices against facilities and infrastructure all activities of regular armed forces during periods of armed conflict, or in times of peace where used by official bodies.

This raises the question of the legal status, under international law, of bombing operations attributable to official bodies that violate State sovereignty, such as the bombing by the United States of a pharmaceutical factory in Sudan in 1998, on the pretext of suspected links to al-Qaeda, or of suspected involvement in chemical-weapons production (Zubaidi & Hussein Aziz, 2015).

Likewise, France's 1985 bombing of the Greenpeace vessel *Rainbow Warrior* in the Pacific Ocean, on the pretext that the vessel sought to obstruct French nuclear testing, was a case that, under an international arbitral award, engaged the responsibility of the French State (Charpenier, 1996).

All these acts are attributable to official bodies, yet they raise serious questions as to their standing under the rules of international law.

It is worth noting that the fight against terrorism is not new: the international community has enacted more than nineteen international legal instruments to prevent terrorist acts, the first of which was the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (United Nations, UNODC, 2004).

The phenomenon of terrorism resurfaced following the collapse of the Soviet Union, driven by the escalating activities of transnational networks operating under various banners, which came to claim large numbers of victims and inflict severe damage on the facilities and infrastructure of States, in a manner threatening their very existence and constituting a threat to international peace and security.

In response, the reaction of targeted States to such threats has often been extremely harsh, with human rights disregarded, the rules and principles of international law set aside, and international ethics and values not respected — all under various pretexts such as exceptional circumstances, security and military necessities, or ensuring the continuity of the State, among others, which has provoked wide-ranging debate over the appropriate methods and means of combating terrorism.

Between action and reaction, some argue that a State's security necessities — represented in the protection of persons and property — take precedence over the mere legal treatment of the question of counter-terrorism, while others hold that the legitimacy of combating this scourge can never justify undermining the force of law or the sanctity of shared fundamental human values (Tercinet et al., 2007).

Amid this divergence and conflict of views over the concepts of military necessity and terrorism, and against the backdrop of the contradictions that have marked international practice in dealing with these questions, the attacks of 11 September 2001, along with the horrors and tragedies that accompanied them and the events that followed, constituted a practical test of how successive American administrations would deal with these emergency situations, and an opportunity to unravel the workings of these unbalanced equations.

Axis Two: The American War on Terror as a Case Study

In the aftermath of the attacks of 11 September 2001, which targeted a number of cities in the United States by means of civilian aircraft and caused massive human losses and severe material damage, President George W. Bush moved swiftly to describe these attacks as terrorist acts and to characterize them as an act of war against his country, accusing al-Qaeda of being behind them. On this basis, he declared a comprehensive war on terror, under the pretext of pursuing members of this organization on the grounds that military necessity required combating and eradicating this scourge.

What President Bush began in the war on terror in the wake of these attacks, together with the wholly unprecedented measures and procedures that accompanied it (I), was continued by President Barack Obama over two terms, following his first election victory in 2008 (II), and successive American administrations thereafter pursued the same course (III).

How, then, did American administrations instrumentalize both military necessity and terrorism through this comprehensive war? And to what extent are their unilateral interpretations of the rules of international humanitarian law and human rights conventions valid — particularly following the Security Council resolution directed at all States requiring them to take the necessary measures to prohibit and criminalize terrorist acts (UN Security Council, 2001)?

I. The War on Terror Under President George W. Bush

At the request of President Bush, the US House of Representatives and Senate adopted a joint resolution on 14 September 2001, entitled the “Authorization for Use of Military Force” (GPO, 2001), which constituted the formal declaration of the war on terror.

This resolution authorized the President of the United States to use necessary and appropriate military force against all organizations, States, and individuals found to have authorized, planned, committed, or aided the terrorist attacks of 11 September 2001, or to have harboured such organizations or persons, with a view to preventing future terrorist operations against the United States.

President Bush relied on this authorization as a constitutional legal basis to justify the invasion of Afghanistan, as the headquarters of al-Qaeda, and to adopt a series of other legal and military measures, the first of which was the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act” (USA PATRIOT Act) (US Department of Justice, 2001).

This Act contained an unprecedented arsenal of measures against the scourge of terrorism, accompanied by extensive military operations on the ground, reflecting the war-oriented mindset then prevailing among American decision-makers. It gave a very broad meaning to terrorism, particularly under Section 802, which introduced a new category termed “domestic terrorism,” further compounding the ambiguity surrounding the concept of terrorism.

Invoking military necessity, the President relied on the same Act to issue a presidential memorandum dated 7 February 2002, which contained a set of measures constituting a grave breach of the American Constitution and marking a clear retreat from the international obligations of the United States.

Military necessity thus became a justification for extrajudicial arrest, detention, and torture (1), as well as for the denial of the privileges reserved for prisoners of war (2).

1. Military Necessity as a Justification for Extrajudicial Detention, Torture, and Arrest

Pursuant to the USA PATRIOT Act, and specifically Section 412 thereof, the powers of the US Attorney General with respect to the detention of aliens were expanded, allowing him to arrest and detain any person for up to seven days on the basis of mere reasonable suspicion, with the possibility of extending detention for up to six months where military necessity so required.

As Commander-in-Chief, President Bush issued a military order on 13 November 2001 (DoD, 2001), authorizing the indefinite detention of “unlawful enemy combatants” within the framework of the war on terror, without being bound by any legal procedure or the bringing of any charge, and while denying them the right to challenge their detention through habeas corpus, on the grounds that military necessity required preventing them from continuing hostile acts against the United States. This clearly indicates that the American administration considered itself bound neither by international conventions nor by the domestic legislation that Congress was expected to enact.

Relying on the same order, and on the pretext that the Guantánamo Bay detention facility lay outside the territory of the United States, military tribunals known as “Military Commissions” (DoD, 2006) were established to try these detainees, who were classified as “non-American enemy combatants” detained within the framework of the war on terror.

The report of the Working Group on Arbitrary Detention of the United Nations Commission on Human Rights concerning the situation of detainees at Guantánamo Bay (United Nations, UNDOCS, 2006) stated that the detainees had been excluded from the application of American law, and that the legal regime applied to them seriously undermined the rule of law and stripped them of a number of internationally recognized fundamental human rights — including prolonged detention without charge as “enemy combatants,” and interrogation using nearly twenty methods of torture approved by the Secretary of Defense on 2 December 2003, ranging from deprivation of all comforts to the manipulation of environmental conditions, such as altering room temperature or releasing foul odours, in order to increase levels of distress.

The report further documented that, under the pretext of military necessity, excessive force was used against these detainees, including shackling with iron chains, hooding, blindfolding, and ear-plugging during transfer, in addition to beating, kicking, punching, and stripping, and other inhumane and degrading treatment causing detainees severe physical and psychological pain and suffering. Whether the aim of these practices was mere punishment or intimidation, the circumstances and procedures of detention were subject to absolute secrecy.

These narrow American governmental interpretations were fundamentally intended to circumvent American constitutional rules and to disengage from all the commitments undertaken by the American State under international humanitarian law and human rights conventions.

By contrast, the rules of international humanitarian law and the relevant human rights conventions establish the right to legal assistance and the right of detainees to challenge their detention through habeas corpus, in addition to the entitlement to the privileges reserved for prisoners of war where they belong to enemy forces, while permitting the detention of any civilian who poses a security threat.

However, anyone who does not enjoy prisoner-of-war status must, in return, either be released or confronted with the charges attributed to them where grounds for detention exist, with a fair trial guaranteed.

Despite all these documented abuses, the American administration insists on every occasion that it remains firmly committed to complying with the rules of international humanitarian law, and justifies its violations of its provisions on the grounds that it is not engaged in a conflict with another recognized party within the meaning of this body of law.

Amid this climate marked by repeated infringements of fundamental rights and freedoms, and in the absence of effective judicial oversight, the American administration opened a wide-ranging confrontation with the US Supreme Court, reflected in a series of cases brought before the latter concerning Guantánamo detainees against President Bush and Secretary of Defense Donald Rumsfeld — including *Rasul v. Bush* (US Supreme Court, 2004), *Hamdi v. Rumsfeld* (US Supreme Court, 2004), and *Boumediene v. Bush* (US Supreme Court, 2008) — in which the Court ruled against the justifications put forward by the American government.

After considering all these cases, the Court affirmed that Guantánamo Bay is under actual American control and therefore falls within American judicial jurisdiction; on this basis, detainees are entitled to the minimum rights that must be afforded to both nationals and aliens, including the right to seek judicial recourse for legal assistance and the right to challenge the lawfulness of their detention order.

The federal courts, like Congress, have nevertheless often worked to circumvent the Supreme Court's rulings at the request of the central executive authority — particularly following the enactment of two statutes in 2005 and 2006 denying these detainees the right to challenge their detention orders on grounds of military necessity, in an attempt to confer legitimacy on the military commissions (US Supreme Court, 2006).

On 29 June 2006, the Supreme Court held that the military commissions established under the November 2001 military order lacked legal legitimacy, as they violated American military law, had not been authorized by federal statute, and were wholly inconsistent with the spirit of the 1949 Geneva Conventions, in addition to failing to satisfy the requirements of the alleged military necessity.

2. The Denial of Prisoner-of-War Status on Grounds of Military Necessity

The demand of Guantánamo detainees for recognition of prisoner-of-war status was primarily aimed at putting an end to the torture and degrading treatment they had continuously suffered at the hands of American governmental agencies since their detention. However, relying once again on the presidential memorandum of 7 February 2002, the American authorities stripped them of the privileges reserved for this category, classifying them as “unlawful enemy combatants” who did not satisfy the conditions set out in Article 4 of the Third Geneva Convention of 1949 relating to prisoners of war.

In addition, they were denied the protection afforded to civilians during armed conflicts under the Fourth Geneva Convention of 1949, on the pretext that they did not belong to a “recognized category” under international humanitarian law.

All these measures ran contrary to the position taken by the International Criminal Tribunal for the former Yugoslavia in the Čelebići (Delalić) case, which affirmed that “there is no gap between the Third and Fourth Geneva Conventions: a person who does not enjoy the protection afforded to prisoners of war under the Third Geneva Convention necessarily enjoys the protection afforded under the Fourth Geneva Convention, provided that he is not a national of the detaining party” (ICTY, 1998).

Nor did these violations end there: the American government also refused to accord detainees even the minimum humane treatment required under Common Article 3 of the Geneva Conventions, on the pretext that the war on terror was not governed by the rules regulating armed conflicts.

This, in turn, contradicted the advisory opinion of the International Court of Justice in the case concerning Military and Paramilitary Activities in and against Nicaragua (1986) (ICJ, 1986).

Paragraph 218 of that opinion states: “Common Article 3 of the 1949 Geneva Conventions constitutes the minimum standard of humane treatment, whatever the nature of the armed conflict, and applies in all places and circumstances” — a position wholly consistent with Article 75(7) of Additional Protocol I of 1977 to the 1949 Geneva Conventions.

The American administration, for its part, continued to act contrary to the Supreme Court's rulings, seeking to maintain the denial of prisoner-of-war privileges to Guantánamo detainees on grounds of military necessity, on the basis that this measure was among those permitted within the framework of the war on terror as an exceptional circumstance, insisting that the criteria set out in Article 4 of the Third Geneva Convention of 1949 did not apply to this category of detainees.

The Supreme Court, however, continued to challenge the administration's decisions: having reaffirmed the right of Guantánamo detainees to contest the lawfulness of their detention before civilian courts, it rejected the expansive interpretation of military necessity as an inadequate justification for departing from American law, and as no acceptable excuse for violating the rules of international humanitarian law that guarantee minimum standards of humane treatment.

In its concluding remarks in the previously mentioned 2008 case of *Boumediene v. Bush*, the Court observed that “[the Suspension Clause] has served the American nation for over 220 years, despite the dangers it has faced, since the Founders established fundamental principles that stand as pillars not to be readily set aside under the banner of ‘the necessity of the moment’” — a reference to military necessity — while Justice Kennedy stated that “the laws of the United States were made to remain in force in extraordinary times.”

The succession of reversal rulings handed down by the Supreme Court against the measures adopted by the Bush administration on the basis of exceptional circumstances clearly demonstrates the American administration's persistent effort to secure the greatest possible degree of power and authority beyond constitutional constraints, which it regarded as a major obstacle in the war against this new form of terrorism. The administration's recourse to the legislative branch to seek legitimization of practices struck down by the Supreme Court likewise reveals that judicial oversight of such acts is not sufficiently guaranteed under the American judicial system, where the legislature is able to circumvent and nullify the authority of the American judiciary.

Moreover, the American government's excessive invocation of military necessity to justify its repeated breaches of the Geneva Conventions and their Additional Protocols, and its systematic and widely known infringement of human rights, undoubtedly reveals that this administration has arrogated to itself the right to interpret the rules of international law unilaterally, betraying its contempt for this body of law and its disdain for the international community.

II. The War on Terror Under President Obama

On the occasion of accepting the Nobel Peace Prize on 10 December 2009 in Oslo, Norway, President Obama declared: “War, in some places and for some time, may be the only means of

stopping human suffering and defeating evil, and may be necessary for the security of the United States — regrettably so, but we do not sacrifice our principles and our values in confronting our adversaries” (White House Press Secretary, 2009). On the same occasion, he proposed reconsidering the concept of just and necessary war, in an implicit reference to the heavy legacy he had inherited from his predecessor.

This statement raised hopes, both across the world and for President Obama himself at the outset of his first term, of a radical shift in the approach to the global war on terror initiated by President Bush. This was reflected in a number of strong signals before and after his inauguration, expressing his intention and determination to abandon the widely criticized brutal practices of the previous administration, particularly with respect to arbitrary detention, widespread torture, “black sites” such as secret detention facilities, and the Guantánamo Bay facility, among others (1).

Things, however, often unfolded contrary to expectations, since a break in tone does not necessarily entail discontinuity in the customary practice of successive American administrations. What President Bush began, President Obama went on to deepen under new labels, as reflected in his new 2012 Defense Strategic Guidance (2).

1. The Partial Review of the War on Terror

Upon assuming office as President of the United States, President Obama signed an executive order on 22 January 2009 (National Archives, 2009), setting out a number of objectives, foremost among them a ban on the practice of torture in all its forms and a commitment to working towards the gradual closure of the Guantánamo Bay facility in cooperation with the judiciary.

Although the legal framework governing the war on terror did not change and remained subject to the provisions of the “Authorization for Use of Military Force” passed by Congress on 14 September 2001, this partial review met with fierce resistance and severe criticism from the conservative majority in Congress.

As a result, the effective consolidation of military dominance in fact continued, reflected in the reinforcement of the American military presence in Afghanistan: on 1 December 2009, President Obama deployed more than 30,000 additional American troops to Afghanistan to bring the operation there to a conclusion (Le Roug, 2014).

Despite the relative improvement in methods of detention and interrogation that followed President Obama's executive order, human rights organizations and civil society intensified their pressure on him to disclose the acts of torture and inhumane treatment inflicted on detainees under President Bush, and to pursue and prosecute those responsible for such practices.

Under this pressure, on 16 April 2009 the President authorized the release of four memoranda issued by the White House Office of Legal Counsel concerning torture practices between 2003 and 2005, which laid bare the brutal methods employed by American intelligence and revealed that these were not isolated incidents but widespread practices forming part of a systematic official policy pursued by the previous American administration — as had already been disclosed in the reports of the Working Groups on Arbitrary Detention and on Torture and Other Cruel, Inhuman, or Degrading Treatment, presented to the UN Commission on Human Rights at its sixty-second session on 27 February 2006, referred to earlier in the previous axis of this study.

The publication of these memoranda sparked wide-ranging controversy and heated debate in political and legal circles, with many members of Congress calling for investigations and the prosecution of those responsible for such practices. President Obama, however, preferred not to be drawn into these demands or into a process of settling scores with his predecessors, and instead offered the necessary guarantees to the intelligence services in anticipation of relying on them in future phases. Attorney General Eric Holder stated on 30 July 2011: “The Department of Justice will not prosecute any employee who acted in good faith and in accordance with the guidance issued by the Office of Legal

Counsel concerning methods for interrogating terrorism suspects” (DOJ, 2011) — a further reference to the American Supreme Court's opposition to all unlawful measures pursued by the American government.

In this climate, President Obama established a new body, the “High-Value Detainee Interrogation Group,” whose functions are bound by the rules of international humanitarian law and which is committed to complying with the US Army Field Manual, under the supervision of the National Security Council (Mansour, 2017).

Following all these measures, President Obama in effect entrenched the previously prevailing policy of impunity, and put to the test the effectiveness of the balance of powers, particularly with respect to parliamentary oversight of executive action.

As for the Guantánamo detention facility, the failure to close it, with 242 detainees remaining, raised numerous questions both among official bodies and non-governmental organizations, some relating to legal aspects and others to humanitarian aspects.

Despite the relative improvement in the treatment of detainees noted above, President Obama's efforts to permanently close the facility likewise met with objections from Congress, which refused to allow the transfer of detainees to American soil for trial before federal courts, and also rejected subjecting the conditions of their detention to the rules of international humanitarian law. This prompted the President to establish a further task force linked to the Guantánamo facility, tasked with reviewing the status of detainees and issuing recommendations specific to each detainee.

Following the task force's findings, a standing body known as the “Periodic Review Board” was established, among whose functions is to consider whether subjecting detainees to the law of armed conflict remains necessary to protect American national security against any serious threats.

Having examined and reviewed the status of the 242 detainees, the Board concluded the following:

- Approval of the transfer of 126 detainees, and referral of 44 detainees for criminal prosecution;
- A finding that 48 detainees could not be transferred owing to the danger they posed, while 30 Yemeni-nationality detainees were retained under “conditional detention,” given the prevailing security conditions in their country, with the possibility of transfer to another country.

At the end of President Obama's term, 41 detainees remained in custody, of whom 5 had not been transferred despite approval for transfer; 26 benefited from the rights established under the law of armed conflict; 7 remained subject to proceedings before military commissions; 3 were serving sentences handed down by military courts; and the sole detainee tried before an American federal court — Ahmed Ghailani, convicted of the bombings of the American embassies in Kenya and Tanzania — was serving his sentence in a federal prison (Mansour, “Lessons from Guantánamo and the Future of American Detention Policy,” 2017).

Despite the efforts made by the Obama administration and the measures it adopted over two full terms in an attempt to close the Guantánamo facility, and despite managing to release around 80% of the detainees, President Obama left the White House without achieving the facility's final closure. Chief among the reasons for this failure was the fierce opposition he encountered from the conservative majority in Congress, which restricted his legislative powers and blocked many of the measures he had intended to pursue in this regard.

As for the operational side of the fight against terrorism, Obama developed alternative strategies, involving in-depth reviews concerning the use of military force, embodied in the Defense Strategic Guidance, which sought overall to define the American defensive posture, to elaborate new forms of military commitment, and finally to rebalance strategic focus towards the Asia-Pacific axis.

2. Obama's New 2012 Defense Strategy — the “Obama Doctrine” — Extrajudicial Targeted Killings as Military Necessity

This new strategy rests on two axes. The first concerns American military commitments, embodied in the adoption of “smart power,” as opposed to the excessive military force of the Bush era, relying extensively on diplomacy and on economic and trade policy. This was reflected in the declared end of major combat operations and the redeployment of forces, embodied in the reduction of the American military presence in both Afghanistan and Iraq.

The second axis concerns the means of military intervention, based on the concept of “least risk at lowest cost,” which encompasses the “fight against terrorism” (DoD, Washington DC, 2012).

This second axis rests in turn on two approaches within a comprehensive, pragmatic, realist framework. The first, known as “leading from behind,” is based essentially on limiting the American role, as far as possible, to support and backing, distributing security responsibilities and burdens among various allied partners — particularly by involving local actors and forces and placing them on the front lines — while relying extensively on tasks entrusted to “private military and security companies” where urgent operations are required to protect vital American interests.

The second approach within this axis was termed the “light footprint,” and represents the spirit of President Obama's strategy in the war on terror and everything associated with exceptional circumstances and situations of absolute military necessity. It rests essentially on the selective use of armed force in complex operations against high-risk terrorist groups, relying on covert and clandestine methods.

Its tools consist mainly of special forces, drones, and missiles for long-range attacks, all supported by central intelligence and cyber-warfare capabilities.

Also invoking military necessity, this approach established “targeted assassinations,” representing the decisive shift in the war on terror. This refers to the right claimed by the American administration to track down individuals identified by its services as potential terrorists and, on that basis, to eliminate them wherever they may be found, without being bound by any legal procedure.

This is because, under military necessity, the United States does not wait for a person to carry out a terrorist act and inflict irreparable harm on American interests.

It is sufficient that a person's name appears on a watch-list of suspected terrorists posing a threat to American national security for them to be targeted, since, from the American standpoint, this constitutes a legitimate target and does not amount to an extrajudicial assassination (Henry, 2016).

It is well established, however, from the standpoint of international humanitarian law, that for this type of killing to satisfy the conditions of military necessity, or even legitimate self-defence, it must first be shown that planning for the terrorist act had taken place, that an actual and imminent danger genuinely existed, and finally that no feasible alternatives existed to counter this danger — conditions that are impossible to establish in practice with respect to targeted killings. Accordingly, these assassination operations take place outside any legal framework, representing a continuation of the approach pursued by the previous American administration.

Contrary to what the architects of the light-footprint strategy had intended, events have demonstrated that operations to physically eliminate suspects, whether by drone or by missile, result in grave collateral losses and damage among civilians and civilian objects (Grandin & Manger, 2015), particularly given the ambiguity deliberately maintained by American intelligence agencies regarding the criteria used to identify a targeted individual and the circumstances surrounding each operation.

In 2010 alone, the number of drone strikes on Pakistan reached 128, claiming 1,345 victims among children and women (Kendel, 2017).

The very limited elements of legal analysis provided by the American government — resting either on military necessity or on preventive self-defence — reveal the dishonest, selective approach based on an expansive interpretation of imminent danger or threat when it comes to combating terrorism,

particularly al-Qaeda. This casts serious doubt on the true intentions of the United States in its war on terror, particularly following the geographical expansion of its scope — through direct operations, the assistance of local military forces, or aerial bombardment — to encompass numerous countries across Asia and Africa, with no regard whatsoever for State sovereignty or for the remaining rules of international law.

In 2014, with the emergence of the so-called “Islamic State” organization in Iraq and subsequently in Syria, the war on terror shifted into a war against “violent extremism,” with the United States activating the “leading from behind” approach in line with the new American National Security Strategy.

3. Continuity of the Obama Strategy

After the end of Obama's second term, combating terrorism was no longer at the top of American priorities, given the diminishing threat posed by this phenomenon to American national security, particularly following the elimination of most of the leaders of its organizations.

Attention began instead to shift towards confronting newly rising powers, foremost among them China and Russia, which had emerged while the United States was preoccupied with the fight against terrorism and had come to compete with it strategically, thereby posing a serious new threat to American national security. President Donald Trump continued along the same trajectory set by President Obama during his first term; and although he sought to devise an alternative plan for combating terrorism, after consulting with the Secretary of Defense he settled instead for a roadmap for withdrawing American forces deployed across various zones of tension around the world (Macheker, 2017).

President Joe Biden, in turn, did not depart from Obama's strategy, proceeding to withdraw American forces from Afghanistan in a sudden manner amid fierce criticism, without consulting American allies, and leaving the reins of power to the Taliban movement.

He likewise decided on a gradual withdrawal from the Middle East, focusing on the new axis of strategic competition — the Asia-Pacific axis — while retaining the light-footprint approach to combating terrorism whenever American interests face extreme threats (Courrier International, 2021).

Amid the rise of China as a serious strategic rival to the United States, President Trump returned to the White House bearing the slogan “America First,” emphasizing the priority of the economic dimension in this confrontation — an explicit declaration of the abandonment of his country's military and security commitments.

He harshly criticized the historic agreements under which allies, in his view, have exploited American generosity, calling on NATO member States to increase their military spending and cease relying on American support, questioning the merit of his country continuing to bear the burden of maintaining large numbers of military forces abroad, and calling for their withdrawal at the earliest opportunity, preferring instead to deal with newly arising exceptional security situations by means of swift military strikes (Rayan, 2025).

After all these internal and external legal battles, in which successive American administrations have used the method of selective interpretation as a weapon — both against the rules of American domestic law, in order to obtain internal powers and authorities exceeding constitutional bounds, and against the rules of international humanitarian law, in order to justify grave violations of this body of law and infringements of human rights so as to evade international responsibility — the United States has, in effect, implicitly disengaged from every obligation to respect this law and to ensure respect for it.

This dangerous approach, which aims at undermining the very foundations on which international humanitarian law rests — namely humanitarian protection — has prompted some States to follow

the same path, transforming it into a tool of international legal characterization that certain parties now seek to replicate, as reflected in a number of current armed conflicts and situations of occupation in both Asia and Africa.

Conclusion

This study has arrived at a number of findings and recommendations, the most important of which are as follows:

- Successive American administrations base their practices in the war on terror on a biased political and ideological background rooted in unilateralism and domination, whereby national security and strategic interests take precedence over the principles of the United Nations and humanitarian values.
- Successive American administrations instrumentalize the selective interpretation of the rules of international humanitarian law in order to reformulate concepts associated with exceptional circumstances, such as “military necessity” and the “war on terror,” with a view to obtaining internal powers and authorities exceeding constitutional bounds, in the service of undisclosed interests and objectives.
- This deviation in interpretation has resulted in grave violations of international humanitarian law and flagrant infringements of individual rights, manifested in: degrading and dignity-violating treatment, extrajudicial arrest, unlimited arbitrary detention, interrogation under widespread torture in the absence of judicial safeguards, the establishment of unlawful detention facilities, and the denial of certain categories of persons of the rights and privileges afforded under international humanitarian law.
- Large categories of persons have been excluded from the right to humanitarian protection through the formulation of novel concepts such as the “unlawful enemy combatant” and “categories unrecognized under the law of armed conflict,” among others.
- The manipulation of legal concepts through unilateral, selective interpretations has led to the distortion of certain notions, such as “civilian,” “military objective,” “prisoner of war,” and “armed conflict,” among others.
- The excessive instrumentalization of the alleged concept of military necessity has transformed it from a narrowly construed legal exception into a permanent justificatory tool in the hands of military commanders, invoked to circumvent the restrictions imposed by the rules of international humanitarian law.
- These recurring and ever-renewed practices aim to undermine the credibility of international humanitarian law and to weaken confidence in the effectiveness of humanitarian protection.
- These practices have become challenges and risks confronting international humanitarian law in particular, and may carry negative repercussions for the international order more generally.
- It may be inferred from the practices and outcomes resulting from the American administration's instrumentalization of military necessity in its war on terror that the American political and ideological background may in fact pose a greater danger to the rules of humanitarian law than the traditional German theory rejected in the aftermath of the Second World War.
- This approach constitutes a flagrant distortion of the purposes of international humanitarian law, which are founded on humanitarian protection and the restriction of armed violence.
- The danger of selective interpretation increases when this model becomes a tool of international legal characterization that other parties to armed conflicts and situations of occupation seek to replicate under similar pretexts — an endeavour that may ultimately undermine the very pillars of international humanitarian law as a whole and empty it of its humanitarian content.

- The failure of international legal drafting to keep pace with modern military technological developments has played a significant role in opening the door to selective interpretation, in a manner that has weakened this body of law's capacity to regulate the means and methods of warfare.

All these developments in the reality of armed conflicts require the international community, in all its components, to:

- Unite in confronting this type of deviant interpretation and all associated practices.
- Establish an independent international reference body or mechanism entrusted with ruling on requests for interpretation, whose opinions would be binding with respect to treaties of a humanitarian character.
- Establish strict rules restricting the interpretation of flexible and contested terms in conventions of a humanitarian character.
- Call for international diplomatic conferences, in cooperation with the International Committee of the Red Cross and in conjunction with international judicial bodies, dedicated to reviewing the 1977 Additional Protocols with respect to the use of modern weapons, so as to keep pace with technological military developments in the means and methods of warfare.
- Criminalize deviant interpretation where it results in the commission of international crimes or grave breaches of the rules of international humanitarian law.

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