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THE LEGALITY OF ARMED DRONES UNDER INTERNATIONAL LAW

BACKGROUND PAPER BY THE INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

Adopted on 25 May 2017

This Background Paper sets out the legal framework applicable to the use of armed drones, to assist all those seeking to inform themselves about this framework. The purpose of this Background Paper is to explain a Resolution on the topic, adopted by the International Bar Association's Human Rights Institute (IBAHRI) on 25 May 2017. The Resolution appeals for the observance of the legal standards, which must apply when drones are used for the delivery of lethal weapons. It is available at:

www.ibanet.org/Human_Rights_Institute/council-resolutions.aspx

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1 Introduction

Since the turn of the century, a new type of warfare has developed. The standard-bearer is arguably the remotely piloted aircraft or ‘drone’, a technological innovation that has proliferated at a rapid rate and appears to be becoming commonplace in the arsenals of states throughout the globe. The remote nature of drones means that they can be lighter, smaller and cheaper than conventional aircraft, and can overfly areas otherwise too risky, which is key to their success.¹ Originally utilised for surveillance purposes, the use of drones has evolved over time to enable the swift delivery of lethal force. Carrying laser-guided munitions, drones ostensibly enable precision strikes while removing humans from the battlefield.²

Drones have a long history, having been developed during the First World War (1914–1918). They have since been present in numerous conflicts, in Korea (1950–1953), Vietnam (1955–1975) and the Arab/Israeli conflict of 1973, as well as in the many armed conflicts that marked the break-up of the former Yugoslavia. Nonetheless, though some of these drones were used lethally as guided bombs, most were solely for reconnaissance. It was not until the conflict in Kosovo that a drone (the ‘Predator’) was equipped with missiles that could be fired remotely,³ and it was not until the war in Afghanistan that such a missile was actually fired.⁴ The United States is the world’s most prolific user of armed drones and its programme is rapidly expanding: in 2000, it comprised fewer than 50 drones⁵ but, by 2012, this figure had risen to over 19,000,⁶ and is set to rise further as the Pentagon seeks to increase its daily drone flights by 50 per cent.⁷ Many US drones are piloted by the Air Force but, controversially, a large number are flown by the Central Intelligence Agency (CIA), which regularly launches attacks, particularly in Pakistan, Somalia and Yemen.⁸ The first of these strikes took place in Yemen in 2002, in which a laser-guided missile was launched from a drone, destroying a car and causing the death of six people, including a suspected al-Qaeda lieutenant.⁹ To add to the controversy of this particular strike, it has been argued that there was no armed conflict in Yemen at the time.¹⁰

Since this first strike in Yemen, drones have been used consistently, in a similar manner. Table 1 draws on data from multiple drone monitoring bodies and demonstrates the breadth of the use of armed drones globally:

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- 1 J Garamone, ‘Unmanned Aerial Vehicles Proving Their Worth Over Afghanistan’ (16 April 2002) *American Forces Press Service*, <http://archive.defense.gov/news/newsarticle.aspx?id=44165> accessed 20 June 2017.
 - 2 S Davies, ‘Drone warfare and the Geneva Convention’ (15 August 2011) *Engineering and Technology*, <https://eandt.theiet.org/content/articles/2011/08/drone-warfare-and-the-geneva-convention> accessed 20 June 2017.
 - 3 M Benjamin, *Drone Warfare; Killing by Remote Control* (Verso 2013) 15.
 - 4 K Somerville, ‘US drones take combat role’ (5 November 2002) *BBC*, <http://news.bbc.co.uk/1/hi/world/2404425.stm> accessed 20 June 2017.
 - 5 See n 3 above, 17.
 - 6 M Hastings, ‘The Rise of Killer Drones: How America Goes to War in Secret’ (16 April 2012) *Rolling Stone*, www.rollingstone.com/politics/news/the-rise-of-the-killer-drones-how-america-goes-to-war-in-secret-20120416 accessed 20 June 2017.
 - 7 D Alexander and S Heavey, ‘Pentagon eyes sharp increase in drone flights by 2019: official’ (17 August 2015) *Reuters*, www.reuters.com/article/us-usa-security-drones-idUSKCN0QM1FR20150817 accessed 20 June 2017.
 - 8 E Schmitt, ‘Threats And Responses: The Battlefield; U.S. Would Use Drones To Attack Iraqi Targets’ *New York Times* (Washington, 5 November 2002), www.nytimes.com/2002/11/06/world/threats-responses-battlefield-us-would-use-drones-attack-iraqi-targets.html?scp=1&sq=drones&st=nyt accessed 20 June 2017.
 - 9 ME O’Connell, ‘Unlawful Killing with Combat Drones, A Case Study of Pakistan 2004-2009’ (2010) Notre Dame Legal Studies Paper No 09-43, <http://ssrn.com/abstract=1501144>, 3, accessed 20 June 2017.
 - 10 KJ Heller and JC Dehn, ‘Debate: Targeted Killing: The Case of Anwar Al-Aulaqi’ (2011) 159 *University of Pennsylvania Law Review PENNumbra*, 175, 183.

Table 1: Estimated drone use figures

State (User)	Number of strikes	Minimum total killed	Maximum total killed	Minimum civilians killed	Maximum civilians killed
Pakistan (US, 2004–present) ⁱ	428	2,511	4,020	424	969
Yemen (US, 2002–present) ⁱⁱ	254	890	1,228	166	210
Somalia (US, 2007–present) ⁱⁱⁱ	46	323	479	10	28
Afghanistan (Coalition, 2008–2012; US, 2015–present) ^{iv}	2,920	2,849	3,718	142	200
Iraq/Syria (US, UK, 2014–present) ^v	1,381	n/a	n/a	n/a	n/a
Libya (US, 2011) ^{vi}	145	n/a	n/a	n/a	n/a
Palestine (Israel, 2004 – present) ^{vii}	n/a	n/a	n/a	n/a	n/a

Table 1 footnotes

- i 'Get the Data: Drone Wars', *The Bureau of Investigative Journalism*, www.thebureauinvestigates.com/stories/2012-07-02/pakistan-drone-statistics-visualised accessed 11 July 2017.
- ii *Ibid.*
- iii *Ibid.*
- iv *Ibid*; C Woods and A Ross, 'Revealed: US and Britain Launched 1,200 Drone Strikes in Recent Wars' (4 December 2012) *The Bureau of Investigative Journalism*, www.thebureauinvestigates.com/stories/2012-12-04/revealed-us-and-britain-launched-1-200-drone-strikes-in-recent-wars accessed 11 July 2017. Data regarding the deaths from drone strikes in Afghanistan relate only to the period 2015 to present.
- v This is an estimate as to the combined total of US and UK strikes. In terms of UK strikes, this is based on information obtained by Drone Wars UK through Freedom of Information requests: 'UK Drone Strike Stats' (12 May 2016) *Drone Wars UK*, <https://dronewars.net/uk-drone-strike-list-2> accessed 11 July 2017. In terms of US strike data, the estimate is based on the reported percentage of all airstrikes that have been carried out by drones (three per cent from MQ-1 Predators and four per cent from MQ-9 Reapers: O Pawlyk 'ISIS Kill Missions: 1 in 5 Drone Flights Includes a Missile Strike' (30 March 2016) *Air Force Times*, www.airforcetimes.com/story/military/2016/03/30/isis-kill-missions-1-5-conducted-drone/82389432 accessed 11 July 2017). Data on the total number of US airstrikes in Iraq and Syria is available at *Air Wars*, <https://airwars.org/data> accessed 11 July 2017.
- vi See n iv above.
- vii Israel's use of drones is kept entirely secret by the government and, as such, it has been impossible to produce data as to the extent of Israel's drone programme. Nonetheless, due to the fact that Israel does use drones for the delivery of lethal weapons, it has been included in this table. M Dobbing and C Cole 'Israel and the Drone Wars' (2014) *Drone Wars UK*, <https://dronewarsuk.files.wordpress.com/2014/01/israel-and-the-drone-wars.pdf> accessed 11 July 2017.

In 2010, Harold Koh (then Legal Adviser at the US Department of State) provided justifications for the targeting of al-Qaeda officials in Pakistan by drone strikes. Under US domestic law, drone strikes are carried out pursuant to the September 2001 Authorization for Use of Military Force, under which ‘all necessary and appropriate’ measures may be taken against the organisation responsible for the attacks of September 2001.¹¹ In terms of international law, Koh referred to the US’s ‘inherent right’ to self-defence in response to the attacks of 11 September 2001.¹² Additionally, other US officials have referred to the consent of the states in which the US uses armed drones.¹³

Currently, more than 50 countries possess surveillance drones, and several are developing armed versions.¹⁴ Many of these countries claim to have created their own armed drones, and at least seven states (Iran, Iraq, Israel, Nigeria, Pakistan, the United Kingdom and the US) have utilised these armed capabilities.¹⁵ Additionally, there is some suggestion that drone technology is now being used by non-state armed groups.¹⁶ Moreover, while the US refuses to market drone technology, China, Israel and other states appear to intend to take advantage of the gap in the market and are likely to commercialise this technology as soon as it is developed.¹⁷

11 H Koh, ‘The Obama Administration and International Law’ (March 2010), speech at the Annual Meeting of the American Society of International Law (stating that the US ‘may use force consistent with its inherent right to self-defence under international law’), www.state.gov/documents/organization/179305.pdf accessed 20 June 2017.

12 *Ibid.*

13 E Holder, ‘Attorney General Eric Holder Speaks at Northwestern University School of Law’ (5 March 2012) *United States Department of Justice*, www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law accessed 20 June 2017. See also J Brennan (White House Counterterrorism Advisor), ‘The Ethics and Efficacy of the President’s Counterterrorism Strategy’ (April 2012) prepared remarks at the Woodrow Wilson International Center for Scholars, www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy accessed 20 June 2017.

14 W Wan and P Finn, ‘Global race on to match U.S. drone capabilities’ (4 July 2011) *The Washington Post*, www.washingtonpost.com/world/national-security/global-race-on-to-match-us-drone-capabilities/2011/06/30/gHQACWdmxH_story.html accessed 20 June 2017.

15 ‘World of Drones’, *New America: International Security Program*, www.newamerica.org/in-depth/world-of-drones accessed 20 June 2017.

16 C Alexander and G Ackerman, ‘ Hamas Bragging Rights Grow With Drones Use Against Israel’ (16 July 2014) *Bloomberg*, www.bloomberg.com/news/articles/2014-07-16/hamas-bragging-rights-grow-with-drones-use-against-israel accessed 25 March 2017.

17 *Ibid.*

2 International law and the *resort* to drones

Article 2(4) of the United Nations Charter prohibits ‘the threat or use of force against the territorial integrity’ of another state. This self-evidently includes drone strikes, the use of which by one state on the territory of another would be a *prima facie* breach of Article 2(4). Nevertheless, there are scenarios in which uses of force can be lawfully carried out: with the consent of the territorial state (eg, if a non-state armed group is operating in or from its territory); in self-defence (on either an individual or collective basis); or by authorisation of the UN Security Council (so-called Chapter VII actions).¹⁸ This framework governing when states may resort to the use of force is known as the *jus ad bellum* and it will now be considered how this relates to the use of drones.

2.1 Consent

Consent has been cited by the US in support of the lawfulness of its drone programme against ‘al-Qaeda, the Taliban and associated forces’ on several occasions¹⁹ and, consequently, may provide for the legitimisation of drone strikes in Afghanistan, Iraq, Pakistan, Somalia and Yemen. It is, therefore, a key area of investigation, though little scholarly examination has been undertaken.²⁰

Article 20 of the International Law Commission Draft Articles on State Responsibility and the accompanying commentary provides a framework for understanding consent in international law. The article refers to ‘valid’ consent and the commentary asserts that validity requires consent to be ‘freely given and clearly established’²¹ by an official of a ‘legitimate’ government²² who is authorised to do so.²³ In addition to this, Article 20 refers to the ‘limits’ of consent, demonstrating that, first, intervening states may not stray outside the bounds of the remit provided by consent;²⁴ and second, that consent is unable to preclude the wrongfulness of acts in breach of international laws other than *jus ad bellum*, most obviously those of international humanitarian law (IHL) and international human rights law (IHRL).²⁵ Both the consenting and intervening states have a duty to ensure that uses of force by consent do not breach other areas of international law.²⁶

18 In addition, there is ongoing debate as to whether force may be resorted to as an ultimate means to avert an impending humanitarian catastrophe, though this remains highly contentious and does not provide a justification akin to those others within the framework governing the use of force.

19 US Department of Justice White Paper, ‘Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of al-Qa’ida or An Associated Force’ (2011) 1, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf accessed 20 June 2017; see also n 13 above.

20 For an in-depth consideration of consent and the use of armed drones, see M Byrne, ‘Consent and the use of force: an examination of “intervention by invitation” as a basis for US drone strikes in Pakistan, Somalia and Yemen’ (2016) 3(1) *Journal on the Use of Force and International Law*, 97.

21 International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), General Assembly Official Records 56th session, supplement no 10 (A/56/10), Art 20 [6].

22 *Ibid.*, Art 20 [5].

23 *Ibid.*, Art 20 [4] and [6].

24 A point reflected in General Assembly Resolution 3314 (XXIX) Definition of Aggression (1974), Art 3(e) and its reference to actions in ‘contravention of the conditions provided for in the agreement’.

25 Both of these areas of international law will be discussed in section 3.

26 AS Deeks, ‘Consent to the Use of Force and International Law Supremacy’ (2013) 54 *Harvard International Law Journal*, 1, 35.

2.1.1 Legitimate government

The determination of legitimacy for consent is based primarily on a government's *de jure* control of a state, even if it has lost physical control, when there is 'no new single regime in control to take its place'.²⁷ This is particularly so when the government remains in control of the capital city.²⁸

With regard to drone strikes that have been carried out, there is no reason to conclude that this requirement would impact on the ability of the Pakistan government to consent to strikes upon its territory, as the government maintains both physical and legal control over the country. There is nothing within the doctrine of consent that requires governmental control over the entirety of its territory, so the fact that the tribal areas (in which the majority of drone strikes have occurred) are semi-autonomous will have no impact on the government's ability to consent.

The legitimacy question is important when considering US drone strikes in Yemen and Somalia, as both administrations have tenuous control over their respective territories. In Yemen, the Houthi rebellion has forced the Hadi regime out of the capital (and indeed, for a time, out of the country)²⁹ suggesting a lack of legitimacy. Nonetheless, state practice supports the validity of consent given by regimes in such a situation.³⁰ Furthermore, many states have affirmed the validity of Yemeni consent to air strikes against Houthi rebels (as distinct to drone strikes against al-Qaeda in the Arabian Peninsula)³¹ and the Hadi regime's continued legitimacy has been recognised by the Security Council.³² This suggests *de jure* though highly tenuous control, which satisfies the legitimacy requirement.

With regard to Somalia, the Somali federal government has been widely recognised³³ and there is no single alternative regime. Thus, despite it lacking control outside of Mogadishu, the Somali federal government has *de jure* control and is the legitimate government, enabling it to consent to drone strikes.

Similar conclusions are inevitable with regard to Iraq and Afghanistan, as in both cases the governments maintain *de jure* legitimacy despite at times being faced with significant losses of territorial control to armed groups such as the Islamic State of Iraq and Syria (ISIS) and the Taliban respectively.

27 L Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56(1) *British Yearbook of International Law*, 189, 199.

28 D Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7 *Duke Journal of Comparative & International Law*, 209, 220.

29 Agence France-Presse, 'Yemen president "in safety" as rebels advance' (25 March 2015) *The Guardian*, www.theguardian.com/world/2015/mar/25/anti-government-militia-captures-airbase-yemen accessed 20 June 2017.

30 For instance, Mali consented to French intervention in 2013 despite having lost control of the north of the country. See also, consent from the Iraqi government to intervention against ISIS, despite struggling for its existence at the time. Though differing from the situation in Yemen, the practice is nonetheless informative. See B Nußberger, 'Military Strikes in Yemen in 2015—Intervention by Invitation and Self-Defence in the Course of Yemen's "Model Transitional Process"' (forthcoming) *Journal on the Use of Force and International Law*.

31 Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the UN addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/217, 3. Despite referring to Art 51, this letter demonstrates the continued legitimacy of the Hadi regime in the eyes of the international community.

32 Security Council Resolution 2216 (2015), UN Doc S/RES/2216.

33 M Bryden, 'Somalia Redux? Assessing the New Somali Federal Government' (August 2013) *Report of the CSIS Africa Program*, 23. In 2015, the US announced the establishment of a diplomatic mission in Mogadishu: see J Kerry, 'Remarks in Mogadishu, Somalia' (5 May 2015) *US Department of State*, <https://2009-2017.state.gov/secretary/remarks/2015/05/241906.htm> accessed 20 June 2017.

2.1.2 Given by an authorised official

The International Law Commission commentary to the Draft Articles on State Responsibility states that ‘[w]ho has authority to consent to a departure from a particular rule may depend on the rule... Different officials or agencies may have authority in different contexts’.³⁴ Due to the significance of consent to intervention, the approach of the Vienna Convention on the Law of Treaties is informative, Article 7(2) of which holds that heads of state, heads of government and ministers for foreign affairs represent states without the need to produce full powers, meaning that such officials are able to speak on behalf of their state per se without needing to be specifically authorised to do so. Thus, according to these authorities, consent to intervention must come from the highest ranks of government.

In Pakistan, the president is the symbolic head of state³⁵ and *de jure* power lies with the prime minister,³⁶ thus it is the prime minister who is principally empowered to consent to drone strikes. In addition, the chief of army staff, appointed by the president on the advice of the prime minister,³⁷ may be able to consent, though it has been suggested that, when in disagreement, the opinion of higher officials is determinative.³⁸ Prime Minister Yousuf Raza Gilani gave secret consent in 2008, though publicly opposed drone strikes.³⁹ This consent was operative until 2013 when it was rescinded by Prime Minister Nawaz Sharif⁴⁰ and the Pakistani foreign ministry.⁴¹ Therefore, in the case of Pakistan, consent has been given by an authorised official, at least in the period up to 2013.

In the case of Yemen, President Hadi reportedly consents to each strike⁴² and, in addition, it has been suggested that general consent has also been given.⁴³ This is ongoing and, as long as the administration remains the legitimate one, there is no reason to doubt the validity of this consent in terms of international law.

With regard to Somalia, in 2007, President Mohamed consented to US airstrikes against suspected terrorists.⁴⁴ Drone strikes have been consented to specifically, Defence Minister Abdihakim Haji Mohamud Fiqi having stated that these were ‘welcome[d] against al-Shabaab’.⁴⁵ In 2013, President

34 See n 21 above, Art 20 [6].

35 Constitution of the Islamic Republic of Pakistan (2010), Arts 41(1) and 48(1).

36 *Ibid*, Arts 48(1) and 91(3).

37 *Ibid*, Art 243(1)(b).

38 C Heyns, ‘Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ (13 September 2013) UN General Assembly, UN Doc A/68/382 [82].

39 Wikileaks, ‘Kayani Wanted More Drone Strikes in Pakistan’ (21 February 2013), https://wikileaks.org/gifiles/docs/30/3049919_os-us-pakistan-mil-ct-wikileaks-kayani-wanted-more-drone.html accessed 20 June 2017.

40 G Miller and B Woodward, ‘Secret Memos Reveal Explicit Nature of US, Pakistan Agreement on Drones’ (24 October 2013) *Washington Post*, www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html?utm_term=.e14a589c8ae9 accessed 20 June 2017.

41 J Boone and S Kirchaessner, ‘Pakistan uses hostage killings to underline risk of US drone strikes’ (24 April 2015) *The Guardian*, www.theguardian.com/world/2015/apr/24/pakistan-us-hostage-killings-drone-strikes-weinstein-lo-porto accessed 20 June 2017.

42 G Miller, ‘Yemeni president acknowledges approving US drone strikes’ (29 September 2012) *Washington Post*, www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-aff-d6c7f20a83bf_story.html?utm_term=.243ff30f9296 accessed 20 June 2017.

43 Human Rights Watch, ‘A Wedding that Became a Funeral: US Drone Attack on Marriage Procession in Yemen’ (February 2014), www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf, 6, accessed 20 June 2017.

44 ‘US Somali air strikes “kill many”’ (9 January 2007) *BBC*, <http://news.bbc.co.uk/1/hi/world/africa/6243459.stm> accessed 20 June 2017.

45 R Young Pelton, ‘Enter the Drones: An In-Depth Look at Drones, Somali Reactions, and How the War May Change’ (7 June 2011) *Somalia Report*, http://piracyreport.com/index.php/post/1096/Enter_the_Drones accessed 20 June 2017.

Mohamud asserted his support for US drone strikes against foreign fighters.⁴⁶ As with Yemen, as long as the Somali federal government is recognised as legitimate, its consent is valid under international law.

Consent by Iraq to general military actions, including drone strikes, has been evidenced in letters to the UN Security Council from Ibrahim al-Ushayqir al-Ja'fari, Minister for Foreign Affairs,⁴⁷ demonstrating that consent has been given by an authorised official. In Afghanistan, general military actions, and thus drone strikes, have been consented to by a 2012 strategic partnership agreement signed by President Hamid Karzai.⁴⁸

Consent has not been given for drone strikes in Syria or Libya. Other justifications under *jus ad bellum* are therefore necessary.

2.1.3 Consent and obligations under international law

States that consent to intervention remain bound by their obligations under IHL and IHRL, as do those that carry out uses of force. It is widely accepted that a territorial state 'may only grant consent to operations that it could itself legally conduct' and so a territorial state 'cannot lawfully allow attacks that would violate applicable human rights or humanitarian law norms, since it does not itself enjoy such authority'.⁴⁹ Additionally, the consenting state must take precautions to ensure that the aiding state is respecting the applicable law.⁵⁰ Therefore, though consent for the use of drones has been granted by numerous states, this only has implications for the lawfulness of the initial resort to their use, not to the manner in which they are used, which remains governed by IHL and IHRL.

2.1.4 Conclusion

Consent is a key strand governing the lawfulness of many drone strikes under *jus ad bellum*, where legitimacy for their use by other means (ie, self-defence) is limited. This is particularly so with covert strikes carried out by the US in Pakistan, Somalia and Yemen. In Pakistan, where the government has a strong and legitimate hold over the country, it appears likely that consent will, for the period that it was given, provide a lawful justification for the resort to drone strikes, though it must not be forgotten that this consent has been publicly withdrawn. Elsewhere, consent has been given by states with a much less clear mandate to give it, due to a lack of legitimacy arising from very tenuous de facto control over territory, particularly the case in Afghanistan, Iraq, Somalia and Yemen. In these instances, it is possible that consent is unable to provide a watertight justification for the use of drones. This is reflected in the fact that the US has given self-defence as a justification alongside consent.

46 J Rogin, 'Somali president asks for more American help' (18 January 2013) *Foreign Policy*, <http://foreignpolicy.com/2013/01/18/somali-president-asks-for-more-american-help> accessed 20 June 2017.

47 See, eg, letter dated 20 September 2014 from the Permanent Representative of Iraq to the UN addressed to the President of the Security Council, UN Doc S/2014/691.

48 Enduring Strategic Partnership Agreement Between the United States of America and the Islamic Republic of Afghanistan (2 May 2012), <http://photos.state.gov/libraries/afghanistan/231771/PDFs/2012-05-01-scan-of-spa-english.pdf> accessed 20 June 2017.

49 MN Schmitt, 'Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the "Fog of Law"' (2010) 13 *Yearbook of International Humanitarian Law*, 311, 315.

50 See n 38 above, 38.

2.2 Self-defence

The use of drones has often been justified by reference to self-defence, which, in the absence of ‘host’ state consent, provides a lawful basis for the use of force within international law under Article 51 of the UN Charter. Self-defence has been invoked by the US, in addition to consent, to justify drone strikes against ‘al-Qaeda, as well as the Taliban and associated forces’,⁵¹ which can be read to cover strikes in Afghanistan, Iraq, Pakistan, Somalia and Yemen. Similarly, the US and the UK have invoked the collective self-defence of Iraq for the use of force (therefore including drone strikes) in Syria.⁵²

Article 51 allows self-defence by a state when: 1) it has suffered an armed attack; 2) the use of force defensively would be necessary; and 3) it would be proportionate. Further to this, under the same article, all states exercising their right to self-defence are required to report it to the Security Council.

2.2.1 The occurrence of an armed attack

The armed attack requirement is not defined by Article 51 of the UN Charter, though it has been interpreted by the International Court of Justice (ICJ) as involving uses of force ‘greater than a mere frontier incident’⁵³ and could be satisfied by a single act if it is sufficiently grave, for instance, the mining of a naval vessel.⁵⁴

In terms of self-defence against attacks that are imminent, but have not yet begun, there is support in state practice and among scholars that states may exercise anticipatory self-defence, though the entire concept of anticipatory self-defence remains a controversial one.⁵⁵ The concept of imminence is often defined narrowly by reference to the ‘Caroline standard’, that is, ‘the necessity of self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation’.⁵⁶ There are also statements in support of a more flexible interpretation of ‘imminence’,⁵⁷ but such flexibility does not go so far as to include the idea of pre-emptive self-defence, as advocated by the US 2002 National Security Strategy. This document conceives self-defence as being available without an imminent threat and when ‘uncertainty remains as to the time and place of the enemy’s attack’.⁵⁸ This latter proposal ‘lacks support under international law’.⁵⁹ There are examples of states and international institutions rejecting the notion of pre-emptive self-defence for being contrary to international law,⁶⁰ and a

51 See n 11 above.

52 Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the UN, addressed to the Secretary-General, UN Doc S/2014/695; letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the UN, addressed to the President of the Security Council, UN Doc S/2015/688.

53 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Reports (1986) [195].

54 *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports (2003) [72].

55 For a recent summary of the debate with detailed references regarding State practice and scholarship, see C Kreß ‘The State Conduct Element’ in C Kreß and S Barriga (eds) *The Crime of Aggression: A Commentary* (Cambridge University Press 2017) 473–479.

56 P Alston ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’ (28 May 2010) A/HRC/14/24/Add.6 [45].

57 See, for instance, E Wilmshurst, ‘Chatham House Principles of International Law on the Use of Force in Self-Defence’ (2006) 55(4) *International and Comparative Law Quarterly*, 963, 967.

58 US National Security Strategy 2002 (2006 revision) 15.

59 See n 56 above, [45].

60 HL Deb 21 April 2004, vol 660, col 370 (Lord Goldsmith asserting the UK government’s view that there is no right of pre-emptive self-defence); Security Council Resolution 487 (1981) UN Doc, S/Res/487 (condemning Israel’s pre-emptive strike against a nuclear facility in Iraq); Rt Hon Jeremy Wright QC MP ‘The Modern Law of Self-Defence’ (January 2017) speech at the International Institute for Strategic Studies, www.ejiltalk.org/the-modern-law-of-self-defence accessed 20 June 2017.

majority of commentators have argued that there is no such doctrine in international law.⁶¹ Even commentators who apparently advocate the possibility that the law is evolving towards acceptance of the doctrine of pre-emptive self-defence have conceded that ‘there is insufficient evidence to say with certainty’ that it has been.⁶² At the same time, the UK Parliament Joint Committee on Human Rights has suggested that the notion of ‘imminence’ in the context of anticipatory self-defence should be interpreted ‘with a degree of flexibility’⁶³ as some have suggested, but it bears emphasising that even such flexibility continues to be more restricted than the definition promoted by the US 2002 National Security Strategy.

Perhaps the most controversial aspect of the use of drones in self-defence is the invocation of the doctrine against purported armed attacks emanating from non-state armed groups. The existence of a right to self-defence against non-state armed groups remains controversial.⁶⁴ The ICJ has implied that an armed attack can only be perpetrated by a state, or a non-state armed group with a connection to its ‘host’ state.⁶⁵ Nonetheless, this has not been determinative of the issue and it has been suggested that the initial need for a connection cited in the *Nicaragua* case was, in fact, made in reference to state responsibility, not for the determination of the existence of an armed attack.⁶⁶ The reality of the law as to the need for a connection between a non-state armed group and its ‘host’ state remains unclear, though there are powerful arguments made for and against it.⁶⁷ It has been argued that the unwillingness or inability of a state playing ‘host’ to a non-state armed group is relevant to the satisfaction of this requirement; this controversial view, which does not appear to have universal acceptance, is considered in more detail below.⁶⁸ Relatedly, a response in self-defence to an armed attack carried out by a non-state armed group only provides for the lawfulness of uses of force against that group, not those that, though potentially ideologically aligned or motivated by the attacking group, do not form a part of it.⁶⁹ This is the case, for instance, with al-Shabaab in Somalia and al-Qaeda in Afghanistan; although they share ideology and have even pledged allegiance to each other, under international law they remain distinct groups, having separate command structures.⁷⁰

61 See, eg, C Gray, *International Law and the Use of Force* (3rd edition, Oxford University Press 2008) 163–165; N Lubell, *Extra Territorial Use of Force Against Non-State Actors* (Oxford University Press 2010) 63. Surrounding the 2003 intervention in Iraq, scores of international lawyers rejected the doctrine of pre-emptive self-defence: ‘Military action in Iraq without Security Council authorization would be illegal’ (2002–03) 34 *Ottawa Law Review* 1; ‘War would be illegal’ (London 7 March 2003) *The Guardian*, www.theguardian.com/politics/2003/mar/07/highereducation.iraq accessed 20 June 2017; ‘Coalition of the willing? Make that war criminals’ (Sydney, 26 February 2003) *Sydney Morning Herald*, www.smh.com.au/articles/2003/02/25/1046064028608.html accessed 20 June 2017; ‘Appel de juristes de droit international concernant le recours à la force contre l’Irak’ (‘Statement by Japanese international law scholars on the Iraqi issue’) (2003) 36 *Revue Belge de Droit International* 293.

62 AS Deeks, ‘Taming the Doctrine of Pre-Emption’ in M Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 676.

63 House of Commons, House of Lords Joint Committee on Human Rights ‘The Government’s Policy on the Use of Drones for Targeted Killing’ Second Report of Session 2015–16, HL Paper 141, HC 574 [3.33]–[3.36].

64 See n 61 above, Gray, 132; see n 56 above, [40].

65 See n 53 above, [195]; *Advisory Opinion Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* ICJ Reports (2004) [139]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Reports (2005) [146].

66 JA Green, *The International Court of Justice and Self-Defence in International Law* (Hart, 2009) 50.

67 See, eg, C Jenks, ‘Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict’ (2010) 85 *North Dakota Law Rev* 649; CJ Tams ‘The Use of Force Against Terrorists’ (2009) 20(2) *EJIL* 359; A Henriksen ‘*Jus ad Bellum* and American Targeted Use of Force to Fight Terrorism Around the World’ (2014) 19(2) *Journal of Conflict and Security Law*, 211; T Reinold ‘State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11’ (2011) 105 *American Journal of International Law*, 244.

68 See section 2.2.2, Necessity.

69 C Kreß, ‘War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice’ (2000) 30 *Israel Yearbook on Human Rights*, 103, 266; A Paulus and M Vashakmadze ‘Asymmetrical War and the Notion of Armed Conflict—a Tentative Conceptualization’ (2009) 91(873) *International Review of the Red Cross*, 95, 119; MN Schmitt, ‘The Status of Opposition Fighters in Non-International Armed Conflict’ (2012) 88 *International Law Studies*, 119, 130; J Pejić, ‘Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications’ (2015) 96(893) *International Review of the Red Cross*, 67, 83–84.

70 N Lahoud, ‘The Merger of al-Shabaab and Qa’idat al-Jihad’ (16 February 2012) *Combating Terrorism Center*, www.ctc.usma.edu/posts/the-merger-of-al-shabab-and-qaidat-al-jihad accessed 25 March 2017.

2.2.2 Necessity

The requirement of necessity is a complicated one but, fundamentally, it means that the use of force in self-defence will only be legitimate to the extent needed to ‘halt or repel an armed attack’.⁷¹ Apart from establishing the required connection between the non-state attacker and the ‘host’ state, as referred to above, the requirement that the ‘host’ state is ‘unwilling or unable’ to neutralise a threat itself is also often seen as being an aspect of necessity.⁷² While this doctrine is controversial, with some commentators hesitant to assert its unambiguous existence,⁷³ it appears to have been increasingly accepted by states.⁷⁴ Recent letters to the Security Council from states regarding intervention in Syria have made explicit or implicit assertions to the unable or unwilling doctrine, suggesting acceptance by some states.⁷⁵ Conversely, a number of other states have specifically *not* relied on the inability or unwillingness of Syria to combat the threat from ISIS,⁷⁶ while Syria itself has objected to the invocation of the doctrine.⁷⁷ This has led prominent writers to suggest that the doctrine has not yet been accepted as law.⁷⁸

2.2.3 Proportionality

In the *Nicaragua* case, the ICJ recalled that the customary international law on self-defence permits only those measures that are proportional to the original armed attack.⁷⁹ This continues to be an accurate statement of the law, having been affirmed by the ICJ in the *Nuclear Weapons* advisory opinion.⁸⁰ Therefore, force cannot be used lawfully in self-defence if that resort to force was not a proportionate response to the prior attack. The term proportionate is, therefore, relative to the

71 See n 38 above, [90].

72 See, eg, ‘Leiden Policy Recommendations on Counter-Terrorism and International Law’ in L van den Herik and N Schrijvers (eds) *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 716; statement of the Institut de Droit International, sub-group on self-defence ‘Present Problems of the Use of Force in International Law’ (27 October 2007); see n 57 above; KN Trapp, ‘Can Non-State Actors Mount an Armed Attack?’ in M Weller (ed) *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 679-696; D Bethlehem, ‘Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors’ (2012) 106 *The American Journal of International Law* 770; AS Deeks, ‘“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense’ (2012) 52 *Virginia Journal of International Law*, 483, 493; see n 61 above, Lubell, 25–42; C Kreß ‘Some Reflections on the International Legal Framework Governing Transnational Armed Conflict’ (2010) 15(2) *Journal of Conflict & Security Law*, 245, 248–252.

73 See, eg, T Ruys, *Armed Attack’ and Article 51 of the UN Charter* (Cambridge University Press 2010) 487, 506.

74 Eg, Russian uses of force against Chechen non-state armed groups in Georgia in 2002, in which the unwilling or unable standard was implicitly relied upon (letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc S/2002/1012); Israeli uses of force against the Palestine Liberation Organization in Lebanon (with a specific reference to the doctrine: UN Security Council, 36th Session, 2,292nd Meeting (17 July 1981) UN Doc S/PV.2292 [54]); Turkey’s use of force against the Kurdistan Workers’ Party, in which the doctrine was explicitly relied upon (identical letters dated 27 June 1996 from the Chargé d’affaires ad interim of the Permanent Mission of Turkey to the United Nations addressed to the Secretary-General and to the President of the Security Council, UN Doc S/1996/479); and an implicit reference to the doctrine in regard to Israel’s use of force against Hezbollah in Lebanon (UN Security Council, 61st session, 5,489th meeting (14 July 2006) UN Doc S/PV.5489 6).

75 Eg, letter dated 23 September 2014 from the Permanent Representative of the US to the UN addressed to the Secretary-General, UN Doc S/2014/695; letter dated 31 March 2015 from the Chargé d’affaires ad interim of the Permanent Mission of Canada to the UN addressed to the President of the Security Council, UN Doc S/2015/221; letter dated 9 September 2015 from the Permanent Representative of Australia to the UN addressed to the President of the Security Council, UN Doc S/2015/693; letter dated 10 December 2015 from the Chargé d’affaires ad interim of the Permanent Mission of Germany to the UN addressed to the President of the Security Council, UN Doc S/2015/946; letter dated 9 September 2015 from the Permanent Representative of Australia to the UN addressed to the President of the Security Council, UN Doc S/2015/693.

76 Identical letters dated 8 September 2015 from the Permanent Representative of France to the UN addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/745; letter dated 11 January 2016 from the Permanent Representative of Denmark to the UN addressed to the President of the Security Council, UN Doc S/2016/34; letter dated 3 June 2016 from the Permanent Representative of Norway to the UN addressed to the President of the Security Council, UN Doc S/2016/513.

77 Identical letters dated 29 December 2015 from the Permanent Representative of the Syrian Arab Republic to the UN addressed to the Secretary-General and the President of the Security Council.

78 O Corten, ‘The “Unwilling or Unable” Test: Has it Been, and Could it be, Accepted?’ (2016) 29(3) *Leiden Journal of International Law*, 777–799.

79 See n 53 above, [176].

80 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 [41].

original attack, but it does not connote that the response in self-defence should be symmetrical with that attack. The assessment of proportionality in individual instances requires a benchmark against which it can be measured; there is some debate as to whether this benchmark is the level of force required for a state to adequately defend itself against an armed attack in question,⁸¹ or whether, going further, proportionality may be judged – to some extent – against the gravity of the original and anticipated future attack.⁸² The ICJ has previously precluded the use of force in self-defence when a specific armed attack had been ‘completely repulsed’⁸³ but, conversely, in subsequent decisions it has considered the proportionality of a use of force in self-defence with reference to the gravity of the preceding armed attack.⁸⁴ The ICJ is thus inclined to recognise the possibility that a forceful defensive measure is disproportionate because its intensity is in excess of the gravity of the armed attack. The jurisprudence offers no real guidance, however, as to when an action taken in self-defence can be said to become excessive in that quantitative sense.⁸⁵

2.2.4 Reporting to the Security Council

The Charter of the United Nations makes it clear that, when exercising self-defence, measures taken by states must ‘be immediately reported to the Security Council’.⁸⁶ While a failure to comply with the reporting requirement does not automatically render measures taken in self-defence unlawful, it may be indicative of the fact that the state in question did not believe it was acting in self-defence.⁸⁷

2.2.5 Conclusion

Claims to the lawfulness of the resort to drones for the delivery of extraterritorial lethal force have commonly been premised on self-defence.⁸⁸ Those carried out by the US against non-state armed groups in Pakistan, Somalia and Yemen have been justified by reference to self-defence in response to the armed attack carried out on 11 September 2001,⁸⁹ as have those strikes in Iraq, Libya and Syria against ISIS.⁹⁰ The resort to drones in these instances, in particular where there is no ‘host’ state consent, will only be lawful when the requirements of self-defence, as depicted in this section, are satisfied. As has been made clear, the elements of ‘armed attack’, necessity and proportionality are subject to competing interpretations, some of which contain a wide degree of latitude as to what is lawful, thereby broadening the scope of situations in which force may be resorted to. It is important that drone strikes based on contested conceptions of self-defence receive proper and thorough

81 R Ago, ‘Eighth Report on State Responsibility’ (A/CN.4/318/Add.5-7) (1980) II(1) *Yearbook of the International Law Commission* 13 [121]; *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Higgins, ICJ Reports 1996 [5]; see n 61 above, Lubell, 66; J Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 156.

82 D Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum*’ (2013) 24(1) *European Journal of International Law* 235, 262–4; see n 73 above, 111.

83 See n 53 above, [237].

84 *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* ICJ Reports (2003) [77].

85 C Kreß, ‘The International Court of Justice and the “Principle of Non-Use of Force”’ in M Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 590.

86 Charter of the United Nations, Art 51.

87 See n 53 above, [200].

88 In addition to the consent of ‘host’ states, see section 2.1, Consent.

89 See n 11 above, stating that the US ‘may use force consistent with its inherent right to self-defense under international law’.

90 Various letters to the Security Council (see n 76 above); letter dated 20 September 2014 from the Permanent Representative of Iraq to the UN addressed to the President of the Security Council, UN Doc S/2014/691.

assessment as to their adherence to the relevant aspects of international law, and that the use of drones, which has the potential to render the resort to lethal force a more feasible undertaking for states, does not have the effect of normalising novel and expansive interpretations of the law. In addition, it must be always recalled that lawfulness in terms of the resort to force is only one aspect of the overall lawfulness of a drone strike, which ‘must satisfy the legal requirements under all applicable international legal regimes’.⁹¹

91 See further, C Heyns, D Akande, L Hill-Cawthorne and T Chengeta, ‘The International Law Framework Regulating the Use of Armed Drones’ (2016) 65(4) *International and Comparative Law Quarterly*, 791, 795.

3 International law and the use of drones

This section of the paper will consider the law that governs states' ongoing use of drones, rather than the resort to them. It must be stressed that the lawfulness or otherwise of the resort to force has *no bearing whatsoever* upon the lawfulness of the conduct of the use of force, and vice versa. Thus, if armed drones were resorted to under a legitimate justification of self-defence, the lawfulness of *how* they are used is a separate question and will not be influenced by the existence of such a legitimate self-defence claim.

3.1 The use of drones within armed conflicts

First, we will consider the use of drones under IHL, which becomes operative during an armed conflict, either international or non-international. During armed conflicts, IHL can become relevant for the interpretation of rights under IHRL in a way that differs from their application during peacetime. Possible legal bases for the reconciliation of the two have been identified variously as *lex specialis*,⁹² mutual application or derogation.⁹³ This can have the effect of rendering the legal regime applicable during an armed conflict more accommodating of uses of force⁹⁴ than when there is no armed conflict, during which time IHRL applies alone.

3.1.1 International armed conflict

The existence of an international armed conflict is based on objective criteria; it is irrelevant in IHL whether a state of war is declared or recognised. Under Common Article 2 of the Geneva Conventions, an international armed conflict will exist in 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. International armed conflicts are regulated by the four Geneva Conventions of 1949 and Additional Protocol I of 1977, as well as customary international law. The Geneva Conventions are generally applicable, having universal ratification. Additional Protocol I has not received universal ratification, but many of its rules, including, as most relevant to this discussion, those on the conduct of hostilities, now exist as customary international law.⁹⁵ Accordingly, to be lawful, targeting by means of armed drones in international armed conflict must comply with the relevant IHL principles and rules, as may be complemented by international human rights law.⁹⁶

92 See n 80 above, [24]–[25]; see n 65 above, *Wall case*, [106].

93 Commentators remain divided as to the nuances of the relationship between IHL and IHRL. See, eg, L Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64(2) *International and Comparative Law Quarterly*, 293; S Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012), 89–94; M Sassòli and L Olson, 'The Relationship Between International Humanitarian Law and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) *International Review of the Red Cross*, 599, 605.

94 On the shift in perception of IHL from a protective body of law to one that is permissive, see D Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 *Israel Law Review*, 8, 23–31.

95 ICRC, Commentary of 2016 to Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949 [353]; Jean-Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law: Vol. I: Rules* (Cambridge University Press 2005).

96 See n 65 above, *Wall case*, [106].

3.1.2 Non-international armed conflict

A non-international armed conflict exists when there is ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.⁹⁷ This has been interpreted further as requiring fighting to be sufficiently intense and involving a group that is sufficiently organised.⁹⁸ Both of these thresholds must be met before a non-international armed conflict can be deemed to exist. Under Additional Protocol II, there is arguably a higher threshold, which requires that non-state armed groups must be ‘under responsible command’ and ‘exercise such control over a part of [the state’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’.⁹⁹ However, this is not customary law and so it applies only as a matter of treaty law between the States Parties to Additional Protocol II. Thus, to be governed by the international law applicable in non-international armed conflict, drone strikes must have been carried out as part of fighting that is sufficiently intense, against an organised non-state armed group. US officials have suggested that an armed conflict is ongoing between the US and ‘Al Qaeda, the Taliban and other associated forces’.¹⁰⁰ But, this proposition is legally problematic, as it artificially conflates the actions of multiple, separate non-state armed groups under the umbrella of a single entity in order to create a conflict that spans several nations.¹⁰¹ Such a conflation is incorrect under international law. The UK government, for example, has specifically rejected the US notion of a global non-international armed conflict between a state and a non-state armed group as a possible basis for action against ISIS outside of the extant non-international armed conflict in Iraq and Syria.¹⁰²

All drone strikes undertaken so far have been in the context of non-international armed conflicts. Though controversial, a non-international armed conflict may remain non-international even when it spreads over an international border, as long as the fighting remains between a state (or states) and a non-state armed group. This can occur either by the intervention of a third state (eg, Saudi Arabia’s intervention in the non-international armed conflict between the Yemeni government and the Houthi rebellion)¹⁰³ or by the fighting spilling over into a third state (eg, the conflict in Afghanistan crossing the border into Pakistan).¹⁰⁴ The legal possibility of a non-international armed conflict of a transnational dimension is based on the requirement of Common Article 2 that an international armed conflict can only be ‘between two or more of the High Contracting Parties’ and it is in line with the US Supreme Court’s interpretation of the Common Article 3 phrase ‘conflict not of an international character’ ‘in contradistinction to a conflict between nations’.¹⁰⁵

97 *Prosecutor v Tadić*, IT-94-1-A, Appeals Chamber Judgment (15 July 1999) [70].

98 International Law Association Committee on the Use of Force, Hague Conference ‘Final Report on the Meaning of Armed Conflict in International Law’ (2010) 2.

99 Additional Protocol II, Art 1.1.

100 See n 11 above.

101 This is considered in more depth below, at section 3.1.2 (a).

102 See n 63 above, [3.52]–[3.53].

103 ICRC Report on the 31st International Conference, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ (Geneva, 2011) 31IC/11/5.1.2 10; D Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in E Wilmshurst (ed) *International Law and the Classification of Conflicts* (Oxford University Press, 2012) 62; *The Prosecutor v Bemba Gombo* ICC-01/05-01/08, Decision on Confirmation of Charges (15 June 2009) [245]–[246].

104 *Ibid*, ICRC Report, 9; see n 93 above, S Sivakumaran, 230.

105 *Hamdan v Rumsfeld* 548 US 557, 629-31 (2006) 67.

As such, uses of force by an invited third state against a non-state party to a non-international armed conflict will not render that conflict international.¹⁰⁶ This is because, as per the reasoning above, such a conflict does not pit one state against another, which is the key feature of an international armed conflict, according to Common Article 2. Therefore, all drone strikes that have been undertaken within such a scenario are within the context of a non-international armed conflict, despite certain transnational dimensions.

Additionally, it has been argued that, when force is used against a non-state armed group *without* the consent of the ‘host’ state, a separate *international* armed conflict will arise between the ‘host’ and the intervening state.¹⁰⁷ It is argued that the use of force in such a situation is necessarily ‘against’ the ‘host’ state, contrary to Article 2(4) of the Charter of the UN, even if only the non-state armed group is targeted.¹⁰⁸ This argument remains controversial¹⁰⁹ and is not supported by a majority of the literature, though it finds support in international and national jurisprudence.¹¹⁰ In this context, it should be noted that more than one international judicial decision has held that conflict situations may be ‘mixed’, and contain *both* international and non-international armed conflicts.¹¹¹ Therefore, it is important to be aware of the ongoing nature of governmental consent to the intervention of third states. This is particularly important when examining drone use, as many extraterritorial operations will raise the issue of whether ‘host’ state consent exists.

(A) ORGANISATION

The requirement of organisation has received much consideration within international jurisprudence. In the *Boškoski* judgment, the International Criminal Tribunal for the Former Yugoslavia (ICTY) asserted that ‘the degree of organisation required to engage in “protracted violence” is lower than the degree of organisation required to carry out “sustained and concerted military operations”’,¹¹² which is a requirement of Additional Protocol II.¹¹³ As such, the level of organisation required to constitute a party to a non-international armed conflict is lower than that which characterises national armed forces. Factors indicating requisite organisation have been held by the ICTY to include ‘the existence of headquarters, designated zones of operation, and the ability to procure, transport and distribute arms’;¹¹⁴ the use of a spokesperson¹¹⁵ and public *communiqués*; and the erection of checkpoints.¹¹⁶ There is a need for a ‘command structure’¹¹⁷ and the ability for

106 N Lubell and N Derejko, ‘A Global Battlefield? Drones and the Geographical Scope of Armed Conflict’ (2013) 11(1) *Journal of International Criminal Justice*, 65, 67–68; M Sassòli, ‘Use and Abuse of the Laws of War in “The War on Terrorism”’ (2004) 22 *Law and Inequality* 199; see n 93 above, Sivakumaran, 229; see n 103 above, ICRC Report, 10; D Jinks, ‘The Applicability of the Geneva Conventions to the “Global War on Terror”’ (2005) 46(1) *Virginia Journal of International Law*, 165, 189.

107 See n 103 above, Akande, 73.

108 *Ibid.*, 73–74.

109 For a detailed analysis of the question of conflict qualification, see n 72 above, Kreß, 253–257.

110 See n 97 above, Separate Opinion of Judge Shahabuddeen [6]; see n 65 above, *Armed Activities; The Public Committee Against Torture in Israel and others v The Government of Israel and others*, Judgment, 11 December 2006, HCJ 769/02, [18].

111 See n 53 above, [219]; see n 97 above, [84].

112 *Prosecutor v Boškoski and Tarčulovski* IT-04-82-T, Trial Chamber Judgment (10 July 2008) [197].

113 Additional Protocol II, Art 1(1).

114 *Prosecutor v Limaj, Bala and Musliu* IT-03-66-T, Judgment (30 November 2005) [90].

115 *Ibid.*, [101]–[103].

116 *Ibid.*, [145]; *Prosecutor v Haradinaj, Balaj and Brahimaj* I-04-84-T, Judgment (3 April 2008) [71]–[72].

117 *Prosecutor v Milošević* IT-02-54-T, Decision on Motion for Judgment of Acquittal, (16 June 2004) [23]–[24]; *ibid.*, Haradinaj, [65].

an armed group to be able to speak ‘with one voice’¹¹⁸ and be sufficiently organised to ‘formulate... military tactics’.¹¹⁹

As things stand, it is very unlikely that al-Qaeda and its affiliates meet the necessary threshold to be considered a *single* global entity, as the disparate groups lack a centralised hierarchy and command structure. Nonetheless, it may be possible that the organisational threshold is met individually by various regional groups (eg, al-Qaeda in Pakistan, Tehrik-i-Taliban Pakistan (TTP), the Haqqani Network, al-Qaeda in the Arabian Peninsula and al-Shabaab), which do bear some of the characteristics of organisation cited in international jurisprudence. This is also likely to be the case with ISIS and its regional affiliates.

(B) INTENSITY

The intensity requirement operates to exclude the application of IHL to internal disturbances, such as ‘riots, isolated and sporadic acts of violence, and other acts of a similar nature’.¹²⁰ Establishing whether there is the requisite level of intensity for a non-international armed conflict requires a case-by-case analysis,¹²¹ for which the ICTY has identified a number of indicative criteria, such as:

‘[t]he seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.’¹²²

The threshold of intensity is a balance between duration and magnitude: in the *La Tablada* case, the Inter-American Commission on Human Rights (IACHR) found that an armed conflict existed due to the intensity of the fighting, despite it lasting only 30 hours, as it was a ‘carefully planned, coordinated and executed... armed attack, i.e., a military operation, against a quintessential military objective’.¹²³ Thus, the brevity of an engagement will not necessarily negate its classification as a non-international armed conflict.

(C) ARE DRONES USED IN ARMED CONFLICTS?

Despite assertions from the Obama administration, some situations in which the US has conducted anti-terrorist drone strikes are unlikely to be classified as separate non-international armed conflicts between the US and the relevant non-state armed group due to insufficient intensity of violence on the part of the non-state armed group. For instance, at the time of writing, al-Shabaab, against which the US uses drone strikes in Somalia, has not carried out any form of attack against the US, whether on or outside its soil.

118 *Ibid*, Haradinaj, [60]; see n 114 above, [129].

119 *Ibid*, [129].

120 Additional Protocol II, Art 1.

121 See n 114 above, [90].

122 *Ibid*.

123 *Abella v Argentina* IACHR Report No 55/97, Case No 11.137, (30 October 1997) [147] and [155].

However, in many cases (eg, in Afghanistan, Iraq, Pakistan, Somalia and Yemen), there may be said to be a *pre-existing* non-international armed conflict between a ‘host’ government and a non-state armed group, into which the US has been invited,¹²⁴ in which case the strikes will be part of that non-international armed conflict. In this way, there is an obvious, though nevertheless important, interrelation between consent and the existence of non-international armed conflicts – a strike may be brought within such a conflict, but: 1) only when there is a pre-existing non-international armed conflict ongoing within the territory; and 2) only for as long as consent is operative and to the extent that the manner in which drones are used accords with the terms of that consent.

In Pakistan, there has been intense fighting since 2008, which subsided and then flared up again in 2013 with the beginning of operation Zarb-e-Azb, an action involving 30,000 troops.¹²⁵ However, it must be recalled that, in 2013, the Pakistan government withdrew its consent to US drone strikes, so any strikes subsequent to that will ostensibly not have been carried out as part of that non-international armed conflict. The question is, therefore, whether they have been carried out as part of a non-international armed conflict just between the US and the target non-state armed group; whether they have even produced a state of international armed conflict between the US and Pakistan;¹²⁶ or whether they occurred outside any armed conflict.

In Yemen, violence of fluctuating intensity has occurred between the government and al-Qaeda in the Arabian Peninsula since 2011, and appears to be ongoing.¹²⁷ It must be noted that the first US drone strike in Yemen was in 2002 and therefore outside of this particular non-international armed conflict. In Somalia, the government, supported by African Union troops, has fought al-Shabaab with an intensity indicative of a non-international armed conflict since at least 2007, and continues to do so.¹²⁸ Nevertheless, consent has been specifically limited by the Somali government, only to include strikes against non-Somali fighters.¹²⁹ Numerous drone strikes have been confirmed as targeting Somali fighters¹³⁰ in breach of this specification, and so it is likely that many strikes will not have been undertaken as part of this non-international armed conflict. Drone strikes against al-Qaeda and the Taliban in Afghanistan have been carried out in the context of the ongoing non-international armed conflict between the Afghan government, supported by the US, and the Taliban and al-Qaeda.

Strikes targeting ISIS in Syria are less easy to classify. The US has suggested that it is engaged in a non-international armed conflict with ISIS¹³¹ while the UK has classified its own drone strikes in Syria as part of the ongoing armed conflict between Iraq and ISIS, into which it has been invited.¹³² The conflict in Iraq against ISIS appears to be a non-international armed conflict as the violence has

124 See section 2.1 on consent.

125 F Zahid, ‘The Successes and Failures of Pakistan’s Operation Zarb-e-Azb’ (10 July 2015) *The Jamestown Foundation Terrorism Monitor*, <https://jamestown.org/program/the-successes-and-failures-of-pakistans-operation-zarb-e-azb/#.VsIEyZOLSRs> accessed 20 June 2017.

126 See section 3.1.2.

127 ‘Yemen declares curfew in Aden as government forces retake strategic port’ (4 January 2016) *The Guardian*, www.theguardian.com/world/2016/jan/04/yemen-declares-curfew-in-aden-as-government-forces-retake-strategic-port accessed 20 June 2017.

128 ‘Who are Somalia’s al-Shabab?’ (3 April 2015) *BBC*, www.bbc.co.uk/news/world-africa-15336689 accessed 20 June 2017.

129 See n 20 above, 117.

130 ‘Somalia: Reported US Covert Actions 2001-2016’ (22 February 2016) *The Bureau of Investigative Journalism*, <https://www.thebureauinvestigates.com/drone-war/data/somalia-reported-us-covert-actions-2001-2017> accessed 23 June 2017.

131 B Egan, ‘International Law, Legal Diplomacy and the Counter-ISIL Campaign’ (April 2016) speech to the American Society of International Law, <http://stockton.usnwc.edu/ils/vol92/iss1/7> accessed 20 June 2017.

132 Email from Treasury Solicitor to Leigh Day regarding Proposed Application for Judicial Review By Caroline Lucas MP and Baroness Jones of Moulsecoomb (23 October 2015), www.parliament.uk/documents/joint-committees/human-rights/Letter_from_Govt_Legal_Dept_Leigh_Day_231015.pdf, [5.4], accessed 20 June 2017.

been sufficiently intense and the non-state armed group sufficiently organised. It is, therefore, most convincing that drone strikes in Syria have formed part of that conflict, which has spilled over into Syria. This reasoning has been deployed by other states involved in that conflict.¹³³

Drone strikes in Libya can be classified less readily, and may depend on whether the non-state armed group targeted is organisationally part of the non-state armed group in Syria and Iraq, in which case they will comprise further aspects of the conflict, which has spilled over from Iraq. This possibility has seemingly been confirmed by reports of US drones targeting ISIS fighters in Libya.¹³⁴ Until recently, the US described the region of Sirte in Libya as an ‘area of active hostilities’, though this designation has since been removed.¹³⁵ While this designation is not in and of itself determinative of the existence of a non-international armed conflict, it may indicate that the US understands the criteria of such a conflict to have been satisfied for a time, at least in Sirte. Additionally, it has been argued that there is a pre-existing non-international armed conflict¹³⁶ into which the US may be intervening.

Drone strikes carried out by Israel against Hamas will likely fall into the remit of IHL to the extent that they were carried out during an armed conflict that raises particularly difficult questions of legal qualification.

3.1.3 *The proper standard for the identification of targets within armed conflicts*

During armed conflicts, IHL must be respected in addition to IHRL. The most pressing aspect of IHL for an analysis of drone strikes is that related to targeting – it is a ‘cardinal principle’ that states must at all times distinguish between combatants and civilians when targeting individuals, and between civilian objects and military objectives.¹³⁷

The rules that govern targeting apply mostly to the way in which drones are used, rather than to drones as a means of combat per se. It is crucial to remember when considering drones that, although as a *means* of combat they are not unlawful under IHL (and are not specifically prohibited, for example, under the Convention on Certain Conventional Weapons), the *methods* of combat they enable have the potential to be employed in a manner that is contrary to the law applicable to armed conflicts.¹³⁸

(A) THE FUNDAMENTALS OF TARGETING

The basic rules of targeting comprise a combination of the principles of distinction, proportionality and precaution. The principle of distinction is primarily codified in Article 48 of Additional Protocol I. This mandates the distinction between ‘the civilian population and combatants and between

133 Letter dated 7 June 2016 from the Permanent Representative of Belgium to the UN addressed to the President of the Security Council, UN Doc S/2016/523; letter dated 3 June 2016 from the Permanent Representative of Norway to the UN addressed to the President of the Security Council, UN Doc S/2016/513.

134 H Cooper and E Schmitt, ‘U.S. Strikes Help Libyan Forces Against ISIS in Surt’ (2 August 2016) *New York Times*, www.nytimes.com/2016/08/03/us/politics/drone-airstrikes-libya-isis.html accessed 20 June 2017.

135 C Savage, ‘U.S. Removes Libya From List of Zones with Looser Rules for Drone Strikes’ (20 January 2017) *New York Times*, www.nytimes.com/2017/01/20/us/politics/libya-drone-airstrikes-rules-civilian-casualties.html?_r=0 accessed 20 June 2017.

136 R Dalton, ‘Libya’ in L Arimatsu and M Choudhry, *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya* (March 2014) Chatham House, <https://chathamhouse.org/publications/papers/view/198023> accessed 23 June 2017.

137 See n 80 above, [78].

138 That IHL applies to both means and methods of warfare is evidenced throughout the Geneva Conventions and the Additional Protocols, eg, Additional Protocol I Arts 35, 51 and 57; see n 95 above, Henckaerts and Doswald-Beck, 17 etc.

civilian objects and military objectives' when an attack is undertaken.¹³⁹ The distinction requirement is also present in Article 51(1) of Additional Protocol I and Article 13(1) of Additional Protocol II, which provide a 'general protection'¹⁴⁰ for the civilian population and individual civilians, and assert that they 'shall not be the object of attack'.¹⁴¹ This has been identified as a rule of customary international law¹⁴² and so is binding on those drone states not party to the Additional Protocols,¹⁴³ (which, out of those states using armed drones, is the US and Israel). The additional importance of the customary nature of distinction is that it will apply to both international and non-international armed conflicts.¹⁴⁴ This has direct relevance for drone strikes that have been carried out in non-international armed conflicts, including extraterritorial ones.

Within international armed conflicts, members of the armed forces of a party to the conflict have an explicit right to take a direct part in hostilities and, thus, may be targeted by the adversary. All those outside of these categories are civilians¹⁴⁵ and, consequently, may not be targeted, unless and for such time as they take a direct part in hostilities.¹⁴⁶ Within non-international armed conflicts, Article 13(3) of Additional Protocol II likewise asserts that civilians lose their protection and become targetable 'for such time as they take a direct part in hostilities'.¹⁴⁷

Under Article 52(2) of Additional Protocol I:

'[a]ttacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time offers a definite military advantage'.

Thus, objects with an essentially non-military nature may become targetable if located, used or repurposed in a manner that has military outcomes, or used to conduct military operations. Article 57 of Additional Protocol I complements the distinction principle by providing for required precautions in attack, holding, inter alia, that parties must 'do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects'. Thus, there is an imperative upon the parties to an armed conflict to undertake precautionary steps to ensure they are not unwittingly targeting civilians or civilian objects.

Furthermore, drone strikes that may incidentally cause death or destruction to civilians or civilian objects, or a combination thereof, will be unlawful if that incidental harm is 'excessive in relation to the concrete and direct military advantage anticipated'.¹⁴⁸ This has been found to be a rule of customary international law and is therefore effective in both international and non-international armed conflicts.¹⁴⁹ The operation of this rule is one of balancing the anticipated military advantage

139 'Attacks' are defined as acts of violence against the adversary, whether in offence or in defence: Additional Protocol I, Art 49(1).

140 Additional Protocol II, Art 13(1).

141 *Ibid*, Art 13(2).

142 See n 95 above, Henckaerts and Doswald-Beck, Rule 1.

143 As confirmed by the International Court of Justice, in *Nicaragua*, see n 53 above, [218].

144 See n 95 above, Henckaerts and Doswald-Beck.

145 Additional Protocol I, Art 50(1).

146 Additional Protocol I, Art 50(3).

147 Additional Protocol II, Art 13(3).

148 Additional Protocol I, Art 51(5)(b).

149 See n 95 above, Henckaerts and Doswald-Beck, Rule 14.

with harm to civilians. This is apposite when assessing the legality of particular drone strikes as it has been asserted that certain strikes have produced a disproportionate level of civilian casualties relative to the military advantage anticipated.¹⁵⁰

In addition to the requirements of distinction and proportionality, parties to a conflict must undertake precautions in their attacks in order to give effect to the protection of civilians.¹⁵¹

International law requires parties to ‘do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects’.¹⁵² Feasibility of precautions has been interpreted as those precautions ‘which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations’.¹⁵³ This provision has nonetheless been held to be customary law applicable in international and non-international armed conflicts,¹⁵⁴ a position that has been accepted by the US.¹⁵⁵

Thus, drone strikes may only be carried out against combatants or civilians who are directly participating in hostilities,¹⁵⁶ and there is a continuing obligation on parties to a conflict to actively verify that those individuals and objects being attacked are not civilian. Assessments as to whether drone strikes breach certain rules of IHL will be done on a case-by-case basis. There are examples of drone strikes having occurred that may breach these rules, when civilians appear not to have been distinguished from combatants. An example of this is a drone strike in Afghanistan in 2002, against a ‘tall man’, thought to be Osama Bin Laden, and two others, none of whom were actually combatants. The US admitted to having no relevant intelligence but carrying out the strike nonetheless as there were ‘no initial indications that these were innocent locals’.¹⁵⁷ A further example is a December 2013 drone strike in Yemen, which targeted a wedding convoy, killing many civilians and thereby potentially breaching the obligation always to distinguish civilians from combatants. Additionally, it may have caused excessive collateral damage in relation to the military advantage anticipated.¹⁵⁸ Israel used drones as well as combat aircraft in 2008 to 2009, during Operation Cast Lead, and it has been suggested that some of these may have breached the principle of distinction. Human Rights Watch identified six instances of strikes directed against civilians in which there were no apparent military targets in the vicinity.¹⁵⁹ Similarly, during Operation Pillar of Defence in 2012, Israeli drones were identified as likely breaching IHL on 14 occasions.¹⁶⁰

150 See, eg, the discussion surrounding the drone strike that killed Baitullah Mehsud and approximately 11 others, discussed in n 9 above, 24. For a contrary position, see RP Barnidge, ‘A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law’ (2012) *Boston University International Law Journal*, 409, 441.

151 Additional Protocol I, Art 57.

152 Additional Protocol I, Art 57(2) (a) (i).

153 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons 1980, Art 1(5). This definition, and ones like it, are also present in numerous military manuals and other examples of state practice, supporting a claim that the imperative is also a customary one: Jean-Marie Henckaerts and Louise Doswald-Beck *Customary International Humanitarian Law, Volume II: Practice* (Cambridge University Press 2005) 357–358.

154 *Prosecutor v Kupreskić* Judgment (14 January 2000) [524]; see n 95 above, Henckaerts and Doswald-Beck, Rule 15; Program on Humanitarian Policy and Conflict Research at Harvard *Manual on International Law Applicable to Air and Missile Warfare* Rule 35 (the commentary to this Rule specifically held that it is applicable to drone use and within NIAC, see Program on Humanitarian Policy and Conflict Research at Harvard *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (Version 2.1 2010) 130).

155 Michael J Matheson, ‘Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions’ (1987) 2 *American University Journal of International Law and Policy*, 419, 427.

156 The notion of direct participation is considered in more detail in section 3.1.2 (b), on non-state fighters.

157 J Sifton, ‘A Brief History of Drones’ (7 February 2012) *The Nation*, www.thenation.com/article/brief-history-drones accessed 20 June 2017.

158 See, eg, n 43 above, 10.

159 Human Rights Watch, *Precisely Wrong: Gaza Civilians Killed by Israeli Drone-Launched Missiles* (2000), 4.

160 ‘Israel: Gaza Airstrikes Violated Laws of War’ (12 February 2013), www.hrw.org/news/2013/02/12/israel-gaza-airstrikes-violated-laws-war accessed 20 June 2017.

(B) SUBJECTIVITY IN TARGETING

It is necessary to note that assessments of targeting decisions are made based on the subjective understanding of the decision-maker at the time a decision was made. This is by virtue of Article 52(2) of Additional Protocol I (which mandates that the assessment as to the ‘definite military advantage’ offered by the targeting was present ‘*in the circumstances ruling at the time*’) and Articles 51(5)(b) and 57(2)(a)(iii) of Additional Protocol I (both of which, in discussing the proportionality requirement of targeting decisions, refer to the ‘concrete and direct military advantage *anticipated*’).

Therefore, drone strikes that *prima facie* breach rules governing targeting may be nonetheless lawful if, at the time the targeting decision was made, it appeared that they would not breach those rules. This has been argued was the case with the US’s targeting of the al-Firdos bunker in the Gulf War of 1991.¹⁶¹ On the other hand, this element means that targeting decisions must be made based on all available information, which, in the case of drones, can be considerable. The ability of drones to loiter over a target and confirm its status would suggest a presumption that all strikes ought to be well-informed, thereby making strikes that fail to distinguish more likely to be in breach of IHL. In addition, the possibility must be guarded against that this presumption (that strikes are well-informed) results in a second presumption that drone strikes are *per se* carried out in accordance with targeting rules (in particular, those on proportionality) by virtue of their technological capabilities.

(C) MILITARY NECESSITY

Military necessity is an underlying principle of IHL,¹⁶² and is reflected in Articles 52(2) and 54(5) of Additional Protocol I and Article 17 of Additional Protocol II. It is a complex principle and the extent of its practical relevance is the source of academic debate.¹⁶³ The principle asserts that measures that are necessary to accomplish a legitimate military purpose are permitted as long as they are not otherwise prohibited by IHL. According to the British Manual of the Law of Armed Conflict, the legitimate purpose of any attack should be ‘the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources’.¹⁶⁴ As such, the principle of military necessity plays a double role in the sense that it is both prescriptive (by allowing necessary violence) and restrictive (limiting potential uses of force to those that are necessary to achieve a legitimate military aim in accordance with rules of IHL).

(D) HUMANITY

Relatedly, the principle of humanity underpins IHL generally, and is the ‘essential counterbalance to the principle of military necessity and serves as a central principle of constraint’.¹⁶⁵ Its first iteration was in the Martens clause, present in the preambles of the 1899 and 1907 Hague Conventions, which

161 E Crawford and A Pert, *International Humanitarian Law* (Cambridge University Press 2015) 170–171.

162 J Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) [1389].

163 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’ (2010) 42 *New York University Journal of International Law and Politics*, 831.

164 Ministry of Defence (United Kingdom), *The Manual of the Law of Armed Conflict* (Joint Service Publication), Section 2.2 (Military Necessity).

165 L Blank and G Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War* (Wolters Kluwer 2013) 129.

asserted limitations on the conduct available to states in conflicts, in the absence of ‘a more complete code of the laws of war’. This has been replicated in the Geneva Conventions¹⁶⁶ and the Additional Protocols.¹⁶⁷ The possibility of the principle of humanity to provide additional protection beyond the specific rules of IHL was supported by Judge Shahabuddeen in the *Nuclear Weapons* advisory opinion (in dissent), who asserted that the Martens clause provides additional normative controls over military conduct.¹⁶⁸ Thus, the principle of humanity works in tandem with the principle of military necessity to restrict uses of force in armed conflict to those that are necessary to achieve a military aim, beyond what is explicitly proscribed by the corpus of IHL rules.

Notwithstanding the absence of a prohibition to kill military targets within the IHL framework, a reading of the interrelated principles of humanity and military necessity may recommend that, because of their nature, drones should not be used where there is a possibility to arrest and bring to trial legitimate military targets without causing excessive civilian casualties or taking excessive risks for the military. Nonetheless, this point rests on a controversial interpretation of the law, which does not have universal acceptance. It has been stated that the Martens clause produces an imperative that ‘capture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible’.¹⁶⁹ Subsequently, the International Committee of the Red Cross (ICRC) has put forward a similar restrictive interpretation of IHL, limiting the resort to lethal force when a non-lethal alternative exists, which does not place additional risks on combatants.¹⁷⁰ As it is based on the principles of humanity and military necessity, rather than specific rules of IHL, the proposition by the ICRC has been subject to criticism, arguing that it lacks a clear basis in substantive international law.¹⁷¹ Despite this criticism, the US appears to advocate a capture rather than kill policy when conducting drone operations outside ‘areas of active hostilities’.¹⁷²

(E) NON-STATE FIGHTERS AND TARGETING

Given the current use of drones, which are prevalent in extraterritorial non-international armed conflicts, it is necessary to examine in more detail the rules of IHL governing the targeting of members of non-state armed groups. This varies between international and non-international armed conflicts, so the two are addressed separately.

IHL does not contain the concept of combatant status within non-international armed conflicts, as it is legal status provided for solely within the law governing international armed conflicts. Nonetheless, the law governing non-international armed conflicts provides for the targeting of certain types of

166 Geneva Convention I, Art 63, Geneva Convention II, Art 62, Geneva Convention III, Art 142 and Geneva Convention IV, Art 158.

167 Additional Protocol I, Art 1(2) and Additional Protocol II, Preamble.

168 See n 80 above, dissenting opinion of Judge Shahabuddeen, 408.

169 J Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 62.

170 N Melzer, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC 2009) 77.

171 See, eg, D Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’ (2010) 59 *International and Comparative Law Quarterly*, 180, 191–192; W Hays Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect’ (2010) 42 *New York University Journal of International Law and Politics* 769. But cf n 163 above, 892–913.

172 ‘Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities’ (22 May 2013), www.documentcloud.org/documents/3006440-Presidential-Policy-Guidance-May-2013-Targeted.html accessed 20 June 2017.

persons. Common Article 3 of the Geneva Conventions protects ‘[p]ersons taking no active part in the hostilities’, implying that those who *actively* participate will not be protected. When read in conjunction with the preamble of Common Article 3, which refers to ‘each party to the conflict’, this provision authorises the targeting of members of non-state armed groups. Additional Protocol II goes further in its definition, referring to ‘dissident armed forces or other organized armed groups... under responsible command’.¹⁷³ In addition, Article 13 of Additional Protocol II asserts that civilians lose their protection and become targetable ‘for such time as they take a direct part in hostilities’.¹⁷⁴ This has been recognised generally as being customary international law¹⁷⁵ and is therefore binding on those states, like the US and Israel, that are not party to Additional Protocol II.

Dissident armed forces

The category of ‘dissident armed forces’ is not applicable when considering uses of drones so far in non-international armed conflicts, as they have not been employed by governments against forces that have broken away. As such, they will not be considered presently, other than to assert that there is apparent consensus that such forces are always targetable.¹⁷⁶

Organised armed groups

International jurisprudence supports the loss of protection for members of ‘organized armed groups’¹⁷⁷ but does not specify how membership is to be determined. The ICRC’s *Interpretative Guidance on the Notion of Direct Participation in Hostilities* provides a framework through which to identify targetable members of such groups. Under the ICRC guidance, members of organised armed groups are not targetable per se, but only when they carry out a ‘continuous combat function’.¹⁷⁸ Individuals who carry out such functions will be targetable ‘for the duration of their membership’.¹⁷⁹ This would mean that members of such groups who hold non-combat roles (eg, cooks) would retain their civilian protection and would not be targetable, unless and for such time as they directly participated in hostilities, as provided by Article 13(3) of Additional Protocol II. Nonetheless, this approach is controversial and some commentators have argued that, to produce parity between organised armed groups and national armed forces (non-combat members of which are targetable at any time), members of organised armed groups should be targetable by virtue of their membership alone, regardless of function.¹⁸⁰ Other commentators, however, have maintained support for the approach of the ICRC.¹⁸¹

173 Additional Protocol II, Art 1(1).

174 *Ibid*, Art 13(3).

175 See n 95 above, Henckaerts and Doswald-Beck, Rule 6.

176 See n 69 above, Schmitt, 125.

177 *Prosecutor v Stanislav Galić*, IT-98-29-T, Judgment, 5 December 2003 [47]; *Prosecutor v Blaškić* IT-95-14-A, Judgment (29 July 2004) [114].

178 See n 171 above, 33.

179 *Ibid*, 73.

180 *Ibid*, 128; MN Schmitt, ‘The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis’ (2010) 1 *Harvard National Security Journal* 5, 23; K Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’ (2010) 42 *New York University Journal of International Law and Politics*, 641, 685.

181 See n 171 above, Akande, 188; J Pejić, ‘Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications’ (2015) 96(893) *International Review of the Red Cross*, 67, 89; D Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?’ (2005) 16(2) *European Journal of International Law*, 171, 199-200.

It has been argued that, while al-Qaeda qualifies as an organised armed group (and that, therefore, those individuals carrying out a continuous combat function will be targetable members of the group), other groups who share its ideology are not *ipso facto* part of that armed group, as they lack the required level of organisation to be cumulatively considered a single entity.¹⁸² Therefore, as is the case with all long-range weapons systems, in order for the lawfulness of this kind of targeting decision to be asserted, it is necessary that this type of drone strike (known as a ‘personality strike’¹⁸³) is carried out on the basis of reliable intelligence as to an individual’s function within any organised armed group to which they are purported to belong.

Civilians directly participating in hostilities

This category comprises civilians who might engage in fighting within an armed conflict but who are not members of an organised armed group. Under Article 13(3) of Additional Protocol II, civilians lose their protection from attack ‘for such time as they take a direct part in hostilities’. This depends upon a determination of what type of conduct counts as direct participation. The *Interpretive Guidance*, while not unanimously supported, provides a very helpful and insightful three-part test to determine the existence of direct participation in hostilities, each part of which needs to be satisfied before an individual loses their protection from attack. The three parts require that the act carried out:

- ‘[M]ust be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
- There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
- The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).’¹⁸⁴

Therefore, a civilian who engages in fighting in a non-international armed conflict may only be targeted when they have carried out an act that either does harm to their adversary, who is a party to the conflict, or that hampers some aspect of their military operations. This harm or adverse effect must have been directly caused by their act, not indirectly. The ICRC guidance suggests that this requires either that an individual’s act will cause the harm within ‘one causal step’¹⁸⁵ or, if it was carried out as part of a group, that the act ‘constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm’.¹⁸⁶ Under this reasoning, an individual who contributes to the general war effort will not have been directly participating.¹⁸⁷ As such, the ICRC guidance posits that activities such as providing supplies and services to a party to a conflict, or designing, producing and transporting weapons (including the assembly and storage of improvised

182 See n 69 above, Schmitt, 130.

183 A Entous, S Gorman and JE Barnes, ‘U.S. Tightens Drone Rules’ (4 November 2011) *Wall Street Journal*, www.wsj.com/articles/SB10001424052970204621904577013982672973836 accessed 20 June 2017.

184 See n 170 above, 46.

185 *Ibid.*, 53.

186 *Ibid.*, 54–55.

187 *Ibid.*, 53.

explosive devices (IEDs)), or recruiting and training personnel, though all war sustaining activities, are not direct participation.¹⁸⁸ There is a lack of consensus regarding certain acts with a less obvious direct causal link to the harm caused (eg, the production of IEDs),¹⁸⁹ but the requirement of direct causation itself appears undisputed. Findings of direct causation (and direct participation more generally) are made on a case-by-case basis,¹⁹⁰ so activities that are controversial in theory are unlikely to be so in practice, when the surrounding context is taken into account.

A further element of direct participation in hostilities is the time period in which such participation is deemed to occur. This could be taken to either of two extremes: an individual could be deemed to be directly participating only during the actual carrying out of a specific act, or it could be that, once an individual has begun to prepare for a specific act, they are deemed to be directly participating and this will last until they explicitly renounce their participation. The approach of the ICRC is that direct participation encompasses the time during which an individual is preparing for and returning from combat,¹⁹¹ but no further, so participation will have come to an end when an individual has ‘physically separated from an operation’.¹⁹² It has been argued that this approach is too narrow and a broad interpretation, which prevents the ‘revolving door’ of protection for those who only sporadically directly participate, better represents the realities of conflict and ‘military common sense’.¹⁹³ According to this view, civilians individually directly participating in specific acts of hostilities are targetable (including by drone strikes) at all times, and potentially until such time as they ‘opt out of hostilities in an unambiguous manner’.¹⁹⁴ This approach is much broader than that of the ICRC, and does not reflect the provisions of IHL that regulate direct participation and specifically refer to a loss of protection only ‘for such time as’ an individual participates.¹⁹⁵ Therefore, the less expansive approach of the ICRC is to be preferred.

The method by which individuals are deemed to have directly participated in hostilities, and thereby lost their civilian protection, is of vital importance when assessing the lawfulness of particular drone strikes. This is because it is the category of individuals directly participating in hostilities who are most likely to be targeted by drones, in so-called ‘signature strikes’.¹⁹⁶ This type of strike differs from ‘personality strikes’, in which an individual is targeted on the basis of intelligence as to their function within a group, as the targeting decision is made based upon the individual’s behaviour. Therefore, strikes can only be lawful if they are undertaken on the basis of a robust set of criteria for identifying direct participation in hostilities, which adopt a clear point of cut-off, at which point an individual’s participation is deemed to have ended, and their protection resumed.

It is axiomatic that this issue is not confined to drone strikes – any long-range weapon used against individuals on the basis of their behaviour will require the same robust targeting criteria.

188 *Ibid*, 53–54.

189 Y Dinstein, ‘Direct Participation in Hostilities’ (2013) 18 *Tilburg Law Review*, 3, 11; MN Schmitt, ‘Deconstructing Direct Participation in Hostilities: the Constitutive Elements’ (2010) 42(3) *New York University Journal of International Law and Politics*, 697, 731.

190 *Prosecutor v Struga*, IT-01-42-A, Appeals Chamber Judgment, 176-79 (July 17, 2008) [178]; see n 110 above, *Public Committee Against Torture*, [34] and [39].

191 See n 163 above, [1942].

192 See n 170 above, 67.

193 See n 69 above, Schmitt, 136.

194 *Ibid*, 137.

195 Additional Protocol I, Art 51(3); Additional Protocol II, Art 13(3).

196 S Ackerman ‘US to continue “signature strikes” on people suspected of terrorist links’ (1 July 2016) *The Guardian*, www.theguardian.com/us-news/2016/jul/01/obama-continue-signature-strikes-drones-civilian-deaths accessed 20 June 2017.

Nevertheless, the extent to which drones have been used for this type of strike necessitates a consideration of the criteria upon which targeting decisions have been made for this particular kind of lethal operation.

Counterterrorist drone strikes carried out by the US have historically been based on a variety of criteria that have been held to indicate the requisite 'signature' of an individual directly participating in hostilities. The US government has not released a full account of its targeting matrix, so it has been necessary for experts to deduce the criteria from statements made by officials. Concerns have been expressed that some of these inferred criteria have the potential to breach IHL, while others will certainly breach it. A 2013 study of statements by US government officials identified 14 'signatures', of which five were certainly lawful (ie, individuals planning attacks, transporting weapons or training at an al-Qaeda compound) and five others that could be lawful, depending on the breadth of their interpretation (ie, armed individuals comprising a group, facilitating terrorist activity or individuals present in known fighter rest areas).¹⁹⁷ However, the same study identified four criteria that have been used for targeting decisions that are contrary to IHL rules. These are male individuals of military-age in areas of known terrorist activity, individuals who consort with known militants, groups of armed male individuals travelling in trucks in al-Qaeda controlled territory and suspicious camps in al-Qaeda territory.¹⁹⁸ It is clear that these activities, when considered alone, do not satisfy any aspect of the three-part test provided by the ICRC, even when an expansive interpretation of the necessary elements of direct participation is applied.

Thus, there is broad scope for signature strikes to be unlawful, though not inherently so. Drone strikes may be lawfully undertaken against unknown individuals who do not have a pre-identified link to a non-state armed group, but this can only be the case where the criteria upon which the decision to strike such individuals remains within the framework of direct participation. It is impermissible to target an individual by virtue of their direct participation in hostilities on the basis of a definition of direct participation that is so broad as to include activities that have no direct causal link with hostilities. Though these considerations apply to targeting with any weapon system, drone use has been typified by this approach. As such, the use of signature drone strikes should at all times be subject to scrutiny. It is submitted that signature strikes may well produce the greatest instances of unlawful strikes that are carried out as part of an armed conflict.

Additional approaches to targeting

Official documents released by the US have incidentally revealed that the US drone programme may utilise a further approach to targeting outside those provided by IHL (in which organised armed groups and civilians directly participating in hostilities may be targeted). The declassified Presidential Policy Guidance on direct action against non-state armed groups refers to individuals targeted 'in the exercise of national self-defence', in addition to those targeted due to their membership of a non-state armed group or direct participation in hostilities.¹⁹⁹ This was repeated in a later document detailing US estimates of the numbers of civilians killed in drone strikes, which likewise pointed to a

197 KJ Heller, 'One Hell of a Killing Machine: Signature Strikes and International Law' (2013) 11(1) *Journal of International Criminal Law* 89.

198 *Ibid.*, 94–103.

199 See n 173 above.

further category of individuals ‘otherwise targetable in the exercise of national self-defence’.²⁰⁰ This appears to conflate the targeting rules under IHL with those rules under *jus ad bellum*, governing the lawful resort to force in self-defence. As has been emphasised, these two areas are different and separate corpuses of law; both must be satisfied (along with others, such as international human rights law) to determine the lawfulness of drone strikes under international law. This is done in a cumulative manner, and the satisfaction of one will not impact upon the satisfaction of the other. While a lawful invocation of self-defence permits a state to use force, specific instances of targeting cannot be made on that basis alone, and require additional and separate assessments under IHL. Thus, it seems that the US has attempted to broaden its targeting remit by including rules from outside IHL to inform its understanding of who may be lawfully targeted. This approach is incorrect under international law and, needless to say, any drone strikes carried out under this additional category, which violates the traditional IHL categories of targetable individuals, will be unlawful.

3.2 Drones and international human rights law

Based on the criteria for the existence of international and non-international armed conflicts discussed above,²⁰¹ there have been drone strikes that have likely been undertaken outside of armed conflict.²⁰² In such instances, IHL is not triggered and does not apply, and so consideration of the drone strikes’ legality must be done within the framework of IHRL alone. It is almost universally accepted that IHRL also applies during armed conflicts,²⁰³ in a relationship of concomitance, in which the more specific will prevail when there is a conflict between rules, be it one of IHL or IHRL.²⁰⁴ Therefore, this section will primarily consider the application of IHRL during peacetime, in which it operates in a manner that is not subject to augmentation by IHL, though there will also be some overlap with operations undertaken during armed conflict.

3.2.1 Application of international human rights law

Though their application is virtually axiomatic, the international community has reiterated the need to abide by IHRL during actions to combat terrorism. The UN Global Counter-Terrorism Strategy has reaffirmed that states ‘must ensure that any measures taken to combat terrorism comply with their

200 ‘Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities’ (1 July 2016) *United States Director of National Intelligence*, www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF accessed 20 June 2017.

201 See sections 3.1.1 and 3.1.2.

202 Eg, the US strike in Yemen in 2002, which killed al-Qaeda leader Qa’id Salim Sinan al Harithi and five others. The threshold of intensity between al-Qaeda in the Arabian Peninsula and the US has never been reached, and that between al-Qaeda in the Arabian Peninsula and the Yemeni government was not reached until 2012.

203 See n 80 above, [24]–[25]. Affirmed in the *Wall* case (n 65 above) at [106]; see n 65 above, *Armed Activities*, [217]; *Coard v United States* Report No 109/99, Case 10.951, Inter-American Commission on Human Rights (IACHR), 29 September 1999 [42]; Human Rights Committee, General Comment No 31, CCPR/C/21/Rev.1/Add.13 (26 May 2004) [11]; see n 93 above, Sivakumaran, 89–94; C Greenwood, ‘Rights at the Frontier—Protecting the Individual in Time of War’ in Barry Rider (ed) *Law at the Centre: The Institute of Advanced Legal Studies at Fifty* (Kluwer Law International 1999) 288–289; L Hill-Cawthorne, ‘Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict’ (2015) 64 *International and Comparative Law Quarterly* 293, 313–316; M Milanović, ‘Norm Conflicts, International Humanitarian Law, and Human Rights Law’ in Orna Ben-Naftali (ed) *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 124; I Scobbie, ‘Principles or Pragmatics? The Relationship between Human Rights and the Law of Armed Conflict’ (2010) 14(3) *Journal of Conflict and Security Law* 449, 456–457; C Garraway, ‘“To Kill or not to Kill?”—Dilemmas on the Use of Force’ (2010) 14(3) *Journal of Conflict and Security Law* 499, 509–510; M Sassòli and L Olson, ‘The Relationship Between International Humanitarian Law and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’ (2008) 90(871) *International Review of the Red Cross*, 599, 605.

204 YDinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) 226.

obligations under international law, in particular human rights law, refugee law and international humanitarian law'.²⁰⁵ Therefore, it is necessary to consider multiple facets of IHRL and how they relate to drone strikes.

(A) JURISDICTION

The first step to determine whether a state deploying drone strikes has obligations under IHRL is to consider whether or not an individual affected by a strike is within the jurisdiction of that state.²⁰⁶ If the drone use is undertaken within the state's own territory, then this threshold is relatively straightforward, as conduct within a state's territory is necessarily within its jurisdiction. However, at present, the large majority of instances of armed drone use occur extraterritorially, and though there are reports of drones being used – for example, in Pakistan by the Pakistani military – such instances are relatively few.²⁰⁷

The extraterritorial application of IHRL is an issue of much debate. Article 2 of the International Covenant on Civil and Political Rights (ICCPR) asserts that its protections apply to actions of a state 'within its territory and subject to its jurisdiction', which some have argued restricts its application to only those acts occurring in a state's territory.²⁰⁸ However, this view appears to be that of a minority, and the ICCPR is applicable to extraterritorial uses of force²⁰⁹ with 'jurisdiction' therefore being the operative word.

In the context of armed drone use, the issue becomes particularly complicated due to their inherent remoteness: they may be flown by a pilot situated thousands of miles away. As a result, the interpretations of jurisdiction in relation to extraterritoriality, developed by organs such as the European Court of Human Rights (ECtHR), the UN Human Rights Council (HRC) and the UN Human Rights Committee, provide vital insight into the question of whether drone strikes bring targeted individuals within the jurisdiction of drone states.

The first approach to establishing whether a state is exercising jurisdiction outside of its own territory is whether that state has effective control over a *geographical* area within another state. An example of this is a state that has been recognised as being an occupying power.²¹⁰ Thus, the use of drones by Israel over occupied Palestinian territory will be subject to IHRL, but extraterritorial uses by other states that do not fall within this scenario would not be. For those other strikes, alternative methods of establishing jurisdiction are necessary.

The second approach focuses not on geographical control but on *personal* control, under which it must be shown that a state was exercising control over an individual, an example being an individual who has been detained by state agents. International jurisprudence has supported a finding that the requirement of jurisdiction is satisfied in situations of control less than that of direct physical

205 Resolution General Assembly on 8 September 2006, UN Doc A/RES/60/288.

206 As per the International Covenant on Civil and Political Rights, Art 2; the African Charter on Human and Peoples' Rights, Art 1; and the European Convention on Human Rights, Art 1.

207 U Ansari, 'Pakistan Surprises Many with First Use of Armed Drone' (10 September 2015) *Defense News*, www.defensenews.com/story/defense/air-space/strike/2015/09/08/pakistan-surprises-many-first-use-armed-drone/71881768 accessed 20 June 2017.

208 See, eg, M Dennis, 'Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?' (2006) *ISLA Journal of International and Comparative Law* 459.

209 See n 61 above, Lubell, 195–206.

210 Concluding observations of the Human Rights Committee: Israel (18 August 1998) CCPR/C/79/Add.93 [10]; see n 65 above, *Wall* case, [110].

control, for example, detention. Case law from the ECtHR has emphasised that effective control can manifest at levels less than that of direct physical control. The ECtHR has found that individuals shot by soldiers on patrol during an occupation fell within the jurisdiction of the occupying state.²¹¹ Going further, the ECtHR has also found that jurisdiction may exist prior to invading armed forces having ‘assumed responsibility for the maintenance of security’ of an area.²¹² Similarly, jurisdiction has also been found to exist between members of a state’s armed forces and individuals passing through a checkpoint.²¹³ This personal approach to jurisdiction, dispensing with the need for geographical control, is also present elsewhere in international jurisprudence. For instance, the UN Human Rights Committee adopted an understanding in which the nature of the act could produce jurisdiction, stating that:

‘it would be unconscionable to so interpret the responsibility under Article 2 of the [ICCPR] as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory’.²¹⁴

Furthermore, the UN Human Rights Committee has stated its own understanding of jurisdiction as pertaining ‘to anyone within the power or effective control of [a] state party’,²¹⁵ which, it has been argued, will bring into a state’s jurisdiction ‘anybody directly affected by a state party’s actions’.²¹⁶ Elsewhere it has been asserted that, specifically with regard to distance targeted killing, the appropriate test for determining jurisdiction is ‘the exercise of authority or control over the individual in such a way that the individual’s rights are in the hands of the state’.²¹⁷

The tendency within judicial decisions on jurisdiction appears to be towards a gradual expansion of the concept.²¹⁸ This is evidenced by the statement of Leggatt J in *Al-Saadoon and others v Secretary of State for Defence* that ‘[u]sing force to kill is indeed the ultimate exercise of physical control over another human being’.²¹⁹ This statement has since been reined in by the UK Court of Appeal, which stated that such an expansion of the jurisdictional application of the ECHR should be made by the ECtHR.²²⁰ It is nevertheless arguable that the trajectory of the notion of jurisdiction is towards the model formulated by Marko Milanović in which negative rights (eg, the right to life) may be subject to unlimited jurisdiction, while positive rights (eg, the right to education) will be restricted to geographical areas over which a state maintains effective control.²²¹

As a result of the case law surrounding jurisdiction, it can be concluded that a strong case can be made for the inclusion of extraterritorial drone strikes within the framework of IHRL on the basis

211 *Al-Sheini v United Kingdom* 55721/07 [2011] ECHR [149]–[150].

212 *Hassan v United Kingdom* 29750/09 [2014] ECHR [75].

213 *Jaloud v The Netherlands* 47708/08 [2014] ECHR [152].

214 *Delia Saldías de Lopez v Uruguay* Communication No 52/1979, UN Doc CCPR/C/OP/1 at 88 (1984) [12.3].

215 ‘The Nature of the General Obligations Imposed on States Parties to the Covenant’ General Comment no 31 [80] (29 March 2004) UN Doc CCPR/C21/Rev.1.Add.13 [10].

216 See n 181 above, Kretzmer, 184.

217 See n 61 above, Lubell, 223.

218 This has not always been the course taken by the courts, as the personal approach to jurisdiction as rejected by the ECtHR in the now (implicitly) overruled case of *Bankovic et al v Belgium et al* 52207/99 [2001] ECHR.

219 *Al-Saadoon and others v Secretary of State for Defence* [2015] EWHC 715 (Admin) [95].

220 *Al-Saadoon and others v Secretary of State for Defence* [2016] EWCA Civ 811 [69]–[70].

221 M Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011) 209–222.

of drone states' personal relation with those who they strike.²²² There is certainly an argument to be made that the nature of drone strikes brings those individuals targeted into the jurisdiction of the drone state. It is submitted that a finding that IHRL is inapplicable to the victims of extraterritorial drone strikes by virtue of jurisdiction when such law would be applicable in situations of detention is unconscionable and runs counter to the object and purpose of numerous human rights treaties.

One final and important point is that IHRL will apply to a state 'through the consent, invitation or acquiescence of the Government of [a] territory'.²²³ Therefore it may be possible that, with regard to strikes carried out in Afghanistan, Iraq, Pakistan, Somalia and Yemen (where drones are operated with the consent of the 'host' state), IHRL jurisdiction will be far more readily applicable than in situations in which intervention is based on self-defence alone.

By virtue of this, and the fact that there is the possibility of invoking extraterritorial jurisdiction, it is necessary to consider specific rights implicated by the use of armed drones.

(B) THE RIGHT TO LIFE

The right to life is a fundamental right within IHRL, recognised by multiple treaties and as a norm of customary international law.²²⁴ It is therefore a rule – under Article 6 of the ICCPR, which is binding upon all states using drones – that no one can be arbitrarily deprived of their life.²²⁵ Within an armed conflict, the term 'arbitrary' is interpreted in light of norms of IHL, so that if an individual were to be deprived of their life during an armed conflict, in a manner that was lawful under IHL, it would not be an arbitrary killing.²²⁶ Additionally, States Parties to the European Convention on Human Rights (ECHR) are prohibited from carrying out intentional killing²²⁷ unless they have formally derogated during a 'time of war' and only if that killing is carried out in accordance with IHL.²²⁸ It should be noted, however, that no ECHR State Party has thus far derogated from its obligations in respect of Article 2 in any type of armed conflict.

Outside of an armed conflict, a state may use lethal force when exercising law enforcement, but not arbitrarily. This has been interpreted by the UN Human Rights Committee as requiring that force used is proportionate and necessary; proportionate to the threat the target represents; and necessary as the only available means to stop the threat.²²⁹ Therefore, though the use of drone strikes to kill outside of an armed conflict may likely be unlawful under IHRL, their use would potentially be lawful if other lives were at stake and the urgency of the situation did not leave any choice for methods of incapacitation other than lethal force.²³⁰ This is in accord with the approach taken by the ECtHR to the use of lethal force during law enforcement operations.²³¹ Lethal force is reconcilable with the right to life when used in 'defence of others against the imminent threat

222 This point has been made in brief by Robert McCorquodale in 'Human Rights and the Targeting by Drone' (18 September 2015) *EJIL:Talk!*, www.ejiltalk.org/human-rights-and-the-targeting-by-drone accessed 20 June 2017.

223 See n 218 above, [69].

224 N Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 184–221.

225 International Covenant on Civil and Political Rights, Art 6(1).

226 See n 80 above, [25].

227 ECHR, Art 2.

228 ECHR, Art 15(1) and (2).

229 Human Rights Committee, General Comment No 6, HRI/GEN/1/Rev.6 (1982).

230 See n 56 above, [33].

231 *McCann and others v United Kingdom* 18984/91 [1995] ECHR [194].

of death or serious injury [or] to prevent the perpetration of a particularly serious crime involving grave threat to life',²³² but the law is unclear as to the precise nature of imminence – that is, the point at which lethal force may be used against a developing threat. This is a determination that must be made on a case-by-case basis.

The use of drones for the targeted killing of specific individuals, a key theme of the US drone programme, will most likely be unlawful under IHRL if undertaken outside the context of an armed conflict. This is because the prior identification of an individual on the basis of acts previously performed, or their position in an organisation, is contrary to the requirements of necessity and proportionality. This has been argued in the case of the 2002 strike in Yemen against Abu Ali al-Harithi who, it was alleged, was involved with the 2000 USS Cole bombing. In the absence of new imminent threats from al-Harithi, this strike would have been solely a response to the 2000 bombing and would therefore fail to satisfy the requirement of necessity.²³³ Other strikes that follow a similar pattern will also be contrary to the right to life under IHRL.

(C) THE RIGHT NOT TO BE SUBJECTED TO CRUEL, INHUMAN OR DEGRADING TREATMENT

Prohibited by Article 7 of the ICCPR, as well as other regional IHRL instruments,²³⁴ the right not to be subjected to cruel, inhuman or degrading treatment can be impacted by drone strikes. This is due to the psychological impact of the presence of drones upon those who live beneath them. Life in a region in which drones are regularly operated has been described as 'hell on earth', in which the constant sound of droning is juxtaposed with missiles that, moving faster than the speed of sound, impact and detonate without warning.²³⁵ A study, in which individuals living in areas with a drone presence were interviewed, found that:

'[i]n addition to feeling fear, those who live under drones – and particularly interviewees who survived or witnessed strikes – described common symptoms of anticipatory anxiety and post-traumatic stress disorder. Interviewees described emotional breakdowns, running indoors or hiding when drones appear above, fainting, nightmares and other intrusive thoughts, hyper startled reactions to loud noises, outbursts of anger or irritability, and loss of appetite and other physical symptoms. Interviewees also reported suffering from insomnia and other sleep disturbances, which medical health professionals in Pakistan stated were prevalent'.²³⁶

The definition of torture in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) includes both 'physical or mental' suffering, which means that, depending on the circumstances, the impact of drone flights can be brought within this category. Article 16 of the CAT refers to 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture', demonstrating that the different categories of treatment exist on a spectrum. Thus, if not torture, drone use may amount to cruel, inhuman or degrading treatment. It has been asserted by the Special Rapporteur on Torture and Other Cruel,

232 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, [9], welcomed by UNGA Res 45/166, 18 December 1990.

233 See n 61 above, Lubell, 177.

234 ECHR, Art 3; IACHR, Art 5(2); ACHPR, Art 5(2).

235 D Rhode, 'The drone wars' (26 January 2012) *Reuters Magazine*, www.reuters.com/article/us-david-rohde-drone-wars-idUSTRE80P11I20120126 accessed 20 June 2017.

236 International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), *Living Under Drones: Death, Injury, And Trauma To Civilians From US Drone Practices In Pakistan* (September 2012) 82–83.

Inhuman or Degrading Treatment or Punishment that cruel, inhuman and degrading treatment is distinct from torture as the latter is done with intent to punish or adduce information, as per Article 1 of the CAT,²³⁷ a position supported by ICTY jurisprudence.²³⁸ On this basis, while it may not amount to torture, it is highly likely that drone use may amount to cruel, inhuman or degrading treatment or punishment.

Further, Article 1 of the CAT requires the *intentional* infliction of pain or suffering, which might exclude mental suffering arising as an incidental result of drone use, rather than an intended consequence. Early jurisprudence appears to follow this approach: in the *Greek* case, it was held that ‘inhuman treatment covers at least such treatment as *deliberately* causes severe suffering’.²³⁹ Nevertheless, Nowak appears to suggest that negligent conduct leading to suffering could still be cruel, inhuman or degrading treatment.²⁴⁰ Such an interpretation leaves open the possibility that the mental suffering caused by persistent drone flights could be brought within the definition of cruel, inhuman or degrading treatment.

In this context, it should be noted that Article 16 of CAT does not contain a specific requirement for intent as there is for torture. Consequently, cruel, inhuman or degrading treatment can be inflicted even by negligence.

(D) CONCLUSION

Despite serious questions over its application due to questions surrounding states’ jurisdiction, IHRL raises some important implications for the use of drones. It seems likely that targeted killings conducted by drones outside of an armed conflict will be contrary to the right to life, with a sufficient jurisdictional link. Thus, in those situations in which the existence of an armed conflict is not clear (Gaza, Pakistan, Somalia, Yemen and possibly Libya), the use of drone strikes may be particularly problematic. Depending on whether a determination as to the existence of an armed conflict can be made, many strikes that have been carried out will, in all likelihood, be unlawful.

237 M Nowak, ‘What Practices Constitute Torture? US and UN Standards’ (2006) 28 *Human Rights Quarterly* 809, 830–832.

238 *Prosecutor v Milorad Krnojelac*, IT-97-25-T, Trial Chamber Judgment (15 March 2002) [180].

239 The *Greek* case (1969) 12 *Yearbook of the European Convention on Human Rights* 180.

240 See n 237 above, 830.

4 Civilian casualties in international human rights law and international humanitarian law

Civilian casualties are a tragic and indisputable result of military operations, including drone strikes. These are often relabelled ‘collateral damage’ in an attempt to sanitise the least palatable aspect of armed conflict, and the designation may be said to simultaneously demean the loss of human life. The examination of civilian casualties is key to gaining a clear picture of the nature and impact of drone strikes. In the situation of an armed conflict, civilian casualties, ancillary to a lawful military attack, are not necessarily unlawful under international law, as long as they are not excessive.²⁴¹ Under Article 8 of the Rome Statute, the intentional targeting of civilians or the launching of an attack in the knowledge that such attack will cause clearly excessive incidental civilian casualties is a war crime. Assessing harm to civilians is an important marker of operational effectiveness, as no party to an armed conflict can know if force used has been accurate, precise or proportionate, unless it has data about the consequences of that force. Without proper post-strike assessments, it would be very difficult to make accurate statements as to the scale of civilian harm caused in any particular operation.

4.1 Identifying civilian casualties

IHL provides obligations with respect to the dead, including civilian casualties. Under Article 12 of the Fourth Geneva Convention, there is an obligation that ‘[a]s far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded’. This is reflected in Article 8 of Additional Protocol II, and there are more detailed provisions, relating to the search, identification and recovery of missing and dead persons, provided by Articles 33 and 34 of Additional Protocol I. Crucially, it has been argued that rules governing the identification of civilian casualties have become part of customary international law,²⁴² thereby extending such obligations to those states that use drones but are not party to the Additional Protocols. Rule 109 of the ICRC study on customary IHL asserts that: ‘[w]hen circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction’.²⁴³ Similarly, Rule 116 requires parties to take positive actions to enable the identification of the dead.²⁴⁴ In the *Jenin (Mortal Remains)* case, Israel’s High Court of Justice held that this applied regardless of affiliation and that, out of ‘respect for all dead’, parties are obliged to search for their own dead, those of their enemies and civilians.²⁴⁵ Thus, there is clearly a recognised duty to identify and recover civilian casualties.

241 Additional Protocol I, Art 51(5)(b).

242 See n 95 above, Henckaerts and Doswald-Beck, Rules 109 and 116.

243 *Ibid*, Rule 109.

244 *Ibid*.

245 *Barake v Minister of Defense* (2002) HJC 3114/02 56(3) PD 11.

4.2 The duty to investigate civilian casualties

The principle of accountability is paramount in IHRL and IHL, requiring states to undertake investigations into possible violations of IHRL and IHL and, where appropriate, prosecute those responsible.²⁴⁶ The UN Basic Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989) provide that, where there is a suspicion that a death has been caused in such circumstances, there must be an independent and impartial investigation to determine the cause of death, as well as to prevent future deaths.²⁴⁷ The law differs between situations of armed conflict and peacetime, so these will be examined separately.

4.2.1 The duty to investigate under international human rights law

While there is no express provision to investigate violations of IHRL, there is a general obligation to investigate, derived from the requirement by treaties that states ensure the rights of those within their jurisdiction.²⁴⁸ Case law supports the contention that such an obligation is a contingent aspect of the duty to ensure individuals' human rights.²⁴⁹ During peacetime, IHRL jurisprudence creates a procedural obligation upon states to conduct an effective investigation when individuals have been killed as a result of the use of force by a state agent or non-state armed group, which flows from the right to life.²⁵⁰ There is a duty upon state authorities to act of their own accord and not to wait for a deceased's relatives to lodge a complaint. Failure to comply with this obligation would be a violation to the right to life; a failure to investigate would render civilian deaths 'arbitrary' killings.

To ensure effectiveness, investigations must be prompt, exhaustive, impartial and independent, and must be carried out by 'competent authorities'.²⁵¹ The investigation should be broad enough to allow the consideration of 'the planning and control of the operations in question, where this is necessary in order to determine whether the state complied with its obligation under Article 2 [of the ECHR] to protect life'.²⁵² Such an investigation will be effective if it is capable of leading to a determination as to whether the use of force was legal or not, and the results in the identification of any civilian casualties.

As a result, all lethal drone strikes undertaken outside of an armed conflict must be investigated, despite the absence of concrete provisions within international human rights instruments.

246 ICCPR, Art 2(3); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA 60/147, 16 December 2005.

247 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Resolution of the Economic and Social Council 1989/65 [9].

248 ICCPR, Art 2(1); ECHR, Art 1.

249 Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) [15] and [18]; see n 232 above, [161].

250 *Isayeva v Russia* 57950/00 [2005] ECHR [209].

251 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1990) UN Doc A/CONF.144/28/Rev.1, Art 22.

252 See n 212 above, [163].

4.2.2 The duty to investigate under international humanitarian law

Unlike the implied rules governing investigation under rules of IHRL, IHL provides a more explicit requirement that breaches be examined by states, even though it does not explicitly refer to the duty to investigate as such. Additional Protocol I creates an obligation for military commanders to ‘report to competent authorities breaches of the Conventions and of this Protocol’.²⁵³ All four Geneva Conventions of 1949 and Article 85 of Additional Protocol I create an obligation for the parties to search for persons who may have committed or ordered to be committed grave breaches of IHL, and to bring such persons before their own courts, regardless of their nationality. This duty applies to all breaches of IHL amounting to war crimes.²⁵⁴ In this context, it has been argued that states are ‘under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation, where there are civilian casualties’²⁵⁵ and that ‘[w]here an initial fact-finding investigation discloses reasonable grounds to suspect that a war crime may have been committed, a formal criminal investigation must be opened’.²⁵⁶ Conversely, it has also been argued elsewhere that, in light of the targeting rules under IHL, it would be mistaken to say that the death of a civilian in a situation of armed conflict invariably gives rise to a reasonable suspicion that a war crime has been committed.²⁵⁷ The need to conduct a fact-finding investigation may also be implied from the obligation – whenever circumstances permit – to search for missing persons and the dead, and to provide information on missing persons, obligations that exist in both international and non-international armed conflict.²⁵⁸ In addition, the duty to prosecute the alleged perpetrators of war crimes has been held to constitute a rule of customary IHL, which binds parties to both international and non-international armed conflicts.²⁵⁹ This means that there is clearly a duty upon all states using drones to investigate potential war crimes, regardless of whether they were committed in non-international armed conflicts.²⁶⁰

4.3 Specific challenges posed by drone strikes

Data as to the level of civilian casualties varies greatly depending on sources, though it is clear that, regardless of disagreement as to numbers, civilians have been killed and injured by drone strikes. The Emmerson report identified a sample of 30 drone strikes in which civilians were certainly killed or injured in Afghanistan, Gaza, Pakistan, Somalia and Yemen, all of which went without being investigated by the striking state.²⁶¹ This is in contrast to certain other incidents, in which states have been forthcoming and public about civilian deaths caused by drones,²⁶² though these appear to be the exception rather than the rule. It is important to note that, since 2016, the US appears to have begun

253 Additional Protocol I, Art 87(1).

254 *The Public Commission to Examine the Maritime Incident of 31 May 2010—The Turkel Commission, Second Report* (February 2013) 76.

255 B Emmerson, ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (18 September 2013) UN Doc A/68/389 [78].

256 *Ibid.*, [45].

257 See n 255 above, [48].

258 Additional Protocol I, Art 33; Additional Protocol II, Art 8.

259 See n 95 above, Henckaerts and Doswald-Beck, Rule 158.

260 For a detailed study of this question reaching the same conclusion, see n 255, 52–93, with a summary at 93.

261 See n 255 above, [39]–[69].

262 See, eg, ‘Memorandum for Commander, United States Forces–Afghanistan/International Security Assistance Force, Afghanistan: Executive Summary for AR 155-6 Investigation, 21 February 2010 CIVCAS incident in Uruzgan Province’, www.rs.nato.int/images/stories/File/April2010-Dari/May2010Revised/Uruzgan%20investigation%20findings.pdf accessed 20 June 2017.

a policy of releasing statistics as to civilian casualties caused by drone use ‘outside areas of active hostilities’,²⁶³ suggesting a shift in policy towards more openness. Nonetheless, these data are at odds with those produced by non-governmental organisations (NGOs) working in the area and so may not give a full picture.²⁶⁴

The technological ability that makes drones so alluring for states (principally that of being able to access remote regions out of the reach of ground troops) is what creates such difficulty with regard to investigating civilian casualties. Deaths can be caused in areas in which undertaking an investigation would be highly problematic. In addition, drone strikes conducted in Pakistan, Somalia and Yemen are carried out covertly, and often by the CIA, which is likely to stymie the reporting and investigation of civilian casualties (see section 5.1).

4.4 Access to fair trials and remedies

IHRL demands that deaths and injuries experienced by civilians are effectively investigated and that victims or their relatives are properly compensated.²⁶⁵ There is a requirement for legal mechanisms and procedures through which those responsible for civilian deaths can be held accountable, including affording the victims and their families a fair trial and adequate compensation.²⁶⁶ In addition, it has been stated that victims and their families are entitled to an effective remedy.²⁶⁷

Nonetheless, remedies are only available where there is appropriate access to justice and the operation of fair trial mechanisms. While the legal obligation to investigate and compensate is clear, those affected by drone strikes are often located in remote parts of the world, with limited means to access courts or other adjudicative bodies and, consequently, where access to justice is limited (eg, the Federally Administered Tribal Areas of Pakistan). Attempts to bring actions in the jurisdictions of the states that direct the strikes are few and far between, and are subject to state-requested or court-imposed secrecy. Cases that are brought in states that may have facilitated the use of drone strikes are found to lack jurisdiction, as courts are reluctant to sit in judgment on the acts of foreign states.²⁶⁸

Given that there are credible reports that the proportion of civilian deaths outweighs the number of successful targeted killings, the inability of victims and their families to seek compensation represents a conspicuous denial of justice for a considerable number of individuals. The US has claimed to have established a policy of investigation and compensation for the victims of drone strikes, but reports state that there is little evidence of this in practice.²⁶⁹

263 ‘FACT SHEET: Executive Order on the US Policy on Pre & Post-Strike Measures to Address Civilian Casualties in the US Operations Involving the Use of Force & the DNI Release of Aggregate Data on Strike Outside Area of Active Hostilities’ (1 July 2016) *White House*, www.whitehouse.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address accessed 20 June 2017.

264 S Ackerman, ‘Obama claims US drone strikes have killed up to 116 civilians’ (1 July 2016) *The Guardian*, www.theguardian.com/us-news/2016/jul/01/obama-drones-strikes-civilian-deaths accessed 20 June 2017.

265 M Scheinin, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’ (22 December 2010) A/HRC/16/51 [22].

266 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005) UN Doc A/Res/60/147 [18].

267 *Ibid*, [12].

268 See, eg, *R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24, [2014] 1 WLR 872; *Verwaltungsgericht Köln*, 3 K 5625/14 (27 May 2015).

269 See n 43 above, 12.

5 The requirements of transparency, public declarations and accountability

5.1 Transparency

The need for transparency in the use of lethal drone strikes is provided by two related imperatives. The first, derived from the obligations of states under IHL and IHRL, as well as domestic law, is that transparency is the only way to ensure that targeted killing by armed drones is carried out in accordance with the norms and rules that govern states' conduct when using force. The second imperative arises out of the interests of casualties and their families: without transparency, it cannot be known: (1) whether and how civilians have been affected; (2) whether they have been able to secure an effective investigation and/or remedy; and (3) whether and how errors have been made and lessons learned.

Transparency is a requirement necessary to establish whether a use of force adheres to or breaches rules of international law. It has been argued that 'a lack of disclosure gives States a virtual and impermissible license to kill'.²⁷⁰ There is no unanimity on the legal criteria justifying resort to the use of drones and, as such, there is a pressing need for states to disclose the legal basis upon which they are conducting drone strikes.²⁷¹ The absence of this information stymies investigations into drone strikes, which states are under a duty to undertake: the ECtHR has held that the failure to investigate, punish and provide compensation for breaches of the right to life may in itself constitute a violation of that right.²⁷² Investigation, punishment and the provision of compensation necessarily require public access to relevant information.²⁷³ Nonetheless, this imperative is counterbalanced by the need or desire of governments to restrict transparency in the interests of national security. For instance, the UK government maintains the position that investigations into lethal drone strikes should be political only, without recourse to the judiciary.²⁷⁴

The immediate problem is that some agencies charged with deploying unmanned drones (eg, the CIA, which flies drones in Pakistan, Somalia and Yemen) are inscrutable. Indeed, the direction of drones by such agencies has led to 'an almost insurmountable obstacle to transparency'.²⁷⁵

There have been some public declarations regarding the use of drones by senior politicians – purportedly in the interests of transparency. For instance, in his 2013 speech to the National Defence University, President Obama declassified a drone strike against a US national on the explicit basis of 'transparency and debate', as it raised 'serious constitutional issues' and made reference to his administration 'review[ing] proposals to extend oversight' of such operations.²⁷⁶ More recently, the administration has released figures on civilian casualty numbers, emphasising

270 See n 56 above, [88].

271 *Ibid.*, [87].

272 See n 232 above, [169]; *Kaya v Turkey*, application No 22729/93, judgement of 19 February 1998 [86]–[92].

273 See n 266 above, [16].

274 See n 63 above, [5.33]–[5.34].

275 See n 255 above, [46].

276 *Ibid.*

the need to be as ‘transparent as possible’.²⁷⁷ This move is laudable but continued monitoring is required. Additionally, the level of civilian casualties will not suffice to enable assessments as to the lawfulness of strikes without the mutual disclosure of the legal basis upon which the decision to strike is made in different instances.

In September 2015, the UK Prime Minister David Cameron announced the targeted killing of a British national in Syria – referred to as a ‘new departure’.²⁷⁸ Nonetheless, these strikes fall within the purview of the Ministry of Defence, which employs a ‘neither confirm nor deny’ policy on the use of drone strikes.²⁷⁹ In reality, secrecy remains commonplace while transparency appears to remain selective, which directly conflicts with the requirement for transparency.

The use of drones by Israel has been described as being the least transparent programme of all states using them for lethal force, with no official acknowledgment or domestic debate.²⁸⁰ This is despite a decision by the Israel High Court of Justice, which holds that, in order for targeted killing to be lawful, there must be sufficient accountability and transparency.²⁸¹ The leading judgment outlined relevant conditions that must be satisfied, including the carrying out of a retrospective investigation by an independent commission.²⁸² Israel’s continued silence renders any assessment of the legality of drone strikes and their impact upon civilians very difficult. It is likely that this secrecy is inherently contrary to obligations under international law, regardless of the lawfulness in terms of the specifics of particular strikes.

5.2 Accountability

Serious violations of IHL may amount to war crimes under Article 8 of the Rome Statute. Additionally, as the massive unlawful use of drones extraterritorially may constitute an act of aggression in manifest violation of the Charter of the UN, giving rise to individual criminal responsibility for the crime of aggression, both under customary international law and under Article 8bis of the International Criminal Court (ICC) Statute, the exercise of jurisdiction over which may be activated as from 2017.²⁸³ These scenarios could all produce the individual criminal responsibility of the perpetrators, who could be prosecuted before the ICC (where it exercises jurisdiction), before another properly constituted international criminal tribunal with jurisdiction, or before a competent national jurisdiction.

277 See n 264 above.

278 HC Deb 7 September 2015 col 30.

279 Ministry of Defence Guidance Note D7: The Duty to Either Confirm or Deny whether Information is held (March 2009), www.gov.uk/government/uploads/system/uploads/attachment_data/file/16826/D720090507MOD_FOI_Guidance_D7U.pdf accessed 20 June 2017.

280 See table 1, n vii above, 6.

281 See n 110 above, *Public Committee Against Torture*.

282 *Ibid*, [40].

283 See n 55 above.

5.2.1 State accountability

Under international law, states are responsible for acts of their organs of government and individuals acting under their direction.²⁸⁴ Every internationally wrongful act of a state entails international responsibility, a standard that depends on three factors: attribution of conduct to a state; a breach, by that conduct, of an international obligation; and the absence of any circumstances precluding wrongfulness.

The first requirement, that of attribution, is in principle a relatively straightforward process in the context of armed drone use by a state, as they are piloted either by a state's armed forces or (in the case of some US drones) intelligence agencies.

The second requirement under state responsibility may prove to be a major hurdle to accountability for drone strikes in some instances. As discussed above, in the context of IHRL, a state can only have an obligation if it is exercising its jurisdiction over a particular area, a concept that is controversial within international law and subject to competing interpretations.²⁸⁵ Therefore, there may be a barrier to accountability for drone strikes that breach individuals' human rights. Nonetheless, a state can potentially be held accountable for breaches of other international law obligations, under IHL or *jus ad bellum*.

State responsibility can also arise where a state aids or assists the unlawful conduct of another state.²⁸⁶ This standard is dependent upon two criteria: that the assisting state is aware of the circumstances making the conduct of the assisted state unlawful; and its assistance is intended to – and actually does – facilitate that particular conduct. In order for the international responsibility of an assisting state to arise, the threshold demands that such assistance contributes significantly, yet it does not need to be proven that the need is indispensable or essential to the unlawful conduct of the assisted state. In addition, the state assisting does not necessarily have to be conscious of the unlawfulness of the assisted conduct but, instead, it must be aware of the factual circumstances that make such conduct unlawful. In the circumstances of armed drone use, if a state undertakes drone strikes that are contrary to international law, another state that assists in such conduct could be held accountable under the law of state responsibility.²⁸⁷ This formed the basis of a claim (that was ultimately unsuccessful) brought against Germany by relatives of Yemeni nationals killed by US strikes.²⁸⁸ Additionally, the law governing responsibility in this manner has the effect that, in situations in which one state uses drones with the consent of another, both states may incur responsibility for strikes that contravene IHL or IHRL. This most clearly implicates those strikes in Pakistan, Somalia and Yemen, many of which have been carried out with the consent of the 'host' state.

Chapter V of the International Law Commission Draft Articles of State Responsibility sets out circumstances that will preclude wrongfulness. Those that are most relevant for an examination of drone use are Article 20 (consent) and Article 21 (self-defence in accordance with the UN Charter).

284 See n 21 above, Ch II.

285 See section 3.2.1 (a).

286 See n 21 above, Art 16.

287 *Ibid*; see n 63 above, [3.87]; House of Commons, House of Lords Joint Committee on Human Rights 'Allegations of UK Complicity in Torture' Twenty-Third Report of Session 2008-09, HL Paper 152, HC 230 [24]–[27].

288 *Verwaltungsgericht Köln*, 3 K 5625/14 (27 May 2015).

Both of these have been considered in detail above,²⁸⁹ though it is important to reiterate that the existence of either of these circumstances will only preclude the wrongfulness of violations of *jus ad bellum*, not of IHL or IHRL.

In instances where a drone strike is found to be in violation of international law, the responsible state has a duty to make reparations depending on the gravity of the violation in question. This includes cessation and guarantees of non-repetition,²⁹⁰ compensation,²⁹¹ rehabilitation and restitution.²⁹²

5.2.2 Non-state armed group accountability

A more complex issue is asserting how non-state armed groups may be held accountable for violations of international law in the event that such a group deployed armed drones.

It is axiomatic that non-state armed groups will be subject to domestic criminal law for acts undertaken both in and outside of an armed conflict, but the situation is more complex with regard to international law. There is no express international framework that addresses the responsibility of non-state armed groups, though this does not mean that non-state armed groups cannot bear responsibility for breaches of international law.

During a non-international armed conflict,²⁹³ armed groups are bound by IHL under Common Article 3 of the Geneva Conventions and Additional Protocol II, to the extent that the latter is applicable in a given context, in addition to the rules of customary IHL.²⁹⁴ This is by virtue of the text of Common Article 3 of the Geneva Conventions, which states that ‘each Party to the conflict shall be bound to apply as a minimum the following provisions’. Non-state armed groups are likely to be bound by norms of IHL ‘by reason of their being active on the territory of a Contracting Party [to the Geneva Conventions]’²⁹⁵ or, similarly, by virtue of the legislative jurisdiction of the states in which they operate.²⁹⁶ The UN Security Council has confirmed that individual responsibility will be attached to violations of IHL during non-international armed conflicts.²⁹⁷ Jurisprudence supports a finding that non-state armed groups as a whole are bound by IHL, rather than just the individuals comprising them.²⁹⁸ In terms of IHRL, it has been suggested that, as a corpus of law regulating the relationship between governments and those governed, it is not applicable to non-state armed groups.²⁹⁹ Nonetheless, while states have the primary legal obligations under IHRL, there are arguments that

289 See sections 2.1 and 2.2.

290 See n 21 above, Art 30.

291 *Ibid*, Art 36; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997 [152].

292 *Ibid*, Art 35.

293 Non-state armed groups cannot be a party to an international armed-conflict as they are not states, per Common Art 2 of the Geneva Conventions. In the event that a non-state armed group becomes involved in fighting classified as an international armed-conflict, a parallel and simultaneous non-international armed conflict will become extant, per the ICTY in *Tadić*, n 97 above, [84].

294 See n 95 above, Henckaerts and Doswald-Beck, Rule 139.

295 C Ryngaert, ‘Non-State Actors and International Humanitarian Law’ (2008) Institute for International Law, Working Paper, www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf accessed 20 June 2017.

296 S Sivakumaran, ‘Binding Armed Opposition Groups’ (2006) 55 *International and Comparative Law Quarterly*, 369, 381.

297 Security Council Resolution 1214 (1998) S/RES/1214.

298 See n 123 above, [174].

299 Inter-American Commission on Human Rights (1990) *Inter-American Yearbook on Human Rights* 356, 358; Follow-up to the World Conference on Human Rights (30 September 1996) UN Doc E/CN.4/1997/3 [46].

non-state armed groups may have some responsibilities under customary IHRL,³⁰⁰ particularly when these groups hold territory and exercise government-like functions. Indeed, the UN Security Council has specifically referenced human rights violations committed by non-state armed groups, calling on such groups to respect relevant human rights law,³⁰¹ and emphasising the need for those responsible for serious violations of human rights to be brought to justice,³⁰² which is indicative of some degree of applicability to such group.³⁰³

Under international criminal law, individuals may be held accountable for violations of IHL they have committed or ordered to be committed; this is particularly the case for leaders, who may be held individually responsible for the crimes of their subordinates by virtue of the principle of command responsibility.³⁰⁴ This form of responsibility has been held to be present within customary international law.³⁰⁵ War crimes are committed not by abstract entities but by the individuals that constitute them,³⁰⁶ thus, it is individuals who are responsible for war crimes. Article 8 of the Rome Statute is the treaty provision of international criminal law most likely to apply in the event of a non-state armed group utilising a drone in a manner that breaches IHL during a non-international armed conflict.

Nonetheless, there are significant barriers to prosecution, with the most likely option being the domestic prosecution of violations of IHL by those states upon whose territory the violations occur.³⁰⁷ Thus, before the relevant national criminal courts, a non-state armed group (either individual or group) may be held accountable for violations of domestic and/or international law, but the reality of the situation is such that those states in which drones have been operated sometimes lack the juridical structures to actuate the prosecution of non-state armed groups. However, under the present framework, there are few ways in which a non-state armed group is likely to be held accountable for similar acts under international law mechanisms.

300 See, eg, A Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88(863) *International Review of the Red Cross*, 491.

301 Security Council Resolution 1216 (1998) S/RES/1216.

302 Security Council Resolution 1509 (2003) S/RES/1509.

303 Security Council Resolution 1214 (1998) S/RES/1214.

304 Rome Statute, Art 28.

305 *Prosecutor v Delalić*, IT-96-21-T, Trial Chamber Judgment (16 November 1998) [343].

306 See, eg, *Prosecutor v Furundzija*, IT-95-17/1-T, Trial Chamber Judgment (10 December 1998) [140].

307 L Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 132.

6 Conclusion

There are numerous facets to the legal framework in which drones operate. Their lawfulness is assessed by multiple regimes of international law, which apply concurrently. Violation of any applicable international legal rule will render a strike unlawful, regardless of whether it has adhered to all other applicable rules. For instance, use of a drone in accordance with all norms of IHL will not be lawful if it has been resorted to in a manner that breaches *jus ad bellum* (ie, if it does not satisfy the test for lawful self-defence and has not been consented to). Likewise, a strike lawfully resorted to with the consent of a 'host' state will become unlawful if it is carried out in a way that is contrary to IHL or IHRL. In this way, it is clear that the lawfulness of drone strikes under international law must be analysed holistically.³⁰⁸

There is nothing inherent about drones that renders them unlawful. Like the majority of weapons, their use is lawful if it accords with all applicable international laws. Nonetheless, the fact that they are not *inherently* unlawful should not be taken to mean that their use is *generally* lawful. Drones clearly have the capacity to be employed using methods that may be unlawful. Their ability to access remote areas covertly and without endangering the lives of their pilots presents the possibility that they may be used in a unique manner that stretches the boundaries of accepted norms governing when force may be used, while simultaneously stretching the geography of armed conflict and IHL. Drones remove practical barriers that have previously restricted the resort to force by states, and they reduce the cost of military campaigns, both in terms of financial and political capital. Drones provide a simple recourse to force that would otherwise have been impossible, and this gives them a uniquely destabilising capacity. As the practical barriers to the use of force fall down, it is vital that the legal barriers are reinforced and reasserted.

Additionally, the way in which targeting decisions are made has the potential to have produced strikes that may breach IHL and IHRL rules and principles. Thus far, drones, and the interpretation of the international law surrounding their use, have been operated behind a veil of secrecy, which stymies most attempts to assess their lawfulness. Nevertheless, assessments of drone programmes have suggested that wide interpretations of the law may have been adopted, which may go beyond what is acceptable. There is an ongoing need to assess the use of drone strikes in all situations to ensure that the technology is being used in accordance with international law as it actually exists, not as it is interpreted to be, where such interpretations undermine the object and purpose of the law.

³⁰⁸ See further n 91 above.

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4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
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