

The Right to Life and the International Law Framework Regulating the Use of Armed Drones in Armed Conflict or Counter-Terrorism Operations: Executive Summary

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1. The emergence of the use of armed drones (here called drones) in armed conflict or counter-terrorism operations renders an evaluation of the applicable legal rules and their compliance therewith essential. In any use of drones, and any use of lethal force generally, a number of different sources of law will apply concurrently. This executive summary, which distils the key points that we make in a longer academic piece that is attached to this summary, focuses on the relevant rules under international law and their application to the use of drones. There are three key areas of international law that apply to drones: international human rights law, international humanitarian law, and the law governing the use of military force between States (the *ius ad bellum*). Each of these areas of law focuses on a slightly different element of the use of drones. On the one hand, the *ius ad bellum* is concerned with the inter-State issue of whether a use of military force by one State on another State's territory is compatible with the latter's sovereignty and territorial integrity. International human rights law and international humanitarian law, on the other hand, are concerned with the protection of individuals (and property), and focussed on the specific features of a particular drones strike, such as against whom the strike is carried out.

2. It must be stressed that, for a drone strike to be lawful under international law, it must be compatible with each of these bodies of law. It is possible for a particular act to be compatible with the law regulating inter-State use of force, for example, but incompatible with international humanitarian law and human rights law. Equally, an act can be compatible with international humanitarian law but incompatible with the law on the use of force and/or human rights law. The important point is that where there is a lack of compatibility with one of these legal regimes, the act is unlawful under international law, which can entail both State responsibility and, in certain circumstances, individual criminal responsibility. Moreover, the various justifications that are available under each of these bodies of law for particular action do not affect legality under the other two bodies of law. For example, the fact that an action is lawfully taken in self-defence under the UN Charter does not mean that the action is lawful under international humanitarian law or human rights law

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I. International Human Rights Law

3. As a general rule, international human rights law requires that any deprivation of life must be non-arbitrary.⁵ The prohibition of arbitrary deprivation of life has also been described as a rule of customary international law, as well as a general principle of international law and a norm having the status of *ius cogens*.⁶ Moreover, certain violations of the right to life are considered to be war crimes or crimes against humanity.⁷

4. The non-arbitrariness standard defining the scope of the right to life under human rights law has been interpreted in case law to require that lethal force be used only as a last resort in order to *protect* life⁸ against an imminent threat. Thus, Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.” Indeed, article 2 of the European Convention on Human Rights (ECHR) contains, rather than a general prohibition of arbitrary deprivation of life, an exhaustive list of grounds on which it is permissible to use lethal force. It must therefore be both necessary to protect life and proportionate to that end, requiring that alternative means for containing the threat have been considered and determined to be incapable of doing so. Moreover an operation must be planned in a way so as to avoid the use of lethal force where possible.⁹

5. Whether a particular drone strike satisfies these conditions must be examined on a case by case basis. It is important to note, however, that, under these rules, alternatives to lethal force would need to be explored and shown to be inadequate for a drone strike to be lawful. In addition, it would need to be concluded that the use of lethal force is necessary on the basis that the person to be targeted constitutes an imminent threat to others.

6. At this point, two issues concerning the scope of application of human rights law, including the right to life, must be noted. The first is that international human rights law, including the right to life, applies in all situations, both peacetime and armed conflict.¹⁰ Where a drone strike is carried out in peacetime it will be regulated by human rights law (and the law relating to inter-State use of force). However, where a drone strike is carried out in the context of an armed conflict, it will be regulated by both international human rights law and by international humanitarian law (in addition to the law on inter-State use of force). [Nonetheless, as the International Court of Justice has stated, while the right not arbitrarily to be deprived of one’s life continues to apply in armed conflict, what is an arbitrary deprivation

⁵ Art 6(1) of the International Covenant on Civil and Political Rights (ICCPR); Art 4(1) of the American Convention on Human Rights (ACHR); Art 4 of the African Charter of Human and Peoples’ Rights (ACHPR). The European Convention on Human Rights (ECHR) gives an exhaustive list of permissible grounds on which lethal force may be based, Art 2.

⁶ CCPR/C/21/Rev.1/Add.6, 10.

⁷ See generally ICTY, *Prosecutor v Mile Mrkšić and Veselin Šljivančanin* Case No. IT-95-13/1-A.

⁸ Cordula Droege, ‘Elective Affinities? Human Rights and Humanitarian Law’ (2008) 90 Intl Rev Red Cross 501, 525; David Kretzmer, ‘Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence’ (2005) 16 EJIL 171, 179.

⁹ *McCann and others v United Kingdom*, Application No.18984/91, ECHR, 27 September 1995, para 203 – 214; *Maria Fanny Suárez de Guerrero v. Colombia*, Merits (CCPR/C/15/D/45/1979), para 13.2.

¹⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Territory*, Advisory Opinion [2004] ICJ Rep 136, para 106; *DRC v Uganda* [2005] ICJ Rep 116, para 216.

of life in such situations under the ICCPR is to be considered by reference to the rules of international humanitarian law on the conduct of hostilities. Where compatible with applicable humanitarian law, a taking of life in armed conflict would not be arbitrary under Article 6(1) ICCPR.¹¹

7. The right to life under Article 2 ECHR is not, however, expressed in terms of a prohibition against arbitrariness, but rather as a closed list of permissible grounds for the taking of life, none of which matches precisely the bases for targeting particular persons that are provided for under international humanitarian law. Given that this is a closed list rather than an open arbitrariness standard, the scope of interpretation consistent with international humanitarian law appears to be limited. However, in light of *Hassan v United Kingdom*, it might be possible to read the rules on the conduct of hostilities under humanitarian law into Article 2 ECHR in an international armed conflict where one can demonstrate a clear intention to that effect amongst the States parties to the ECHR.¹² For States parties to the ECHR, however, Article 15(2) ECHR permits derogation from Article 2 ECHR ‘in respect of deaths resulting from lawful acts of war’. This provision should, therefore, be used where States consider it necessary to resort to more permissive rules of international humanitarian law.

8. The second issue concerning the scope of application of human rights law relates to extraterritorial application. Under customary international law, the negative obligation not arbitrarily to deprive someone of their life applies in full without any territorial restriction.¹³ Under treaty law, the principal human rights treaties contain clauses restricting their application to the ‘jurisdiction’ of the States parties. It is clear that ‘jurisdiction’ in this context includes both situations where one State exercises effective control over a part of another State’s territory,¹⁴ and where individuals are within the authority and control of a State’s agents abroad, for example detainees in a detention facility.¹⁵

9. Many drone strikes will be conducted in territory over which the operating State does not exercise effective control. Though the European Court of Human Rights in *Bankovic* suggested that jurisdiction would not arise in cases of air campaigns with no territorial control,¹⁶ case law since then has clearly demonstrated that much of that judgment has now been overturned.¹⁷ Indeed, it has been demonstrated that, as is the case under customary international law, the negative obligation not to violate the right to life under human rights treaties should be read as applying without territorial restriction, with the positive obligation to ensure respect (including by non-State actors) for the right to life applying where jurisdiction is exercised.¹⁸

II. International Humanitarian Law

¹¹ *Legality of the Threat or Use of Nuclear Weapons*, para 25.

¹² *Hassan v. United Kingdom*, (Application no. 29750/09), European Ct Human Rights, Grand Chamber Judgment, 16 Sept. 2014.

¹³ Article 3 UDHR.

¹⁴ Human Rights Committee, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 10; *Loizidou v Turkey*, Preliminary Objections, 310 ECtHR, Series A, paras 62–4 (1995).

¹⁵ *Ocalan v Turkey*, Judgment of 12 March 2003, para 93.

¹⁶ *Bankovic and Others v. Belgium and 16 Other Contracting States*, Application no. 52207/99, 12 December 2001 (Grand Chamber) para 82.

¹⁷ *Al-Skeini case* (2011), p 47 -76 para 106-186.

¹⁸ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP, 2011) 209–21.

10. International humanitarian law applies only in a situation of armed conflict, which can be international or non-international . If there is no armed conflict, then the only relevant international rules against which to judge the legality of the drone strike are those in human rights law (and the law on inter-state use of force).

11. Non-international conflicts are conflicts between a State and a non-State armed group (or between two or more non-State armed groups). Whether a non-international armed conflict exists, and thus whether international humanitarian law applies to a situation, is a question of fact and not subject to any recognition on the part of the State involved, the non-State group or indeed other States. The threshold for a situation to be classified as a non-international armed conflict is where there is ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’¹⁹ This has two elements: organisation of the parties and protracted violence (which case law has read as requiring a certain intensity of violence).²⁰ It is very unlikely that these criteria would be satisfied by individual drone strikes, and thus for international humanitarian law to apply to such strikes, there would likely need to be a pre-existing non-international armed conflict of which the drone strike forms a part.

12. A key controversy in international humanitarian law is whether it is possible to have a single, global non-international armed conflict between a State and a non-State group that operates out of a number of different territories. This claim might be made by a State wishing to exploit the more permissive rules under international humanitarian law without having to demonstrate that the threshold criteria for a non-international armed conflict have been met in each new territory in which a drone strike is carried out. If one extends the ICJ’s reasoning on the relationship between international humanitarian law and international human rights law to non-international armed conflicts, then the protections that would otherwise be afforded by human rights law, as ordinarily interpreted, would be undermined by such claims.

However, it must be remembered that, even if it is possible in principle to have a single, global non-international armed conflict, a drone strike in a new territory could only be considered a part of that pre-existing non-international armed conflict where the group targeted is clearly the same group that is party to that pre-existing non-international conflict.²¹ The organisation criterion for establishing that a non-international conflict exists can be applied here to determine objectively whether the group targeted in a new territory is indeed the same group that is party to the pre-existing non-international conflict. In all cases there must be ‘a sufficient body of evidence pointing to the . . . [group] being an organized military force, with an official joint command structure, [and] headquarters’.²²

Moreover the group should have “a unified military strategy” and be “able to speak with one voice”.²³ Where it cannot be shown that the group targeted in the new territory is the same group as that party to the non-international conflict, IHL will not apply, leaving IHRL to

¹⁹ *Prosecutor v Duško Tadić* (Decision on the Defence Motion Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995), para 70.

²⁰ *Prosecutor v Duško Tadić* (Trial Judgment) IT-94-1-T (7 May 1997), para 562.

²¹ Noam Lubell and Nathan Derejko, ‘A Global Battlefield? Drones and the Geographical Scope of Armed Conflict’ (2013) 11 J Intl Crim Justice 65.

²² *Prosecutor v Slobodan Milosevic* (Decision on Motion for Judgment of Acquittal) IT-02-54-T (16 June 2004), para 23.

²³ *Prosecutor v Ramush Haradinaji*, Judgment, IT-04-84-T (3 April 2008), para 60.

apply in full. It must also be emphasised that this assessment is separate from the *ius ad bellum* assessment, according to which a lawful basis for using force in each new territory must be shown to exist (e.g. consent of the territorial State, self-defence, or enforcement action authorised by the Security Council).

13. The principal rule of international humanitarian law that applies to targeting by drones (or other weapons) is the principle of distinction. According to this rule civilians may not be targeted unless, and for such time as, they directly participate in hostilities.²⁴ The notion of direct participation in hostilities has been elaborated by the International Committee of the Red Cross, which makes clear that the key criterion is that the civilian either carries out acts that directly cause harm or engages in an operation that directly causes harm.²⁵ The ICRC has defined this requirement narrowly, stating that ‘direct causation should be understood as meaning that the harm in question must be brought about in one causal step.’²⁶ General production and transport of weapons, or recruiting and training of personnel, is considered too indirect, unless forming an integral part of a specific military operation.²⁷ Importantly, all feasible precautions must be taken in determining whether a person is a civilian, and, if so, whether the person is taking a direct part in hostilities.²⁸ Where drones are used, they should first be employed for surveillance purposes to determine civilian status before they are used for targeting purposes. Where there is doubt as to civilian status or direct participation in hostilities, civilian status and the protection from attack is to be presumed.²⁹

14. International humanitarian law is less clear about whether members of the non-State armed group party to a non-international armed conflict can be targeted on the basis of status (like combatants in an international armed conflict) rather than individual conduct (like civilians directly participating in hostilities). The ICRC has taken the view that “civilians” protected from direct attack in a non-international conflict are those who are neither members of a State’s armed forces nor members of organized armed groups. The latter are then defined as “individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’ or CCF)”, as that term was defined above; such persons can then be targeted on the basis of that function.³⁰

15. Even where the individuals targeted constitute lawful targets, whether on the basis of civilians directly participating in hostilities or members of organised armed groups that have a continuous combat function, the second key international humanitarian law principle of proportionality must also be satisfied. According to this principle, it is prohibited to carry out “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.³¹ By implication, where the use of

²⁴ Art 13(2) and (3) AP II. See also J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (CUP, Cambridge 2005), Rule 6.

²⁵ Dapo Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’ (2010) 59 ICLQ 180, 187.

²⁶ ICRC (Nils Melzer), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva 2009) 53.

²⁷ *Ibid.*

²⁸ ICRC (Nils Melzer), *Interpretive Guidance*, 74.

²⁹ Art 13(2) and (3) AP II.

³⁰ ICRC (Nils Melzer), *Interpretive Guidance*, 27. See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, Oxford 2012) 359–62.

³¹ Art 51(5)(b) of Additional Protocol I to the Geneva Conventions (1977).

force is not excessive, such losses are regarded as incidental (“collateral”) damage and are not prohibited provided other humanitarian law rules have been respected. Proportionality also requires taking all feasible precautions to prevent or minimize incidental loss of civilian lives and information gathering relating to possible civilian casualties and military gains.³²

III. The Law on the Use of Force

16. In addition to the rules of international humanitarian law and international human rights law, which must be strictly observed in any drone strike, the use by one State of drones to target individuals located in another State can only be lawful where it complies with the rules on the use of inter-State force. While international humanitarian law and international human rights law are aimed at protecting the individuals concerned, the law on the use of inter-State force focuses on State sovereignty; it serves primarily to protect the legal rights of States, including the right and interest of the State to have the lives of its citizens and inhabitants protected from acts of aggression. It can thus indirectly serve to protect life by containing the geographical spread of conflict.

17. The basic rule underpinning the *ius ad bellum* is Article 2(4) of the UN Charter, reflected also in custom, which prohibits the threat or use of inter-State force. A State may, however, consent to the use of force on its territory by another State, with the result that Article 2(4) will not be engaged. Where no consent is given, the UN Charter gives two exceptions to the Article 2(4) prohibition: where action is taken lawfully in self-defence under Article 51, or where the Security Council authorizes enforcement action under Chapter VII.

18. With respect to consent, the question arises over who may give consent for a drone strike on another State’s territory. The *ius cogens* nature of the prohibition of the unlawful use of force means that only the State’s highest authorities may validly give consent – that is, have the authority to give consent - to a use of force.³³ Moreover, the view that consent to the use of force must be given by the highest authorities in the central government of a State accords with the bulk of international practice.³⁴ There is no requirement as such that consent be publicly given, but the parameters of the consent should be clear, for in the instance that the use of force goes beyond the consent given, it becomes illegal.³⁵ Finally, even where consent is validly given, action taken would still need to comply with international humanitarian law and international human rights law as international law does not permit a State to give its consent to another State violating international humanitarian law and international human rights law on the territory of the first State.

19. With respect to self-defence, Article 51 of the UN Charter and customary international law allow a State to invoke self-defence to justify its use of force to target individuals in another State’s territory where an armed attack against it occurs or is imminent (on which see below). The ICJ has confirmed that, for an attack to constitute an “armed attack” and thus

³² Art 57 of Additional Protocol I to the Geneva Conventions (1977).

³³ See Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), p. 259.

³⁴ Corten, *The Law Against War*, p. 266.

³⁵ See ILC Commentary to Art. 20, Articles on Responsibility of States for Wrongful Acts, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, para. 9; ICJ, *DRC v Uganda*, para. 105.

engage the right to self-defence, the scale and effects of the attack must reach a certain threshold of gravity.³⁶ Thus, not any use of force against a State will necessarily justify a response in self-defence.

20. The State claiming to be acting in self-defence must also satisfy the dual requirements of necessity and proportionality, grounded in customary international law.³⁷ These requirements, as defined in the context of the law on inter-State use of force, are closely linked to the important issue of the *aim* of a lawful act of self-defence. Thus, ‘necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt and repel an attack.’³⁸ In other words, action taken lawfully in self-defence (i.e. the use of drones to target individuals in another State’s territory) must serve the purpose of halting and repelling an armed attack and must be both necessary and proportionate to this end.³⁹ Moreover, the right persists only for so long as it is necessary to repel the immediate or imminent threat; it does not permit complete destruction of the enemy.

21. Though Article 51 refers to the right to self-defence once an armed attack occurs, under custom it is permissible to respond in self-defence where the armed attack has not yet occurred but is imminent. As the Report of the High-Level Panel Established by the UN Secretary-General noted: ‘Long-established customary international law makes it clear that States can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate’.⁴⁰

22. There is some doubt as to the legality of self-defence action against non-State actors in another’s State’s territory, where the non-State actor’s actions are not attributable to the territorial State. However, in light of State practice since 9/11, it now seems to be the case that there is a *prima facie* right to exercise self-defence in response to an armed attack or imminent armed attack by a non-State actor.⁴¹ Other customary international law requirements would still need to be fulfilled before a State can respond with force in self-defence against a non-State actor. In particular, attention would still need to be paid to the requirements of necessity and proportionality, such that it must be necessary and proportionate to respond with force to an armed attack from a non-State actor. In the context of a use of force against a non-State group, it is suggested that the necessity condition would only be satisfied where the ‘host’ State is either unable or unwilling to prevent continued attacks.⁴² However, in determining whether a State is unable or unwilling to take action, the State acting in self-defence might be required to request such action prior to the commencement of acts taken in self-defence.⁴³

³⁶ *Nicaragua v United States* [1986] ICJ Rep 14, para 191; *Oil Platforms* [2003] ICJ Rep 161, paras 51, 62.

³⁷ *Nicaragua v United States*, para 194; *Legality of the Threat or Use of Nuclear Weapons*, para 41; *Oil Platforms*, para 74; *DRC v Uganda*, para 147.

³⁸ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP, Oxford 2008) 150; see also Albrecht Randelzhofer, ‘Article 51’ in Bruno Simma (ed), *The Charter of the United Nations: A Commentary, Volume I* (2nd edn, OUP, Oxford 2002) 805.

³⁹ *Nicaragua v United States*, para 237; *Oil Platforms*, para 76.

⁴⁰ Report of the High-Level Panel Established by the UN Secretary-General (December 2004) UN doc A/59/565 (2004) at 188–92.

⁴¹ UN Security Council Resolution 1368 (12 September 2001), S/RES/1368/2001, preambular para 3; Security Council Resolution 1373 (28 September 2001), S/RES/1373 (2001), preambular para 4.

⁴² Kimberley N Trapp, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors’ (2007) 56 ICLQ 141; Daniel Bethlehem, ‘Self Defence Against an Actual or Imminent Armed Attack by Non-State Actors’ (2012) 106 AJIL 770, 776.

IV. Conclusion

23. The purpose of this summary has been to outline the international legal framework applicable to armed drones. It must be reiterated that the three applicable bodies of law (international human rights law, international humanitarian law and the law governing inter-State use of force) must all be complied with, independently, if a particular drone strike is to be lawful under international law. Drones are not inherently illegal weapons, though they do pose challenges to the law. Most importantly, they make the deployment of lethal force across borders much easier than before, which risks creating perpetual global battlefields. The central norms of international law need not and should not be abandoned to meet the new challenges posed by terrorism. On the contrary, the fact that drones make targeted killing so much easier should serve as a prompt to ensure a diligent application of these standards, especially in view of the likely expansion in the number of States with access to this technology in the future.

The Right to Life and the International Law Framework Regulating the Use of Armed Drones *

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I. Introduction

States have and will continue to develop new methods of employing lethal force. On the horizon, for example, are developments in autonomous robotic systems⁴⁸ and nano- and biotechnology,⁴⁹ which raise a plethora of complex issues that the international community must address in coordinated ways. Drones (or ‘unmanned aerial vehicles’, UAVs), understood here to be armed drones, have moved from the horizon into the realm of the known. The

⁴³ Bethlehem, *ibid.*

* An earlier version of this article was presented by Christof Heyns to the UN General Assembly on 25 October 2013, A/68/30532, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/473/63/PDF/N1347363.pdf?OpenElement> Or http://www.un.org/ga/search/view_doc.asp?symbol=A%2F68%2F382&Submit=Search&Lang=E. We would like to thank the participants at the expert meeting on “Armed Drones and the Right to Life” hosted by the Oxford Institute for Ethics, Law and Armed Conflict and the Oxford Martin Programme on Human Rights for Future Generations in July 2013.

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⁴⁸ Heyns report on Lethal Autonomous Robots A/HRC/23/47, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/127/76/PDF/G1312776.pdf?OpenElement>.

⁴⁹ See Simonis/Schilthuizen, Nanotechnology: innovation opportunities for tomorrow’s defence (TNO Science and Industry, 2006).

attraction of drones is clear — in particular, they provide a strategic advantage of the deployment of deadly force against a remote target without exposing one's own forces to risks.

During the past decade or so, many States have become increasingly reliant on unmanned systems and in particular drones to deliver force in the context of air, land, and naval military operations.⁵⁰ By the end of 2013, the US for example, had over 20,000 unmanned systems.⁵¹ Drones have been used by the UK, USA, Israel and the North Atlantic Treaty Organisation in operations in Afghanistan, Pakistan, Yemen, Libya, Iraq, Somalia, Gaza and Syria.⁵² In Pakistan, it was reported that between 2004 and 2014, a minimum of 2,300 people were killed by drone strikes.⁵³ Of that number, 420 have been identified as civilians, amongst which were approximately 150 children.⁵⁴ In Yemen, at least 300 people have been killed to date, amongst them a minimum of 30 civilians.⁵⁵

Drones, it can safely be said, are here to stay. Unmanned systems, including drones, are clearly the future of warfare. There is broad agreement that drones themselves are not illegal weapons.⁵⁶ However, despite the fact that drones are now an established technology, there is a notable lack of consensus on how to apply the various rules of international law that regulate the use of force to drones. It is the aim of this article to contribute toward clarifying the application of these different rules to drone warfare from the perspective of the protection of the right to life.

⁵⁰ Singer, *Wired for War* (2009); Rogers, *Unmanned Air Systems: The Future of Air & Sea Power?*, Institut Français des Relations Internationales (IFRI) Focus Stratégique 49 (2014); Gertler, *U.S. Unmanned Aerial Systems*, Congressional Research Service (2012) 3; US Department of Defense *Unmanned Systems Integrated Roadmap FY2013-2038* (2013) 19 available at <http://www.defense.gov/pubs/DOD-USRM-2013.pdf> See O'Gormann/Abbott, *Remote control war: Unmanned combat air vehicles in China, India, Israel, Iran, Russia and Turkey*, Open Briefing (2013) available at http://issuu.com/openbriefing/docs/remote_control_war; Joshi/Stein, *Emerging Drone Nations*, *Survival* Vol 55:5 (2013) pp. 53–78G; Taylor, *U.S. intelligence warily watches for threats to U.S. now that 87 nations possess drones*, *The Washington Times*, 10 November 2013, available at <http://www.washingtontimes.com/news/2013/nov/10/skys-the-limit-for-wide-wild-world-of-drones/?page=all>.

⁵¹ See Singer, *The Predator Comes Home: A Primer on Domestic Drones, their Huge Business Opportunities, and their Deep Political, Moral, and Legal Challenges*, (2013) available at <http://www.brookings.edu/research/papers/2013/03/08-drones-singer>; US Department of Defense, *Defense Science Board, Task Force Report: The Role of Autonomy in DoD Systems* (2012), 78, available at <http://www.acq.osd.mil/dsb/reports/AutonomyReport.pdf>.

⁵² UN Doc. A/68/389, para 25-40.

⁵³ The Bureau of Investigative Journalism, *Covert Drone War* (2014) available at <http://www.thebureauinvestigates.com/category/projects/drones/>

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ This is not the case, for example, with lethal autonomous robots. See Report, note 5.

Drones can be expected to become more sophisticated and available in more compact form, as well as become cheaper and therefore more accessible. They are likely to form part of the arsenals of an increasing number of States that may be able to deploy such weapons across international borders in relatively non-intrusive and sometimes non-attributable ways, both on traditional ‘battlefields’ and for the purposes of pursuing targets far removed from what would traditionally be seen as the ‘zone of hostilities’. Some States may also wish to use armed drones in domestic law enforcement contexts, such as for border patrols, operations against organised crime, and crowd control in demonstrations. Armed drones may also fall into the hands of non-State actors and may be hacked by enemies or other entities. In sum, the number of States and actors with the capacity to use drones is likely to increase significantly in the near future, underscoring the need for greater consensus on the terms of their use.

One of the most important consequence of the expanding use of drones is that targeted killing across borders appears to be easier than in the past. This carries the potential of undermining the role that State sovereignty plays in sustaining the international security system. Indeed, the ready availability of drones may lead to situations where States that perceive their interests to be threatened increasingly engaging in low-intensity, but drawn-out, applications of force that know few geographical or temporal boundaries.

This would run counter to the notion that war — and the transnational use of force in general — is an exceptional situation of limited duration and scope, and that there should be a time for healing and recovery following conflict. An approach in terms of which peacetime is the exception, and armed conflict the norm, could have far-reaching consequences for the protection of the right to life. The laws specifically designed for wartime, international humanitarian law (IHL), offer far less protection of life than does the default regime of international human rights law (IHRL), precisely because war is seen as an exception. To the extent that war becomes the norm, the lower level of protection of life offered by IHL risks becoming the default regime.

II. The Applicable Legal Frameworks and the Relationship Between Them

A number of substantive areas of international law implicate the right to life and, consequently, have a direct bearing on the use of armed drones. The two most directly relevant are international human rights law (IHRL) and international humanitarian law (IHL). Each of these regimes balances, albeit to different degrees, State security concerns on the one hand and protection of life on the other. The third area of international law of particular importance to the use of drones is the law governing the use of force by one State on another State's territory (*ius ad bellum*). These rules form the cornerstone of the international security system and will determine the legality of the use of armed drones on another State's territory in itself. The law on the inter-state use of force serves in the first place to protect state sovereignty, but in doing so it also serves to protect people. One might think of the *ius ad bellum* as an outer layer of protection of the right to life. The protection of State sovereignty and of territorial integrity – which in other ways often presents a barrier to the protection of human rights – can constitute an important component of the protection of people against deadly force, especially with the advent of armed drones, by containing the spread of armed conflicts.

IHL and IHRL, by contrast, are aimed more narrowly at the protection of peoples' rights to bodily integrity and, in the context of drones, at the right to life of those targeted and bystanders. These bodies of law are therefore concerned not with the inter-State question but rather the specific features of a particular drone strike, such as against whom it is carried out and the consequences that follow. These differences notwithstanding, both international security and the protection of the right to life depend on the principle that the use of force is a matter of last resort.

In order to examine the legality of a particular drone strike under international law, a holistic approach is thus needed. For a particular drone strike to be lawful under international law, it must satisfy the legal requirements under *all* applicable international legal regimes.⁵⁷ Although a particular drone strike may satisfy the requirements of the *ius ad bellum*, it may still be inconsistent with applicable rules of IHL and IHRL, and thus unlawful under international law. And the opposite may also be true: whereas a drone strike may appear to comply with applicable rules of IHL and IHRL, if it does not satisfy the conditions for lawful

⁵⁷ Heller, *One Hell of a Killing Machine, Signature Strikes and International Law*, (2013) 11 JICJ 89, 91; Melzer, *Targeted Killing in International Law* (2009), 51-52.

force under the *ius ad bellum*, it will constitute an unlawful act under international law, entailing the responsibility of the violating State.

As discussed in more detail below, a valid claim to be acting in self-defence, under Article 51 of the UN Charter, in response to an armed attack, may justify a use of armed force in another State's territory. However, a valid claim by a State to act in self-defence for the purposes of Article 51 is entirely *irrelevant* to that State's compliance with the rules designed to protect the right to life of those at the receiving end of the force which may be applicable under IHRL and IHL. Nor, as a matter of the secondary rules of State responsibility, can a valid claim to act in self-defence preclude the wrongfulness of conduct which otherwise violates any applicable rules under IHL or IHRL.⁵⁸ This position has been articulated clearly by the International Law Commission (ILC) in its commentary to the Articles on the Responsibility of States for Wrongful Acts. Although Article 21 of those Articles stipulates that lawful measures in self-defence will preclude the wrongfulness of an act, the ILC emphasised that:

This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations . . . As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.⁵⁹

Likewise, while the consent of a State on whose territory force is used can justify what would otherwise be regarded as an infringement of territorial integrity, such consent will not be relevant to the compliance of the State with any applicable rules of IHRL and IHL. The obligations of States under IHRL⁶⁰ and IHL⁶¹ are owed not on a bilateral, reciprocal basis, but

⁵⁸ Milanovic, *Drones and Targeted Killing: Can Self-Defense Preclude their Wrongfulness*, *EJIL:Talk!*, Jan 10, 2010, <http://www.ejiltalk.org/drones-and-targeted-killings-can-self-defense-preclude-their-wrongfulness/>.

⁵⁹ On the non-availability of self-defence as a circumstance precluding wrongfulness for breaches of IHL and IHRL, see ILC Commentary to Art. 21, Articles on Responsibility of States for Wrongful Acts, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, and also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (2002), 166.

⁶⁰ Questions Relating To The Obligation To Prosecute Or Extradite (Belgium v. Senegal), ICJ, Judgment, 20 July 2012, para 68.

⁶¹ The *erga omnes* nature of IHL can be seen in Art. 1 of the Geneva Conventions and of the Additional Protocol I which imposes on States an obligation not only to respect these treaties to but "ensure respect" of the treaties. The ICRC Commentaries to Art. 1 of GC states that: "The proper working of the system of protection

rather to each and every State party to the relevant treaty, and, under customary international law, to all states.

In addition, IHRL and (some) IHL obligations are owed to individuals entitled to protection under the legal regimes. The 'non-bilateralisable' or *erga omnes* nature of IHRL and IHL obligations means that one State cannot consent to another State violating the rights owed to individuals.⁶² Acts which violate these rights violate also the obligations owed to every other State party to the particular treaty (or to every other State in the case of obligations arising under customary international law) and the rights of individuals protected by the rules of IHRL.⁶³

Each of the legal regimes explored in this article is therefore relevant to a different aspect of the use of drones, and each must therefore be considered separately. In seeking to help contribute towards greater clarity, and at least to take stock of the applicable legal framework as a whole, , each of the three international legal regimes identified as relevant to the use of drones will be explored in turn.

We begin with the generally applicable regime of international human rights law.

III. International Human Rights Law

i. General considerations

provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally." (para 7). The ICRC Commentary to Art. 1 of AP I is even clearer when it states that: "the [Diplomatic] Conference clearly demonstrated that humanitarian law creates for each State obligations towards the international community as a whole ('*erga omnes* '); in view of the importance of the rights concerned, each State can be considered to have a legal interest in the protection of such rights."(para. 45) Commentaries available at <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=6C86520D7EFAD527C12563CD0051D63C> .

⁶² Similarly, the *erga omnes* nature of these obligations means countermeasures may not preclude wrongfulness for breaches of obligations under IHL and IHRL. See, e.g., Borelli/ Olleson, *Obligations Relating to Human Rights and Humanitarian Law*, in Crawford/Pellet/Olleson (eds), *The Law of International Responsibility* (2010).

⁶³ The ILC has made it clear that: "In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another." See ILC Commentary (paras 9, 10, as well as n. 326) to Art. 20, Articles on Responsibility of States for Wrongful Acts, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, and also Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

The right to life is most clearly protected under international human rights law, as set out in the various international and regional human rights treaties,⁶⁴ and the rules of customary international law.⁶⁵ As discussed in the next subsection international human rights law applies not only in peacetime but also in armed conflict. Thus, the right to life forms the default legal norm applicable to the protection of people affected by drone strikes.. The right to life is sometimes described as the “supreme right.”⁶⁶ As a general rule, international human rights law requires that any deprivation of life must be non-arbitrary.⁶⁷ Moreover, certain violations of the right to life are considered to be war crimes or crimes against humanity.⁶⁸

The non-arbitrariness standard defining the scope of the right to life has generally been interpreted in human rights jurisprudence to require that lethal force be used only as a last resort in order to *protect* life.⁶⁹ Thus, Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”⁷⁰ Indeed, article 2 of the European Convention on Human Rights (ECHR) contains, rather than a general prohibition of arbitrary deprivation of life, an exhaustive list of grounds on which it is permissible to use lethal force.⁷¹

Under IHRL any force must be necessary (a factual assessment of cause and effect – is the least harmful way followed to achieve the desired result?). Other avenues should be explored first and only when they are shown to be inadequate can there be resort to force.⁷² Force must also be proportionate (a value judgement – does the benefit gained justify the harm done?). Intentional lethal or potentially force can only be used where strictly necessary to protect against an imminent threat to life: “[T]he police may shoot to kill only when it is clear

⁶⁴ Art 6(1) ICCPR; art 4(1) ACHR; art 4 ACHPR; art 5 ArCHR.

⁶⁵ CCPR/C/21/Rev.1/Add.6, 10.

⁶⁶ General Comment no. 6: the right to life (1982).

⁶⁷ Art 6(1) ICCPR; Art 4(1) ACHR; Art 4 ACHPR; Art 5 IACHR. The ECHR gives an exhaustive list of permissible grounds on which lethal force may be based, Art 2.

⁶⁸ See generally *Prosecutor v Mrkšić and Šljivančanin* Case No. IT-95-13/1-A.

⁶⁹ Droege, *Elective Affinities? Human Rights and Humanitarian Law* (2008), 90 *Intl Rev Red Cross* 501, 525; Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence*, (2005) 16 *EJIL* 171, 179.

⁷⁰ See also Principle 10.

⁷¹ Art 2(2) ECHR.

⁷² Article 3 of Code of Conduct for Law Enforcement Officials (General Assembly Resolution 34/169, annex, of 17 December 1979).

that an individual is about to kill someone (making lethal force proportionate) and there is no other available means of detaining the suspect (making lethal force necessary).”⁷³

Proper precautions must also be taken to prevent, where possible, the resort to force. In *McCann and others v UK*, the European Court of Human Rights (ECtHR) held that the killing of members of the Provisional Irish Republican Army by State agents was a violation of their right to life as they could have been arrested on their arrival in Gibraltar, where the operation took place.⁷⁴

Whether a particular drone strike satisfies these conditions must be examined on a case by case basis. It is important to note, however, that, under these rules, alternatives to lethal force would need to be explored and shown to be inadequate for a drone strike to be lawful. In addition, it would need to be concluded that the use of lethal force is necessary on the basis that the person to be targeted constitutes an imminent threat to others.⁷⁵

It is here that conflation of different legal standards across different regimes often poses problems. It is important not to confuse this imminence requirement in IHRL with similar conditions under the *ius ad bellum*. As will be discussed below, according to the doctrine of anticipatory self-defence, a State can use force against another State where there is an imminent threat of armed attack emanating from the latter State. This, however, is a different legal threshold than the imminence requirement in IHRL. Whether a particular transnational drone strike is lawful would depend on demonstrating imminence in *both* of these senses in cases where the attacking State is claiming a right of anticipatory self-defence.⁷⁶

⁷³ A/HRC/14/24 para 35.

⁷⁴ *McCann and others v United Kingdom*, Application No.18984/91, ECHR, 27 September 1995, para 203 - 214, *Suárez de Guerrero v. Colombia*, Merits (CCPR/C/15/D/45/1979), para 13.2.

⁷⁵ See references to ‘imminence’ in the 2013 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’ (made public 5 February 2013) (although note the lack of clarity in the use of this requirement, discussed below) available at <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf>; White House, U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, (23 May 2013) 2 (‘... the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons’) available at <http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf>; see also the discussion of whether a US drone strike in Yemen fell foul of the arbitrary deprivation of life prohibition in IHRL, in Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010), 174–8.

⁷⁶ The US White Paper on drones is an example where these categories of rules and the requirements under

ii. *Application of human rights in armed conflict*

It is now well-established that IHRL continues *prima facie* to apply in time of armed conflict, alongside IHL.⁷⁷ This has been confirmed in a number of decisions of the International Court of Justice (ICJ).⁷⁸ Indeed, the applicability of human rights obligations in armed conflict is confirmed by the presence of provisions relating to derogations in certain human rights treaties. Those provisions permit State parties to derogate in time of war or public emergency from some of their human rights obligations arising under those treaties.⁷⁹ Such provisions confirm that, absent derogation, human rights obligations continue to apply in time of war or armed conflict. Thus, a State's conventional human rights obligations will only cease where that State validly suspends the rights in accordance with the treaty's derogation provisions.

Where a particular drone strike falls within the context of an armed conflict, therefore, it will be governed by *both* IHL *and* IHRL. In certain cases, however, the right to life standard in IHRL might be interpreted in accordance with the relevant rules on the conduct of hostilities under IHL, to be explored below. Thus, the ICJ has stated that, while the right not arbitrarily to be deprived of one's life continues to apply in situations of armed conflict, what is an arbitrary deprivation of life under the ICCPR depends on the circumstances at hand and in armed conflict should be considered by reference to the IHL rules on the conduct of hostilities.⁸⁰ According to this view, where a State targets an individual in a drone strike that falls within an armed conflict, whether that State has violated its obligation not arbitrarily to deprive that individual of their life depends on whether the State has acted consistently with the IHL rules discussed in the following section.

them are conflated, leading to an apparent misapplication of the imminence standard: see 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*' (made public 5 February 2013); see a discussion of the 'imminence' requirement in the White Paper in: Heller, '*The DOJ White Paper's Confused Approach Imminence (and Capture)*' *Opinio Juris* (Blog), 5 February 2013.

⁷⁷ For an overview of the trend towards the consensus that IHRL continues to apply in situations of armed conflict, see Droege, (note 26), 503-9.

⁷⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Territory*, Advisory Opinion [2004] ICJ Rep 136, para 106; *DRC v Uganda* [2005] ICJ Rep 116, para 216.

⁷⁹ See, e.g., International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 ('ICCPR'), Art 4; Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 194 CETS (as amended) ('ECHR'), Art 15; American Convention on Human Rights (entered into force 18 July 1978) OAS Treaty Series No 36 ('ACHR'), Art 27.

⁸⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep, para 25.

However, the European Convention on Human Rights, as noted, does not express the right to life by reference to arbitrary deprivation of life. Rather, the ECHR provides for a closed list of permissible bases for depriving a person of their life.⁸¹ The extent to which one can read into this provision the IHL rules on the conduct of hostilities is, consequently, much more limited than in the case of the arbitrariness standard found in the ICCPR and ACHR.⁸² However, it is important to note that the European Court of Human Rights has interpreted the right not to be deprived of liberty under Article 5 of the European Convention by reference to the IHL rules on detention in international armed conflicts.⁸³ This was done despite the fact that the relevant provision, like the provision on the right to life, is not expressed by reference to arbitrary deprivation, but instead a closed list of permissible bases for deprivation of liberty is set out in the Convention. A similar interpretation of the right to life would allow the European Court to read in the IHL rules on the conduct of hostilities into the right to life under the European Convention. In any case, Article 15(2) ECHR permits derogation from this provision ‘in respect of deaths resulting from lawful acts of war’. This provision should, therefore, be used where States consider it necessary to resort to more permissive rules of IHL.

Where a drone strike is conducted outside the context of an armed conflict, IHL will not apply and thus a State’s human rights obligations will not be interpreted in accordance with that body of law. Instead, those obligations will apply according to their ordinary meaning as developed in human rights jurisprudence. That said, the arbitrariness standard remains context-specific and indeed has been applied in ways that are realistic in the context.⁸⁴ However, there are limits to this. For example, the view that mere past involvement in planning attacks is sufficient to render an individual targetable even where there is no evidence of a specific and immediate attack, distorts the requirements established in IHRL.⁸⁵

The above relates to the potential responsibility of the state using the drone. But what about the state on whose territory it is used? It should be remembered, as noted at the outset of

⁸¹ Article 2(2) ECHR.

⁸² Milanovic, *Extraterritorial Application of Human Rights Treaties, Law, Principles and Policy* (2011), 254 f.

⁸³ See *Hassan v United Kingdom*, (Application no. 29750/09), European Ct Human Rights Grand Chamber Judgment, 16 Sept. 2014.

⁸⁴ Melzer, (note 14), 33.

⁸⁵ US Department of Justice White Paper available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

this article,⁸⁶ that States cannot consent to the violation of their IHL or IHRL obligations. A State that consents to the activities of another State on its territory remains bound by its own human rights obligations, including the obligations not actively to violate the rights of those within its jurisdiction itself, and also to ensure respect for human rights within its jurisdiction and thus to prevent violations of the right to life, including by other States operating on its territory, to the extent that it is able to do so.⁸⁷

iii. Extraterritorial application of the right to life

The fact that drones have, thus far, been used with lethal effects only by States against individuals *outside* their territory raises the additional question of whether States can be held accountable under those human rights treaties to which they are a party for their extra-territorial actions. Reference was made earlier to the status of the right to life, and the prohibition of the arbitrary deprivation thereof, as a norm of customary international law. In its customary form, at least the negative obligation not arbitrarily to deprive someone of their life appears not to be limited to application *within* a State's territory. Indeed, the Universal Declaration of Human Rights does not contain a limitation clause on its application and simply states that '[e]veryone has the right to life'.⁸⁸

In addition, States are, in certain circumstances, bound by those human rights treaties to which they are a party in extra-territorial contexts. The fact that human rights treaty obligations can apply in principle to the conduct of a State outside its territory has been confirmed, *inter alia*, by the International Court of Justice,⁸⁹ the UN Human Rights Committee,⁹⁰ the Inter-American Commission on Human Rights⁹¹ and the European Court of Human Rights.⁹² The applicability of such treaties is normally limited to those individuals within the 'jurisdiction' of a State party.⁹³ It is clear that all persons finding themselves within

⁸⁶ See the discussion in the text around footnotes 17 and ff.

⁸⁷ ILC, Draft Articles on State Responsibility, Art 23.

⁸⁸ Art 3 UDHR.

⁸⁹ *Construction of a Wall* case (note 35), para 109.

⁹⁰ Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add.13 (2004), para 10.

⁹¹ *Coard and others v United States*, Case 10.951, Report No. 109/00, IACHR, 29 September 1999, para 37.

⁹² *Al-Skeini v United Kingdom* (Application no. 55721/07) Grand Chamber Judgment, 7 July 2011, 47 -76 para 106-186; *Loizidou v Turkey* (1997) 23 EHRR 513; *Ilascu v Moldoca and Russia* (2005) EHRR 46, para 392. *Al-Jedda v United Kingdom* App No 27021/08, 7 July 2011; *Jaloud v Netherlands*, (Application no. 47708/08), Grand Chamber Judgment, 20 Nov. 2014.

⁹³ In the ICCPR, the obligation of States is further limited to "all individuals within its territory." (Art 2, para 1) However, since *Lopez Burgos v Uruguay* Com 52/1979, Views, 29 July 1981, the Human Rights Committee has

the territory of a State are presumed to be within its territorial jurisdiction.⁹⁴ Moreover, it is clear from the case law that where a State is exercising effective control over a part of *another* State's territory, the State will be exercising 'jurisdiction' such that its obligations under those human rights treaties to which it is a party will apply.⁹⁵ Jurisdiction for the purposes of extra-territorial application of human rights treaties will additionally exist where, absent such territorial control, the State exercises, through its agents, 'authority or control' over the specific individual abroad.⁹⁶

One of the key difficulties posed by drones is that the attacking State can engage in targeted killing without exercising effective control over territory or without having the individual in custody, leading to questions whether such persons fall within the 'jurisdiction' of the attacking State for the purposes of their human rights treaty obligations. There is limited case law on this matter. In the *Alejandro* case, the Inter-American Commission concluded that the shooting down of two private US registered air planes by Cuban military aircraft in international space violated the right to life of the passengers.⁹⁷

At the same time, however, in *Bankovic*, the European Court held that persons killed during aerial bombings by NATO of a radio station in Serbia did not fall within the "jurisdiction" of the participating States for the purposes of establishing whether they have violated the right to life.⁹⁸ The broad sweep of this decision has, however, increasingly been narrowed in subsequent cases of the Court,⁹⁹ and it is not clear that the position can be sustained. Indeed, the English High Court has held that "whenever and wherever a state which is a contracting party to the [European] Convention [of Human Rights] purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights".¹⁰⁰

held that State parties can also be held accountable for violations outside their territory.

⁹⁴ This presumption may be rebutted, however, where the State is unable to exercise its authority over its territory.

⁹⁵ See, e.g., Human Rights Committee, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 10; *Loizidou v Turkey*, Preliminary Objections, 310 ECHR, Series A, paras 62–4 (1995). See the discussion in Melzer, (note 14), 155-67.

⁹⁶ *Ocalan v Turkey*, Judgment of 12 March 2003, para 93; *Issa and others v Turkey*, Judgment of 16 November 2004, para 71.

⁹⁷ *Alejandro Jr and others v Republica de Cuba*, Case 11.589, Report No. 86/99, IACHR, 29 September 1999, paras 23–25.

⁹⁸ Decision as to the admissibility of Application no. 52207/99 of 12 December 2001 (Grand Chamber) in the case *Bankovic and Others v Belgium and 16 Other Contracting States*, para 82.

⁹⁹ *Al-Skeini* case, (note 49), 47 -76, paras 106-186.

¹⁰⁰ *Al-Saadoon and others v Secretary of State for Defence* [2015] EWHC 715 (Admin), para 106 (17 March 2015). For comment, see Goddard, *Applying the European Convention on Human Rights to the Use of Physical*

It has been argued that the implication of this broader view of when an individual is within the jurisdiction of a state for the purposes of human rights treaties is that the deliberate killing of selected individuals through extraterritorial drone strikes is likely to bring the affected persons within the jurisdiction of the operating State.¹⁰¹ Pursuing this line of reasoning, where a State targets individuals abroad with lethal force, one can argue that it intends to exercise ultimate control over the individuals concerned, resulting in those actions being governed by the State's human rights treaty law obligations.¹⁰²

Marko Milanovic is similarly of the view that the human rights treaty obligations of a State would apply to the deliberate killing of an individual through extraterritorial drones strikes.¹⁰³ However, Milanovic's reasoning is that the *negative* obligations owed by States under IHRL, e.g. the obligation not arbitrarily to kill, should extend unbound by territorial constraints. This argument is based on the view that in treaties that contain a jurisdiction clause the negative obligation to *respect* rights is to be treated differently from the obligation to *ensure* and that texts can and should be interpreted such that only the latter is confined to matters within the jurisdiction of the State.

This appears to be a normatively desirable and principled basis for holding States to account in such situations, and it is in line with the position as set out above under customary international law. Importantly, to say that a State has human rights obligations with respect to conduct outside its territory does not, therefore, automatically mean that those obligations are the same as those that arise within its territory.¹⁰⁴ In principle, while control of territory means that a State has obligations not only to respect but also to ensure and to fulfill the human rights of those on the territory guaranteed by international law, the exercise of authority with respect to an individual by State agents in the absence of territorial control at a minimum triggers the State's obligation to respect the rights of those individuals.¹⁰⁵

Force: Al-Saadoon, (2015) 91 Int'l. L. Studies 402.

¹⁰¹ See Meltzer, (note 14).

¹⁰² See Droege, (note 26) and Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010) 227–31.

¹⁰³ Milanovic, (note 39), 209-21.

¹⁰⁴ See the ECtHR in *Al-Skeini*, (note 49), holding (contrary to the *Bankovic* decision, note 59) at para. 137 that "Convention rights can be 'divided and tailored'" on separating and tailoring obligations in extra-territorial contexts."

¹⁰⁵ Milanovic, (note **Error! Bookmark not defined.**), 209–21.

It has been held that human rights treaties “cannot be interpreted so as to allow a State party to perpetrate violations of [the treaty] on the territory of another State, which it could not perpetrate on its own territory.”¹⁰⁶ The same must apply to the right to life under both custom and treaty law. In consequence, any positive action by a State, on its own territory or that of another State, should be carried out in compliance with its human rights obligations under both treaty and custom.

IV. International Humanitarian Law

International Humanitarian Law (IHL) applies only where there is a situation of armed conflict and, which can take the form of an international or non-international armed conflict. (NIAC). As such, whether a particular drone strike is regulated by IHL will depend on whether that strike falls within the context of an armed conflict. If a drone strike does not take place in the context of an armed conflict, IHL will not apply, and the applicable rules of IHRL will continue to govern the use of lethal force. on their own. The test whether an armed conflict is at hand is an objective one – it is not determined by the categorization of the conflict by the parties involved. This section will consider some of the key controversies in the application of IHL to drone strikes.

i. The threshold for non-international armed conflict

Where a State targets non-State actors in a foreign State, that act may, depending on the fulfilment of other conditions, take place in the context of a non-international armed conflict,¹⁰⁷ and thus be governed by the rules of IHL applicable in that type of conflict. Classification of conflicts as international or non-international depends primarily on the question who are the parties to the conflict. Where a conflict is between States, it will, according to Common Article 2 to the Geneva Conventions, be an international armed conflict. Where the conflict is between a State and an organized non-State armed group, or between such groups, the conflict will be a non-international armed conflict. It is generally accepted that a non-international armed conflict may take place across State boundaries, with the words ‘non-

¹⁰⁶ *Issa and others v Turkey* Application no. 31821/96), para 71.

¹⁰⁷ Unless the non-State group acts on behalf of a foreign State, in which the conflict would be international only.

international' referring not to the territorial scope of the parties but to the nature of the parties.¹⁰⁸

Drones have thus far typically not been used in situations of international armed conflict. The question thus arises whether they are being used in non-international armed conflicts. For violence to amount to a non-international armed conflict there must be 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'¹⁰⁹ Two cumulative criteria must thus be satisfied in order for a particular situation to be classified as a non-international armed conflict to which IHL would apply: 'the intensity of the conflict and the organisation of the parties to the conflict' (emphasis added).¹¹⁰

Thus, an armed group will only be considered to constitute a party to a NIAC if it is sufficiently organized. International jurisprudence has determined the relevant indicative criteria, which include, inter alia, the existence of a command structure, headquarters, and a group's ability to plan and carry out military operations.¹¹¹

Moreover, for a conflict to qualify as NIAC, armed violence must also reach a certain threshold of intensity which is higher than that of internal disturbances and tensions.¹¹² The armed violence should not be sporadic or isolated but protracted.¹¹³ The requirement of protracted violence "refers more to the intensity of the armed violence than its duration."¹¹⁴ Like the condition of organization, the intensity of the armed violence is an issue which is determined on a case by case basis.¹¹⁵ In the context of drones, these requirements mean that IHL will not apply where the threshold levels of violence or organization are not present,

¹⁰⁸ Thus, the wording of Common Article 3 to Geneva Conventions which speaks of a non-international armed conflict in the territory of *one* of the parties is regarded as requiring only the fighting takes place at least on the territory of one party to the Geneva Conventions. See *Hamdan v Rumsfeld*, 542 US 507 (2004); Lubell, *The War (?) Against Al-Qaeda*, in Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012) 432–3; Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in Wilmshurst, *ibid*, 72.

¹⁰⁹ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1 (2 October 1995), para 70.

¹¹⁰ *Prosecutor v Tadić* (Trial Judgment) IT-94-1-T (7 May 1997), para 562.

¹¹¹ *Prosecutor v Limaj and others*, Case No. IT-03-66-A, 30 November 2005, paras 94-134; *Prosecutor v Lubanga*, No ICC-01/04-01/06-2842, 14 March 2012 para 536-538.

¹¹² Art. 1(2) AP II to GCs; *Prosecutor v Musema* ICTR-96-13-A para 248.

¹¹³ *Musema*, *ibid*.

¹¹⁴ *Prosecutor v Haradinaj and others* Judgment (Trial Chamber) IT-04-84-T ICTY (3 April 2008) para 49; *Prosecutor v Limaj et al* (note 68) para 90.

¹¹⁵ *Musema*, (note 69), para 249.

leaving IHRL principles to govern the situation alone. Individual drone strikes by themselves are not likely to meet the necessary threshold of violence, leaving IHL inapplicable.

A number of controversies have, however, arisen with regard to the scope of non-international armed conflicts and the threshold criteria for their existence, as a result of claims made by particular States when employing armed drones abroad. For example, where a State employs armed drones against members of the same non-state group in a number of different territories, the question arises as to whether the violence between the State and non-State group should be treated as a single, global non-international armed conflict.¹¹⁶ The consequence of following such an approach would be that, when assessing whether the intensity threshold for a non-international armed conflict had been met, one would aggregate the entirety of the violence between the State and non-State group across the globe.

It might be argued that where a State targets members of the same (sufficiently organised) non-State armed group, with which it is in a non-international armed conflict, in a number of different States, a single, global non-international armed conflict exists, with the relevant rules of IHL applying to all such strikes.¹¹⁷ If this approach is followed, the intensity requirement could be met by aggregation of violence, rather than by examining the level of violence in each country. The result of such an approach is that the less protective rules of IHL will apply in such cases to those targeted, and unsuspecting communities, far away from the battle zone, may become 'collateral damage'. This, of course, depends on one's view of the interaction between IHL and IHRL in this area. If the ICJ's approach to the interaction between IHL and the right to life is applied equally in non-international armed conflicts,¹¹⁸ then the right to life of such persons would not be violated so long as the IHL principle of

¹¹⁶ See, e.g. the ICRC's criticisms of the view that the international fight against terrorism constitutes a single, transnational non-international armed conflict: *International Humanitarian Law and Terrorism: Questions and Answers*, (1 January 2011), available at <<http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm#Dosomeaspectsofthefightagainstterrorismamounttoatransnationalarmedconflict>>.

¹¹⁷ See, e.g., Lubell/Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, (2013) 11 *J Intl Crim Justice* 65. Amongst the many pieces written on this issue from the perspective of drone strikes, see, e.g., Blank, *Defining the Battlefield in Contemporary Conflict and Counter-Terrorism: Understanding the Parameters of the Zone of Combat*, 39 *Georgia Journal of International and Comparative Law* (2010) 1; Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a "Legal Geography of War"*, *Washington College of Law Research Paper* No 2011-12 (26 April 2011); Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, (2013) 161 *University of Pennsylvania Law Review* 1165.

¹¹⁸ See note. 37.

proportionality (discussed below) is complied with. Aggregation of violence would, in this way, lead to those civilians affected by drone strikes protected by the less protective rules of IHL than IHRL.

The possibility of a non-international armed conflict which spans across more than one country could certainly only exist where the individuals against which the State uses force in the several countries are *actually* members of the same non-State armed group.¹¹⁹ This is because the violence can only be part of the same armed conflict if it is between the same parties. Where violence is between entities that are not parties to the same conflict, that violence is not part of the existing non-international armed conflict. Thus, in a supposed global non-international armed conflict, the organized armed group criterion would have to be tested on a global basis.¹²⁰ Where there is no single organization that groups together all those fighting then the test for an organization would not be met, and one could not aggregate all the violence together for the purposes of the intensity criterion.

There is clearly an incentive for states that are engaged in military clashes will to define the group with whom they are engaged so broadly as to capture those not really members thereof, so as to bring them all within the same non-international armed conflict. The way in which the existing organization criterion under IHL has been interpreted to some extent helps to protect against this. An armed group is a party to a non-international armed conflict if, and only if, it is sufficiently organized in accordance with the demands of IHL. An armed group will only be sufficiently organised to be a party to a non-international armed conflict, if there is ‘a sufficient body of evidence pointing to the . . . [group] being an organized military force, with an official joint command structure, [and] headquarters . . .’¹²¹ Moreover the group should have “a unified military strategy” and be “able to speak with one voice”.¹²² This should be a question of fact, immune from the political considerations of the attacking State.

¹¹⁹ Note 73 (stating that where the individuals targeted by drone strikes are not members of the same non-State armed groups with which the targeting State is already in an armed conflict, ‘it will become necessary to show that a separate armed conflict exists between the state and the targeted armed group’). Note that US strikes in Pakistan, for example, have allegedly targeted individuals from a number of different groups and thus with no nexus to a pre-existing armed conflict: *ibid*, at 83.

¹²⁰ Lubell/Derejko, (note 74) (‘It is, however, highly questionable as to whether a one-sided drone strike can meet the threshold of intensity for armed conflict ... It is therefore submitted here that drone strikes alone are unlikely to be sufficient for the determination of a NIAC and the ensuing applicability of IHL’).

¹²¹ *Prosecutor v Milosevic* (Decision on Motion for Judgment of Acquittal) IT-02-54-T (16 June 2004), para 23.

¹²² *Haradinaj*, (note 71), para 60.

A related controversy arising from the use by certain States of drones against non-State armed groups abroad involves claims by certain States that force may be used not only against an organized armed group in a situation that meets the above requirements but also against its co-belligerents (or “affiliates” or “associates”).¹²³ Co-belligerency is a concept that applies in international armed conflicts and entails that a sovereign State becomes a party to a conflict either through formal or informal processes.¹²⁴ A treaty of alliance may be concluded as a formal process, while the informal process could involve providing assistance to or establishing a “common cause” with belligerent forces.¹²⁵

Transposing the concept of co-belligerency into non-international armed conflicts has been met with resistance because it ignores the significant differences between the various forms of armed conflict and opens the door for an expansion of targeting without clear limits.¹²⁶ Where the individuals targeted are not part of the same command and control structures as the organized armed group or are not part of a single military hierarchical structure, they ought not to be regarded as part of the same group, even if there are close ties between the different groups.¹²⁷ As a result, one cannot aggregate the violence between the State and these different armed groups as part of the determination as to whether the threshold for non-international armed conflicts has been met. Violence by different organized armed groups against the same State can amount to non-international armed conflicts only where the intensity of violence between each group and the State individually crosses the intensity threshold.

With regard to the possibility of a single, global non-international armed conflict with Al Qaeda, it has been stated that “[t]here is little evidence that the various terrorist groups that call themselves AQ or associate themselves with AQ possess the kind of integrated command structure that would justify considering them a single party involved in a global NIAC with the

¹²³ <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>. Bradley/Goldsmith, Congressional authorization and the war on terrorism, (2005), *Harvard Law Review*, Vol. 118, No. 7, 2112, 2113.

¹²⁴ Lauterpacht (ed.), Oppenheim, *International Law: A treatise* (1935), 203, 206.

¹²⁵ *Ibid.*

¹²⁶ “The [U.S.] administration’s failure to define what specific organizational features or conduct would lead a group to be classified as an associated force raises concerns that this results in an aggressive and indefinitely expansive scope of targeting authority.” *Statement of shared concerns regarding U.S. drone strikes and targeted killings*, AI Index: AMR 51/017/2013, 6.

¹²⁷ For what constitutes an armed group, see *Haradinaj*, (note 71), 144-145.

US . . . Indeed, even the US government rejects the idea that AQ is a unified organization, dividing AQ into three separate tiers.” The view of the International Committee of the Red Cross (ICRC) is that, based on the facts, this type of NIAC is not and has not been taking place. Instead, a case by case approach to legally analyzing and classifying the various situations of violence that have occurred in the fight against terrorism should be applied. Some situations may be classified as an IAC, others as NIACs, while various acts of terrorism taking place in the world may be outside any armed conflict.¹²⁸

A final, important point must be emphasised here, in keeping with the general theme of this article that each applicable legal regime must be addressed separately to adjudge the legality of a particular drone strike under international law. Thus, even if the concept of a global or transnational non-international armed conflict is accepted, IHL would not, and does not, on its own grant a licence to use force extraterritorially, nor does that branch of law determine whether armed force can be used in foreign States. IHL simply governs *how* force may be used and does not regulate *whether* or *when* armed force may be used. It is the *ius ad bellum* which determines *whether* force may be used on foreign territory and which restrains the extraterritorial use of force. Thus, accepting the possibility of a global non-international armed conflict between a State and a non-State group does not in itself give permission to States to use force on foreign territory. Whether a State can carry the fight to a(nother) foreign territory will depend on the law relating to the use of force. The State seeking to carry out a drone attack in a particular foreign State will need to show that there is a sufficient, and indeed, separate justification under the law relating to the use of force for any attacks on the particular territory.

ii. Who may be targeted under the law of non-international armed conflict?

Once it has been established that an armed conflict exists, and thus that the rules of IHL apply in the specific case, the next question concerns who may be targeted. The law of non-international armed conflict is less settled in this area than the law of international armed conflict. It is clear that, as a matter of both treaty and customary law, civilians may not be made the object of an attack unless, and for such time as, they take a direct part in hostilities (DPH).¹²⁹ This is the principle of distinction and constitutes one of the cardinal principles of

¹²⁸ ICRC, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 2011, 10 f.

targeting under IHL. Where there is doubt as to whether a person is a civilian or is taking a direct part in hostilities, civilian status must be presumed.¹³⁰

The treaty rules applicable in non-international armed conflict, however, do not define ‘civilian’, and there have been debates about whether members of non-state armed groups may be targeted on the basis of their status alone (e.g. as combatants can in international armed conflicts). In its Interpretive Guidance on Direct Participation in Hostilities, the ICRC has taken the view that “civilians” protected from direct attack in a NIAC are all those who are neither members of a State’s armed forces nor members of organized armed groups. The latter are then defined as “individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’ or CCF)”.¹³¹ They may be targeted based on their status.

Thus, where a drone strike is carried out against an individual with a continuous combat function in an organized armed group with which the attacking State is engaged in a NIAC, this will be consistent with the principle of distinction in IHL, provided the other rules of IHL are also observed. However, ‘recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities.’¹³² Such persons, therefore, remain civilians, protected against attack unless they directly participate in hostilities.

In addition to targeting on the basis of status, individuals may be targeted as result of conduct they have undertaken. Therefore, civilians will lose their protection from direct attack where, and for such time as they take a direct part in hostilities. According to the ICRC there is a

¹²⁹ Art 13(2) and (3) AP II. See also Henckaerts/Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (2005), Rule 6.

¹³⁰ Art 13(2) and (3) of AP II; Art 50(1) AP I.

¹³¹ ICRC (Melzer), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Guidance 2009), 27. See also Sivakumaran, *The Law of Non-International Armed Conflict* (2012), 359–62. Others adopt a different approach to defining membership of organized armed groups see, e.g., See Dinstein/Garraway/Schmitt, *The Manual on the Law of Non-International Armed Conflict: With Commentary* (International Institute of Humanitarian Law (2006); Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, (2010) 42 NYU J Intl L & Pol, 641.

¹³² *Ibid* (Melzer), 34.

three-stage (cumulative) test for determining when a civilian is directly participating in hostilities and thus may be targeted.¹³³ In order for activity to qualify as direct participation in hostilities:

1. The act must 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);, 2. 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 3. 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).¹³⁴

The most important criterion with respect to direct participation in hostilities is the requirement that the civilian either carries out acts that directly cause harm or engages in an operation that directly causes harm.¹³⁵ The ICRC has defined this requirement narrowly, stating that 'direct causation should be understood as meaning that the harm in question must be brought about in one causal step.'¹³⁶ General production and transport of weapons, or recruiting and training of personnel, is considered too indirect, unless forming an integral part of a specific military operation.¹³⁷

The ICRC also emphasises the rule that civilians lose their immunity from attack only *for so long as* they directly participate in hostilities, stating that '[c]ivilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities.'¹³⁸ However, the ICRC Guidance also states that '[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.'¹³⁹ As

¹³³ Ibid, 46.

¹³⁴ Ibid, 46.

¹³⁵ Akande, Clearing the Fog of War? The ICR's interpretive Guidance on Direct Participation in Hostilities (2010) 59 *ICLQ* 180, 187.

¹³⁶ Melzer, (note 88), 53.

¹³⁷ Ibid.

¹³⁸ Ibid, 70. Certain States, including Israel and the US, have advocated a 'continuous direct participation' standard, arguing that the 'for such time' limit does not reflect what is required under customary international law. Such a view was rejected, however, by the Israeli Supreme Court: *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006) paras 12, 30.

such, a civilian will be participating directly in hostilities both during the commission of the act and for a certain period before and after the act is carried out.

The ICRC's concept of "continuous combat function" may be criticized because of its lack of an authoritative basis in treaty law. However, it has the advantage of answering the question of who is a legitimate target by referring to activity that directly causes harm to belligerents and/or civilians. This provides some objective basis for determining who may be targeted. It is noteworthy that the ICRC's approach to the concepts of "members of organised armed groups" and "direct participation in hostilities" has been followed in recent State practice concerning drone attacks.¹⁴⁰ Indeed, many would accept that members of an organised non-State armed group that is party to a non-international armed conflict are not to be regarded as civilians and are therefore not immune from attack.

The ICRC's "continuous combat function" test for membership of a non-State armed group has also been criticised for not going far enough.¹⁴¹, in the sense that it provides advantages to non-State groups as compared to State forces and thus promotes inequality between belligerents.¹⁴² There is an imbalance were the combined combat function approach to be adopted since members of the State's armed forces without a combat role (with limited exceptions) are lawful targets, whereas their counterparts in non-State forces are not.

Furthermore, since the continuous combat function is defined by reference to taking a direct part in hostilities, which is then itself narrowly defined, persons who join an organized armed group and perform military functions that do not constitute direct battlefield activity are exempt from targeting on the basis of status.. It has therefore been suggested that an analogy should be drawn between members of regular armed forces and members of organized armed groups such that persons who perform the types of functions performed by members of the armed forces would not be considered a civilian.. Although superficially attractive as it promotes equality of arms, the problem with this latter approach is that the functions performed by members of the regular armed forces are very broad indeed. Since

¹³⁹ *Ibid*, 65.

¹⁴⁰ Decision of the German Federal Prosecutor of 20 June 2013

https://www.generalbundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf.

¹⁴¹ See, e.g., Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, (2010) 42 *NYU J Intl L & Pol*, 641.

¹⁴² *Ibid*.

non-State groups do not necessarily have formal indicia of membership, one would still need some criteria for identifying the membership of an organized armed group.

Although the ICRC's test has some weaknesses, the its main advantage is that the question of who is a legitimate target is answered by reference to activity performed. This provides some objective basis for determining who may be targeted.

The critical question with regard to targeted killing in armed conflict is how to ensure that persons being targeted are indeed legitimate targets. A loose test of membership of a group that cannot be applied on the basis of objective evidence is likely to lead to greater civilian casualties or at least a lack of public confidence in the program. In all cases where a State uses lethal force against individuals in a non-international armed conflict there must be objective evidence to support the claim of membership of an armed group, or alternatively that the persons in question are taking a direct part in hostilities at that point in time. Furthermore, as noted above, where there is doubt as to whether a person is a civilian or is taking a direct part in hostilities, the person is to be presumed as protected from direct attack.¹⁴³

All feasible precautions must be taken in determining whether a person is a civilian, and, if so, whether the person is taking a direct part in hostilities.¹⁴⁴ This obligation requires parties to the conflict to use all information that is reasonably available in making the determination about whether a person is a lawful target. Where drones are used for targeting it could be argued there is a greater degree of responsibility to take precautions than might otherwise be the case. This is because the technology and the way in which it is used in many cases make long term surveillance possible. This means that more information is available about targets and more information can be made available than might otherwise be possible. Therefore, the assessment as to what information is reasonably available should take into account the relative ease with which information can be acquired.

It will not always be the case that evidence that a person is a member of an armed group or is directly participating in hostilities arises from information known about or which reveals the identity of the individual. In some cases, evidence about membership in an armed group or direct participation will arise from the characteristics associated with the individual or the activity that the individual is known to have performed or is performing. For example, where a non-State group has a particular uniform

¹⁴³ *Ibid*, Article 50(1) API.

¹⁴⁴ ICRC (Melzer), (note 88), 74.

or insignia evidence of membership may be derived from the wearing of that uniform or insignia. Therefore, strikes based on the “signature” or defining characteristics of an individual are not *per se* unlawful. What is crucial is whether the signatures or characteristics that are being used in making targeting decisions are the relevant characteristics as a matter of law.¹⁴⁵ The characteristics must be relevant to a determination that a person is a member of an armed group or that the person is taking a direct part in hostilities. The information must be such as to provide a high degree of confidence that the legal tests have been satisfied.

A determination that individuals are military-age males in an area of known terrorist activity does not provide a high degree of confidence that the individual is either a member of an armed group or that the person is taking a direct part in hostilities at that particular time. Indeed, mere presence in a given locality can never, in itself, amount to direct participation in hostilities. Some specific act would need to be engaged in for the person to be considered to be taking a part in hostilities. Furthermore, the fact that a person is armed, even in areas that are known to contain terrorists, is not sufficient to constitute evidence of loss of civilian status or direct participation in hostilities.¹⁴⁶ There are many parts of the world where it is lawful and/or common for individuals to carry personal arms. Carrying of such arms will not be sufficient to displace the presumption of civilian status.

The public statements of States that they conduct threat assessments of individuals before targeting them in armed conflict should be welcomed and should be urged, as this helps to raise the floor of protection with respect to legitimate targets.¹⁴⁷ Of course, the situation must be correctly classified as an armed conflict — if the requirements posed for a NIAC are not met, a loose threat assessment is not enough, and the more rigorous conditions of self-defence under IHRL must be met.

Even in cases where lethal force is targeted at a member of an organized armed group or a civilian directly participating in hostilities, any such strike would need to comply with the principle of proportionality, the second cardinal principle of targeting in IHL. Drones come from the sky, but they

¹⁴⁵ Heller, (note 14), 94 ff. distinguishing between “legally adequate” and “legally inadequate” signatures.

¹⁴⁶ See generally Heller, *ibid* and *Prosecutor v Simić*, IT-95-9-T, Trial Chamber, Judgment, 17 Oct. 2003, para 659.

¹⁴⁷ <http://www.theguardian.com/world/2013/may/23/obama-drones-guantanamo-speech-text>.

leave the heavy footprint of war on the communities they target.¹⁴⁸ The principle of proportionality protects those civilians who are not directly targeted but nevertheless may bear the brunt of the force used. According to this principle, it is prohibited to carry out “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.¹⁴⁹ By implication, where the use of force is not excessive, such losses are regarded as incidental (“collateral”) damage and are not prohibited provided the IHL rules have been respected.

The risk to civilians may be exacerbated where drone strikes are carried out far away from areas of actual combat operations, especially in densely populated areas, where unsuspecting civilians may suddenly find themselves in the line of fire. Avoiding collateral damage requires taking all feasible precautions to prevent or minimize incidental loss of civilian lives and information gathering relating to possible civilian casualties and military gains.¹⁵⁰

iii. The possible existence of an international armed conflict

As noted above, where there is an armed conflict between the State and non-State group it will likely be a non-international armed conflict. It was also noted that drone strikes may take place in circumstances where there is no armed conflict between the State and the non-State group, because the criteria for the existence of such a conflict are not met. However, the absence of a non-international armed conflict between the State and the non-State actor does not necessarily mean that IHL will not apply to the use of force by a State. This is because the use of lethal force by a State directed at a non-State actor may still be governed by the law relating to international armed conflicts.

As noted earlier, international armed conflicts are limited to conflicts *between States*. When a State carries out drone strikes on the territory of another State, it will either do so with the consent of the territorial State or without that consent. Where the force is used with the consent of the territorial State, there can only be a non-international armed conflict between the State and the group against

¹⁴⁸ *Living Under Drones: Death, injury, and trauma to civilians from U.S. drone practices in Pakistan*, available at <http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf>.

¹⁴⁹ Art 51(5)(b) of AP I.

¹⁵⁰ Art 57 AP I.

whom force is used. However, where force is used without the consent of the territorial State, Dapo Akande and others have argued that there would be an international armed conflict between the State using force and the State on whose territory force is used.¹⁵¹ This would be an international armed conflict between the foreign State and the territorial State. This could be the case because the use of force by the intervening foreign State on the territory of the territorial State, without the consent of the latter, is a use of force *against* the territorial State. This is so, so the argument goes, even if the use of force is not directed against the governmental structures of the territorial State, or the purpose of the use of force is not to coerce the territorial State in any particular way.

However, even on the view that there is an international armed conflict between the two States, such a conflict would exist in parallel with the non-international armed conflict between the State and the non-State group, if the criteria for such a conflict were met. The two conflicts would exist simultaneously. With regard to targeting of the members of the non-state group, it would be the criteria discussed above from the law of non-international armed conflicts that would be determinative of the legality of the targeting of such members.¹⁵² This is so because, as seen from the *Tadić* criteria discussed above,¹⁵³ the hostilities between the State and non-state group constitute the essence of a non-international armed conflict. Failure to apply the law of non-international armed conflict to those hostilities would in effect be a failure to recognize the non-international armed conflict.

In cases where drone strikes occur outside the context of non-international armed conflicts and without the consent of the territorial State, on this view the individuals targeted would necessarily be classified as civilians.¹⁵⁴ IHL prescribes that such persons would be protected from direct attack,¹⁵⁵ *unless and for such time as* they take a direct part in hostilities.¹⁵⁶ Drones strikes against them would,

¹⁵¹ See, e.g., Akande, (note 65), 70–9.

¹⁵² Arguably, matters regarding detention of persons taken from the territory of the non-consenting state or strikes that result in damage to objects or the natural environment would be governed by the law of international armed conflicts as though those matters may be connected to the non-international armed conflict, the fact that they affect the territory of the state means that are also connected to the conflict between the two States.

¹⁵³ See *Tadić*, (note 66), para 70.

¹⁵⁴ Art. 50(1) API (effectively defining civilians negatively, as all persons who are not combatants).

¹⁵⁵ Art. 51(2) API.

¹⁵⁶ Art. 51(3) API. The Israeli Supreme Court has held that this constitutes a rule of customary international law and is therefore binding also on those States not party to API: *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, H CJ 769/02 (13 Dec 2006) para 30.

therefore, on this view only be lawful so long as they are directly participating in hostilities. The importance and definition of the notion of direct participation in hostilities is discussed above..

Moreover, the fact that drone strikes in terms of this view take place in the context of an international armed conflict means that all the IHL obligations of the State using lethal force are applicable. In addition to the obligation not to make civilians the object of an attack, there is the obligation to respect the principle of proportionality, the obligation to confine attacks to military objectives and the obligation to take feasible precautions in the launching of an attack. In addition, the applicable principles of international criminal law with respect to war crimes in an international armed conflict will be relevant in such situations.

iv. Does IHL require a capture rather than kill approach?

Recent debates have asked whether IHL requires that a party to an armed conflict under certain circumstances considers the capture of an otherwise lawful target (i.e. a combatant, a member of an armed group with a CCF or a civilian directly participating in hostilities) rather than targeting with force. The ICRC has taken the view that it does, and in its Interpretive Guidance, it states that “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”¹⁵⁷

The articulation of this principle has been controversial.¹⁵⁸ It has been criticized for its alleged misrepresentation of the current *lex lata*,¹⁵⁹ particularly on the basis that it suggests that the principle of military necessity sits above every rule of IHL in a limiting manner, rather than simply as a consideration that has already been factored into the rules.¹⁶⁰ In other words, so the argument goes, States have already decided that it is necessary and proportionate to target combatants on the basis of their status and in some cases conduct alone.

¹⁵⁷ ICRC, (Melzer) (note 88), 82.

¹⁵⁸ See Akande, (note 92), 191.

¹⁵⁹ See Schmitt, The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis, *Harvard National Security Journal* 1 (2010), 5, 39–43.

¹⁶⁰ Schmitt, Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance, *Virginia Journal of International Law* 50 (2010), 795, 835.

It is too early to determine in which direction the controversy around this concept will be resolved. The impulse to move in the direction of the approach that in some cases capture rather than kill is required will likely continue in the context of modern anti-terrorism measures where individuals or small groups may be isolated in territory far away from the conflict zone, which may even be controlled by the State party or its allies.¹⁶¹ At least one other State that uses drones has stated that, as a matter of policy, it will not use lethal force when it is feasible to capture a terror suspect.¹⁶²

v. Investigation and accountability for violations

The modern concept of human rights is based on the fundamental principle that those responsible for violations must be held to account. A failure to investigate and where applicable punish those responsible for violations of the right to life in itself constitutes a violation of that right.¹⁶³ Legal as well as political accountability are dependent on public access to the relevant information.¹⁶⁴ Only on the basis of such information can effective oversight and enforcement take place. The first step towards securing human rights in this context is transparency about the use of drones. A lack of appropriate transparency and accountability concerning the deployment of drones undermines the rule of law and may threaten international security.¹⁶⁵ Accountability for violations of IHRL (or IHL) “is not a matter of choice or policy; it is a duty under domestic and international law.”¹⁶⁶

The various components of transparency¹⁶⁷ require that the criteria for targeting and the authority which approves killings be known, and drone operations be brought within institutions which are able to disclose to the public the methods and findings of their intelligence, criteria used in selection of targets and precautions incorporated in such criteria. One of the criticisms leveled against the current drone programs has been the absence of an

¹⁶¹ Goodman, “The Power to Kill or Capture Enemy Combatants”, EJIL 24 (2013), 819.

¹⁶² *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, May 23, 2013.

¹⁶³ *Kaya v Turkey*, Application No. 22729/93, Judgement of 19 February 1998 para 86-92; UNHRC, General Comment No. 31 (2004), para 15; *McCann* (note 31), para 169.

¹⁶⁴ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions para 16.

¹⁶⁵ Melzer (note 14), 4.

¹⁶⁶ Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 12 April 2011.

¹⁶⁷ See Alston, *The CIA and Targeted Killings Beyond Borders*, Harvard National Security Journal, (2011), Vol. 2, No. 2, 287.

official record regarding the persons killed. States must also give guarantees of non-repetition of unlawful drone strikes and realize the right of victims to reparations.

Drone victims, like any other human rights victims, and the society at large, have a right to access information related to allegations of human rights violations and their investigations.¹⁶⁸ Under IHRL, the UN Human Rights Committee has emphasized the need for transparency, highlighting victims' right to know the truth about the perpetrators, their accomplices and the motives thereof.¹⁶⁹

Likewise, during an armed conflict, relatives of persons killed or missing have the right to know the fate of their relatives.¹⁷⁰

A parallel obligation to investigate and where appropriate punish those responsible in respect of cases of alleged war crimes exists under IHL.¹⁷¹ Whenever there are reasons to query whether violations of IHL may have occurred in armed conflict as a result of a drone strike, such as the incorrect designation of persons as targetable, or disproportionate civilian harm, full adherence to accountability demands at least a preliminary investigation.¹⁷² Civilian casualties must be determined and should be disclosed.

V. The Law Relating to the Use of Force on Foreign Territory

In addition to the rules of IHL and IHRL, which must be strictly observed in any drone strike, the use by one State of drones to target individuals located in another State can only be lawful where it complies with the rules on the use of inter-State force. While IHL and IHRL are aimed at protecting the individuals concerned, the law on the use of inter-State force focuses on state sovereignty; it serves primarily to protect the legal rights of States, including the

¹⁶⁸ See the Case of *Mapiripán Massacre v Colombia*, 15 September 2005, para 238.

¹⁶⁹ Human Rights Council Resolution 9/11. Right to the truth preamble, para 1; General Assembly Resolution 61/177 Art 24 (2); Commission on Human Rights Resolution 2005/66.

¹⁷⁰ Art. 32 of AP I to GCs; ICRC Commentary on Art 32 of AP I; Art 33 of AP I; ICRC Commentary on Art 33 of AP I, p.350 para 1222; Art 138 of GC IV.

¹⁷¹ See GC I, Art 49; GC II, Art 50; GC III, Art 129; GC IV, Art 146; AP-I, Art 85; Statute of ICTY, Art 2, UN Doc. S/RES/827 (1993); Statute for ICTR, Art 4, UN Doc. S/RES/955 (1994)(ICTR Statute); Statute of ICC, Art 8(2)(a), 2187 UNTS 90.

¹⁷² Second Turkel Commission Report, The Public Commission to Examine the Maritime Incident of 31 May 2010, 256.

right and interest of the State to have the lives of its citizens and inhabitants protected from acts of aggression. As was stated above, it can thus indirectly serve to protect life by containing the geographical spread of conflict.

Article 2(4) of the UN Charter and customary international law prohibit the threat or use of inter-State force. A State may, however, consent to the use of force on its territory by another State, with the result that Article 2(4) will not be engaged. Where no consent is given, the UN Charter gives two exceptions to the Article 2(4) prohibition: where action is taken lawfully in self-defence under Article 51, or where the Security Council authorizes enforcement action under Chapter VII. Consent, self-defence and enforcement action will be considered in turn for their relevance to the use of drones by States abroad.

i. Consent

Where a territorial State consents to another State targeting non-State actors on the former's territory with drones, no issue in principle should arise under the *jus ad bellum*, for Article 2(4) of the UN Charter will not have been violated.¹⁷³

While consent would seem a simple test that would result in a particular drone strike in a foreign territory being consistent with the *jus ad bellum*, in practice there are issues of considerable difficulty surrounding consent, including who may give consent, whether consent must be made publicly and explicitly or could instead be implicit, and when consent could be considered to have been vitiated by coercion.¹⁷⁴

With regard to who may give consent, the *jus cogens* nature of the prohibition of the use of force means that only the State's highest authorities may validly give consent – that is, have the authority

¹⁷³ It has been suggested that a State cannot invite another State to assist it in a civil war, such that where the domestic situation is so severe, the *de jure* government would not be able to consent to force being used on its territory by another State. See Gray, *International Law and the Use of Force* (2008), 81. However, it is not clear that there is sufficient State practice and *opinio juris* for such a limitation of the consent principle to be regarded as a part of international law. See Dinstein, *War, Aggression and Self-Defence* (2011), 119, para 317. In the situation regarding Syria (2011 et seq.) there has been vigorous debate among States as to whether it is lawful to provide assistance to the government or to the opposition movement but no State (on either side of the debate) has argued that assistance is unlawful simply because there is a civil war.

¹⁷⁴ The controversies surrounding the issue of consent more generally are discussed in Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), 163–5.

to give consent - to a use of force.¹⁷⁵ Although the acts of all government officials, acting in that capacity, are attributable to the government, not all parts of the government are entitled to give consent with respect to the use of force. In particular, it is not sufficient to obtain consent from regional authorities or from particular agencies or departments of government. The International Law Commission has made it clear that:

“[w]hether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State”¹⁷⁶

The question of which domestic authority is entitled to give consent to a potential violation of international law depends on the interplay between international and domestic law.¹⁷⁷ In the first place, one needs to consider the nature of the international rule in question and the manner in which that rule is generally applied. As already stated, the importance of the prohibition on the use of force suggests that consent to a departure from this rule will usually need to be established at the highest levels of government. Secondly, one will need to consider the domestic arrangements made with respect to the matter at hand.¹⁷⁸ Where domestic law or domestic constitutional arrangements are such as to give responsibility on these issues to lower level officials this may be taken into account.

¹⁷⁵ See Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* [?] (2010), 259: “In the case of a military operation, no one contests that only the highest authorities of the State are able to issue such consent validly. It is only on this condition that it can be claimed that a use of force is not directed against the State’s independence and so does not violate article 2(4).”

¹⁷⁶ See ILC Commentary (paras 5) to Art. 20, Articles on Responsibility of States for Wrongful Acts, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two.

¹⁷⁷ The ILC has stated that: “Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority.” *Ibid*, para 6.

¹⁷⁸ It has also been argued that where a State’s actions on another’s State’s territory are consented to by the latter, the former should inquire into whether this consent complies with the latter’s domestic law: Deeks, *Consent to the Use of Force and International Law Supremacy*, (2013) 54 *Harvard Intl LJ*.

However, it would be natural that where there is a difference of view between the highest authorities in government and lower level officials, it is the view of the higher level officials that should be taken as determinative. This arises in part because international law itself assumes that certain organs of government have the capacity to represent the State in international affairs. Thus, the Head of State, Head of Government and the Foreign Minister are presumed, as a matter of international law, to have plenary competence to conclude treaties on behalf of the State.¹⁷⁹ In addition, these senior government officials are accorded immunity *ratione personae* from the jurisdiction of other States because of their privileged position in conducting international relations on behalf of the State.¹⁸⁰

Thus, it can be assumed that it is the view of these officials, where expressed, that should be determinative of whether the State gives consent or not to the use of force on the State's territory. Moreover, the view that consent to the use of force must be given by the highest authorities in the central government of a State accords with the bulk of international practice.¹⁸¹

Regarding the issue of publicity and consent, while there is no requirement that consent be made public, it must nevertheless be clear as between the States concerned that consent is being given to the use of force, and the parameters of that consent should also be made clear. Consent must be given in advance.¹⁸² Moreover:

“. . . certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.”¹⁸³

¹⁷⁹ Art. 7, Vienna Convention on the Law of Treaties, 1969.

¹⁸⁰ *Arrest Warrant Case (DRC v Belgium)*, ICJ, Judgment, 2002, paras 53-55; Akande & Shah, “Immunities of State Officials, International Crimes and Foreign Domestic Courts”, (2010) 21 EJIL 815, 818 f.

¹⁸¹ Corten, (note 132), 266: “In respect of all the precedents just examined, it appears clearly that, to be validly given, consent to external intervention must have been given by the highest authorities of the State such as the Prime Minister, the President or the Government as a whole.”

¹⁸² “Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility.” See ILC Commentary to Art. 20, Articles on Responsibility of States for Wrongful Acts, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two.

¹⁸³ See ILC Commentary to Art. 20, Articles on Responsibility of States for Wrongful Acts, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, para 6.

Consent on so serious a matter as the use of force is not to be implied. Furthermore, where force exceeds the limits of the consent given, that force will be a violation of Article 2(4).¹⁸⁴ In addition, once consent to the use of force is withdrawn, the State conducting the targeting operations is bound by international law to refrain from conducting any further operations from that moment onwards (unless there is a separate justification for using force).¹⁸⁵

ii. Self-defence

Where no consent is given, Article 2(4) will be engaged by a drone strike on another State's territory, requiring resort to one of two exceptions to the prohibition contained in the UN Charter. The most common is self-defence. International law poses stringent requirements on the use of force in self-defence. Under Article 51 of the UN Charter and customary international law, a State may invoke self-defence to justify its use of force to target individuals in another State's territory where an armed attack against it occurs or is imminent (on which see below). The International Court of Justice (ICJ) has confirmed that, for an attack to constitute an "armed attack" and thus enable the State's right to use force in self-defence, the scale and effects of the attack must reach a certain threshold of gravity.¹⁸⁶ Thus, not any use of force against a State will necessarily justify a response in self-defence.

In addition to the requirement of an armed attack, the State claiming to be acting in self-defence must also satisfy the dual requirements of necessity and proportionality, grounded in customary international law.¹⁸⁷ These requirements, as defined in the context of the *jus ad bellum*, are closely linked to the important issue of the *aim* of a lawful act of self-defence. Thus, 'necessity and proportionality mean that self-defence must not be retaliatory or punitive; the aim should be to halt

¹⁸⁴ *Ibid*, para 9: "where consent is relied on . . . it will be necessary to show that the conduct fell within the limits of the consent."

¹⁸⁵ See *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), ICJ, Judgment, Dec. 2005 where the ICJ took the view that Ugandan presence in the DRC was unlawful from the moment when consent was withdrawn (despite an agreement setting out modalities for withdrawal), para 105.

¹⁸⁶ *Nicaragua v United States* (1986) ICJ Rep 14, para 191, *Oil Platforms* (2003) ICJ Rep 161, paras 51, 62.

¹⁸⁷ The ICJ has on numerous occasions highlighted the need for a response to an armed attack to be necessary and proportionate for that to constitute lawful self-defence: see *Nicaragua* (note 143), para 194; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] IC Rep 226, para 41; *Oil Platforms* [2003] ICJ Rep 161, para 74; *DRC v Uganda* [2005] ICJ Rep 168, para 147.

and repel an attack.¹⁸⁸ In other words, action taken lawfully in self-defence (i.e. the use of drones to target individuals in another State's territory) must serve the purpose of halting and repelling an armed attack and must be both necessary and proportionate to this end.¹⁸⁹ Action taken after an armed attack has ended, and which in reality seeks to retaliate against that armed attack, would not constitute a lawful exercise of self-defence, but rather an armed reprisal in violation of Article 2(4) of the UN Charter.¹⁹⁰

In considering the elements relevant to determining whether a particular action is necessary and proportionate to the aim of self-defence, the ICJ in the *Oil Platforms* case placed emphasis on the nature of the objects targeted by the US and their role in staging any initial armed attacks.¹⁹¹

The requirements of necessity and proportionality also help to define the limits of the right to self-defence. The right persists only for so long as it is necessary to halt or repel an armed attack and must be proportionate to that aim. However, in determining what is necessary to bring an attack to an end and what is a legitimate objective for self-defence, it is important to consider whether States are entitled to continue to act in self-defence until the absolute destruction of the enemy is achieved such that the enemy poses no short or long term threats. International law cannot permit States to act until the elimination of long term threats is secured.

The law of self-defence permits responses to emergency situations in which States face immediate or imminent risks. Once the immediate or imminent threats of (continued) attack are resolved, States will need to find other methods of securing long term peace and stability.

¹⁸⁸ Gray, *International Law and the Use of Force* (2008), 150; see also Randelzhofer, 'Article 51' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary, Volume I* (2002) 805. CITE 3RD ED

¹⁸⁹ The manner in which the requirements of necessity and proportionality have been invoked by the ICJ confirms this interpretation of the purpose of lawful self-defence: see, e.g., *Nicaragua* (note 143), para 237 (holding that US actions in and against Nicaragua were not necessary as the threat to the Salvadorian government had already been curbed by other means); *Oil Platforms* (note 143), para 76 (holding that the US attacks against Iranian oil platforms were not necessary to respond to the attacks against US ships); see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996), IC Rep 226, Dissenting Opinion of Judge Higgins, para 5 ('...the concept of proportionality referred to was that which was proportionate to repelling the attack, and not a requirement of symmetry between the mode of the initial attack and the mode of response ...').

¹⁹⁰ *Oil Platforms* (note 143), Dissenting Opinion of Judge Elaraby, para 1.2.

¹⁹¹ *Ibid*, para 76.

To permit force to be used as a means of achieving long term security, where the threat of immediate or imminent attacks has receded, is to permit perpetual warfare. Therefore, even when drones are used in self-defence, consideration needs to be given to the moment at which the group against which drones are being used is sufficiently disrupted such that it no longer poses an immediate or imminent threat.

Article 51 recognises the right to self-defence where “an armed attack occurs”, but also refers to self-defence as an “inherent” right of States. This has given rise to arguments that the right to self-defence under customary law is not displaced by the Charter. Importantly, the argument that an anticipatory attack against an imminent threat is permissible rests on this basis.¹⁹² There is a significant debate about the legality of action in self-defence prior to an actual armed attack. However, as the Report of the High-Level Panel Established by the UN Secretary-General noted: ‘Long-established customary international law makes it clear that States can take military action as long as the threatened attack is imminent, no other means would deflect it, and the action is proportionate’.¹⁹³ The UK, for example, takes the view that action in self-defence can be lawful where an armed attack is imminent.¹⁹⁴

Importantly, at most anticipatory self-defence could be lawful only in response to an existing threat. It may not be employed pre-emptively to prevent a threat from arising in the future. The necessity of the self-defence, in the well-known phrase, “must be instant, overwhelming, and leaving no choice of means, no moment of deliberation”.¹⁹⁵ The body of opinion and State practice that rejects the concept of anticipatory self-defence altogether should also be noted, and serves at least as a confirmation of the limited scope of the exception.¹⁹⁶

The imminence requirement in IHRL which stipulates that force may be used only to *protect* life, is not to be conflated with the requirement of imminence in the law governing the use of force on foreign territory under Article 51. The former is a condition required for all uses of lethal force to be lawful under IHRL. The latter applies under the doctrine of anticipatory self-defence and would allow the use of self-defence where an attack is imminent.¹⁹⁷

¹⁹² A/59/565 at 188–192.

¹⁹³ Report of the High-Level Panel Established by the UN Secretary-General (December 2004) UN doc A/59/565 (2004) at 188–92.

¹⁹⁴ ‘Attorney-General’s Advice on the Iraq War, Iraq: Resolution 1441’ (2005) 54 ICLQ 767, 768..

¹⁹⁵ Letter from Mr. Webster to Lord Ashburton, August 6, 1842 in *Caroline and McLeod Cases*, (1938) 32 AJIL.

¹⁹⁶ Gray, (note 145), 160-1.

The question of self-defence measures taken in a foreign State against non-State actors who do not act on behalf of that foreign State must also be considered. This question is of particular importance given that non-State actors are currently being targeted by the drones in States that do not necessarily bear responsibility for the acts of these non-State actors.¹⁹⁸

Before 9/11, the claim that force could be used in self-defence in response to an armed attack by a non-State group whose acts were not attributable to a State was controversial at best.¹⁹⁹ The International Court of Justice rejected this view of the law in the *Nicaragua case*.²⁰⁰ However, State practice since 9/11 suggests that international law now permits such a notion of self-defence. The shift began with the near universal support for the US and UK's response to the 9/11 attacks, which was based on a claim to be acting in self-defence.²⁰¹ Indeed, following the events of 9/11, the Security Council adopted Resolutions 1368 and 1373, both of which recognised 'the inherent right of individual or collective self-defence in accordance with the Charter'.²⁰² This would suggest that a State may use force in self-defence on another State's territory, where that first State has been the victim of an armed attack by non-State groups operating on the latter's territory, even where that attack is not attributable to the 'host' State.

In contrast, the ICJ in its *Israeli Wall* advisory opinion subsequently implied that force cannot be used in self-defence in response to an armed attack by a non-State actor:

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.²⁰³

¹⁹⁷ Contrast 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", " (5 February 2013.).

¹⁹⁸ See references above at n 1 for recent news articles detailing drone strikes by the UK and US against non-State actors in a number of different countries.

¹⁹⁹ See discussion of pre-9/11 practice in Gray, (note 145), 195–8.

²⁰⁰ *Military and Para-Military Activities in and against Nicaragua (Nicaragua v. US)*, ICJ, Judgment, 1986, para 195.

²⁰¹ See, e.g., the US' letter to the Security Council under Article 51 of the UN Charter, in which it referred to its right to self-defence against Al-Qaida and the Taliban regime in Afghanistan that was allowing its territory to be used by Al-Qaida: UN doc S/2001/946. The same claim was made by the UK: UN doc S/2001/947.

²⁰² UN Security Council Resolution 1368 (12 September 2001), S/RES/1368/2001, preambular para 3; Security Council Resolution 1373 (28 September 2001), S/RES/1373 (2001), preambular para 4.

²⁰³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion

Nonetheless, State practice relating to the use of force abroad against non-State actors, since 2001, is now broad and extensive. It extends beyond the immediate post-9/11 context.²⁰⁴ The law on this matter, therefore, appears to have changed.

However, even if States may, in certain circumstances, lawfully exercise self-defence in response to an armed attack against a non-State actor this only means that the armed attack requirement can be fulfilled without attribution of the attack to a State. Other customary international law requirements would still need to be fulfilled before a State can respond with force in self-defence. In particular, attention would still need to be paid to the requirements of necessity and proportionality, such that it must be necessary and proportionate to respond with force to an armed attack from a non-State actor. In the context of a use of force against a non-State group, it is suggested that the necessity condition would only be satisfied where the 'host' State is either unable or unwilling to prevent continued attacks.²⁰⁵ However, in determining whether a State is unable or unwilling to take action, the State acting in self-defence might be required to request such action prior to the commencement of acts taken in self-defence.²⁰⁶

Article 51 of the UN Charter makes it clear that measures adopted by States in exercise of self-defence must be reported to the UN Security Council.²⁰⁷ This can be seen as posing an obligation of transparency and justification to the international community, placing the issue formally on the agenda of the Security Council and recognising its role. All member States of the UN have an obligation under its founding treaty to submit such reports. While failure to report will not render unlawful an otherwise lawful action taken in self-defence, "the absence of a report may be one of the factors indicating whether the State in question was itself

[2004] ICJ Rep 136, para 139. It is to be noted that Article 51 does not, in fact, condition the notion of armed attack as emanating from a State only.

²⁰⁴ For example, Uganda and Rwanda's use of force in the DRC, Kenya and Ethiopia's use of force in Somalia; Russia's use of force in Georgia; Turkey's use of force in northern Iraq; Saudi Arabia's use of force in Yemen; Columbia's use of force in Ecuador.

²⁰⁵ Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors* (2007) 56 ICLQ, 141; Bethlehem, *Self Defence Against an Actual or Imminent Armed Attack by Non-State Actors* (2012) 106 AJIL 770, 776.

²⁰⁶ Bethlehem, *ibid.*

²⁰⁷ *Nicaragua v United States* (note 143), para 235; *Case Concerning Armed Activities in the Territory of the Congo*, (note 142), 222, para 145.

convinced that it was acting in self-defence”.²⁰⁸ According to Article 51 the right to exercise self-defence shall continue “until the Security Council has taken measures necessary to maintain international peace and security”. This demonstrates that the end-point of an action in self-defence is not only determined by the principles of necessity and proportionality, noted above, but may also be determined by the Security Council.²⁰⁹

In addition to its transparency function, it could be argued that the rationale for this reporting requirement is to contribute towards the protection of the legal rights of sovereignty by the international community, since the State using force is required to offer its justification for that use of force. By extension, it must be concluded that a State must report afresh when the material facts have changed — for example, where self-defence is used as a basis for the use of force on the territory of a new State, or new parties are added to the conflict.

Conclusion

The legal framework for maintaining international peace and the protection of the right to life is a coherent and well-established system, reflecting norms that have been developed over the centuries and have withstood the test of time. Even though drones are not illegal weapons, they can easily be abused. The central norms of international law need not and should not be abandoned to meet the new challenges posed by terrorism. On the contrary, the fact that drones make targeted killing so much easier should serve as a prompt to ensure a diligent application of these standards, especially in view of the likely expansion in the number of States with access to this technology in the future. The use of drones by States to exercise essentially a global policing function to counter potential threats presents a danger to the protection of life, because the tools of domestic policing (such as capture) are not available, and the more permissive targeting framework of the laws of war is often used instead.

Drones, as has been stated, are not inherently illegal weapons. In fact, they are weapon platforms rather than weapons. However, they do make the deployment of lethal force across the borders much easier than before, and as such they do pose significant risks to the

²⁰⁸ *Ibid*, para 200.

²⁰⁹ Randelzhofer, (note 145), 804.

protection of life. In this context the legal paradigm that is followed does make an important difference. If the assumption is that the use of force is justified by law, it will be very easy for the increasing number of States with access to this technology to find reasons to use deadly force. However, the starting point must be that the use of force should always be justified before it can be legal, and in addition the question must be asked in each case whether it is wise. Such an approach is the only one that can lead to a safer world and a better protection of the right to life in the long run.

There is an urgent need for the international community to gain greater consensus on the interpretation of the constraints that international law in all its manifestations places on the use of drones. This is important not only because of the implications for those who currently find themselves on the receiving end of drones, but in order to keep a viable and strong system of international security intact. A central component of such a security system is the rule of law. Drones should follow the law, not the other way around.

The following fundamental principles as far as drones are concerned should form the starting point of a search for greater consensus. They are as follows:

- a) The current international legal framework is adequate to govern drone strikes;
- b) The right to life can only be adequately protected if all constraints on the use of force set out by international law are complied with;
- c) International norms on the use of force must not be abandoned to suit the current use of drones;
- d) There should be transparency surrounding all drone operations to enhance accountability.
- e) Outside of the narrow confines of armed conflict, any killing must meet the requirements of human rights law, and be strictly necessary and proportionate as those terms have been developed in human rights jurisprudence.²¹⁰

These are merely a starting point, but we would contend that the international community has a strong interest in ensuring that there is stronger agreement on the basis of our common security.

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²¹⁰ A/HRC/26/36 para 139 -140 Available at http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-36_en.doc .