

# Pandora's box? Drone strikes under *jus ad bellum*, *jus in bello*, and international human rights law

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## **Abstract**

*Armed drones pose a major threat to the general prohibition on the inter-state use of force and to respect for human rights. On the battlefield, in a situation of armed conflict, the use of armed drones may be able to satisfy the fundamental international humanitarian law rules of distinction and proportionality (although attributing international criminal responsibility for their unlawful use may prove a significant challenge). Away from the battlefield, the use of drone strikes will often amount to a violation of fundamental human rights. Greater clarity on the applicable legal regime along with restraints to prevent the further proliferation of drone technology are urgently needed.*

**Keywords:** armed conflict, direct participation in hostilities, drone, human rights, international humanitarian law, law enforcement, targeted killing, unmanned aerial vehicle.

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Some have called such operations ‘assassinations’. They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings.

US Attorney General, Eric Holder, 5 March 2012<sup>1</sup>

Over the last ten years, the use of drones – unmanned aerial vehicles (UAVs) or unmanned aircraft<sup>2</sup> – for military and counterterrorism purposes has seen ‘explosive growth’.<sup>3</sup> For example, it is reported that in 2010, United States President Barack Obama’s administration authorized more than twice as many drone strikes in north-west Pakistan than it did in 2009 – ‘itself a year in which there were more drone strikes than during George W. Bush’s entire time in office’.<sup>4</sup> By early 2012, the Pentagon was said to have 7,500 drones under its control, representing about one-third of all US military aircraft.<sup>5</sup> Use of UAVs by police forces in connection with traditional law enforcement within a state’s borders has also been steadily growing, albeit at a lesser pace.<sup>6</sup>

Drones<sup>7</sup> were first deployed on a significant scale for surveillance and reconnaissance in armed conflict by the United States of America: in Vietnam in

- 1 Speech to the Northwestern University School of Law, Chicago, 5 March 2012, available at: <http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/>.
- 2 According to US Federal legislation adopted in 2012, the term ‘unmanned aircraft’ means ‘an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft’. Section 331(8), FAA Modernization and Reform Act of 2012, signed into law by the US President on 14 February 2012.
- 3 US Department of Defence, ‘US unmanned systems integrated roadmap (fiscal years 2009–2034)’, Washington, DC, 2009, p. 2, available at: <http://www.acq.osd.mil/psa/docs/UMSIntegratedRoadmap2009.pdf>. Presumably no pun was intended.
- 4 Peter Bergen and Katherine Tiedemann, ‘Hidden war, there were more drone strikes – and far fewer civilians killed’, in *New America Foundation*, 22 December 2010, available at: <http://newamerica.net/node/41927>.
- 5 W. J. Hennigan, ‘New drone has no pilot anywhere, so who’s accountable?’, in *Los Angeles Times*, 26 January 2012, available at: <http://www.latimes.com/business/la-fi-auto-drone-20120126,0,740306.story>. A similar percentage of drones to piloted aircraft is expected within twenty years in the British Royal Air Force (RAF). Nick Hopkins, ‘Afghan civilians killed by RAF drone’, in *The Guardian*, 5 July 2011, available at: <http://www.guardian.co.uk/uk/2011/jul/05/afghanistan-raf-drone-civilian-deaths>. General N. A. Schwartz, the US Air Force Chief of Staff, has reportedly deemed it ‘conceivable’ that drone pilots in the Air Force would outnumber those in cockpits in the foreseeable future, although he predicted that the US Air Force would have traditional pilots for at least thirty more years. Elisabeth Bumiller, ‘A day job waiting for a kill shot a world away’, in *The New York Times*, 29 July 2012, available at: <http://www.nytimes.com/2012/07/30/us/drone-pilots-waiting-for-a-kill-shot-7000-miles-away.html?pagewanted=all>.
- 6 See, e.g., ‘Groups concerned over arming of domestic drones’, in CBSDC, Washington, DC, 23 May 2012, available at: <http://washington.cbslocal.com/2012/05/23/groups-concerned-over-arming-of-domestic-drones/>; Vincent Kearney, ‘Police in Northern Ireland consider using mini drones’, in *BBC*, 16 November 2011, available at: <http://www.bbc.co.uk/news/uk-northern-ireland-15759537>; BBC, ‘Forces considering drone aircraft’, 26 November 2009, available at: [http://news.bbc.co.uk/2/hi/uk\\_news/england/8380796.stm](http://news.bbc.co.uk/2/hi/uk_news/england/8380796.stm); Ted Thornhill, ‘New work rotor: helicopter drones to be deployed by US police forces for the first time (and it won’t be long before the paparazzi use them, too)’, in *Daily Mail*, 23 March 2012, available at: <http://www.dailymail.co.uk/sciencetech/article-2119225/Helicopter-drones-deployed-U-S-police-forces-time-wont-long-paparazzi-use-too.html>. The US Federal Aviation Authority Modernization and Reform Act of 2012 grants increased powers to local police forces across the USA to use their own drones.
- 7 According to the Oxford English Dictionary, the pertinent definition of a drone is ‘a remote-controlled pilotless aircraft or missile’, the etymology being the Old English word for a male bee. In Pakistan, the drones, which make a buzzing noise, are nicknamed *machay* (wasps) by the Pashtuns. Jane Meyer, ‘The

the 1960s,<sup>8</sup> in Bosnia and Herzegovina, and Kosovo in the 1990s.<sup>9</sup> Most recently, in 2012, it has been reported that drones have been used by the Syrian regime to identify the location of rebel forces.<sup>10</sup> But although they are used in this role (and some armed forces use them only for this), they are better known for firing explosive weapons in targeted killings<sup>11</sup> of suspected ‘terrorists’, especially in cross-border operations.

At the same time as scientific developments are leading to larger and faster drones, miniaturization has been paving the way for UAVs the size of insects – ‘nano’ drones<sup>12</sup> – that could also be used for targeted killings, possibly using poison. In February 2011, researchers unveiled a prototype hummingbird drone, which can fly at 11 miles per hour and perch on a windowsill.<sup>13</sup>

Robotic warfare is also on the horizon, with its obvious difficulties for establishing individual criminal responsibility (which are discussed below). In this regard, a media report in 2011 warned that fully autonomous drones, able to determine a target and fire on it without a ‘man in the loop’ (that is, independent of human control after launch), were being prepared for deployment by the USA,<sup>14</sup> potentially representing the greatest challenge to *jus in bello* since the development of chemical warfare.<sup>15</sup> In an internal study of drones published by the UK Ministry of Defence in 2011, it was asserted that: ‘In particular, if we wish to allow systems to make independent decisions without human intervention, some considerable

Predator war’, in *The New Yorker*, 26 October 2009, [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer).

- 8 David Cenciotti, ‘The dawn of the robot age: US Air Force testing air-launched UCAVs capable to fire Maverick and Shrike missiles in 1972’, in *The Aviationist* (weblog), 14 March 2012, available at: <http://theaviationist.com/2012/03/14/the-dawn-of-the-robot-age/>.
- 9 ‘Predator drones and unmanned aerial vehicles (UAVs)’, in *The New York Times*, updated 5 March 2012, available at: [http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned\\_aerial\\_vehicles/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned_aerial_vehicles/index.html).
- 10 ‘Syrian forces use drone in attack on rebel city’, in *ABC News*, 12 June 2012, available at: <http://www.abc.net.au/news/2012-06-12/52-killed-in-syria-as-troops-pound-rebels-strongholds/4064990>.
- 11 According to Alston, a targeted killing is ‘the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator’. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Study on targeted killings, Report to the Human Rights Council, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, para. 1, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> (hereinafter, 2010 Study on Targeted Killings). Melzer affirms that a targeted killing has five cumulative elements: use of lethal force; intent, premeditation, and deliberation to kill; targeting of individually selected persons; lack of physical custody; and the attributability of the killing to a subject of international law. Nils Melzer, *Targeted Killings in International Law*, Oxford Monographs in International Law, Oxford University Press, Oxford, 2008, pp. 3–4.
- 12 J. Meyer, above note 7.
- 13 Elisabeth Bumiller and Thom Shanker, ‘War evolves with drones, some tiny as bugs’, in *The New York Times*, 19 June 2011, available at: <http://www.nytimes.com/2011/06/20/world/20drones.html?pagewanted=1&r=1&ref=unmannedaerialvehicles>.
- 14 W. J. Hennigan, ‘New drone has no pilot anywhere, so who’s accountable?’, in *Los Angeles Times*, 26 January 2012, <http://www.latimes.com/business/la-fi-auto-drone-20120126,0,740306.story>.
- 15 Emma Slater, ‘UK to spend half a billion on lethal drones by 2015’, *The Bureau of Investigative Journalism*, 21 November 2011, available at: <http://www.thebureauinvestigates.com/2011/11/21/britains-growing-fleet-of-deadly-drones/>.

work will be required to show how such systems will operate legally.<sup>16</sup> Similarly, the US Department of Defense affirmed in 2009 that:

Because the Department of Defence complies with the Law of Armed Conflict, there are many issues requiring resolution associated with employment of weapons by an unmanned system. . . . For a significant period into the future, the decision to pull the trigger or launch a missile from an unmanned system will not be fully automated, but it will remain under the full control of a human operator. Many aspects of the firing sequence will be fully automated but the decision to fire will not likely be fully automated until legal, rules of engagement, and safety concerns have all been thoroughly examined and resolved.<sup>17</sup>

Given that drones are clearly ‘here to stay’<sup>18</sup> – indeed, ‘killer drones’ are said by a former CIA lawyer to be ‘the future of warfare’<sup>19</sup> – this article looks at the legality of UAV strikes within and across borders,<sup>20</sup> and within both armed conflict and situations of law enforcement. It will thus address the interplay between *jus ad bellum*, *jus in bello*, and the rules governing law enforcement, especially international human rights law. It ends with a brief discussion of the future challenges to international law from the use of armed drones and robots.

Before embarking on more detailed discussion, however, it is worth recalling Article 36 of the 1977 Additional Protocol I, which requires that:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

As a new method of warfare, the delivery of missiles by pilotless aircraft controlled by operators – often civilians – stationed thousands of miles away should already have been subjected to rigorous scrutiny by those states seeking to develop or procure drones. At the very least, the obligation set out in Article 36 should encompass all states that are party to the 1977 Additional Protocol I, although,

16 Development, Concepts and Doctrine Centre, *The UK Approach to Unmanned Aircraft Systems*, Joint Doctrine Note 2/11, Ministry of Defence, 2011, p. 5–2, para. 503. The report further stated that: ‘Estimates of when artificial intelligence will be achieved (as opposed to complex and clever automated systems) vary, but the consensus seems to lie between more than 5 years and less than 15 years, with some outliers far later than this.’ *Ibid.*, p. 5–4, para. 508.

17 US Department of Defence, above note 3, p. 10.

18 See E. Bumiller and T. Shanker, above note 13. According to the US Department of Defense, ‘Unmanned systems will continue to have a central role in [the US’s] diverse security needs, especially in the War on Terrorism’. US Department of Defence, above note 3, p. iii.

19 Afsheen John Radsan, ‘Loftier standards for the CIA’s remote-control killing’, Statement for the House Subcommittee on National Security & Foreign Affairs, in *Legal Studies Research Paper Series, Accepted Paper No. 2010–11*, William Mitchell College of Law, St Paul, Minnesota, May 2010, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1604745](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604745).

20 Other aspects of the use of drones, such as surveillance and reconnaissance, will not be assessed in this article.

arguably, the general obligation to ‘respect and to ensure respect’ for international humanitarian law (IHL) should incite every state, whether or not it is party to the Protocol, to conduct such legal analysis.<sup>21</sup> However, the seventy or more states that reportedly possess drones have not made public their own analysis – if they have conducted one – of the legality of armed drones, whether for use in armed conflict or for law enforcement purposes.<sup>22</sup>

## Drones and *jus ad bellum*

*Jus ad bellum* governs the legality of recourse to military force, including through drone strikes, by one state against another and against armed non-state actors in another state without that latter state’s consent.<sup>23</sup> Under Article 2, paragraph 4 of the UN Charter,

[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Cryer *et al.* describe this as the ‘fundamental legal principle governing the use of force’, which ‘reflects customary international law’.<sup>24</sup> However, as is also well known, under Article 51 of the Charter it is stipulated that:

Nothing in the present Charter shall impair the inherent right of collective or individual self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.<sup>25</sup>

- 21 Somewhat surprisingly, the International Committee of the Red Cross (ICRC)’s study of customary IHL published in 2005 did not find that Article 36 was part of the corpus of customary law, seemingly due to a lack of positive state practice. Notwithstanding this lacuna, it is hard to understand how customary obligations prohibiting the use of indiscriminate weapons or of weapons of a nature to cause superfluous injury or unnecessary suffering (respectively Rules 71 and 70 of the ICRC study) can be respected unless a weapon’s capabilities are first tested by legal analysis to ensure that they comply with the law. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, 2005. The USA, for instance, not a state party to the Protocol, conducts detailed reviews of weapons prior to their deployment. See, e.g., US Department of Defence, above note 3, p. 42.
- 22 See, e.g., Peter Bergen and Jennifer Rowland (New America Foundation), ‘A dangerous new world of drones’, in *CNN*, 1 October 2012, available at: <http://newamerica.net/node/72125>. Indeed, it was only in early 2012, ten years after the first drone strike, that the US administration formally acknowledged the existence of its covert programme for the use of armed drones. In an online Google+ and YouTube chat on 31 January 2012, President Obama said the strikes targeted ‘people who are on a list of active terrorists’. See, e.g., [www.youtube.com/watch?v=2TAScH7gBfQ](http://www.youtube.com/watch?v=2TAScH7gBfQ), posted by *Al Jazeera* on 31 January 2012.
- 23 Thus, as Lubell observes, the *jus ad bellum* framework is not designed to restrict the use of force within a state’s own borders. Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford Monographs in International Law, Oxford University Press, Oxford, 2011, p. 8.
- 24 Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd edn, Cambridge University Press, Cambridge, 2010, p. 322.
- 25 UN Charter, Art. 51. Aside from self-defence and use of force authorized by the UN Security Council, it is only lawful to use force in another state with that state’s consent.

The definition of an armed attack in the case of armed groups armed and equipped by a foreign state was elaborated on by the International Court of Justice (ICJ) in the *Nicaragua* case as follows:

The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.<sup>26</sup>

The threshold for the occurrence of an armed attack by another state thus appears to be relatively high, going beyond ‘a mere frontier incident’ between members of the armed forces of two states (or armed groups operating in one state with limited support from another state). It might even be argued by some that a very limited and targeted drone strike by one state against individuals located in another state would not constitute an armed attack in the sense of the UN Charter or customary law, with the argument being based on the highly contested concept of anticipatory self-defence.<sup>27</sup> Nevertheless, in the absence of lawful self-defence such use of armed force would undoubtedly contravene the general prohibition on the use or threat of force (and therefore amount to a violation of international law unless the use of force was consented to by the ‘victim’ state).<sup>28</sup> Almost certainly, a more intensive cross-border use of drone strikes, akin to a bombardment, would be an armed attack on another state and therefore constitute aggression, absent Security Council authorization or being an action being taken in legitimate self-defence.<sup>29</sup>

However, there is a strong argument that even one drone strike constitutes an armed attack and potentially aggression. Indeed, UN General Assembly Resolution 3314 (XXIX) provided that an act of aggression shall be constituted, inter alia, by: ‘Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State’.<sup>30</sup> The 1988 case of nine Israeli commandos killing a single Palestine Liberation Organization military strategist in his home in Tunis, which the UN Security Council condemned as an ‘aggression’ in flagrant violation of the UN Charter, further supports the argument.<sup>31</sup>

26 International Court of Justice (ICJ), *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, para. 195.

27 See, e.g., Antonio Cassese, *International Law*, 2nd edn, Oxford University Press, Oxford, 2005, pp. 357–363.

28 For details of the conditions for the lawful granting of consent, see, e.g., *ibid.*, pp. 370–371.

29 See, e.g., *ibid.*, pp. 158–159.

30 UN General Assembly Resolution 3314 (XXIX) of 14 December 1974, Annex, Art. 3(b).

31 UN Security Council Resolution 611 (1988), adopted on 25 April 1988 by fourteen votes with one abstention (USA).

If a single drone strike does constitute an ‘armed attack’, the state launching the drone will need to justify its action by reference to its inherent right of self-defence (unless it had received the requisite consent or an authorization from the UN Security Council); otherwise it would be at risk of committing an act of aggression.<sup>32</sup> The situation is controversial when self-defence is claimed not against another state but against an armed non-state actor located in another state. In its 2004 Advisory Opinion in the *Wall* case, the ICJ appeared to imply that self-defence could only be invoked by one state against another state.<sup>33</sup> A closer reading of the dicta, though, suggests that the ICJ did not entirely rule out the possibility of self-defence against an armed non-state actor that commits ‘terrorist’ acts where effective control was not exercised by the state under threat.<sup>34</sup> In the subsequent *Case Concerning Armed Activities on the Territory of the Congo*, the ICJ avoided the question as to whether international law allows for self-defence ‘against large-scale attacks by irregular forces’.<sup>35</sup> A separate, minority opinion by Judge Kooijmans in this case goes further than the *Wall* dicta, asserting that:

if the attacks by the irregulars would, because of their scale and effects, have had to be classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the Charter that prevents the victim State from exercising its *inherent* right of self-defence.<sup>36</sup>

The traditional customary law governing self-defence by a state derives from an early diplomatic incident between the USA and the UK over the killing of a number of US citizens engaged in transporting men and materials from American territory to support rebels in what was then the British colony of Canada.<sup>37</sup> Under the so-called Caroline test, for a lawful right to self-defence there must exist ‘a necessity

32 An act of aggression is generally defined as the use of armed force by one state against another state without the justification of self-defence or authorization by the UN Security Council. The actions qualifying as acts of aggression are explicitly influenced by UN General Assembly Resolution 3314 (XXIX) of 14 December 1974. Under Article 8 *bis* of the 1998 Rome Statute of the International Criminal Court, as adopted by the First Review Conference in Kampala in 2010, the individual crime of aggression is the planning, preparation, initiation, or execution by a person in a leadership position of an act of aggression. Such an act must constitute a ‘manifest violation’ of the UN Charter (Article 8 *bis*, para. 1).

33 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 139.

34 The Court (para. 139) refers to UN Security Council resolutions 1368 (2001) and 1373 (2001), passed in the aftermath of the 11 September 2001 attacks against the USA, noting that ‘Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence’. In both instances, a preambular paragraph to the respective resolution recognises ‘the inherent right of individual or collective self-defence in accordance with the Charter’.

35 ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, para. 147.

36 *Ibid.*, Separate Opinion of Judge Kooijmans, para. 29.

37 See in this regard, Christopher Greenwood, ‘International law and the pre-emptive use of force: Afghanistan, Al-Qaida, and Iraq’, in *San Diego International Law Journal*, Vol. 4, 2003, p. 17; and N. Lubell, above note 23, p. 35; and Andrew Clapham, *Brierly’s Law of Nations*, 7th edn, Oxford University Press, Oxford, 2008, pp. 468–469.

of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation’ and, furthermore, any action taken must be proportional, ‘since the act justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it’.<sup>38</sup> These statements in 1842 by the US Secretary of State to the British authorities are widely accepted as an accurate description of a state’s customary right of self-defence.<sup>39</sup>

Therefore, the two principles of necessity and proportionality must both be met if the use of force by a state claiming to be acting in self-defence is to be adjudged lawful. Failure to meet the twin criteria means that the use of force may even constitute aggression. In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated that the two interdependent requirements constitute a rule of customary international law.<sup>40</sup> According to the principle of necessity, ‘the State attacked (or threatened with imminent attack if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force’.<sup>41</sup> The principle of proportionality, on the other hand, is rather more abstruse, for despite the word generally connoting a balancing (often of contrary concepts), its intent in this context is rather different:

The requirement of proportionality of the action taken in self-defence ... concerns the relationship between that action and its purpose, namely ... that of halting and repelling the attack ... It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered. ... Its lawfulness cannot be measured except by its capacity for achieving the desired result. In fact, the requirements of the ‘necessity’ and ‘proportionality’ of the action taken in self-defence can simply be described as two sides of the same coin.<sup>42</sup>

This viewpoint, particularly the claim that effectiveness in stopping an armed attack is determinant of proportionality,<sup>43</sup> has been addressed indirectly in

38 Letter dated 27 July 1842 from Mr Webster, US Department of State, Washington, DC, to Lord Ashburton.

39 See, e.g., A. Clapham, above note 37, pp. 469–470.

40 ‘As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), there is a ‘specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law’. The Court noted that this dual condition ‘applies equally to Article 51 of the Charter, whatever the means of force employed’. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 41.

41 ‘Addendum – Eighth report on State responsibility by Mr Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (part 1)’, Extract from the *Yearbook of the International Law Commission 1980*, Vol. II(1), UN Doc. A/CN.4/318/Add.5-7, para. 120.

42 *Ibid.*, para. 121.

43 See, e.g., Elizabeth Wilmshurst, ‘Principles of international law on the use of force by states in self-defence’, Chatham House Working Paper, October 2005, esp. pp. 7–8, 10, available at: <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpforce.doc>.



other ICJ jurisprudence. In the 2003 *Oil Platforms* case (*Iran v. USA*), the Court concluded that:

As to the requirement of proportionality, the attack of 19 October 1987 might, had the Court found that it was necessary in response to the *Sea Isle City* incident as an armed attack committed by Iran, have been considered proportionate. In the case of the attacks of 18 April 1988, however, they were conceived and executed as part of a more extensive operation entitled 'Operation Praying Mantis'. . . . As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither 'Operation Praying Mantis' as a whole, nor even that part of it that destroyed the Salman and Nasr [oil] platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence.<sup>44</sup>

Both the application and the precise threshold for the lawful use of force in self-defence remain uncertain.<sup>45</sup> Nonetheless, it is arguably the case that a state that uses an armed drone in a cross-border operation, which has not been consented to by the state on whose territory the 'terrorist' is located, may only legitimately claim it was acting in self-defence if the threat or use of force against it amounts to an armed attack.<sup>46</sup> A threat of an isolated, more limited 'terrorist' attack would therefore not be sufficient. This has potentially significant implications, in particular, for the use of armed drones by Israel on Palestinian territory. In any event, it would also appear, based on Article 51 of the UN Charter, that the use of an armed drone by a state against another or in another's territory purporting to be in self-defence must at least be immediately reported to the Security Council if it is to be lawful.<sup>47</sup> This is not known to have happened yet.<sup>48</sup>

44 ICJ, *Case Concerning Oil Platforms, Islamic Republic of Iran v. United States of America*, Judgment of 6 November 2003, para. 77.

45 Including with respect to claims of a right to self-defence that arises from low-level, cumulative attacks by non-state actors. See in this regard, Special Rapporteur '2010 study on targeted killings', above note 11, para. 41.

46 As Alston has asserted, 'it will only be in very rare circumstances that a non-state actor whose activities do not engage the responsibility of any State will be able to conduct the kind of armed attack that would give rise to the right to use extraterritorial force'. Special Rapporteur '2010 study on targeted killings', above note 11, para. 40.

47 'Measures taken by members in exercise of this right of self-defence shall be immediately reported to the Security Council'. Alston goes further, arguing that the UN Charter would require that Security Council approval should be sought. *Ibid.*, para. 40.

48 Moreover, even when operating in a state that appears on the facts – and despite regular public pronouncements to the contrary – to implicitly at least acquiesce to the use of drones on its territory, the fact of using drones to target 'terrorists' is certainly not popular. In an interview with Voice of America (VOA) on 31 January 2012, a Pakistani Foreign Ministry spokesman called the US missile strikes 'illegal, counterproductive and unacceptable, and in violation of Pakistan's sovereignty' even though it is asserted that they are carried out with the help of Pakistani intelligence. 'Obama's drone strikes remark stirs controversy', in VOA, 31 January 2012, available at: <http://www.voanews.com/content/pakistan-repeats-condemnation-of-drone-strikes-138417439/151386.html>.

## Drones and international humanitarian law

Potentially, the use of drones on the battlefield is relatively uncontroversial under *jus in bello* (without prejudice to *jus ad bellum*) because there may be scant practical difference between the use of a Cruise missile or an aerial bombardment and the use of a drone equipped with explosive weapons.<sup>49</sup> Indeed, according to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, although ‘in most circumstances targeted killings violate the right to life, in the exceptional circumstance of armed conflict, they may be legal’.<sup>50</sup> Whether or not the use of armed drones constitute aggression or legitimate self-defence, should they take place within a situation of armed conflict and fulfil the relevant nexus criteria (see below subsection on the nexus to the conflict) they will also be judged under applicable *jus in bello*, particularly IHL.<sup>51</sup> They will thus have to comply with, at a minimum, the IHL rules applicable to the conduct of hostilities, in particular those rules relating to precautions in attacks, distinction, and proportionality, and they must not employ weapons the use of which is unlawful under IHL. These rules are discussed in turn.

### Precautions in attacks

There are direct links between respect for the rules on precautions in attacks and respect for other customary rules applicable to the conduct of hostilities, notably distinction (discrimination) and proportionality, as well as the prohibition on using means or methods of warfare that are of a nature to cause superfluous injury or unnecessary suffering. Most of the rules on precautions in attacks, which were codified in 1977 Additional Protocol I, are of a customary nature and are applicable in non-international armed conflict as well as in international armed conflict, according to the International Committee of the Red Cross (ICRC) study published in 2005. Central among the rules is the obligation to take ‘constant care’ in the conduct of military operations to ‘spare the civilian population, civilians, and civilian objects’. In this regard, ‘[a]ll feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians, and damage to civilian objects’.<sup>52</sup> Article 57 of the Protocol provides that those who plan

49 US drones have been actively deployed in Afghanistan since 2001; it has been claimed that the first-ever drone strike occurred during the November 2001 invasion, targeting a high-level Al Qaeda meeting in Kabul. See, e.g., John Yoo, ‘Assassination or targeted killings after 9/11’, in *New York Law School Law Review*, Vol. 56, 2011/12, p. 58, citing also James Risen, ‘A nation challenged: Al Qaeda; Bin Laden aide reported killed by US bombs’, in *The New York Times*, 17 November 2001, p. A1, available at: <http://www.nytimes.com/2001/11/17/world/a-nationchallenged-al-qaeda-bin-laden-aide-reported-killed-by-us-bombs.html>. From April 2011, drone strikes were also used in the armed conflict in Libya where they famously struck the convoy carrying the deposed leader Muammar al-Gaddafi out of Sirte in October of the same year.

50 ‘2010 study on targeted killings’, above note 11, para. 10.

51 Thus, acts that are unlawful under *jus in bello* would not necessarily constitute disproportionate responses for the purposes of determining the legality of actions taken in self-defence under *jus ad bellum*.

52 ICRC’s Study on customary international humanitarian law, above note 21, Rule 15.

or decide upon an attack shall ‘take all feasible precautions in the choice of means and methods of attack’.<sup>53</sup>

For several reasons it could be argued that drone strikes might fulfil the requirements for precautions in attacks. First, a video feed from the drone can give ‘real-time’ eyes on the target so that the absence of civilians close to the target can be monitored until the last few minutes or even seconds.<sup>54</sup> Second, it appears that at least some of the targets of drone strikes are located using a tracking device that is presumably attached (or ‘painted’ on) to the vehicle, luggage, or equipment, or even potentially the person or one of the persons being targeted. Third, in certain cases (notably on Afghan soil), nearby military forces are also charged with monitoring the target. Fourth, other than the thermobaric variant of the Hellfire missile,<sup>55</sup> most of the missiles fired from drones are believed to have a smaller blast radius than other conventional munitions that might typically be deployed from a fighter jet. These factors do not eliminate the risk of civilian casualties, but they certainly represent feasible precautions that can minimize incidental loss of civilian life.<sup>56</sup>

Significant failings have undeniably occurred, however, with one drone strike in Afghanistan in 2010 alone killing twenty-three Afghan civilians and wounding twelve others.<sup>57</sup> In May 2010, the US military released a report on the deaths, saying that ‘inaccurate and unprofessional’ reporting by Predator drone operators had led to the airstrike in February 2010 on the group of civilian men, women, and children.<sup>58</sup> The report said that four American officers, including

53 1977 Additional Protocol (AP) I, Art. 57(2)(a)(ii).

54 In contrast, an unnamed former White House counterterrorism official has reportedly asserted that “there are so many drones” in the air over Pakistan that arguments have erupted over which remote operators can claim which targets, provoking “command-and-control issues”. See J. Meyer, above note 7.

55 According to one US defence industry website, the AGM-114N variant of the Hellfire uses a thermobaric (metal augmented charge) warhead that can suck the air out of a cave, collapse a building, or produce ‘an astoundingly large blast radius out in the open’. ‘US Hellfire missile orders, FY 2011-2014’, in *Defense Industry Daily*, 10 January 2012, available at: <http://www.defenseindustrydaily.com/US-Hellfire-Missile-Orders-FY-2011-2014-07019/>.

56 Though, note the caution expressed in this regard by Alston: ‘Drones’ proponents argue that since drones have greater surveillance capability and afford greater precision than other weapons, they can better prevent collateral civilian casualties and injuries. This may well be true to an extent, but it presents an incomplete picture. The precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based’. ‘2010 study on targeted killings’, above note 11, para. 81. Indeed, as Daniel Byman has argued: “To reduce casualties, superb intelligence is necessary. Operators must know not only where the terrorists are, but also who is with them and who might be within the blast radius. This level of surveillance may often be lacking, and terrorists’ deliberate use of children and other civilians as shields make civilian deaths even more likely’. Daniel L. Byman, ‘Do targeted killings work?’, in *Brookings Institution*, 14 July 2009, available at: [http://www.brookings.edu/opinions/2009/0714\\_targeted\\_killings\\_byman.aspx](http://www.brookings.edu/opinions/2009/0714_targeted_killings_byman.aspx).

57 ‘First drone friendly fire deaths’, in *RT*, 12 April 2011, available at: <http://rt.com/usa/news/first-drone-friendly-fire/>. In October 2011, the US Department of Defense concluded that a number of miscommunication errors between military personnel had led to a drone strike the previous April, a strike that mistakenly killed two US troops in Afghanistan. ‘Drone strike killed Americans’, in *RT*, 17 October 2011, available at: <http://rt.com/usa/news/drone-american-military-report-057/>.

58 Dexter Filkins, ‘Operators of drones are faulted in Afghan deaths’, in *The New York Times*, 29 May 2010, available at: <http://www.nytimes.com/2010/05/30/world/asia/30drone.html>. The report, signed by Major-General T. P. McHale, found that the Predator operators in Nevada and ‘poorly functioning command posts’ in the area failed to provide the ground commander with evidence that there were civilians in the trucks. According to military officials in Washington and Afghanistan, who spoke on the condition of

a brigade and battalion commander, had been reprimanded, and that two junior officers had also been disciplined. General Stanley A. McChrystal, who apologized to Afghan President Hamid Karzai after the attack, announced a series of training measures intended to reduce the chances of similar events. General McChrystal also asked Air Force commanders to open an investigation into the Predator operators.<sup>59</sup>

The question of how many civilians are killed in drone strikes is highly polarized.<sup>60</sup> It was reported in *The New York Times* in May 2012 that the Obama administration had embraced a method for counting civilian casualties that ‘in effect counts all military-age males in a strike zone as combatants ... unless there is explicit intelligence posthumously proving them innocent’.<sup>61</sup> Seen in the light of these events, the ‘extraordinary claim’ in June 2011 by President Obama’s top counterterrorism adviser, John O. Brennan, that there had not been ‘a single collateral death’ over the previous twelve months is of highly questionable accuracy.<sup>62</sup>

## The rule on distinction

With respect to the rule on distinction, which can be considered the most fundamental of all IHL rules, its application in an international armed conflict is far simpler than it is in an armed conflict of a non-international character. Use of drone strikes appears to have been confirmed in only two international armed conflicts to date, namely the USA and others against Afghanistan (the Taliban – as opposed to Al Qaeda<sup>63</sup> – forces) in 2001–2002<sup>64</sup> and the one that pitted NATO member states’ armed forces against Libya in 2011. It is, however, also likely that drone strikes were

anonymity, intelligence analysts who were monitoring the drone’s video feed sent computer messages twice, warning the drone operators and ground command posts that children were visible.

59 *Ibid.*

60 See, e.g., Chris Woods, ‘Analysis: CNN expert’s civilian drone death numbers don’t add up’, in *The Bureau of Investigative Journalism*, 17 July 2012, available at: <http://www.thebureauinvestigates.com/2012/07/17/analysis-cnn-experts-civilian-drone-death-numbers-dont-add-up/>.

61 Jo Becker and Scott Shane, ‘Secret “kill list” proves a test of Obama’s principles and will’, in *The New York Times*, 29 May 2012, available at: [http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=1&pagewanted=all).

62 The Bureau of Investigative Journalism, which monitors the toll, counted “credible media accounts” of between 63 and 127 non-militant deaths in 2011, and a recent Associated Press investigation found evidence that at least 56 villagers and tribal police had been killed in the 10 largest strikes since August 2010. But analysts, American officials and even many tribesmen agree the drones are increasingly precise. Of 10 strikes this year, the local news media have alleged civilian deaths in one case. The remainder of those killed – 58 people, by conservative estimates – were militants’. Declan Walsh, Eric Schmitt and Ihsanullah T. Mehsud, ‘Drones at issue as US rebuilds ties to Pakistan’, in *The New York Times*, 18 March 2012, available at: <http://www.nytimes.com/2012/03/19/world/asia/drones-at-issue-as-pakistan-tries-to-mend-us-ties.html?pagewanted=all>. For a robust defence of drone strikes and claims that the number of civilian casualties is greatly exaggerated, see, e.g., Gregory S., McNeal, ‘Are targeted killings unlawful? A case study in empirical claims without empirical evidence’, in C. Finkelstein, J. D. Ohlin and A. Altmann (eds), *Targeted Killings, Law and Morality in an Asymmetrical World*, Oxford University Press, Oxford, 2012, pp. 326–346.

63 In the view of the author, the combat with Al Qaeda in Afghanistan since 2001 is best classified as a separate, non-international armed conflict.

64 The conflict against the Taliban changed in character as a result of the *Loya Jirga* that in June 2002 elected President Hamid Karzai. With respect to the qualification of the armed conflicts in Afghanistan, see, e.g.,

conducted in 2003–2004 during the attack against Iraq,<sup>65</sup> which formed part of the international armed conflict between the USA (and others) against the regime of Saddam Hussein.

These examples aside, it is clear that the overwhelming majority of drone strikes during armed conflict have occurred in conflicts that are non-international in character: by the USA and the UK in Afghanistan from June 2002,<sup>66</sup> and by the USA in Pakistan,<sup>67</sup> Somalia,<sup>68</sup> and Yemen.<sup>69</sup> In Iraq, unarmed drones are today being used by the US Department of State for surveillance purposes only;<sup>70</sup> armed drones were also used there in the past, with controversial effect.<sup>71</sup> In India, drones are employed to help Indian Special Forces to home in on Maoist fighters, but the UAVs they use are said to be unarmed.<sup>72</sup>

Given these realities, the applicable rule on distinction – between lawful military objectives and civilians and civilian objects – is typically that which governs the conduct of hostilities in armed conflicts of a non-international character. Only lawful military targets, including civilians ‘participating directly in hostilities’, may lawfully be targeted by attacks, in accordance with the provisions of Common Article 3 to the four Geneva Conventions, as supplemented by customary international law (and, where applicable, Art. 13(3) of 1977 Additional Protocol II).<sup>73</sup>

Robin Geiß and Michael Siegrist, ‘Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?’, in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, especially pp. 13 ff.

- 65 See, e.g., ‘Unmanned aerial vehicles (UAVs)’, in *GlobalSecurity.org*, last modified 28 July 2011, available at: <http://www.globalsecurity.org/intell/systems/uav-intro.htm>.
- 66 Australia and Canada are believed to use unarmed Heron drones. See, e.g., ‘Canada, Australia contract for Heron UAVs’, in *Defense Industry Daily*, 17 July 2011, available at: <http://www.defenseindustrydaily.com/Canada-Contracts-for-Heron-UAVs-05024/>.
- 67 See, e.g., ‘US drone strike kills “16” in Pakistan’, in *BBC*, 24 August 2012, <http://www.bbc.co.uk/news/world-asia-19368433>.
- 68 The first drone strike against al-Shabaab forces is believed to have taken place in late June 2011. Declan Walsh, ‘US begins drone strikes on Somalia militants’, in *The Guardian*, 1 July 2011, p. 18.
- 69 See, e.g., Ahmed Al Haj, ‘Khaled Batis dead: US drone strike in Yemen reportedly kills top Al Qaeda militant’, in *Huffington Post*, 2 September 2012, available at: [http://www.huffingtonpost.com/2012/09/02/khaled-batis-dead\\_n\\_1850773.html](http://www.huffingtonpost.com/2012/09/02/khaled-batis-dead_n_1850773.html); and Hakim Almasari, ‘Suspected US drone strike kills civilians in Yemen, officials say’, in *CNN*, 4 September 2012, available at: <http://edition.cnn.com/2012/09/03/world/meast/yemen-drone-strike/index.html>.
- 70 Eric Schmitt and Michael S. Schmidt, ‘US drones patrolling its skies provoke outrage in Iraq’, in *The New York Times*, 29 January 2012, available at: <http://www.nytimes.com/2012/01/30/world/middleeast/iraq-is-angered-by-us-drones-patrolling-its-skies.html?pagewanted=all>.
- 71 J. Meyer, above note 7.
- 72 Nishit Dholabhai, ‘Scanner in sky gives fillip to Maoist hunt’, in *The Telegraph (India)*, Calcutta, 16 January 2012, available at: [http://www.telegraphindia.com/1120117/jsp/nation/story\\_15015539.jsp](http://www.telegraphindia.com/1120117/jsp/nation/story_15015539.jsp).
- 73 The USA is not a State Party to the Protocol, although Afghanistan is. Even were the USA to adhere to the Protocol, it might argue that based on Article 1 of the Protocol this instrument would apply only to Afghanistan and/or would exclude its extraterritorial application to attacks in Pakistan. This is because under its Article 1, the Protocol applies ‘to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.’ For a better view on the applicability of the Protocol in Afghanistan to, at least, all states parties to that instrument, see, e.g., the Rule of Law in Armed Conflicts (RULAC) project, Australia profile, Qualification of Armed Conflicts section, especially note 2, available at: [http://www.geneva-academy.ch/RULAC/applicable\\_international\\_law.php?id\\_state=16](http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=16).

The ICRC’s *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* is highly controversial in certain respects. No one appears to claim that IHL prohibits targeting the armed forces of a state that is party to a non-international armed conflict.<sup>74</sup> Far more controversial is the assertion that (military) members of organized armed groups that are a party to such a conflict likewise fulfil the requisite criteria on the basis of a claimed ‘continuous combat function’.<sup>75</sup> Those who exercise such a continuous combat function may, in principle, be targeted by attacks at any time (though this general permissiveness is subject to the rule on military necessity). As Alston observes:

the creation of CCF [continuous combat function] category is, *de facto*, a status determination that is questionable given the specific treaty language that limits direct participation to ‘for such time’ as opposed to ‘all the time.’ . . . Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from his or her function.<sup>76</sup>

A further challenge is how to identify – legally and practically – who such military members are. As the *Interpretive Guidance* published by the ICRC observes:

under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: ‘continuous combat function’). . . . [This function] distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.<sup>77</sup>

Those who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis may only lawfully be targeted while they so participate (although at other times they may of course be arrested by a law enforcement operation and charged under domestic law for offences committed). Those who assume exclusively political, administrative, or other non-combat functions may not be lawfully targeted unless and until they directly participate in hostilities, and only for such

74 See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, pp. 30–31 (hereinafter, *ICRC Interpretive Guidance*).

75 See *ibid.*, pp. 27–28. ‘The term organized armed group . . . refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense’. *Ibid.*, p. 32.

76 ‘2010 study on targeted killings’, above note 11, paras. 65–66.

77 *ICRC Interpretive Guidance*, above note 74, p. 33. According to Melzer, continuous combat function ‘may also be identified based on conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation’. *Ibid.*, p. 35; and see N. Melzer, ‘Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation In Hostilities’, in *New York University Journal of International Law and Politics*, Vol. 42, 2010, p. 890 (hereinafter, ‘Keeping the balance’).

time as they undertake such acts.<sup>78</sup> In case of doubt as to his or her status, a person should be considered a civilian not directly participating in hostilities.<sup>79</sup>

On this basis, using lethal force to target an Al Qaeda operative in Afghanistan who is engaged in planning, directing, or carrying out an attack in Afghanistan against, for example, US forces, would therefore be, a priori, lawful under the IHL rule of distinction. Targeting his son, his daughter, his wife, or wives would not be lawful, unless (and only for such time as) they were directly participating in hostilities.<sup>80</sup> The legality of an attack against the operative, where the attack was also expected to incidentally kill or injure civilians, would depend on a determination according to the rule of proportionality (see below subsection on proportionality in attacks).

Failing to make such a distinction during attack would render the attack unlawful and constitute evidence of a war crime.<sup>81</sup> In March 2012, the UK law firm Leigh Day & Co and the charity Reprieve launched an action against British foreign secretary William Hague on behalf of Noor Khan, whose father Malik Daud Khan

78 In contrast, Brigadier-General Watkin proposes to significantly widen the category of those who would fall within the definition, notably including persons assuming exclusively 'combat service support' functions, including cooks and administrative personnel. Kenneth Watkin, 'Opportunity lost: organized armed groups and the ICRC "Direct Participation in the Hostilities" Interpretive Guidance', in *New York University Journal of International Law and Politics*, Vol. 42, 2010, p. 692, available at: [http://www.law.nyu.edu/ecm\\_dlv1/groups/public/@nyu\\_law\\_website\\_journals\\_journal\\_of\\_international\\_law\\_and\\_politics/documents/documents/ecm\\_pro\\_065932.pdf](http://www.law.nyu.edu/ecm_dlv1/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065932.pdf). See N. Melzer, 'Keeping the balance', above note 77, pp. 848–849.

79 According to Recommendation VIII of the ICRC's *Interpretive Guidance*: 'All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack'. *ICRC Interpretive Guidance*, above note 74, pp. 75–76. See also N. Melzer, 'Keeping the balance', above note 77, especially pp. 874–877. Radsan asserts that: 'Except in extraordinary circumstances, the agency may strike only if it is satisfied beyond a reasonable doubt that its target is a functional combatant of al Qaeda or a similar terrorist group. Drone strikes, in effect, are executions without any realistic chance for appeal to the courts through habeas corpus or other procedures'. A. J. Radsan, above note 19, p. 3. Regrettably, he later claims that: 'There are, of course, exceptions to my general rule for CIA targeting. I summarize these exceptions under the label of extraordinary circumstances. The target, for example, may play an irreplaceable role in al Qaeda. A drone operator may see a person on the screen who is probably Bin Laden – but not Bin Laden beyond any doubt. Even so, the military advantage of killing Bin Laden, compared to a mid-level terrorist, may justify the additional risk of mistakenly harming a peaceful civilian'. (*Ibid.*, p. 5.)

80 In this regard, Melzer notes the USA's understanding, declared in the context of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, that 'the phrase "direct part in hostilities": (i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and (ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment'. See N. Melzer, 'Keeping the balance', above note 77, p. 888, and note 226.

81 In this regard, claims that numerous CIA drone strikes have targeted funerals or those rescuing the victims of drone strikes are extremely disquieting. According to a report by the Bureau of Investigative Journalism: 'A three-month investigation including eye witness reports has found evidence that at least 50 civilians were killed in follow-up strikes when they had gone to help victims. More than 20 civilians have also been attacked in deliberate strikes on funerals and mourners'. Chris Woods and Christina Lamb, 'Obama terror drones: CIA tactics in Pakistan include targeting rescuers and funerals', in *Bureau of Investigative Journalism*, 4 February 2012, available at: <http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/>.

was killed in a drone strike in Pakistan in 2011 ‘while presiding over a peaceful council of tribal elders’.<sup>82</sup>

In 2009, it was reported in the media that the US Department of Defense’s Joint Integrated Prioritized Target List – the Pentagon’s roster of approved terrorist targets, containing 367 names – had been expanded to include some fifty Afghan drug lords suspected of giving money to help finance the Taliban.<sup>83</sup> Individuals engaged in the cultivation, distribution, and sale of narcotics are, a priori, criminals; however, even if they willingly or otherwise finance terrorism, they are not directly participating in hostilities in Afghanistan.<sup>84</sup> Targeting individual criminals with drone strikes would therefore be unlawful.

## The rule of proportionality

Even if a target is a lawful military objective under IHL the question of proportionality arises and may either affect the selection of the means and methods of warfare that may lawfully be used, or even effectively prohibit an attack being launched. Violating the rule of proportionality is an indiscriminate attack according to 1977 Additional Protocol I.<sup>85</sup> The rule is not given voice in either Common Article 3 to the Geneva Conventions or 1977 Additional Protocol II, but is deemed to be a customary rule of IHL applicable not only in international armed conflict but also in armed conflicts of a non-international character. According to Rule 14 of the ICRC’s study of customary international humanitarian law:

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

The question, of course, is what is ‘excessive’? In the ICRC-published commentary on Article 51(5) of the 1977 Additional Protocol I, from where the text setting out the rule on proportionality in attack originates, it is stated that:

Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail.<sup>86</sup>

82 ‘GCHQ staff could be at risk of prosecution for war crimes’, in *Gloucester Echo*, 13 March 2012, available at: <http://www.thisisgloucestershire.co.uk/GCHQ-staff-risk-prosecution-war-crimes/story-15505982-detail/story.html>.

83 J. Meyer, above note 7.

84 See, in this regard, ‘2010 study on targeted killings’, above note 11, para. 68.

85 See 1977 AP I, Art. 51(5)(b) and Art. 57(2)(a)(iii).

86 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, paras. 1979–1980.



It is well known that different states have widely differing assessments of what is proportionate. Even close military allies, such as the UK and the USA, appear to differ materially on this issue. An instructive example occurred in Afghanistan in March 2011 when a UK Royal Air Force drone killed four Afghan civilians and injured two others in an attack against ‘insurgent leaders’ in Helmand province, the first confirmed operation in which a UK Reaper aircraft had been responsible for the death of civilians.<sup>87</sup> According to a press report, the UK Ministry of Defence spokesman said:

Any incident involving civilian casualties is a matter of deep regret and we take every possible measure to avoid such incidents. On 25 March a UK Reaper was tasked to engage and destroy two pick-up trucks. The strike resulted in the deaths of two insurgents and the destruction of a significant quantity of explosives being carried on the trucks. Sadly, four Afghan civilians were also killed and a further two Afghan civilians were injured. There are strict procedures, frequently updated in light of experience, intended to both minimise the risk of casualties occurring and to investigate any incidents that do happen.

An ISAF investigation was conducted to establish if any lessons could be learnt from the incident or if errors in operational procedures could be identified; the report noted that the UK Reaper’s crews’ actions had been in accordance with procedures and UK Rules of Engagement.<sup>88</sup>

Nonetheless, a ‘source’, apparently from the UK Ministry of Defence, informed the British *Guardian* newspaper that the attack ‘would not have taken place if we had known that there were civilians in the vehicles as well’.<sup>89</sup> Thus, while the target (that is to say, individual insurgents in at least one of the pick-up trucks) would probably not have been unlawful under IHL, it seems that the UK would have considered it disproportionate to target the two insurgents had they had known that the civilians were present.

Contrast this example with the case of the Taliban leader, Baitullah Mehsud. On 23 June 2009, the CIA killed Khwaz Wali Mehsud, a mid-ranking Pakistan Taliban commander. They planned to use his body as ‘bait’ to target Baitullah Mehsud, who was expected to attend Khwaz Wali Mehsud’s funeral. Up to 5,000 people attended the funeral, including not only Taliban fighters but many civilians. US drones struck again, killing up to eighty-three people. Forty-five of the dead were reportedly civilians, among them ten children and four tribal leaders. Such an attack raises very serious questions about respect for the prohibition on indiscriminate attacks. Baitullah Mehsud escaped unharmed, reportedly dying six weeks later, along with his wife, in another CIA attack.<sup>90</sup>

87 N. Hopkins, above note 5.

88 *Ibid.*

89 *Ibid.*

90 C. Woods and C. Lamb, above note 81. According to Meyer, the CIA conducted sixteen missile strikes with the deaths of up to 321 people before they managed to kill Baitullah Mehsud. See J. Meyer, above note 7.

## The use of lawful weaponry

Customary law prohibits the use, whether in international or non-international armed conflicts, of inherently indiscriminate weapons, as well as of weapons that are of a nature to cause superfluous injury or unnecessary suffering.<sup>91</sup> In general, the Hellfire missiles typically fired from drones do not appear to violate this criterion.<sup>92</sup> As noted above, however, a cautionary note is warranted where potential use of thermobaric Hellfire missiles is concerned. Given their wide area effects and consequences for human beings, such thermobaric missiles demand further consideration under both general principles relating to weaponry.<sup>93</sup> Moreover, as drones are only platforms, other weapons can be – and are – used, which may fall foul of the rules prohibiting the use of unlawful weapons in armed conflict.

## The nexus to the conflict

Are the strikes in Pakistan, specifically those against Al Qaeda suspects, to be considered legal conduct of hostilities within the armed conflict in Afghanistan?<sup>94</sup> In remarks online on 31 January 2012, President Obama said that the drone strikes in Pakistan, which are carried out by the CIA rather than the military,<sup>95</sup> are a ‘targeted, focused effort at the people who are on a list of active terrorists’ and that the USA was not just ‘sending in a whole bunch of strikes willy-nilly’ but targeting ‘Al Qaeda suspects who are up in very tough terrain along the border between Afghanistan and Pakistan’.<sup>96</sup> A ‘terrorist’ is not, however, necessarily someone who is engaged in an armed conflict (let alone the even further removed case of drug lords noted above). There must be a clear nexus to an armed conflict with a clearly defined non-state party, not an ill-defined, globalized ‘war against terror’, especially since the current US administration has sought to distance itself from such rhetoric.<sup>97</sup> As Melzer has noted:

Whether or not a group is involved in hostilities does not only depend on whether it resorts to organized armed violence temporally and geographically coinciding with a situation of armed conflict, but also on whether such violence

91 See the ICRC’s study of customary IHL, above note 21, Rules 70 and 71.

92 Given that drone strikes often occur in populated areas, were the blast radius of missiles used to increase in size there would be greater concerns about compliance with the prohibition on indiscriminate attacks.

93 Thermobaric weapons are described as ‘among the most horrific weapons in any army’s collection: the thermobaric bomb, a fearsome explosive that sets fire to the air above its target, then sucks the oxygen out of anyone unfortunate enough to have lived through the initial blast’. Noah Shachtman, ‘When a gun is more than a gun’, in *Wired*, 20 March 2003, available at: <http://www.wired.com/politics/law/news/2003/03/58094> (last visited on 20 February 2012, but page no longer online).

94 Where, in contrast, Pakistani or Afghani Taliban members are planning and conducting cross-border raids into Afghanistan, or the USA is conducting drone strikes in support of Pakistan’s non-international armed conflict against the Pakistan Taliban (TTP), these are clearly related to a specific armed conflict.

95 The CIA drones are said to be controlled from a suburban facility near the Agency’s headquarters in Langley, Virginia. See D. Walsh, above note 68.

96 See, e.g., ‘Obama discusses US use of drones in online Q&A – video’, in *The Guardian*, 31 January 2012, available at: <http://www.guardian.co.uk/world/video/2012/jan/31/obama-us-drones-video>.

97 See, e.g., N. Lubell, above note 23, pp. 113, especially note 5, and 114.

is designed to support one of the belligerents against another (belligerent nexus).<sup>98</sup>

According to the US Attorney General, Eric Holder, who addressed the issue of drone strikes in a speech in March 2012, the US government's 'legal authority is not limited to the battlefields in Afghanistan'. Mr Holder said there were circumstances under which 'an operation using lethal force in a foreign country, targeted against a US citizen who is a senior operational leader of Al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful'.<sup>99</sup> Such circumstances included that a thorough review had determined the individual posed 'an imminent threat of violent attack against the United States', that 'capture is not feasible', and the 'operation would be conducted in a manner consistent with applicable law of war principles'.<sup>100</sup>

While the limiting of legality of targeted killings to senior operational leaders of Al Qaeda or associated forces who pose 'an imminent threat of violent attack against the United States' might be welcome as it suggests that unless the threat of violent attack is 'imminent', an attack will not be authorized, it still raises a series of questions. First, what constitutes an 'imminent' threat? Second, many of those killed in drone strikes in Pakistan are not senior leaders but mid- or low-level fighters. Quid the legality of these strikes? Or do the criteria only restrict drone strikes when it concerns a US citizen? Is it 'open season' on foreign nationals?<sup>101</sup> Third, is an attack against US forces in Afghanistan by fighters based in Pakistan deemed a terrorist attack by the US government? Although the definition of terrorism remains highly controversial, many would argue that it is the targeting of civilians, not members of a state's armed forces, that is one of the defining characteristics of terrorism,<sup>102</sup> along with an associated attempt to influence government policy on one or more issues. This is clearly not, however, the US government's understanding of the term 'terrorism'.

And, again, the Attorney General's statement does not address the issue of whether such strikes form part of an armed conflict: an oral commitment to conduct an operation 'in a manner consistent with applicable law of war principles' does not mean that IHL is applicable under international law. The US Supreme Court, in *Hamdan v. Rumsfeld*, rejected the assertion that the conflict was a global war against Al Qaeda to which the Geneva Conventions did not apply, and

98 N. Melzer, 'Keeping the balance', above note 77, p. 841; see also N. Melzer, above note 11, p. 427.

99 The notion of 'associated forces' needs clarification. The USA would be on firmer legal ground if it publicly narrowed its list designated for killing to members of the Al Qaeda leadership, not anyone who publicly or privately supports their objectives or sympathizes with their methods.

100 'Attorney General Eric Holder defends killing of American terror suspects', in *Daily Telegraph*, 6 March 2012, available at: <http://www.telegraph.co.uk/news/worldnews/al-qaeda/9125038/Attorney-General-Eric-Holder-defends-killing-of-American-terror-suspects.html>.

101 As Radsan notes: 'If non-American lives are just as important as American lives, then one model of due process (or "precaution" to use an IHL term), should apply across the board. In negative terms, if the controls are not good enough for killing Americans, then they are not good enough for killing Pakistanis, Afghans, or Yemenis'. See A. J. Radsan, above note 19, p. 10.

102 See, e.g., UN, 'A more secure world: Our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change', New York, 2004 (UN High Level Panel), paras. 159–161.

specifically determined that Common Article 3 to the Geneva Conventions applied to Salim Ahmed Hamdan, a former bodyguard and driver of Osama bin Laden, an individual who was captured by US military forces inside Afghanistan in November 2001.<sup>103</sup> This judgment does not mean that anyone – wherever he (or she) may be in the world – affiliated to Al Qaeda is drawn into an armed conflict of a non-international character against the USA as a person participating directly in hostilities by virtue of espousal of, or even indirect support for, a violent ideology.<sup>104</sup>

## Drone strikes and international human rights law

The application and impact of IHL on drone strikes in a situation of armed conflict having been reviewed above, this section looks at the implications of international human rights law for the use of armed drones. The first targeted killing using a drone strike outside a theatre of armed conflict is believed to have been the killing of six alleged Al Qaeda members, including Qaed Senyan al-Harithi, also known as Abu Ali, who was the suspected mastermind of the bombing of the USS *Cole* in October 2000.<sup>105</sup> The six were killed on 3 November 2002 in Yemen when either one or two Hellfire missiles<sup>106</sup> launched from a drone controlled by the US Central Intelligence Agency (CIA) destroyed the jeep in which they were travelling in the northern Yemeni province of Marib, about 160 kilometres east of Sana'a.<sup>107</sup> Since then, targeted killings using drones have become a regular occurrence in Pakistan and, albeit to a lesser extent, in Yemen as well as in other countries.<sup>108</sup> The September 2011 killing, by a CIA drone, in Yemen of Anwar al-Awlaki, a radical Muslim cleric of Yemeni descent, was particularly controversial as he was

103 US Supreme Court, *Hamdan v. Rumsfeld*, 29 June 2006, pp. 67–69.

104 See, e.g., M. E. O'Connell, 'Seductive drones: learning from a decade of lethal operations', Notre Dame Legal Studies Paper No. 11-35, in *Notre Dame Law School Journal of Law, Information & Science*, August 2011; and as cited by Carrie Johnson, 'Holder spells out why drones target US citizens', in *NPR*, 6 March 2012, <http://www.npr.org/2012/03/06/148000630/holder-gives-rationale-for-drone-strikes-on-citizens>.

105 See N. Melzer, above note 11, p. 3; 'Sources: US kills Cole suspect', in *CNN*, 4 November 2002, available at: [http://articles.cnn.com/2002-11-04/world/yemen.blast\\_1\\_cia-drone-marib-international-killers?\\_s=PM:WORLD](http://articles.cnn.com/2002-11-04/world/yemen.blast_1_cia-drone-marib-international-killers?_s=PM:WORLD).

106 The AGM-114 Hellfire is an air-to-surface missile developed primarily for anti-armour use, which can be launched from air, sea, or ground platforms. See, e.g., Lockheed Martin, 'HELLFIRE II Missile', in *Lockheed Martin* website, undated, available at: <http://www.lockheedmartin.com/us/products/HellfireII.html> (last visited 20 March 2012). The name of the missile, the first guided launch of which occurred in 1978, comes from its original conception as a helicopter-launched 'fire-and-forget' weapon (HELicopter Launched FIRE-and-forget). 'AGM-114A HELLFIRE missile', in *Boeing*, available at: <http://www.boeing.com/history/bna/hellfire.htm>.

107 See, e.g., 'CIA "killed al-Qaeda suspects" in Yemen', in *BBC*, 5 November 2002; and 'US Predator kills 6 Al Qaeda suspects', in *ABC News*, 4 November 2002, available at: <http://abcnews.go.com/WNT/story?id=130027&page=1>. According to the *ABC* news report, all that remained of the car 'was rubble in the desert'.

108 Israeli forces have conducted targeted killings of Palestinians using drones. See, e.g., 'Three killed in Israeli airstrike', in *CNN*, 1 April 2011, available at: <http://articles.cnn.com/keyword/gaza-strip>; 'Gaza truce gets off to a shaky start', in *CNN*, 23 June 2012, available at: [http://articles.cnn.com/2012-06-23/middleeast/world\\_meast\\_israel-gaza-violence\\_1\\_gaza-truce-popular-resistance-committees-palestinian-medical-officials?\\_s=PM:MIDDLEEAST](http://articles.cnn.com/2012-06-23/middleeast/world_meast_israel-gaza-violence_1_gaza-truce-popular-resistance-committees-palestinian-medical-officials?_s=PM:MIDDLEEAST).

a US citizen.<sup>109</sup> After earlier failed drone strikes against him, his family had launched a legal challenge seeking to prevent the USA from executing one of its citizens without any judicial process.<sup>110</sup>

The first subsection below discusses how human rights law regulates the use of force outside armed conflict in a 'law enforcement' situation, while the second looks at its role and consequences – actual and potential – within armed conflict as a constituent of *jus in bello* alongside IHL.

## Application of human rights law to law enforcement

Under international human rights law two important principles govern all use of force in a law enforcement setting: necessity and proportionality. Although these terms have been used in the context of both *jus ad bellum* and IHL, their precise meaning in the context of human rights law is markedly different. As Alston has stated: 'A State killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or nonlethal incapacitation, of preventing that threat to life (making lethal force *necessary*)'.<sup>111</sup> A further requirement is that the threat to life which the use of lethal force is seeking to forestall must be imminent.<sup>112</sup> Thus, in its approach to regulating the intentional use of lethal force, international human rights law generally embraces the standards laid down in the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (the 'Basic Principles').<sup>113</sup> According to the final sentence of Basic Principle 9: 'In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life'.<sup>114</sup>

This general position is, however, subject to two caveats. First, the Basic Principles were not designed to regulate acts by armed forces in a situation of armed conflict, which remain under the purview of *jus in bello*. Second, the threshold for the intentional lethal use of force has been set less restrictively by domestic

109 'Predator drones and unmanned aerial vehicles (UAVs)', in *The New York Times*, updated 5 March 2012.

110 'Obituary: Anwar al-Awlaki', in *BBC*, 30 September 2011, available at: <http://www.bbc.co.uk/news/world-middle-east-11658920>.

111 '2010 study on targeted killings', above note 11, para. 32. As Melzer has noted, under the law enforcement 'paradigm', the 'proportionality test asks not whether the use of potentially lethal force is "necessary" to remove a concrete threat, but whether it is "justified" in view of the nature and scale of that threat'. N. Melzer, above note 11, p. 115.

112 According to Principle 9 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (emphasis added): 'Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the *imminent* threat of death or 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'.

113 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. The USA did not participate in this meeting, but a UN General Assembly resolution adopted the same year welcomed the Basic Principles and invited governments 'to respect them and to take them into account within the framework of their national legislation and practice'. UN General Assembly Resolution 45/166, A/45/PV.69, adopted without a vote on 18 December 1990, Operative Paragraph 4.

114 Principle 8 provides that: 'Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles'.

US jurisprudence (relating to police powers) and similarly interpreted more permissively by the Inter-American Commission on Human Rights (with respect to counterterrorism operations).<sup>115</sup> In *Tennessee v. Garner*,<sup>116</sup> the US Supreme Court stated that:

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.<sup>117</sup>

Other nations, including Australia and the UK, support the higher standard as set out in the Basic Principles. For example, the UK has a shoot-to-kill policy for suspected suicide bombers, but which clearly meets that higher standard because a suicide bomber not only threatens death, but also is likely to meet the criterion of imminence that is an integral element accompanying the level of threat. Following the July 2005 killing by Metropolitan Police officers of an unarmed youth, Jean Charles de Menezes, wrongly suspected to be a suicide bomber and shot seven times at point-blank range,<sup>118</sup> Lord Stevens, the former Metropolitan Police Commissioner, made public – in a British tabloid newspaper – a policy that had been adopted when he was in charge in 2002.<sup>119</sup> He told that British newspaper that the teams he sent to Israel and other countries<sup>120</sup> hit by suicide bombers after

115 The Commission appears, however, to confuse the situations in which firearms may be used (imminent threat of death or serious injury) with those in which intentional lethal force may be employed. Indeed, in claiming that the use of lethal force by law enforcement officials is lawful also to protect themselves or other persons from imminent threat of serious injury, it cites Basic Principle 9, which as we have seen limits the intentional use of lethal force to where it is strictly unavoidable in order to protect life. Certain leading authors seem to have committed similar errors. See, e.g., N. Melzer, ‘Keeping the balance’, above note 77, p. 903; N. Melzer, , above note 11, pp. 62, 197; and N. Lubell, above note 23, p. 238.

116 *Tennessee v. Garner*, 471 US 1, Appeal from the US Court of Appeals for the Sixth Circuit, No. 83-1035 (27 March 1985). The case involved the fatal shooting by a police officer of an unarmed 15-year-old boy. The suspect, who was shot in the back of the head with a .38-calibre pistol loaded with hollow point bullets, was fleeing a suspected burglary. On his person was found money and jewellery worth \$10 that he had allegedly taken from the house.

117 The Court cited with approval the model penal code whereby: ‘The use of deadly force is not justifiable . . . unless (i) the arrest is for a felony; and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed’. American Law Institute, Model Penal Code, Section 3.07(2)(b) (proposed Official Draft 1962), cited in *Tennessee v. Garner*, *ibid.*, para. 166, note 7.

118 See, e.g., ‘De Menezes police “told to shoot to kill”’, in *Daily Telegraph*, 3 October 2007, available at: <http://www.telegraph.co.uk/news/uknews/1564965/De-Menezes-police-told-to-shoot-to-kill.html>. This incident shows the potential for fatal mistakes to be made even when round-the-clock, direct and indirect surveillance is maintained on a terrorist suspect.

119 The policy, codenamed Operation Kratos, was named after the Greek demi-god Kratos, meaning strength or power in ancient Greek.

120 Reportedly Russia and Sri Lanka.

the 11 September 2001 attacks in the USA had learned a ‘terrible truth’, that the only way to stop a suicide bomber was to ‘destroy his brain instantly, utterly’. Previously, officers had fired at the offender’s body, ‘usually two shots, to disable and overwhelm’.<sup>121</sup> Sir Ian Blair, who was Commissioner in 2005, stated that there was ‘no point’ in shooting a suspect in the chest as that is where a bomb would most likely be and it would detonate.<sup>122</sup>

The question of imminence is extremely important to the issue of drone strikes, especially given the risk of subjectivity and lack of transparency as to who is on the US list of those designated for elimination.<sup>123</sup> The speech by Attorney General Holder in March 2012 appeared to seek to marry two different legal regimes – one applicable to a law enforcement paradigm and the other applicable to armed conflict – when he claimed that authorization for the use of a drone strike against a US citizen would require ‘a thorough review’ that had determined the individual posed ‘an imminent threat of violent attack against the United States’ and that ‘capture is not feasible’. In 2010, Koh stated that:

[it] is the considered view of this Administration – and it has certainly been my experience during my time as Legal Adviser – that US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with *all applicable law*, including the laws of war.<sup>124</sup>

In May 2012, *The New York Times* reported on the existence of ‘Terror Tuesdays’, when the US President would decide who would be killed by the USA, typically through drone strikes:

This was the enemy, served up in the latest chart from the intelligence agencies: 15 Qaeda suspects in Yemen with Western ties. The mug shots and brief biographies resembled a high school yearbook layout. Several were Americans. Two were teenagers, including a girl who looked even younger than her 17 years.<sup>125</sup>

Given the significant constraints on the intentional use of lethal force under international human rights law, Alston concludes that: ‘Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a state’s own territory, over which the State has control,

121 ‘Debate rages over “shoot-to-kill”’, in *BBC*, 24 July 2005, available at: <http://news.bbc.co.uk/1/hi/uk/4711769.stm>. Lord Stevens said: ‘We are living in unique times of unique evil, at war with an enemy of unspeakable brutality, and I have no doubt that now, more than ever, the principle is right despite the chance, tragically, of error. . . . And it would be a huge mistake for anyone to even consider rescinding it’.

122 The use of ‘less-lethal’ weapons, such as the Taser conducted electrical weapon, is also not recommended for fear it might detonate the explosives. See, e.g., Memorandum entitled ‘Counter Suicide Terrorism’ from the Clerk to the Metropolitan Police Authority to the Members of the MPA, London, 8 August 2005.

123 See ‘2010 study on targeted killings’, above note 11, para. 20. There is also an obvious risk that targeted killings are seen as lethal retribution for past crimes. See, e.g., in Pakistan, N. Melzer, above note 11, p. 178.

124 Speech by Harold Hongju Koh, Legal Adviser, US Department of State, to the Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010 (emphasis added), available at: <http://www.state.gov/s/l/releases/remarks/139119.htm>.

125 J. Becker and S. Shane, above note 61.

would be very unlikely to meet human rights law limitations on the use of lethal force’. Furthermore, outside a state’s own territory,

there are very few situations outside the context of active hostilities in which the test for anticipatory self-defence . . . would be met. . . . In addition, drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in state responsibility and individual criminal liability.<sup>126</sup>

For Lubell, for example, the killing of al-Harithi in Yemen in 2002 was unlawful on the basis that it violated the right to life as set out in the 1966 Covenant on Civil and Political Rights.<sup>127</sup>

### Application of applicable international law within and linked to armed conflict

Aside from, and in addition to, any determination under *jus ad bellum* of the legality of the use of force in another state, international human rights law will be the primary source of international law determining the legality of the use of drones outside a situation of armed conflict. Within a situation of armed conflict and with respect to acts that represent the requisite nexus, at least non-derogable rights will continue to apply fully, while others may be subject to derogation to the extent ‘strictly required by the exigencies of the situation’.<sup>128</sup> Since armed drone strikes are most obviously a threat to life even though they may directly or indirectly affect numerous other human rights, analysis will focus on this ‘supreme’ right (in the words of the UN Human Rights Committee).<sup>129</sup>

### *Applicability of human rights law in armed conflicts*

In an oft-cited dictum pertaining to the right to life as set out in 1966 Covenant on Civil and Political Rights, the ICJ opined in 1996 that:

the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.

126 ‘2010 study on targeted killings’, above note 11, paras. 85, 86.

127 N. Lubell, above note 23, pp. 106, 177, 254–255.

128 Human Rights Committee, ‘General Comment 29: States of Emergency (Article 4)’, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

129 ‘General Comment No. 6: The right to life (Article 6)’, 30 April 1982.



Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>130</sup>

Several states argued, unsuccessfully, before the Court that the Covenant – and indeed human rights in general – was not applicable in a situation of armed conflict. This position is rarely heard today, and has been generally discredited.<sup>131</sup>

### *Relationship between human rights law and international humanitarian law*

In contrast, the Court's assertion that whether the right to life has been violated depends on a *renvoi* to the law applicable in armed conflict as *lex specialis*<sup>132</sup> still attracts widespread support. On a superficial reading, this would appear to constitute total deference to IHL. There are, though, a number of reasons for questioning such an assertion. As Christian Tomuschat has noted,<sup>133</sup> the Court's statement was 'somewhat short-sighted'<sup>134</sup> given that in the issue before it, the legality of the threat or use of nuclear weapons, it was unable to 'conclude definitively' based on IHL interpretation whether such threat or use 'would be lawful or unlawful in an extreme circumstance of self-defence'.<sup>135</sup> Second, as he and others have observed, the Court's appraisal of the mutual relationship between IHL and human rights law has been modified in subsequent decisions,<sup>136</sup> notably the Advisory Opinion in the *Wall* case (2004)<sup>137</sup> and the decision in the *Armed*

130 ICJ, *Nuclear Weapons Advisory Opinion*, 8 July 1996, para. 25.

131 Though for the position of Israel and the US, see, e.g., Melzer, above note 11, pp. 79–80. With respect to the American Convention on Human Rights, the Inter-American Commission on Human Rights has specified that 'the contours of the right to life may change in the context of an armed conflict, but ... the prohibition on arbitrary deprivation of life remains absolute. The Convention clearly establishes that the right to life may not be suspended under any circumstances, including armed conflicts and legitimate states of emergency'. Inter-American Commission on Human Rights, 'Report on Terrorism and Human Rights', Doc. OEA/Ser.L/V/II.116 (doc. 5 rev. 1 corr.), 22 October 2002, para. 86.

132 For a discussion of the application of the principle, see, e.g., Nancie Prud'homme, 'Lex specialis: oversimplifying a more complex and multifaceted relationship?', in *Israel Law Review*, Vol. 40, No. 2, 2007.

133 Christian Tomuschat, 'The right to life – legal and political foundations', in C. Tomuschat, E. Lagrange and S. Oeter (eds), *The Right to Life*, Brill, The Netherlands, 2010, p. 11.

134 Schabas describes it as 'clumsy at best'. See William A. Schabas, 'The right to life', in A. Clapham and P. Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, forthcoming. Lubell is even harsher on the Court, calling it 'perhaps an inept approach'. N. Lubell, above note 23, p. 240. Milanović calls for *lex specialis* to be 'abandoned as a sort of magical, two-word explanation of the relationship between IHL and IHRL, as it confuses far more than it clarifies'. M. Milanović, 'Norm conflicts, international humanitarian law and human rights law', in Orna Ben-Naftali (ed.), *Human Rights and International Humanitarian Law*, Collected Courses of the Academy of European Law, Vol. XIX/1, Oxford University Press, Oxford, 2010, p. 6.

135 *Ibid.*, para. 105.

136 See also in this regard Sir Daniel Bethlehem, 'The relationship between international humanitarian law and international human rights law and the application of international human rights law in armed conflict', unpublished paper, undated but 2012, para. 39.

137 *Ibid.* As set out in para. 106: 'As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters

*Activities on the Territory of the Congo* case (2005).<sup>138</sup> According to Alston, since both IHL and human rights law apply in the context of armed conflict,

whether a particular killing is legal is determined by the applicable *lex specialis*. . . . To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law.<sup>139</sup>

Others, including this author, would go even further. Milanović, for example, notes the omission of a reference to IHL as *lex specialis* in the ICJ judgment in the 2005 Congo case, compared with its Advisory Opinions in the *Wall* case and the *Nuclear Weapons* case, and expresses the hope that this was intentional.<sup>140</sup> In a 2011 *European Journal of International Law* blog, he stated:

A bolder approach to the joint application of IHL and IHRL [international human rights law] would ask whether there are killings which do comply with IHL but are still arbitrary in terms of IHRL. Can, in other words, IHRL during armed conflict impose additional requirements for the lawfulness of a killing to those of IHL? And can these requirements, while more stringent than those of IHL, still be somewhat less stringent than those set out in human rights jurisprudence developed in and for times of normalcy . . . ? . . . I think all these questions can be answered with a cautious ‘yes’.<sup>141</sup>

Indeed, in its Nuclear Weapons Advisory Opinion, the Court had made it clear that the law applicable in armed conflict (*jus in bello*) was not limited to IHL.<sup>142</sup> Further evidence that it could be overly simplistic to interpret the right to life in a situation of armed conflict merely through the lens of compliance with IHL comes from the meaning of ‘arbitrarily deprive’. With respect to the 1966 Covenant on Civil and Political Rights, the term is said to contain ‘elements of unlawfulness and injustice, as well as of capriciousness and unreasonableness’.<sup>143</sup>

There is a clear limit to this approach, however. While human rights law has much to bring to the IHL table in terms of limiting violence and promoting

of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.’

138 ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, para. 216.

139 ‘2010 study on targeted killings’, above note 11, para. 29.

140 M. Milanović, above note 134, p. 6.

141 M. Milanović, ‘When to kill and when to capture?’, in *EJIL Talk!*, 6 May 2011, available at: <http://www.ejiltalk.org/when-to-kill-and-when-to-capture/>.

142 Thus, in para. 42 of its Advisory Opinion, the Court referred to the ‘requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law’. The law applicable in armed conflict do [sic] indeed comprise *in particular* the principles and rules of humanitarian law, but they are not so limited, comprising elements of international human rights and (‘humanitarian’) disarmament law. ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 42.

143 Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, N. P. Engel, Kehl, 1993, p. 111. See also N. Melzer, above note 11, p. 93.

humanity (for instance, by contributing to a greater understanding of what constitutes in practical terms 'the principles of humanity' and the 'dictates of public conscience' in the application of the Martens clause), it is not being suggested here that a weapon that is generally lawful under IHL is somehow generally rendered unlawful by human rights law. Lubell, for example, indicates that the laws on the selection of weaponry are rightly addressed by IHL without interference from human rights law.<sup>144</sup> (In fact, it could even be argued that such interference would run the risk of weakening IHL, given that tear gas and expanding bullets, outlawed under IHL as a method and a means of warfare, respectively, might be somehow rendered legitimate as they can be used for law enforcement in compliance with international human rights law.)

Nonetheless, an increased, and increasing, influence of human rights law on the content of *jus in bello*, an area formerly considered the *domaine réservé* of IHL, should be seen not as a threat but as a necessary counterbalance to the more aggressive acts of certain states in response to, what they espouse as, a new legal paradigm in the post-9/11 world.<sup>145</sup> Restraint is not a sign of weakness – it is a sign of strength. With respect to drones, it is said that the CIA refused to deploy the Predator for anything other than surveillance prior to 9/11. The week before the Al Qaeda attacks against the US, the then-Director of the CIA, George Tenet, is reported to have remarked, referring to drones, that it would be 'a terrible mistake' for the 'Director of Central Intelligence to fire a weapon like this'.<sup>146</sup> How prophetic this statement may prove to be.

## Conclusion

Drones can enable states to carry out targeted killings efficiently, at relatively little cost, and at minimal risk. In the *Corfu Channel* case,<sup>147</sup> the ICJ stated that:

the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.<sup>148</sup>

144 N. Lubell, above note 23, p. 242.

145 Another way of looking at states' attitude after the 9/11 attacks is to apply IHL rules to situations where human rights applicable to law enforcement operations should be applied.

146 Daniel Benjamin and Steven Simon, *The Age of Sacred Terror*, Random House, New York, 2002, p. 345.

147 The *Corfu Channel* case resulted from two British Royal Navy ships in the Corfu Strait hitting and detonating sea mines (forty-five British officers and sailors lost their lives and forty-two others were wounded) and subsequent mine clearance operations by the Royal Navy in the Strait, but in Albanian territorial waters. The ICJ held Albania responsible for the explosions and awarded damages to the UK but judged that the clearance operations had violated Albania's sovereignty.

148 ICJ, *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, (Merits) Judgment of 9 April 1949, p. 35.

Too often, targeted killings by states, whether using drones or other means, look rather like crossing names off a Mafia hit list. Indeed, as Melzer has observed: 'In the final analysis, . . . measured by the moral standards common to most societies, even targeted killings carried out within the framework of the present legal order often have traits that are more readily associated with criminal behaviour than with acceptable Government policy'.<sup>149</sup> And in the words of a former CIA lawyer: 'The government's power to kill must be carefully controlled – or it could turn into a tyranny worse than terrorism'.<sup>150</sup>

Such control means international legal responsibility for unlawful drone strikes, both at the level of the state and the individual. But who is to be held criminally responsible when civilians are killed either in violation of IHL rules of distinction or proportionality or in violation of fundamental human rights? The operator of the drone? The 'spotters' on the ground (if any)? Those who designate the target as a military objective (who may be paid informants)? The lawyer who authorizes the strike? All of the above? If the strike is unlawful, could it be an example of a joint criminal enterprise under international criminal law, or have one or more of the above aided or abetted an international crime?

Of even greater concern is the prospect of fully autonomous drones making targeting decisions based on a series of programmed vectors, potentially without any human control.<sup>151</sup> Who is then to be held responsible? The manufacturer of the drone? The software programmer? For the moment, there are far more questions than answers.

Moreover, it is only a matter of time before non-state armed groups develop or procure drone technology<sup>152</sup> (or hack into the operation of a state-controlled

149 N. Melzer, above note 11, p. 435.

150 A. J. Radsan, above note 19, p. 8. A study 2011 UK Ministry of Defence study stated that: 'It is essential that, before unmanned systems become ubiquitous (if it is not already too late) that we consider this issue and ensure that, by removing some of the horror, or at least keeping it at a distance, that we do not risk losing our controlling humanity and make war more likely'. *The UK Approach to Unmanned Aircraft Systems*, Development, Concepts and Doctrine Centre, Joint Doctrine Note 2/11, Ministry of Defence, 2011, pp. 5–9. See also Richard Norton-Taylor and Rob Evans, 'The terminators: drone strikes prompt MoD to ponder ethics of killer robots', in *The Guardian*, 17 April 2011, available at: <http://www.guardian.co.uk/world/2011/apr/17/terminators-drone-strikes-mod-ethics>.

151 According to a 2010 US Air Force report: 'Growth in military use of remotely piloted vehicles has been rapid as forces around the world explore increasingly wider uses for them, including surveillance, strike, electronic warfare, and others. These will include fixed-wing and rotary-wing systems, airships, hybrid aircraft, and other approaches. They will have increasingly autonomous capabilities allowing remote pilots to declare their overall mission intent but permit these systems to adapt autonomously in the local environment to best meet those objectives. . . . Although humans will retain control over strike decisions for the foreseeable future, far greater levels of autonomy will become possible by advanced technologies. These, in turn, can be confidently exploited as appropriate V&V [verification and validation] methods are developed along with technical standards to allow their use in certifying such highly autonomous systems'. US Air Force Chief Scientist, 'Report on technology horizons, a vision for Air Force science & technology during 2010–2030', Doc. AF/ST-TR-10-01-PR, Vol. I, May 2010, pp. 24, 42. See also, Tom Malinowski, Human Rights Watch, 'A dangerous future of killer robots', in *Washington Post*, 22 November 2012, available at: <http://www.hrw.org/news/2012/11/22/dangerous-future-killer-robots>.

152 In October 2012, the leader of Hezbollah claimed that his group was behind the launch of a drone shot down over Israel by the Israeli Defence Forces on 6 October. Sheikh Hassan Nasrallah asserted that the drone was made in Iran and had flown over 'sensitive sites' in Israel. BBC, 'Hezbollah admits launching drone over Israel', 11 October 2012, available at: <http://www.bbc.co.uk/news/world-middle-east-19914441>.

drone and assume control).<sup>153</sup> Will not such groups be seeking actively to level the killing field? As a Senior Fellow with the Brookings Institute warned in 2011:

To believe that drones will remain the exclusive province of responsible nations is to disregard the long history of weapons technology. It is only a matter of time before rogue groups or nations hostile to the United States are able to build or acquire their own drones and to use them to launch attacks on our soil or on our soldiers abroad.<sup>154</sup>

Pandora's box has been opened, but undoubtedly even nastier surprises are yet to emerge.

153 In June 2012, US researchers took control of a flying drone by 'hacking' into its GPS system, acting on a \$1,000 (£640) dare from the US Department of Homeland Security (DHS). A University of Texas at Austin team used 'spoofing', a technique where the drone mistakes the signal from hackers for the one sent from GPS satellites. The same method may have been used to bring down a US drone in Iran in 2011. 'Researchers use spoofing to "hack" into a flying drone', in *BBC*, 29 June 2012, available at: <http://www.bbc.com/news/technology-18643134>.

154 John Villasenor, 'Cyber-physical attacks and drone strikes: the next homeland security threat', *The Brookings Institution*, 5 July 2011, available at: [http://www.brookings.edu/papers/2011/0705\\_drones\\_villasenor.aspx](http://www.brookings.edu/papers/2011/0705_drones_villasenor.aspx).