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International law and lethal drone strikes

Doctor of Philosophy

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Declaration

I confirm that this is my own work and the use of all material from other sources has been properly and fully acknowledged.

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Abstract

Armed drones are an integral part of modern warfare, adopted by a progressively wider array of states. Academic engagement with their use has so far either been general, paradigm-specific or state-specific. This thesis builds upon existing knowledge to present a comprehensive analysis of drone strikes to examine their lawfulness, both as an abstract artifice and through the uses to which they have been put, focusing on US drone strikes in Pakistan, Yemen and Somalia. Using doctrinal analysis, the use of drone strikes is considered through the separate though linked frameworks of the law on the use of force (consent and *jus ad bellum*), international humanitarian law, and international human rights law. These frameworks must be satisfied cumulatively for a drone strike to be lawful, thus the question of lawfulness can only be answered through a holistic analysis, and it is such that is presented within this thesis.

Generally, it is concluded that armed drones are no different, under international law, from other weapon systems: they can be used in violation of international law but this is not a necessary outcome of their use. Considered through the lens of the law on the use of force it is concluded that, in many cases, drone strikes in Pakistan, Yemen and Somalia have been lawful due to consent from territorial states. Outside of this consent, self-defence provides only a limited basis for lawfulness. It is also concluded that, in the relevant states, drones have been used during armed conflicts and are capable of adhering to international humanitarian law, though this often depends on the operative interpretation of the law. Finally, it is concluded that there have been drone strikes outside of armed conflict, regulated by international human rights law; though not inherently unlawful, all of the strikes analysed herein violated the right to life.

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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ADHR	American Declaration of Human Rights
AMISOM	African Union Mission in Somalia
AUMF	Authorization for Use of Military Force
AP I	Additional Protocol I
AP II	Additional Protocol II
APC	Armoured Personnel Carrier
AQAP	al-Qaeda in the Arabian Peninsula
AQY	al-Qaeda in Yemen
ARS	Alliance for the Re-liberation of Somalia
ASEAN	Association of Southeast Asian Nations
ASY	Ansar al-Shari'a Yemen
CIA	Central Intelligence Agency
CIHL	customary international humanitarian law
CCF	continuous combat function
DASR	Draft Articles on State Responsibility
DoD	Department of Defense
DPH	direct participation in hostilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
F2T2EA	find, fix, track, target, engage and assess
FARC	Fuerzas Armadas Revolucionarias de Colombia
HPCR	Humanitarian Policy and Conflict Research
IAC	international armed conflict
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICU	Islamic Courts Union
IDI	Institut de Droit International
IED	improvised explosive device
IHL	international humanitarian law
IHRL	international human rights law
IIHL	International Institute of Humanitarian Law
ILA	International Law Association
ISAF	International Security Assistance Force
ISIS	Islamic State in Iraq and al-Sham
ISIS-Y	Islamic State in Iraq and al-Sham in Yemen
ISS	Islamic State in Somalia
JSOC	Joint Special Operations Command
OAG	organised armed group
NIAC	non-international armed conflict
NGO	non-governmental organisations
NSA	non-state actor
NSS	National Security Strategy
PCA	Permanent Court of Arbitration
PCFRS	Provisional Constitution of the Federal Republic of Somalia
PLO	Palestine Liberation Organisation
PPG	Presidential Policy Guidance
SFG	Somalia Federal Government
STSL	Special Tribunal for Sierra Leone
TBIJ	The Bureau of Investigative Journalism
TFCRS	Transitional Federal Charter of the Republic of Somalia
TFG	Transitional Federal Government
TTP	Tehrik-i-Taliban Pakistan
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council

US	United States
USAF	United States Air Force
USS	United States Ship
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

CHAPTER 1 — INTRODUCTION

That armed drones[1] are part of modern conflict is not an original or insightful claim. Their use, along with other technologies (such as cyber warfare), is now so well-known as to be a fact recognised by anyone who opens a newspaper. It is also incontestable that drones raise legal concerns, with much having been written celebrating and excoriating their use, which is presented as being both uniquely able to adhere to international law and inherently contrary to almost every rule or norm going.

Despite this, the use of drones has not been subjected to a sustained, holistic and in-depth analysis through the overlapping lenses of relevant frameworks of international law, taking account of the abstract *thing* that is a drone, as well as the concrete uses to which they have been put. The literature on the use of armed drones has generally taken three forms: some have provided general overviews of the relationship of drone strikes and international law;[2] others have focused on analysis of drone strikes in more depth through the lens of a particular area of international law;[3] and some have conducted analyses of drone use in a particular geographical context.[4] While not intended as a full literature

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[1] The term 'drone' is used throughout this work instead of alternatives such as 'unmanned aerial vehicle' or 'remotely piloted air system'. This is solely due to the common use of 'drone' within academia, policy and media circles.

[2] See, for instance, Stuart Casey-Maslen, 'Pandora's Box? Drone Strikes Under *Jus ad Bellum, Jus in Bello,* and International Human Rights Law' (2012) 94(886) International Review of the Red Cross 597; Christof Heyns and others, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65(4) International and Comparative Law Quarterly 791; Michael N Schmitt, 'Drone Attacks Under the *Jus ad Bellum* and *Jus in Bello*: Clearing the "Fog of Law"' (2010) 13 Yearbook of International Humanitarian Law 311.

[3] See, for instance, Aaron M Drake, 'Current US Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law—An Overview' (2011) 39(4) Denver Journal of International Law and Policy 629; Jordan J Paust, 'Self-Defence Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan' (2010) 19(2) Journal of Transnational Law and Policy 237; Kinga Tibori-Szabo, 'Self-Defence and the United States Policy on Drone Strikes' (2015) 20(3) Journal of Conflict and Security Law 381.

[4] See, for instance, Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009' in Simon Bronitt, Miriam Gani and Saskia Hufnagel (eds), *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force* (Hart 2012); Norman G Printer, 'The Use of Force Against

review (rather than presenting a full literature review in this chapter, literature is reviewed throughout, where relevant to the legal framework under consideration) this overview illustrates how scholarship has generally been undertaken on this subject. The research presented herein builds on previous work to present a comprehensive legal analysis of the use of drones, considering key frameworks of international law implicated by their use to arrive at an overall picture of the lawfulness of drone strikes. The doctrinal legal analysis is contextualised through the consideration of US drone strikes in Pakistan, Yemen and Somalia as broad case-studies. Within these case-studies, examples of individual strikes are examined to further contextualise the legal analysis and produce a multifaceted and in-depth understanding of the way drones have been used and the extent to which that use has been lawful.

1.1 Research question

The overarching research question is: to what extent are drone strikes lawful under international law? This is broken down into further questions concerning: the lawfulness of drone strikes *per se* under international law, that is, when considered as an abstract and decontextualized *thing*; and the lawfulness of drone strikes as they have been undertaken by the US as part of its global counterterrorist programmes. These questions are asked in relation to three separate though interconnected frameworks: the law on the use of force, IHL, and IHRL, as the lawfulness of a drone strike depends on the satisfaction of each, necessitating a comprehensive analysis.

1.2 Drone use

Drones—aircraft which are piloted remotely—are not a new phenomenon, having been developed during the First World War and supporting anti-aircraft targeting practice for several decades, before being employed as guided missiles in the Second World War, and

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Non-State Actors Under International Law: An Analysis of the US Predator Strike in Yemen' (2003) 8 UCLA Journal of International Law and Foreign Affairs 331; Sikander A Shah, *International Law and Drone Strikes in Pakistan: the Legal and Socio-Political Aspects* (Routledge 2015).

for reconnaissance in the Vietnam War.[5] In 1995, General Atomics developed the Predator drone, which was used for surveillance and target designation in Kosovo in 1999.[6] In October 2001 the first drone strike was carried out, targeting (and missing) Afghan Taliban Leader Mullah Omar in Kandahar, Afghanistan.[7] Since then, the use of armed drones has ballooned and, as of 2017, 28 states possess armed drones, 10 of which have used them during combat.[8] The research herein focuses on the use of drones by the US rather than any other state due to the breadth of its drone programmes and because its practices raise particularly acute legal issues that are less present in the programmes carried out by other states. For instance, the US is the only state to have undertaken drone strikes extraterritorially, for a long period of time, in regions in which the dominant legal paradigms are unclear. Further, though drone strikes by the US remain predominantly secret, data is available through which the strikes can be analysed, which is far less the case with other users, such as Israel.

1.2.1 US drone operations

In general, the US operates three drone programmes. One is carried out by the USAF in Afghanistan, Libya, Iraq and Syria; another is undertaken by JSOC and focuses on counterterrorism, principally in Yemen and Somalia; the last is the CIA programme on the Pakistan/Afghanistan border.[9] It is the latter two of these programmes that have been focused on in the current study, with case-studies drawn from Pakistan, Yemen and Somalia.

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[5] Medea Benjamin, *Drone Warfare: Killing by Remote Control* (Verso 2013) 13.

[6] Grégoire Chamayou, *Drone Theory* (Penguin 2013) 29-9.

[7] Chris Woods, 'The Story of America's Very First Drone Strike' *The Atlantic* (30 May 2015) https://www.theatlantic.com/international/archive/2015/05/america-first-drone-strike-afghanistan/394463/.

[8] 'World of Drones: Examining the Proliferation, Development, and Use of Armed Drones' (*New America*) https://www.newamerica.org/in-depth/world-of-drones/.

[9] Chris J Fuller, *See it/Shoot it: The Secret History of the CIA's Lethal Drone Program* (Yale University Press 2017) 9-10.

These states were chosen for a variety of reasons. It was a pragmatic choice—there is insufficient space to extend this research to every situation of drone use, therefore it was necessary to be selective. Also pragmatically, there are datasets for the drone programmes in these states, complied by NGOs reporting on drone use, upon which it was possible to draw to enable state- and incident-level case-studies, something that is much more difficult with, for instance, drone use in Syria and Iraq.

Further, drone use in Pakistan, Yemen and Somalia has occurred as a series of discrete strikes, rather than the maelstrom of fighting in other, more intense, conflict zones (such as Afghanistan, Syria and Iraq), meaning that the factual analysis of individual drone strikes is more straightforward as the strikes themselves stand out and have been subjected to media scrutiny. Importantly, it was felt that the unclear nature of the legal context in which drone strikes have occurred in Pakistan, Yemen and Somalia—and the concordant academic dispute over the existence or not of armed conflicts—meant that legal analysis of these areas had the potential to provide greater insight and make a more pronounced academic contribution than analysis of regions where the relevant legal paradigm is clearer (for instance, the armed conflict in Syria). Relatedly, the shifting nature of the context of drone strikes in Pakistan, Yemen and Somalia (between situations of armed conflict and, relatively, 'peacetime') meant that the study of these regions enabled a more holistic approach to be adopted, allowing examination of drone use not just under IHL but also IHRL, rendering the overall analysis significantly richer.

Throughout the work there will be detailed discussion of the facts surrounding drone use in Pakistan, Yemen and Somalia but, for introductory purposes, below is an overview of US drone operations in these areas. Beforehand, it is important to note that successive US officials have asserted that drone strikes target a monolithic enemy, vaguely presented as 'al-Qaeda, the Taliban and associated forces'.[10] This phrase appears repeatedly in public discussion about drone strikes and US counterterrorism, and serves to combine a range of organisationally and geographically distinct groups into a single entity. This blanket term implies that general legal justifications for drone strikes can be made, rather than needing to account for the variety of groups targeted and distinct regional contexts. As

[10] See, for instance, Harold H Koh, 'The Obama Administration and International Law' (US Department of State, 25 March 2010) https://2009-2017.state.gov/s/l/releases/remarks/139119.htm.

will be shown in the following chapters, to do so is grossly misrepresentative and has significant implications for any analysis of the lawfulness of US drone strikes.

1.2.1.1 Pakistan

Pakistan has been host to the US' most prolific drone campaign. The first drone strike occurred in June 2004 and they have been ongoing ever since, with varying frequency. Based on TBIJ data, as of September 2018 there have been 430 confirmed drone strikes, 307 of which occurred during the first four years of the Obama administration.[11] Perhaps counterintuitively, drone strikes have not increased particularly under the Trump administration, with 10 occurring between January 2017 and September 2018.[12]

Drone strikes in Pakistan have targeted three groups: TTP, al-Qaeda and the Haqqani Network. The first two engage in military activity in Pakistan while the latter is involved in the conflict in Afghanistan. Though these groups share ideologies and involve some integration, they should generally be considered as separate and not be conglomerated into one single group.[13]

1.2.1.2 Yemen

US operations in Yemen have occurred since 2001, though drone and other airstrikes did not begin until November 2002, which saw the first example of a drone strike unrelated to an ongoing conflict (a strike examined later in this work[14]). After a pause, airstrikes have been carried out by the US in Yemen since a 2009 cruise missile attack, there

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[11] 'CIA and US Military Drone Strikes in Pakistan, 2004 to Present' (*The Bureau of Investigative Journalism*) https://docs.google.com/spreadsheets/d/1NAfjFonM-Tn7fziqiv33HlGt09wgLZDSCP-BQaux51w/edit#gid=1436874561.

[12] ibid; 'Pakistan: Reported US Strikes 2018' (*The Bureau of Investigative Journalism*) https://www.thebureauinvestigates.com/drone-war/data/pakistan-reported-us-strikes-2018#strike-logs.

[13] In section 3.1.5.2.2 TTP and al-Qaeda are considered together in relation to the NIAC between those groups and the Pakistani government, due to the idiosyncrasies of the situation and the applicable law.

[14] Section 4.4.2.2.

reportedly having been between 315 and 480, with 53 carried out by the Trump administration.[15]

The US carries out attacks in Yemen with conventional jets and cruise missiles as well as drones, and official reports do not generally reveal which platform has been used, making it difficult to accurately assert the extent of drones use. However, an examination of media accounts of airstrikes reveals that 59 percent are claimed to have been carried out by drone, with a further 12 percent being possibly drone strikes. Only 5 percent of attacks were confirmed to have been carried out with other means.[16] In all other reports there is insufficient information to make a determination as to the weapon system used. Therefore it can be said with a degree of confidence that the vast majority of airstrikes in Yemen are carried out by drones.

Drone strikes in Yemen have almost exclusively targeted AQAP, though in 2017 there were two incidents of alleged ISIS-linked camps being struck.[17]

1.2.1.3 Somalia

Somalia has been subjected to US counterterrorist surveillance since 2001, and the first physical operation occurred in 2003, when the US undertook missions to capture terrorist suspects.[18] In January 2007 the US carried out its first airstrikes in Somalia, killing 50

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[15] 'US Strikes in Yemen, 2002 to Present' (*The Bureau of Investigative Journalism*) https://docs.google.com/spreadsheets/d/1lb1hEYJ_omI8lSe33izwS2a2lbiygs0hTp2Al_Kz5KQ/edit#gid=323032473.

[16] Percentages have been rounded to the nearest whole number.

[17] 'US Forces Conduct Strike Against ISIS Training Camps in Yemen' (US Department of Defense, 16 October 2017) https://www.defense.gov/News/Article/Article/1344561/us-forces-conduct-strike-against-isis-training-camps-in-yemen/; Ryan Browne and Zachary Cohen, 'Pentagon: US Airstrikes in Yemen Kill 9 ISIS Militants' *CNN* (Washington, 25 October 2017) https://edition.cnn.com/2017/10/25/politics/us-airstrikes-isis-militants-yemen/index.html.

[18] Adrian Blomfield, 'US Snatches Terror Suspect in Somalia' *The Telegraph* (Nairobi, 20 March 2003) https://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/1425171/US-snatches-terror-suspect-in-Somalia.html.

people using conventional jets.[19] The first drone strike occurred in June 2011, targeting a convoy of fighters.[20] Based on TBIJ data there have up to been 85 drone strikes within Somalia,[21] though conventional airstrikes have continued during the period and some operations have combined strikes from both drones and conventional aircraft.[22] Under the Obama administration, drone strikes were carried out at a relatively low level, with approximately nine in 2015 and 13 in 2016.[23] Since the beginning of the Trump Presidency US operations in Somalia have increased tremendously with 35 airstrikes carried out in 2017 and 18 reported in 2018, up to September.[24]

The extent to which these strikes have been carried out by drone is difficult to say with certainty. Between 2011 and 2016 74 percent of airstrikes were depicted in media reports as carried out by drone. In 2017-18 there is less clarity, recent practice from US Africa Command being to assert that strikes have occurred without giving further information, including the weapon system used.[25] News reports have alleged drone use in 24 percent of strikes in that period, with the rest being unclear, apart from one confirmed instance of

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[19] Jeffrey Gettleman, 'More than 50 Die in US Strikes in Somalia' *New York Times* (Mogadishu, 9 January 2007) https://www.nytimes.com/2007/01/09/world/africa/09cnd-somalia.html.

[20] 'US "Extends Drone Strikes to Somalia"' *Al Jazeera* (1 July 2011) https://www.aljazeera.com/news/africa/2011/06/201163018229379353.html.

[21] 'Somalia: Reported US Covert Actions 2001-2016' (*The Bureau of Investigative Journalism*) https://www.thebureauinvestigates.com/drone-war/data/somalia-reported-us-covert-actions-2001-2017; 'Somalia: Reported US Actions 2017' (*The Bureau of Investigative Journalism*) https://www.thebureauinvestigates.com/drone-war/data/somalia-reported-us-covert-actions-2017; 'Somalia: Reported US Actions 2018' (*The Bureau of Investigative Journalism*) https://www.thebureauinvestigates.com/drone-war/data/somalia-reported-us-actions-2018.

[22] See, for instance, 'US Air Strike "Kills 150 Somali Militants"' *BBC* (7 March 2016) https://www.bbc.co.uk/news/world-africa-35748986.

[23] TBIJ 'Somalia 2001-16' (n 21).

[24] 'US Strikes in Somalia, 2007 to Present' (*The Bureau of Investigative Journalism*) https://docs.google.com/spreadsheets/d/1-LT5TVBMy1Rj2WH30xQG9nqr8-RXFVvzJE_47NlpeSY/edit#gid=0.

[25] See, for instance 'US Conducts Airstrike in Support of the Federal Government of Somalia' (US Africa Command, 27 November 2017) http://www.africom.mil/media-room/pressrelease/30119/u-s-conducts-airstrike-in-support-of-the-federal-government-of-somalia.

conventional jets being used without drones. On this basis is it reasonable to assume that drone strikes continue to make up the majority of airstrikes in Somalia.

Drone strikes in Somalia have almost exclusively targeted al-Shabaab, a group loosely aligned with al-Qaeda, sharing a similar ideology. Two drone operations in Somalia have reportedly targeted members of a splinter group that had professed support for ISIS but do not seem to be integrated with ISIS itself.[26]

1.3 The law

To assert the lawfulness of drone strikes under international law it is necessary to adopt a comprehensive approach—lawfulness does not depend on a single body of law, but on the entirety of laws implicated by their use.[27] Extraterritorial drone strikes touch upon many aspects of international law, but it is necessary to restrict the present analysis to those that are the most immediately relevant. Therefore, Chapter 2 will consider lawfulness under the law on the use of force, comprising the law on consent and self-defence, followed, in Chapter 3, by an analysis of lawfulness during armed conflict through, primarily, IHL. The final substantive analysis, presented in Chapter 4, concerns drone strikes under the operative paradigm of IHRL. By considering these three areas, the analysis takes in the key elements of drone use—the original resort to drone strikes, as well as their ongoing use within and outside of armed conflict—providing the holistic approach necessary to fully assess lawfulness. The work would have been further enhanced by consideration of the law relating to the aftermath of drone use, for instance considering the law on identifying casualties during armed conflict, and *post facto* investigations under IHRL. This absence is unavoidable due to lack of space, though it is nevertheless regrettable, and it is anticipated to feature in future analysis.

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[26] ibid; Harun Maruf, 'Somali Pro-IS Group Chief Survives US Strike, Says Regional Leader' *Voice of America* (5 November 2017) https://www.voanews.com/a/somalia-puntland-pro-islamic-state-group-abdulkadir-mumin/4101841.html.

[27] Heyns and others (n 2) 795.

Of the areas analysed, some have particular potential for advancing relevant research, both generally and in relation to the particular facts considered, and it is in these areas that the work arguably makes its most obvious contributions. The consideration of drone use with consent[28] is an analysis that has not previously been undertaken in significant depth, and the research herein provides conclusions that cut across the dominant tendency within the literature to consider drones from the perspective of self-defence. A further example is the identification of NIACs in Pakistan, Yemen and Somalia and assessment of the presence of IHL as a framework governing drone use.[29] Predominantly, previous analyses of this issue have been brief, whereas the work presented herein involves detailed and in-depth factual assessment. Likewise, the application of multiple interpretations of the concepts of NSA membership and DPH are used to inform nuanced conclusions of the lawfulness of drone strikes under IHL[30] which are original in their scope and depth. Finally, the consideration of IHRL jurisdiction in relation to drone use[31] and the application of the right to life to case-study examples[32] represent original engagement in terms of depth of analysis.

1.4 Methodology

The methodological underpinnings of the work centre around the aim of assessing the lawfulness of drones both in the abstract and in concrete situations. The work, as an exercise of analytical jurisprudence, is grounded on the theoretical basis of substantive legal positivism. Despite potential misgivings over the designation of international law as a *legal system* as such, it is entirely possible to adopt a positivist theory of international *laws*.[33] On this basis, the work conceives of legal analysis as concerning the identification and application of the law as it is, focusing on drone strikes as an abstract phenomenon

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[28] Section 2.2.

[29] Section 3.1.5.

[30] Section 3.2.3.

[31] Section 4.1.1.

[32] Section 4.4.2.

[33] Herbert LA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994) 236-7. See also Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of HLA Hart' (2011) 21(4) European Journal of International Law 967.

and specific instances of their use. Further, the positivist view that there is 'no necessary connection between morality and the content of law'[34] manifests in a separation of *lex lata* and *lex ferenda* in the application of international law herein and, as such, the work is not normative, with no suggestion of how international law *should* regulate armed drones.

This grounding in legal positivism is augmented by an epistemological view of international law as being subject to multiple competing interpretations. This approach draws on Koskenniemi's characterisation of international law as a '[p]olitical struggle … waged … on the meaning of legal symbols'.[35] This recognises the internal logic of international law as a language capable of sustaining opposing viewpoints that can be nonetheless supported by legal arguments,[36] where these remain within the conceivable scope of interpretation of a particular text.[37] This augmentation of positivism enables the work to take account of the pluralism of international law interpretation. An example of this that features within the work is the distinct understandings of membership of an NSA for the purposes of targeting under IHL presented by the ICRC *Interpretive Guidance on the Notion of Direct Participation in Hostilities* and that of the US government in its *Law of War Manual*. Adopting this theoretical approach places the analysis of lawfulness on a surer footing, reducing the extent to which it can be criticised for partiality of interpretation, as well as providing a fuller analysis of lawfulness that avoids privileging one perspective. This approach is particularly necessary in relation to the use of drones, as states have produced interpretations of relevant law that diverge significantly from those of international organisations, courts, scholars and other states.

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[34] Stephen R Perry, 'Hart's Methodological Positivism' in Jules L Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press 2001) 311.

[35] Martti Koskenniemi, 'What Should International Lawyers Learn from Karl Marx?' (2004) 17 Leiden Journal of International Law 229, 236.

[36] Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press 2005) 569.

[37] Gleider Hernández, 'Interpretive Authority and the International Judiciary' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 170-2.

1.5 Methods

On the basis of the methodology outlined above, methods have been adopted that allow the production of conclusions in terms of abstract and concrete lawfulness.

1.5.1 Doctrinal analysis

Reflecting the theoretical framework of legal positivism, the primary method employed is doctrinal analysis,[38] concerned with 'establish[ing] the nature and parameters of the law',[39] making it the most apposite method for undertaking the expositions of law that accompany assessments of lawfulness.

Nevertheless, the augmentation of the positivist methodology requires an augmentation of method, and so the doctrinal analysis undertaken will not aspire to the creation of legal certainties. Instead it will seek to outline the way in which relevant areas of law have been interpreted in different ways, producing distinct assessments of the lawfulness of drone strikes. To account for this, extensive reference is also made to official statements, government documents, manuals and additional sources to demonstrate how relevant international law has been interpreted and subsequently applied to the use of drones.

Using doctrinal analysis to determine interpretations of the law allows the assessment of drone strikes in the abstract, considering the extent to which they can be declared lawful or unlawful in and of themselves. This is important but only presents a partial picture of lawfulness: remaining within the abstract takes account only of the potential lawfulness of drones as a *thing*, it does not enable examination of processes of drone strikes and the way they (and the law) are used. To extend the analysis in this manner, an additional method is used.

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[38] Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart 2011) 37

[39] Terry Hutchinson and Nigel Duncan, 'Defining and describing What we do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 114.

1.5.2 Empirical case-study analysis

To contextualise the lawfulness of drone strikes, the research goes beyond purely abstract assessments and undertakes a series of empirical case-study analyses. This occurs on both a state-level (when lawfulness relates to sovereignty: consent and *jus ad bellum*) and on an individual-level (where lawfulness relates to conduct in relation to individuals: IHL and IHRL), supporting the holistic approach necessary for any claim of lawfulness.

Data is taken from a variety of media sources, with no first-hand data gathered during the research, primarily due to the secrecy surrounding drone use but also the difficulties involved in collecting data in the regions of interest. The research questions explored do not require the gathering of additional data beyond what is already publicly available and, as such, the inability to gather first-hand data does not stymie the research.

Data on the overall instances of drone strikes has been taken from TBIJ, an organisation that, *inter alia*, tracks US drone use. TBIJ data is compiled from a range of sources, including news reports, governments and NSAs.[40] While TBIJ publishes figures regarding the number of people killed, which is broken down into civilians, children and militants, data as to the numbers and identities of those killed have generally not been used within this research. This is due to the contentious and subjective nature of reporting this information: the notion of whether a person is a civilian or not may differ drastically between an international lawyer and a journalist. There are two exceptions where these figures *are* used within the research. First, during case-study analysis, consideration is made of the specific identities of those killed to inform determinations of lawfulness, for instance in terms of IHL distinction or IHRL necessity. However, this information is taken from media reports of drone strikes rather than from TBIJ, and case-studies were chosen where the identity of those killed was clear. Additionally, use has been made of TBIJ overall casualty data in the analysis of IHL precaution, in which an approach was used that involved the comparison of the numbers of people killed in drone strikes and of civilians killed specifically.[41] The potential problems of using this type of data were

[40] 'Our Methodology' (*The Bureau of Investigative Journalism*) https://www.thebureauinvestigates.com/explainers/our-methodology.

[41] Text from n 1579 to n 1582.

mitigated by drawing from a single source (TBIJ reports) thereby accounting for idiosyncrasies of classification that might distinguish data drawn from different sources; and by limiting this type of analysis to a very small part of the overall research.

The scope, depth and approach of this research renders it uniquely able to answer questions surrounding the lawfulness of drone use, which can only be determined through a compressive analysis covering each interlinked framework. Having set out the background, the analysis now begins with the law on the use of force.

CHAPTER 2 — THE LAW ON THE USE OF FORCE

2.1 Introduction

The initial issue facing extraterritorial drone strikes is whether the resort to their use is lawful. This area is governed by the fundamental prohibition on the use of force, set out in Article 2(4) of the UN Charter, which holds that states 'shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.[42] This is subject to certain exceptions, principal among which are the consent of the territorial state involved; self-defence (under Article 51 of the Charter); and collective action in response to threats to peace (under Chapter VII of the Charter).[43] The first two have been proffered as justifications for the use of drone strikes by the US in Pakistan, Yemen and Somalia and their ability to render these strikes lawful will be interrogated within this chapter.

In terms of the law on the use of force, a drone is no different from any other weapon system.[44] It is perhaps the least controversial aspect of international law relating to drone use, within this research, as there are no additional considerations than if another means of combat was used. Nevertheless, this only presents a partial picture; although drone strikes apparently raise no unique legal questions in this area, the manner in which drone campaigns are conducted raises non-unique questions in a unique way, emphasising the

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[42] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter).

[43] Some would argue that there is an additional basis for permissible uses of force under the doctrine of humanitarian intervention. Nevertheless, this controversial legal justification is not universally accepted (see, for instance, Christian Henderson, 'The UK Government's Legal Opinion on Forcible Measures in Response to the Use of Chemical Weapons by the Syrian Government' (2015) 64(1) International and Comparative Law Quarterly 179); additionally it is not relevant to the use of drone strikes by the US in Pakistan, Yemen or Somalia and so will be not considered.

[44] Louise Doswald-Beck, 'Confronting Complexity and New Technologies: A Need to Return to First Principle of International Law' (2012) 106 American Society of International Law Proceedings 107, 112.

importance of the study of drones and law on the use of force, despite the superficial appearance of 'ordinariness'.[45]

Drones allow the long-term use of low-level force to target individuals extraterritorially. By enabling this particular *type* of ongoing force, the use of drones for lethal attacks is an important area for analysis beyond a general consideration of the use of force. As it is the factual use of drones that is of note (the way they are used rather than *that* they are used), this chapter will avoid abstract considerations of drone use, as this mirrors any other abstract question of the resort to force. Instead, this chapter will examine the facts surrounding the reality of US drone campaigns in Pakistan, Yemen and Somalia, to assess how these quasi-perpetual low-level uses of force have been justified and the extent to which they can be said to be lawful in terms of the law governing the resort to force.

2.2 Consent[46]

The US has utilised consent to attest to the lawfulness of its drone programme together with the *jus ad bellum* doctrine of self-defence. Their regular presentation together demonstrates two things: first, though the provision of multiple justifications is common practice in international law,[47] it implies a pragmatic equivocation by the US, suggesting a potential fallibility of consent to justify the use of force, in contrast to the cast-iron image often presented rhetorically. Second, it highlights the opaque presentation given by the US of its various drone programmes, in which multiple campaigns, such as those in Pakistan, Yemen and Somalia, are portrayed as part of a diffuse whole, justified by

[45] Philip Alston, 'The CIA and Targeted Killings Beyond Borders' (2011) 2 Harvard National Security Journal 283, 325-6.

[46] This section has been modified from Max Byrne, 'Consent and the Use of Force: an Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3(1) Journal on the Use of Force and International Law 97.

[47] For instance, in justifying its intervention in Grenada in 1983, the US posited three bases, consent being one of them (the other two being protection of nationals and collective self-defence; see UNSC, Letter dated 25 October 1983 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (25 October 1983) UN Doc S/16076).

both consent and self-defence, a vagueness symptomatic of the secrecy surrounding the US armed drones programme.

Consent has been repeatedly invoked to justify US drone strikes, though generally just briefly. In 2012 then-Attorney General Eric Holder stressed that extraterritorial uses of force were 'consistent with international legal principles if conducted … with the consent of the nation involved.'[48] Similar sentiment was expressed by the US Department of Justice which emphasised that extraterritorial force carried out with consent 'would be consistent with international legal principles of sovereignty and neutrality'.[49] In 2012, in the Obama administration's first acknowledgment of its covert drone programme, then-Homeland Security Advisor, John Brennan, referred specifically to consent as providing for the lawful use of drones.[50] Thus consent is a key plank in the US justification of the resort to drone strikes, yet it has been subjected to far less analysis than self-defence.[51]

Within international law, consent is typically presented as foundational: Gray has asserted that the post-war right of states to request intervention has been 'taken for granted'[52] and the ILC branded consent a 'basic international law principle'.[53] This is echoed within the

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[48] Eric Holder, 'Attorney General Eric Holder Speaks at Northwestern University School of Law' (US Department of Justice, 5 March 2012) http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law. See also John O Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy' (Wilson Center, 30 April 2012) http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

[49] US Department of Justice, *Lawfulness for a Lethal Operation Directed Against a US Citizen who is a Senior Operational Leader of al-Qa'ida or an Associated Force* (White Paper, 2011) https://fas.org/irp/eprint/doj-lethal.pdf, 1.

[50] Brennan (2012) (n 48).

[51] A notable exception to this being an in depth study of drone use specifically in Pakistan, which contains a chapter dealing solely with consent, Shah (2015) (n 4).

[52] Christine Gray, *The Use of Force in International Law* (3rd edn, Oxford University Press 2008) 85. Supporting the idea of consent as axiomatic, Gray refers to multiple examples of state practice in which force was used consensually with no international condemnation: France's interventions in Gabon (1964), Chad (1968), Côte d'Ivoire (2002) and Senegal's intervention in Guinea-Bissau (1998).

[53] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the Commission to the General Assembly on the Work of its Fifty-Third Session (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 (DASR) Article 20, para 1.

literature on drones: Schmitt has touched briefly on consent, claiming that it is 'indisputable that one state may employ force in another with the consent of that state'.[54] While correct, Schmitt's assertion reveals an important trait of consent as discussed within the drone literature, in which the validity of consent to drone strikes is presumed but not tested. The 'indisputability' of consent is privileged and does not feature in Schmitt's analysis, which instead focuses on 'operations … conducted without the [host] state's acquiescence'.[55] Consent viewed in this manner reveals its capacity to be understood as a principle with such exculpatory force that it forecloses the possibility of critical analysis, perhaps explaining the paucity of scholarship on the subject.

To fill this gap, the subsequent sections of this chapter will consider the key doctrinal requirements of consent. This will then be used as a framework for analysis with which to assess US drone strikes within Pakistan, Yemen and Somalia.

2.2.1 Consent within international law

Consent is a manifestation of the 'sovereign equality' of states, the underlying principle of the UN as enshrined in Article 2(7) of the UN Charter. A corollary of the UN Charter's privileging of sovereignty is that states may ostensibly govern all activity carried within their territory, meaning they may *prima facie* invite forceful interventions from third states. Consent, as an exercise of sovereignty, removes that specific use of force from the *jus ad bellum* framework of the UN Charter. If valid, the use of force does not infringe the 'territorial integrity or political independence of any state',[56] but is instead a manifestation of that state's political independence. Consent, unlike the 'excused violations' of sovereignty, (self-defence and actions under Chapter VII), 'involves no breach of Article 2(4) *ab initio*.'[57]

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[54] Schmitt 'Drone Attacks' (2010) (n 2) 315.

[55] ibid 315.

[56] UN Charter Article 2(4).

[57] Use of Force Committee, 'Report on Aggression and the Use of Force' (International Law Association, 2018) http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf 18.

That a state can consent to acts otherwise contrary to its sovereignty is recognisable broadly within international law. Article 2(7) UNC states that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are *essentially within the domestic jurisdiction* of any state' emphasising the preservation of states' capacity to self-govern, extending to inviting external intervention.[58] In a similarly implicit manner, consent features in the 1974 Definition of Aggression, which includes the 'use of armed forces which are within the territory of another State *with the agreement of the receiving State*, in contravention of the conditions provided for in the agreement',[59] indirectly acknowledging consent as self-evident within international law. Consent is made explicit in the DASR, being specifically posited as potentially precluding the wrongfulness of acts otherwise contrary to international law.[60]

Consent to intervention is evident in the practice of states. Action by the US-led coalition against ISIS in Iraq was based on the invitation of the Iraqi government. Consent was the sole legal justification adduced by President Obama for the 2014 action in Iraq, rather than relying on alternatives like humanitarian intervention.[61] This was restated by Stephen Preston, then-General Counsel of the US Department of Defense, who called consent 'a firm foundation in international law'.[62] Similarly, the UK government stated that the 'prohibition [on the use of force] does not apply to the use of military force by one State on the territory of another if the territorial State so requests or consents',[63] with consent presented as 'provid[ing] a clear and *unequivocal* legal basis' for the use of

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[58] Emphasis added.

[59] UNGA Res 3314 (XXIX) (14 December 1974) Article 3(e) (emphasis added).

[60] DASR Article 20.

[61] Letter from President Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (23 September 2014) https://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq.

[62] Stephen Preston, 'The Legal Framework for the United States' Use of Military Force Since 9/11' (US Department of Defense, 10 April 2015) http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1931.

[63] Summary of the Government Legal Position on Military Action in Iraq Against ISIL (UK Prime Minister's Office, 25 September 2014) https://www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil.

force,[64] demonstrating the power consent is seen to possess for allowing the use of force. The absence of equivocality suggests an interpretation in which consent creates a strong presumption of lawfulness. Echoing this, then-Prime Minister of Australia Tony Abbott described force used with consent as 'perfectly, perfectly legal under international law'.[65] Abbott's depiction of consent as providing a 'perfect' justification for the use of force, with the implications of irrefutability that this carries with it demonstrates the potential of consent, once invoked, to stymie critique. These assured proclamations by states as to the nature of consent demonstrate both the doctrine's presence in international law but also its rhetorical power, emphasising the vital need for in-depth examination of consent as it has been used in relation to drone strikes.

Consent is, therefore, clearly a part of international law. In order to have interrogative protentional, however, it is necessary to set out its constituent elements. These elements will be set out presently, before being applied to the campaigns of drone strikes carried out by the US in Pakistan, Yemen and Somalia. The DASR notion of consent provides a useful framework, however, as a secondary rule of state responsibility, it is used here as analogous to the primary norm of consent avoiding *jus ad bellum* violations.[66]

2.2.1.1 Consent must be 'valid'

An initial and overarching requirement of consent presented by Article 20 DASR is that it must be 'valid'. While 'validity' relates to the legitimacy of consent generally, the ILC has identified specific aspects of valid consent, such as the need for consent to be 'freely given and clearly established', 'actually expressed by the State rather than merely presumed' and not 'vitiated by error, fraud, corruption or coercion'.[67] This understanding is similar to the definition of 'request' in the IDI Resolution on Military Assistance on

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[64] UK Government Legal Position (n 63) (emphasis added).

[65] Fran Kelly, Interview with Tony Abbott, Prime Minister of Australia (Department of the Prime Minister and Cabinet, 16 September 2014) https://pmtranscripts.pmc.gov.au/release/transcript-23831.

[66] An approach adopted by others. See, for instance, Michael N Schmitt, 'Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law' (2013) 52 Columbia Journal of Transnational Law 77, 82.

[67] DASR Article 20 para 6.

Request, which must '[reflect] the free expression of will of the requesting State and its consent to the terms and modalities of the military assistance'.[68] Further illustration is provided by the ILC commentary on Article 45 DASR, governing the waiver of a state's right to invoke state responsibility, which is analogous to consent, providing state acquiescence to intervention after the fact. The commentary states that a waiver can be inferred through unilateral statements or conduct, but specifies that 'the conduct or statement must be unequivocal.'[69]

The vitiating power of fraud, corruption and coercion manifests elsewhere in international law, principally in Articles 49 and 50 VCLT—in which fraud or corruption can invalidate consent—and 51 and 52—which render treaties respectively without legal validity or void if agreement was produced by coercion, either against the state representative[70] or the state with the threat or use of force.[71] Therefore it is clear that at a minimum consent must represent the true, voluntary and clear intention of a state. The ICJ has emphasised clarity and voluntariness, asserting in the *Armed Activities* case that a state may withdraw consent with 'no particular formalities'.[72] Though the Court left open the question of the level of renunciation required to retract consent, the fact that such inferred severance is possible (in the case itself, consent was inferred through the DRC's accusation that Uganda had invaded its territory[73]) suggests a high threshold for consent to be valid.

2.2.1.2 Consent given by the 'legitimate government'

While Article 20 DASR refers to consent 'by a State', it is that state's government that consents. While states are 'non-physical juridical entities', governments are 'the

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[68] Institut de Droit International, Present Problems of the Use of Force in Internatioanl Law 10th Commission, Sub-Group C—Military Assistance on Request, Resolution (8 September 2011) Article 1(b).

[69] DASR Article 45 para 5.

[70] United Nations, Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) Article 51.

[71] VCLT Article 52.

[72] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Reports 168, para 51.

[73] ibid para 53.

exclusively legally coercive organizations for making and enforcing certain group decisions.'[74] It is a 'basic principle' in international law that 'the government speaks for the State and acts on its behalf'.[75] Indeed, Article 1 of the Montevideo Convention on the Rights and Duties of States specifically cleaves state and government. As such, consent emphasises the legitimacy of the consenting regime, as it is the voice of the state. This raises important questions as to the ability of weak governments to consent to third state interventions, as is potentially the case in Yemen and Somalia.

The imperative of legitimacy is prevalent within the doctrine of consent, identified as a key test within Doswald-Beck's preeminent study,[76] and present within Article 20 DASR.[77] As for what demonstrates the legitimacy of a government, the principal issue has been control of the state, though whether a government must exert *de facto* or *de jure* control is subject to dispute: it is not immediately clear which of the two is determinative of legitimacy.

Doswald-Beck draws evidence from pre-UN Charter arbitral decisions which favoured a finding of legitimacy through *de facto* control. In the *Dreyfus* case it was held that 'the usurper who *in fact* holds power with the express or tacit assent of the nation acts and validly concludes treaties in the name of the State'.[78] Similarly the *Tinoco* arbitration concluded that '… non-recognition … cannot outweigh … the *de facto* character of Tinoco's government.'[79] Thus these decisions privilege *de facto* control, with no consideration of the legal nature of control. State practice has been more equivocal and in 1986, when Doswald-Beck's study was published, *de facto* control (understood

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[74] Edward H Robinson, 'The Distinction Between State and Government' (2013) 7/8 Geography Compass 556, 561.

[75] Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56(1) British Yearbook of International Law 189, 190.

[76] Doswald-Beck (n 75) 191.

[77] DASR Article 20 para 6.

[78] '[L]'usurpateur qui détient en fait le pouvoir avec l'assentiment exprès ou tacite de la nation agit et conclut valablement au nom de l'Etat des traités': *Affaire du Guano (Chile v France)* (1901) 15 RIAA 125, 350.

[79] *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v Costa Rica)* (1923) 1 RIAA 369, 381.

generally to be 'effective control'[80]), though still the most important, was not the sole consideration in determining legitimacy, with instances of consent being accepted from governments lacking effective control of their states.[81] More recently, the Use of Force Committee of the ILA has opined that consent may be given by a government with either *de jure* or *de facto* control.[82] Wippman has suggested a reading of legitimacy in which the loss of control does not vitiate a government's capacity to consent 'so long as [it] retains control over the capital city and does not appear to be in imminent danger of collapse'.[83] Nevertheless, this view is questionable in the light of Gray's examination of state practice, which provides no uniformity in terms of the required nature of governmental control.[84] To add further complication, Fox has suggested the emergence of a post-Cold War, governance-based approach, which asserts the legitimacy of governments with a democratic mandate,[85] though acknowledging that all relevant practice has occurred within the narrow category of elections that were internationally monitored.[86]

Further, Doswald-Beck argued that prior recognition of a government is 'extremely important' and that 'recognition will rarely be withdrawn from an established regime, even once it has lost control, if there is no new single regime in control to take its place.'[87] Recognition plays a part in assessing the legitimacy of a government but is not entirely determinative. Talmon has illustrated the concept's dual and intersecting meanings: recognition can mean one government's willingness to 'enter into official relations' with

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[80] HL Deb 28 April 1980, vol 408, col WA1122. This is also evident in the jurisprudence of the ICJ, e.g. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Reports 14, para 115.

[81] Doswald-Beck (n 75) 197-8, citing, *inter alia*, Lebanon's invitation to UN Interim Force in Lebanon in 1978 despite the army's limited control over the capital.

[82] Use of Force Committee (2018) (n 57) 18-9.

[83] David Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7 Duke Journal of Comparative and International Law 209, 220.

[84] Gray (n 52) 99.

[85] Gregory H Fox, 'Intervention by Invitation' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 834

[86] Fox (n 85) 837.

[87] Doswald-Beck (n 75) 199.

another, or it can mean that the former recognises that the latter 'exists *as such*'.[88] As a result of this, non-recognition does 'not necessarily mean that … the unrecognised government does not exist as a government in the sense of international law. It may mean only that the recognizing government is unwilling to enter into normal … relations with it.'[89] Therefore it is conceivable that non-recognition will not always render a government unable to consent if it maintains *de facto* control.

The situation remains ambiguous but the predominant interpretation appears to be that a government can be legitimate, and may consent to intervention, either by exercising effective control or, in the absence of such control, if it is recognised by the international community and has not been replaced by another entity. Nonetheless, even this broad requirement is questionable in light of Russia's use of armed forces in Ukraine at the request of Ukrainian President Yanukovych *after* he had fled the country[90] and had been replaced by an interim government[91] (though in a manner that did not accord with the constitution[92]). However, the consequent condemnation by the US as an act of aggression[93] maintains the notion of consent being available only until a government is replaced.

2.2.1.3 Consent given by the requisite official

Related to legitimacy is the requirement that consent is given by an official representing the government. In the DASR commentary, the ILC advocates a contextual approach to consent, stating that '[w]ho has authority to consent to a departure from a particular rule

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[88] Stefan Talmon, *Recognition of Governments in International Law* (Oxford University Press 1998) 33 (original emphasis).

[89] ibid 33.

[90] UNSC, 7125th Meeting (3 March 2014) UN Doc S/PV.7125, 4.

[91] Harriet Salem, 'Who Exactly is Governing Ukraine?' *The Guardian* (Kiev, 4 March 2014) http://www.theguardian.com/world/2014/mar/04/who-governing-ukraine-olexander-turchynov.

[92] James A Green, 'Editorial Comment: The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited' (2014) 1(1) Journal on the Use of Force and International Law 3, 6.

[93] John Kerry, 'Remarks: Secretary of State John Kerry at a Solo Press Availability' (US Department of State, 4 March 2014) US Department of State https://2009-2017.state.gov/secretary/remarks/2014/03/222882.htm.

may depend on the rule … Different officials or agencies may have authority in different contexts'.[94] As such, there is flexibility as to the particular official empowered to consent, which allows for constitutional variation between states. According to the VCLT, officials considered to represent a state without the need for full powers are Heads of State, Heads of Government and Ministers for Foreign Affairs.[95] Considering these two together, it is reasonable to conclude that consent to foreign intervention can be given by one of these three officials, due to the nature of the act carried out. This is borne out by state practice and *opinio juris*: in 1958 it was King Hussein of Jordan who requested intervention from the UK;[96] the request in 1983 for external intervention in Grenada was made by Governor-General Sir Paul Scoon;[97] President Kabila originally provided consent to the presence of Ugandan troops on the territory of the DRC;[98] and, most recently, force has been used in Iraq against ISIL at the request of the Iraqi foreign minister.[99] Thus it is clear that in order to establish the validity of consent when authorising uses of force, it is necessary to determine its ultimate source.

2.2.2 Consent and US drone strikes

Having set out the doctrine of consent, it will be applied to US drone strikes in the areas of Pakistan, Yemen and Somalia, which will each be treated in turn.

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[94] DASR Article 20 para 6.

[95] VCLT Article 7(2).

[96] Quoted in Doswald-Beck (n 75), 214. It should be noted that the UK invoked collective self-defence to justify this intervention, but it is nonetheless supportive as to who may give consent.

[97] Marian Nash, *Cumulative Digest of United States Practice in International Law 1981-88* (US Department of State, 1995) Book III, 3399.

[98] *Armed Activities* (n 72) para 29.

[99] Martin Chulov and Spencer Ackerman, 'Iraq Requests US Air Strikes as Isis Insurgents Tighten Grip on Oil Refinery' *The Guardian* (Baghdad and Washington, 18 July 2014) http://www.theguardian.com/world/2014/jun/18/iraq-request-us-air-strikes-isis-baiji-oil.

2.2.2.1 Pakistan

In Pakistan, consent has been apparently forthcoming in secret. It has been reported that President Musharraf consented to US drone strikes from their commencement in 2004,[100] and leaked documents indicate that between 2007 and 2011 the government of Pakistan and the CIA cooperated closely,[101] suggesting that valid consent existed at that time. However, in 2013 Prime Minister Nawaz Sharif withdrew this consent, asserting that drone strikes were a violation of sovereignty,[102] a position more recently reiterated by the Pakistani foreign ministry.[103] Following the approach of international institutions,[104] and the ICJ decision in the *Armed Activities* case in which retraction of consent can be made by inference,[105] this statement represents a clear withdrawal of consent, removing it as a justification for drone strikes.

Some writers on drone strikes in Pakistan suggest that consent is not a necessary avenue to explore in terms of lawfulness. Paust has adopted such a broad interpretation of self-defence (as explored below[106]) that, effectively, the validity of consent is beside the point, as drone strikes against NSAs will *always* be justified as self-defence.[107] While Paust

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[100] Steve Coll, 'The Unblinking Stare: The Drone War in Pakistan' *The New Yorker* (24 November 2014) https://www.newyorker.com/magazine/2014/11/24/unblinking-stare; Mark Mazzetti, 'A Secret Deal on Drones, Sealed in Blood' *New York Times* (6 April 2013) https://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?pagewanted=all.

[101] Greg Miller and Bob Woodward, 'Secret Memos Reveal Explicit Nature of US, Pakistan Agreement on Drones' *Washington Post* (24 October 2013) http://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html.

[102] ibid.

[103] Jon Boone and Stephanie Kirchgaessner, 'Pakistan Uses Hostage Killings to Underline Risk of US Drone Strikes' *The Guardian* (Islamabad and Milan, April 2015) http://www.theguardian.com/world/2015/apr/24/pakistan-us-hostage-killings-drone-strikes-weinstein-lo-porto.

[104] Text from n 67 to n 69.

[105] *Armed Activities* (n 72) para 53.

[106] Text from n 419 to n 422.

[107] Paust (2010) (n 3) 249-50.

does not suggest there is no place whatsoever for consent in the use of force,[108] consent is absent from his analysis of drone strikes in Pakistan.

The clandestine nature of consent in Pakistan has been suggested to undermine its validity. O'Connell, writing prior to the revelation of Pakistani consent, asserted a need for 'express, *public* consent',[109] suggesting that validity requires publicity. It is unclear from where O'Connell gets support for this, as a publicity requirement is not present in any international legal documents or as customary international law. Shah also deals with secretive consent in relation to drone strikes, recalling the general principle promoting publicity arising out of the League of Nations' prohibition on secret agreements, to argue that secret consent is at best 'legally questionable in the context of international law'.[110] This is a persuasive line of reasoning but Article 18 of the Covenant of the League of Nations,[111] to which Shah refers, relates to the agreement of treaties specifically, and is only applicable by analogy to consent to intervention and so does not resolve the issue. Elsewhere it has been asserted that, in terms of state responsibility, 'consent can be *expressed* or *tacit*, *explicit* or *implicit*',[112] the key issue being whether it 'can be evidenced'.[113] In turn, the ILC's non-exhaustive list of activities that might be consented to includes, for instance, 'official investigations or inquiries', activities that could conceivably be consented to without publicity.[114] Therefore there seems little weight to the argument that the secrecy of Pakistan's consent undermines its validity. Nevertheless, once consent was withdrawn in 2013 the lawfulness of further drone strikes would be entirely a question of *jus ad bellum*, unless there was a continuation of consent in secret.

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[108] Jordan J Paust, 'Operationalizing Use of Drones Against Non-State Actors Terrorists Under the International Law of Self-Defense' (2015) 8 Albany Government Law Review 166, 174-5.

[109] O'Connell (2012) (n 4) 282.

[110] Shah (2015) (n 4) 102.

[111] Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 37 UKTS 493.

[112] ILC, Eighth Report on State Responsibility, by Mr Roberto Ago, Special Rapporteur—the Internationally Wrongful Act of the State, Source of International Responsibility (Continued) (24 January, 5 February, 15 June 1979) UN Doc A/CN.4/318 and ADD.1-4 para 69.

[113] Use of Force Committee (2018) (n 57).

[114] DASR Article 20 para 2.

In terms of the legitimacy of the government, the doctrinal debate over the need for *de jure* or *de facto* control is not immediately relevant. During the period in which consent was given, the state was represented by an elected government, which continues to have effective control over most of the country and possesses *de jure* legitimacy, holding power lawfully according to the Constitution. Thus, the central government is legitimate insofar as it is necessary to consent to the use of force within its territory. Nonetheless, all but one of the drone strikes carried out in Pakistan have occurred in FATA, the vast majority in North and South Waziristan,[115] regions that exist in a state of semi-autonomy. Thus it may be argued that the central government is disempowered to consent to uses of force in these areas.

FATA is part of Pakistan according to the Constitution,[116] and has a number of members within the National Assembly[117] and the Senate.[118] Nonetheless, under Article 247(3), acts of the National Assembly do not apply automatically to FATA, requiring first the direct approval of the President. Thus the tribal areas have a level of constitutional autonomy that could conceivably alter the operation of consent. In light of the dual-nature of 'legitimacy', this constitutional arrangement could be argued to have implications as to the Islamabad government's claim to exercise *de jure* control over the tribal regions. Nonetheless, Article 247(5) empowers the President to 'make regulations for the peace and good government of a Federally Administered Tribal Area or any part thereof' and FATA regions are represented in the Parliament.[119] Thus there exists constitutional integration which is sufficiently demonstrative of *de jure* control of FATA, regardless of the area's autonomy.

There is a further argument to be made in terms of the lack of *de facto* control exercised over FATA, which has long been separated from the central government. Described in 1893 as being 'severely left alone' by the British authorities despite being within British

[115] TBIJ 'Pakistan 2004 to Present' (n 11).

[116] The Constitution of the Islamic Republic of Pakistan (1973) (Constitution of Pakistan) Article 1(2)(c).

[117] Constitution of Pakistan Article 51(3).

[118] Constitution of Pakistan Article 59(1)(b).

[119] Constitution of Pakistan Article 51.

India,[120] colonial-era treaties maintained the autonomy of the region within the state,[121] a situation that broadly remains. It has been suggested, however, that since 2001 there have been significant increases in militancy, with fighters crossing the border into Pakistan from Afghanistan, and concomitantly local tribes resisting attempts by the central government to reform governance and administration in the region.[122] Murphy has called this the 'Talibanization' of FATA, concluding that the ongoing insurgency has the capacity to restrict the ability of the central government to exercise effective control over the region, questioning its legitimacy and consequently its ability to give valid consent to uses of force.[123]

Nevertheless, this notion of 'Talibanization' fails to represent the reality within FATA,[124] and, regardless, there is no state practice to suggest that a government is disempowered to consent to interventions within regions where its control is less certain, if it maintains control over the rest of the state. For instance, in 2013 France used force in Mali upon the invitation of the government, which, at the time, had lost control of the relevant region.[125] Similarly, interventions in Iraq against ISIS have evidenced acceptance of consent from a government without effective control, and suffering a serious existential challenge.[126] As Wippman has suggested, where an incumbent government 'exercises control over most of the state', it 'ordinarily retains full authority to request external assistance'.[127]

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[120] Theodore L Pennell, *Among the Wild Tribes of the Afghan Frontier* (Seeley & Co. 1909) 48.

[121] See, for instance, Agreement Between British and Wana Wazirs no. XIX (1921), appended in Akbar S Ahmed, *Resistance and Control in Pakistan* (Revised edn, Cambridge University Press 2004) 156-7, asserting that the (British) Government of India 'has no intention of introducing … regular administration of a settled district, but … will administer it on tribal lines in accordance with tribal customs and usage.'

[122] 'Country Reports on Terrorism' (US Department of State, 2010) 162.

[123] Sean D Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan' (2009) 85 International Law Studies 109, 119.

[124] Max Byrne, 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3(1) Journal on the Use of Force and International Law 97, 111-2.

[125] 'Mali Tuareg Rebels Declare Independence in the North' *BBC* (6 April 2012) http://www.bbc.co.uk/news/world-africa-17635437.

[126] Ben Smith, 'ISIS and the Sectarian Conflict in the Middle East' (19 March 2015) House of Commons Library, Research Paper 15/16, 54.

[127] Wippman (n 83) 213-4.

This, coupled with the recognisable constitutional framework governing the relationship between FATA and Islamabad, providing *de jure* legitimacy, and the absence of a 'new single regime in control',[128] leads to the conclusion that the government of Pakistan is the legitimate government of FATA and may consent to drone strikes. Of course, the corollary of this is that the government also has the ability to *revoke* consent to drone strikes, which it has done.

The need for consent to be given by the requisite official is relevant to the use of drones in Pakistan, due to the various political offices within the government and their cleaved nature. The existence of the distinct offices of President, as head of state,[129] and Prime Minister, elected by the National Assembly,[130] has the potential to confuse the provision of consent. Under Pakistan's constitution the President must be *kept informed* by the Prime Minister of 'all matters of internal and foreign policy'[131] but is empowered only to act on the advice of the Cabinet or Prime Minister.[132] The President is symbolic, while the Prime Minister is the *de jure* principal official able to consent to external interventions. Consent to US drone strikes was given by both President Musharraf[133] and Prime Minister Gilani[134] therefore satisfying this requirement; that is, until consent was rescinded by the government in 2013.[135]

Despite the government's retraction of consent in 2013, the 2013-16 Chief of Army Staff, Reheel Sharif, was reported to have requested US help in addressing belligerent NSAs with Pakistan.[136] Murphy has suggested that the Chief of Army Staff 'might be seen as

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[128] Doswald-Beck (n 75) 199.

[129] Constitution of Pakistan Article 41(1).

[130] Constitution of Pakistan Article 91(3).

[131] Constitution of Pakistan Article 46.

[132] Constitution of Pakistan Article 48(1).

[133] Mazzetti (n 100).

[134] 'Wikileaks: Kayani Wanted More Drone Strikes in Pakistan' *Express Tribune* (20 May 2011) https://tribune.com.pk/story/172531/wikileaks-kayani-wanted-more-drone-strikes/.

[135] Miller and Woodward (n 101).

[136] 'Old Problems, New Hope' *The Economist* (11 December 2014) http://www.economist.com/news/asia/21636088-nato-lowers-flag-taliban-have-not-been-beaten-militarily-politically-they-have-been.

deputized to provide consent'[137] which could imply ongoing consent. However, as stated by the Special Rapporteur on Extrajudicial, Summary and Arbitrary executions, '[w]here there is a difference of view between the highest authorities in the Government and lower-level officials, the view of the higher-level officials should be taken as determinative.'[138] Therefore, contrary statements by the Chief of Army Staff would not operate to overrule the retraction of consent from the Prime Minister.

As a result, the facts demonstrate that consent was operative in relation to drone strikes carried out in Pakistan between 2004 and June 2013, but that for any strikes undertaken outside this period an alternative basis must be found to establish their lawfulness, covering approximately 61 drone strikes. Without an alternative basis for lawfulness they will very likely have occurred in breach of *jus ad bellum*.

2.2.2.2 Yemen

In Yemen, consent has reportedly been given, initially by President Saleh and then by his successor, President Hadi, for each individual drone strike[139] and generally.[140] Consent has clearly been given by the requisite official and there is no assertion that consent has not been freely given, and so Yemeni consent is *prima facie* valid. This is regardless of the fact that in 2013, the Yemeni Parliament called for drone strikes to cease[141] as it does not have the executive capacity to withdraw consent.

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[137] Murphy (n 123) 119.

[138] UNGA, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (13 September 2013) UN Doc A/68/382 para 82.

[139] Greg Miller, 'Yemeni President Acknowledges Approving US Drone Strikes *Washington Post* (29 September 2012) http://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf_story.html.

[140] *A Wedding that Became a Funeral: US Drone Attach on Marriage Procession in Yemen* (Human Rights Watch, 2014) http://www.hrw.org/sites/default/files/reports/yemen0214_ForUpload_0.pdf 6.

[141] Hakim Almasmari, 'Drone Strikes Must End, Yemen's Parliament Says' *CNN* (15 December 2013) https://edition.cnn.com/2013/12/15/world/meast/yemen-drones/index.html.

Nevertheless, the legitimacy of the government of Yemen is in question, due to its instability. Both President Saleh and Hadi held power legally, being elected according to Article 106(a) of the Constitution of Yemen[142] and so there is no debate concerning the government's *de jure* legitimacy. It is, however, questionable as to whether the government possesses sufficient effective control to be legitimate as regards consent. In illustrating this, a very brief history of the Yemeni government is necessary. The post-unification government of Yemen has historically had tenuous control over parts of the country. Since 2004 Houthi rebels have been fighting the regime and in 2011 ASY, an umbrella group including AQAP, took control of parts of the south of the country, maintaining control until June 2012 when they were retaken by government and local forces supported by US airstrikes.[143]

President Hadi came to power in a single-candidate election after the Arab Spring in 2012 (that it may be described as undemocratic does not, under international law, affect Hadi's legitimacy to consent to intervention[144]). Since the election, the Houthi rebellion has grown and poses a serious challenge to the government's *de facto* control. In January 2015 the Yemeni capital Sana'a was captured by rebels, who overran government buildings[145] and subsequently the President and his cabinet resigned *en masse*.[146] Following this, the President fled to Riyadh, suggesting a *prima facie* lack of effective control (particularly considering Wippman's formulation which bases legitimacy in part on control of the capital[147]). Regardless, having fled, President Hadi rescinded his

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[142] The Constitution of the Republic of Yemen (2001).

[143] Aaron Y Zelin, 'Know Your Ansar al-Sharia' *Foreign Policy* (21 September 2012) http://foreignpolicy.com/2012/09/21/know-your-ansar-al-sharia/.

[144] Fox (n 85) 837; Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force' (2016) 26(4) *European Journal of International Law* 979, 989.

[145] Hakim Almasmari and Martin Chulov, 'Houthi Rebels Seize Yemen President's Palace and Shell Home' *The Guardian* (Sana'a and Beirut, 21 January 2015) http://www.theguardian.com/world/2015/jan/20/houthi-rebels-seize-yemen-presidential-palace.

[146] Hakim Almasmari and Martin Chulov, 'Yemeni Government Quits in Protest at Houthi Rebellion' *The Guardian* (Sana'a, 22 January 2015) http://www.theguardian.com/world/2015/jan/22/yemeni-government-quits-houthi-rebellion.

[147] Wippman (n 83) 220.

resignation[148] and invited the intervention of Saudi Arabia which has since led a coalition undertaking airstrikes against the rebels.[149] Simultaneously, ASY has captured large areas in the east of the country; previously the central government have been able to retake these areas using the armed forces but the Houthi uprising means that the military is in disarray and, as such, may be unable quickly to regain control.[150] The government has relocated to Aden, however the President remains abroad, and has been reported to be under house arrest in Riyadh.[151] This all suggests an almost total lack of effective control.

The situation in Yemen cuts to the core controversy within the doctrine of consent and the use of force in international law. Arising out of the requirement of legitimacy, there is serious doubt whether a government with such a tenuous grasp over its territory can lawfully request intervention by a third state. In a factual sense, it seems impossible that such a government can be seen to speak for the state any longer. Though the existence of a NIAC[152] will not *per se* remove the ability of a government to consent to intervention, Doswald-Beck has argued that consent will be unavailable if a 'rebellion is widespread and seriously aimed at the overthrow of the incumbent regime'.[153] However, state practice supports a finding that consent continues to be available beyond this threshold. As discussed above,[154] interventions in Mali and Iraq both occurred at the request of governments without total effective control. This suggests a large degree of latitude regarding the point at which a state will be unable to consent.

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[148] Agence France-Presse, 'Yemen President "In Safety" as Rebels Advance' *The Guardian* (Aden, 25 March 2015) http://www.theguardian.com/world/2015/mar/25/anti-government-militia-captures-airbase-yemen.

[149] Dan Roberts and Kareem Shaheen, 'Saudi Arabia Launches Yemen Air Strike as Alliance Builds Against Houthi Rebels' *The Guardian* (Washington and Beirut, 26 March 2015) http://www.theguardian.com/world/2015/mar/26/saudi-arabia-begins-airstrikes-against-houthi-in-yemen.

[150] Bill Roggio, 'Al Qaeda Takes Control of Eastern Yemeni City' *Long War Journal* (3 April 2015) http://www.longwarjournal.org/archives/2015/04/al-qaeda-takes-control-of-eastern-yemeni-city.php.

[151] 'Yemeni Minister Resigns After Calling for President Hadi's Return' *Al Jazeera* (21 March 2018) https://www.aljazeera.com/news/2018/03/yemeni-minister-resigns-calling-president-hadi-return-180321072909844.html.

[152] A question explored below: sections 3.1.3 and 3.1.4.

[153] Doswald-Beck (n 75) 251.

[154] Text from n 125 to n 126.

Further, the responses of states to the government of Yemen's request for assistance against the Houthi rebellion is itself state practice in favour of the possibility of consent in situations of very weak control. In responding to the government's invitation for intervention, Saudi Arabia, Qatar, Kuwait, Bahrain and the United Arab Emirates have referred to the Hadi regime as 'legitimate'.[155] Additionally, the UNSC has affirmed 'its support for the legitimacy of the president of Yemen, [President] Hadi',[156] while Iran has been the only state to protest foreign intervention as an infringement of Yemen's sovereignty.[157]

Thus it is plausible to conclude that, based on state practice and equivocal commentary, the international law on legitimacy has moved away from *de facto* control to the extent that the government of Yemen's lack of effective control does not remove its ability to consent to intervention, particularly as there is no new government to replace the existing one. It is therefore submitted that the government of Yemen can be conceived of as the legitimate government and that as such its consent to all US drone strikes avoids the engagement of *jus ad bellum*.

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[155] UNSC, Identical Letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council (26 March 2015) UN Doc S/2015/217, 3. It should be noted that this letter refers to an invitation to act under Article 51 and therefore the action is primarily collective self-defence, but it nevertheless demonstrates states' recognition of the legitimacy of the beleaguered Hadi regime.

[156] UNSC Res 2216 (14 April 2015) UN Doc S/RES/2216. Further specific reference to the Hadi regime's legitimacy was made again at Article 1(d).

[157] Carol Morello, 'Final Make-or-Break Moment for Iran Nuclear Talks' *The Washington Post* (Lausanne, 26 March 2015) http://www.washingtonpost.com/world/final-make-or-break-moment-for-iran-nuclear-talks/2015/03/26/835ac586-d25e-11e4-8b1e-274d670aa9c9_story.html.

2.2.2.3 Somalia

Consent from the government of Somalia has apparently been given freely by the Presidents of both the TFG[158] and SFG,[159] with nothing to suggest that it was the product of fraud or coercion and, as such, appears valid. Under Article 39 of the Transitional Federal Charter[160] the President is Head of State and commander-in-chief of the armed forces. Similarly, the 2012 Provisional Constitution reasserts the President as Head of State[161] and commander of the armed forces[162] and provides the office-holder with the ability to declare war.[163] Therefore consent to US drone strikes has clearly come from the requisite officials.

As with Yemen, the question of governmental legitimacy in the face of tenuous territorial control is relevant. After the collapse of the regime of General Barre in 1991, Somalia existed primarily without a functional central government and has been characterised by clan rivalries and 'endless secessionism'.[164] In 2004 the TFG was formed under President Ahmed, though it struggled against militant groups and it took until June 2007 for the President and executive to be able to enter Mogadishu.[165] Additionally, a number of Somali regions operate autonomously, notably Somaliland and Puntland, each with its own government and administration.[166] Like Yemen, the picture that emerges is of a government with no effective control of its territory, at times without even a physical presence in the capital. Despite this, the Transitional Federal Charter, in place until 2012,

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[158] 'US Somali Air Strikes "Kill Many"' *BBC* (9 January 2007) http://news.bbc.co.uk/1/hi/world/africa/6243459.stm.

[159] 'Government Spokesman says they were Pre-Informed US Drone Strike Against al-Shabab Commander' *RBC Raxanreeb* (Mogadishu, 18 January 2014) https://web.archive.org/web/20170214183235/http://www.raxanreeb.com/2014/01/somalia-government-spokesman-says-they-were-pre-informed-u-s-drone-strike-against-al-shabab-commander/.

[160] Transitional Federal Charter of the Republic of Somalia (2004) (TFCRS).

[161] Provisional Constitution of the Federal Republic of Somalia (2012) (PCFRS) Article 87.

[162] PCFRS Article 90(b).

[163] PCFRS Article 90(b).

[164] Raphael C Njoku, *The History of Somalia* (Greenwood 2013) 141.

[165] ibid 173.

[166] Mary Harper, *Getting Somalia Wrong* (Zed 2012) 109.

asserted the indivisibility of Somalia,[167] confirming the country's post-colonial borders.[168] This, coupled with the absence of recognition by third states of any self-proclaimed autonomous regions, points to *de jure* control by the central government, albeit ephemeral. Furthermore, in 2012 the new SFG was inaugurated and a provisional constitution adopted that referred to the unity of Somalia as 'inviolable',[169] restating the borders.[170] The SFG has received wide international recognition,[171] supporting a conclusion that it possesses *de jure* control despite its limited effective control beyond Mogadishu and dependence on African Union troops.[172]

US drone strikes in Somalia have occurred since 2011[173] though consent to the intervention was given in 2007, President Yusuf stating that '[t]he US has a right to bombard terrorist suspects who attacked its embassies in Kenya and Tanzania'.[174] This statement is primarily in reference the US's 1998 claim of self-defence in relation to the Kenya and Tanzania attacks[175] but also indicates consent to US strikes in Somalia more generally; though not the 'clearly established' consent envisaged by the ILC,[176] it is demonstrative of underlying approval. More explicitly, Defence Minister Fiqi stated that

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[167] TFCRS Preamble.

[168] TFCRS Article 2(3).

[169] TFCRS Articles 1(3) and 7(2).

[170] TFCRS Article 7(5).

[171] Matt Bryden, *Somalia Redux? Assessing the New Somali Federal Government* (Center for Strategic and International Studies 2013) 23. Recently the US announced that it would establish a diplomatic mission in Mogadishu: John Kerry, 'Remarks in Mogadishu, Somalia' (US Department of State, 5 May 2015) http://www.state.gov/secretary/remarks/2015/05/241902.htm.

[172] Bryden (n 171) 1.

[173] Greg Jaffe and Karen DeYoung, 'US Drone Targets Two Leaders of Somali Group Allied with al-Qaeda' *Washington Post* (29 June 2011) http://www.washingtonpost.com/national/national-security/us-drones-target-two-leaders-of-somali-group-allied-with-al-qaeda/2011/06/29/AGJFxZrH_story.html.

[174] BBC (9 January 2007) (n 158).

[175] UNSC, Letter dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (20 August 1998) UN Doc S/1998/780.

[176] DASR Article 20 para 6.

drone strikes were 'welcome[d] against al-Shabab'.[177] These expressions of consent came from the TFG, which did not, at the time, exercise effective control over Somalia. Doswald-Beck's depiction of consent states the importance of recognition for legitimacy, emphasising that recognition would unlikely be withdrawn for a government with no effective control, if no other regime could take its place. Thus, despite the TFG's Somalia being branded the world's most failed state for seven years,[178] the groups vying to take over[179] were disparate and did not provide an alternative government. As such, at the relevant time, the TFG was the legitimate government through its *de jure* control and therefore its consent to US drone strikes was valid. This adheres with state practice, depicted above,[180] in which governments without control of their territories have been able to consent validly to intervention.

The situation under the SFG is similar but its *de jure* control is stronger due to greater international recognition.[181] Thus, it too is in a position to consent, and it has done on several occasions: in 2013 President Mohamud asserted his support for US drone strikes against foreign fighters,[182] and in 2014 the government stated that it was 'pre-informed' of a drone strike, which, coupled with an apparently positive view of the attack, implies continued governmental consent.[183] More recent drone strikes have been described as

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[177] Robert Young Pelton, 'Enter the Drones: An In-Depth Look at Drones, Somali Reactions, and How the War May Change' (*Somalia Report*, 7 June 2011) http://www.somaliareport.com/index.php/post/1096.

[178] 'Country Dashboard: Somalia' (*Fund for Peace: Fragile States Index*) http://fundforpeace.org/fsi/country-data/.

[179] Including al-Shabab, the Islamic Courts Union, and the autonomous regions of Somaliland and Puntland.

[180] Text from n 125 to n 126.

[181] Recognition has even come from the US, for the first time since 1991 (see Hillary R Clinton, 'Remarks With President of Somalia Hassan Sheikh Mohamud After their Meeting' (US Department of State, 17 January 2013) https://2009-2017.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm.

[182] Josh Rogin, 'Somali President Asks for More American Help' *Foreign Policy* (18 January 2013) http://foreignpolicy.com/2013/01/18/somali-president-asks-for-more-american-help/.

[183] RBC Raxanreeb (18 January 2014) (n 159).

undertaken 'in coordination with the [SFG]'.[184] Therefore, consent to US drone strikes appears valid.

Somali consent covers the entire period during which US drone strikes have occurred, however President Mohamud's 2013 consent contained a nationality caveat, apparently allowing strikes only against foreign fighters. Article 20 DASR states that consent will preclude wrongfulness only 'to the extent that the act remains within the limits of … consent'. Therefore, drone strikes targeting Somali members of al-Shabaab are *ultra vires* and will require justification through *jus ad bellum*.

Prior to 2013, when general consent was operative, the US carried out six drone strikes,[185] the resort to which is lawful regardless of the nationality of those targeted. After the 2013 caveat, a reported 81 strikes have been carried out, the majority of which are likely to have been by drone. Due to the secrecy surrounding operations in Somalia it is impossible, in many cases, to identify the nationality of those targeted and therefore determine the extent to which drone strikes may require additional justification under *jus ad bellum*. However, some general points can be made based on available reports of strikes. First, it is extremely likely US drones *have* targeted Somalis; for example, in May 2016 a drone strike killed Abdullahi Haji Da'ud[186] whose name appears to reveal that his nationality is Somali. In Somalia, lineage is demonstrated within names, meaning that Da'ud's father was named Haji, a Somali nickname for a person who has undertaken the Hajj.[187] Therefore it seems that Da'ud was himself Somali. As such this drone strike would fall outside the parameters of consent, requiring a *jus ad bellum* justification to be lawful. Second, since 2013 there have been drone strikes against groups of al-Shabaab

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[184] Mohamed O Hassan, 'US Drone Strike Kills al-Shabab Militants in Somalia' *Voice of America* (22 February 2018) https://www.voanews.com/a/united-states-drone-strike-kills-shabab-militants-somalia/4266354.html.

[185] TBIJ 'Somalia 2007 to present' (n 24).

[186] 'Assessment Confirms Deaths of Two Senior al-Shabaab Members in Somalia' (US Africa Command, 8 June 2016) http://www.africom.mil/media-room/article/28228/assessment-confirms-deaths-of-two-senior-al-shabaab-members-in-somalia.

[187] Email from Amal Ali (University of Lincoln) to author (16 May 2018).

members, with two targeting over 100 individuals.[188] Though foreign fighters feature in al-Shabaab, they do not comprise the majority,[189] meaning that where large groups are attacked, it is highly likely that Somalis will have been targeted. As such, there is a high chance that such strikes go beyond the bounds of consent and require a basis in *jus ad bellum* to be lawful.

Thus, consent appears to provide a wide justification for the resort to drone strikes in Somalia but it is not comprehensive, and further justifications based on self-defence must be considered.

2.2.3 Concluding remarks on consent and drone strikes

Based on the above, it can be seen that a large number of drone strikes carried out by the US in Pakistan, Yemen and Somalia are lawful, insofar as the initial resort, by virtue of the consent of the territorial states. This is a product of the incredibly flexible nature of consent in relation to the use of force and the extent to which a government may remain 'legitimate' in the face of limited effective control over its territory. Despite claims that a beleaguered government, struggling to maintain control and effectively acting as a party to a civil war, cannot consent to intervention from a third state,[190] it appears that the law is such that very little, if any, factual control is necessary. Consideration of the evidently problematic nature of this doctrine is beyond the scope of the current work.[191]

Regardless of the wide scope for consent to be exercised, it is not a panacea; only in Yemen does consent appear comprehensive. There are many drone strikes in Pakistan and some in Somalia that do not find their lawfulness on this basis, requiring a

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[188] 'US Air Strike "Kills 150 Somali Militants"' *BBC* (7 March 2016) https://www.bbc.co.uk/news/world-africa-35748986; Idrees Ali, 'US says Air Strike Kills Over 100 Militants in Somalia' *Reuters* (Washington, 21 November 2017) https://af.reuters.com/article/topNews/idAFKBN1DL296-OZATP.

[189] Raffaello Pantucci and AR Sayyid, 'Foreign Fighters in Somalia and al-Shabaab's Internal Purge' (2013) 11(22) The Jamestown Foundation: Terrorism Monitor http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=41705#.Vvz1y5MrKRs.

[190] Gray (n 52) 81.

[191] See, for instance, Gray (n 52) 67-110; de Wet (n 144).

justification through *jus ad bellum*. Therefore the possibility that these drone strikes have been carried out in self-defence will occupy the remainder of the current chapter.

2.3 Self-defence

Examination of self-defence and the use of drones in Pakistan, Yemen and Somalia exemplifies the need for a methodological approach that is cognisant of the struggle for interpretation and meaning that occurs within international law. The picture that emerges of the law pertaining to drone strikes undertaken without host-state consent is a complicated mesh of different understandings. To a large extent, the lawfulness of drone strikes through the lens of self-defence is conditional upon interpretation. Broadly speaking, the interpretation of self-defence can be divided into two paradigms. One, loosely termed the 'restrictionist' school, seeks to promote an interpretation of the law that privileges the peaceful aspiration of the UN Charter, distinguishing it from the pre-existing customary international law.[192] Conversely, the 'expansionist'[193] paradigm takes greater account of the permissive system of customary international law predating the UN Charter, which allows the use of force more readily, focusing on the rights of the victim state.

Despite consent providing the lawful basis for the resort to force with armed drones in the majority of cases considered within this study, self-defence has been invoked in many public statements relating to drone strikes. In his famous speech outlining the place of international law within US campaigns against al-Qaeda, the Taliban and associated groups, Harold Koh asserted that the US 'may use force consistent with its inherent right to self-defence under international law.'[194] Similarly, President Obama referred to campaigns against those groups as 'waged proportionally, in last resort, and in self-

[192] Tom Ruys, *Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 9.

[193] ibid.

[194] Koh (2010) (n 10).

defence.'[195] This therefore includes its drone strikes in Pakistan, Yemen and Somalia, where those operations have gone outside the remit of host-state consent.

Though self-defence is a more marginal issue in terms of the resort to the use of drones, due to the presence of consent, it has occupied many writers. Some appear to assume that US drone strikes are carried out lawfully in self-defence, using it as the basis for other analyses (such as IHL).[196] Others have carried out fuller considerations of US drone use under self-defence,[197] though some have focused on regions and periods in which it now appears that consent was operative,[198] vitiating the need to examine self-defence.

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[195] Barack Obama, 'Remarks by the President at the National Defense University' (The White House, 23 May 2013) https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

[196] Ryan J Vogel, 'Ending the "Drone War" or Expanding it? Assessing the Legal Authority for Continued US Military Operations Against al-Qa'ida After Afghanistan' (2015) 8 Albany Government Law Review 280, 286-90.

[197] Casey-Maslen (n 2) 601-5; Alejandro Chehtman, 'The *ad Bellum* Challenge of Drones: Recalibrating Permissible Use of Force' (2017) 28(1) European Journal of International Law 173; Chris Downes, 'Targeted Killings in an Age of Terror: the Legality of the Yemen Strike' (2004) 9(2) Journal of Conflict and Security Law 277, 286-92; Anders Henriksen, '*Jus ad Bellum* and American Targeted Use of Force to Fight Terrorism Around the World' (2014) 19(2) Journal of Conflict and Security Law 211; Kurt Larson and Zachary Malamud, 'The United States, Pakistan, the Law of War and the Legality of Drone Attacks' (2011) 10 Journal of International Business and Law 1; Craig Martin, 'Going Medieval: Targeted Killings, Self-Defense and the *Jus ad Bellum* Regime' in Claire Finklestein, Jens D Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford University Press 2012); Thomas M McDonnell, 'Sow What you Reap? Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists' (2012) 44(2) George Washington International Law Review 243, 264-9; Andrew C Orr, 'Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law' (2011) 44(3) Cornell International Law Journal 729, 735-41; Paust (2010) (n 3); Paust (2015) (n 108); Theresa Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11' (2011) 105(2) American Journal of International Law 244; Schmitt 'Drone Attacks' (2010) (n 2) 314-9; Tibori-Szabo (n 3); Eveylon C Westbrook Mack, 'Remotely Piloted Aircrafts (RPAS) in Targeted Killing Operations: the United States is no Lone Wolf' (2014) 26 Florida Journal of International Law 447, 466-79.

[198] O'Connell (2012) (n 4); Printer (n 4), 352; Jake W Rylatt, 'An Evaluation of the US Policy of Targeted Killing under International Law: The Case of Anwar Al-Aulaqi (Part I)' (2013) 44(1) California Western International Law Journal 39, 55-72; Sikander A Shah, 'War on Terrorism: Self Defense,

Unlike consent, self-defence is a more tenuous justification for US drone strikes, requiring particularly gymnastic legal interpretations for a claim of lawfulness to be made. Self-defence is principally governed by Article 51 of the UN Charter, which maintains 'the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.' Thus, self-defence may only be invoked in response to a prior armed attack.[199] Further, for a purported act of self-defence to be lawful, the response to an armed attack must be necessary and proportionate, requirements not mentioned in Article 51, but arguably recognised as requirements for lawful self-defence since the *Caroline* affair. Though the on-going impact of this quasi-jurisprudence on the modern law of self-defence is debatable,[200] necessity and proportionality continue to be consistently cited as aspects of self-defence.[201] Therefore, for a drone strike to be lawful it must be, or form part of, a necessary and proportionate response to an armed attack. As such, the remainder of this chapter will consist of an examination of each of these elements in isolation, before they are applied to the use of drone strikes in Pakistan, Yemen and Somalia.

2.3.1 The 'armed attack' requirement

Before self-defence may be lawfully undertaken an armed attack is required; Article 51 of the UN Charter is clear on this point. The concept of 'armed attack', however, presents several sites of hermeneutic tension, with competing interpretations of its disparate elements subject to varied interpretation. The outcomes of these interpretive debates have huge implications for the lawfulness of the resort to drone strikes, producing paradigms that are more or less permissive of the resort to their use. The elements of an armed attack

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Operational Enduring Freedom, and the Legality of US Drone Attacks in Pakistan' (2010) 9 Washington University Global Studies Law Review 77.

[199] Or, it has been argued, in anticipation of one that has not yet occurred but which is imminent, discussed in section 2.3.1.4.

[200] James A Green, 'Docking the *Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense' (2006) 14 Cardozo Journal of International and Comparative Law 429.

[201] See, for instance, *Nicaragua* (n 80) para 194.

that will be considered are: whether an armed attack can be carried out by an NSA; whether there is a gravity threshold before an act becomes an armed attack; and the extent to which self-defence is permissible against an armed attack that has not yet begun.

2.3.1.1 Armed attacks by non-state actors

While the requirement of an armed attack within self-defence is clear from Article 51 of the UN Charter, the provision is silent on the nature of entities capable of carrying out an armed attack. A debate rages between those arguing that an armed attack can only be carried out by a state or an armed group that is linked to its host-state, and those who dispense with the need for a link, claiming that an armed attack can be carried out by an NSA unconnected with its host-state.

This issue is hugely relevant to the question of the resort to drone strikes by the US in Pakistan, Yemen and Somalia, as these have solely targeted NSAs that appear dissociated with their host-states. In Pakistan, drone strikes have been identified against TTP, al-Qaeda and the Haqqani Network.[202] While it has been suggested that the Haqqani Network has support from the Pakistani government as a method of promoting Pakistan's influence in Afghanistan,[203] TTP and al-Qaeda have been actively opposed by the government, in combat that has at times arguably reached the level of a NIAC.[204] Likewise, in Yemen and Somalia, where AQAP and al-Shabaab are targeted respectively, the existence of armed conflicts demonstrates separation between the groups and host-state.[205] Therefore, where the resort to drone strikes is justified by self-defence against TTP and al-Qaeda in Pakistan, AQAP in Yemen, and al-Shabaab in Somalia, the

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[202] 'Naming the Dead: People Database' (*The Bureau of Investigative Journalism*) https://v1.thebureauinvestigates.com/namingthedead/the-dead/?lang=en.

[203] Elisabeth Bumiller and Jane Perlez, 'Pakistan's Spy Agency Is Tied to Attack on U.S. Embassy' *New York Times* (22 September 2011) https://www.nytimes.com/2011/09/23/world/asia/mullen-asserts-pakistani-role-in-attack-on-us-embassy.html.

[204] Discussed in section 3.1.5.2.2.

[205] Discussed in sections 3.1.5.3.2 and 3.1.5.4.1.

lawfulness of these strikes in part rests on the interpretation of self-defence as providing for situations of armed attacks by NSAs lacking a nexus with the territorial state.

The nature of the armed attack requirement of self-defence against NSAs has been discussed in depth elsewhere[206] but it is necessary to provide a sketch in order to develop an analytical framework with which to examine US drone strikes.

Despite a lack of guidance within the UN Charter, international law is not silent on the issue of NSAs and the use of force. The Principles of International Law Concerning Friendly Relations mandates that states 'refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.'[207] Additionally, Article 3(g) of the Definition of Aggression identifies as an act of aggression '[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.' Article 3(g) was adopted by the ICJ to confirm that where an NSA is sent 'by or on behalf of a state' this falls within the scope of an armed attack.[208] Elsewhere in the judgment, the Court specified that for an NSA's use of force to be *attributable* to a state and so 'to give rise to legal responsibility of [the State accused], it would in principle have to be proved that State had *effective control*'[209] but this was specifically a reference to state responsibility and is therefore not necessarily indicative of the level of involvement that the court felt was necessary to give rise to an armed attack. This point is made by Ruys who notes the mutual operation of different legal regimes of state responsibility (or imputability), *jus ad bellum* and due diligence makes the situation one of great legal complexity.[210] The point is further and explicitly made by Green, who contends that statements made as to 'effective control' 'were made with regard to "state responsibility" … not with regard to the level of state involvement

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[206] See, for instance, Gray (n 52) 128-48; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010) 25-36; Ruys (2010) (n 192).

[207] UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625.

[208] *Nicaragua* (n 80) para 195.

[209] ibid para 115.

[210] Ruys (2010) (n 192) 371.

necessary for an armed attack giving rise to the right of self-defence.'[211] Regardless of the lack of clarity as to the degree of connection between a state and an NSA required for an armed attack to have occurred, the existence of such a threshold is argued to be implicit within the judgment.[212] Thus a nexus is required, but the extent of that nexus is unclear from the *Nicaragua* judgment.[213]

The ICJ has remained reluctant to accept the possibility of armed attacks from NSAs with no link to their host-states. In the *Wall* advisory opinion the Court referred to 'the existence of an inherent right of self-defence in the case of an armed attack *by one state* against another state'[214] suggesting a high level of involvement necessary for an armed attack to be identified. Nevertheless, rather than setting a high threshold of involvement, the Court appears simply to have been referring briefly to the basic principle of self-defence.[215] Indeed, the Court avoided elaborating on the required involvement, holding that Article 51 had 'no relevance' by virtue of Israel's occupation of Palestinian territory.[216] This aspect of the judgment was not free of internal controversy. In her separate opinion, Judge Higgins suggested that the Court *had* stated that self-defence required an armed attack from a state but that this derived from the *Nicaragua* judgment not the UN Charter.[217] Similarly, Judge Kooijmans asserted that Article 51 contained no exclusion of armed attacks from NSAs acting alone, expressing the view that, despite decades of practice suggesting the need for a state-NSA link, nothing in the law necessitates one.[218] Judge Buergenthal also emphasised the absence of anything requiring a state-NSA nexus within Article 51.[219]

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[211] James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 50.

[212] Gray (n 52) 133.

[213] Lubell (2010) (n 206) 32.

[214] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) [2004] ICJ Reports 136, para 139 (emphasis added).

[215] Gray (n 52) 135.

[216] *Wall* (n 214) para 139.

[217] Separate Opinion of Judge Higgins, *Wall* (n 214) para 33.

[218] Separate Opinion of Judge Kooijmans, *Wall* (n 214) para 35.

[219] Separate Opinion of Judge Buergenthal, *Wall* (n 214) para 6.

Despite this disunity, in the *Armed Activities* case the ICJ appeared to endorse the state involvement requirement, asserting that 'the exercise of a right of self-defence by Uganda against the DRC were not present',[220] in part because '[t]he attacks did not emanate from armed bands or irregulars *sent by ... or on behalf of the DRC*' and 'remained non-attributable to the DRC.'[221] However, having concluded thus, the Court asserted that, as self-defence was not possible on the facts, there was 'no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.'[222] Lubell has argued that the Court was potentially moving away from the previous suggestion of a requirement of a state-NSA nexus, and leaving the question open.[223] It is submitted that, while it is fair to say that the Court left open the question of state involvement, it is probably a stretch to claim it backtracked. The fact that the DRC was not at all involved in NSA conduct was material to the absence of self-defence, arguably sustaining the *Nicaragua* position that *some* involvement is required, though the necessary level of involvement remains uncodified.

As in the *Wall* advisory opinion, various separate opinions in the *Armed Activities* case demonstrate distinct interpretations of the law by judges in the ICJ. Judge Koroma appears to advocate the maintenance of a state involvement requirement, asserting that the *Armed Activities* decision coheres with that of the *Nicaragua* case and that both are 'consistent with Article 51 of the Charter and represent[] the existing law.'[224] Indeed, Judge Koroma goes further than the ICJ in its judgment, stating that while 'a State's massive support for armed groups, including *deliberately* allowing them access to its territory' would be an armed attack under Article 51, 'a State's enabling groups of this type to act against another State' would be 'no more than a "breach of the peace", enabling the Security Council to take action pursuant to Chapter VII of the Charter, without, however, creating an entitlement to unilateral response based on self-defence.'[225] Judge

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[220] *Armed Activities* (n 72) para 147.

[221] ibid para 146.

[222] ibid para 147.

[223] Lubell (2010) (n 206) 33.

[224] Separate Opinion of Judge Koroma, *Armed Activities* (n 72) para 9.

[225] Separate Opinion of Judge Koroma, *Armed Activities* (n 72) para 9 (original emphasis).

Koroma appears to maintain the emphasis on collective security, confirming the exceptional nature of self-defence. Nevertheless, the term 'enabling groups … to act against another state' is confusing; it is unclear how 'enabling' denotes less involvement than 'deliberately allowing', the former connoting active involvement while the latter suggests passivity. Though the necessary nature of involvement is beyond the scope of this work, the important point is that *some* form of involvement is required. Judge Kooijmans repeated his view from the *Wall* advisory opinion that, under Article 51, an attack by an NSA is an armed attack where it would be if undertaken by a state.[226] Judge Simma asserted that while the requirement of a state-NSA nexus may have been appropriate at the time of the *Nicaragua* judgment, in 2005 that 'ought urgently to be reconsidered' particularly due to 9/11 and the related actions of states and the UNSC.[227] These views are not determinative of the ICJ's jurisprudence, which cannot but be seen as continuing to endorse some form of state involvement within the concept of armed attack, but they nevertheless demonstrate the lack of consensus upon which the requirement rests.

There is state practice to support claims of a wider notion of an armed attack, but it is insufficient to conclusively contradict the existence of a state-NSA nexus requirement. Israel's use of force in response to an attack by the People's Front for the Liberation of Palestine on a passenger plane was condemned by the UNSC,[228] as was its 1985 attack on PLO headquarters in Tunis.[229] US claims of self-defence against NSAs in Libya and Iraq were, in part, made with reference to the connection between the NSA and the host governments, supporting the need for a nexus.[230]

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[226] Separate Opinion of Judge Kooijmans, *Armed Activities* (n 72) para 29.

[227] Separate Opinion of Judge Simma, *Armed Activities* (n 72) para 11.

[228] UNSC Res 262 (31 December 1968) UN Doc S/RES/262.

[229] UNSC Res 573 (4 October 1984) UN Doc S/RES/573.

[230] UNSC, Letter dated 14 April 1986 from the Acting Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (14 April 1986) UN Doc S/17990; UNSC, Letter dated 26 June 1993 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (26 June 1993) UN Doc S/26003.

Conversely, a claim by Iran of self-defence against NSAs in Iraq made no reference to host-state involvement, instead explicitly emphasising the fact that 'the Government of Iraq is not in a position to exercise effective control over its territory'.[231] Similarly, the US carried out strikes against reported NSA training camps in Afghanistan and a chemical facility in Sudan in response to prior NSA attacks, with no reference to any link between the group and the states in which it was targeted.[232] The reaction of the international community to these strikes has been viewed as either rejecting the concept of NSA armed attacks where there is no state involvement[233] or as 'implied acceptance of a State's right to react forcefully to terrorism pursuant to the law of self-defence, so long as the action is based on reliable information'.[234]

State and UNSC practice since 9/11 seems to have exaggerated the shift away from the nexus requirement, though it is argued that this has not yet been such as to do away with the requirement entirely, despite vehement claims to the contrary.[235] UNSC Resolutions 1368 and 1373, on threats to international peace and security caused by terrorist acts, refer to self-defence under the UN Charter and make no reference to a requirement of state involvement.[236] ICJ judges have argued that these resolutions provide a 'completely new element' of self-defence under Article 51, by recognising armed attacks from NSAs without state involvement.[237] This is conceivable, but on a literal reading neither resolution discusses the *nature* of self-defence, instead restating the existence of the right. It is submitted that these resolutions cannot be viewed as having a significant impact on the nature of self-defence. In support of this is the fact that in its invocation of self-defence against al-Qaeda in Afghanistan, the US referred to the relationship between the Taliban

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[231] UNSC, Letter dated 29 July 1996 from the Permanent Representative of the Islamic Republic of Iran To The United Nations Addressed to the Secretary-General (29 July 1996) UN Doc S/1996/602.

[232] UNSC UN Doc S/1998/780 (n 175).

[233] Gray (n 52) 197.

[234] Michael N Schmitt, 'Responding to Transnational Terrorism under the *Jus ad Bellum*' in Michael N Schmitt and Jelena Pejić (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff 2007) 165.

[235] Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge University Press 2017) 245.

[236] UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

[237] Separate Opinion of Judge Kooijmans, *Wall* (n 214) para 35.

regime and the NSA.[238] Though this has been suggested to be lower than the level of involvement required under the *Nicaragua* judgment,[239] it arguably demonstrates the continued requirement of some form of state involvement for an armed attack to have occurred.

Later practice is also insufficient to claim that the requirement of state involvement has been removed. In 2002 Russia launched attacks in self-defence against an NSA based in Georgia, grounding its claim to self-defence on the inability of the territorial government to respond to the threat posed by the group.[240] However, since then the Russian government appears to have reaffirmed the need for state involvement, describing US operations against ISIS in Syria as 'unlawful and detrimental to international and regional stability'.[241] In 2006 Israel launched attacks against Hezbollah in Lebanon but grounded its claim to self-defence in the responsibility of the Lebanese government.[242]

Ultimately the law is unclear. The requirement of state involvement is not explicated by the UN Charter, arising, as it does, out of ICJ decisions, building on the Definition of Aggression; but the requirement has been affirmed through state practice and jurisprudence. Most convincing is the view of Ruys, who identifies 'an emerging shift in the attitude of States vis-à-vis the permissibility of recourse to force against terrorist attacks' rather than full acceptance of the transformation of the rule.[243] Despite an apparent lowering of the level of involvement required, the existence of this requirement seems to remain, though the *nature* of the threshold of state involvement remains unclear.

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[238] UNSC, Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (7 October 2001) UN Doc S/2001/946.

[239] Ruys (2010) (n 192) 440.

[240] UNSC, Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General Statement by Russian Federation President V V Putin (11 September 2002) UN Doc S/2002/1012.

[241] UNSC, 7271st Meeting (19 September 2014) UN Doc S/PV.7271, 19.

[242] UNGA, UNSC Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council (12 July 2006) UN Doc A/60/937–S/2006/515.

[243] Ruys (2010) (n 192) 427-8.

2.3.1.2 Armed attacks and the 'unwilling and unable' approach

One controversial manifestation of the state involvement requirement is the adoption of the 'unwilling and unable' approach. Through this approach, an attack by an NSA can become an armed attack in the absence of host-state involvement, where that state refuses or is unable to respond the threat of the NSA, thereby providing a lawful recourse to self-defence. The requirement has its cheerleaders but remains controversial.

That states must respond to threats posed by NSAs in their territory is fairly clear within international law. In the *Corfu Channel* case the ICJ asserted that states are obliged 'not to allow knowingly … territory to be used for acts contrary to the rights of other States.'[244] Nevertheless, this relates to state responsibility for allowing territory to be used in this way,[245] rather than giving rise to a right of self-defence. Thus, the 'unwilling and unable' approach does not arise from this obligation, though it has been repeatedly put forward as an aspect of self-defence.

Reinold has argued that the concept of 'sovereignty as responsibility', germinating within the responsibility to protect, places obligations on states to respond to threats to other states from NSAs within their territory.[246] This replaces the question of state involvement in NSA acts with that of whether a host-state is 'unwilling or unable' to respond to the NSA.[247] Considering the practice of states utilising self-defence since 9/11, (that of Russia in Georgia, Israel in Lebanon, considered above,[248] as well as uses of force by Colombia in Ecuador, Turkey in Iraq, and the US drone programme in Pakistan) Reinold argues that 'the largely condoning international reaction to … US drone strikes … suggests that the international community at large has come to accept that a state's inability to prevent the

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[244] *The Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Reports 4, 22.

[245] Marko Milanovic, 'State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken' (2009) 22(2) Leiden Journal of International Law 307, 322.

[246] Reinold (n 197) 245.

[247] ibid 283.

[248] Text to n 240 and n 242.

wrongdoings of private actors provides a legitimate ground for military intervention',[249] concluding that there is a trend towards the rejection of the restrictive *Nicaragua* interpretation.[250] This reading of the 'unwilling and unable' concept has been adopted by other academics.[251] For similar reasons, the Chatham House Principles of International Law on the Use of Force in Self-Defence—reflecting the views of twelve highly regarded international lawyers—assert that self-defence under Article 51 is available against attacks by NSAs where these attacks are 'large scale' and where it is 'evident that [the] State is unable or unwilling to deal with the nonstate actors itself'.[252]

The concept of a state's unwillingness or inability giving rise to an armed attack has not been absent from ICJ jurisprudence. In his *Armed Activities* separate opinion, Judge Kooijmans stated that while 'failure to control the activities of armed bands cannot in itself be attributed to the territorial State as an unlawful act, that … does not necessarily mean that the victim State is under such circumstances not entitled to exercise the right of self-defence under Article 51.'[253] That a state has no control over a region, Kooijmans opines, does not mean that large scale attacks against a third state by an NSA in that region cannot be an armed attack allowing self-defence.

Though the 'unwilling or unable' approach to self-defence conceptually maintains the inter-state nature of self-defence, it does so by artificially constructing state involvement. The result is that states are empowered to invoke self-defence unilaterally in the face of attacks from NSAs. The approach represents a transformation of a core feature of *jus ad bellum*, and consequently has been challenged by a significant number of writers. Corten has argued that adopting the 'unwilling or unable' approach would potentially spell the end of the UN collective security system by providing states with an avenue to bypass the

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[249] Reinold (n 197) 283.

[250] ibid 285

[251] Dinstein (2017) (n 235) 244-9; Federica I Paddeu, 'Use of Force Against Non-State Actors and the Circumstances Precluding Wrongfulness of Self-Defence' (2017) 30(1) Leiden Journal of International Law 93, 96; Schmitt 'Extraterritorial Lethal Targeting' (2013) (n 66) 86-7.

[252] Elizabeth Wilmshurst, 'Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55(4) International and Comparative Law Quarterly 963, 969.

[253] Separate Opinion of Judge Kooijmans, *Armed Activities* (n 72) para 26.

UNSC.[254] While this view may be exaggerated, others have rejected the use of 'unwilling and unable' in relation to state involvement, citing insufficient state practice.[255] Brunnée and Toope have argued that rather than extensive practice evidencing general recognition that the 'unable and unwilling' approach is customary international law, instead there is 'curious interplay amongst State officials, former officials writing in their personal capacity and some academic commentators, whereby a small group tries to expand its influence by constantly cross-referencing each other',[256] further stating that 'the rather mixed, and largely self-referential, practice of a small number of primarily Western States cannot suffice to shift customary law'.[257] As will be demonstrated, this view is broadly correct.

Early state practice supporting the 'unwilling and unable' approach is identifiable in statements of Israel and Turkey that specifically link the approach with self-defence.[258] More recently, there has been an increase in state practice advocating the 'unwilling and unable' approach to self-defence, in part as a result of the US-led coalition against ISIS in Syria. The US has advocated the 'unwilling and unable' approach[259] and invoked it when asserting the collective self-defence of Iraq against ISIS.[260] In their justifications of the same intervention, Germany and Belgium each referred to the absence of 'effective

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[254] Olivier Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?' (2016) 29(3) Leiden Journal of International Law 777, 797-8.

[255] Paulina Starski, 'Right to Self-Defence, Attribution and the Non-State Actor' (2015) 75 Heidelberg Journal of International Law 455, 496-7.

[256] Jutta Brunnée and Stephen J Toope, 'Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?' (2018) 67 International and Comparative Law Quarterly 263, 275.

[257] Brunnée and Toope (n 256) 277.

[258] See, for instance, UNSC, 2071th Meeting (30 October 1956) UN Doc S/PV.2071 [53] (Israel); UNSC, Letter dated 24 July 1995 from the Chargé d'affaires AI of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council (24 July 1995) UN Doc S/1995/605.

[259] 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (The White House, December 2016) https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf 10.

[260] UNSC, Letter dated 23 September 2014 from the Permanent Representative of the US to the UN addressed to the Secretary-General (23 September 2014) UN Doc S/2014/695.

control' exercised by the government of Syria, suggesting an acceptance of the 'unwilling or unable' approach.[261] However it has been argued that, unlike the US's use of 'unwilling or unable' as the foundation of its self-defence claim, Germany and Belgium emphasised UNSC Resolution 2249, and as such did not endorse a wide 'unwilling or unable' standard.'[262]

A handful of other states have been as explicit as the US about the 'unwilling an unable' approach. Australia premised much of its claim to collective self-defence against ISIS on the 'unwilling and unable' approach,[263] as did Turkey[264] and Canada.[265] Brunnée and Toope have argued that its subsequent halt of airstrikes in Syria under the Trudeau administration 'at least raises the question of its legal intent, which now requires clarification',[266] though it would perhaps be an overstatement to see this as a rejection of the 'unwilling and unable' approach.

The Netherlands also referred to Resolution 2249 rather than the 'unwilling and unable' approach in its Article 51 letter to the UNSC regarding Syria,[267] but elsewhere claimed self-defence 'does not require attribution to a third state but a determining factor in such cases is whether or not a state is willing and/or able to respond to attacks by NSA[s] …

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[261] UNSC, Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council (10 December 2015) UN Doc S/2015/946; UNSC, Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council (9 June 2016) UN Doc S/2016/523.

[262] Brunnée and Toope (n 256) 272-3.

[263] UNSC, Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (9 September 2015) UN Doc S/2015/693.

[264] UNSC, Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council (24 July 2015) UN Doc S/2015/563.

[265] UNSC, Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council (31 March 2015) UN Doc S/2015/221.

[266] Brunnée and Toope (n 256) 282.

[267] UNSC, Letter dated 10 February 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the President of the Security Council (10 February 2016) UN Doc S/2016/132.

from its territory.'[268] The Czech Republic has stated that 'state sovereignty should not serve as a protection of a State if such [a] state is unable or unwilling to exercise its sovereignty within its territory.'[269] It is hard to see how these cannot be seen as endorsements of the approach. The UK has previously referred to the existence of the 'unwilling and unable' approach in self-defence[270] but it did not feature within its claim to self-defence against ISIS.[271] Brunnée and Toope have interpreted this absence as indicating equivocation as to the existence of the approach,[272] however they also claim that the UK is, along with the US, 'attempting openly to shift the law'.[273] Ultimately, the UK seems to support the approach, though its practice is more limited than other states.

Finally, Russia has previously invoked the 'unwilling and unable' approach in support of its use of force against Chechen NSAs in Georgia[274] but has since apparently reversed its support for the approach, describing the US-led coalition's campaign against ISIS as

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[268] Jessica Dorsey and Christophe Paulussen, 'Towards a European Position on Armed Drones and Targeted Killing: Surveying EU Counterterrorism Perspectives' (April 2015) ICCT Research Paper https://icct.nl/wp-content/uploads/2015/05/ICCT-Dorsey-Paulussen-Towards-A-European-Position-On-Armed-Drones-And-Targeted-Killing-Surveying-EU-Counterterrorism-Perspectives.pdf 32.

[269] ibid 12.

[270] HC Deb 26 November 2015, vol 602, col 1491; Jeremy Wright, 'Attorney General's speech at the International Institute for Strategic Studies' (Attorney General's Office, 11 January 2017) https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies.

[271] UNSC, Identical Letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary General and the Security Council (26 November 2014) UN Doc S/2014/851; UNSC, Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (8 September 2015) UN Doc S/2015; UNSC, Letter dated 3 December 2015 from the Permanent Representative of Great Britain and Northern Ireland to the United Nations addressed to the Secretary General and the Security Council (3 December 2015) UN Doc S/2015/928.

[272] Brunnée and Toope (n 256) 273-4.

[273] ibid 275.

[274] UNGA, UNSC, Letter dated 31 July 2002 from the Chargé d'affaires a.i. of the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General (31 July 2002) UN Doc A/57/269-S/2002/854.

unlawful in the absence of consent from the Syrian government or a mandate from the UNSC.[275]

Thus, it appears that a relatively small group of states are demonstrating state practice and *opinio juris* in an attempt to confirm the 'unwilling and unable' approach as an element of self-defence. It is submitted that, at present the requirement of general practice accepted as law[276] is not demonstrated; practice is very far from being 'extensive'.[277] On this basis, the reality seems to be that, at present, an armed attack cannot be established through the 'unwilling and unable' standard alone. Though this may mean the law is not a perfect fit with the threat some NSAs pose, that is not a reason for arguing that the law has changed, '[i]rrespective of how harsh this result is'.[278]

Nevertheless, despite the 'unwilling and unable' approach not forming part of the armed attack requirement, it has been suggested to 'perhaps condition the exercise of [self-defence] as part of the necessity calculus but this is a completely different thing.'[279] The reason being that self-defence is premised on the existence of an armed attack, not on the extent to which a host-state is able or willing to respond to the threat of the NSA.[280] Thus once the armed attack exists (regardless of how it is identified, a judgement depending on one's interpretation of various aspects of *jus ad bellum*) it is *then* that ability and willingness are considered, impacting on the degree to which forcible self-defence is *necessary*.

This approach is persuasive, according more readily with the doctrine of self-defence as a whole. The satisfaction of necessity requires the exhaustion of non-forceful alternatives,

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[275] UNSC UN Doc S/PV.7271 (n 316) 19 (Russian Federation).

[276] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 67 UKTS 1135 (1946) (ICJ Statute) Article 38(1)(b).

[277] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (judgment) [1969] ICJ Reports 3, para 74.

[278] Starski (n 255) 497.

[279] Nicholas Tsagourias, 'Self-Defence Against Non-State Actors: The Interaction Between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule' (2016) 29 Leiden Journal of International Law 801, 810.

[280] Tsagourias (n 279) 810.

making the use of force a last resort, and this is implied by the 'unwilling and unable' approach, rather than it being a replacement of the pre-existing rules of *jus ad bellum*, which would be the result of it featuring within the armed attack analysis.[281] This view is held by a large number of commentators.[282] Though the 'unwilling and unable' concept remains controversial, *if* it has become a part of *jus ad bellum* it is within the rubric of necessity. As such the concept will be considered again, below.[283]

The controversy around the nature of NSA-authored armed attacks presents an immediate problem for any drone strikes carried out in self-defence. Where drone strikes are against NSAs with no nexus to their host-states—which is their primary function given the ability of most state air-forces to counter slow-moving drones with relative ease—any justification based on self-defence can only be sustained with a wide interpretation of the armed attack requirement, either by removing the nexus requirement, a contradiction of ICJ jurisprudence and various state practice, or through adoption of the unwilling and unable approach. Thus drone strikes in self-defence will always be, at least in part, based on contested and uncertain interpretations of the law.

2.3.1.3 The armed attack threshold: gravity

Also contested is the point at which a violent act is sufficiently intense to become an armed attack. Depending upon the nature of the claimed armed attack to which drone strikes are a response, this issue can be of great importance to the lawfulness of drone use in self-defence. Where ongoing instances of low-level force are presented as a

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[281] Noam Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups' (2017) 93 International Law Studies 215, 219-20.

[282] Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106(4) American Journal of International Law 770, 776; Ashley S Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 Virginia Journal of International Law 483, 495; Lubell (2017) (n 281) 219-20; Ruys (2010) (n 192) 509; Nico Schrijver and Larissa van den Herik, 'Leiden Policy Recommendations on Counter-Terrorism and International Law' (2010) 57 Netherlands International Law Review 531, 540; Kimberly Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Actors (2007) 56 International and Comparative Law Quarterly 141, 147; Wilmshurst (n 252) 969.

[283] Text from n 370 to n 372.

justification for the resort to drone strikes this can only be maintained as lawful where an interpretation of the armed attack requirement sets the threshold of an armed attack very low, or where it can be satisfied cumulatively over time.

The potential for a 'gravity' requirement within the concept of an armed attack is absent from Article 51 but is identifiable within the *Nicaragua* decision, in which the ICJ made a conceptual distinction between 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.[284] Further, Ruys has suggested that the different language used in Articles 2(4) ('use of force') and 51 ('armed attack') indicates that the latter is narrower than the former,[285] while also highlighting state practice in support of a threshold beneath which acts will breach Article 2(4) without constituting an armed attack.[286] But while this suggests the presence of a gravity threshold, it says nothing about the level of that threshold, marking the concept out as an area of conceptual malleability, which has become a point of tension between restrictionist and expansionist interpretations of *jus ad bellum*.

In the *Nicaragua* judgment the Court held that the gravity requirement was a threshold that could potentially be satisfied by acts carried out by 'armed bands' greater in scale 'than a mere frontier incident had it been carried out by regular armed forces'.[287] Nonetheless, this does not provide a clear framework in which to determine whether an armed attack has occurred. This was not helped by the Court's later *Oil Platforms* decision in which it held that while the use of a missile against a lone merchant vessel would not constitute an armed attack[288] 'the mining of a single military vessel may be sufficient'.[289] Thus the jurisprudence of the Court indicates the existence of a gravity threshold, while leaving unclear what that threshold actually *is*.

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[284] *Nicaragua* (n 80) para 191.

[285] Ruys (2010) (n 192) 148.

[286] ibid 155.

[287] *Nicaragua* (n 80) para 195.

[288] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Reports 161, para 64.

[289] *Oil Platforms* (n 288) para 72.

The existence of a gravity threshold was also identified by the Eritrea-Ethiopia Claims Commission in its partial award regarding *jus ad bellum*. In this decision, it was held that 'localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter.'[290] In the case, occupation of a small area, brief armed incursions, fighting and the deaths of eight soldiers[291] were described as 'geographically limited clashes between small … patrols along a remote, unmarked, and disputed border', which were 'not of a magnitude to constitute an armed attack by either State against the other within the meaning of Article 51'.[292]

Green has suggested, in light of the *Oil Platforms* case, that the gravity requirement is 'context-specific',[293] which is a conceptually sound approach. Conversely, some have rejected the possibility of a gravity requirement.[294] Adopting this view, Paust has cited the absence of any relevant provision in Article 51.[295] A middle ground is presented in the Chatham House Principles, in which the gravity requirement is rejected when an armed attack is carried out by one state against another[296] but recognised for armed attacks launched by NSAs, which must be 'large scale'.[297] This appears a pragmatic mediation, but does rather ignore the suggestions made by the ICJ in *Oil Platforms* and the decision of the Ethiopia-Eritrea Claims Commission.

Ultimately, it seems there is little to support claims that there is no gravity requirement, though it remains unclear precisely what level of force will tip the balance as this likely depends on the circumstances.

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[290] *Eritrea-Ethiopia Claims Commission* (Partial Award: *Jus ad Bellum*, Ethiopia's Claims 1-8) (2005) 26 RIAA 457, para 11.

[291] ibid para 9.

[292] ibid para 12.

[293] Green (2009) (n 211) 41.

[294] Harold H Koh, 'Remarks at USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace' (US Department of State, 18 September 2012) https://2009-2017.state.gov/s/l/releases/remarks/197924.htm.

[295] Paust (2015) (n 108) 188.

[296] Wilmshurst (n 252) 966.

[297] ibid 969.

2.3.1.3.1 Satisfaction of the gravity threshold

Having established that for an armed attack to exist force must be of a certain gravity, it is then necessary to consider *how* that threshold may be reached. This question principally centres on the question of whether the threshold can be satisfied through a series of events, rather than a single incident.

The 'accumulation of events' doctrine has proponents and detractors. Philip Alston, writing as Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, asserted that the ICJ has set a high gravity threshold, arguing that 'sporadic, low-intensity attacks do not rise to the level of armed attack' and that self-defence 'must be judged in light of each armed attack, rather than by considering occasional, although perhaps successive, armed attacks in the aggregate.'[298] It is submitted that this is probably an overly restrictive reading of ICJ jurisprudence, which has suggested the possibility of satisfying the gravity requirement cumulatively. For instance, in the *Nicaragua* case, the Court asserted that due to a lack of information it could not answer the question of whether the acts of the parties 'may be treated for legal purposes as amounting, *singly or collectively*, to an "armed attack"',[299] suggesting that discrete acts can be aggregated. Further, in *Oil Platforms* the Court asserted that 'the question is whether [the] attack, either in itself *or in combination with the rest of the "series of ... attacks"* … can be categorized as an "armed attack"'.[300] In the *Armed Activities* case the Court made reference to a cumulative approach to the armed attack requirement, but in a more ambivalent manner, stating that '*even if this series of deplorable attacks could be regarded as cumulative in character*, they still remained non-attributable to the DRC'.[301] This is not an endorsement of the accumulation of events doctrine, in fact it could be argued that the words 'even if' is suggestive of the Court rejecting the doctrine, however in light of its previous pronouncements and the fact that the Court has never explicitly

[298] UNHRC, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, Study on Targeted Killings (28 May 2010) UN Doc A/HRC/14/24/Add.6 para 41.

[299] *Nicaragua* (n 80) para 231 (emphasis added).

[300] *Oil Platforms* (n 288) para 64 (emphasis added).

[301] *Armed Activities* (n 72) para 146 (emphasis added).

rejected the doctrine, it appears marginally more convincing that the Court seems to view the doctrine as an aspect of the armed attack requirement.

The doctrine has been raised by various states with mixed international reactions. In 1956 Israel invoked self-defence in the face of a series of low-level violent incidents involving groups based in Egypt.[302] Though the response was described as aggression[303] the acts to which it was responding were referred to by the French representative as 'liable to cause a reaction of self-defence'.[304] Additionally, there are more recent examples: Russia referred to its right to self-defence in response to repeated attacks from bandits operating out of Georgia,[305] and Lebanon claimed a right to self-defence in response to seven violations of its airspace by Israel.[306] Further, in 2000 Iran claimed a right to respond in self-defence to a series of minor uses of force by an NSA based in Iraq,[307] though it is unclear whether these would not have been viewed singularly as armed attacks. Relatedly, the UNSC appears disinclined to accept claims to self-defence presented in terms of the 'accumulation of events'.[308]

Academic treatment of the 'accumulation of events' doctrine asserts growing appetite for its acceptance, though to a varying extent. Tams claims a 'new willingness' among states regarding the doctrine, though with the caveat that this 'general trend … may require

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[302] UNSC, 749th Meeting (30 October 1956) UN Doc S/PV.749 para 33. Examples of actions undertaken by the *Fedayeen* included blowing up a house and attacking a police car (para 52), murdering a tractor driver (para 58), blowing up a combine harvester (para 60) and the killing of a soldier and wounding of two others (para 51).

[303] ibid para 21 (Yugoslavia); para 29 (USSR); para 111 (Egypt).

[304] ibid para 168.

[305] UNSC UN Doc S/2002/1012 (n 240).

[306] UNGA, Letter dated 4 February 2003 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General (5 February 2003) UN Doc A/57/722–S/2003/148.

[307] UNSC, Letter dated 13 March 2000 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General (13 March 2000) UN Doc S/2000/216.

[308] David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum*' (2013) 24(1) European Journal of International Law 235, 244; Lubell (2010) (n 206) 51; Christian J Tams, 'The Use of Force Against Terrorists' (2009) 20(2) European Journal of International Law 359, 370.

further consolidation'.[309] Similarly, Ruys has concluded that there is 'considerable support' for the doctrine, while acknowledging that this 'is not entirely unequivocal'.[310] Others have been less quick to interpret limited state practice as representing likely adoption of the doctrine. Lubell avoids making a conclusion either way, while recognising that both acceptance and rejection of the doctrine have compelling arguments.[311] Kretzmer has asserted that the doctrine 'has not gained general acceptance in the international community', though with the caveat that, in the face of a growing threat from NSAs, 'it is not as widely rejected as it was in the past.'[312]

Regardless of the disagreement as to the extent to which the 'accumulation of events' doctrine has been accepted by states, the common refrain is that the doctrine cannot be uncritically viewed as part of the *lex lata*. The most defensible conclusion seems that, though states appear to be advancing arguments that reflect a cumulative approach to armed attacks, this has not yet clearly become part of self-defence. Therefore, for drone strikes in self-defence to be lawful they must be undertaken in response to a previous violent act that individually is sufficiently grave to be described as an armed attack. Where drone strikes occur in response to a series of low-intensity attacks that, taken individually, would clearly not amount to an armed attack, the use of force cannot be confidently asserted to be lawful self-defence without reliance on what has been shown to be a particularly contentious interpretation of the law.

2.3.1.4 Self-defence against future armed attacks

Unsurprisingly, the extent to which self-defence can be exercised against armed attacks that are yet to happen is another area of entrenched controversy, mapping on to the restrictionist—expansionist divide.[313] Broadly, the argument against self-defence in the face of a future armed attack comes out of Article 51, which provides a right of self-

[309] Tams (n 308) 388.

[310] Ruys (2010) (n 192) 174. See also, Henriksen (n 197) 223.

[311] Lubell (2010) (n 206) 5154.

[312] Kretzmer (2013) (n 308) 244.

[313] Text from n 192 to n 193.

defence 'if an armed attack *occurs*'.[314] The suggestion is that this requires the actual rather than potential occurrence of an armed attack,[315] reasoning that seems to have informed, for instance, Lebanon's claim that US and UK military operations against Iraq in 2003 had no legal basis.[316] Conversely, the alternative argument draws on the Webster formula, from the *Caroline* incident, that the necessity of self-defence must be 'instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[317] Proponents of this view have argued that, as a matter of interpretation and common-sense in the face of modern weapons of mass destruction, the Webster formula remains relevant while avoiding overly broad readings of self-defence.[318] However, the debate forks further, with those identifying a right of self-defence against future armed attacks split as to the extent to which the right stretches into the future: some suggest that self-defence may only be invoked once a future threat has been put irreversibly into action,[319] while others propound a much wider right, in which 'pre-emptive' self-defence is available, 'even if uncertainty remains as to the time and place of the enemy's attack.'[320]

Discussion of self-defence against future armed attacks inevitably requires some mention of terminology, due to the varied and overlapping phrases adopted, in which the same words may be used to describe different types of self-defence. This work adopts the typology posited by Green, in which the three main types of self-defence against future threats are split into those that are: 'interceptive', in which self-defence is available prior

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[314] Emphasis added.

[315] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Stevens & Sons 1951) 797-8.

[316] UNSC, 4726th Meeting (26 March 2003) UN Doc S/PV.4726 para 35.

[317] Letter from Daniel Webster, US Secretary of State, to Lord Ashburton, British Special Representative to the US (27 July 1842), 30 BSP 193, 193-94 (quoting Letter from Daniel Webster, US Secretary of State, to Henry S Fox, British Minister in Washington (24 April 1841), 29 BSP 1126, 1137-38, quoted in Green (2006) (n 200) 436.

[318] Derek W Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 188; Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 98; Rosalyn Higgins, *Problems and Process—International Law and How We Use it* (Clarendon Press 1995) 242-3.

[319] Dinstein (2017) (n 235) 231-3.

[320] 'The National Security Strategy of the United States of America' (September 2002) 15.

to the occurrence of the attack but after it has been launched;[321] 'anticipatory', in which self-defence is available against a threat that has not yet materialised but which is 'imminent';[322] and 'pre-emptive', in which self-defence is available against inchoate future threats.[323] This is distinct from definitions given by others scholars; for instance, Ruys refers to these as 'interceptive', 'pre-emptive' and 'preventive' self-defence, respectively.[324] This emphasises the need to consider the substance of claims regarding the temporality of self-defence, rather than the terms used.

Academic debate around the temporality of self-defence is complex, though this is perhaps unwarranted in light of the relevant applicable law. There are those who have argued, prior to 9/11 and its reverberations within the law, that self-defence should be interpreted restrictively, allowing no recourse to force before an armed attack has factually occurred, in line with the literal wording of Article 51.[325] Conversely, in the same pre-9/11 period, other writers emphasised a limited right of self-defence against imminent threats, in line with the Webster formula.[326]

A brief examination of pre-9/11 state practice reveals that it is likely that no right of anticipatory self-defence was available. The Cuban Missile Crisis of 1962 has been cited as supporting anticipatory self-defence,[327] but the action was not one of self-defence[328] and provides no state practice or *opinio juris* in support.[329] Likewise, the 1967 Six Days War between Israel and Egypt, Jordan and Syria is presented as an instance of anticipatory

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[321] James A Green, 'The *Ratione Temporis* Elements of Self-Defence' (2015) 2(1) Journal on the Use of Force and International Law 97, 107.

[322] Green (2015) (n 321) 105-7.

[323] ibid 107.

[324] Ruys (2010) (n 192) 253-4.

[325] See, for instance, Kelsen (n 315) 797-8.

[326] See, for instance, Bowett (n 318) 188; Franck (n 318) 98; Higgins (n 318) 242-3.

[327] Franck (n 318) 101; Myres M McDougal, 'The Soviet-Cuban Quarantine and Self-Defense' (1963) 57(3) American Journal of International Law 597, 603.

[328] Quincy Wright, 'The Cuban Quarantine' (1963) 57(3) American Journal of International Law 546, 554 n 35.

[329] Gray (n 52) 161-2.

self-defence,[330] though Israel claimed self-defence in response to a pre-existing armed attack,[331] and therefore the incident does not support the development of the concept.[332] Finally, the 1981 strike by Israel against the Osiraq nuclear reactor in Iraq was claimed to be lawful on the basis of self-defence[333] in the face of possible future nuclear attacks by Iraq.[334] The strike was condemned as a violation of the UN Charter by the UNSC, demonstrating a lack of acceptance of this type of self-defence,[335] though it has been argued that certain states appeared to recognise a limited anticipatory self-defence against imminent armed attacks,[336] representing 'a crack in the *opinio juris* vis-à-vis the legality of pre-emptive action in response to "imminent" threats.'[337]

Therefore, the right to anticipatory self-defence, during the 20th century, not to have been a right that could be confidently asserted. The need for an armed attack to *occur*, as under Article 51, emerges as the dominant paradigm of self-defence during the period, though with references to imminence occasionally suggesting this understanding was not necessarily universal.

It is trite to claim that things have changed since 9/11, but it seems that these changes are not as dramatic as may be expected. In the face of a massive attack from an NSA, the US called for the armed attack notion of imminence to be adapted to include 'pre-emptive actions'.[338] Importantly, this pre-emptive adaptation of self-defence was argued to be

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[330] Franck (n 318) 103.

[331] UNGA, 'The Situation in the Middle East' (1967) Yearbook of the United Nations 158, 195-6 (Israel Foreign Minister).

[332] Gray (n 52) 161; Ruys (2010) (n 192) 271-80.

[333] UNSC, 2280th Meeting (12 June 1981) UN Doc S/PV.2280 para 58.

[334] UNSC, Letter dated 8 June 1981 from the Permanent Representative of Israel to the United Nations Address to the President of the Security Council (8 June 1981) UN Doc S/14510.

[335] UNSC Res 487 (19 June 1981) UN Doc S/RES/487.

[336] UNSC, 2283rd Meeting (15 June 1981) UN Doc S/PV.2283 para 147 (Sierra Leone); UNSC, 2284th Meeting (16 June 1981) UN Doc S/PV.2284 para 11; UNGA, 55th Plenary Meeting (12 November 1981) UN Doc A/36/PV.55 para 39.

[337] Ruys (2010) (n 192) 287.

[338] NSS 2002 (n 320) 15. Interestingly, emphasising the semantic variations within the temporal aspect of armed attack, the National Security Strategy also refers to 'anticipatory action' in the same paragraph.

available 'even if uncertainty remains as to the time and place of the enemy's attack.'[339] This is clearly beyond the narrower 'anticipatory' self-defence, with its focus on imminent threats that have not yet materialised, instead opening it up to include inchoate attacks.

Despite the brazen presentation of this new approach in the US NSS, it seems not to have been adopted in the practice of states.[340] The US itself appears not to have relied on pre-emptive self-defence when justifying the 2003 invasion of Iraq, instead emphasising the consistency of the use of force with UNSC Resolutions 678, 687 and 1441, with Taft and Buchwald arguing that, even if the intervention appeared pre-emptive, this did not make it unlawful, due to the alternative basis for lawfulness under the UNSC Resolutions.[341] In condemning the intervention at the UNSC, some states specifically asserted that pre-emptive self-defence contravenes the UN Charter[342] while others emphasised the lack of imminent threat to justify the attack.[343] Other states discussing the lawfulness of the intervention focused on its possible authorisation by the UNSC rather than self-defence, which Ruys has argued removes the potential for the intervention in Iraq to provide state-practice in support of pre-emptive self-defence.[344]

In the years since 9/11, academic commentary seems more accepting of anticipatory self-defence, in line with the Webster formula, though there is resistance to expansive pre-emptive self-defence,[345] a minority limiting anticipatory self-defence to situations in

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[339] ibid 15.

[340] Gray (n 52) 214-6; Ruys (2010) (n 192) 314-8.

[341] William H Taft and Todd F Buchwald, 'Preemption, Iraq and International Law' (2003) 97(3) American Journal of International Law 557, 563.

[342] UNSC UN Doc S/PV.4726 (n 316) 8 (Malaysia), 33 (Iran), 35 (Lebanon).

[343] Ibid 10 (Algeria).

[344] Ruys (2010) (n 192) 317.

[345] See, for instance, Michael Bothe, 'Terrorism and the Legality of Pre-Emptive Force' (2003) 14(2) European Journal of International Law 227, 231; Noura S Erakat, 'New Imminence in the Time of Obama: The Impact of Targeted Killing on the Law of Self-Defense' (2014) 56(1) Arizona Law Review 195, 202; Green (2015) (n 321) 107; W Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100(3) American Journal of International Law 525, 547; Miriam Sapiro, 'Iraq: The Shifting Sands of Preemptive Self-Defense' (2003) 97(3) American Journal of International Law 599, 605; Schrijver and van den Herik (n 282) 543; Raphaël van Steenberghe, 'The

which the event has begun, though where the attack has not been 'suffered'.[346] This arguably accords with ICJ jurisprudence, which, while not determining the existence of anticipatory self-defence, has asserted that the term 'inherent' within Article 51 likely preserves some pre-existing customary international law. [347]

There are, nonetheless, continued arguments in favour of self-defence against temporally remote threats, which, without calling it pre-emptive self-defence, bear similar hallmarks. These arguments retain the need for an imminent threat, thereby remaining anticipatory rather than pre-emptive, but propound a wider notion of imminence, extending the temporal reach of self-defence. For instance, Daniel Bethlehem famously stated that:

> 'absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent … provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.'[348]

For Bethlehem, imminence is not strictly temporal, but instead is context specific, with reference to 'all relevant circumstances'.[349] UK Attorney General Jeremy Wright has declared that this 'reflects and draws upon what has been a settled position of successive British Governments.'[350] Furthermore, it has been implicitly (retrospectively) identified as the basis of the Obama administration's 'elongated' reading of imminence.[351] In presenting an alternative notion of imminence, the question becomes arguably more to do with necessity, and as such will be explored further in that section.[352]

Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side' (2016) 29(1) Leiden Journal of International Law 43, 51; Wilmshurst (n 252) 967-8.

[346] Dinstein (2017) (n 235) 233.

[347] *Nicaragua* (n 80) para 176.

[348] Bethlehem (n 282) 776.

[349] ibid 775.

[350] Wright (n 270).

[351] Harold H Koh, 'The Trump Administration and International Law' (2017) 56(3) Washburn Law Journal 413, 454.

[352] Text from n 373 to n 380.

It is clear, therefore, that, like much within *jus ad bellum*, the law is ambiguous. While there is a strong argument in favour of anticipatory self-defence representing the current paradigm of the temporal nature of the armed attack requirement, the law is sufficiently unclear to allow the provision of expansive notions of imminence that, arguably, have the potential to produce a doctrine of self-defence resembling the widely rejected pre-emptive version.

2.3.2 Necessity and proportionality

Necessity and proportionality relate to the armed attack to which self-defence is a response. Thus, whether force is necessary or proportionate will be conditioned by the interpretation of the armed attack requirement; this means that where one adopts a wide understanding of the armed attack requirement—for instance accepting the accumulation of events doctrine—then it is likely that more intense uses of force may be considered to be necessary and proportionate. Each of these concepts are vital to the analysis of drone strikes in self-defence and provide a lens through which to examine the nature and appropriateness of drone use against armed attacks from NSAs.

Necessity and proportionality do not form part of the doctrine of self-defence under Article 51 but are commonly viewed as arising out of the *Caroline* affair, and the requirement of a 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[353] The ICJ has confirmed the ongoing relevance of the customary basis of necessity and proportionality in the *Nicaragua* case,[354] the

[353] Letter from Daniel Webster, US Secretary of State, to Lord Ashburton, British Special Representative to the US (27 July 1842), 30 BSP 193, 193-94 (quoting Letter from Daniel Webster, US Secretary of State, to Henry S Fox, British Minister in Washington (24 April 1841), 29 BSP 1126, 1137-38, quoted in Green (2006) (n 200) 436.

[354] *Nicaragua* (n 80) para 194, in which the Court confirmed the necessity and proportionality requirements. See also para 237 for the application of necessity to the facts.

Nuclear Weapons Advisory Opinion,[355] the *Oil Platforms* case[356] and the *Armed Activities* case.[357]

The requirements of necessity and proportionality are closely linked, with some suggesting that, while separate, they cannot really operate independently.[358] Nevertheless, each has a distinct function, with necessity analysing the resort to force and proportionality assessing the nature of the force used.[359] As such, the two will be treated separately in the present analysis.

2.3.2.1 Necessity

Necessity is conceptually blurry, as the necessity of a use of force depends on the circumstances in which is occurs.[360] The Webster formula is general only, as it mandates consideration of the context of self-defence. Nevertheless, it is possible to discern some features of necessity that can guide the context-specific determination.

For a use of force to be necessary, it must be required 'to bring an attack to an end, or to avert an imminent attack'.[361] There is no requirement that force is necessary to avoid an existential threat to the victim state,[362] demonstrated by the UK's use of force in the Falklands/Malvinas, which was widely recognised to be self-defence, despite the conflict not threatening the existence of the UK.[363] Therefore, self-defence must be necessary to

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[355] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 226, para 41, in which the Court stated that '[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law'.

[356] *Oil Platforms* (n 288) para 43, in which the Court stated that 'the criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence'.

[357] *Armed Activities* (n 72) para 147, in which the Court confirmed the presence of the necessity requirement but felt no need to apply it to the facts.

[358] Gray (n 52)150.

[359] Kretzmer (2013) (n 308) 239.

[360] Green (2006) (n 200) 450-1.

[361] Schrijver and van den Herik (n 282) 543.

[362] Green (2006) (n 200) 450-1.

[363] ibid 452.

'halt and repel' and armed attack,[364] rather than being necessary to protect the existence of the victim state.

It is perhaps axiomatic that to be necessary, a use of force must be the last resort—clearly, if alternatives existed, force would not be necessary.[365] In the *Oil Platforms* case, the failure by the US to complain to Iran of the attack to which it was purportedly responding undermined the claim that force was necessary.[366] However, this has been argued not to require that *all* possible peaceful means are exhausted but that, where they have not been exhausted, it would have been unreasonable to require the victim state to continue to pursue non-forcible means.[367] Thus, the requirement of necessity has been rendered as the requirement that there is 'no *practical* alternative to the proposed use of force that is likely to be effective in ending or averting the attack'.[368] In the case of armed attacks by NSAs, this requirement has been further interpreted to require that victim states seek the consent of the territorial states prior to using force.[369]

Related to this is the earlier considered issue of a territorial state's unwillingness or inability to address a threat.[370] While this concept appears rejected as a way of establishing attribution of the conduct of an NSA to its host-state, it has a less controversial place within necessity. As an aspect of the exhaustion of non-forcible means, where a host-state is willing and able to address an actual or imminent armed attack from an NSA, the use of force by the victim state is clearly unnecessary.[371] This is the approach adopted by many scholars,[372] and seems an unremarkable and common-sense reading of necessity.

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[364] Gray (n 52) 150.

[365] ILC UN Doc A/CN.4/318 and ADD.1-4 (n 112) para 120.

[366] *Oil Platforms* (n 288) para 76.

[367] Green (2006) (n 200) 455.

[368] Wilmshurst (n 252) 966. See also Dinstein (2017) (n 235) 250-1.

[369] Dapo Akande and Thomas Lieflander, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107(3) American Journal of International Law 563, 566.

[370] Section 2.3.1.2.

[371] Lubell (2010) (n 206) 46.

[372] Bethlehem (n 282) 776; Deeks (n 282) 495; Dinstein (2017) (n 235) 244-9; Lubell (2017) (n 281) 219-20; Ruys (2010) (n 192) 509; Trapp (n 282) 147.

Further consideration of the exhaustion of non-forcible means raises the issue of temporality. As shown, it can be argued that self-defence contains a right to anticipatory self-defence against imminent armed attacks.[373] What counts as imminent is a question of necessity as, while there remains time to respond to an armed attack non-forcibly, the use of force cannot be necessary.[374] On this basis the Chatham House principles rejected 'a temporal criterion only' for imminence, instead emphasising the contextual question of whether 'any further delay would result in an inability by the threatened State effectively to defend against or avert the attack against it.'[375] Thus, force would be necessary against an imminent threat where it represented the last chance to prevent the attack. This does not remove time from the equation, as the further into the future an attack will occur, the harder it is to assert that there is a 'a reasonable and objective basis'[376] that an impending armed attack requires force to prevent it.[377] It does, however, mean that time is not *the* operative consideration.

Bethlehem's influential principles on self-defence against NSAs arguably extends this contextual reading of imminence, including considerations such as 'the probability of an attack', 'whether the anticipated attack is part of a concerted pattern of continuing armed activity', 'the likely scale of the attack' as well as 'immediacy' and 'the likelihood that there will be other opportunities to undertake effective action in self-defence'.[378] The fact that 'probability' is present suggests perhaps an opening up of the extent to which an attack must be anticipated. This, in conjunction with Bethlehem's assertion that 'absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent'[379] arguably conceives of self-defence in situations where it cannot really be said with confidence that 'further

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[373] Section 2.3.14.

[374] Wilmshurst (n 252) 967.

[375] ibid 967.

[376] Bethlehem (n 282) 776.

[377] Akande and Lieflander (n 369) 565; Noam Lubell, 'The Problem of Imminence in an Uncertain World' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 712.

[378] Bethlehem (n 282) 775-6.

[379] ibid 776

delay would result in an inability by the threatened State effectively to defend against or avert the attack'.[380]

Reflecting imminence is the requirement of immediacy,[381] an element of necessity requiring that, though self-defence need not occur *during* an armed attack, 'there must not be an undue time-lag'.[382] The content of immediacy is said to be unclear,[383] and in *Nicaragua* the ICJ stated that a delay of several months between the purported armed attack and self-defence meant that force was not necessary.[384] Nevertheless, in *Nicaragua* the attack had been 'completely repulsed',[385] and in other instances force has been held to be necessary in spite of a long delay between armed attack and response.[386] While remaining vague, it has been suggested that the extent to which force is required in order to 'halt and repel' an armed attack[387] and the absence of alternative means of resolution will determine whether self-defence was immediate.[388]

2.3.2.2 Proportionality

While necessity asks whether there is a need to use force, proportionality assesses the nature of force used. There is debate over certain aspects of proportionality, but it is possible to identify some broad characteristics.

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[380] Wilmshurst (n 252) 967.

[381] Dinstein (2017) (n 235) 469.

[382] ibid 252

[383] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) 150.

[384] *Nicaragua* (n 80) para 237.

[385] ibid para 237.

[386] Examples of this are the UK's use of force in the Falklands/Malvinas in 1982, the UNSC reaction to Iraq's invasion of Kuwait in 1990-1, and Operation Enduring Freedom in Afghanistan, beginning in 2001. See, for instance, Lubell (2010) (n 206) 44-5.

[387] Gray (n 52) 150.

[388] Gardam (n 383) 153.

Gardam has stated that the 'first step in applying the proportionality equation is to determine the legitimate aim of self-defence'.[389] Thus, proportionality is contextual, centring on the facts of a situation. A use of force can be said to be disproportionate where it goes beyond what is necessary (illustrating the overlap between proportionality and necessity) to achieve the result sought.[390] Key is what counts as a legitimate aim of self-defence.

It is widely accepted that a legitimate aim of self-defence is the halting and repelling of an armed attack and that there need not be parity between attack and response for it to be proportionate.[391] Proportionality is judged with reference to the entirety of a self-defence operation[392] and ongoing self-defence must 'remain defensive in character'.[393]

This approach is supported by significant state practice,[394] though some commentators have argued in favour of self-defence beyond the 'defensive' when responding to terrorism, involving punitive elements aimed at weakening an NSA rather than simply repelling an attack.[395] Kretzmer suggests a possible preventative or deterrent aim of self-defence, beyond pure repulsion, acting against 'threats posed by the aggressor, whether imminent or not.'[396] Tams and Devaney posit Turkey's 2008 action against the PKK in Iraq, Israel's 2006 offensive against Hezbollah in Lebanon and US 1998 operations in Sudan and Afghanistan as state practice supporting a wider view of proportionality.[397] These are, however, isolated examples, and do not provide a convincing basis for what

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[389] ibid 158.

[390] ILC UN Doc A/CN.4/318 and ADD.1-4 (n 112) para 121.

[391] *Nuclear weapons* (n 355) para 5; Gardam (n 383) 159; Schrijver and van den Herik (n 282) 543; Wilmshurst (n 252) 968.

[392] Wilmshurst (n 252) 969.

[393] ibid 543.

[394] Sina Etezazian, 'The Nature of the Self-Defence Proportionality Requirement' (2016) 3(2) Journal on the Use of Force and International Law 260, 268.

[395] Christian J Tams and James G Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence' (2012) 45(1) Israel Law Review 91, 103.

[396] Kretzmer (2013) (n 308) 262.

[397] Tams and Devaney (n 395) 103.

would be a total transformation of ontology of self-defence. Israel's action against Hezbollah was condemned by the Secretary-General of the UN as 'excessive', emphasising that force went beyond what was proportionate.[398] At present, it is submitted that the most persuasive reading of proportionality remains defensive.

In terms of the time and space of self-defence, a response will be proportionate where it lasts as long as is necessary to address the armed attack.[399] This is evident within the *Nicaragua* judgment, in which the US response far outlasted the armed attack to which it was responding and was held to be disproportionate.[400] Gardam has stated that, geographically, self-defence will be proportionate where it remains within the area from which the attack is being repelled.[401] Nevertheless, she acknowledges that it may be necessary to enter another state's territory[402] and Tams and Devaney go further, arguing that self-defence allows states to go beyond the location of an attack and 'respond against terrorists at their base'.[403] The issue relates again to the permissible aims of self-defence; it seems that, where the targeting of an NSA base is carried out for *defensive* reasons this will likely be proportionate, whereas if the purpose is *offensive* it would go beyond the bounds of self-defence, rendering the use of force unlawful.

In part, the temporal nature of a response, as well as proportionality more generally, depends on the operative interpretation of armed attack. Where the accumulation of events doctrine is accepted, ongoing self-defence may be proportionate to repel a series of attacks considered together, while being disproportionate if each attack is considered discretely. The former approach, which provides for a wide right of self-defence, is adopted by Bethlehem[404] and rejected by others.[405] The issue reaches to the heart of debates around *jus ad bellum* and, as demonstrated above,[406] has not conclusively entered

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[398] UNSC, 5492nd Meeting (20 July 2006) UN Doc S/PV.5492, 3.

[399] Gardam (n 383) 167.

[400] *Nicaragua* (n 80) para 237.

[401] Gardam (n 383) 163.

[402] ibid 164.

[403] Tams and Devaney (n 395) 104.

[404] Bethlehem (n 282) 775.

[405] UNHRC UN Doc A/HRC/14/24/Add.6 (n 298) para 41.

[406] Section 2.3.1.3.1.

into the corpus of international law. Therefore, to be certainly proportionate, an act of self-defence must seek the repulsion of a specific actual or imminent attack, rather than a series of attacks, cohering with the view that proportionality is not based on 'symmetry between the mode of the initial attack and the mode of response'.[407]

2.3.3 Self-defence and US drone strikes

Having set out a broad framework of self-defence, it is now necessary to apply it to the resort to armed drones.

Self-defence has been regularly, though indirectly, presented by US officials as justifying extraterritorial drone strikes against NSAs. There has been little specific comment on the drone programmes themselves, though references to campaigns against al-Qaeda, the Taliban and associated forces clearly include drone use in Pakistan, Yemen and Somalia. Nevertheless, Koh, then-Legal Adviser at the Department of State, directly referred to drone strikes, stating that they are carried out in self-defence as part of the US's ongoing 'war' against 'al-Qaeda, the Taliban and associated forces'.[408] Similarly, John Brennan, then-Assistant to the President for Homeland Security and Counterterrorism, directly referred to drone strikes against 'al-Qaida, the Taliban, and associated forces' in self-defence.[409] Similarly, President Obama asserted that the use of drones is carried out in self-defence.[410] Additionally, there are several instances of self-defence being presented as the justification of the US's use of force against NSAs.[411]

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[407] Dissenting Opinion of Judge Higgins, *Nuclear weapons* (n 355) para 5.

[408] Koh (2010) (n 10).

[409] Brennan (2012) (n 48).

[410] Obama (n 195).

[411] See, for instance, Authorization for Use of Military Force (2001) SJ Res 23 (107th) (AUMF); Department of Justice White Paper (n 49); John O Brennan, 'Strengthening our Security by Adhering to our Values and Laws' (The White House, 16 September 2011) https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an; Holder (n 48).

The repeated invocation of self-defence is curious given the extent to which US operations have been consented to, though perhaps understandable given the secrecy of at least some of this consent, and because self-defence claims often apply to more than just drone operations in Pakistan, Yemen and Somalia. In addition, self-defence serves as a gap filler, providing justification where consent runs out, either because drone strikes transcend the apparent boundaries set by host government[412] or where it has been withdrawn.[413] As a result, self-defence occupies a lesser position in the discussion on the resort to drones, yet it features prominently within the literature, an overview of which is presented within the analysis.

2.3.3.1 Drone use in Pakistan, Yemen and Somalia in response to armed attacks

This section involves the application of the framework set out above to the facts of US drone strikes in Pakistan, Yemen and Somalia. This is done with a degree of detail that has thus far been absent in the literature on drones, particularly in respect of the three regions considered. Previous writing has tended towards seeing 9/11 as an armed attack providing an overall basis upon which to launch drone strikes in self-defence,[414] without going into detail as to the distinct groups targeted and the fact that these NSAs cannot be homogenised in relation to 9/11. Conversely, herein these groups will be considered separately. Further, consideration will be made of how distinct interpretations of the law of self-defence impact upon the perceived lawfulness of strikes.

US officials have asserted that drone strikes are a response to an armed attack by 'al Qaeda, the Taliban, and their associated forces', 9/11 being most often cited. For instance, the preamble of the AUMF asserts that self-defence may be resorted to in response to

[412] Text from n 182 to n 185.

[413] Text from n 102 to n 103.

[414] See, for instance, Paust (2015) (n 108) 172; Raul A Pedrozo, 'Use of Unmanned Systems to Combat Terrorism' (2011) 87 International Law Studies 217, 221-6; Printer (n 4) 352; Vogel (2015) (n 196) 286-90; though, cf, Martin (2012) (n 197) 243-5.

9/11,[415] an assertion regularly repeated[416] and applied to armed drone use.[417] Much less is made of ongoing and potential armed attacks, though Koh has specifically referred to drone use in self-defence against 'an enemy that attacked us on September 11, 2001, and before, and that *continues to undertake* armed attacks against the United States.'[418] Under the Trump administration there have so far been no revocations of this justification, suggesting that it continues to be held.

Thus, 9/11 appears to be conceived of as an armed attack providing a blanket authorisation for lethal drone strikes in self-defence against a variety of NSAs, with unspecified 'continuing' armed attacks allowing additional recourse. This raises multiple issues with regard to the lawfulness of drone strikes under self-defence.

First, there is the basic issue of the armed attack coming from an NSA. As shown, there is support for the continued requirement of host-state involvement for an armed attack to occur. This disputed aspect of self-defence has, unsurprisingly, split the literature on drone strikes. Those who argue that drones can be used in self-defence against isolated NSAs provide an array of reasons in support. Printer has asserted simply that 9/11 was an armed attack, without dwelling on the nature of armed attacks from NSAs.[419] Paust, has relied on the continued applicability of customary self-defence to argue that there is no requirement of state involvement.[420] Orr has argued that reading an exception into Article 51 excluding self-defence against NSAs conflicts with the object and purpose of the UN Charter.[421] Larson and Malamud have argued that UNSC Resolution 1368 provides the US with 'broad authority to defend itself', allowing it to exercise self-defence against NSAs in Pakistan.[422] On the basis of these arguments, each of these writers concludes that US drone strikes are undertaken in response to an armed attack, 9/11, passing the first stage of lawful self-defence.

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[415] Authorization for Use of Military Force (2001) SJ Res 23 (107th).

[416] Brennan (2011) (n 411); Holder (n 48).

[417] Obama (n 195); Brennan (2012) (n 48).

[418] Koh (2010) (n 10) (emphasis added).

[419] Printer (n 4) 353.

[420] Paust (2010) (n 3) 244-50.

[421] Orr (n 197) 739.

[422] Larson and Malamud (n 197) 14.

Conversely, others have maintained the restrictive reading of the armed attack element, requiring state involvement for an armed attack. Discussing the issue in general, Breau and Aronsson state that drone strikes may only occur where there is a 'degree of state sponsorship of [armed] attacks', though without concluding as to the lawfulness of US strikes.[423] Citing ICJ jurisprudence, particularly the *Armed Activities* case, O'Connell has argued that, while the 9/11 armed attack has been used to justify self-defence against al-Qaeda in Afghanistan due to its links to the Taliban government, this self-defence cannot be extended beyond Afghanistan.[424] Therefore, 9/11 cannot be an armed attack allowing self-defence against NSAs in other states. Martin has asserted the need for a state-NSA nexus, arguing that, rather than shifting the law away from this requirement, UNSC Resolution 1373 'can be interpreted as recognizing that the 9/11 attacks constituted armed attacks … justifying the exercise of the right of self-defence *against the state deemed to be responsible for them*, consistent with established principles of *jus ad bellum*.'[425] In requiring state responsibility, Martin adopts a particularly restrictive interpretation of the armed attack criterion, seemingly going beyond the limited and non-unanimous judgment of the ICJ. Ultimately this conclusion matches O'Connell's, suggesting that self-defence is permissible in Afghanistan only. Likewise, Shah, writing about Pakistan, states that there is too little state involvement over Afghan al-Qaeda or Taliban groups to allow drone strikes outside of Afghanistan,[426] meaning that, where drone strikes exceed the scope of consent from the government of Pakistan, they would be unlawful.

This latter group of authors identifies a very limited right to use drones in self-defence against NSAs, where there is a link between an NSA and its host-state. This translates in the US context to a right to use drones in Afghanistan only, due to the support of al-Qaeda by the Taliban. As such, drone strikes in Pakistan, Yemen and Somalia would not

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[423] Susan Breau and Marie Aronsson, 'Drone Attacks, International Law and the Recording of Civilian Casualties of Armed Conflict' (2012) 35(2) Suffolk Transnational Law Review 255, 273.

[424] Mary Ellen O'Connell, 'The International Law of Drones' (2010) 14(37) *ASIL Insights* https://www.asil.org/insights/volume/14/issue/37/international-law-drones.

[425] Martin (2012) (n 197) 239 (emphasis added).

[426] Shah (2001) (n 198) 120.

constitute lawful self-defence by virtue of the absence of host-state involvement with the NSAs.

There is broad support for the contention that 9/11 *did* constitute an armed attack,[427] but disagreement as to whether this enables self-defence against NSAs outside Afghanistan. A linked and crucial point, often overlooked, is that the 'al-Qaeda' that carried out the 9/11 attacks is not the same group as those targeted by drone strikes in Pakistan, Yemen and Somalia.[428] Tibori-Szabo has highlighted this, arguing that 'an armed attack carried out by a group adhering to an ideology shared by other groups can only be the basis of self-defence against that particular group'.[429]

As shown, targeted groups are TTP, al-Qaeda and the Haqqani Network in Pakistan, al-Shabaab in Somalia and AQAP in Yemen;[430] apart from al-Qaeda in Pakistan, these groups are distinct from the perpetrators of 9/11. This distinction is made within the 2014 US Intelligence Committee Worldwide Threat Assessment which separates AQAP and 'core' al-Qaeda, as well as a 'global following' of 'regional affiliates', including al-Shabaab.[431] In the 2018 Assessment there is reference to al-Qaeda 'affiliates', including those in Somalia and Yemen, emphasising the separation between groups,[432] while also describing the Haqqani Network as 'not subordinate to' al-Qaeda.[433] AQAP is called 'the

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[427] Though, cf Eric PJ Myjer and Nigel D White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?' (2002) 7(1) Journal of Conflict and Security Law 5, 7.

[428] Though see Michael J Boyle, 'The Legal and Ethical Implications of Drone Warfare' (2015) 19(2) International Journal of Human Rights 105, 114.

[429] Tibori-Szabo (n 3) 400; see also Shah (2001) (n 198) 116-9.

[430] Text from n 202 to n 205.

[431] James R Clapper, 'Worldwide Threat Assessment of the US Intelligence Community' (Senate Select Committee on Intelligence, 29 January 2014) https://www.dni.gov/files/documents/Intelligence%20Reports/2014%20WWTA%20%20SFR_SSCI_29_Jan.pdf 4-11.

[432] Daniel R Coats, 'Worldwide Threat Assessment of the US Intelligence Community' (Senate Select Committee on Intelligence, 13 February 2018) https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA---Unclassified-SSCI.pdf 10.

[433] 2018 Threat Assessment (n 432) 9.

most active operational franchise' of al-Qaeda,[434] and al-Shabaab is allied with al-Qaeda,[435] but this does not make them a single NSA for self-defence purposes. Even the oft cited enemy, 'al-Qaeda, the Taliban and associated forces'[436] demonstrates that, in the minds of those discussing them, the groups are heterogeneous.

Therefore, it is wrong to view 9/11 as an armed attack permitting the use of drones in self-defence generally in Pakistan, Yemen and Somalia (with the possible exception of those against al-Qaeda in Pakistan, which can be linked to 9/11[437]). These can only be justified in light of separate armed attacks by those groups, and only then when a wide interpretation of the armed attack requirement is adopted that dispenses with the requirement of state involvement, as none have links with their hosts. As discussed, it is controversial as to whether this requirement remains part of self-defence, and the debate is such that it cannot be said with absolute confidence that in the absence of state involvement an NSA cannot carry out an armed attack. Therefore, it is necessary to consider the possibility of armed attacks from these groups to which drone strikes may be a response, though with the understanding that any armed attacks identified stand on contested legal interpretation.

As stated, US drone strikes have been impliedly presented as a response to 'continuing' armed attacks.[438] The 2018 Assessment refers to 'persistent' and 'continuing terrorist threats to US interests' from al-Qaeda affiliates.[439] Martin suggests that the failure to identify relevant armed attacks means that drone strikes cannot be lawful under self-defence; [440] however, though this opaqueness is unfortunate, there is no requirement that an account of operations is given for them to be lawful. Thus, while remaining

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[434] 'Profile: Al Qaeda in the Arabian Peninsula' *Al Jazeera* (9 May 2012) http://www.aljazeera.com/news/middleeast/2012/05/2012597359456359.html.

[435] Nelly Loahoud, 'The Merger of al-Shabaab and Qa'idat al-Jihad' (*Combating Terrorism Center, West Point*, 16 February 2012) https://www.ctc.usma.edu/posts/the-merger-of-al-shabab-and-qaidat-al-jihad.

[436] Koh (2010) (n 10).

[437] Shah (2001) (n 198) 117.

[438] Koh (2010) (n 10) (emphasis added).

[439] 2018 Threat Assessment (n 432) 9.

[440] Martin (2012) (n 197) 247.

speculative, it can be suggested that drone strikes are carried out not just due to 9/11 but also due to other armed attacks, either that have happened or may happen in the future.

2.3.3.1.1 Yemen[441]

Ironically, AQAP, against which host-state consent appears to provide a blanket basis for drone strikes, is cited as being 'of foremost concern' in the 2014 Assessment.[442] Paust has cited AQAP's attack on the *USS Cole* as an armed attack,[443] and this may well be correct given the ICJ's assertion in *Oil Platforms* that the 'mining of a single military vessel may be sufficient' to invoke self-defence.[444] The plot to blow up a US airliner was co-ordinated by AQAP member Anwar al-Aulaqi[445] and so could also be treated as an AQAP armed attack. Nevertheless, with regard to US drone strikes in Yemen, references to self-defence and threats or attacks from AQAP are ancillary to the more robust lawfulness of the government's consent. Claims to self-defence are perhaps better viewed as statements supporting the *policy* of drone strikes, rather than as legal claims.

2.3.3.1.2 Pakistan

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[441] Breaking with this work's convention, Yemen is dealt with first in this section, due to the fact that, in realtion to that state, self-defence can be considered with great brevity, compared with Pakistan and Somalia.

[442] 2014 Threat Assessment (n 431) 10.

[443] Jordan J Paust, 'Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond' (2002) 35(3) Cornell International Law Journal 533, 554; see also, John Odle, 'Targeted Killings in Yemen and Somalia: Can the United States Target Low-Level Terrorists' (2013) 27 Emory International Law Review 603, 650.

[444] *Oil Platforms* (n 288) para 72.

[445] Scott Shane, 'Insider Al Qaeda's Plot to Blow Up an American Airliner' *New York Times* (Washington, 22 February 2017) https://www.nytimes.com/2017/02/22/us/politics/anwar-awlaki-underwear-bomber-abdulmutallab.html?rref=collection%2Ftimestopic%2FAbdulmutallab%2C%20Umar%20Farouk&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection.

With Pakistan, the situation is more complex. As stated, US drone operations appear to have been consented to between 2004 and June 2013; therefore, the 61 drone strikes after June 2013 will require justification in self-defence to be lawful. This is complicated when considering the groups targeted: the Haqqani Network, TTP and an autochthonous franchise of al-Qaeda. These groups are separate and cannot be considered under the same self-defence justification, having not carried out armed attacks together.

The US position regarding these groups is vague. Officials generally refer to 'al-Qaida, the Taliban, and associated forces',[446] which is a very wide designation, presumably including all groups opposed to the US and its allies, and sharing a broad 'terrorist' ideology. But this says nothing about specific threats from specific groups, thereby preventing an understanding of the 'continuing' armed attacks cited in support of ongoing self-defence. The US Threat Assessments provide little illumination: in the 2014 Assessment, there was no reference to the Haqqani Network, and the Taliban was discussed only in relation to Afghanistan, there being no references to TTP.[447] al-Qaeda was discussed in terms of its 'core'—which, as shown below,[448] represents that based in Pakistan—and AQAP.[449] There is no delineation of Pakistan-based groups and their actual or potential armed attacks. In the 2018 Assessment, the Haqqani Network is cited as an ongoing threat, though this centres on its activity in Afghanistan.[450] There is, again, no reference to TTP and all discussions of Pakistan relate not to NSAs but to domestic policy and its relations with India.[451] Failing to identify NSAs makes it hard to identify any armed attack that the US has suffered or may suffer from groups other than the Haqqani Network. It is clear that the US has continued to target TTP[452] and al-Qaeda in

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[446] Brennan (2011) (n 411).

[447] Worldwide Threat Assessment of the US Intelligence Community, Senate Select Committee on Intelligence (29 January 2014) 7, 17-18.

[448] n 487.

[449] 2014 Threat Assessment (n 431) 4.

[450] 2018 Threat Assessment (n 432) 9.

[451] ibid17-8.

[452] See, for instance, the June 2018 death of Maulana Noor Saeed, a TTP commander: Shamim Shahid, '24 Militants Killed in US Drone Strikes in NW, Pak-Afghan Border' *Express Tribune* (9 January 2016) https://tribune.com.pk/story/1024553/20-islamic-state-militants-killed-in-us-drone-strike-near-pak-afghan-border/.

Pakistan[453] though this has become less prevalent, reflecting a general reduction in drone strikes in Pakistan at the end of the Obama administration. Therefore, it can be assumed that, as they continue to be targeted without the apparent consent of the Pakistani government, the US is conducting drone strikes in self-defence against the Haqqani Network, TTP and al-Qaeda.

In terms of the Haqqani Network, identifying armed attacks is straightforward. The group are involved in resisting the US in Afghanistan in support of the Afghan Taliban. The group has carried out attacks against the US, including a 2009 bombing of a CIA base in Khost Province,[454] a 2011 siege of the US Embassy and headquarters of NATO in Kabul,[455] and a 2013 attack on the US consulate in Herat.[456] If a gravity requirement is read into self-defence, in light of the discussion of gravity in *Oil Platforms*, it seems that these events would likely rise to the level of an armed attack. The attacks have been in Afghanistan but as the group is based along the border, drone strikes have often occurred in Pakistan. While the US has the consent of the Afghan government, strikes that occur

[453] Zahir Shah Sherazi, 'Key Qaeda Commanders Sarbuland, Retired Major Adil Reported Killed in Drone Attack' *Dawn* (Peshawar, 21 November 2014) https://www.dawn.com/news/1145863/key-qaeda-commanders-sarbuland-retired-major-adil-reported-killed-in-drone-attack.

[454] Alissa J Rubin and Mark Mazzetti, 'Suicide Bomber Killed CIA Operatives' *New York Times* (Kabul, 30 December 2009) https://www.nytimes.com/2009/12/31/world/asia/31khost.html?mtrref=www.google.co.uk. However, elsewhere this attack was attributed to TTP. See, for instance, Tom Cohen, 'Taliban Factions Compete for Credit in CIA Bombing Deaths' *CNN* (Washington, 4 January 2010) http://edition.cnn.com/2010/US/01/03/cia.bombing.claims/.

[455] Jack Healy and Alissa J Rubin, 'US Blames Pakistan-Based Group for Attack on Embassy in Kabul' *New York Times* (Kabul, 14 September 2011) https://www.nytimes.com/2011/09/15/world/asia/us-blames-kabul-assault-on-pakistan-based-group.html.

[456] Elise Labott and Masoud Popalzai, 'US Consulate in Heart, Afghanistan, Attacked; 3 Reported Dead' *CNN* (13 September 2013) https://edition.cnn.com/2013/09/13/world/asia/us-consulate-afghanistan-attack/index.html.

in Pakistan require a separate *jus ad bellum* justification,[457] particularly as the Pakistani government has stated that they violate Pakistan's sovereignty.[458]

Under the wide interpretation of the armed attack requirement, the attacks on their own would justify self-defence, however, under the more restrictive view there must be some state involvement. There have been assertions that the Pakistani government has provided support to the Haqqani Network: without naming Pakistan directly, the Indian representative to the UNSC referred to 'safe havens' that 'provide sanctuaries to support the dark agendas of terrorist organizations like the Taliban, the Haqqani Network, [and] Al-Qaeda'.[459] In 2011 Senator John McCain stated that the 'Haqqani network continue[s] to enjoy sanctuary in [Pakistan] as well as *active support* from Pakistan's intelligence service'.[460] In the same instance Admiral Michael Mullen, then-Chairperson of the Joint Chiefs of Staff described the Haqqani Network as 'a veritable arm of Pakistan's Internal Services Intelligence agency', which supported it in planting truck bombs and undertaking attacks,[461] describing this as part of a 'national strategy to protect their own vital interests'.[462] In 2016 the US suggested that a Pakistani intelligence officer paid Haqqani Network members to carry out the 2009 attack on the Khost base, though without indicating whether the sponsorship was systemic or from an individual.[463] More recently, Pakistan has been accused of 'providing intelligence, weapons, and protection to the Afghan Taliban and the Haqqani network'.[464] This seems to place the involvement of the

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[457] Mary Ellen O'Connell, 'Remarks: The Resort to Drones Under International Law' (2011) 39(4) Denver Journal of International Law and Policy 585, 599.

[458] Agence France-Presse, 'NW Pakistan Military Strikes, US Drone Kill 17' *Mail Online* (11 November 2014) http://www.dailymail.co.uk/wires/afp/article-2830580/NW-Pakistan-military-strikes-US-drone-kill-17.html.

[459] UNSC, 8294th Meeting (26 June 2018) UN Doc S/PV.8294 35.

[460] *US Strategy in Afghanistan and Iraq: Hearing before the Committee on Armed Services*, Senate 112th Cong 1 (2011) 6.

[461] ibid 11.

[462] ibid 40.

[463] David Alexander, 'Declassified US Document Suggest Pakistani Link to Attack on CIA Agents' (14 April 2016) *Reuters* https://www.reuters.com/article/us-usa-pakistan-cia-attack-idUSKCN0XB2VM.

[464] Vanda Felbab-Brown, 'Why Pakistan Supports Terrorist Groups, and Why the US Finds it So Hard to Induce Change' (*The Brookings Institution*, 2018) https://www.brookings.edu/blog/order-from-

Pakistani government on the edge of the ICJ's concept of state involvement sufficient to render the acts of an NSA as an armed attack: while 'substantial involvement' was deemed sufficient, 'assistance … in the form of the provision of weapons or logistical or other support' was not.[465]

More commonly, references to the relationship between the Haqqani Network and Pakistani government emphasise 'sanctuary', rather than support.[466] Pakistan was monitored by the Financial Action Task Force for failing to tackle terrorist financing,[467] suggesting toleration, or an inability to act, rather than active support. Further, the group was only outlawed in 2015,[468] which raises the spectre of the 'unwilling and unable' approach to armed attacks, a point made by some authors.[469] As shown,[470] however, this cannot be seen as an accurate representation of the law: unwillingness or inability may form part of the necessity assessment of a drone strike, but it is not dispositive of the armed attack requirement.

It seems that, on balance, if the Internal Services Intelligence agency of Pakistan was operationally involved in Haqqani Network attacks, then this is arguably sufficient to

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chaos/2018/01/05/why-pakistan-supports-terrorist-groups-and-why-the-us-finds-it-so-hard-to-induce-change/.

[465] *Nicaragua* (n 80) para 195.

[466] Speech by Lisa Curtis, Deputy Assistant to US President Trump and Senior Director for South and Central Asia, National Security Council, quoted in 'Pakistan has fundamental responsibility to address use of its territory by malign actors: US official' *Financial Express* (Washington, 8 June 2018) https://www.financialexpress.com/world-news/pakistan-has-fundamental-responsibility-to-address-use-of-its-territory-by-malign-actors-us-official/1198322/.

[467] 'After Being Added to FATF "grey list", Pakistan Plans to Curb Terror Financing: Report' *Hindustan Times* (Islamabad, 28 June 2018) https://www.hindustantimes.com/world-news/after-being-added-on-fatf-s-grey-list-pakistan-plans-to-curb-terror-financing-report/story-c64ZdHze89lnZnaPX4IX1H.html.

[468] Mehreen Zahra-Malik, 'Pakistan Bans Haqqani Network After Security Talks with Kerry' *Reuters* (Islamabad, 16 January 2015) http://www.reuters.com/article/us-pakistan-militants-haqqani-idUSKBN0KP1DA20150116.

[469] Robert P Barnidge, 'A Qualified Defence of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law' (2012) 30 Boston University International Law Journal 409, 417 and 428; Westbrook Mack (n 197) 469-71; Reinold (n 197) 283; Schmitt 'Drone Attacks' (2010) (n 2) 316.

[470] Section 2.3.1.2.

establish armed attacks against which drone strikes could be used in self-defence, even under the more restrictive view of self-defence. If, instead, there has been mere toleration then this is insufficient to produce armed attacks permitting a response in self-defence.

In relation to TTP there is less to suggest armed attacks have occurred. While US Central Command suggests at least 15 US service personnel have been killed in Pakistan, media reports point to only three low-level attacks directly attributable to TTP: the bombing of a US armoured vehicle in 2010, killing three soldiers;[471] an attack on the US consulate in Peshawar in 2010, in which no US citizens were killed;[472] and the kidnapping of Warren Weinstein, an aid worker who was later accidentally killed by a US drone.[473]

Unlike the Haqqani Network, the Pakistani government has not tolerated or supported TTP. As will be discussed below,[474] since 2008 the government has engaged TTP in sustained and intense conflict. Therefore, where TTP has been targeted without consent from the Pakistani government, the only way self-defence can justify drone strikes is either by suggesting that there is no requirement of state involvement, or that Pakistan's inability to suppress TTP vitiates any such requirement.

While the latter has been refuted, it is not clear whether the former can be similarly rejected. Thus, while it seems persuasive that there is no armed attack from TTP due to the lack of state involvement, it is necessary to proceed on the basis that there may have been, where the armed attack requirement is interpreted as lacking a state involvement requirement.

A key consideration is whether TTP's attacks are armed attacks when taken individually or only when aggregated, raising the controversy surrounding the gravity requirement.

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[471] Jane Perlez, 'Soldier Deaths Draw Focus to US in Pakistan' *The New York Times* (Islamabad, 3 February 2010) http://www.nytimes.com/2010/02/04/world/asia/04pstan.html?_r=0.

[472] Ismail Khan and Sabrina Tavernise, 'US Consulate in Pakistan Attacked by Militants' *The New York Times* (Peshawar, 5 April 2010) http://www.nytimes.com/2010/04/06/world/asia/06pstan.html.

[473] Harriet Alexander, 'American Aid Worker Warren Weinstein Kidnapped in Pakistan' *The Telegraph* (13 August 2011) http://www.telegraph.co.uk/news/worldnews/asia/pakistan/8699426/American-aid-worker-Warren-Weinstein-kidnapped-in-Pakistan.html.

[474] Section 3.1.5.2.2.

Koh has argued that 'there is no threshold for the use of deadly force to qualify as an "armed attack"',[475] which would position these three incidents as armed attacks allowing self-defence.

Paust, writing on the lawfulness of drone strikes, argues against the existence of a gravity requirement.[476] Henriksen maintains a gravity requirement but argues that the accumulation of events doctrine means that drone strikes in Pakistan may be lawful self-defence.[477] Henriksen errs, however, by homogenising the groups within Pakistan, citing armed attacks by Pakistan-based groups in Afghanistan as permitting self-defence drone strikes in Pakistan generally. This is only correct to the extent that drones target the Haqqani Network, but would not support strikes against TTP and al-Qaeda. This same criticism can be levelled at the analysis of Orr, which combines numerous terrorist acts attributed to 'al-Qaeda' across the globe,[478] but which in fact are perpetrated by different groups. Conversely, O'Connell supports a strict gravity requirement, and has argued that terrorist attacks have 'all the hallmarks of crimes, not armed attacks that can give rise to the right of self-defence',[479] a position with some support.[480]

While the drone-centric literature seems to favour a less restrictive notion of armed attack, this is not reflective of the wider self-defence literature. In light of the discussion above[481] it is submitted that drone strikes will only be lawful in self-defence as a response to a sufficiently grave attack. In terms of the three TTP attacks, only the bombing of a US armoured vehicle resembles an armed attack, drawing a vague parallel with the 'mining of a single military vessel' mentioned by the ICJ in *Oil Platforms*.[482] Nevertheless, a car bomb detonating next to an armoured vehicle is perhaps less grave than mining a ship, and so it is hard to view as an armed attack enabling self-defence.

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[475] Koh (2012) (n 294).

[476] Paust (2015) (n 108) 188.

[477] Henriksen (n 197) 239.

[478] Orr (n 197) 737.

[479] O'Connell (2012) (n 4) 278.

[480] Casey-Maslen (n 2) 605; McDonnell (n 197) 266.

[481] Section 2.3.1.3.

[482] *Oil Platforms* (n 288) para 72.

In the absence of *actual* armed attacks, the US may face *potential* armed attacks. This requires a justification based on anticipatory self-defence against imminent attacks from TTP against the US. It is submitted that, ultimately, such an argument cannot be sustained. During the period that drone strikes were consented to, TTP did threaten to attack US cities, however this threat appears never to have materialised and to have abated by the time consent was rescinded. TTP does not feature in the 2014, 2017 or 2018 Threat Assessments and is not presented as a threat to the US in the 2015 and 2016 Assessments.[483] Further, the group has been described by US officials as 'focused on regional efforts and has little intent to target the United States'.[484] Even adopting the broad notion of imminence presented by Bethlehem, TTP do not pose a threat of imminent armed attack. The Bethlehem principles require consideration of 'whether the anticipated attack is part of a concerted pattern of continuing armed activity', and a threat's 'immediacy'[485] neither of which are satisfied in relation to TTP.

On this analysis, it appears there can be no justification for US drone strikes against TTP under self-defence. Therefore, without the consent of the government of Pakistan, absent since 2013, the resort to drone strikes targeting TTP will be unlawful.

Finally it is necessary to consider armed attacks by al-Qaeda in Pakistan. al-Qaeda in Pakistan has, along with TTP, been involved in a long-running NIAC with the government of Pakistan,[486] strongly suggesting a lack of host-state involvement in the NSA. Therefore, to be lawful, any armed attack carried out by al-Qaeda must necessarily be viewed through an expansive interpretation of self-defence.

Those elements of al-Qaeda dwelling in Pakistan, within the FATA region subject to US drone strikes, can be viewed as the 'core' of al-Qaeda: the group that conducted the 9/11

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[483] James R Clapper, 'Worldwide Threat Assessment of the US Intelligence Community' (Senate Select Committee on Intelligence, 26 February 2016) 21; Daniel R Coats, 'Worldwide Threat Assessment of the US Intelligence Community' (Senate Select Committee on Intelligence, 9 February 2017) 26.

[484] 'Tehrik-e-Taliban Pakistan (TTP)' (State of New Jersey Office of Homeland Security and Preparedness, 17 January 2017) https://www.njhomelandsecurity.gov/analysis/tehrik-e-taliban-pakistan.

[485] Bethlehem (n 282) 776.

[486] Section 3.1.5.2.2.

attacks against the US.[487] Thus, if 9/11 is an armed attack, self-defence by the US could be lawfully undertaken against this group. Resulting in the deaths of 2,977 people[488] and causing many billions of dollars of property damage,[489] the 9/11 attacks can be seen as sufficiently grave to constitute an armed attack. Despite early claims to the contrary, due to the absence of state involvement,[490] a link has been made with the Taliban government of Afghanistan and, consequently, the 9/11 attacks have generally been recognised as an armed attack.[491]

In terms of future attacks from—and anticipatory self-defence against—al-Qaeda in Pakistan, it is hard to identify anything beyond an ongoing, unspecific threat. To refer again to the Worldwide Threat Assessments, the 2014 Assessment—the first after the withdrawal of Pakistani consent—states that 'core' al-Qaeda has been 'on a downward trajectory since 2008' and that counterterrorism and the emergence of other NSAs have 'degraded the group's ability to carry out a catastrophic attack against the US Homeland'.[492] In 2015 no threat to the US from al-Qaeda in Pakistan was mentioned. In 2016, the degradation of al-Qaeda was again cited, though it was stated that the group 'aspires to attack the US and its allies' and has been 'dedicating resources to planning attacks.'[493] In 2017 it was asserted that counterterrorism operations had 'significantly reduced al Qa'ida's ability to carry out large-scale, mass casualty attacks, particularly against the US homeland', but that the group 'maintain[s] the intent to conduct attacks against the United States.'[494] Most recently, al-Qaeda were asserted to 'pose continuing

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[487] Rohan Gunaratna and Anders Nielsen, 'Al Qaeda in the Tribal Areas of Pakistan and Beyond' (2008) 31(9) Studies in Conflict and Terrorism 775, 777-8.

[488] Steven Brill, 'Is America Any Safer?' *The Atlantic* (September 2016) https://www.theatlantic.com/magazine/archive/2016/09/are-we-any-safer/492761/.

[489] 'How much did the September 11 terrorist attack cost America?' (*Institute of Analysis of Global Security*) http://www.iags.org/costof911.html.

[490] Myjer and White (n 427) 7.

[491] AUMF; George Robertson, 'Statement by NATO Secretary General Lord Robertson' (NATO Online Library, 2 October 2001) https://www.nato.int/docu/speech/2001/s011002a.htm; UNSC Res 1371 (n 236).

[492] 2014 Threat Assessment (n 431) 4.

[493] 2016 Threat Assessment (n 483) 5.

[494] 2017 Threat Assessment (n 483) 5.

terrorist threats to US interests' though the group is then described as 'dedicat[ing] most of their resources to local activity'.[495] Importantly, it is stated that al-Qaeda 'will call for followers to carry out attacks in the West, but their appeals probably will not create a spike in inspired attacks.'[496] Thus, the picture is arguably one in which the threat posed by al-Qaeda, while present, is not of large-scale armed attacks. Calling for 'lone-wolf' violence is not the same as orchestrating an armed attack capable of permitting self-defence. Under Koh's highly expansive version of self-defence, in which there is no threshold for an armed attack, and adopting a broad understanding of imminence, perhaps this threat could be presented as representing some form of imminent armed attack. But this is a highly tenuous basis upon which to justify the ongoing employment of drone strikes. Without adopting such a controversial position, drone strikes in Pakistan against al-Qaeda cannot be recognised as a lawful exercise of anticipatory self-defence. They can only possibly be seen as ongoing self-defence in response to the armed attack on 9/11.

On this basis, the US may potentially be undertaking drone strikes in response to armed attacks from the Haqqani Network, where that group is sufficiently linked to the Pakistani government (though this is not certain) or under an interpretation of self-defence which does away with a state involvement requirement. Based on media and eye-witness accounts compiled by TBIJ, Haqqani Network-affiliated individuals were reportedly among those killed or targeted in 54 drone strikes (approximately 13 percent of total strikes).[497] After consent was retracted, of the 61 strikes reported, reportedly 16 targeted Haqqani Network members (approximately 27 percent).

Drone strikes may also potentially be in response to armed attacks from al-Qaeda, if a wide interpretation of self-defence is adopted, removing the gravity requirement, expanding imminence and dispensing with the need for state involvement. Again, considering media and eye-witness accounts compiled by TBIJ, al-Qaeda members were reported to have died or been targeted in 89 drone strikes (21 percent of all drone strikes in Pakistan). After consent was withdrawn they were reportedly targeted 15 times (approximately 25 percent of drone strikes).

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[495] 2018 Threat Assessment (n 432) 9-10.

[496] ibid 10.

[497] TBIJ 'Pakistan 2004-now' (n 11); Percentages are rounded to the nearest whole percent.

This demonstrates that many US drone strikes in Pakistan are likely to violate *jus ad bellum*, having not been undertaken in response to an armed attack. Even where there is a basis for viewing drone strikes as responding to armed attacks this is only sustainable through the adoption of wide and contentious interpretations of the law.

2.3.3.1.3 Somalia

Drones strikes against al-Shabaab in Somalia may go beyond the scope of Somali government consent where they target Somali, rather than foreign, fighters. It is difficult, in the absence of specific information as to the nationality of those killed in drone strikes, to assess the extent that drone strikes have been against Somali fighters but, as shown above, there are some cases in which this has apparently happened. Therefore, in at least some cases, drones strikes in Somalia will be unlawful under *jus ad bellum* unless carried out in self-defence.

The Somali government has been involved in a NIAC with al-Shabaab for an extended period,[498] and there is no suggestion of state involvement with the group. Therefore, any claim that an armed attack has occurred will necessarily require a broad interpretation of self-defence, dispensing with the state involvement requirement for armed attacks.

This point is, however, moot as there is no evidence whatsoever that al-Shabaab has carried out anything remotely like an armed attack against the US. Its violent acts abroad have been in Uganda and Kenya.[499] The closest the group has come to an armed attack against the US was the publication of a video calling for 'lone wolf' attacks in the US, Canada and the UK, though this was not viewed as a credible threat.[500] Therefore, there

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[498] Section 3.1.5.4.1.

[499] Claire Felter, Jonathan Masters and Mohammed A Sergie, 'Al-Shabab' (*Council on Foreign Relations*, 9 January 2018) *Council on Foreign Relations* https://www.cfr.org/backgrounder/al-shabab.

[500] Faith Karimi, Ashley Fantz and Catherine E Shoichet, 'Al-Shabaab Threatens Malls, Including Some in US: FBI Plays Down Threat' *CNN* (22 February 2015) http://edition.cnn.com/2015/02/21/us/al-shabaab-calls-for-mall-attacks/.

cannot be said to have been any armed attacks against the US by al-Shabaab, no matter how broad an interpretation of self-defence is adopted.

In terms of anticipatory self-defence, al-Shabaab is described in the 2018 Threat Assessment as 'the most potent terrorist threat to US interests in East Africa',[501] a designation not present in previous Assessments, though it is unclear on what this is based. Considering Bethlehem's factors in assessing imminence, there appears to be no immediate threat, the probability of an attack seems low, and there is no evidence of 'a concerted pattern of continuing armed activity',[502] at least as far as the US is concerned. As such, it would seem a significant stretch to suggest that al-Shabaab present an imminent threat of armed attack justifying anticipatory self-defence. Therefore, without specific consent in relation to those strikes going beyond what has previously been consented to, any US drone strike against Somali members of al-Shabaab will be unlawful under *jus ad bellum* as there is no armed attack to which they can be said to be a response in self-defence.

The analysis will now examine whether drone strikes in response to armed attacks which can be identified have been necessary and proportionate, requirements determinative of the lawfulness of self-defence.

2.3.3.2 Drone strikes and necessity

Having established that the only actual or future armed attacks that are potentially identifiable come from the Haqqani Network and al-Qaeda in Pakistan, drone strikes in response to these will now be examined in terms of necessity.

US officials have said little about the necessity of drone strikes purportedly carried out in self-defence. John Brennan, discussing the extraterritorial use of force generally, comes the closest, asserting that the key element is the interpretation of imminence.[503] The

[501] 2018 Threat Assessment (n 432) 10.

[502] Bethlehem (n 282) 775.

[503] Brennan (2011) (n 411).

absence of discussion around necessity makes it impossible to interrogate the basis in self-defence upon which these drone strikes in Pakistan are claimed to rest by the US. As such it is necessary to examine the facts surrounding the strikes to determine their lawfulness under *jus ad bellum*.

As discussed,[504] whether force is necessary depends on whether it is required to end or avert an attack. Commentators are divided as to the extent to which US drone strikes satisfy this requirement. Some have argued that they are necessary as the targeted 'enemy' has not been 'defeated'.[505] This view is incredibly expansive, providing an unlimited right of self-defence in the face of a single armed attack and, it is submitted, does not reflect the law. Less expansively, Heyns and others have suggested that 'consideration needs to be given to the moment when the group against which drones are being used is sufficiently disrupted such that it no longer poses an immediate or imminent threat', emphasising that the right to self-defence 'persists only for so long as it is necessary to halt or repel an armed attack', emphasising the ultimately restrictive character of necessity.[506]

Others have taken a more episodic approach to necessity, regarding the use of drones in self-defence against specific attacks, holding that drone strikes in response to 9/11 could no longer be considered 'necessary' years after the initial attack.[507] Differently still, O'Connell has argued that drone strikes in Pakistan are not necessary as they have encouraged terrorism, their counterproductivity undermining any claim to necessity.[508] Martin has stated that the absence of specified armed attacks to which drone strikes are a response means that necessity cannot be satisfied.[509] Finally, Shah suggested in 2010 that US drone strikes in Pakistan were not necessary as they occurred without consent and so without exhausting alternative means of addressing the threat.[510] This position is

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[504] Test from n 361 to n 364.

[505] Printer (n 4) 356-7.

[506] Heyns and others (n 2) 801.

[507] Downes (n 197) 286; Rylatt (2013) (n 198) 64.

[508] O'Connell (2012) (n 4) 283.

[509] Martin (2012) (n 197) 247.

[510] Shah (2001) (n 198) 123.

grounded in relevant international law, but came before the consent of the Pakistani government—now known to have been operative at the time—had come to light.

Though the US has not specifically stated which attacks its drone strikes are a response to, possible candidates are identifiable. As stated,[511] the Haqqani Network has carried out several armed attacks against the US in Afghanistan. Further, the group continues to engage the Afghan government as part of a NIAC in Afghanistan, in which the US has been invited to intervene.[512] By representing a continuing threat of significant violence to Afghanistan and, to a lesser extent, US citizens and armed forces in the region, it seems that drone strikes against the Haqqani Network can be argued to be necessary to address this threat.

The fact that consent was given until 2013 demonstrates evidence of attempts to use means other than force, giving the impression that, contrary to Shah's argument, the US may have exhausted other options before resorting to self-defence. Furthermore, the fact that elements of the government of Pakistan have been apparently unwilling to respond to the Haqqani Network and may have been supporting it, strengthens the argument that drone strikes against the group may be necessary. As attacks attributed to the Haqqani Network are ongoing,[513] it seems also that drone strikes in self-defence can be regarded as necessary in a temporal sense, responding with requisite immediacy and addressing imminent threats.

In terms of al-Qaeda, the question is whether drone strikes are necessary in response to 9/11, as no continuing armed attacks are identifiable. While Printer suggests necessity is satisfied while the group is still functional,[514] this broad interpretation of the law finds

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[511] Text from n 454 to n 456.

[512] Section 3.1.5.2.1.

[513] Helene Cooper, 'US Braces for Return of Terrorist Safe Havens to Afghanistan' *New York Times* (Washington, 12 March 2018) https://www.nytimes.com/2018/03/12/world/middleeast/military-safe-havens-afghanistan.html?rref=collection%2Ftimestopic%2FHaqqani%20network&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection.

[514] Printer (n 4) 356-7.

little doctrinal support. Critical is the requirement that self-defence be necessary to halt and repel an attack.[515] Clearly the attack has halted, but self-defence may be necessary to repel further attacks. However, having examined the perceived threat from al-Qaeda in the previous section it appears likely that repulsion has already occurred.

Under the wider interpretation of necessity, the ongoing functioning of al-Qaeda in Pakistan may be argued to necessitate continued drone strikes, though this is a tenuous legal basis. Even if this approach is adopted, drone strikes cannot be justified as necessary: first, the government of Pakistan appears both willing and able to respond to the threat posed by al-Qaeda, continuing to engage the group militarily.[516] Second, it is difficult to see how drone strikes occurring up to 17 years after the armed attack is sufficiently immediate. As a gap of months between attack and response was seen to undermine necessity in *Nicaragua,*[517] drone strikes against al-Qaeda carried out since consent was withdrawn do not appear necessary.

On this basis it is submitted that it is very likely that drone strikes targeting al-Qaeda in Pakistan are not necessary, and cannot be lawful acts of self-defence.

2.3.3.3 Drone strikes and proportionality

Finally, there is the question of proportionality, asking whether the use of drone-launched missiles is proportional to the aim of halting and repelling the relevant armed attack. This question will be applied to drone strikes against the Haqqani Network and al-Qaeda, despite the weak necessity argument underpinning actions against the latter.

There is even less public discussion of proportionality by US officials than necessity. Thus it can only be by implication that, as the lawfulness of drone strikes is proclaimed, this must include the claim that their use is proportionate.

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[515] Gray (n 52) 150.

[516] Anwar Iqbal, 'Military Aid to Pakistan will Help Defeat IS, Al Qaeda: US' *Dawn* (Washington, 14 February 2018) https://www.dawn.com/news/1389289; Section 3.1.5.2.2.

[517] *Nicaragua* (n 80) para 237.

Academic engagement with the proportionality of drone strikes demonstrates, once again, a variety of perspectives. O'Connell is categorical that military force will always be disproportionate against terrorist acts 'hav[ing] all the hallmarks of crimes, not armed attacks'.[518] This view really relates to the armed attack requirement, and is rejected as, under certain conditions, NSAs may carry out terrorist attacks that rise to the level of armed attacks.[519] Orr has recognised that drone strikes may be proportionate but states that lack of facts precludes a conclusion.[520] Nevertheless, he has suggested that where there are 'ongoing threats to the United States', the targeting of 'specific individual fighters' would be proportionate.[521] Sterio has also taken the view that the secrecy of the drone programme in Pakistan prevents conclusive determinations, though stating that '[i]t is probable that many drone strikes do not meet the [proportionality] requirements of *jus ad bellum*, but it is nonetheless difficult to conclude, under this approach, that the entire drone program is *per se* illegal.'[522] Printer makes a similar point, arguing that proportionality does not preclude drone strikes, but that their use must be judged in light of the threat posed.[523] Rylatt, writing on the 2011 drone strike killing Anwar al-Aulaqi, stated that targeting senior commanders implicated in plots against the US would be proportionate.[524] Chehtman has adopted a philosophical reading of proportionality that appears to use a calculus of damage to discern lawfulness comparing the number killed by drones with the number saved by the disruption of plots to argue that drone strikes are generally disproportionate.[525] This is, however, not how proportionality works in *jus ad bellum*, where the metric is the force necessary to halt and repel an attack, and as such Chehtman does not provide a reliable conclusion as to the proportionality of drone strikes.

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[518] O'Connell (2012) (n 4) 278.

[519] Section 2.3.1.1.

[520] Orr (n 197) 738.

[521] ibid 738.

[522] Milena Sterio, 'The United States' Use of Drones in the War on Terror: The (Il)Legality of Targeted Killings Under International Law' (2012) 45 Case Western Reserve Journal of International Law 197, 204.

[523] Printer (n 4) 357.

[524] Rylatt (2013) (n 198) 71.

[525] Chehtman (n 197) 181-4.

In relation to the Haqqani Network, proportionality must be considered in light of the group's ongoing campaign against the Afghan government and US forces in Afghanistan. Firing conventional missiles, drone strikes are no different from conventional airstrikes. The abstract use of a drone strike as part of an overall campaign against the group is not, therefore, *per se* disproportionate to prevent continued attacks. A recent attack, reputedly by the Haqqani Network, resulted in the deaths of 43 civilians[526] making it arguable that the military force provided by drone strikes could be proportionate to the aim of halting and repelling similar attacks.

That drone strikes are carried out in Pakistan in response to Haqqani Network attacks in Afghanistan does not impede their proportionality.[527] Equally, that drone strikes against the Haqqani Network have continued for a long period does not *per se* mean they are not proportionate; self-defence may be proportionate for as long as it remains necessary.[528] The ongoing violence of the Haqqani Network makes it more likely that long-term drone strikes are not disproportionate. Drone strikes therefore appear likely to be proportionate against members of that group.

As discussed, for drone strikes against al-Qaeda there is only an incredibly slim basis upon which they can be said to be necessary, employing the broad doctrinal interpretation of necessity based on destroying the group.[529] Even so, the temporality of proportionality is not infinite: in relation to drone strikes, Heyns and others have asserted that '[i]nternational law cannot permit States to act until the elimination of long-term threats is secured'.[530] That drone strikes against al-Qaeda have continued for so long since the 9/11 armed attacks emphasises their incredibly shaky *jus ad bellum* basis. Printer has stated that the threat from terrorist groups means that 'responsive force used by the US

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[526] Mujib Mashal and Fatima Faizi, 'Seige at Kabul Hotel Caps a Violent 24 Hours in Afghanistan' *New York Times* (Kabul, 21 January 2018) https://www.nytimes.com/2018/01/21/world/asia/afghanistan-hotel-attack.html?rref=collection%2Ftimestopic%2FHaqqani%20network&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=8&pgtype=collection.

[527] n 402.

[528] Gardam (n 383) 167.

[529] Text from n 395 to n 396, and n 505.

[530] Heyns and others (n 2) 801.

cannot be said to be disproportionate',[531] but, as shown, there is no identifiable threat to the US from al-Qaeda sufficient to continue invoking self-defence.[532] Therefore, the most persuasive conclusion is that drone strikes against al-Qaeda have no basis within *jus ad bellum*.

2.3.4 Concluding remarks on self-defence and drone strikes

Having systematically applied *jus ad bellum* to the available facts surrounding drone strikes by the US in Pakistan, Yemen and Somalia, some simple conclusions have been reached.

There is nothing about the use of drones that is inherently incompatible with self-defence. They are like any other weapon system in this sense—their use is lawful where the elements of self-defence are satisfied. However, where relevant, US drone strikes have often failed to satisfy these elements. In Somalia, al-Shabaab have never conducted an attack against the US that is classifiable as an armed attack. In Pakistan, TTP have not carried out armed attacks against the US, nor do they appear to pose a threat. Thus, drone strikes against TTP, outside the scope of consent, will be unlawful under *jus ad bellum*. Drone strikes against the Haqqani Network and al-Qaeda may be lawful under self-defence but only where a series of expansive and controversial interpretations of the law are adopted. The requirement of state involvement must be dispensed with for drone strikes against al-Qaeda, and possibly the Haqqani Network, depending on the level of Pakistani state involvement. While drone strikes against the Haqqani Network as part of a NIAC in Afghanistan appear likely to be necessary and proportionate, those against al-Qaeda can only be said to be so where exceptionally broad notions of the law are used. Where necessity is the need to halt and repel an attack, and where proportionality is restricted to the force required to achieve that result, drone strikes against al-Qaeda in Pakistan are not lawful under self-defence. Therefore, where lawfulness is not provided for by consent, only those drone strikes against the Haqqani Network may be said with any confidence to be lawful under *jus ad bellum*.

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[531] Printer (n 4) 357.

[532] Text from n 492 to n 497.

2.4 The resort to drone strikes: conclusion

The law on the use of force represents the first stage in the holistic analysis of US drone strikes—where strikes are found to be unlawful at this stage nothing can be done to render them lawful subsequently. A finding of lawfulness here does not equate to lawfulness overall; self-defence drone strikes must be carried out in a way that is lawful under other relevant paradigms of international law. Likewise those by way of host-state consent: this does not absolve the intervening state of obligations under other applicable rules of international law.[533] A drone strike must adhere to duties under IHL and IHRL to be definitively 'lawful'.

The resort to the majority of drone strikes appears lawful due to consent from the host-states. All drone strikes in Yemen have general consent from the weak government. All of those carried out in Pakistan between 2007 and 2013 also had general consent. Finally, consent was given to all drone strikes in Somalia until 2013, and to all those against foreign fighters since 2013. This leaves a significant minority which must derive their initial lawfulness from self-defence. As shown, it cannot simply be stated that US drone strikes are part of a blanket response in self-defence to terrorist attacks against it. They are targeted against disparate groups which must each be treated separately.

In Pakistan it is only drone strikes against the Haqqani Network that are likely to constitute lawful self-defence, comprising 27 percent of strikes after consent was revoked. Self-defence provides a basis for lawful drone strikes against al-Qaeda only where a wide and contentious reading of the armed attack requirement is adopted, accounting for a further 25 percent of instances of non-consensual drone strikes. However, even adopting that broad interpretation, it appears likely that lawfulness is undermined by a lack of necessity and proportionality. All those remaining, which target TTP, have no basis in *jus ad bellum*, due to the lack of armed attacks, and so are unlawful, regardless of the extent to which they may adhere to other paradigms of international law.

[533] UNGA UN Doc A/68/382 (n 138) para 38.

This leads to the general conclusion that, after the revocation of consent, up to 73 percent of drone strikes in Pakistan have likely been unlawful under *jus ad bellum*.

With regard to Somalia, no drone strikes against al-Shabaab can be justified through self-defence, in light of the absence of an armed attack. Thus, since the nationality caveat on consent was imposed in 2013, any strike targeting Somali members of al-Shabaab has no basis for lawfulness under *jus ad bellum*. Frustratingly, due to a paucity of data it is impossible to provide an accurate figure, but it nonetheless demonstrates that at least *some* drone strikes in Somalia are unlawful, this being particularly likely where large groups are targeted.

CHAPTER 3 — INTERNATIONAL HUMANITARIAN LAW

3.1 The applicability of IHL[534]

IHL regulates the conduct of force within armed conflicts and so is relevant to drone strikes carried out in such circumstances. The prerequisite for the application of IHL is the determination of whether a situation amounts to an armed conflict, and consequently this will feature in the present analysis, with an examination of the content of the law before it is applied to the specific situations of drone strikes in Pakistan, Yemen and Somalia.

3.1.1 IHL and jus ad bellum

The existence of an armed conflict is separate from considerations under *jus ad bellum*,[535] though the two are at risk of being conflated, with an armed conflict claimed to exist (and IHL therefore applying) where force is justified under *jus ad bellum*. This can possibly be seen in a 2010 assertion by Koh that:

> 'as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.'[536]

This seems to imply the presence of an armed conflict due to the satisfaction of *jus ad bellum* criteria, suggesting a fusion of the two frameworks. Vogel has apparently adopted

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[534] This section has been modified Max Brookman-Byrne, 'Drone Use "Outside Areas of Active Hostilities": An Examination of the Legal Paradigms Governing US Covert Remote Strikes' (2017) 64(1) Netherlands International Law Review 3.

[535] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press 2016) para 215.

[536] Koh (2010) (n 10).

this view, suggesting that, in the absence of an overall armed conflict the US could 'make a self-defense claim under Article 51 of the UN Charter for each and every attack against an al-Qa'ida member, as opposed to using self-defence once as an initial trigger to initiate a state of armed conflict'[537] allowing the US to 'conduct lethal strikes against dangerous militants.'[538] Thus it seems that Vogel uses *jus ad bellum* to allow IHL targeting practices, when in fact it is entirely possible that force used lawfully under *jus ad bellum* may not amount to an armed conflict and will therefore be governed by IHRL. Thus the conflation of *jus ad bellum* and IHL in Vogel's argument becomes clear. This conflation appears accidental as it contradicts Vogel's earlier assertion that 'even after a violent event has triggered a state's right of self-defense, the situation must meet certain objective criteria in order to constitute an armed conflict.'[539] The fusion of the two concepts has the potential to dilute the power of IHL, lowering the threshold at which more permissive targeting rules apply. The danger of conflation has been noted and resisted by many scholars[540] and is an area of international jurisprudence with implications far beyond the current analysis and so will not be considered further. For now, it suffices to assert that the separation of IHL and *jus ad bellum* represents the law and that, therefore, the two concepts should not be used in a manner that sees them as symbiotic.

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[537] Vogel (2015) (n 196) 296.

[538] ibid 296.

[539] ibid 291.

[540] See, for instance, Geoffrey S Corn, 'Self-Defense Targeting: Blurring the Line Between the *Jus ad Bellum* and the *Jus in Bello*' (2012) 88 International Law Studies 57; Noam Lubell, 'The War (?) against Al-Qaeda' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press, 2012) 432; Julie Mertus, 'The Danger of Conflating *Jus ad Bellum* and *Jus in Bello*' (2006) 100 American Society of International Law Proceedings 114; Gabor Rona and Raha Wala, 'No Thank You to a Radical Rewrite of the *Jus ad Bellum*' (2013) 107(2) American Journal of International Law 386; and Raphaël van Steenberghe, 'Proportionality Under *Jus ad Bellum* and *Jus in Bello*: Clarifying their Relationship' (2012) 45(1) Israel Law Review 103.

3.1.2 International armed conflicts

If a conflict is international, the parties benefit from the full protections of IHL in both its conventional[541] and customary norms.[542] Common Article 2 of the four 1949 Geneva Conventions asserts that IHL within the conventions' framework

> 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.'

Thus an armed conflict will exist where a state declares one, or where force is used between states. As US drone strikes in Pakistan, Yemen and Somalia have only been against NSAs, they do not directly raise issues of IAC, and so it is necessary instead to consider the possibility of NIACs.[543]

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[541] Per, *inter alia*, Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 27 UKTS 119 (1910) Article 2; Convention (IV) Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 9 UKTS 1225 (1910) Article 2; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Convention I) Article 2; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (Geneva Convention II) Article 2; Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (Geneva Convention III) Article 2; Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV) Article 2; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) Article 1(3).

[542] All but one of the 161 rules of customary international humanitarian law identified by the ICRC study on CIHL are applicable to IACs. See, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Vol. I: Rules* (Cambridge University Press 2005).

[543] There is a question of whether drone strikes without consent would create an IAC between intervenor and host-state, and this is discussed briefly below, text from n 645 to n 649.

3.1.3 Non-international armed conflicts

Identifying NIACs is more complicated than IACs, with different 'types' of IHL applicable in different types of conflict, each having (potentially) distinct thresholds for the determination of their existence. This section will therefore examine each type of conflict in turn.

3.1.3.1 Ordinary non-international armed conflicts

The first type, NIACs '*simpliciter*', or ordinary NIACs,[544] arises under Article 3 common to the Geneva Conventions[545] and involves 'armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties'. Common Article 3 does not explicate a threshold of applicability, and the original commentary simply asserts that 'the scope of application of the article must be as wide as possible.'[546] The only semblance of a threshold within common Article 3 comes from its reference to 'each *Party*', suggesting the need for defined groups, rather than loose collections of individuals.

Despite this absence, criteria for the existence of a NIAC were set out by ICTY in the *Tadić* case, requiring '*protracted armed violence* between governmental authorities and *organised armed groups* or between such groups within a State'.[547] The ILA Use of Force Committee distilled this into the dual requirements of '[t]he existence of organized armed groups' and 'fighting of some intensity'.[548] The intensity and organisation requirements

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[544] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 182.

[545] Hereafter 'common Article 3'.

[546] Jean S Pictet, *Commentary IV to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) 36.

[547] *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995), para 70 (emphasis added)..

[548] Use of Force Committee, 'Final Report on the Meaning of Armed Conflict in International Law' in International Law Association Report on the Seventy-Fourth Conference (The Hague, 2012) 677.

have been applied by international arbitral bodies[549] and states,[550] and feature within the 2016 commentary on the First Geneva Convention.[551] By these criteria, NIACs are distinct from internal disturbances, 'banditry, unorganized and short-lived insurrections, or terrorist activities'[552] which, while remaining 'isolated and sporadic', may cause 'incalculable human fatalities and/or colossal damage to property' but nevertheless are outside the scope of IHL.[553]

The requirements of intensity and organisation will now be sketched, though it is important to note that their application is always 'on a case-by-case basis.'[554]

Intensity relates to the duration and magnitude of fighting. The *Tadić* reference to '*protracted* armed violence' suggests a temporal focus though the Appeals Chamber also referred to fighting that is 'large-scale'.[555] However, 'large-scale' was used to describe fighting between parties in the former Yugoslavia, which the Appeals Chamber held 'exceeded the intensity requirements applicable to both international and internal armed conflicts',[556] suggesting that 'large-scale' is beyond sufficient intensity. Nonetheless, it is wrong to dismiss the need for violence to reach a 'certain magnitude' as the Appeals Chamber specifically linked protraction with scale.[557] Additionally, the ICC has made

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[549] See, *inter alia*, *Prosecutor v Boškoski and Tarčulovski* (Judgment) IT-04-82-T (10 July 2008), para 175; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Judgement) I-04-84-T (3 April 2008), para 40; *Prosecutor v Limaj, Bala and Musliu* (Judgment) IT-03-66-T (30 November 2005), para 84; *Prosecutor v Milošević* (Decision on Motion for Judgment of Acquittal) IT-02-54-T (16 June 2004), para 18; *Prosecutor v Tadić* (Opinion and Judgment) IT-94-1-T (7 May 1997), para 562.

[550] 'The Joint Service Manual of the Law of Armed Conflict' (UK Ministry of Defence, 2004) 387; 'Law of War Manual' (UK Department of Defense, 2015) 84 and 1010-11.

[551] ICRC 2016 Commentary (n 535) para 427.

[552] *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 26.

[553] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2015) 21.

[554] *Prosecutor v Rutaganda* (Judgement) ICTR-96-3 (6 December 1999), para 93. This was subsequently affirmed in *Limaj* (Judgment) (n 549) para 90.

[555] *Tadić* (Jurisdiction) (n 547) para 70 (emphasis added).

[556] ibid para 70.

[557] Sivakumaran (n 544) 167.

reference to scale in regard to NIAC, separate from duration.[558] In the *Abella* case, the IACHR identified a NIAC due to the intensity of fighting, despite it lasting only 30 hours.[559] Thus intensity is a balance between duration and magnitude, and lack of one may be compensated by the other; it is 'dynamic'.[560]

Ad hoc tribunals provide numerous factors indicative of intensity, including the numbers of deaths, casualties and buildings destroyed,[561] duration,[562] the involvement of bodies like the UNSC,[563] and the geographical scope of conflict.[564] Additional factors include the mobilisation of volunteers,[565] distribution of weapons,[566] the nature of weapons used,[567] and governmental response[568] (for instance, utilising the military rather than police[569]). As indicative, factors identified need not be cumulatively satisfied: there are none that are inherently necessary to create a NIAC.[570]

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[558] *Prosecutor v Lubanga Dyilo* (Decision on Confirmation of Charges) ICC-01/04-01/06 (29 January 2007), para 232 and 237.

[559] *Abella v Argentina* Inter-American Commission of Human Rights Report No 55/97 (30 October 1997), paras 147 and 155.

[560] Use of Force Committee (2012) (n 548) 709-10.

[561] *Boškoski* (n 549) para 177; *Prosecutor v Delalić, Mucić, Delić and Landžo* (Judgment) IT-96-21-T (16 November 1998), para 189; *Dyilo* (n 558) para 235; *Haradinaj* (n 549) para 49; *Limaj* (Judgment) (n 549) paras 135, 138 and 141; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 28; *Tadić* (Opinion and Judgment) (n 549) paras 565-6.

[562] *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 28; *Tadić* (Opinion and Judgment) (n 549) para 565.

[563] *Boškoski* (n 549) para 177; *Dyilo* (n 558) para 235; *Delalić* (n 561) para 190; *Haradinaj* (n 549) para 49; *Tadić* (Opinion and Judgment) (n 549) para 567.

[564] *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 29; *Tadić* (Opinion and Judgment) (n 549) para 566.

[565] *Delalić* (n 561) para 188.

[566] *Delalić* (n 561) para 188; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 31.

[567] *Boškoski* (n 549) para 177; *Haradinaj* (n 549) para 49; *Limaj* (Judgment) (n 549) para 136; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 31.

[568] *Boškoski* (n 549) para 178.

[569] *Abella* (n 559) para 155.

[570] Sivakumaran (n 544) 168.

In terms of organisation, indicative criteria include 'the existence of headquarters, designated zones of operation, and the ability to procure, transport and distribute arms'[571] as well as *communiqués* issued to the public and the use of spokespeople,[572] and the erection of checkpoints.[573] The need for a 'command structure' has been asserted,[574] which suggests a high-level of organisation, but this has been interpreted broadly, requiring only that an armed group speaks 'with one voice'[575] and is organised enough to 'formulate … military tactics'.[576] In the *Boškoski* judgment, the ICTY asserted that 'the degree of organisation required to engage in "protracted violence" is lower than the degree of organisation required to carry out "sustained and concerted military operations"'.[577] Similarly, the IACHR emphasised the ability carefully to plan, coordinate and execute a military operation.[578] As with intensity, no individual characteristic is 'essential to establish whether the "organisation" criterion is fulfilled.'[579] Ultimately, jurisprudence demonstrates that organisation must be systemic but need not be akin to that of national armed forces.

3.1.3.2 Additional Protocol II non-international armed conflicts

This type of armed conflict arose as a separate category from additional threshold requirements before AP II becomes operative. The threshold of AP II is higher than that of common Article 3: Article 1 AP II requires a NIAC to be between a state and armed group—excluding those between groups—and NSA parties must be 'under responsible command' and 'exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations and to implement this

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[571] *Limaj* (Judgment) (n 549) para 90.

[572] ibid paras 101-103.

[573] *Haradinaj* (n 549) paras 71-72; *Limaj* (Judgment) (n 549) para 145.

[574] *Haradinaj* (n 549) para 65; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) paras 23-24.

[575] *Haradinaj* (n 549) para 60; *Limaj* (Judgment) (n 549) para 129.

[576] *Limaj* (Judgment) (n 549) para 129.

[577] *Boškoski* (n 549) para 197.

[578] *Abella* (n 559) paras 147 and 155.

[579] *Haradinaj* (n 549) para 60.

Protocol'.[580] Thus, the threshold of AP II requires greater organisation, making its application narrower than common Article 3. Additionally, the ICRC asserted in the 1987 commentary that the higher threshold 'restrict[s] the applicability of the Protocol to conflicts of a certain degree of intensity',[581] interpreted as meaning a '*higher* degree of intensity'.[582]

It has been asserted that this restricted criteria makes AP II 'seldom … applicable to recent internal conflicts because insurgent groups rarely, if ever, meet the requirements of its Article 1.'[583] Regardless, in the case of US drone strike AP II is inapplicable as the US has not ratified it.

3.1.3.3 Recognition of Belligerency

A third possible type of armed conflict arises through the recognition of belligerency, at which point a conflict becomes subject to IHL applicable to IACs rather than NIACs.[584] This has a higher threshold than ordinary NIACs, requiring 'a state of general hostilities; occupation and a measure of orderly administration of substantial parts of national territory by the insurgents; [and] observance of the rules of warfare on the part of the insurgent forces acting under responsible authority.'[585] Further, these conditions 'must be

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[580] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) Article 1(1).

[581] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) para 4453.

[582] Emily Crawford and Alison Pert, *International Humanitarian Law* (Cambridge University Press 2015), 71.

[583] Andrea Paulus and Mindia Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict—a Tentative Conceptualization' (2009) 91 International Review of the Red Cross 95, 103.

[584] Lootsteen (n 586) 110; Kerim Yildiz and Susan Breau *The Kurdish Conflict: International Humanitarian Law and Post-Conflict Mechanisms* (Routledge 2010) 45.

[585] Lassa Oppenheim, *International Law: Volume II Disputes, War and Neutrality*, Hersch Lauterpacht (ed) (7th edn, Longmans, Green and Co. 1952) 249.

recognized by third party states, by the belligerents or by international organizations',[586] narrowing its application further. The concept has fallen into disuse (appearing in the 1861-5 American Civil War,[587] and 1899-1902 Boer War[588] though called for by General Franco in the 1936-9 Spanish Civil War[589] and more recently, in 2008, by the Venezuelan government with regard to FARC[590]), though it has been described as possibly 'still germane'.[591]

3.1.3.4 Rome Statute Article 8(2) non-international armed conflicts

There is a potential further type of NIAC under Article 8(2)(f) of the Rome Statute,[592] which refers to a requirement of 'protracted armed *conflict*', as opposed to the *Tadić* requirement for 'protracted armed *violence*'.[593] While there is some difference of opinion, the general tenor of the literature is that Article 8(2)(f) remains within the remit of ordinary NIACs.[594]

3.1.3.5 Customary classifications of non-international armed conflicts

Finally, it is necessary to consider whether a separate threshold exists for the application of CIHL. Though their content is contentious, rules of CIHL are broader than common

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[586] Yair M Lootsteen, 'The Concept of Belligerency in International Law' (2000) 166 Military Law Review 109, 120.

[587] Yildiz and Breau (n 584) 46.

[588] Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 50.

[589] Yildiz and Breau (n 584) 46.

[590] Sivakumaran (n 544) 196.

[591] Lootsteen (n 586) 111.

[592] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

[593] *Tadić* (Jurisdiction) (n 547) para 70.

[594] Akande (2012) (n 588) 56; Anthony Cullen, 'The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)' (2008) 12(3) Journal of Conflict and Security Law 419, 442; Paulus and Vashakmadze (n 583) 123; Sivakumaran (n 544) 193-5.

Article 3 and AP II. For instance, the ICRC CIHL study identifies 161 rules, 141 of which apply to NIACs,[595] and, though not all are accepted by states,[596] many apply without controversy.[597] The study has been criticised for blurring *lex lata* and *lex ferenda*, in identifying CIHL rules that lack widespread state practice,[598] however, for now it is sufficient that there exist at least *some* rules of CIHL that go beyond the principles in common Article 3, necessitating consideration of when those rules operate.

The ICRC study's definition of NIAC does not suggest whether a threshold exists.[599] In terms of customary rules akin to the limited protections of common Article 3, Paulus and Vashakmadze have advocated a wide application, utilising the threshold of ordinary NIACs.[600] This conclusion reflects international jurisprudence, the principles within common Article 3 asserted to be 'elementary considerations of humanity',[601] a 'minimum yardstick',[602] and 'intransgressible principles of international customary law.'[603] Thus these general principles will be operative in NIACs satisfying the *Tadić* criteria of intensity and organisation.

Of critical importance is whether more detailed CIHL protections also become operative by the satisfaction of this threshold. Many have argued that, upon passing the *Tadić* threshold, the full gamut of CIHL applies: Geiß has specifically cleaved the operation of common Article 3 and CIHL on the one hand, and AP II on the other, with the former

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[595] Henckaerts and Doswald-Beck 'Rules' (n 542).

[596] See, for instance, John B Bellinger III and William J Haynes II, 'A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*' (2007) 89 International Review of the Red Cross 443, 447.

[597] Further discussion of specific rules of CIHL is present throughout Section 3.2.2.

[598] Dinstein (2015) (n 553) 206.

[599] Jelena Pejić, 'Status of Armed Conflicts' in Elizabeth Wilmshurst and Susan Breau (eds) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 88.

[600] Paulus and Vashakmadze (n 583) 119.

[601] *Corfu Channel* (n 244) 22.

[602] *Nicaragua* (n 80) para 218.

[603] *Nuclear weapons* (n 355) para 79.

subject only to the *Tadić* threshold.[604] Kreß has argued that practice supports this,[605] asserting that the CIHL threshold 'probably tends to become more or less congruous with that of common Article 3'.[606] This is the approach of the ICTY, which solely utilised the *Tadić* threshold to assess the application of CIHL.[607] The STSL has recognised the continued presence of both the *Tadić* and AP II thresholds,[608] which has been interpreted as contrary to the understanding of the ICTY.[609] However, it is submitted that this is not the case because, in requiring satisfaction of the AP II threshold, the STSL was referring specifically to provisions of AP II. Jurisprudential evidence therefore supports the conclusion that satisfaction of the *Tadić* threshold will operationalise CIHL, significantly broadening the IHL applicable to NIACs. This is of particular relevance to US drone strikes as the US is not party to the Additional Protocols.

3.1.4 'Internationalised' armed conflicts

In addition to 'classic' IACs and NIACs there are variations containing elements of both, where a NIAC becomes 'internationalised' by third state intervention, the contours of which are now considered.

The legal result of third state intervention is contested. Pejić has identified a 'minority view' that holds that *any* intervention in a NIAC by a third state transforms it into an IAC.[610] This is compelling as it provides those affected with the full range of protections

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[604] Robin Geiß, 'Armed Violence in Fragile States: Low- Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties' (2009) 91(873) International Review of the Red Cross 127, 133.

[605] Claus Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2000) 30 Israel Yearbook on Human Rights 103, 121.

[606] Claus Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15(2) Journal of Conflict & Security Law 245, 260.

[607] *Limaj* (Judgment) (n 549) paras 88-90 and 92.

[608] *Prosecutor v Sesay, Kallon and Gbao* (Judgment) SCSL-04-15-T (2 March 2009), para 97.

[609] Sivakumaran (n 544) 66.

[610] Pejić (2007) (n 599) 90.

under IHL, and a case can be made in favour amending the law in this manner.[611] Nevertheless, it does not represent the *lex lata*, and the more accurate understanding is that third state intervention will not *automatically* end the non-international character of a NIAC. Common Article 2 of the Geneva Conventions defines an IAC as occurring *between two states*, a situation that would not automatically result with the intervention of a third state, for instance, if the territorial state has consented to that intervention.[612] The 2016 commentary on the First Geneva Convention emphasises that only where a state intervenes against another state will a NIAC become an IAC, possessing, as it then would, the requirements of common Article 2.[613] In addition, the Appeals Chamber of the ICTY has asserted that a NIAC:

> '*may* become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.'[614]

The use of 'may' rather than 'will' confirms the Court's view that though third state intervention in a NIAC can create an IAC, this is not necessarily so. Additionally, it is important to note that this also asserts the possibility, previously identified by the ICJ,[615] of an armed conflict that is 'international in character alongside an internal armed conflict'.[616] This allows for 'mixed' conflict situations, with IACs and NIACs occurring simultaneously in the same area between multiple actors, again emphasising that transformation into an IAC is not inevitable.[617] In such a situation, it would be necessary

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[611] See James G Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 International Review of the Red Cross 313.

[612] Kubo Mačák, *Internationalized Armed Conflicts in International Law* (Oxford University Press 2018) 33-6.

[613] ICRC 2016 Commentary (n 535) para 413.

[614] *Prosecutor v Tadić* (Appeal Judgment) IT-94-1-A (15 July 1999), para 84 (emphasis added).

[615] *Nicaragua* (n 80) para 219.

[616] *Tadić* (Appeal Judgment) (n 614) para 84.

[617] Mačák (n 612) 100.

to undertake an analysis of the nature of the parties involved in a given incident (rather than the conflict as a whole) to determine which aspects should be viewed through the legal lens of IAC or NIAC. Nevertheless, where a conflict between a state and NSA becomes 'inextricably bound up' with an IAC, the parties will be governed by rules of IHL applicable in an IAC.[618]

The view that intervention in a NIAC does not necessarily turn it into an IAC is widely held, and it is often asserted that different manifestations of intervention result in different regimes of IHL becoming applicable, rather than the instant transformation of a NIAC into an IAC.[619] How the legal character of conflict changes with different permutations of third state intervention is vital for the analysis of US drone strikes due to their use extraterritorially against NSAs: by considering these permutations an accurate IHL analysis of extraterritorial strikes is possible. As such, different types of intervention and their consequences for the legal nature of conflict will be considered.

3.1.4.1 Spill-over

Arguably the simplest iteration of an internationalised NIAC is between a host government and a domestic NSA, which has spilled-over into a neighbouring state. The ICRC has opined that this remains a NIAC, 'at a minimum governed by Common Article 3 and customary IHL'.[620] As the conflict remains between the government and NSA it sits outside the inter-state requirement of Article 2, falling within the intra-state remit of common Article 3, AP II (if applicable) and CIHL, though there is the possibility of a

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[618] Akande (2012) (n 588) 72-3. See also Mačák (n 612) 103.

[619] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2010) 27; Dinstein (2015) (n 553) 86; Dinstein (2017) (n 235) 7-11; Kreß (2010) (n 606) 255; Lubell (2012) (n 540) 435; Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 Journal of International Criminal Justice 65, 67-8; Lindsay Moir, *Legal Protection of Civilians During Internal Armed Conflict* (Cambridge University Press 2001) 51; Pejić (2007) (n 599) 91; Sivakumaran (n 544) 222.

[620] ICRC, 'Report on the 31st International Conference "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts"' (Geneva, 2011) 9.

separate IAC between that government and the state into whose territory the conflict has spilled.

Nevertheless, the act of crossing a border raises the question of whether such a NIAC should in fact be understood as an IAC. Common Article 3 applies to conflicts 'occurring in the territory of one of the High Contracting Parties', and the commentary asserts that it applies to armed conflicts that 'take place in the confines of a single country.'[621] In addition, the IIHL Manual states that NIACs do not 'encompass conflicts extending to the territory of two or more States'.[622] These approaches pose a problem as, in cases of spill-over, the conflict clearly occurs in more than one territory.

Academic opinion favours the extension of common Article 3 to internationalised armed conflicts,[623] a view present in the latest commentary to the First Geneva Convention.[624] A common refrain is that the territoriality requirement of common Article 3 reiterates that the Conventions apply only to states parties, not that they apply only to conflicts within single territories.[625] Schmitt has argued that a geographical limitation runs counter to the object and purpose of the Geneva Conventions,[626] a view that accords with the imperative in the original ICRC commentary that 'the scope of application of [common Article 3] must be as wide as possible'.[627] Sivakumaran has provided evidence of wide state practice affirming this interpretation, citing the conflicts involving FARC on the Ecuador-

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[621] Pictet Commentary (1958) (n 546) 36.

[622] Michael N Schmitt, Charles Garraway and Yoram Dinstein, 'The Manual on the Law of Non-International Armed Conflict with Commentary' (International Institute of Humanitarian Law, 2006) 2.

[623] Charles Garraway, 'Afghanistan and the Nature of Conflict' (2009) 85 International Law Studies 157, 164; Jelena Pejić, 'Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications' (2014) 96(893) International Review of the Red Cross 67, 80; Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 258; Derek Jinks, 'September 11 and the Laws of War' (2003) 28 Yale International Law Journal 1, 41; Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law' (2006) Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, https://archive-ouverte.unige.ch/unige:6418 8-9.

[624] ICRC 2016 Commentary (n 535) para 472.

[625] Sassòli (2006) (n 623) 8-9; Melzer (2008) (n 623) 258; Jinks (2003) (n 623) 41.

[626] Michael N Schmitt 'Charting the Legal Geography of Non-International Armed Conflict' (2014) 90 International Law Studies 1, 12.

[627] Pictet Commentary (1958) (n 546) 36.

Colombia border, the Lord's Resistance Army on the South Sudan-Uganda border and the Algerian Armeé de Libération Nationale on the Algeria-Tunisia border.[628] In each of these situations, internal conflicts spilled over national borders but their continued characterisation as non-international was 'not seriously challenged.'[629] It is therefore submitted that NIACs that spill-over remain non-international, and the applicable law is that of common Article 3, AP II (if applicable) and CIHL.

3.1.4.2 Third state intervention on behalf of a domestic government

Another simple form of internationalised armed conflict occurs when a third state intervenes in an existing NIAC between a government and NSA, in support and with the consent of the government. As demonstrated, the US has operated many of its drone strikes with the consent of host governments, making this concept particularly relevant. As common Article 2 requires a conflict 'between two or more of the High Contracting Parties' and this situation is not between states it remains a NIAC, but becomes 'internationalised'.

This understanding is widely accepted. Recently, the ICRC has held that intervention on the side of the incumbent government maintains the non-international character of a conflict on the basis that 'as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant.'[630] This is reflected in the commentary to the definition of a NIAC in the IIHL Manual, in which 'the armed forces of no other State are engaged against the central government.[631]

This approach is broadly represented within the literature,[632] though it has been suggested that this 'traditional answer … clash[es] with the undeniably international character of

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[628] Sivakumaran (n 544) 230.

[629] ibid 230.

[630] ICRC Report on the 31st International Conference 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (Geneva, 2011) 31IC/11/5.1.2, 10.

[631] IIHL Manual (n 622) 2.

[632] Akande (2012) (n 588) 62; Mačák (n 612) 33-6.

this type of [NIAC].'[633] Nevertheless, this discontent is not universal: Dinstein has held that intervention with consent maintains the non-international character of a NIAC whether the intervention involves 'skirmish[es]' or the use of a full-scale 'expeditionary force engaged in intense hostilities against the insurgents'.[634] This position is shared by Sivakumaran who asserts that 'as fighting remains between a state and a non-state armed group' it remains a NIAC.[635] Furthermore, this understanding has been adopted in jurisprudence of the ICC.[636]

Therefore, in such NIACs applicable law remains common Article 3, AP II (if applicable) and CIHL. This is despite the fact that neither common Article 3 nor AP II refer to such conflicts but due to the clear inapplicability of common Article 2.

3.1.4.3 Third state intervention on behalf of an NSA

The opposite situation is that of a third state intervening on behalf of an NSA. In this situation, the state siding with the NSA pits itself against the host government, making it a conflict between two states. As such the conflict becomes international, in accordance with common Article 2 and reflecting the original commentary to the Geneva Conventions that 'any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2'.[637] This view is present in the IIHL Manual[638] and commands very wide acceptance.[639]

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[633] Hans-Peter Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon' (1983) 33 The American University Law Review 145, 147.

[634] Dinstein (2015) (n 553) 86.

[635] Sivakumaran (n 544) 223.

[636] *Prosecutor v Bemba Gombo* (Decision on Confirmation of Charges) ICC-01/05-01/08 (15 June 2009), para 245-6.

[637] Jean S Pictet, *Commentary I to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross 1952) 32.

[638] IIHL Manual (n 622) 2.

[639] Akande (2012) (n 588) 57; Dinstein (2010) (n 619) 27; Mačák (n 612) 38-9; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 50-1; Pejić (2007) (n 599) 90; Schmitt 'Charting' (2014) (n 626) 10; Sivakumaran (n 544) 224.

This understanding is supported by international jurisprudence, but it must be recalled that such intervention may not transform the entire armed conflict into an IAC. In *Nicaragua* the ICJ implicated the possibility of multiple strands within a conflict, some international, others non-international.[640] In that case the Court held that the conflict between the Nicaraguan government and the *Contras* was non-international while that between the government and the US was international.[641] The possibility of a multi-strand conflict was confirmed by the ICTY in *Tadić*, in which it was asserted that a conflict may 'be international in character *alongside* an internal armed conflict'.[642]

More can be said on the subject of this type of intervention within a NIAC[643] but it is outside the scope of this current analysis, as the use of extraterritorial drone strikes has thus far always been on behalf of an incumbent regime.

3.1.4.4 Conflict with an NSA in one or more third states' territories

The final permutation of internationalised armed conflict involves the use of force by one state against an NSA present in one or more other states. It is distinct from the category of 'spill-over' conflicts, which overlap a border, as the present category manifests through the presence of an NSA in a state geographically distant from existing NIACs or where there is no pre-existing NIAC as, for instance, was the case with Israel's action against Hezbollah in Lebanon in 2006.

This type of conflict cannot be an IAC for the reasons given above with regard to other internationalised NIACs.[644] Crucially, such a conflict does not pit two or more states against each other, as required by common Article 2. Nevertheless, these conflicts have an international element, superficially clashing with common Article 3's conflicts 'not of an international character'.

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[640] *Nicaragua* (n 80) para 219.

[641] ibid para 219.

[642] *Tadić* (Appeal Judgment) (n 614) para 84 (emphasis added).

[643] Mačák (n 612) 37-47.

[644] Text from n 612 to n 619.

An issue arises around whether the host-state has consented to intervention: the absence of consent appears likely to create an IAC between the intervening and host-states,[645] which may have an impact upon the nature of the conflict. As previously asserted, there can exist multiple armed conflicts simultaneously,[646] therefore a *de facto* inter-state conflict appears not to bear upon the classification of a distinct conflict between intervening state and NSA, which could exist in tandem. This is so at least insofar as the conflict with the NSA and the default IAC with the host-state remain separate—where the two become indistinguishable it is arguable that a generalised IAC would result.[647] It has been suggested that a corollary of the de facto IAC emerging between an intervening state and host-state is that any attack on an NSA is simultaneously an attack on the host-state, thereby necessary combining the two conflicts into a single IAC.[648] This view is not universally accepted,[649] and remains an area of contestation beyond the scope of the present work. This is particularly so because, in terms of the IHL rules applied below to drone strikes, CIHL largely bridges the gap between rules applicable in IACs and NIACs.

Some have suggested that situations of this nature are a new *type* of armed conflict. Lietzau has argued that the US's 'war or terrorism' (considered below[650]) provides one such example, claiming it is ill-suited to the dichotomous framework of IHL due to the international nature of terrorism precluding the application of common Article 3, and the non-state nature of those involved precluding the application of common Article 2.[651] He argues that the nature of this new conflict has developed a new category of armed conflict, within customary international law.[652] This assertion has been disputed, however, due to the absence of state practice and *opinio juris*.[653] Indeed, the only practice provided by

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[645] Akande (2012) (n 588) 73-6.

[646] *Nicaragua*, [219].

[647] Akande (2012) (n 588) 72-3.

[648] ibid 77.

[649] ICRC 2016 Commentary (n 535) para 477.

[650] Section 3.1.5.1.

[651] William K Lietzau, 'Combating Terrorism: Law Enforcement or War?' in Michael N Schmitt and Gian L Beruto (eds), *Terrorism and International Law* (International Institute of Humanitarian Law 2002) 78.

[652] Lietzau (n 651) 80.

[653] Pejić (2007) (n 599) 96.

Lietzau is that of the US.[654] This is not 'general practice'[655] or 'widespread and representative participation'[656] and as such the argument is not persuasive.

Shöndorf has argued that changing conflict scenarios call for a new classification of 'extra-state armed conflict',[657] asserting its customary development via the practice of the US and Israel.[658] Corn has similarly argued that the dualism of IHL cannot cope with this kind of conflict, calling for the recognition of a new category of 'transnational armed conflict'.[659] The crux of each argument is that any conflict extending beyond a single state contradicts the territorial requirement of common Article 3 and is consequently no longer non-international.[660] This is not a sustainable argument, for the reasons given above in relation to spill-over NIACs: the territorial requirement of common Article 3 refers to its application to states parties, it does not restrict the Convention to conflicts only in single territories.[661] In addition, the existence of the law governing NIACs as customary law has reduced the impact of the geographic aspect of common Article 3,[662] but this is addressed by neither Corn nor Schöndorf.

Arguments in favour of a new classification highlight that conflicts involving multinational NSAs are distinct from those envisaged at the drafting of the Geneva Conventions, but these arguments do not demonstrate that such situations *cannot* be governed by the existing NIAC framework. Corn, Schöndorf and Lietzau adopt normative stances and discuss *lex ferenda* due to the purported poor fit of internationalised armed conflict with common Article 3, but the potential desirability of new law has no bearing on the applicability of the *lex lata.* The better understanding, which accords with the *lex*

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[654] Lietzau (n 651) 78-80.

[655] ICJ Statute Article 38(1)(b).

[656] *North Sea Continental Shelf* (n 277) para 73.

[657] Roy Shöndorf, 'Extra-State Armed Conflicts: is there a Need for a New Legal Regime?' (2004) 37(1) New York University Journal of International Law and Politics 1, 5.

[658] Shöndorf (n 657) 53.

[659] Geoffrey S Corn, 'Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict' (2007) 40(2) Vanderbilt Journal of Transnational Law 295, 309-10.

[660] Corn (2010) (n 1710) 307; Shöndorf (n 657) 50.

[661] Text from n 625 to n 629.

[662] Paulus and Vashakmadze (n 583) 119.

lata, is that these multinational conflicts cannot but be NIACs due to their failure to satisfy the inter-state requirement of common Article 2. Common Article 3 applies to conflicts 'not of an international character', the Latin prefix 'inter-' meaning 'between' or 'among', the term 'international' denoting 'mutual transactions between sovereigns':[663] common Article 3 can thus be understood to apply to all conflicts not between states. This position was emphasised by the US Supreme Court which interpreted common Article 3 as applying 'in contradistinction to a conflict between nations',[664] a conclusion with wide support,[665] and which reflects the original commentary's call to apply common Article 3 'as widely as possible',[666] avoiding a significant gap in the law.[667]

Furthermore the Appeals Chamber of the ICTY has rejected the geographical restriction of IHL to specific zones of hostilities[668] holding that '[t]here is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war'.[669] Lubell and Derejko have pointed out that key to the geographical scope of a NIAC is where hostilities actually occur, rather than the territory of the parties to the conflict,[670] a finding supported by the ICTR's reference to 'where the hostilities are *occurring*.'[671] Common Article 3 requires fighting to happen within the territory of a state party to the *Convention*, not the territory of a state party to the *conflict*.[672] Pejić has

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[663] Jeremey Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1781, Batoche Books 2000) 236.

[664] *Hamdan v Rumsfeld* 548 US 57 (2006) 67.

[665] Cherif Bassiouni, 'Legal Control of International Terrorism: A Policy-Oriented Assessment' (2003) 43(1) Harvard International Law Journal 83, 99; ICRC Report (2011) (n 620) 10; Jinks (2003) (n 623) 40-1; Lubell and Derejko (n 619) 67-8; Lubell (2012) (n 540) 435; Marco Sassòli, 'Use and Abuse of the Laws of War in "The War on Terrorism"' (2004) 22 Law and Inequality 195, 199-200; Sivakumaran (n 544) 229.

[666] Pictet (1952) (n 637) 50.

[667] Jinks (2003) (n 623) 40; Derek Jinks, 'The Applicability of the Geneva Conventions to the "Global War on Terror"' (2005) 46(1) Virginia Journal of International Law 165, 189; Sassòli (2004) (n 665) 201.

[668] Lubell and Derejko (n 619) 74.

[669] *Prosecutor v Kunarac, Kovač and Vuković* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002), para 57.

[670] Lubell and Derejko (n 619) 70-1.

[671] *Rutaganda* (n 554) para 102.

[672] Lubell (2012) (n 540) 434.

asserted that the drafting history of common Article 3 demonstrates that the territorial reference of common Article 3 was a necessary addition due to the fact that it applied to NSAs that could not be parties to the Conventions, therefore the Article required a territorial specification that was not needed for IACs.[673]

More restrictively Dinstein holds that NIACs must be internal.[674] However, it is submitted that Dinstein actually refers to the wider, proposed, 'global' NIAC.[675] He also states that the presumption of bounded territorial scope inherent in a NIAC 'does not denote that every act of hostilities, without any exception must be contained within that territory.'[676] Therefore even Dinstein's more restrictive approach does not seem entirely to preclude the possibility of a NIAC occurring within more than one state.

A cross-border NIAC is not the same as the 'global' armed conflict suggested to exist by the US in the form of its 'war on terrorism'.[677] This phrase is widely regarded as political, rather than being a legal classification, connoting a collection of distinct actions, which may be IACs,[678] NIACs or law enforcement, rather than a single ongoing operation allowing the general use of extraterritorial military force.[679] There is no state practice to support the existence of a global armed conflict as a legal category.[680]

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[673] Jelena Pejić, 'The Protective Scope of Common Article 3: More than Meets the Eye' (2011) 93(881) International Review of the Red Cross 189, 200-1.

[674] Yoram Dinstein, 'Concluding Remarks on Non-International Armed Conflicts' (2012) 88 International Law Studies 399, 400.

[675] Dinstein (2012) (n 674) 400; Dinstein (2015) (n 553) 27.

[676] Dinstein (2015) (n 553) 25.

[677] NSS 2002 (n 320) Preamble; 'National Strategy for Combating Terrorism' (September 2003) 2; Koh (2010) (n 10); Obama (n 195).

[678] Jinks (2005) (n 667) 179.

[679] Karinne Coombes, 'Protecting Civilians During the Fight Against Transnational Terrorism: Applying International Humanitarian Law to Transnational Armed Conflict' (2008) 46 Canadian Yearbook of International Law 241, 270; Dinstein (2015) (n 553) 27; Hans-Peter Gasser, 'Acts of terror, "terrorism" and international humanitarian law' (2002) 84(847) International Review of the Red Cross 547, 554; ICRC Report (2011) (n 620) 10; Lubell (2012) (n 540) 451; Mary Ellen O'Connell, 'The Legal Case Against the Global War on Terror' (2004) 36 Case Western Reserve Journal of International Law 349, 353.

[680] Kreß (2010) (n 606) 266.

Having confirmed that a NIAC *can* exist extraterritorially, it is necessary to determine *when* fighting in one state is part of a NIAC initially based in another. As common Article 3 refers to 'each Party to the conflict', it is logical that a NIAC will extend when a group engaged in fighting in a third state comprises part of an NSA party to that original NIAC. Where a second group is not part of the original NSA, fighting in a third state must separately satisfy the *Tadić* criteria,[681] otherwise remaining outside the scope of IHL. The more tenuous 'the link between [a] target and an already occurring armed conflict' the more likely it is that the attacking state will need to demonstrate that a separate NIAC exists.[682] For a link to be sufficient it must be more than a 'loose "terrorism franchise"',[683] and in establishing this link, writers have applied the *Tadić* organisation requirement.[684] This is the correct approach as, in establishing whether a territorially remote NSA is linked with a party to a NIAC, it is logical that the group must fit within the organisational structure of the party. Kreß provides a similar understanding, though adds the caveat that state practice supports the geographical extension of a NIAC only where the NSA has 'an actual (quasi-)military infrastructure' on the third state's territory.[685] This accords with IHL rules on targeting: the geographical extension of a NIAC does not provide the intervening state with *carte blanche* to use military force against all members of an NSA in any third state.[686] Despite this, Kreß's call for '(quasi-)military infrastructure' should not be overstated—it must be read in light of the judicial interpretation of organisation as involving a group speaking 'with one voice'[687] and with the capacity to 'formulate … military tactics'.[688]

Therefore, it can be concluded that this complex and emergent permutation of armed conflict can be deemed to be a NIAC occurring in multiple territories when the NSA party is present in each territory. Where there are multiple NSAs, each territorially distinct

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[681] Sivakumaran (n 544) 233.

[682] Lubell and Derejko (n 619) 77.

[683] Paulus and Vashakmadze (n 583) 119.

[684] Heyns and others (n 2) 807-8; Schmitt 'Charting' (2014) (n 626) 102.

[685] Kreß (2010) (n 606) 266.

[686] Section 3.2.2.2.1.

[687] *Haradinaj* (n 549) para 60; *Limaj* (Judgment) (n 549) para 129.

[688] *Limaj* (Judgment) (n 549) para 129.

conflict will need to pass the threshold of a NICA, or will remain outside the scope of IHL.

3.1.5 Drone strikes and armed conflicts in Pakistan, Yemen and Somalia

Having set out the categories of armed conflict, this section will consider whether situations in which drone strikes have occurred can be said to constitute armed conflicts and, if so, which kind. This is a vital undertaking, confirming the possible applicability and nature of IHL to drone strikes. It is a necessarily in-depth contribution to the discussion, as little analysis of this depth has been undertaken,[689] beyond wider examinations of the US's engagement with NSAs as a global campaign.[690]

3.1.5.1 Global non-international armed conflict?

US officials have suggested that the US is in a global armed conflict against various NSAs: the Bush administration's 2002 NSS labelled the war on terror 'a global enterprise'[691] and the 2003 National Strategy for Combating Terrorism referred to the US's 'global reach',[692] 'multinational' nature of groups like al-Qaeda[693] and the need 'to defeat terrorist networks globally.'[694] This understanding continued under the Obama administration: the 2010 NSS referred to a 'global campaign against al-Qa'ida and its terrorist affiliates'[695] while that of 2015 identified 'globally oriented' and 'globally connected' groups.[696] More recently, the Trump administration has stated that it will

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[689] Though see Jeffery S Bachman, 'The Lawfulness of US Targeted Killing Operations Outside Afghanistan' (2015) 38(11) Studies in Conflict and Terrorism 899, 903-6.

[690] As undertaken in, for instance, Jinks (2003) (n 623); Jinks (2005) (n 667) ; Lubell (2012) (n 540); O'Connell (2010) (n 1013); Sassòli (2004) (n 665); Schmitt 'Drone Attacks' (2010) (n 2); Ryan J Vogel 'Drone Warfare and the Law of Armed Conflict' (2010) 39(1) Denver Journal of International Law and Policy 101.

[691] NSS 2002 (n 320) Preamble

[692] NSCT 2003 (n 677) 2.

[693] ibid 7.

[694] ibid 17.

[695] 'National Security Strategy' (May 2010) 19.

[696] 'National Security Strategy' (February 2015) 9.

'pursue threats to their source', 'regardless of where they are.'[697] Importantly, beyond political rhetoric, Koh claimed in 2010 that, 'as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces,'[698] a view repeated by President Obama in 2013.[699] It was initially claimed by the US that the 'war on terrorism' was a global IAC but this position was changed after the decision of the US Supreme Court in *Hamdan v Rumsfeld*, which emphasised its intra-state nature.[700]

As stated, a global armed conflict is not a legal classification.[701] The US's 'global enterprise' is political, including IACs and NIACs as well as uses of force outside of armed conflict. It is nevertheless possible that the US is in an umbrella *internationalised* NIAC against an NSA present in Pakistan, Yemen and Somalia, bringing these drone programmes within the remit of IHL. Indeed, it has been argued that 'armed Islamist extremists remain the enemy that carried out the September 11, 2001 attacks, and they remain the belligerents in the ongoing War on Terror'.[702] As demonstrated,[703] for a nebulous group to be a single NSA party to a NIAC, each geographically separate entity must fit within the overall organisation of one NSA. This necessitates, at least, that the overall group speaks 'with one voice'[704] and possesses a command structure[705] that is effective internationally.

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[697] 'National Security Strategy of the United States of America' (December 2017) 10-1.

[698] Koh (2010) (n 10) (emphasis added).

[699] Obama (n 195).

[700] *Hamdan* (n 664) 67.

[701] Text from n 678 to n 680.

[702] Frank M Walsh, 'An Enemy by Any Other Name: the Necessity of an "Associated Forces" Standard that Accounts for Al Qaeda's Changing Nature' (2015) 32(2) Arizona Journal of International & Comparative Law 349, 352.

[703] Text from n 681 to n 688.

[704] *Haradinaj* (n 549) para 60; *Limaj* (Judgment) (n 549) para 129.

[705] *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) paras 23-4; *Haradinaj* (n 549) para 65.

The oft-identified party to the conflict is 'al-Qaeda, as well as the Taliban and associated forces'.[706] That these forces are 'associated' immediately suggests disunity: for a group to be 'associated' with another they must be separated. The definition of 'associated forces' provided by the US conceives of '(1) … an organised, armed group that has entered the fight alongside al-Qaeda, and (2) a cobelligerent with al-Qaeda in hostilities against the United States or its coalition partners.'[707] It has been argued that the term 'associated forces' provides the US with the legal scope to use force against 'regional extremist Islamist groups waging an armed conflict against the United States [that] often do not conduct joint operations with al-Qaeda'[708] but this appears only to be in terms of US domestic law.[709] The implication that regional NSAs, unaffiliated with al-Qaeda will automatically be part of the NIAC between al-Qaeda and the US is manifestly wrong under international law, and will be demonstrated to fall below the organisation threshold for a NIAC.

The first category—NSAs having 'entered the fight alongside al Qaeda'—clearly envisages *separate* groups fighting together and is *prima facie* below the organisation threshold. The word 'alongside' in the US's definition, like 'associated', clearly implies organisational separation. The need for NSAs to speak with one voice[710] within a single command structure[711] requires more than the ideological identification of one group with another.

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[706] Koh (2010) (n 10) (emphasis added).

[707] Jeh C Johnson, 'National Security Law, Lawyers and Lawyering in the Obama Administration: Dean's Lecture at Yale Law School, February 22, 2012' (2012) 31 Yale Law and Policy Review 141, 146.

[708] Walsh (n 702) 355.

[709] Walsh discusses the implicit inclusion of 'associated forces' within the Authorization of the Use of Military Force by virtue of Section 1021(b) (the 'Affirmation of Authority'), National Defense Authorization Act 2011, both pieces of domestic US legislation: ibid 354.

[710] *Haradinaj* (n 549) para 60; *Limaj* (Judgment) (n 549) para 129.

[711] *Haradinaj* (n 549) para 65; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) paras 23-4.

The second category, co-belligerency, has been asserted by the US as a basis upon which to include multiple groups within one NIAC.[712] Its invocation is problematic as co-belligerency is a concept that historically applies to conflicts between states, requiring the participation in hostilities to a *significant* extent.[713] Its inclusion within a NIAC appears to be a conflation of the laws of IAC and NIAC. The notion that one NSA can be a co-belligerent purely by virtue of engaging in violent acts against the same state as another NSA is contrary to the NIAC organization requirement as it requires no unity of command structure. Therefore, it is submitted that two NSAs cannot be viewed as a single entity in this manner.

Vogel has asserted that al-Qaeda conceived of as a global organisation satisfies the organisation requirement by 'maintain[ing] "headquarters" in Pakistan and Yemen from which it coordinates attacks', it 'operat[ing] within designated Zones in Afghanistan, Pakistan, Yemen and elsewhere', and 'demonstrat[ing] a persistent ability to procure, transport, and distribute arms to countries across the globe,'[714] a position supported by a minority of other writers.[715] Vogel's conclusions are based on a 2012 Report by the US Department of State[716] and share the view of that administration. It is submitted that this view is incorrect in its interpretation of the facts surrounding the nature and degree of co-ordination between al-Qaeda franchises, the reality of which will now be demonstrated.

An examination of the facts demonstrates that there is not just one NIAC between the US and a single NSA, encompassing Pakistan, Yemen and Somalia. The US has undertaken

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[712] *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing before the Committee on Foreign Relations*, Senate 113th Cong (2014) (Testimony of Stephen W Preston) 1.

[713] Co-belligerency can also occur through more formalised alliances: Oppenheim (n 585) 203 and 206.

[714] Vogel (2015) (n 196).

[715] Jinks (2003) (n 623) 37-8; Catherine Lotrionte, 'Targeted Killings by Drones: A Domestic and International Legal Framework' (2012) 3(1) St John's Journal of International and Comparative Law 19, 64-6.

[716] 'Country Reports of Terrorism 2012: Chapter 6, Foreign Terrorist Organizations (US Department of State, 30 May 2013) http://www.state.gov/j/ct/rls/crt/2012/209989.htm.

drone strikes in Pakistan against members of al-Qaeda, TTP and the Haqqani Network.[717] In Yemen, targets appear almost exclusively members of AQAP,[718] with two reported strikes against ISIS,[719] while all strikes bar two in Somalia have targeted members of al-Shabaab.[720] Though these groups share a similar ideology, this is insufficient to demonstrate unified organisation[721]—they remain distinct groups operating in different states. In Pakistan, al-Qaeda and TTP may be linked for purposes of establishing a NIAC, appearing sufficiently integrated as they purportedly train and plan attacks together,[722] reflecting the jurisprudential understanding of organisation as including the formulation of military tactics[723] sufficient for 'protracted violence'.[724] However, this group does not include those that operate in other states. al-Qaeda internationally comprises autonomous cells lacking central organisation.[725] AQAP in Yemen has been described as 'the most active operational franchise' of al-Qaeda[726] but operating as a 'terrorism franchise' is manifestly below the requisite level of organisation.[727] Likewise, despite having strong links to al-Qaeda, Somalia's al-Shabaab is an autochthonous franchise with its own identity, even though the groups have pledged allegiance to one another.[728]

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[717] Spencer Ackerman, '41 Men Targeted but 1,147 People Killed: US Drone Strikes—the Facts on the Ground' *The Guardian* (New York, 24 November 2014) http://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147.

[718] ibid.

[719] Department of Defense (16 October 2017) (n 17); Browne and Cohen (n 17).

[720] Barbara Starr, 'US Increasing the Pressure on Al-Shabaab in Somalia' *CNN* (Washington, 25 July 2015) http://edition.cnn.com/2015/07/24/politics/al-shabaab-u-s-strikes/.

[721] Kevin J Heller, '"One Hell of a Killing Machine": Signature Strikes and International Law' (2013) 11(1) Journal of International Criminal Justice 89, 110; Pejić (2014) (n 623) 83-4; Michael N Schmitt, 'The Status of Opposition Fighters in Non-International Armed Conflict' (2012) 88 International Law Studies 119, 130; Schmitt 'Extraterritorial Lethal Targeting' (2013) (n 66) 95.

[722] Candy Crowley, 'Transcript of CNN interview with John O Brennan' *Washington Post* (9 May 2010) http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050901442.html.

[723] *Limaj* (Judgment) (n 549) para 129.

[724] *Boškoski* (n 549) para 197.

[725] Adam Elkus, 'Future War: The War on Terror After Iraq' (*Athena Intelligence*, 26 March 2007) 13.

[726] Al Jazeera (9 May 2012) (n 434).

[727] Paulus and Vashakmadze (n 583) 119; Kreß (2010) (n 606) 261.

[728] Loahoud (n 435).

In 2014 Preston, then-General Counsel of the Department of Defense, specifically identified AQAP as 'part of, or at least an associated force' of al-Qaeda, and al-Shabaab as 'openly affiliated' with the group.[729] But in itself, this does not satisfy the organisation requirement. Further, Preston is clear that the determination as to whether a group is an 'associated force' is one made by the US.[730] This is contrary to the legal determination of an armed conflict, which requires objective assessment. It is submitted that the US has not demonstrated that the three distinct groups are a single NSA for the purposes of the NIAC organisation requirement.

The US cannot, therefore, be in a single multinational NIAC. Instead it may be fighting a series of distinct armed conflicts against different NSAs in different states. The existence of NIACs can only be determined on a case-by-case basis[731] and, as such, the next sections will consider, in turn, the situations in which drones have been deployed in Pakistan, Yemen and Somalia to see if they can be classified as such.

3.1.5.2 Pakistan

In Pakistan US drones have targeted al-Qaeda, TTP and the Haqqani Network.[732] There are three possible ways in which these strikes may fall within a NIAC: first, they may form part of a spill-over from the conflict in Afghanistan; second, they may be part of a NIAC between the Pakistani government and an NSA; and, third, they may be part of a NIAC between the US and an NSA.

There has been a degree of academic commentary on this issue, but primarily without the in-depth factual assessment necessary to reach a conclusive determination. Some have uncritically applied the notion of spill-over conflict to bring all drone strikes in Pakistan within the NIAC in Afghanistan.[733] Orr has adopted the unsustainable argument that al-

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[729] Preston testimony (n 712) 3.

[730] ibid 3.

[731] *Limaj* (Judgment) (n 549) para 90.

[732] Ackerman (n 717).

[733] Kristina Benson, '"Kill 'em and Sort it Out Later": Signature Drone Strikes and International Humanitarian Law' (2014) 27(1) Global Business and Development Law Journal 17, 25; Michael W

Qaeda's actions globally support the presence of a NIAC in Pakistan involving the US,[734] while Jenks has asserted the existence of a NIAC on the basis of *jus ad bellum* rather than through the *Tadić* criteria.[735] Others have separated the various possible conflicts, though treated a NIAC in Pakistan as a given.[736] Conversely, Blank and Farely have conducted a factual analysis and asserted both that a NIAC exists between Pakistan and TTP,[737] and the US and TTP,[738] positions that will be considered below.

3.1.5.2.1 Spill-over from Afghanistan

If an armed conflict exists in Afghanistan, where this spills into Pakistan the application of IHL will be extended, covering drone strikes conducted as part of that conflict. The ICRC has identified an IAC in Afghanistan from October 2001 until the establishment of the transitional government in June 2002.[739] This appears accurate: the use of force by the US-led coalition against the Taliban government of Afghanistan satisfies the inter-state requirement of common Article 2, a point accepted by those states party to the conflict, other than the Taliban.[740] Upon the establishment of the transitional government, the conflict subsequently continued as a number of NIACs: one between the US, the

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Lewis, 'Potential Pitfalls of Strategic Litigation: How the Al-Aulaqi Lawsuit Threatened to Undermine International Humanitarian Law' (2011) 9(1) Loyola University Chicago International Law Review 177, 181; Beth van Schaack, 'The Killing of Osama Bin Laden and Anwar Al-Aulaqi: Uncharted Legal Territory' (2011) 14 Yearbook of International Humanitarian Law 255, 287.

[734] Orr (n 197) 743.

[735] Chris Jenks, 'Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict' (2009) 85 North Dakota Law Review 649, 657-62.

[736] O'Connell (2012) (n 4) 281; Heller (n 721) 111-2.

[737] Laurie R Blank and Benjamin R Farley, 'Characterizing US Operations in Pakistan: Is the United States Engaged in an Armed Conflict' (2011) 34 Fordham International Law Journal 151, 164-76.

[738] Blank and Farley (n 737) 176-8.

[739] Letter from the Clerk of the Committee to Philip Spoerri, Legal Adviser, International Committee of the Red Cross and Reply (20 December 2002) http://www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm.

[740] Françoise J Hampson, 'Afghanistan 2001-2010' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 250.

Taliban and al-Qaeda, one between ISAF, the Taliban and al-Qaeda, and one between the government of Afghanistan, the Taliban and al-Qaeda.[741]

US statements have reiterated that there continues to be an armed conflict in Afghanistan,[742] and this is borne out by the facts. Though duration is a less conclusive determinant of intensity than the magnitude of a conflict[743] it is relevant. In Afghanistan non-international fighting has lasted from June 2002 until the present, the longest conflict ever to involve the US. Considering magnitude, casualty and fatality numbers[744] suggest sufficient intensity, as the non-international part of the conflict had, by the end of 2014, resulted in the deaths of 23,496 civilians.[745] In addition, it has been estimated that at least 2,853 Afghan National Army soldiers were killed between 2003 and 2013,[746] with 2,771 between 2010 and 2013,[747] and deaths among Afghan civilians and armed forces remain high.[748] Between 2003 and 2015 there were 2,320 US fatalities[749] though these have decreased each year since a peak in 2010.[750] Though US involvement in Afghanistan is

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[741] Hampson (n 740) 256..

[742] See, for instance, the US government submission in recent litigation on detention: *Tofiq Nasser Awad al-Bihani and others v Donald J Trump* Civil Action No 1:09-CV-00745 (RCL) Columbia District Court, filed 16 February 2018.

[743] *Haradinaj* (n 549) para 49.

[744] n 561.

[745] Based on data in: Neta C Crawford, 'War-Related Death, Injury, and Displacement in Afghanistan and Pakistan 2001-2014' (Costs of War: Watson Institute for International Studies, Brown University, 22 May 2015) http://watson.brown.edu/costsofwar/files/cow/imce/papers/2015/War%20Related%20Casualties%20Afghanistan%20and%20Pakistan%202001-2014%20FIN.pdf 2.

[746] Crawford (2015) (n 745) 8.

[747] Ron Nordland, 'War Deaths Top 13,000 in Afghan Security Forces' *The New York* (Kabul, 3 March 2014) http://www.nytimes.com/2014/03/04/world/asia/afghan-cabinet-releases-data-on-deaths-of-security-personnel.html?_r=0.

[748] 'Midyear Update on the Protection of Civilians in Armed Conflict: 1 January to 30 June 2018' (UN Assistance Mission in Afghanistan) https://unama.unmissions.org/sites/default/files/unama_poc_midyear_update_2018_15_july_english.pdf.

[749] Based on data from 'iCasualties: Operation Enduring Freedom' (*iCasulties*) http://icasualties.org/oef/.

[750] Based on data from iCasualties, ibid.

purportedly drawing to a close, troop numbers have increased:[751] the Obama administration stated it would maintain a force of 5,500 soldiers until at least 2017,[752] while the Trump administration has increased US involvement in Afghanistan,[753] focusing on both the Taliban and ISIS.[754] Statistics on Taliban and al-Qaeda fatalities are essentially non-existent, though one estimate suggests that 4,300 Taliban fighters were killed in 2014.[755] In addition, all sides have mobilised military forces and weapons rather than law enforcement, satisfying further NIAC criteria.[756] Taken together, these data provide a compelling case that the intensity requirement is satisfied.

In terms of the organisation of the non-state party to the conflict, the Afghan Taliban presents a number of indicators. The group has generally spoken with one voice under various leaders,[757] most recently Haibatullah Akhunzada,[758] though splinter groups have emerged.[759] A recent example of the group's organisation was a ceasefire between it and

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[751] Spencer Ackerman and Sune Rasmussen, 'US to Deploy Hundreds of Troops in Afghanistan to Thwart Taliban' *The Guardian* (New York and Kabul, 8 February 2016) http://www.theguardian.com/us-news/2016/feb/08/hundreds-us-troops-deployed-afghanistan-taliban-helmand.

[752] Dan Roberts, Spencer Ackerman and Sune Rasmussen, 'Barack Obama Delays Withdrawal of US Troops from Afghanistan' *The Guardian* (Washington, New York and Kabul, 15 October 2015) http://www.theguardian.com/world/2015/oct/15/obama-delay-withdrawal-us-troops-afghanistan.

[753] Julie Hirschfeld Davis and Mark Landler, 'Trump Outlines New Afghanistan War Strategy with Few Details' *New York Times* (Washington, 21 August 2017) https://www.nytimes.com/2017/08/21/world/asia/afghanistan-troops-trump.html.

[754] Idrees Ali and Robin Emmott, 'US Military Operationa Against IS in Afghanistan to Intensify' *Reuters* (Brussels, 8 June 2018) https://www.reuters.com/article/us-usa-afghanistan-military/u-s-military-operations-against-is-in-afghanistan-to-intensify-idUSKCN1J411O.

[755] Crawford (2015) (n 745) 9.

[756] n 566 and n 568.

[757] 'Who are the Taliban?' *BBC* (29 September 2015) http://www.bbc.co.uk/news/world-south-asia-11451718.

[758] Shereena Qazi, 'Afghan Taliban: Haibatullah Akhunzada Named New Leader' *Al Jazeera* (26 May 2016) https://www.aljazeera.com/news/2016/05/afghan-taliban-haibatullah-akhunzada-leader-160525045301080.html.

[759] 'Afghan Taliban Splinter Group Names Mullah Rasool as Leader' *BBC* (4 November 2015) https://www.bbc.co.uk/news/world-asia-34719314.

the government,[760] the ability to enter negotiations being indicative of the requisite level of organisation.[761] Further, the group's continued military actions demonstrate an ongoing ability to plan, coordinate and execute military operations, satisfying the requirement set out in the *Abella* decision.[762] These factors all point strongly to the satisfaction of the second prong of the *Tadić* test.

Thus there appears to be an ongoing NIAC in Afghanistan, which could have spilled-over into Pakistan. However, due to the organisation requirement, only the non-state party to, or individuals directly participating in,[763] the NIAC in Afghanistan may be targeted in Pakistan as part of that conflict. Many of those targeted by US drone strikes in Pakistan have been members of NSAs not party to the Afghanistan NIAC. As stated above,[764] only 13 percent of drone strikes in Pakistan were reported to target members of the Haqqani Network (54 in total), with a further 6 percent (25 in total) reportedly targeting others involved in the Afghanistan NIAC, representing 79 out of 430 strikes (25 of which occurred after consent was rescinded). Therefore, the remaining 351 will only be subject to IHL if they come within other NIACs.

3.1.5.2.2 TTP, al-Qaeda and the Pakistani government

One possibility is that a NIAC exists between the Pakistani government and an NSA, into which the US has been invited. Fighting has been ongoing in FATA, and so it is necessary to consider whether this reaches the requisite thresholds of intensity and organisation.

Prior to the formation of TTP in 2007, the Pakistani armed forces engaged in sporadic 'half-hearted' skirmishes against groups in FATA.[765] In August 2008 the government

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[760] Shereena Qazi, 'Rare Eid of "Calm and Peace" as Taliban, Government Truce Holds' *Al Jazeera* (15 June 2018) https://www.aljazeera.com/news/2018/06/rare-eid-peace-calm-taliban-government-truce-holds-180615174619751.html.

[761] *Limaj* (Judgment) (n 549) para 125; *Haradinaj* (n 549) para 60; *Boškoski* (n 549) para 203.

[762] *Abella* (n 559) paras 147 and 155.

[763] Section 3.2.2.2.2.

[764] Text around n 497.

[765] Blank and Farley (n 737) 156.

launched its first major and prolonged offensive against TTP, and in 2009 deployed over 15,000 troops, while TTP carried out weekly attacks.[766] In 2013 the government sought peace talks with TTP[767] but this ended in June 2014 with Operation Zarb-e-Azb in response to attacks by TTP, including the beheading of 23 soldiers,[768] an attack on Karachi airport[769] and the assassination of an army general.[770] Operation Zarb-e-Azb involved airstrikes and the positioning of 30,000 troops in FATA[771] and was followed by Operation Radd-ul-Fasaad which, though less intense than its predecessor, still involved military force.[772] TTP actions continue, though have dwindled: in 2015 TTP carried out 212 attacks, killing 384 people and injuring 465 others[773] while in 2017 this was reduced to 70 attacks with 186 killed and 360 injured.[774]

The number of clashes and casualties are indicators of intensity,[775] and these factors in Pakistan suggest sufficient intensity. In *Limaj*, the Trial Chamber of the ICTY identified a NIAC based on 'sporadic acts of violence' over the course of a year[776] that ranged from

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[766] ibid 167.

[767] Maria Golovnina, 'Pakistan Says No to Military Action Against Taliban' *Reuters* (Islamabad, 17 December 2013) http://www.reuters.com/article/us-pakistan-taliban-idUSBRE9BG0TF20131217.

[768] Pazeer Gul and Suhail Kakakhel, 'TTP Tries to Justify Ruthless Killing of 23 FC Soldiers' (Nowshera and Mirashah, 18 February 2014) *Dawn* http://www.dawn.com/news/1087719.

[769] 'TTP Claims Attack on Karachi Airport' *Dawn* (Karachi, 9 June 2014) http://www.dawn.com/news/1111397.

[770] Salman Masood, 'Senior Pakistani General is Killed in Insurgent Attack' *New York Times* (Islamabad, 15 September 2014) http://www.nytimes.com/2013/09/16/world/asia/insurgent-attack-kills-senior-pakistani-general.html.

[771] Farhan Zahid, 'The Successes and Failures of Pakistan's Operation Zarb-e-Azb' (2015) 13(14) The Jamestown Foundation Terrorism Monitor http://www.jamestown.org/programs/tm/single/?tx_ttnews%5Btt_news%5D=44144&cHash=d4281630e5ad104ab6fbc0bd5f3bbf9f#.VsIEyZOLSRs.

[772] 'Operation Rudd-ul-Fasaad in Full Swing Throughout the Country' *Dunya News* (Lahore, 22 March 2018) https://dunyanews.tv/en/Pakistan/432315-Operation-Radd-ul-Fasaad-in-full-swing-throughout-country.

[773] 'Pakistan Security Report 2015' (*Pak Institute for Peace Studies*, 2016) 7.

[774] Pak Institute for Peace Studies, 'Pakistan Security Report 2017' (2018) 10(1) *Conflict and Peace Studies* 1, 83.

[775] *Haradinaj* (n 549) para 49.

[776] *Limaj* (Judgment) (n 549) para 135.

an attack causing 83 deaths to a 20 minute firefight with no casualties.[777] These caused 'great devastation to a limited number of buildings'[778] and involved 'tanks and armoured vehicles, heavy artillery weapons, air defence systems, [armoured personnel carriers], machine guns, and explosives, among other weapons'.[779] The Trial Chamber asserted that these facts indicated NIAC intensity.[780] TTP has used military weapons and the Pakistani government has responded by deploying the army rather than the police, both indicating NIAC-level intensity.[781] Furthermore, the conflict has been of significant duration, lasting over ten years. This all suggests the conflict is 'protracted'.

In terms of organisation, TTP and al-Qaeda train and plan attacks together,[782] thus, with regard to the classification of a NIAC, they can be considered organisationally linked. The Haqqani Network has been involved with both, but operates in Afghanistan rather than carrying out attacks in Pakistan.[783] The lenient treatment (or support[784]) of the group—it was only banned in 2015[785]—further suggests that it is not part of a single group with TTP and al-Qaeda. As shown, the TTP/al-Qaeda amalgam has demonstrated an ability to obtain and distribute arms, possesses a command structure capable of coordinating protracted violence, and has engaged in negotiations with the government,[786] all of which are indicators of organisation identified by international jurisprudence.[787] Having apparently splintered since the death of Hakimullah Mehsud in

[777] *Limaj* (Judgment) (n 549) para 138.

[778] ibid para 136.

[779] ibid para 166.

[780] ibid para 169.

[781] *Boškoski* (n 549) paras 177-8; *Haradinaj* (n 549) para 49.

[782] Crowley (n 722).

[783] 'Haqqani Network' (*Mapping Militant Organisations, Stanford University*) https://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/363.

[784] Text from n 466 to n 468.

[785] Zahra-Malik (n 468).

[786] Text from n 766 to n 774.

[787] Text from n 571 to n 579.

2013,[788] the groups have reportedly reunited.[789] Thus it appears that this NSA satisfies the organisation requirement, though the lack of substantial evidence prevents a definitive conclusion.

It seems clear that there has been a NIAC in Pakistan since 2008. It may be that the downward trend in the intensity of its attacks indicate that the NIAC is waning, but it arguably continues as of July 2018. As shown, US drone strikes were invited between 2004 and October 2013,[790] therefore strikes against the TTP/al-Qaeda amalgam in that period fall within the NIAC. This covers approximately 358 drones strikes,[791] leaving around 72 outside of this NIAC, which, once those occurring as part of the spill-over Afghanistan NIAC are accounted for, leaves 47 outside of a NIAC.

3.1.5.2.3 TTP, al-Qaeda and the US

Lastly, US drone strikes may come more comprehensively within the remit of IHL if the US is engaged in its own NIAC against TTP and al-Qaeda in Pakistan.

Force used by the US in Pakistan has been entirely carried out through drone strikes. Between 2004 and 2007 there were approximately nine against TTP/al-Qaeda, but from 2008 this increased dramatically to a high of approximately 115 in 2010. This has since receded with 11 in 2015, none in 2016 and one in 2017.[792] Blank and Farely have argued that this inherently satisfies the intensity requirement[793] but this fails to consider both

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[788] Jon Boone, 'Isis Ascent in Syria and Iraq Weakening Pakistani Taliban' *The Guardian* (Islamabad, 22 October 2014) http://www.theguardian.com/world/2014/oct/22/pakistani-taliban-spokesman-isis-pledge (accessed 19 February 2016).

[789] Pakistan Security Report 2017 (n 774) 83-4.

[790] Section 2.2.2.1.

[791] 'Drone Strikes in Pakistan' (*The Bureau of Investigative Journalism*) https://www.thebureauinvestigates.com/projects/drone-war/pakistan.

[792] TBIJ 'Pakistan 2004 to Present' (n 11). The figures quoted are based on the total strikes reported minus through purported to have targeted Haqqani Network members or others involved with the NIAC in Afghanistan. No figure is given for 2018 due to a lack of clear information regarding those targeted in the only confirmed US drone strike in Pakistan so far, TBIJ 'Pakistan 2008' (n 12).

[793] Blank and Farley (n 737) 178.

sides to the conflict—the fact that the US has resorted to military force, though indicative of the intense violence of an armed conflict, is not determinative.[794]

In the case of a possible NIAC between the US and the TTP/al-Qaeda amalgam, the intensity and organisation requirements are interconnected—sporadic acts of violence carried out globally may be sufficiently intense if carried out by a group satisfying the organisation requirement. Conversely, if the organisation threshold is not met, acts of violence cannot be aggregated and are, therefore, less likely to pass the intensity threshold.[795] It has been asserted that, considered cumulatively, global attacks attributed to al-Qaeda go beyond 'isolated or sporadic', satisfying the intensity requirement.[796] However, this view is unpersuasive: actions ostensibly carried out by al-Qaeda in Indonesia, Spain, the US, the UK and elsewhere are in fact perpetrated by *franchises*. As previously concluded, disparate franchises cannot satisfy the organisation requirement and so their attacks cannot be aggregated when assessing intensity. Therefore, in establishing whether the US is in a NIAC in Pakistan, acts carried out by the specific non-state party must be considered in isolation.

There appear to have been very few attacks by the TTP/al-Qaeda amalgam carried out against the US. US Central Command has suggested at least 15 US service personnel were killed in Pakistan between 2001 and 2010.[797] An analysis of news reports reveals three violent incidents against the US perpetrated by the TTP/al-Qaeda between 2002 and 2018, resulting in nine deaths, three of whom were American.[798] The intensity requirement distinguishes NIACs from 'banditry, unorganized and short-lived

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[794] Christian Schaller, 'Using Force Against Terrorists "Outside Areas of Active Hostilities"—The Obama Approach and the Bin Laden Raid Revisited' (2015) 20(2) Journal of Conflict and Security Law 195, 218.

[795] Lubell (2012) (n 540) 437.

[796] Jane Gilliland Dalton, 'What is War?: Terrorism as War After 9/11' (2006) 12 ILSA Journal of International and Comparative Law 523, 527.

[797] Perlez (n 471).

[798] These are the February 2010 suicide attack against a US armoured vehicle, killing three soldiers (ibid); the April 2010 attack on the US consulate in Peshawar, which caused no US and six Pakistani deaths, as well as property damage (Khan and Tavernise (n 472)); and the August 2011 kidnapping of a US aid worker in Lahore (Alexander (n 473)).

insurrections, or terrorist activities'[799] and the actions of the TTP/al-Qaeda against the US appear to be archetypal 'terrorist activities'. Although such activities can produce an armed conflict[800] the number and severity of those carried out do not reach the requisite level of intensity.

Violence is against a foreign state rather than the domestic government; in the *Abella* case the IACHR specifically identified an 'internal' aspect to violence falling short of a NIAC,[801] raising the possibility that the internationalised nature of TTP/al-Qaeda attacks might render the situation a NIAC. However, it is submitted that the fact of violence being directed against a state other than the host does not have any special 'NIAC-creating' quality. No such suggestion has been made by any other jurisprudence dealing with NIACs. The ICTY's cleaving of NIACs from 'banditry, unorganized and short-lived insurrections, *or* terrorist activities' in the *Milošević* case,[802] though implying an internal element with the word 'insurrections', clearly, by the use of 'or', sees terrorism as a separate type of violence, which the tribunal did not class as necessarily internal. That, coupled with the fact that NIACs themselves may be internationalised, supports a conclusion that an internationalising element in violence short of a NIAC does not transform the legal classification of that act. Therefore, overall it is submitted that the violence between the US and TTP/al-Qaeda is insufficiently intense to be classified as a NIAC.

Consequently, only those US drone strikes in Pakistan carried out as part of the NIAC in Afghanistan or the NIAC in Pakistan between the Pakistani government and the TTP/al-Qaeda amalgam are governed by IHL. In addition, those within the latter NIAC only come into the scope of IHL while the US intervened with consent. This means that, as of September 2018, 47 confirmed drone strikes in Pakistan have occurred outside of a NIAC and so fall outside the scope of IHL.

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[799] *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 26.

[800] *Boškoski* (n 549) para 184.

[801] *Abella* (n 559) para 151.

[802] *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 26 (emphasis added).

3.1.5.3 Yemen

The situation in Yemen is similarly complex. Primarily, US drone strikes have targeted AQAP and so there is no possible spill-over conflict. Drone strikes may come under the remit of IHL either as part of a pre-existing NIAC between the Yemeni government and AQAP or as part of a NIAC between the US and AQAP. The US has also purportedly conducted two strikes against ISIS targets in Yemen, necessitating some consideration of a possible NIAC with this group.

3.1.5.3.1 Houthi Rebels and the Yemeni government

When considering a possible NIAC into which the US has been invited, it is necessary to distinguish such a conflict with AQAP (against which US drone strikes have been targeted) from one involving Houthi rebels. The latter arguably began in 2004 with clashes between Houthi groups and government forces,[803] involving around 2,000 troops and causing up to 600 deaths.[804] Sporadic fighting continued until 2014 when Houthi groups captured much of the capital, Sana'a.[805] A coalition of states have intervened at the request of the Yemeni government,[806] involving airstrikes which are ongoing.[807] These facts, along with an assertion by the Houthi rebels to respect IHL[808] and the

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[803] 'Yemen Forces "Kill 46 Militants"' *BBC* (25 June 2004) http://news.bbc.co.uk/1/hi/world/middle_east/3839709.stm; 'Clashes "Leave 118 Dead" in Yemen' *BBC* (3 July 2004) http://news.bbc.co.uk/1/hi/world/middle_east/3863463.stm.

[804] Brian Whitaker, 'Yemeni Forces Kill Anti-US Cleric' *The Guardian* (11 September 2004) http://www.theguardian.com/world/2004/sep/11/yemen.brianwhitaker.

[805] 'Yemen Profile—Timeline' *BBC* (25 November 2015) http://www.bbc.co.uk/news/world-middle-east-14704951.

[806] UNSC UN Doc S/2015/217 (n 155).

[807] 'Yemen Conflict: Civilians Killed in Air Strikes' *Al Jazeera* (27 February 2016) http://www.aljazeera.com/news/2016/02/civilians-reported-killed-yemen-air-strikes-160227145903661.html.

[808] Letter from Abdul-Malik Badreddin al-Houthi to Dr Mohammed Al-Mikhlafi, the Head of the Yemeni Observatory for Human Rights, dated 29 Jumada II 1430 (23 June 2009) http://theirwords.org/media/transfer/doc/ye_zaidiyyah_2009_01-0023669c01780affdb479c9a00df8ac9.pdf.

agreement of a (failed) ceasefire,[809] strongly suggest a NIAC exists. However, the US has targeted drone strikes against AQAP not Houthi groups. The Houthis are opposed to al-Qaeda,[810] described as their 'strongest opponents',[811] and the two groups cannot be connected in the sense of being a single party to a NIAC. Thus it is necessary to determine whether a separate NIAC exists in Yemen, involving AQAP.

3.1.5.3.2 AQAP and the Yemeni government

Yemen's instability predates its unification in 1990, growing more acute after the 2011 Arab Spring, with multiple groups fighting the government. The literature has broadly focused on the more obvious conflict between the government and the Houthi rebellion, rather than on the possible simultaneous conflict between the government and AQAP, with very little detailed analysis of that conflict.

What discussion there has been is divided on the nature of hostilities. Ramsden has branded the situation 'not even close to being sufficiently protracted or intense',[812] a view also adopted by Lewis,[813] though neither offer factual support. Breau and Aronsson erroneously conflate the distinct conflicts in Yemen, considering US drone strikes against AQAP in light of the NIAC between the Houthis and the government.[814] However, Breau and Aronsson do briefly discuss a possible NIAC involving AQAP, concluding that the intensity and organisation requirements are not satisfied,[815] though they do not provide evidence in support. Others have stated that the fighting between Yemen and AQAP has

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[809] '11 Killed in Saudi-led Airstrike at Wedding Party in Northern Yemen' *Xinhua* (Sana'a, 26 July 2018) http://www.xinhuanet.com/english/2018-07/04/c_137299519.htm.

[810] 'Yemen Crisis: Who is Fighting Whom?' (26 March 2015) *BBC* http://www.bbc.co.uk/news/world-middle-east-29319423

[811] David Kirkpatrick and Kareem Fahim, 'Saudi Leaders Have High Hopes for Yemen Airstrikes, but Houthi Attacks Continue' *The New York Times* (Cairo, 2 April 2015) http://www.nytimes.com/2015/04/03/world/middleeast/yemen-al-qaeda-attack.html?_r=0 .

[812] Michael Ramsden, 'Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki' (2011) 16(2) Journal of Conflict and Security Law 385, 390.

[813] Lewis (n 733) 181.

[814] Breau and Aronsson (n 423) 277-8.

[815] ibid 278.

passed the NIAC threshold,[816] and the ICRC appears to have implicitly recognised a NIAC involving AQAP, calling for all sides to respect IHL.[817] Recently, there is greater recognition of a NIAC involving AQAP: Schaller has stated that it is 'fairly clear' that conflict between the government and AQAP is now a NIAC,[818] a view also posited by Fuller,[819] but neither writer provides a sufficiently detailed analysis in support. Bachman has suggested that the US dissociated its drone strikes from any NIAC between AQAP and the Yemeni government, citing Brennan's claim that the US is 'not involved in working with the Yemeni government in terms of direct action or lethal action as part of that insurgency'.[820] It is unclear whether this remark has the effect of removing drone strikes from such a NIAC, and other statements seem to confirm US involvement in the conflict.[821]

AQY, the precursor to AQAP, had a semblance of government support post-unification, and militants returning from Afghanistan were used by President Saleh to counterbalance Marxist politicians of the newly absorbed People's Democratic Republic of Yemen.[822] AQY undertook terrorist attacks against foreign targets, including the 2000 bombing of the USS Cole,[823] but did not conduct systemic attacks against the Yemeni government.

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[816] Robert Chesney, 'Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force' (2010) 13 Yearbook of International Humanitarian Law 3, 29-34; Benjamin R Farley, 'Targeting Anwar Al-Aulaqi: A Case Study in US Drone Strikes and Targeted Killing' (2011) 2(1) National Security Law Brief 57, 63-4.

[817] ICRC, 'Annual Report 2012: vol I' (Geneva, 2012) 452.

[818] Schaller (n 794) 218.

[819] Roslyn Fuller, 'All Bark and No Bite: Rhetoric and Reality in the War on Terror' (2015) 2 Indonesia Journal of International and Comparative Law 1, 35.

[820] Bachman (n 689).

[821] Leon Panetta, 'The Fight Against Al Qaeda: Today and Tomorrow' (US Department of Defense, 20 November 2012) http://archive.defense.gov/speeches/speech.aspx?speechid=1737; Cheryl Pellerin, 'Pentagon Provides Updates on Support for Operations in Yemen, Somalia' (US Department of Defense, 4 August 2017) https://dod.defense.gov/News/Article/Article/1269091/pentagon-provides-updates-on-support-for-operations-in-yemen-somalia/.

[822] W Andrew Terrill, *The Conflicts in Yemen and US National Security* (Strategic Studies Institute 2011) 48-9.

[823] ibid 50.

After 9/11, however, the government actively pursued AQY[824] with law enforcement methods.[825] Nonetheless, until 2009 AQY, and then AQAP, primarily targeted non-Yemeni objects,[826] meaning there could be no NIAC with the government. The government launched an offensive against AQAP in 2009, involving US drone strikes, in response to an attempted attack on Saudi Arabia and the US.[827] In November 2009 AQAP action against the government began[828] though the number of attacks were minimal and sporadic, below the NIAC threshold.

The situation changed in 2011, during the uprising against President Saleh and seems more to resemble the intensity of a NIAC. In May and June 2011, AQAP captured multiple towns, controlling the provinces of Shabwa and Abyan[829] before the government retook them in June 2012.[830] Nasir al Wuhayshi, then-head of AQAP, stated that 'control of these areas during one year cost us 500 martyrs, 700 wounded, 10 cases of hand or leg amputation and nearly $20 million'.[831] In identifying a NIAC in *Limaj*, the ICTY cited approximately 169 deaths from incidents between February and June 1998,[832] the same rate as between AQAP and the government (41-43 deaths per month). Reportedly 300-700 AQAP fighters were involved in the capture of Zinjibar, the capital of Abyan,[833] a larger mobilisation than in the *Limaj* NIAC, (generally in the low hundreds[834]) though

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[824] ibid 52.

[825] ibid 55.

[826] Al Jazeera (9 May 2012) (n 434).

[827] ibid.

[828] 'Timeline: Al Qaeda Activity in Yemen' *Reuters* (6 January 2010) http://www.reuters.com/article/us-yemen-qaeda-timeline-idUSTRE6052XK20100106.

[829] Bill Roggio, 'Osama Bin Laden's Files: AQAP Emir Foreshadowed 2011 Takeover of Southern Yemen' *Long War Journal* (2 March 2016) http://www.longwarjournal.org/archives/2016/03/osama-bin-laden-documents-aqap-emir-outlined-strengths-prior-to-2011-takeover-of-southern-yemen.php.

[830] Mohammed Mukhashaf, 'Yemen Army Seizes Qaeda Bastion in Major Advance' *Reuters* (Aden, 15 June 2012) http://www.reuters.com/article/us-yemen-violence-idUSBRE85E0AG20120615.

[831] Letter from Nasir al Wuhayshi to Abdelmalek Droukdel (May 2012), quoted Roggio (n 829).

[832] *Limaj* (Judgment) (n 549) paras 135-70.

[833] Sudarsan Raghavan, 'Militants Linked to al-Qaeda Emboldened in Yemen' *The Washington Post* (Sana'a, 13 June 2011) https://www.washingtonpost.com/world/militants-linked-to-al-qaeda-emboldened-in-yemen/2011/06/12/AG88nISH_print.html.

[834] *Limaj* (Judgment) (n 549) paras 141, 142, 147 and 151.

lower than the *Haradinaj* case, in which some operations involved up to 2,000 Serbian soldiers.[835] The government of Yemen responded to AQAP with shelling and airstrikes,[836] described as an 'intensive campaign'.[837] In *Limaj*, the use of heavy weapons and mortars indicated a NIAC,[838] further suggesting a NIAC in southern Yemen. Additionally, the government employed the military in recapturing territory,[839] further indicative of a NIAC,[840] as is the fact that fighting occurred in multiple regions.[841] Fighting during 2011 and 2012 led to 'tens of thousands of civilians fleeing their homes;[842] in *Limaj*, the displacement of 15,000 people supported the identification of a NIAC.[843] Finally, the UNSC has become involved, which has been said to be indicative of a NIAC.[844] The UNSC has asserted the need to combat AQAP 'in accordance with … international law including applicable … *humanitarian law*'[845] suggesting recognition of a NIAC. In the *Boskoski* case, the ICTY held that the UNSC reminding parties of their obligations under IHL could suggest the UNSC viewed the situation as a NIAC.[846]

The evidence presented above supports the conclusion that fighting between the Yemeni government and AQAP reached the level of intensity necessary for classification as a NIAC between 2011 and 2012. However, US drone strikes have persisted, so it is necessary to consider whether the NIAC continued.

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[835] *Haradinaj* (n 549) para 91.

[836] Raghavan (n 833).

[837] Sudarsan Raghavan, 'Militants Create Haven in Southern Yemen' *The Washington Post* (31 December 2011) https://www.washingtonpost.com/world/middle_east/militants-create-haven-in-southern-yemen/2011/12/29/gIQA9Fb1SP_story.html.

[838] *Limaj* (Judgment) (n 549) para 136; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 31.

[839] Jeremy M Sharp, 'Yemen: Background and US Relations' (Congressional Research Service, 1 November 2012) http://www.dtic.mil/dtic/tr/fulltext/u2/a584873.pdf 9-10.

[840] *Abella* (n 559) para 155.

[841] *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 29.

[842] Raghavan (n 833).

[843] *Limaj* (Judgment) (n 549) para 167.

[844] *Boškoski* (n 549) para 177; *Delalić* (n 561) 190; *Dyilo* (n 558) para 235; *Haradinaj* (n 549) para 49; *Tadić* (Opinion and Judgment) (n 549) para 567.

[845] UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014 para 9 (emphasis added).

[846] *Boškoski* (n 549) para 192.

2013 saw the violence diminish in intensity. AQAP carried out attacks against Yemeni Security forces in August (killing five[847]), twice in September (killing 31[848] and three[849]) and in December (killing 52[850]). A similar level of attacks continued through 2014 resulting in the deaths of approximately 48 Yemeni soldiers.[851] In addition, during 2014 Yemeni armed forces began an offensive against areas that remained controlled by AQAP after the 2011-12 struggle in Shabwa and Abyan.[852] Nonetheless, it does not appear that this new offensive manifested in intense fighting, which appeared to continue until March 2015, at which point AQAP captured the city of al-Houtha, involving 'heavy clashes' with 27 soldiers killed.[853] Later in 2015 AQAP captured districts within Aden, destroying government buildings and purportedly recruiting 'hundreds of young men'.[854] It was also

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[847] Agence France-Presse, '"Al-Qaeda Attackers" Shoot Dead Five Yemeni Soldiers Before Fleeing' *Al Arabiya* (Aden, 11 August 2013) http://english.alarabiya.net/en/News/middle-east/2013/08/11/-Al-Qaeda-attack-kills-five-Yemeni-soldiers-at-gas-terminal.html.

[848] Mohammed Mukhashaf, 'Suspected al Qaeda Attacks on Yemeni Forces Kill at Least 31' *Reuters* (Aden, 20 September 2013) http://www.reuters.com/article/us-yemen-attack-idUSBRE98J04V20130920.

[849] 'Suspected al-Qaeda Militants Storm Yemeni Army Base' *BBC* (30 September 2013) http://www.bbc.co.uk/news/world-middle-east-24335568.

[850] 'Al-Qaeda Claims Attack on Yemen Defence Ministry' *BBC* (6 December 2013) http://www.bbc.co.uk/news/world-middle-east-25256368.

[851] 'Militants Kill 10 Soldiers in Central Yemen' *The Arab American News* (Sana'a, 17 January 2014) https://www.arabamericannews.com/2014/01/17/militants-kill-10-soldiers-in-central-yemen/; 'Yemen Attack on Military Checkpoint "Kills 20 Soldiers"' *BBC* (24 March 2014) http://www.bbc.co.uk/news/world-middle-east-26712897; Fawaz Al-Haidari, '30 Dead as Yemen Army Launches New Assault on Qaeda' *The Lebanon Daily Star* (Aden, 29 April 2014) http://www.dailystar.com.lb/News/Middle-East/2014/Apr-29/254829-30-dead-as-yemen-army-launches-new-assault-on-qaeda.ashx#axzz30LUUnOrr.

[852] Al-Haidari (n 851).

[853] 'Al-Qaeda Takes Control of Yemen's Southern City of al-Houtha' *Al Arabiya* (20 March 2015) http://english.alarabiya.net/en/News/middle-east/2015/03/20/Al-Qaeda-takes-control-of-Yemen-s-southern-city-of-al-Houta.html.

[854] Associated Press, 'Yemen Officials say al-Qaida Seizes Key Areas of Aden' *Mail Online* (Sana'a, 22 August 2015) http://www.dailymail.co.uk/wires/ap/article-3207059/Yemen-officials-say-al-Qaida-seizes-key-areas-Aden.html.

reported to control parts of Hadramout province, including its capital, Mukalla.[855] In 2016 AQAP captured Aden for one weekend before it was retaken by the government,[856] and in the same year the Saudi-led coalition supporting the Yemeni government against the Houthis began airstrikes against AQAP. In 2017 intense fighting continued, with clashes lasting days and around 4,000 AQAP fighters mobilised.[857]

It is possible that fighting between the government and AQAP ceased to be a NIAC during the period of 2013 to March 2015 but to suggest this it is necessary to consider *when* a NIAC ends. There has been little written in detail on this topic: common Article 3 and Additional Protocol II are silent on the matter, and key texts touch on it briefly,[858] if at all.[859] In *Tadić*, the ICTY suggested that a NIAC lasts 'beyond the cessation of hostilities *until a peaceful settlement is achieved*';[860] this would mean that, regardless that fighting may diminish in intensity, a NIAC continues until a 'peaceful settlement' occurs. On this basis, in the *Haradinaj* case, it was held that 'since there is no evidence of such a settlement during the indictment period, there is *no need for the Trial Chamber to explore the oscillating intensity* of the armed conflict.'[861]

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[855] Sami Aboudi, 'Islamists rise as Chaos Descends in Yemen's Cosmopolitan Port' *Reuters* (Dubai, 27 October 2016) http://www.reuters.com/article/us-yemen-security-aden-insight-idUSKCN0SL0S320151027.

[856] Associated Press, 'Yemen Declares Curfew in Aden as Government Forces Retake Strategic Port' *The Guardian* (Aden, 4 January 2016) http://www.theguardian.com/world/2016/jan/04/yemen-declares-curfew-in-aden-as-government-forces-retake-strategic-port.

[857] Sudarsan Raghavan, 'Still Fighting al-Qaeda' *Washington Post* (Jaar, 6 July 2018) https://www.washingtonpost.com/news/world/wp/2018/07/06/feature/as-a-u-s-shadow-war-intensifies-in-yemen-al-qaeda-is-down-but-not-out/?utm_term=.be557c5cd069.

[858] Dinstein (2015) (n 553) 48-50; Sivakumaran (n 544) 252-4.

[859] Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010); Moir (n 639).

[860] *Tadić* (Jurisdiction) (n 547) para 70 (emphasis added).

[861] *Haradinaj* (n 549) para 100 (emphasis added).

This puts the onus of ending a NIAC on formalities between the parties, contrary to the start of a NIAC, which is based on acts.[862] It is potentially because of this distinction that writers have generally adopted a different stance. Sivakumaran has suggested the common-sense approach that 'the applicability of the law of [NIAC] turns on whether or not a [NIAC] continues to exist at the relevant time.'[863] Thus a NIAC may persist after a ceasefire, 'as violence of requisite intensity may continue to exist' and so 'the *lack* of a peace agreement cannot be considered determinative.'[864] Dinstein has proposed a similar possibility, stating that, as well as by peace agreement, a NIAC will end when 'insurgents are roundly beaten'.[865] Bartels has undertaken an analysis and concluded similarly that once the thresholds are no longer satisfied, a NIAC will cease.[866] Nevertheless, he describes this as 'the *hypothesis* that non-international armed conflicts do not necessarily end only by virtue of a peace settlement being reached',[867] reiterating the fact that the law is unclear. Going further, Milanovic has affirmed this approach as a '*general principle*' identifying the disapplication of IHL 'once the conditions that trigger its application in the first place no longer exist.'[868] Though desirable, Milanovic gives no evidence in support other than the absence of a 'good reason of text, principle or policy that warrants an exception'.[869] This is contrary to the ICTY's approach, and Milanovic consciously posits his formulation as '[a]nother option', which is 'more logical from a purely IHL standpoint'.[870] In contrast, Jinks posits a 'general rule' taken from Article 6 of Geneva Convention IV, asserting the application of IHL until 'the general close of hostilities', which could be interpreted as 'the complete cessation of all aggressive military

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[862] Genevan Conventions I-IV common Article 2 identifies IACs in 'all cases of declared war or of any other armed conflict which may arise' and the *Tadić* definition of a NIAC clearly considers solely the factual interaction of parties to a conflict, rather than their assertions. See above, Sections 3.1.2 and 3.1.3.

[863] Sivakumaran (n 544) 253.

[864] ibid 253 (emphasis added).

[865] Dinstein (2015) (n 553) 48.

[866] Rogier Bartels, 'From *Jus in Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press 2014) 311.

[867] ibid 314 (emphasis added).

[868] Marko Milanovic, 'The End of Application of International Humanitarian Law' (2014) 96 International Review of the Red Cross 163, 170 (emphasis added).

[869] Milanovic (2014) (n 868) 170.

[870] ibid 180.

manoeuvres.'[871] Article 6, of course, applies to IACs and its analogical application to NIACs cannot be taken for granted, but it nonetheless provides a possibility in which the end of a NIAC rests on the negative requirement of the cessation of hostilities, without the additional positive requirement of a peace agreement.

It is clear that the law is unsettled and is open to interpretation. It is possible to adopt a permissive interpretation that a NIAC will continue until a peace agreement is reached, prolonging the application of IHL. The alternative is a more restrictive interpretation that a NIAC ends when hostilities fall below the *Tadić* thresholds, limiting the scope of IHL. This has important implications for the analysis of US drone strikes in Yemen as fighting has occurred over long periods with oscillating intensity, which has fallen below the *Tadić* threshold for a period, before satisfying it again. It is noteworthy that the US has suggested that NIACs with unconventional groups like al-Qaeda 'presumably will not come to a conventional end', positing instead that these NIACs end when NSAs 'have been effectively destroyed and will no longer be able to attempt or launch a strategic attack',[872] lending support to the restrictive approach to the end of NIACs, which dispenses with the peace settlement requirement.

Considering the facts presented above, it seems likely that fighting between AQAP and the Yemeni government fell below the intensity threshold between 2013 and March 2015: there are long gaps between attacks (with seven reported in 27 months) and the number of deaths is significantly lower (an average of approximately five per month).[873] Nonetheless, elsewhere it has been suggested by that six attacks, globally, over six years is sufficiently intense:[874] however, this was suggested in defence of the notion that the global acts of al-Qaeda were part of a single NIAC, which has been debunked above.[875] Even if the underlying assertion as to intensity is correct in terms of the time-frame of

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[871] Derek Jinks, 'The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts' (2003) Background paper, Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge.

[872] Report on Legal and Policy Frameworks (n 259) 11-2.

[873] Text from n 847 to n 852.

[874] Dalton (n 796) 527.

[875] Text from n 796 to n 797.

attacks (one per year),[876] the six attacks referred to[877] produce a death-toll of 3,525, an average of 49 per month, ten times that of the relevant period in Yemen, suggesting those in Yemen would nevertheless remain insufficiently intense.

Since March 2015, the fighting has potentially re-crossed the intensity threshold, though with less certainty than in 2011-12. Though the death-toll remains low, more territory has been captured, government buildings destroyed, and the government has responded militarily, all indicating requisite intensity. Additionally, the UNSC has referred to fighting in terms of IHL,[878] though subsequently referring to it as terrorism with no reference to IHL.[879] Therefore, the violence in Yemen has apparently intensified sufficiently to be a NIAC once more.

Having considered intensity, it is necessary to look at AQAP's organisation. The primary requirements—that NSAs have a 'command structure',[880] and speak 'with one voice'[881]—appear satisfied. When founded, AQAP's hierarchy contained defined roles, including leader, deputy leader, military commander[882] and field commander.[883] On the death of original leader Nasser al-Wuhayshi in 2015, a new leader, Qassim al-Raimi, took

[876] This is purely work of the devil's advocate; the present author submits that, even if attributable to a single NSA, six attacks over six years are manifestly isolated and sporadic and below the intensity threshold.

[877] The al-Qaeda bombings in New York, Madrid, Bali, London and Amman: Dalton (n 796) 527.

[878] UNSC Res 2201 (15 February 2015) UN Doc S/RES/2201.

[879] UNSC Res 2216 (n 156).

[880] *Haradinaj* (n 549) para 65; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) paras 23-4.

[881] *Haradinaj* (n 549) para 60; *Limaj* (Judgment) (n 549) para 129.

[882] 'Counterterrorism Guide: Al-Qa'ida in the Arabian Peninsula (AQAP)' (US National Counterterrorism Center) https://www.dni.gov/nctc/groups/aqap.html.

[883] Saleem Haddad, 'Yemen' in Louise Arimatsu and Mohbuba Choudhury (eds), *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya* (Chatham House 2014) 22.

over straightaway.[884] The group has a bimonthly magazine, *Sada al-Malahim*,[885] emphasising its organised voice. In *Limaj*, a key indicator was the ability to 'formulate … military tactics'[886] which appears demonstrated by AQAP's military successes, such as capturing various cities. Several other indicators proposed by the ICTY also appear satisfied: *Sada al-Malahim* represents the release of *communiqués* held to be indicators of organisation[887] as do AQAP's public statements.[888] AQAP has also erected checkpoints,[889] and engaged in negotiations with the Yemeni government,[890] both indicating sufficient organisation.[891]

From this analysis, a nuanced conclusion can be reached regarding NIAC in Yemen between the government and AQAP. A NIAC undoubtedly existed between May 2011 and June 2012. Based on available data, and in light of the Yemeni government's consent to US drone strikes,[892] this means that the 64 US drone strikes during that period are governed by IHL.[893] It also means that one strike was, with equal certainty, outside the scope of IHL as it happened in 2002.[894] After June 2012 there is less clarity, both in terms

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[884] Mark Mazzetti and Scott Shane, 'For US, Killing Terrorists is a Means to an Elusive End' *The New York Times* (Washington, 16 June 2015) http://www.nytimes.com/2015/06/17/world/middleeast/al-qaeda-arabian-peninsula-yemen-nasser-al-wuhayshi-killed.html?ref=middleeast&_r=0.

[885] 'Al-Qa'ida in the Arabian Peninsula (AQAP)' (*Council on Foreign Relations*, 19 June 2015) http://www.cfr.org/yemen/al-qaeda-arabian-peninsula-aqap/p9369.

[886] *Limaj* (Judgment) (n 549) para 129.

[887] ibid para 101-3.

[888] Ali Ibrahim Al-Moshki, 'AQAP Apologizes for Hospital Attack in Ministry of Defense Operation' *Yemen Times* (Sana'a, 24 December 2013) https://www.thefreelibrary.com/AQAP+apologizes+for+hospital+attack+in+Ministry+of+Defense+operation.-a0353811569.

[889] Mohammed al Qalisi, 'Al Qaeda Seizes two Districts in Yemen's Abyan Province' *The National* (Aden, 3 December 2015) http://www.thenational.ae/world/middle-east/al-qaeda-seizes-two-districts-in-yemens-abyan-province.

[890] Aboudi (n 855).

[891] *Boškoski* (n 549) para 203; *Haradinaj* (n 549) paras 60 and 71-2; *Limaj* (Judgment) (n 549) paras 125 and 145.

[892] Section 2.2.2.2.

[893] TBIJ 'Yemen 2002 to present' (n 15).

[894] 'Sources: US Kills Cole Suspect' *CNN* (Sana'a, 5 November 2002) http://edition.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html.

of facts and law. If a restrictive interpretation of the end of a NIAC is adopted, it appears that, until March 2015 there was no longer a NIAC, or, at least, the existence of one cannot be concluded unequivocally. In this scenario a further 85 drone strikes would have occurred outside the scope of IHL.[895] However, if the permissive interpretation of the ICTY is adopted, the ongoing, less intense violence and absence of a peace agreement will have sustained the NIAC, bringing those 85 strikes within the remit of IHL. Finally, from March 2015 until the present it seems likely that a NIAC existed, even under the restrictive interpretation, therefore bringing all subsequent drone strikes against AQAP into the remit of IHL.

3.1.5.3.3 AQAP and the US

Of course, all drone strikes will fall within IHL if the US was in its own NIAC with AQAP, a possibility now considered.

As shown, AQAP has the requisite organisation for a NIAC, but it is not part of al-Qaeda globally.[896] Therefore, intensity must be assessed only by those acts carried out against the US specifically, perpetrated by AQAP or its predecessor AQY.

Opinions on this differ, and while some hold that there is no NIAC between the US and AQAP,[897] this is not universal.[898] Nevertheless, these claims cannot be upheld without accompanying analysis. Farley has argued that the violence is insufficiently intense[899] as has Heller, though both claims lack thorough legal analysis applied to the facts.[900] Nevertheless, as will be shown, these arguments are both correct: attacks upon the US by AQAP do not appear to satisfy the intensity requirement of a NIAC, when considered through the analytical lens of indicative factors developed by the ICTY.

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[895] TBIJ 'Yemen 2002 to present' (n 15).

[896] Text from n 718 to n 721.

[897] Benson (n 733) 24; Farley (n 816) 63-4.

[898] Odle (n 443) 656-7; Rylatt (2013) (n 198) 126-30; van Schaack (2011) (n 733) 289.

[899] Farley (n 816) 70.

[900] Kevin J Heller and John C Dehn, 'Debate: Targeted Killing: The Case of Anwar Al-Aulaqi' (2011) 159 University of Pennsylvania Law Review PENNumbra 175, 183.

There have been three actual or attempted attacks against the US that appear attributable to AQAP or AQY: the attack on the *USS Cole* in 2000, in which 17 sailors were killed;[901] the failed 2009 bombing of a passenger aircraft;[902] and the failed 2010 bombing of US-bound cargo planes.[903] In addition, it has been claimed that AQAP 'radicalised' those responsible for the 2009 shooting at Fort Hood, Texas and the 2010 attempted bombing of Times Square.[904] However, 'radicalisation' of an individual does not bring them within an NSA for the purposes of including their actions within an intensity analysis; at most they represent an individual franchisee of the group. Therefore, these attacks cannot form part of the present analysis. It has been suggested that the 9/11 attacks can be attributed to AQAP: Terrill identifies a 'subtle Yemeni link' because some of the hijackers were 'Saudis of Yemeni descent',[905] Osama Bin Laden's fourth wife was Yemeni[906] and he (Bin Laden) had funded some al-Qaeda activities in Yemen.[907] It is submitted that these tenuous links are far below the NIAC organisation requirement, and so the 9/11 attack cannot be included within the present intensity analysis.

Simultaneously, the US has carried out drone strikes against AQAP that could push the total violence over the intensity threshold. However, it has been argued that the *Tadić* definition, in focusing on 'protracted armed violence *between* governmental authorities and organized armed groups',[908] emphasises the need for violence from *multiple* parties.[909] It is submitted that this understanding is implicit in common Article 3, by its

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[901] Brian Whitaker, 'Death for USS Cole Bombing' *The Guardian* (30 September 2004) https://www.theguardian.com/world/2004/sep/30/alqaida.terrorism.

[902] 'Al-Qaeda Wing Claims Christmas Day US Flight Bomb Plot' *BBC* (28 December 2009) http://news.bbc.co.uk/1/hi/world/middle_east/8433151.stm.

[903] Mark Mazzetti and Robert Worth, 'US Sees Complexity of Bombs as Link to Al Qaeda' *The New York Times* (Washington, 30 October 2010) http://www.nytimes.com/2010/10/31/world/31terror.html?pagewanted=all.

[904] Al Jazeera (9 May 2012) (n 434).

[905] Terrill (n 822) 51.

[906] ibid 44.

[907] ibid 48.

[908] *Tadić* (Jurisdiction) (n 547) para 70.

[909] Lubell and Derejko (n 619) 78.

proposed application to 'each Party to the conflict'. Therefore, to pass the threshold, intense violence must have occurred as a result of actions on both sides of the conflict, and in this case, with 17 US sailors killed in a 16-year period, necessary fighting has really only occurred on the US side.

Therefore there is no NIAC between the US and AQAP, meaning that those strikes outside of the NIAC involving the Yemeni government will certainly be outside the scope of IHL.

3.1.5.3.4 ISIS-Y

Brief consideration must be made of the two drone strikes reportedly carried out against ISIS-Y[910] and whether they were part of a NIAC. At the time, the US was, with partners, involved in a NIAC against ISIS in Iraq, with spill-over into Syria; involving approximately 25,000 airstrikes and lasting three years, with up to 34,000 square miles of land controlled by ISIS,[911] the fighting is clearly a NIAC. The strikes against ISIS in Yemen can be part of that NIAC if ISIS-Y is integrated within ISIS in Iraq and Syria. ISIS-Y appears to have arisen through a pledge of allegiance to ISIS by 'The Mujahidin of Yemen', in 2014.[912] This alone is insufficient to bring ISIS-Y within the organisation of ISIS in terms of a NIAC. However, the leader of that group has reportedly received funding from ISIS and was offered fighters by Abu Bakr Al-Baghdadi, then-leader of ISIS,[913] suggesting fairly close integration. Nevertheless, even if ISIS-Y is arguably part of the NIAC with ISIS, actions against it would only be subject to IHL where its activities

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[910] 'Update on Recent Counterterrorism Strikes in Yemen' (US Central Command, 20 December 2017) http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1401383/update-on-recent-counterterrorism-strikes-in-yemen/.

[911] Eric Levenson and Jomana Karadsheh, 'Iraq is "Fully Liberated" from ISIS, its Military Says' *CNN* (9 December 2017) https://edition.cnn.com/2017/12/09/middleeast/iraq-isis-military-liberated/index.html.

[912] Elisabeth Kendall, 'al-Qaeda and Islamic State in Yemen: a Battle for Local Audiences' in Simon Staffell and Akil Awan (eds), *Jihadism Transformed: al-Qaeda and Islamic State's Global Battle of Ideas* (Oxford University Press 2016) 103.

[913] 'Treasury Sanctions Major Islamic State of Iraq and the Levant Leaders, Financial Figures, Facilitators, and Supporters' (US Department of the Treasury, 29 September 2015) https://www.treasury.gov/press-center/press-releases/Pages/jl0188.aspx.

were 'closely related to the hostilities'.[914] US drone strikes against ISIS-Y targeted 'training camps' used 'to train militants to conduct terror attacks', 'against America and its allies around the world'.[915] Thus, though it is possibly linked to the NIAC in Iraq and Syria, it appears more likely a base for attacks elsewhere. Based on this limited information, it seems most convincing that the drone strikes against ISIS-Y are not part of the broader NIAC against ISIS.

As with all other drone strikes in Yemen, the US had the consent of the Yemeni government,[916] and these strikes may have formed part of a NIAC between the government and ISIS-Y. In 2016 ISIS-Y was involved in 51 conflict events (causing approximately 440 deaths) and 47 in 2017 (with around 160 deaths), in which Yemeni forces, Houthi forces, and civilians were targeted.[917] This seemingly raises a strong presumption that the violence is sufficiently intense to be a NIAC, due to scale of damage,[918] weapons used[919] and military response.[920] Further, the group's ability to run training camps, distribute arms,[921] and plan military operations indicates sufficient organisation.[922] On the basis of this necessarily brief treatment, it appears that the drone strikes against ISIS-Y fall within a NIAC involving the Yemeni government.

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[914] ICRC 2016 Commentary (n 535) para 460; *Tadić* (Jurisdiction) (n 547) para 70.

[915] 'US Forces Conduct Strike Against ISIS Training Camps in Yemen' (US Central Command, 16 October 2017) http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1344652/us-forces-conduct-strike-against-isis-training-camps-in-yemen/.

[916] Central Command (16 October 2017) (n 915).

[917] Andrea Carboni, 'The Islamic State in Yemen' (*Armed Conflict Location and Event Data Project*, 5 July 2018) 2 https://reliefweb.int/sites/reliefweb.int/files/resources/acleddata.com-The%20Islamic%20State%20in%20Yemen.pdf.

[918] *Boškoski* (n 549) para 177; *Delalić* (n 561) para 189; *Dyilo* (n 558) para 235; *Haradinaj* (n 549) para 49; *Limaj* (Judgment) (n 549) paras 135, 138 and 141; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 28; *Tadić* (Opinion and Judgment) (n 549) paras 565-6.

[919] *Boškoski* (n 549) para 177; *Haradinaj* (n 549) para 49; *Limaj* (Judgment) (n 549) para 136; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 31.

[920] *Boškoski* (n 549) para 178.

[921] *Limaj* (Judgment) (n 549) para 90.

[922] *Abella* (n 559) para 147 and 155.

Based on the overall analysis, it is confidently submitted that many drone strikes in Yemen have occurred during NIAC. Difficulties arise when attempting to specify the periods in which the AQAP NIAC occurred. As stated, a restrictive interpretation of the temporal aspect of a NIAC means that approximately 86 strikes occurred outside the scope of IHL. Conversely, under a permissive interpretation all bar one strike will be within IHL. Alternately, if Brennan's comment—that the US is 'not involved in working with the Yemeni government in terms of direct action or lethal action as part of that insurgency'[923]—does reflect an understanding that US drone strikes are not part of the NIAC between Yemen and AQAP, then potentially all may fall outside of IHL.

Nonetheless, the fact remains that, even under the most permissive interpretation of the law, there is a need to apply both IHL *and* IHRL to assess the lawfulness of drone strikes in Yemen, and this IHRL analysis will be undertaken in the next chapter.

3.1.5.4 Somalia

In Somalia, US drone strikes have targeted al-Shabaab exclusively,[924] apart from two reportedly against an ISIS affiliate.[925] As stated, al-Shabaab is not part of an NSA with which the US is involved in a NIAC elsewhere, thus strikes in Somalia are not part of a spill-over conflict.[926] It is necessary, as with Pakistan and Yemen, to consider the possibility of a NIAC between the Somali government and al-Shabaab or between the US and al-Shabaab. This in-depth analysis of drone strikes in Somalia has not been undertaken previously; Odle has provided a brief consideration of the issue of the organisation threshold, finding that al-Shabaab is sufficiently organised.[927] Elsewhere it

[923] 'A Conversation with John O Brennan' (*Council on Foreign Relations*, 8 August 2012) https://www.cfr.org/event/conversation-john-o-brennan-0.

[924] TBIJ 'Somalia 2017' (n 21); TBIJ 'Somalia 2017' (n 21).

[925] Maruf (5 November 2017) (n 26); Africa Command (27 November 2017) (n 25).

[926] n 728.

[927] Odle (n 443) 656.

has been asserted that common Article 3 is applicable, but without an accompanying examination of intensity and organisation.[928]

3.1.5.4.1 al-Shabaab and the Somali government

In establishing a possible NIAC between the Somali government and al-Shabaab, a little historical context is necessary. For many years after the fall of the Barre regime in 1991, Somalia lacked a central government, hosting ongoing violence between rival groups.[929] In 2004, the ICU and the TFG emerged as dominant in Somalia, polarising the conflict, the ICU backed by Eritrea and the TFG by Ethiopia.[930] The violence had the characteristics of a NIAC[931] involving automatic weapons, bombs, mines, mortars, grenade launchers and antiaircraft guns,[932] and resulted in hundreds of deaths and the displacement of thousands of civilians.[933] Additionally, negotiations between the groups[934] and the presence of a hierarchy in the ICU[935] suggests sufficient organisation. Between December 2006 and January 2007, the TFG defeated the ICU, retaking territory the group had captured.[936] The ICU returned to an insurgency style conflict with the TFG, but in September 2007 senior ICU members were key in forming ARS,[937] concluding a peace agreement with the TFG in June 2008,[938] thereby ending the NIAC. Though

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[928] Omar Alasow, *Violations of the Rules Applicable in Non-International Armed Conflicts and Their Possible Causes: The Case of Somalia* (Martinus Nijhoff 2010) 133-4.

[929] 'Somalia: 2018 Country Review' (*Country Watch*, 2018) http://www.countrywatch.com/Content/pdfs/reviews/B44Q9Q34.01c.pdf 14.

[930] Shaul Shay, *Somalia in Transition Since 2006* (Transaction 2014) 58.

[931] Whether the involvement of Eritrea and Ethiopia renders the conflict an IAC is beyond the scope of this work.

[932] Shay (n 930) 58.

[933] ibid 63.

[934] ibid 39.

[935] ibid 45-53.

[936] Harper (n 166) 83.

[937] Shay (n 930) 76.

[938] Agreement Between The Transitional Federal Government of Somalia and The Alliance for the Re-liberation of Somalia (9 June 2008) https://peacemaker.un.org/sites/peacemaker.un.org/files/SO_080609_Agreement%20between%20the%20TFG%20and%20the%20ARS%20-%20Djibouti%20Agreement.pdf.

germinating within the ICU, al-Shabaab is distinct and cannot be said to have carried on the ICU's NIAC with the TFG. At first 'a relatively marginal insurgent group'[939] al-Shabaab was ideologically separate from the ICU.[940]

Identifying a possible NIAC is difficult due to a paucity of data, particularly during its early stages, but it is possible to reach tentative conclusions. Reportedly, by November 2007, al-Shabaab carried out 55 percent of attacks against the government,[941] though it is unclear how many this actually amounts to. This period was characterised by '*koormeer*' techniques, in which al-Shabaab would capture government outposts or undefended cities and hold them for several days before departing.[942] In August 2008, al-Shabaab captured the city of Kismayo from the TFG, in a three day battle that caused 100 deaths and displaced up to 25,000 civilians.[943] Later in 2008, al-Shabaab captured Merka, with 'hundreds of heavily armed … fighters' and 'trucks mounted with anti-aircraft weapons'.[944] Other instances of al-Shabaab capturing cities have involved the mobilisation of up to 1,000 fighters.[945] These instances suggest that the actions of al-Shabaab were more than 'terrorist activities'.[946] The response of the government was military in nature and, early on, 7,650 AMISOM troops were deployed.[947] By May 2008, the UNSC began referring to the situation in terms of IHL, indicating sufficient intensity.[948] Therefore, it seems that violence intense enough to be a NIAC between the government and al-Shabaab began at some point during 2007 or 2008.[949]

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[939] Stig J Hansen, *Al-Shabaab in Somalia* (Oxford University Press 2013) 54.

[940] Shay (n 930) 99.

[941] Hansen (n 939) 58.

[942] ibid 58.

[943] 'Somali Insurgents "Take Key Port"' *BBC* (22 August 2008) http://news.bbc.co.uk/1/hi/world/africa/7576307.stm.

[944] Mohamed A Adow, 'Islamic Rebels Grab Key Somali Port' *CNN* (12 November 2008) http://edition.cnn.com/2008/WORLD/africa/11/12/somalia.towns.seized/.

[945] Hansen (n 939) 79.

[946] *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 26.

[947] African Union (Peace and Security Council), 'Communique of the 69th Meeting of the Peace and Security Council' (19 January 2007) PSC/PR/Comm (LXIX) para 9.

[948] UNSC Res 1814 (15 May 2008) UN Doc S/RES/1814 para 16.

[949] The lack of specificity as the commencement of the NIAC is not problematic in the current context as US drone strikes did not begin until 2011.

During the subsequent period, al-Shabaab twice attempted to capture Mogadishu: in May 2009 it engaged the TFG and Ugandan troops in a protracted battle for control of the city,[950] involving heavy weapons, including mortars,[951] tanks and APCs.[952] The violence displaced 60,000 civilians[953] and caused up to 200 deaths.[954] A further offensive, in August 2010, involved 1,800 al-Shabaab fighters and AMISOM infantry and tanks.[955] These examples suggest the fighting between al-Shabaab and the government remained above the intensity threshold throughout 2010.

Since August 2011, al-Shabaab appears to have returned to insurgency tactics, rather than seeking to capture cities in large battles. During the period, the government and AMISOM recaptured a number of locations previously under al-Shabaab control.[956] The group has continued to carry out suicide and bomb attacks, often resulting in large numbers of fatalities.[957] It is arguable that these attacks are sporadic and no longer the intense

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[950] Associated Press, 'At Least 35 Killed in Somali Clashes' *The New York Times* (Mogadishu, 10 May 2009) http://www.nytimes.com/2009/05/11/world/africa/11somalia.html.

[951] 'Nearly 40 Killed in Mogadishu, Mosque Hit' *Radio France Internationale* (11 May 2009) http://www1.rfi.fr/actuen/articles/113/article_3731.asp.

[952] Hansen (n 939) 81.

[953] 'Mogadishu Victims Swamp Hospitals' *BBC* (27 May 2009) http://news.bbc.co.uk/1/hi/world/africa/8070144.stm.

[954] 'Troops Reinforce Somalia Airport' *BBC* (26 May 2009) http://news.bbc.co.uk/1/hi/world/africa/8068455.stm.

[955] Hansen (n 939) 101.

[956] See, for instance, Abdulkadir Khalif, 'AMISON Troops Drive Shabaab Out of Suburbs' *Daily Nation* (Mogadish, 20 January 2012) http://www.nation.co.ke/News/africa/Amisom+troops+drive+Shabaab+out+of+suburbs++/-/1066/1311036/-/v1f373z/-/index.html; 'Somalia al-Shabab Militant Base of Baidoa Captured' *BBC* (22 February 2012) http://www.bbc.co.uk/news/world-africa-17127353; 'Somalia Forces Capture Key al-Shabab Town of Afmadow' *BBC* (31 May 2012) http://www.bbc.co.uk/news/world-africa-18288639; Clar Ni Chonghaile, 'Kenyan Troops Launch Beach Assault on Somali City of Kismayo' *The Guardian* (Nairobi, 28 September 2012) http://www.theguardian.com/world/2012/sep/28/kenyan-soldiers-capture-kismayo-somalia.

[957] Zoe Flood and Abukar Albadri, 'Massive al-Shabaab Suicide Bomb Kills Over 80 in Somali Capital Mogadishu' *The Telegraph* (Nairobi and Mogadishu, 4 October 2011) http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/8806699/Massive-al-

violence of a NIAC, however, in responding to al-Shabaab, the AMISOM mission profile emphasises its military character.[958] Though AMISOM troops are being gradually withdrawn, in July 2018 there were still 21,000 in Somalia.[959] Furthermore, al-Shabaab, which maintains a force estimated to consist of between 7,000 and 9,000 fighters,[960] has responded to actions to retake cities with heavy fighting.[961] These facts suggest that sufficiently intense violence is ongoing. The Peace and Security Council of the African Union appears to have sought to change the emphasis of the AMISOM presence in Somalia, towards law enforcement,[962] but this does not, in itself, rebut the evidence of ongoing intense violence. Furthermore, the UNSC continues to refer to the applicability of IHL in relation to al-Shabaab.[963]

Shabaab-suicide-bomb-kills-over-80-in-Somali-capital-Mogadishu.html; Mike Pflanz, 'Al-Shabaab Suicide Bomber Dies in Attack on Somalia Presidency' *The Telegraph* (Nairobi, 29 January 2013) http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/9834874/Al-Shabaab-suicide-bomber-dies-in-attack-on-Somalia-presidency.html; 'Al-Shabaab Attack on Somalia AU Base Kills 50 Ugandan Troops, Another 50 Missing: Western Sources' *Mail & Guardian Africa* (2 September 2015) https://radioshacab.com/articles/3212/Al-Shabaab-attack-on-Somalia-AU-base-kills-50-Ugandan-troops-another-50-missing-Western-sources-Mail-Guardian-Africa.

[958] AMISOM, 'Mission Profile: Military Component' http://amisom-au.org/mission-profile/military-component/.

[959] New Vision, 'Somalia: Security Fears as AMISOM Starts Withdrawal' *Garowe Online* (Mogadishu, 7 May 2018) https://www.garoweonline.com/en/news/somalia/somalia-security-fears-as-amisom-starts-withdrawal.

[960] 'Who are Somalia's al-Shabaab?' *BBC* (3 April 2015) http://www.bbc.co.uk/news/world-africa-15336689.

[961] Hamza Mohamed, 'Al-Shabaab "Retreats" in Battle for Town' *Al Jazeera* (8 March 2014) http://www.aljazeera.com/news/africa/2014/03/al-shabab-retreat-battle-town-201437145216588883.html; 'AMISOM and Somali Forces Liberate Barawe, Al-Shabab's Biggest Stronghold' *Raxanreeb* (Barawe, 5 October 2014) https://web.archive.org/web/20160304040138/http://www.raxanreeb.com/2014/10/somalia-breaking-news-amisom-and-somali-forces-liberate-barawe-al-shababs-biggest-stronghold/.

[962] African Union (Peace and Security Council), 'Communique of the 521st meeting of the Peace and Security Council on the Joint AU – UN Mission in Somalia' (30 June 2015) PSC/PR/Comm (DXXI) para 12.1.

[963] UNSC Res 2372 (30 August 2017) UN Doc S/RES/2372.

There is much to suggest that al-Shabaab is sufficiently organised under the *Tadić* threshold. The group has been described as having a 'functional structured organisation', led by an *Amir*, supported by a ten-member *shura majlis* (council) which makes decisions for the group.[964] Beneath this are other branches, including a military branch, sub-divided into different entities with distinct functions.[965] Locally, al-Shabaab's administrative structure includes 'a governor (*wali*), Office of Social Affairs, Office of Finance, Office of the Judge and Office of the so-called Hesbah Army, Al-Shabaab's equivalent of a police force.'[966] This suggests the existence of a command structure, indicative of requisite organisation.[967] The group has demonstrated an ability to transport troops and weapons throughout the country[968] and into the country by sea,[969] another indicator of organisation.[970] Finally, al-Shabaab is organised in terms of its communication with the public, having its own television channel,[971] further evidence of organisation.[972]

Thus it seems certain that al-Shabaab is adequately organised, and the violence between it and the government meets the intensity threshold. Therefore, since 2007-08 a NIAC has existed in Somalia between these parties, into which US drone strikes have been invited. Nevertheless, in 2013 consent was restricted to drone strikes against non-Somali fighters,[973] and since 2013 there have been three that directly targeted fighters whose nationality was certainly Somali.[974] These strikes fall outside of this NIAC, and will only

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[964] Yinka Olomojobi, *Frontiers of Jihad: Radical Islam in Africa* (Safari Books 2015) 161.

[965] ibid 161.

[966] Hansen (n 939) 87-8.

[967] *Haradinaj* (n 549) para 65; *Milošević* (Decision on Motion for Judgment of Acquittal) (n 549) para 23-4.

[968] Hansen (n 939) 114.

[969] 'Australian Navy says seizes huge weapons cache headed for Somalia' *Reuters* (Nairobi, 7 March 2016) https://www.reuters.com/article/us-somalia-security-idUSKCN0W918C.

[970] *Limaj* (Judgment) (n 549) para 90.

[971] 'Somalia's al-Shabaab Launch TV Channel' *Mail & Guardian* (5 February 2011) http://mg.co.za/article/2011-02-05-somalias-alshabaab-launch-tv-channel/.

[972] *Limaj* (Judgment) (n 549) paras 101-3.

[973] Rogin (n 182).

[974] Two against Ahmed Abdi Godane and one against Abu Ubaidah, both leaders of al-Shabaab from Somalia: Thomas Joscelyn and Bill Roggio, 'Senior Shabaab Commander Rumored to have been Killed in Recent Predator Strike' *Long War Journal* (9 July 2011)

be subject to IHL if there is a separate NIAC between the US and al-Shabaab. In other cases, drones have targeted large groups of fighters, one reportedly comprising up to 200 individuals.[975] Though foreign fighters feature in al-Shabaab, they do not comprise a majority,[976] therefore it is submitted that where drones target large groups, the US would unlikely have limited targeting to non-Somali fighters. Thus, it is possible, though not certain, that these strikes also fall outside the scope of this NIAC. In most cases, it is impossible to determine the nationality of those targeted, and so no determination can be made as to the inclusion or exclusion of the strikes within the NIAC. Nevertheless, of key importance is the fact that not all strikes are governed by IHL as a result of this NIAC.

3.1.5.4.2 al-Shabaab and the US

At least three strikes cannot be included within the NIAC between the Somali government and al-Shabaab, so this section will consider whether a separate NIAC is identifiable between the US and al-Shabaab. It has already been shown that al-Shabaab satisfies the organisation threshold, so it is only necessary to consider intensity.

Since 2011, the US has carried out approximately 87 drone strikes against al-Shabaab[977] but, as stated, the actions of a single party cannot, in and of themselves, produce a NIAC.[978] al-Shabaab has engaged in international acts of violence, but these have primarily been in Kenya and Uganda, with none against the US. The only instances of al-Shabaab actions against the US are its defence against a Navy SEAL attack upon an al-

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https://www.longwarjournal.org/archives/2011/07/senior_shabaab_comma_1.php#ixzz1kIKZCdHC; 'Somalia: Official—Suspected US Drone Kills al-Shabaab Commander in Lower Shabelle Region' *All Africa* (22 December 2015) https://allafrica.com/stories/201512221226.html.

[975] 'US: More than 150 al-Shabab Fighters Killed in Air Raid' *al Jazeera* (8 March 2016) https://www.aljazeera.com/news/2016/03/drone-strike-somalia-kills-150-fighters-160307170607675.html.

[976] Pantucci and Sayyid (n 189).

[977] TBIJ 'Somalia 2007 to present' (n 24).

[978] Text from n 908 to n 909.

Shabaab commander,[979] the deaths of two US civilians in attacks against the UN and Somali citizens,[980] an al-Shabaab video calling for 'lone wolf' attacks at shopping centres in the US, Canada and the UK (a threat described as not credible)[981] and a recent ambush on AMISOM and US troops in which one US soldier was killed.[982] These do not demonstrate requisite intensity and so it is impossible to conclude that there is a NIAC between al-Shabaab and the US.

3.1.5.4.3 ISS

There have been two instances of US drone strikes against ISS. Both occurring in November 2017, the first resulted in approximately 20 deaths[983] and, in the second, one 'terrorist' was reportedly killed.[984] This occurred during the NIAC involving ISIS in Iraq and Syria and so may fall within that NIAC if the group targeted are sufficiently linked with ISIS-proper. The group pledged allegiance to ISIS in 2015, but this was viewed as symbolic only.[985] It has been reported that members of ISS are almost entirely Somali, and it has been described as an ISIS 'faction' and 'spin-off',[986] suggesting it is not sufficiently incorporated with ISIS to be party to the NIAC in Iraq and Syria.

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[979] Henry Austin, 'SEAL Somalia Target Named as "Ikrima" as Questions Remain About Aborted Mission' *NBC News* (7 October 2013) http://www.nbcnews.com/news/other/seal-somalia-target-named-ikrima-questions-remain-about-aborted-mission-f8C11349411.

[980] 'Statement from Pentagon Press Secretary Peter Cook on Airstrike in Somalia' (US Department of Defense, 1 April 2016) https://www.defense.gov/News/News-Releases/News-Release-View/Article/711634/statement-from-pentagon-press-secretary-peter-cook-on-airstrike-in-somalia.

[981] Karimi, Fantz and Shoichet (n 500).

[982] 'Somalia's al Shabaab Claims Attack in Which US Soldier Died' *CNBC* (9 June 2018) https://www.cnbc.com/2018/06/09/somalias-al-shabaab-claims-attack-in-which-us-soldier-died.html.

[983] Katherine Houreld, 'Islamic State's Footprint Spreading in Northern Somalia, UN' *Reuters* (Nairobi, 8 November 2017) https://www.reuters.com/article/us-somalia-islamic-state/islamic-states-footprint-spreading-in-northern-somalia-u-n-idUSKBN1D828Z

[984] Africa Command (27 November 2017) (n 25).

[985] Abdi Sheikh, 'Small Group of Somali al Shabaab Swear Allegiance to Islamic State' *Reuters* (Mogadishu, 23 October 2015) https://www.reuters.com/article/us-mideast-crisis-somalia-idUSKCN0SH1BF20151023.

[986] Houreld (n 983).

The strike was reportedly carried out in coordination with the SFG,[987] which will bring the strike within a NIAC if one exists between ISS and the government, which depends on the satisfaction of the *Tadić* thresholds. Until late 2016, ISS's violent acts were limited in intensity, reportedly having claimed fewer than 12 attacks in the period up to October that year,[988] involving acts such as roadside bombings.[989] In October 2016, ISS attacked the town of Qandala and overran it without resistance,[990] beginning an occupation that lasted until December 2016.[991] The occupation resulted in the displacement of 27,500 civilians,[992] and the battle to retake the town reportedly lasted several days,[993] with around 30 ISS members killed.[994] Additionally it has been stated that ISS has weapons including heavy and light machine guns as well as bazookas.[995] Since ISS's routing from Qandala it has continued to carry out low-level acts causing minimal deaths, such as roadside

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[987] 'US Military says Conducted Air Strike Against ISIS in Somalia' *Reuters* (Bosaso, 27 November 2017) https://www.reuters.com/article/us-somalia-security/u-s-military-says-conducted-air-strike-against-isis-in-somalia-idUSKBN1DR2DD.

[988] Caleb Weiss, 'Islamic State in Somalia Claims Capture of Port Town' *Long War Journal* (26 October 2016) https://www.longwarjournal.org/archives/2016/10/islamic-state-in-somalia-claims-capture-of-port-town.php.

[989] Bill Roggio and Caleb Weiss, 'Islamic State Highlights "First Camp of the Caliphate in Somalia"' *Long War Journal* (25 April 2016) https://www.longwarjournal.org/archives/2016/04/islamic-state-highlights-first-camp-of-the-caliphate-in-somalia.php.

[990] Feisal Omar and Abdi Sheikh, 'Islamic State-Aligned Group Takes Somali Town, Say Officials' *Reuters* (Mogadishu, 26 October 2016) https://www.reuters.com/article/us-somalia-security/islamic-state-aligned-group-takes-somali-town-say-officials-idUSKCN12Q0VW.

[991] Harun Maruf, 'Somalia Security Forces and IS Fighters Directly Clash for First Time' *Voice of America* (3 December 2016) https://www.voanews.com/a/somalia-security-forces-and-is-fighters-directly-clash-for-first-time/3621721.html.

[992] 'Somalia: UN—Fighting Near Qandala Town Displaces 27,500' *All Africa* (8 December 2016) https://allafrica.com/stories/201612090114.html.

[993] 'Somalia: ISIL- Linked Faction Steps Up Attacks in Mogadishu' *Garowe Online* (Mogadishu, 30 June 2018) https://www.garoweonline.com/en/news/somalia/somalia-isil-linked-faction-steps-up-attacks-in-mogadishu.

[994] Harun Maruf, 'Forces Retake Somali Town Held by Pro-Islamic State Fighters' *Voice of America* (7 December 2016) https://www.voanews.com/a/forces-retake-somali-town-held-by-pro-islamic-state-fighters/3626738.html.

[995] Maruf (3 December 2016) (n 991).

bombings[996] and assassinations.[997] By May 2018 ISS, had conducted at least 13 attacks, which reportedly represents an increase in violence, though they remain small-scale shooting incidents.[998] In terms of personnel, ISS was reported to have mobilised up to 200-300 fighters in 2016,[999] and while some claim this level was maintained,[1000] others have suggested that, as of June 2017, there were only 70 members left.[1001]

ISS's actions are not certainly of sufficient intensity to indicate a NIAC, though neither are they so minimal as to clearly be internal disturbances. The battle over Qandala was brief, but, as demonstrated in *Abella*, a lengthy duration is not absolutely necessary in order to establish a NIAC.[1002] Nevertheless, the on-going shooting incidents arguably lack the intensity of NIAC-level violence, though their systemic nature and geographical spread could be said to indicate sufficient intensity.

In terms of organisation, ISS clearly has the capacity to 'formulate … military tactics'[1003] and coordinate and execute military operations,[1004] evidenced by the Qandala attack. A form of command structure is identifiable, with Sheik Abdulkadir Mumin having led the group since its inception.[1005] Further, the group has demonstrated an ability to procure weapons, which can indicate sufficient organisation.[1006] However, it apparently lacks the

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[996] 'One Solider Killed, One Wounded by Roadside Bomb in Somalia's Puntland' *Reuters* (28 March 2017) https://www.reuters.com/article/us-somalia-attacks-puntland-idUSKBN16Z2CT.

[997] Garowe (30 June 2018) (n 993).

[998] Caleb Weiss, 'Analysis: Islamic State Ramps Up Attack Claims in Somalia' *Long War Journal* (9 May 2018) https://www.longwarjournal.org/archives/2018/05/analysis-islamic-state-ramps-up-attack-claims-in-somalia.php.

[999] Harun Maruf, 'Somali Officials Vow to Retake Puntland Town' *Voice of America* (Washington, 28 October 2016) https://www.voanews.com/a/somali-officials-vow-to-retake-puntland-town/3570974.html.

[1000] Harun Maruf, 'Somali Officials Condemn Attacks, Vows Revenge' *Voice of America* (9 June 2017) https://www.voanews.com/a/somali-officials-condemn-attacks-vow-revenge-/3894423.html.

[1001] 'Somalia: ISIS Fighter Surrenders to Puntland Authorities' *Garowe Online* (Bosaso, 6 June 216) https://www.garoweonline.com/en/news/puntland/somalia-isis-fighter-surrender-to-puntland-authorities/.

[1002] *Abella* (n 559) paras 147 and 155.

[1003] *Limaj* (Judgment) (n 549) para 129.

[1004] *Abella* (n 559) paras 147 and 155.

[1005] Garowe (30 June 2018) (n 993).

[1006] *Limaj* (Judgment) (n 549) para 90.

ability to communicate with the public, statements generally being released by other ISIS-affiliated groups.[1007] On this basis, there is an argument that ISS is sufficiently organised, though, as with intensity, it is not an unassailable point.

Overall there is a case to be made that violence involving ISS has become a NIAC, but this position is tenuous. Other than its attack on Qandala, the group has, on the whole, engaged in low-level activities, but these extend over a long period, which can have the effect of satisfying the NIAC threshold. Equally, while the group lacks many of the indicators of sufficient organisation it demonstrates others. The process of determining a NIAC does not require the satisfaction of certain key factors,[1008] instead it is a contextual characterisation. Therefore, it seems very possible, though not certain, that ISS is involved in a NIAC, therefore bringing US drone strikes against that group into the remit of IHL.

Having carried out this analysis of the situation in Somalia, it can be concluded that, though the majority fall within the NIAC between the government and al-Shabaab, there are some that have occurred outside of it, further underlining the importance of considering strikes with both the paradigms of IHL and IHRL.

3.2 Applying IHL to drone strikes

Having demonstrated that IHL governs the majority of US drone strikes, it is necessary to consider the extent to which those strikes—and drone strikes generally—are lawful under IHL. Attention will primarily be on the rules on targeting as they relate to distinction, with proportionality and precaution considered where relevant. This focus on distinction is driven by a series of linked motivations. First, distinction is generally presented as the bedrock of IHL,[1009] making it critical when assessing compliance. Second, drone strikes have been celebrated for their ability to identify and target members

[1007] Jason Warner and Caleb Weiss, 'A Legitimate Challenger? Assessing the Rivalry Between al-Shabaab and Islamic State in Somalia' (2017) 10(10) Combating Terrorism Center Sentinel 27, 31.
[1008] Sivakumaran (n 544) 168.
[1009] *Prosecutor v Kupreškić and others* (Judgment) IT-95-16 (14 January 2000), para 521; *Nuclear weapons* (n 355) para 78.

of armed groups accurately,[1010] and, while proportionality is important, it is their purportedly unique ability to identify lawful targets that positions them as distinct from traditional weapon systems. Third, the regulative power of proportionality lies with its application on a case-by-case basis—as such, it will not feature in the general IHL assessment of drones as this would be speculative, though it does feature within the case studies. Finally, the rules of IHL that derive from the principle of distinction are particularly complex and contested, meaning that to provide a detailed and relevant examination of drone strikes in the space available requires the privileging of this aspect of IHL.

This section will begin by assessing the scope of the rules that apply during armed conflict, before going into detail on the specific aspects of IHL most relevant to the analysis of drone strikes. This comprises an analysis of debates surrounding targeting NSA members and civilians directly participating in hostilities. The final sections will provide in-depth application of these rules to drone strikes, both generally and in individual case studies.

3.2.1 IHL and IHRL: the content of law during an armed conflict

It is immediately necessary to confirm which laws apply during an armed conflict. It is axiomatic that IHL applies when the criteria of an armed conflict are met, augmenting IHRL protections, and providing a body of rules against which hostile conduct linked to the armed conflict[1011] must be assessed. Despite minimal opposition,[1012] it is almost universally accepted that IHRL also applies during armed conflicts,[1013] however, it

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[1010] Brennan (2012) (n 48); Koh (2010) (n 10); Leon Panetta, 'AFPAK Drone Strikes are the Only Game in Town' (2009) 26(3) New Perspectives Quarterly 33, 38.

[1011] Vito Todeschini, 'The ICCPR in Armed Conflict: an Appraisal of the Human Rights Committee's Engagement with International Humanitarian Law' (2017) 35(3) Nordic Journal of Human Rights 203, 205.

[1012] This was the position held by the US until 2012 and presently by Israel. See, for instance, James A Green *The Persistent Objector Rule in International Law* (Oxford University Press 2016) 124-6.

[1013] UNSC Res 237 (14 June 1967) UN Doc S/RES/237; UNGA Res 2252 (ES-V) (4 July 1967) UN Doc A/RES/2252 (ES-V); UNGA Res 2675 (XXV) (9 December 1970) UN Doc A/RES/2675; *Armed Activities* (n 72) para 216; *Coard v United States* Inter-American Commission on Human Rights Report

remains disputed *how* these paradigms relate, particularly in instances of norm conflict. With regard to the work herein, this is most notably an issue as regards the regime

No 109/99 (29 September 1999), para 42; *Kunarac* (n 669) para 467; *Nuclear weapons* (n 355) para 24-5; *Wall* (n 214) para 106; UN Human Rights Committee, General Comment No 29 (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11 para 3; UN Human Rights Committee, General Comment No 31 (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 11; UN Human Rights Committee, Draft General Comment No 36 (2 September 2015) UN Doc CCPR/C/GC/R.36/Rev.2 para 63; William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2006) 16(4) European Journal of International Law 741, 759; Alston (n 45) 301; Bill Bowring, 'Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights' (2009) 14(3) Journal of Conflict and Security Law 485, 487; Robert Cryer, 'The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY' (2009) 14(3) Journal of Conflict and Security Law 511, 517; Dinstein (2015) (n 553) 226; Charles Garraway, '"To Kill or not to Kill?"—Dilemmas on the Use of Force' (2009) 14(3) Journal of Conflict and Security Law 499, 509-10; Christopher Greenwood, 'Rights at the Frontier—Protecting the Individual in Time of War' in Barry Rider (ed), *Law at the Centre: The Institute of Advanced Legal Studies at Fifty* (Kluwer Law International 1999) 288-9; Christopher Greenwood *Essays on International Law* (Cameron May 2006) 85; Françoise J Hampson, 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law' (2011) 87 International Law Studies 187, 188; Oona A Hathaway and others, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law' (2012) 96(6) Minnesota Law Review 1883, 1893-4; Lawrence Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64 International and Comparative Law Quarterly 293, 313-6; David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42 Israel Law Review 8, 15-8; Marko Milanovic, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 124; Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016) 80; Mary Ellen O'Connell, 'The Choice of Law Against Terrorism' (2010) 4 Journal of National Security Law and Policy 343, 350-1; Ian Park, *The Right to Life in Armed Conflict* (Oxford University Press 2018) 111-2; Marco Sassòli and Laura M Olson, 'The Relationship Between International Humanitarian Law and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) International Review of the Red Cross 599, 605; Iain Scobbie, 'Principles or Pragmatics? The Relationship between Human Rights and the Law of Armed Conflict' (2009) 14(3) Journal of Conflict and Security Law 449, 456-7; Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 25; Sivakumaran (n 544) 89-94.

governing the use of lethal force under IHL and its relationship with the prohibition on the arbitrary or intentional deprivation of life under IHRL.

The ICJ has discussed this relationship on three occasions. In the *Nuclear Weapons* advisory opinion, the Court asserted that the right to life under Article 6 ICCPR continues to apply 'in times of war' but that the meaning of 'arbitrary' 'falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.'[1014] Subsequently, in the *Wall* advisory opinion the Court again referred to IHL as *lex specialis* in relation to IHRL, though without limiting it to specific provisions.[1015] Finally, in the *Armed Activities* case the Court dispensed with reference to *lex specialis*, instead applying IHL *and* IHRL, finding breaches of both.[1016] In this decision, the ICJ appears to have reverted from the apparent position in which the *lex specialis* of IHL overrides the more general IHRL *per se*, instead applying both.[1017]

Thus it is not simply the case that while IHRL applies during armed conflict its application is curtailed by more specific rules of IHL. However, opinions diverge as to the alternative. Some maintain that in cases of inconsistency, IHL will prevail as a result of the *lex specialis* principle[1018] or, taking a more nuanced view, that *lex specialis* is dispositive of issues of reconciliation arising between the regimes but without privileging IHL as a whole.[1019] The reason given being the preponderant generality of human rights treaties vis-à-vis the more detailed protections provided under IHL.[1020] Nevertheless,

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[1014] *Nuclear weapons* (n 355) para 25.

[1015] *Wall* (n 214) para 106.

[1016] *Armed Activities* (n 72) para 220.

[1017] In this way the decision accords with the understanding of *lex specialis* put forward by the ILC in the commentary to DASR, Article 55.

[1018] Alston (n 45) 301; Dinstein (2015) (n 553) 229; Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98(1) American Journal of International Law 1, 2.

[1019] Marco Sassòli, 'The Role of Human Rights and International Humanitarian Law in New Types of Armed Conflicts' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 71; Sassòli and Olson (n 1013) 605.

[1020] Greenwood 'Essays' (n 1013) 85.

distinction is made between the laws governing IACs and those of NIACs, and it has been conceded that the absence of detailed IHL provisions applicable to the latter may raise the importance of IHRL in assessing conduct carried out during internal hostilities.[1021]

Others have proposed the graduated application of IHL and IHLR during NIACs.[1022] In one example, IHL is argued to apply to AP II NIACs and IHRL to armed conflicts or internal disturbances beneath that threshold.[1023] This approach has been characterised as representing a 'fundamental shift in the regulation' of NIACs[1024] and, in the view of the present author, suffers from the risk of the same dogmatism of those that advocate the exclusive application of IHL through *lex specialis*, limiting flexibility in the application of different legal regimes. Additionally it is not clear that such an approach accords with the *lex lata* of IHL, which, at least in the context of NIACs, does not explicate such a separation of paradigms.

A more nuanced approach identifies the co-application of both IHL and IHRL during armed conflict with the dominant regime established contextually in a given situation, rather than by determining predominance in advance.[1025] In this approach, *lex specialis* is not dispositive of regime pre-eminence, but is one among several factors used to analyse a set of facts, drawing on IHL and IHRL, thereby according with the ICJ's approach in the *Armed Activities* case.[1026] Typifying this approach, Hill-Cawthorne argues that *lex specialis* is one tool of treaty interpretation among others (such as *lex posterior* or the use of Article 31(3)(c) VCLT) available to determine the intentions of states parties to treaty provisions in situations of norm conflict.[1027] Likewise, Milanovic has argued that *lex specialis* is a ('not … particularly impressive') tool of norm conflict avoidance.[1028] It has been argued that the co-application of IHRL and IHL is mediated by the implicit use of

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[1021] Greenwood 'Rights' (n 1013) 288-9.

[1022] Kretzmer (2009) (n 1013) 42-3.

[1023] Garraway (n 1013) 509-10.

[1024] Sivakumaran (n 544) 94.

[1025] Hathaway and others (n 1013) 1910-11.

[1026] *Armed Activities* (n 72) para 220.

[1027] Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016) 152; Hill-Cawthorne (2015) (n 1013).

[1028] Milanovic (2011) (n 1013)113.

systemic integration under Article 31(3)(c) VCLT and that references to *lex specialis* by the ICJ represent the deployment of this interpretive tool.[1029] Crucially, under this approach the relationship between IHL and IHRL is not determined on a meta-level,[1030] but is used where conflict between rules arises, relative to a specific situation.[1031] Perhaps the most explicit operationalisation of this view of the relationship between IHL and IHRL during armed conflict is presented by Murray, who posits two governing frameworks of 'active hostilities' and 'security operations'.[1032] Under the former, IHL provides the primary body of law, with IHRL being the secondary body interpreted in light of the primary.[1033] Under the 'security operations' framework, IHRL provides the primary source of rules, with provisions of IHL interpreted within that context.[1034] Key to this approach is the fact that 'both bodies of law remain applicable and both may contribute to, and inform, the overall legal regulation of the situation at hand.'[1035]

Considering the evolution of the ICJ's approach to the relationship between IHL and IHRL, state practice,[1036] and the apparent *lex lata* of IHL applicable during NIACs, this approach emphasising nuanced co-application appears the most convincing. Therefore, to determine the way that IHL and IHRL regulate an issue it is necessary to consider specifically applicable rules. Those most immediately relevant to the use of drones in armed conflict are those governing the use of lethal force.

Following Murray, the determination of whether IHL or IHRL is the primary framework regulating drone use requires asking 'whether one body of law establishes explicit rules that are designed for, or specific to, a given situation.'[1037] In terms of lethal force, the relevant provision of IHLR is the right to life, one manifestation being that '[n]o one shall

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[1029] Todeschini (n 1011) 207.

[1030] Scobbie 'Principles' (n 1013) 456-7.

[1031] Hathaway and others (n 1013) 1910-11.

[1032] Murray (n 1013) 80.

[1033] ibid.

[1034] ibid.

[1035] ibid 88. cf Park (n 1013) 113-4.

[1036] Hathaway and others (n 1013) 1913-6.

[1037] Murray (n 1013) 86-7.

be arbitrarily deprived of [their] life';[1038] this is a general rule. More specific regulation during a NIAC is provided under IHL, in which a regime of distinction, proportionality, military necessity and humanity governs when lethal force may be used, and against whom.[1039] While IHRL emphasises the prohibition on lethal force, IHL is more permissive, regulating lethal force such that it is allowed in specific situations. In this way there is *prima facie* incompatibility between the two bodies of law. Drawing solely on the principle of *lex specialis* would mean that this inconsistency would be resolved in favour of IHL. However, such an approach does not necessarily reflect the reality of the interaction of these two regimes.

In reconciling the two, focus has historically been on the interpretation of the term 'arbitrary' in Article 6 ICCPR and how this can change depending on circumstances. The ICJ interpreted it in light of IHL, deploying *lex specialis*, finding that the test of arbitrary deprivation of life during an armed conflict sits with IHL such that lethal force that is unlawful under IHL is an arbitrary deprivation of life.[1040] The interpretation of 'arbitrary' in accordance with IHL has been endorsed due to the 'open' character of the IHRL rule, though it has been emphasised that this interpretation need not have been made solely by resort to *lex specialis*.[1041] So, during armed conflict, the co-application of IHRL and IHL will result in the protections of the former being augmented by the regulatory provisions of the latter.

Therefore, the extent to which IHL provides rules governing NIAC in the form of conventional and customary international law is relevant to the impact of IHRL on hostilities. While IHL applicable in IACs contains detailed provisions in the Geneva Conventions and Additional Protocol I, IHL applying to NIACs is less comprehensive, comprising common Article 3, CIHL, and, in certain contexts, Additional Protocol II. It is possible that, to the extent that IHL does not fully regulate conduct of hostilities within NIAC, IHRL will play a wider regulatory role. One outcome is that, as interpretations of

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[1038] ICCPR Article 6(1).

[1039] The details of this regime, and of the rules relating to distinction in particular, will be examined more closely later in this chapter, in Sections 3.2.2.1 and 3.2.2.2.

[1040] *Nuclear weapons* (n 355) para 25.

[1041] Hill-Cawthorne (n 1027) 153-4. See also, Hathaway and others (n 1013) 1929-30.

applicable provisions of IHL expand beyond the core of what is generally accepted, and stretch towards the penumbra—where readings of the law become contested—it is more likely that IHRL will play a role in regulating conduct.

A key example is the absence of combatant status from IHL applicable in NIACs: while during an IAC anyone deemed a combatant may be targeted, the same is not the case within NIACs, during which only those 'directly participating in hostilities' may be targeted.[1042] This expands the reach of IHRL into NIACs such that if a targeted individual is not, in actuality, directly participating in hostilities, their targeting would be arbitrary and so a breach of Article 6 ICCPR. Though seemingly obvious, this has important implications for the present study. As will be shown, the US has at times utilised very broad interpretations of the IHL rules on targeting and as these interpretations become wider, it is more likely that IHRL will be applicable and that targeting may breach the right to life of those targeted.[1043]

Ultimately, the principal regime governing drone strikes during NIAC is IHL with IHRL becoming more relevant where IHL is less specific or certain. As such, the following sections of this chapter concern the lawfulness of armed drones from the perspective of IHL rules on targeting.

3.2.2 IHL and targeting

IHL rules on targeting comprises a morass of rules, principles, and interpretations. This section will tease out individual aspects applicable to armed drones before applying them to US drone strikes in Pakistan, Yemen and Somalia.

The rules governing targeting (or 'attacks', defined as 'violence against the adversary, whether in offence or defence'[1044]) are premised on the 'cardinal principle' of 'distinction between combatants and non-combatants'.[1045] Distinction is a key feature of IHL, present

[1042] Additional Protocol II Article 13(3).

[1043] Section 3.2.3.2.

[1044] Additional Protocol I Article 49(1).

[1045] *Nuclear weapons* (n 355) para 78.

in the Lieber Code[1046] and (implicitly) the St Petersburg Declaration.[1047] More recently, AP I contains the imperative that 'Parties … shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives', which forms the 'basic rule'.[1048] In AP II the 'general protection' of civilians was affirmed.[1049] Importantly, the principle of distinction is widely recognised as customary international law,[1050] applicable in IAC or NIAC,[1051] a corollary of this being that the principle (and potentially the more specific rules resulting from it) is binding upon states not party to the APs, therefore applying to US drone strikes.

Rules on targeting derive from the principle of distinction.[1052] In *Galić*, the Trial Chamber stated that the 'practical application' of the principle of distinction underpins rules on proportionality, military necessity and precaution.[1053] Additionally, commentators have identified rules governing the general protection of civilians and prohibition of indiscriminate attacks stemming from the principle.[1054]

The present analysis is concerned solely with NIACs, though IHL rules on the conduct of hostilities are more developed and comprehensive in relation to IACs. Nonetheless, the ICRC's study on CIHL identified a great many IHL provisions governing IAC as customary international law applicable in NIAC.[1055] Though the study has been criticised for its methodology,[1056] it nonetheless provides guidance to provisions of IHL that may

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[1046] The Lieber Code General Orders No 100 (24 April 1863) Article 22.

[1047] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 11 December 1868, entered into force 11 December 1868) 15 British State Papers 16 Preamble.

[1048] Additional Protocol I Article 48.

[1049] Additional Protocol II Article 13(1).

[1050] *Nuclear Weapons* (n 355) para 79; *Kupreškić* (n 1009) para 521;*Tadić* (Jurisdiction) (n 547) para 127.

[1051] *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004), para 157.

[1052] Sivakumaran (n 544) 338.

[1053] *Prosecutor v Galić* (Judgment and Opinion) IT-98-29-T (5 December 2003), para 58.

[1054] Sivakumaran (n 544) 338.

[1055] Henckaerts and Doswald-Beck 'Rules' (n 542).

[1056] Bellinger and Hayes (n 596) 444-8; Yoram Dinstein, 'The ICRC Customary International Humanitarian Law Study' (2006) 82 International Law Studies 99, 101-5; W Hays Parks, 'The ICRC Study: A Preliminary Assessment' (2005) 99 American Society of International Law Proceedings 208.

have become binding, and has been used as an authoritative codification of CIHL by many commentators.[1057] Additionally, despite objecting to elements of the study, the US has stated that significant aspects of the APs represent either extant or desirable rules of CIHL.[1058] Therefore it can be said that there is a body of IHL applicable to NIACs, binding upon states not party to AP II, which is indicated by the ICRC study, and which can be used to analyse targeting with armed drones.

3.2.2.1 Protection of civilians and civilian objects and other IHL rules

Civilians benefit from a general protection under both APs,[1059] which also contain the more specific imperative that '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack'[1060] unless directly participating in hostilities.[1061] This has been held by the ICTY to be 'a principle of customary international law that is applicable in internal and international armed conflicts',[1062] an understanding widely accepted by commentators.[1063] The prohibition on directing attacks

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[1057] See, for instance, William H Boothby, *The Law of Targeting* (Oxford University Press 2012) 40; Crawford and Pert (n 582) 40; Eliav Lieblich, *International Law and Civil Wars* (Routledge 2013) 174; Dinstein (2015) (n 553) 72; Timothy L H McCormack, 'An Australian Perspective on the ICRC Customary International Humanitarian Law Study' (2006) 82 International Law Studies 81, 86-7; Theodor Meron, 'Customary Humanitarian Law Today: From the Academy to the Courtroom' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 46; Sivakumaran (n 544) 59.

[1058] See, for instance, Michael J Matheson, 'Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987) 2 American University Journal of International Law and Policy 419.

[1059] Additional Protocol I Article 51(1); Additional Protocol II Article 13(1).

[1060] Additional Protocol I Article 51(2); Additional Protocol II Article 13(2).

[1061] Additional Protocol I Article 51(3); Additional Protocol II Article 13(3). This concept will be considered in depth below, in Section 3.2.2.2.2.

[1062] *Blaškić* (n 1051) para 10

[1063] William H Boothby, *Weapons and the Law of Armed Conflict* (2nd edn, Oxford University Press 2016) 41; Susan C Breau, 'The Law of Targeting' in Elizabeth Wilmshurst and Susan C Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 169; Dinstein (2015) (n 553)214; Michael N Schmitt, 'The Law of Targeting' in Elizabeth

against civilians is Rule 1 of the ICRC Study,[1064] supported by much state practice and *opinio juris*.[1065] Furthermore, its essence is reproduced in the Rome Statute pertaining to both IACs[1066] and NIACs,[1067] and Article 3(7) of Amended Protocol II of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons,[1068] which, since 2001, applies to IACs and ordinary NIACs.[1069] Thus, the protection of civilians appears undoubtedly to be an aspect of customary international law.

Relatedly, Article 52(1) AP I prohibits attacks against civilian objects, defined as 'all objects which are not military objectives.' Military objectives are 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization … offers a definite military advantage.'[1070] There is no similar principle in AP II though the principle has been recognised as customary international law, applicable in both IACs and NIACs,[1071]

Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 136; Sivakumaran (n 544) 338.

[1064] Henckaerts and Doswald-Beck 'Rules' (n 542) 3, Rule 1.

[1065] For a comprehensive list of examples, see Sivakumaran (n 544) 339-41.

[1066] Rome Statute Article 8(b)(i).

[1067] Rome Statute Article 8(e)(i).

[1068] 'It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.' Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 3 May 1996, entered into force 3 December 1998) 2048 UNTS 93 (Amended Protocol II) Article 3(7).

[1069] Amendment to Article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 18 May 2004, entered into force 18 May 2004) 2260 UNTS 89 Article 1(2).

[1070] Additional Protocol I Article 52(2).

[1071] Françoise Hampson, 'Proportionality and Necessity in the Gulf Conflict' (1992) 86 American Society of International Law Proceedings 45, 50; Henckaerts and Doswald-Beck 'Rules' (n 542) 30-1, Rule 8; Sivakumaran (n 544) 342; Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 166; Michael N Schmitt, 'Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate' (2012) 30(1) Boston University International Law Journal 595, 610.

including by the ICTY,[1072] and the prohibition appears elsewhere in treaty law applicable to NIACs.[1073] It is therefore uncontroversial to conclude that the rules prohibiting attacks on civilian objects are a part of CIHL. Consequently, they are clearly applicable to US drone strikes during NIACs in Pakistan, Yemen and Somalia.

3.2.2.1.1 Indiscriminate attacks, proportionality and precaution

Other aspects of IHL have developed out of the principle of distinction and are relevant to the present analysis: the prohibition of indiscriminate attacks, proportionality, and the need to take precautions in attack. The abstract IHL assessment of drone strikes is concerned with choice of target, rather than the extent to which strikes adhere to principles relating to indiscriminate attacks, proportionality and precaution, however these rules will be applied subsequently in the examination of drone strike case-studies.

The prohibition of indiscriminate attacks is a function of the principle of distinction as such attacks inherently fail to distinguish. IHL prohibits indiscriminate attacks during IAC,[1074] defined as those 'not directed at a specific military objective',[1075] 'employ[ing] a method or means of combat which cannot be directed at a specific military objective',[1076] or 'employ[ing] a method or means of combat the effects of which cannot be limited as required by international humanitarian law'.[1077] Despite the removal of an equivalent provision from AP II during drafting, this rule has been described as applicable to NIACs as CIHL[1078] and was identified in the ICRC study.[1079]

[1072] *Prosecutor v Hadžihasanović* (Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule *98bis* Motions for Acquittal) IT-01-47-AR73.3 (11 March 2005), para 30; *Tadić* (Jurisdiction) (n 547) para 127.

[1073] Amended Protocol II Article 3(7); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons 1980 (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 171 (Protocol on Incendiary Weapons), Article 2(1); Rome Statute Article 8(2)(e)(ii) and (iv).

[1074] Additional Protocol I Article 51(4).

[1075] Additional Protocol I Article 51(4)(a).

[1076] Additional Protocol I Article 51(4)(b).

[1077] Additional Protocol I Article 51(4)(c).

[1078] *Kupreškić* (n 1009) para 524, *Tadić* (Jurisdiction) (n 547) para 127.

[1079] Henckaerts and Doswald-Beck 'Rules' (n 542) 37-45, Rules 11-3.

The principle of proportionality is a recognition that armed conflict may result in incidental injury and damage to civilians and civilian objects. Though absent from AP II, it forms part of the CIHL applicable in NIAC.[1080] Under the principle, an otherwise lawful attack (distinguishing between permissible and impermissible targets) will nevertheless be unlawful if it '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.'[1081]

Article 51(5)(b) AP I balances the 'expected' collateral damage with 'anticipated' military advantage, emphasising that what is proportionate lies with the subjective assessment of those planning an attack.[1082] Concordantly, the ICTY has held that a proportionality assessment must consider 'whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'[1083] Thus, proportionality is concerned with what *could* have been reasonably foreseen rather than what actually resulted.

The meaning of 'excessive' is elusive. While the ICRC commentary to AP I implies that 'excessive' may equate to 'extensive',[1084] this has been rejected for failing to reflect that proportionality considers incidental injury *relative* to military advantage.[1085] Thus, even extensive incidental damage can be proportionate. In making an assessment, it is

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[1080] *Kupreškić* (n 1009) para 524; Henckaerts and Doswald-Beck 'Rules' (n 542) 46-50, Rule 14; ILA Study Group on the Conduct of Hostilities in the 21st Century, 'The Conduct of Hostilities and International Humanitarian Law: Challenges of the 21st Century Warfare' (2017) 93 International Law Studies 322, 351.

[1081] Additional Protocol I Article 51(5)(b); Henckaerts and Doswald-Beck 'Rules' (n 542)) 46, Rule 14.

[1082] *Galić* (n 1053) para 58; Boothby (2012) (n 1057) 94-7; Dinstein (2010) (n 619)157; Sivakumaran (n 544) 350.

[1083] *Galić* (n 1053) para 58.

[1084] ICRC AP Commentary (n 581) para 1979.

[1085] Dinstein (2010) (n 619) 156-7; Sivakumaran (n 544) 350; Hans-Peter Gasser and Knut Dörmann, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 245.

necessary to include not just the immediate consequences but also 'indirect harm' that may result from an attack.[1086]

Military advantage, the counterbalance to incidental injury, must be 'concrete and direct',[1087] which was 'intended to show that the advantage concerned should be substantial and relatively close'.[1088] The term has been interpreted as requiring advantage that is 'particular, perceptible and real as opposed to general, vague and speculative'.[1089] Nonetheless, anticipated advantage may go beyond that which is immediately connected with a specific object of attack (both temporally and spatially)[1090] and it has been suggested that state practice supports a view of military advantage that considers an attack as a whole, rather than its discrete elements.[1091] An inherent problem with the assessment of potential military advantage offered by a given attack is that the advantage may not be clear to an observer not party to the planning of the attack[1092] a particularly acute difficulty when operations are covert.

Related to indiscriminate attacks and proportionality, and distinction generally, IHL mandates that parties adopt precautions in attack. Giving effect to the protection of civilians,[1093] parties are required to 'do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects',[1094] and to 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.[1095] Feasibility has been interpreted to mean precautions 'which are practicable or practically possible taking into account all circumstances ruling at the time,

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[1086] ILA (n 1080) 352-3; Sivakumaran (n 544) 350.

[1087] Additional Protocol I Article 51(5)(b).

[1088] ICRC AP Commentary (n 581) para 684.

[1089] Melzer (2008) (n 623) 293.

[1090] Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (International Committee of the Red Cross 2003) 161, n 36.

[1091] Sivakumaran (n 544) 350.

[1092] Dinstein (2010) (n 619) 162.

[1093] Additional Protocol I Article 57.

[1094] Additional Protocol I Article 57(2)(a)(i).

[1095] Additional Protocol I Article 57(2)(a)(ii).

including humanitarian and military considerations.'[1096] This provision was left out of AP II, though it has been identified as CIHL applicable in NIAC,[1097] a view shared by the US.[1098]

3.2.2.2 Targetable individuals

IHL emphasises protection rather than providing states with positive rights to kill, beyond the Article 48 AP I assertion that parties 'shall direct their operations only against military objectives'. Consequently, the lawfulness of targeting depends on whether a targeted individual is protected, meaning the determination of who is a civilian is critical.

During IAC, civilians are defined negatively as those who are not combatants,[1099] combatants being defined as members of the armed forces of one of the parties.[1100] During NIAC the notion of combatants is absent; where the term appears 'it is used in its *generic* meaning, indicating persons who do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status'.[1101] Therefore, the determination of who may be legitimately targeted is based, primarily, on the loss of civilian protection. This occurs 'for such time as [a civilian] take[s] a direct part in hostilities'.[1102] In addition,

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[1096] Protocol on Incendiary Weapons Article 1(5). This definition, and ones like it, are also present in numerous military manuals and other examples of state practice, supporting a claim that the imperative is also a customary one: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol, II: Practice* (Cambridge University Press 2005) 357-8.

[1097] *Kupreškić* (n 1009) para 524; Henckaerts and Doswald-Beck 'Rules' (n 542) 51, Rule 15; HPCR, *Manual on International Law Applicable to Air and Missile Warfare* (Program on Humanitarian Policy and Conflict Research at Harvard 2010) 18, Rules 30-34; ILA (n 1080) 372.

[1098] Matheson (n 1058) 427.

[1099] Additional Protocol I Article 50(1)

[1100] Geneva Convention III Article 4A(1). Under Article 4A individuals may be combatants despite not being members of the armed forces if they: belong to militia or volunteer corps (under responsible command; wearing a fixed distinctive sign recognisable at a distance, carrying arms openly and acting in accordance with IHL); are members of the armed forces of an unrecognised government; or are inhabitants of a state who spontaneously take up arms on the approach of the enemy.

[1101] Henckaerts and Doswald-Beck 'Rules' (n 542) 3.

[1102] Additional Protocol I Article 51(3); Additional Protocol II Article 13(3); Henckaerts and Doswald-Beck 'Rules' (n 542) 19 (Rule 6).

it has been argued that membership of an OAG renders an individual targetable at any time, not just during acts of DPH.[1103] As it is these categories of targetable individuals—OAG members and civilians directly participating in hostilities—that have been targeted by US drones in Pakistan, Yemen and Somalia, each will be considered here to provide a framework for analysis.

3.2.2.2.1 Organised armed groups

The question of whether members of OAGs[1104] can be targeted by virtue of their membership is contentious. The issue contains two questions, both lacking consensus. The first is whether OAG members are targetable due to their membership. The second is, if they are targetable, how membership is discerned.

With regard to whether members are targetable due to membership, there is little indication within relevant treaties as to the situation during NIAC. Common Article 3 conceives of 'each Party to the conflict' as having 'members of armed forces',[1105] targetable at all times, unless rendered *hors de combat* or having 'laid down their arms'. This suggests that groups constituting the 'armed forces' of a non-state party to a NIAC may be targetable *per se*, in the same manner as state armed forces. Similarly, in reference to its application, Article 1(1) AP II refers to 'dissident armed forces or *other organized armed groups*'.[1106] Thus, despite the absence of the notion of 'combatants' in NIACs, it can be argued that members of OAGs are inherently non-civilian and therefore targetable. If this accurately reflects the law, it expands the targeting potential of states using armed drones against NSAs, by removing entirely the civilian protection otherwise enjoyed by individuals within those groups. Nonetheless, relevant treaty provisions do not, in isolation, provide a firm conclusion, and it is necessary to examine in more detail the relevant provisions of conventional and customary international law.

[1103] As discussed below, in Section 3.2.2.2.1.

[1104] 'Organised armed group' is used in this section instead of NSA to reflect its general usage in literature on this issue.

[1105] Jean S Pictet, *Commentary III on the Geneva Convention Relative to the Treatment of Prisoners of War* (International Committee of the Red Cross 1960) 37.

[1106] Emphasis added.

The drafting history of AP II—which may be consulted when the 'general rule' of treaty interpretation under Article 31 VCLT produces ambiguity,[1107] as is the case here—gives some insight into how states have approached this issue. Article 25 of the original draft AP II defined civilians as 'any person who is not a member of the armed forces' and an amended draft, which expanded this to include OAGs, was subsequently approved.[1108] That this amendment was proposed and supported by multiple state representatives[1109] and then approved[1110] suggests a desire to separate OAG members from civilians. Indeed, the representative of Vietnam sought specifically to restrict civilian status to those playing no part in conflict at all, other than offering relief to the sick and wounded.[1111] The phrase '[c]ertain categories of personnel who could be considered neither as armed forces nor as civilians',[1112] supports the conclusion that OAG members were not to be viewed as civilian. Similar sentiment was expressed by the Australian representative.[1113] These representations—and the absence of objections—point towards an understanding that OAG members are not civilians who directly participate, but a separate, non-civilian category within NIACs.

Ultimately, however, draft Article 25 was deleted from AP II. Instead, a simplified version of the Protocol was adopted, due to draft AP II 'ventur[ing] into domains which [states] considered sacrosanct and inappropriate for inclusion in an international instrument.'[1114] One of these areas was the 'responsibility of [a state's] Government to

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[1107] VCLT Article 32.

[1108] 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) vol IV' (1978) 73.

[1109] ibid 73 (Romania; Brazil) and 74 (Canada); 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) vol XIV' (1978) 42 (Finland; USSR) and 28 (Nigeria).

[1110] Diplomatic Conference (1978) 'vol IV' (n 1108) 73

[1111] Diplomatic Conference (1978) 'vol XIV' (n 1109) 41

[1112] ibid 41 (Vietnam).

[1113] Diplomatic Conference (1978) 'vol IV' (n 1108) 74.

[1114] 'Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) vol VII' (1978) 61 (Pakistan).

maintain law and order',[1115] which could be read as a desire—at least in part—to maintain the civilian character of OAG members and so avoid the possibility that, were they to be viewed as analogous to combatants, states would lose the ability to prosecute for acts during NIAC. Furthermore, despite its apparent support, draft Article 25 was deleted by consensus.[1116] This may imply that states were keen to avoid bestowing special legal status upon insurgents, or that the status of OAG members was ultimately unimportant.

Nevertheless, the discussion surrounding draft Article 25 demonstrates an apparent desire to distinguish OAG members from civilians. Therefore, the drafting of AP II lends some support to the notion that OAG members lose their civilian status and are targetable *per se*. This approach is reflected within the commentary to Article 13(3) AP II, which states that '[t]hose who belong to armed forces *or armed groups* may be attacked at any time.'[1117]

The situation within CIHL is unclear, the ICRC study providing little clarity. Rule 5 defines civilians as those who are not members of the armed forces, asserting that 'practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians'.[1118] The study's definition of combatants, drawn from Article 43(2) AP I, refers solely to armed forces, while the commentary asserts that 'practice is not clear as to the situation of members of armed opposition groups' stating only that they are targetable while directly participating in hostilities, per Article 13(3) AP II.[1119]

Similarly, while Rule 4 defines armed forces as 'all organised armed forces, groups and units' responsible to a party to the conflict, the commentary states that '[f]or purposes of the principle of distinction, it may also apply to State armed forces in [NIAC]',[1120] apparently precluding its application to OAGs. Though it subsequently posits

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[1115] ibid 61 (Pakistan).

[1116] ibid 135.

[1117] ICRC AP Commentary (n 581) para 4789 (emphasis added).

[1118] Henckaerts and Doswald-Beck 'Rules' (n 542) 17.

[1119] ibid 12, Rule 3

[1120] ibid 14.

characteristics that seemingly include OAGs, this is stated specifically in relation to IACs.[1121] Ultimately, the study does not provide concrete guidance as to the extent to which OAG members are targetable other than when they directly participate, suggesting that CIHL remains unclear.

This conclusion is repudiated by commentators: it has been argued that 'even a cursory glance' at state practice demonstrates that states target OAG members even while not directly participating in hostilities.[1122] While there is an absence of clear *opinio juris* (potentially attributable to a desire not to legitimise the acts of OAGs), there has not been international condemnation when members of OAGs who were not directly participating have been targeted,[1123] which can provide 'evidence of acceptance as law'.[1124] However, in a recent study detailing state attitudes regarding *inter alia* the status of OAG members, the Czech respondent suggested that 'membership of organized armed groups should be approximated as much as possible to the affiliation of a regular armed force' and that 'DPH concept should not be used to shield members of organized armed groups'.[1125] In the same study, the respondent for an unnamed state said that 'members of NSA/organized armed groups … are and remain legitimate military targets for the entire duration of the NIAC'.[1126] Therefore, although it is perhaps too much to state definitively that CIHL has crystallised to allow the indefinite targeting of members of OAGs, evidence may support the argument that the process of crystallisation is underway.

The judgments of international courts and tribunals may provide a subsidiary means for determining customary international law,[1127] and the ICTY has asserted that OAG members are not civilians. In *Tadić* the Trial Chamber referred to an individual who

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[1121] Stating that 'a combatant is any person who, under responsible command, engages in hostile acts in an armed conflict on behalf of a party to the conflict.' ibid 15.

[1122] Melzer (2008) (n 623) 317, referring to conflicts in Colombia, Sri Lanka, Uganda, Chechnya and Sudan.

[1123] ibid.

[1124] ILC, Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee (30 May 2016) UN Doc A/CN.4/L.872 para 10.3.

[1125] Dorsey and Paulussen (n 268) 15-6.

[1126] ibid 52.

[1127] ILC UN Doc A/CN.4/L.872 (n 1124) para 13.1.

'cannot be considered a traditional "non-combatant" because he is actively involved in the conduct of hostilities by membership in some form of resistance group'.[1128] Similarly, in *Galić* the Trial Chamber held that 'the term "civilian" is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict.'[1129] In that case, however, the tribunal did not deem it necessary to establish the international or non-international character of the conflict,[1130] so it is not clear whether this interpretation is applicable to NIACs or solely IACs as an aspect of AP I Articles 43 (including 'organized armed forces, groups and units' within the definition of armed forces) and 50(1) (defining civilians as those not belonging to the categories listed in Article 4A, Geneva Convention III).

This approach was adopted in *Blaškić*, where the Appeals Chamber held that '[i]f [an individual] is indeed a member of an armed organization, the fact that he is not armed or in combat … does not accord him civilian status.'[1131] This statement is based on the commentary to Article 43(2) AP I, and relates to a conflict previously defined as international.[1132] Thus, the Tribunal's assertion of the non-civilian character of OAG members relates to those that are an element of the state armed forces, as conceived by Article 43. It is submitted, therefore, that the jurisprudential treatment of the issue of OAGs in NIACs is not conclusive:[1133] it is only the *Tadić* case that deals specifically with NIACs, though that judgment supports the existence of CIHL classifying OAG members as non-civilian.

In the absence of clarity, there is significant debate over the nature of OAGs and the degree to which their members are targetable. On the one hand, membership of OAGs parallels membership of national armed forces, suggesting members are targetable. On the other, with no concept of combatants in the law governing NIACs it seems that members must be civilians directly participating in hostilities, and therefore only

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[1128] *Tadić* (Opinion and Judgment) (n 549) para 639.

[1129] *Galić* (n 1053) para 47.

[1130] ibid para 22.

[1131] *Blaškić* (n 1051) para 114.

[1132] ibid para 123.

[1133] Though cf Dinstein (2015) (n 553) 62.

targetable 'for such time' as they participate.[1134] While, on the surface, this debate appears intractable, there are areas of agreement enabling tentative conclusions as to the state of the law.

Arguments have been made against finding that members of OAGs are targetable, on the basis of legal doctrine and the IHL principle of humanity. From a doctrinal perspective, the absence of a concept of combatants in the IHL of NIAC appears to contradict assertions that such a status may be implied from other treaty provisions (e.g. Article 1(1) AP II),[1135] meaning that, during a NIAC there can only be members of the state's armed forces and civilians. This argument does not render members of OAGs immune from attacks, but grounds their loss of protection in Article 13(3) AP II[1136] rather than creating an ostensibly new legal category.[1137]

An alternative argument is based on the principle of humanity. It has been argued to be preferable not to create a new category of targetable individuals, to avoid gaps in the protection of civilians.[1138] This is a salient point as civilian OAG members who would not normally be targetable unless directly participating in hostilities would become susceptible to attack if their membership resulted in a loss of civilian status. On this view, targeting of this group may well be an arbitrary deprivation of life under applicable IHRL in addition to being unlawful under IHL.

Nonetheless, arguments in favour of OAG members being targetable are predominant within the literature.[1139] Citing the apparent distinction in common Article 3 between

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[1134] Additional Protocol II Article 13(3).

[1135] Lubell (2010) (n 206) 154.

[1136] Anthony Rogers, 'Combatant Status' in Elizabeth Wilmshurst and Susan C Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 115; Lubell (2010) (n 206) 154.

[1137] Lubell (2010) (n 206) 155.

[1138] Rogers (n 1136) 115.

[1139] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16(2) European Journal of International Law 171, 198-200; Anisseh van Engeland, *Civilian or Combatant? A Challenge for the Twenty-First Century* (Oxford University Press 2011) 105; Guénaël Mattraux, *International Crimes and the ad hoc Tribunals* (Oxford University Press

civilians and the armed forces of non-state parties to NIAC, the ICRC has argued that there is an implied mutual exclusivity of civilians and those bearing arms on behalf of a party to a conflict, which removes the civilian status of members of an OAG.[1140] It has been suggested that this approach reflects the 'terminological and conceptual approach of treaty and customary IHL'.[1141] Additionally, the ICRC has stated that maintaining the civilian status of OAG members would 'seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction'.[1142] Further, allowing the targeting of OAG members only while they directly participate, rather than continuously, 'would provide members of such groups with a significant operational advantage', compared to armed forces who may be targeted at any time.[1143]

Taken as a whole, the ICRC's interpretive guidance has been controversial, with many contributors requesting their names be dissociated from it,[1144] but, nevertheless, there were areas of consensus during its drafting. One such area was the non-civilian nature of OAG members (though disagreements as to the specifics of this non-civilian character remained): at the fourth Expert Meeting only one expert rejected the notion that members were not civilian.[1145] The main controversy has been the guidance's claimed imperative on states to capture rather than kill where possible (an aspect of the guidance considered

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2005) 120; Melzer (2008) (n 623) 311; Michael N Schmitt, 'Targeting in Operational Law' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (2nd Edn, Oxford University Press 2015) 273; Sivakumaran (n 544) 360.

[1140] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (International Committee of the Red Cross 2009) 28.

[1141] Nils Melzer, 'The Principle of Distinction Between Civilians and Combatants' in Andrew Clapham and Paoloa Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford Universty Press 2014) 311; see also, Schmitt 'Status of Opposition Fighters' (2012) (n 721) 128.

[1142] Melzer (2009) (n 1140) 28.

[1143] Ibid 72.

[1144] It was ultimately published without participating experts being identified: Michael N Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 Harvard National Security Journal 5, 6.

[1145] For instance, at the fourth Expert Meeting, while disagreements remained as to who within an organised armed group could be targeted, only one expert rejected the overall notion that members of such groups were not civilians (ICRC, 'Summary Report: Fourth Expert Meeting on the Notion of Direct Participation in Hostilities (Geneva, 27-8 November 2006) 20.)

below[1146]), which has no bearing on the categorisation of individuals.[1147] Thus the ICRC guidance in fact represents considerable agreement among experts that OAG membership can result in permissible targeting, without DPH.

In light of the above analysis it is argued that the most convincing understanding of the law is that members of OAGs lose their civilian protection by virtue of their membership, and that this is different from the periodic loss of protection of civilians who sporadically participate. This conclusion is not firm, however, as the law continues to lack clarity and it seems the issue is not yet definitively resolved.

There remains the further controversy of what constitutes membership: status or function. The ICRC guidance does not proffer a blanket authorisation to target all formal OAG members by virtue of their status, instead emphasising their function. The diverse nature of OAGs means that abstract indicators of affiliation are inappropriate to determine membership, so instead the guidance declares that the 'decisive criterion for individual membership' is whether they assume a 'continuous combat function'.[1148] The guidance's emphasis upon function means that OAG members with a supportive role, who 'contribute continuously to the general war effort' are not deemed members according to IHL, and are civilians targetable only when directly participating.[1149] This is argued to include individuals engaged in weapon smuggling and intelligence gathering,[1150] but forbids targeting members who are solely 'political and religious leaders, instigators or militants making up the "political wing" … financial contributors, informants, collaborators, and other service providers.'[1151] Those with a CCF are specifically not

[1146] Section 3.2.2.2.2.4.

[1147] Schmitt 'Interpretive Guidance' (2010) (n 1144) 42.

[1148] Melzer (2009) (n 1140) 33.

[1149] ibid 34.

[1150] ibid 35.

[1151] Melzer (2008) (n 623) 320-1.

civilians and are concordantly targetable 'for the duration of their membership',[1152] which begins with the *de facto* assumption of a CCF.[1153]

The requirement of CCF is narrower than the formal approach to OAG membership and reflects the protective priorities of the ICRC—indeed, the ICRC presents the guidance as its own institutional interpretation of the law, rather than a statement of doctrine.[1154] The concept's narrowness has been controversial, but is justified as being necessary to avoid 'overly flexible criteria of distinction [that] are prone to lead to erroneous and arbitrary targeting … [which] can only be avoided where membership … remains closely tied to the actual function assumed.'[1155] This reasoning appears commensurate with the Article 50(1) AP I imperative that '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian', a principle stated to apply in NIACs.[1156]

While scholars have offered similar functional interpretations[1157] or supported the CCF approach,[1158] others have been critical. Schmitt has rejected the functional account of membership in favour of a formal approach, based on status[1159] in which any active OAG member, regardless of function, may be targeted.[1160] This is based on the potential inequality between state armed forces and OAGs under the CCF approach, in which any member of state armed forces (other than religious and medical personnel) can be

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[1152] Melzer (2009) (n 1140) 73.

[1153] ibid 72; Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42(3) New York University Journal of International Law and Politics 831, 890.

[1154] Melzer (2009) (n 1140) 9.

[1155] Melzer (2014) (n 1141) 309.

[1156] Henckaerts and Doswald-Beck 'Rules' (n 542) 24.

[1157] Kretzmer (2005) (n 1139) 199-200; Marco Roscini, 'Targeting and Contemporary Aerial Bombardment' (2005) 54(2) International and Comparative Law Quarterly 411, 418.

[1158] Dapo Akande, 'Clearing the Fog of War? The ICRC'S Interpretive Guidance on Direct Participation in Hostilities' (2010) 59(1) International and Comparative Law Quarterly 180, 186-7; Heyns and others (n 2) 812-3; Pejić (2014) (n 623) 89.

[1159] Schmitt 'Status of Opposition Fighters' (2012) (n 721)128.

[1160] ibid 133.

targeted, but only specific members of an OAG.[1161] Schmitt's interpretation of the law seeks to redress this imbalance and sees all members of OAGs as targetable.[1162] Schmitt nonetheless concedes that the functional approach has produced 'widespread consensus'.[1163]

Due to the disparity between state armed forces and OAGs, other commentators have rejected the CCF requirement,[1164] or have emphasised a status-based concept of membership that includes formal as well as functional members.[1165] Some have argued that the Article 50(1) presumption of civilian status means that further protection in the form of a CCF requirement is unnecessary[1166] though it is submitted that this claim is unsustainable as the CCF requirement appears more an embodiment, rather than a repetition, of the civilian presumption, as the ICRC guidance is purely an interpretation of the law.

The functional approach coheres more readily with the principle of distinction as it seeks pragmatically to distinguish civilians from non-civilians, erring towards the protection of civilians. Yet, this coherence alone is insufficient to produce a definitive conclusion that this approach comprises the *lex lata* governing OAG membership; however, it is equally impossible to conclude that formal membership is the dominant factor. The positions of the ICRC and its detractors represent conflicting interpretations of a diffuse area of law, rather than concrete determinations of what the law is.

[1161] Schmitt 'Status of Opposition Fighters' (2012) (n 721) 128; Schmitt 'Interpretive Guidance' (2010) (n 1144) 23.

[1162] Schmitt 'Status of Opposition Fighters' (2012) (n 721) 133; Michael N Schmitt and Eric W Widmar, '"On Target": Precision and Balance in the Contemporary Law of Targeting' (2014) 7(3) Journal of National Security Law and Policy 379, 387.

[1163] ibid 387.

[1164] Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 New York University Journal of International Law and Politics 641, 685.

[1165] Geoffrey Corn and Chris Jenks, 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts' (2011) 33(2) University of Pennsylvania Journal of International Law 313, 359; Sivakumaran (n 544) 360-1; Vogel (2010) (n 690) 121.

[1166] Schmitt 'Interpretive Guidance' (2010) (n 1144) 23.

Nevertheless, these interpretations provide tools for the analysis of particular drone strikes and programmes. If a drone strike is against an individual with a CCF in an OAG responsible to a party to an armed conflict, then that individual would likely be a lawful target under any interpretation of IHL, and their targeting would likewise also not violate the right to life. Conversely, if a drone strike targets supporting members with lesser, or non-combat functions, then the lawfulness of that targeting would be less certain, and would depend on the interpretive paradigm through which IHL is applied. As such, lethal targeting on this basis may be more likely considered an arbitrary killing under IHRL. In such circumstances, where lawful justification is weak, the need to examine the facts of individual instances of targeting becomes increasingly important. One outcome of the uncertain nature of the law is that it is not unproblematic to target any OAG member purely by virtue of their formal membership, without an accompanying contextual assessment.

3.2.2.2.2 Individuals directly participating in hostilities

In addition to losing protection as a result of OAG membership, civilians may lose their protection as a result of 'direct participation in hostilities'. This concept, like that of membership of OAGs, is not uncontroversial, therefore it is necessary to consider the contours of the doctrine before it is applied.

Having long been an aspect of IHL,[1167] the loss of civilian protection through DPH is explicated in common Article 3, where protection is limited to those 'taking no *active part* in the hostilities'.[1168] This rule has been reiterated for both IACs and NIACs by the Additional Protocols, each providing protection to civilians 'unless and for such time as they take a direct part in hostilities',[1169] the terms 'active' and 'direct' being synonymous.[1170] This basic rule was described as 'a valuable reaffirmation of existing

[1167] It is implicit in the Lieber Code Article 25.

[1168] (emphasis added).

[1169] Additional Protocol I Article 51(3); Additional Protocol II Article 13(3).

[1170] *Prosecutor v Akayesu*, (Judgment) ICTR-96-4-T (2 September 1998), para 629; ICRC 2016 Commentary (n 535) para 525.

customary rules' during the drafting of Article 51 AP I,[1171] an assertion confirmed by the Israeli Supreme Court in the *Targeted Killings* case[1172] and in the ICRC Study on CIHL,[1173] allowing the conclusion that the rule is binding on all states.

The rule's effect upon those who directly participate is a loss of civilian *protection*, not a loss of civilian *status*,[1174] meaning an individual will not be permanently targetable after participating, but 'for such time as' their participation continues,[1175] in contrast to members of state armed forces and non-state OAGs. This begs questions as to the temporality of the loss of protection, which will be explored below.[1176]

While there is consensus on the existence of the rule and its binding nature, there is less agreement on its detail, with a technical definition proving contentious.[1177] Indeed, the assessment of DPH is carried out on a case-by-case basis,[1178] which does not lend itself to systemic classifications. To provide a framework for the analysis of armed drone targeting, contending interpretations of the rule will be considered. Nevertheless, it is submitted that there is meaningful consensus as to the operation of the rule generally, which breaks down only in hard cases, meaning that it is possible to provide a relatively uncontroversial picture of what comprises DPH.

3.2.2.2.2.1 The notion of 'direct' participation

The commentary to the additional protocols defines 'direct' participation as 'acts of war which by their nature or purpose are likely to cause actual harm to the personnel and

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[1171] 'Diplomatic Conference (1978) 'vol IV' (n 1108) 164 (UK).

[1172] *The Public Committee Against Torture in Israel and others v The Government of Israel and others* [2005] HCJ 769/02, para 30.

[1173] Henckaerts and Doswald-Beck 'Rules' (n 542) 19-24.

[1174] The *Targeted Killings* case (n 1172) para 31.

[1175] Additional Protocol I Article 51(3); Additional Protocol II Article 13(3).

[1176] Section 3.2.2.2.2.2.

[1177] Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflicts* (Oxford University Press 2015) 90; Henckaerts and Doswald-Beck 'Rules' (n 542) 22.

[1178] *Prosecutor v Struga* (Appeals Chamber Judgment) IT-01-42-A (July 17, 2008), para 178; The *Targeted Killings* case (n 1172) paras 34 and 39.

equipment of the enemy armed forces', and maintains a 'clear distinction between direct participation in hostilities and participation in the war effort.'[1179] The commentary envisages a 'sufficient causal relationship between the act of participation and its immediate consequences.'[1180] The need for conduct intentionally to cause, or likely cause, actual harm to personnel or equipment has been affirmed in international jurisprudence,[1181] as has the fact that this is distinct from participation in 'the war effort'.[1182] This is reflected in the ICTY's distinction between direct and 'indirect' participation. Examples of the former, which is not limited to combat activities, are:

> 'bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces.'[1183]

Conversely, the Tribunal held that indirect participation includes:

> 'participating in activities in support of the war or military effort of one of the parties to the conflict, selling goods to …, expressing sympathy for the cause of …, failing to act to prevent an incursion by …, [or] accompanying and supplying food to one of the parties to the conflict, gathering and transmitting military information, transporting arms and munitions, and providing supplies, and providing specialist advice

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[1179] ICRC AP Commentary (n 581) paras 1944-5; see also IIHL Manual (n 622) para 1.1.2.b.3.

[1180] ICRC AP Commentary (n 581) para 4787.

[1181] *Prosecutor v Fofana and Kondewa* (Judgment) SCSL-04-14-T (2 August 2007), para 135; *Galić* (n 1053) para 48; *Prosecutor v Milošević* (Trail Chamber Judgment) IT-98-29/1-T (12 December 2007) para 947.

[1182] *Milošević* (Trail Chamber Judgment) (n 1181) para 947.

[1183] *Struga* (n 1178) para 177.

> regarding the selection of military personnel, their training or the correct maintenance of the weapons.'[1184]

In the *Targeted Killings* case, the Israel Supreme Court broadly agreed with these examples, though with some deviation,[1185] holding that servicing weapons would be DPH.[1186] In fact, this difference is illusory, as the ICTY referred only to 'specialist advice regarding … the correct maintenance of the weapons',[1187] which is a step removed from actual services and therefore not 'direct'. Importantly, those who send fighters to undertake combat activities, though removed from the act itself, were also held to be directly participating and lost their civilian protection.[1188]

In its interpretive guidance, the ICRC identified three elements to be satisfied cumulatively to determine DPH, an approach that 'has been widely accepted'.[1189] First, an 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)'.[1190] Second, 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)'.[1191] Finally, '[t]he 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).'[1192]

[1184] ibid para 177.

[1185] The *Targeted Killings* case (n 1172) paras 34-5.

[1186] ibid para 35.

[1187] *Struga* (n 1178) para 177.

[1188] The *Targeted Killings* case (n 1172) para 37.

[1189] Schmitt and Widmar (n 1162) 387.

[1190] Melzer (2009) (n 1140) 46.

[1191] ibid 46.

[1192] ibid.

Despite providing a useful framework for targeting analysis, the three elements have been subject to criticism, though, notably, of the experts who participated in its drafting, two-thirds were comfortable to remain associated with the guidance.[1193]

The 'threshold of harm' expands upon previous approaches, including activities against protected persons, and activities need only 'adversely affect' military operations, rather than 'cause actual harm' to personnel and equipment,[1194] an expansion that has been welcomed.[1195] Nonetheless, the ICRC's approach has been described as under-inclusive for focusing on *harm* to an adversary, rather than *benefit* to the party carrying out the activity (for instance, undertaking defensive repairs at a base).[1196] Melzer has responded that examples of activities benefiting one party often adversely affect the other *per se*; for example, defensive repairs adversely affect the military operations of an enemy by frustrating their attack.[1197] It would seem that this critique is, on the whole, subsumed within the ICRC approach by considering the benefit to one party in terms of the adverse effect it has upon the other, as proposed by Melzer. There may be instances of activity that fall within the penumbra of this notion of harm—for example, the production of IEDs,[1198]—but such hard cases will ultimately be settled through factual examination on a case-by-case basis, rather than through systemic categorisation.

'Direct causation', the second element of the ICRC approach, is derived from the term '*direct* participation', which implies that while direct participation will end civilian protection, *indirect* participation will not.[1199] It is therefore the fulcrum of the notion of DPH. The distinction mirrors that between DPH and participation in the general war

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[1193] Crawford (2015) (n 1177) 87.

[1194] ICRC AP Commentary (n 581) para 4787; *Fofana* (n 1181) para 135; *Galić* (n 1053) para 48; *Milošević* (Trail Chamber Judgment) (n 1181) para 947.

[1195] Akande (2010) (n 1158) 187.

[1196] Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: the Constitutive Elements' (2010) 42(3) New York University Journal of International Law and Politics 697, 718-20; Schmitt 'Interpretive Guidance' (2010) (n 1144) 27.

[1197] Melzer (2010) (n 1153) 859.

[1198] Considered below, text from n 1207 to n 1214.

[1199] Melzer (2009) (n 1140) 51.

effort,[1200] and is present in the IIHL Manual.[1201] The ICRC posited that direct causation manifests either where an individual's act brings about harm 'in one causal step'[1202] or, if the individual acts as part of a group, where their act 'constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.'[1203] A more expansive understanding of direct causation appears in the US *Law of War Manual*, which refers to actions that are 'an integral part of combat operations', but also to those 'that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations',[1204] providing scope for the categorisation of activities as DPH.

Under the ICRC interpretation of direct causation, activities sustaining a war effort but with only indirect impact upon hostilities are not DPH, unless they form 'an *integral* part of a *specific* military operation designed to directly cause the required threshold of harm.'[1205] This approach can be discerned in the Harvard *Manual on International Law Applicable to Air and Missile Warfare*, which refers to activities in support of '*specific* air or missile combat operations' and '*specific* requirements of a particular air or missile combat operation.'[1206] Under this interpretation, the ICRC has argued that activities such as providing supplies and services to a party to a conflict, designing, producing and transporting weapons (including the assembly and storage of IEDs), or recruiting and training personnel, though war sustaining activities, are not DPH.[1207] Conversely, under the more expansive US designation of activities 'that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations', the assembly and storage of weapons has been expressly identified as DPH, albeit with the caveat of 'close geographic or temporal proximity to their use.'[1208]

[1200] ICRC AP Commentary (n 581) para 1944-5; *Milošević* (Trail Chamber Judgment) (n 1181) para 947.

[1201] IIHL Manual (n 622) 4.

[1202] Melzer (2009) (n 1140) 53.

[1203] ibid 54-5.

[1204] 'Law of War Manual' (US Department of Defense, 2015) 224-5.

[1205] Melzer (2009) (n 1140) 53 (emphasis added).

[1206] HPCR Manual (n 1097) Rules 29(vii) and (xii) (emphasis added).

[1207] Melzer (2009) (n 1140) 53-4.

[1208] Department of Defense Manual (n 1204) 228.

The ICRC's approach to direct causation has been criticised as overly restrictive, as activities such as gathering intelligence pursuant to military operations may fall outside DPH by affecting hostilities in more than a single causal step.[1209] Commentators have made particular reference to IED manufacturers, arguing that this is distinct from civilians working in a munitions factory (generally agreed not to be DPH, despite the clear link to harm caused in hostilities)[1210] due to an IED manufacturer's 'knowledge of how, where, and when the ammunition will be used'.[1211] It is argued that the work of those at a munitions factory 'relates to capacity-building rather than actual hostilities,'[1212] though it is difficult to see how this actually differs from IED manufacturing.[1213] Further, this argument ignores the fact that, if those manufacturing IEDs are linked to hostilities in other ways, they may become targetable anyway—for instance, sending individuals out to plant IEDs. It is in this manner that such individuals *would* become different to munitions factory workers. This approach parallels that in the US Manual and the requirement for 'close geographic or temporal proximity to their use',[1214] and reflects the finding of the Israel Supreme Court that sending others out to commit an attack was DPH.[1215]

In response, Melzer has suggested that the argument (that the ICRC's direct causation is overly restrictive) is misplaced, and that in fact activities such as intelligence gathering are DPH as, 'in the case of collective operations, the resulting harm does not have to be directly caused … by each contributing person individually, but only by the collective

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[1209] Schmitt 'Deconstructing' (2010) (n 1196) 728.

[1210] ICRC, 'Summary Report: Fifth Expert Meeting on the Notion of Direct Participation in Hostilities (Geneva 5-6 February 2008) 63.

[1211] Yoram Dinstein, 'Direct Participation in Hostilities' (2013) 18 Tilburg Law Review 3, 11; Schmitt 'Deconstructing' (2010) (n 1196) 731.

[1212] ibid 11.

[1213] It is important to note that even if protected as civilians, IED manufacturers are not invulnerable. It is simply the case that their injury or deaths will need to be considered in a proportionality calculation, as a store of IEDs is likely to be a legitimate military objective as they 'make an effective contribution to military action and [their] total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage' (Additional Protocol I Article 52(2)).

[1214] Department of Defense Manual (n 1204) 228.

[1215] The *Targeted Killings* case (n 1172) para 37.

operation as a whole.'[1216] It is submitted that the approach of the ICRC is not as narrow as its critics maintain: it allows a wide range of activities to constitute DPH, but only where they directly cause harm, reflecting the emphasis within treaty provisions that participation must be both 'direct', and in 'hostilities', which is 'narrower than being involved in the conflict in general.'[1217]

In terms of future harm, the ICRC has asserted that 'direct causation must be determined by reference to the harm that can *reasonably be expected to directly result* from a concrete act or operation'.[1218] This is accepted by critics of the ICRC's guidance, who have suggested that acts such as driving ammunition to the front line and planning combat missions are DPH.[1219] On this basis, a US Military Commission held that driving surface-to-air missiles in a car constituted DPH due to the 'temporal and spatial proximity to … ongoing combat operations'.[1220] This was despite the fact that the missiles 'were in their carrying tubes, and did not have the launchers or firing mechanisms with them.'[1221]

The final requirement within the ICRC's interpretation of DPH is the 'belligerent nexus'; that the act directly causing harm is done 'in support of a party to an armed conflict and to the detriment of another',[1222] deriving from the treaty definition of 'attacks' as being 'against the adversary',[1223] and 'injuring the enemy' as fundamental to 'hostilities'.[1224] Though less controversial than the preceding elements of the ICRC guidance, Schmitt has argued that the belligerent nexus should not be sought in tandem with the threshold of harm, meaning that an individual directly participates if their conduct harms one party *or* benefits another, rather than requiring both.[1225] This would allow individuals to be

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[1216] Melzer (2010) (n 1153) 866-7.

[1217] Akande (2010) (n 1158) 188.

[1218] Melzer (2009) (n 1140) 55 (emphasis added).

[1219] Dinstein (2013) (n 1211) 8; Schmitt 'Deconstructing' (2010) (n 1196) 724.

[1220] *US v Hamdan* (On Reconsideration on Motion to Dismiss for Lack of Jurisdiction) (19 December 2007) Military Commission, reproduced in (2009) 1 Military Commission Reporter 22, 27.

[1221] ibid 25.

[1222] Melzer (2009) (n 1140) 58.

[1223] Additional Protocol I Article 49(1).

[1224] Hague Convention IV Regulations: Article 22.

[1225] Schmitt 'Deconstructing' (2010) (n 1196) 736; Schmitt 'Interpretive Guidance' (2010) (n 1144) 34.

targeted who seek to harm one party to a conflict while not intending to assist the other. It is submitted that this situation is somewhat artificial because, as Schmitt concedes, generally during armed conflict, '[t]o the extent that one side is harmed, the other benefits'.[1226]

The ICRC's three elements of DPH are controversial in terms of their scope, but not their existence. They reflect jurisprudence, legislation and commentary, and appear to represent a coherent distillation of the law into an analytical framework. The controversies as to the operation of the framework generally are confined to its periphery, emphasising the debate that can be had over hard cases. Nevertheless, DPH is a case-by-case assessment, meaning that hard cases need not be determined in advance, but after an examination of relevant facts. It may be that while one IED manufacturer maintains their civilian protection, another does not due contextual differences. Therefore, it is submitted that the ICRC's three elements of DPH should be employed, and so they will be used during the substantive analysis of drone strikes.

3.2.2.2.2.2 The temporality of direct participation in hostilities

The loss of protection arising from DPH is temporary, evidenced by the term 'for such time as' in the APs.[1227] This is left undefined, but the commentary states that a civilian loses protection 'only during such participation' and that protection is regained '[o]nce [they] cease[] to participate',[1228] when they 'no longer present[] any danger for the adversary',[1229] an understanding included in the ICRC CIHL study.[1230] The commentary additionally asserted, based on the drafting history of the APs, that DPH extends to preparation for and return from combat.[1231] While the breadth of this extension is subject

[1226] Schmitt 'Interpretive Guidance' (2010) (n 1144) 34.

[1227] Additional Protocol I Article 51(3); Additional Protocol II Article 13(3).

[1228] ICRC AP Commentary (n 581) para 1944.

[1229] ibid para 4789.

[1230] The *Targeted Killings* case (n 1172) para 38; Henckaerts and Doswald-Beck 'Rules' (n 542) 19.

[1231] ICRC AP Commentary (n 581) para 1943.

to debate[1232] it is clear that protection is not lost permanently after an act of DPH: an individual may not 'be attacked for … hostilities … committed in the past.'[1233]

The temporality of DPH is unclear. Dinstein advocates a broad interpretation, including 'preparatory measures' as well as deployment to and return from an act of DPH.[1234] The inclusion of preparatory measures is also proposed by the ICRC, where they are 'so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act.'[1235] Related to the distinction between direct and indirect participation, the ICRC suggests that 'preparatory measures aiming to establish the general capacity to carry out unspecified hostile acts' are not considered DPH.[1236] Consequently, the ICRC includes, within DPH, deployment to and return from a specific act of DPH, beginning with 'physical displacement' and ending with 'physical separat[ion] from the operation' where these remain integral to the overall operation.[1237] This has been criticised for being overly narrow: Boothby has suggested preparatory acts prior to deployment be considered DPH and, therefore, so too should deployment to those preparatory acts.[1238] Melzer has responded that, while the inclusion of gradually evermore remote preparatory acts should not be classed as DPH *per se*, they will be where integral to a specific act of hostilities.[1239] Boothby's approach is therefore similar to that of the ICRC, while arguing that the 'integral' requirement 'inappropriately restrict[s] the scope of DPH.'[1240] The criteria under which acts preparatory to DPH can be included within the scope of the concept without resort to the 'integral' requirement is unclear, and Boothby does not provide an alternative. Consequently, it is submitted that, in fact, the 'integral' requirement provides a framework in which Boothby's increased scope of DPH can be better realised, providing the flexibility to include temporally remote activities.

[1232] Explored below, in this section.

[1233] The *Targeted Killings* case (n 1172) para 39.

[1234] Dinstein (2015) (n 553) 60.

[1235] Melzer (2009) (n 1140) 65-6.

[1236] ibid 66 (emphasis removed).

[1237] ibid 67-8.

[1238] William Boothby, '"And for Such Time as": The Time Dimension to Direct Participation in Hostilities' (2010) 42(3) New York University Journal of International Law and Politics 741, 751.

[1239] Melzer (2010) (n 1153) 882-3.

[1240] Boothby (2010) (n 1238) 752.

More controversial is the situation of individuals who directly participate on multiple occasions, interspersed with periods of non-participation, and the question of whether these individuals are targetable on a continuous basis or only during periods of specific DPH. The phrase 'for such time as' in the Additional Protocols[1241] suggests protection will be lost only during instances of DPH, meaning it is regained during intervals between acts. This notion is seemingly reiterated by the Commentary to the Protocols, which holds that protection returns after DPH ends, as a civilian 'no longer presents any danger for the adversary.'[1242] The ICTY has asserted that participation may be 'intermittent and discontinuous' necessitating examination of the factual situation during the time DPH is claimed, rather than focusing on previous conduct.[1243] Similarly, the Israel Supreme Court has held that an individual who participates 'sporadically' regains their protection between acts of DPH and may not be targeted due to past participation.[1244]

The removal then restoration of protection due to recurrent participation—the 'revolving door' of protection—was included in the ICRC guidance, which described it as 'an integral part, not a malfunction, of IHL',[1245] though the reports on the expert meetings attest to the acrimony surrounding it.[1246] Many commentators have rejected the revolving door of protection. Some argue that, before regaining protection, individuals must 'opt out of hostilities in an unambiguous manner', which is suggested to represent better the balance in IHL between military advantage and humanity as well as reflecting 'military common sense'.[1247] Likewise, Dinstein favours a permanent loss of protection for

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[1241] Additional Protocol I Article 51(3); Additional Protocol II Article 13(3).

[1242] ICRC AP Commentary (n 581) para 4789.

[1243] *Prosecutor v Strugar* IT-01-42-A, Appeals Chamber Judgment (July 17, 2008), para 178.

[1244] The *Targeted Killings* case (n 1172) para 39.

[1245] Melzer (2009) (n 1140) 70.

[1246] ICRC, 'Summary Report: Second Expert Meeting on the Notion of Direct Participation in Hostilities' (Geneva, 25-6 October 2004) 22-3; ICRC, 'Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities' (Geneva 23-5 October 2005) 59-65; Expert Meeting 4th Report (n 1145) 64-8; Expert Meeting 5th Report (n 1210) 33-43.

[1247] Schmitt 'Status of Opposition Fighters' (2012) (n 721) 136-7. See also, Richard D Rosen, 'Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity' (2009) 42(3) Vanderbilt Journal of Transnational Law 683, 771.

recurrent DPH.[1248] A similar approach adopts the presumption that periods between acts of DPH are better understood as preparation for future hostile acts, bridging the gaps between loss of protection, which will only be regained after 'a sufficient act of disengagement or a sufficient period of non-participation since the last [hostile] act'.[1249] Despite arguments of 'military common sense', these views do not seem to accord with the emphasis on temporality within the law: the phrase 'for such time' connotes a bounded temporality during which protection is lost, a conclusion apparently confirmed by jurisprudence and the Commentary to the APs.[1250]

The revolving door approach is open to abuse, but this risk is reduced by a functional understanding of OAG membership. It has been asserted that a functional assessment of membership of an OAG (such as CCF) combined with an approach to DPH in which protection is regained between hostile acts would not drastically reduce the number of targetable individuals, compared with an approach emphasising continuous DPH, and is preferable for being 'more in keeping with the spirit of the direct participation rule.'[1251] This is a view with much support,[1252] particularly among those involved in drafting the ICRC guidance, despite the rancour surrounding its adoption.[1253] If an individual regularly conducts hostile acts in support of an OAG they will 'be regarded as a *de facto* member assuming a continuous combat function for that force or group' and lose their civilian protection.[1254] The Israel Supreme Court explicitly stated that 'the "revolving door" phenomenon … is to be avoided'[1255] but its characterisation of individuals who sporadically participate and regain protection juxtaposed with those who participate

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[1248] Dinstein (2015) (n 553) 63.

[1249] Boothby (2010) (n 1238) 757.

[1250] Text from n 1242 to n 1244.

[1251] Akande (2010) (n 1158) 190.

[1252] Chesney (n 816) 49; Trevor A Keck, 'Not All Civilians are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare' (2012) 211 Military Law Review 115, 151; Sivakumaran (n 544) 267 (although Sivakumaran advocates a *de jure* and *de facto* approach to membership, he specifies that it is the *de facto* aspect that mitigates the revolving door aspect of DPH).

[1253] Expert Meeting 4th Report (n 1145) 65; Expert Meeting 5th Report (n 1210) 41-2.

[1254] Melzer (2010) (n 1153) 890.

[1255] The *Targeted Killings* case (n 1172) para 40.

repeatedly, with pauses 'to rest and prepare',[1256] seems to match the ICRC's typology of civilians who directly participate and OAG members with a CCF. It is therefore submitted that the *Targeted Killing* case supports recurrent protection under the revolving door approach.

Overall, it is submitted that the correct view is that citizens lose protection while they undertake activities forming an integral part of a hostile act directly causing harm or affecting the military operations of an adversary, in support of a party to a conflict. Unless the individual is a functional member of an OAG, they will regain their protection once they cease these activities. It has been repeatedly stressed that assessments of DPH must be made on a case-by-case basis,[1257] so the lack of consensus in the abstract does not greatly hamper concrete assessments of DPH.

3.2.2.2.2.3 Situations of doubt as to DPH

When considering DPH, it seems a logical consequence of the principle of distinction that, in cases of doubt whether an individual's conduct is DPH, they are presumed to maintain their civilian protection. This is clear in IACs, during which Article 50(1) AP I holds that '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.' This provision is not replicated in AP II, however the commentary to Article 13(3) asserts that the presumption applies in NIACs.[1258]

The ICRC CIHL study does not state that the civilian presumption is a customary rule applicable in NIACs, but that it would be 'justified'.[1259] However, Article 57(2)(a)(i) AP I provides that those conducting an attack must 'do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects … and that it is not prohibited by the provisions of this Protocol to attack them'. This has been held to be

[1256] ibid para 40.

[1257] ibid para 34; Eric Christensen, 'The Dilemma of Direct Participation in Hostilities' (2010) 19(2) Journal of Transnational Law and Policy 282, 288; Corn and Jenks (n 1165) 341; 'The Commander's Handbook on the Law of Naval Operations' (US Navy, July 2007) para 8.2.2; Melzer (2009) (n 1140) 42.

[1258] ICRC AP Commentary (n 581) para 4789.

[1259] Henckaerts and Doswald-Beck 'Rules' (n 542) 24.

CIHL, applying to both IACs and NIACs,[1260] and from this one can derive a civilian presumption in cases of doubt: the verification that an objective is *not* civilian suggests a starting presumption that it *is* civilian, which requires disproving. This supports a finding that there is a civilian presumption within NIACs.

The existence of a presumption of civilian protection in both IACs and NIACs appears to have inspired the Israel Supreme Court to hold that, when in doubt 'careful verification is needed before an attack' and that '[t]he burden of proof on the attacking army is heavy'.[1261] In its guidance, the ICRC held that a civilian presumption exists in situations of doubt, to 'avoid the erroneous or arbitrary targeting of civilians entitled to protection'.[1262] In the alternative, Schmitt has suggested an inverted presumption in which situations of doubt are presumed to be DPH, the reasoning being that for a civilian's behaviour to be doubtful, they must already be participating 'in a manner direct enough to raise questions.'[1263] This appears entirely unjustified in law, contradicts the principle of distinction, and targeting on this basis would violate the right to life. It is based on the assumption that a broad interpretation will encourage civilians to avoid conflict, support for which is derived from a book chapter, also written by Schmitt.[1264]

It is submitted that there is a strong case in favour of there being a presumption of civilian status in cases of doubt. As will be demonstrated below[1265] this has important implications for the use of drones when strikes are undertaken on the basis of the behaviour rather than known identity of the individual targeted.

[1260] ibid 55-6.

[1261] The *Targeted Killings* case (n 1172) para 40.

[1262] Melzer (2009) (n 1140) 76.

[1263] Schmitt 'Deconstructing' (2010) (n 1196) 738.

[1264] ibid 738.

[1265] n 1535 and n 1543.

3.2.2.2.2.4 The possible imperative to capture rather than kill

Finally, it is necessary to consider whether the above analytical framework of DPH results in an unrestrained right to target an individual with lethal force, or whether there is a further restriction in the form of a duty to capture rather than kill, where possible.

The notion that there exists a preference for capture draws on the emphasis in the Hague Convention IV that a belligerent's right to 'adopt means of injuring the enemy is not unlimited',[1266] reiterated more recently in AP I, which states that 'the right of the Parties to the conflict to choose methods or means of warfare is not unlimited'.[1267] Elsewhere it has been argued that if circumstances are such that an arrest is possible, the regime of IHRL will apply,[1268] and so resorting immediately to lethal force would likely breach the right to life. In the *Targeted Killings* case the Israel Supreme Court took the explicit view that 'a civilian taking a direct part in hostilities cannot be attacked … if a less harmful means can be employed.'[1269]

The ICRC guidance presents a similar approach, based on the fact that, while IHL removes the protection of a direct participant, it does not specifically provide a right for states to respond with lethal force, though the guidance acknowledged that the absence of this right does not imply an imperative to use non-lethal alternative before using lethal force.[1270] Indeed, Melzer has confirmed elsewhere that there is no *obligation* to capture rather than kill, there is simply an absence of an 'express "right to kill"' in IHL.[1271]

The ICRC grounds its argument in principle rather than rules: the principle of military necessity allows only such force as is necessary to bring about the submission of an adversary with 'the minimum expenditure of life and resources'.[1272] The principle of

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[1266] Hague Convention IV Article 22.

[1267] Additional Protocol I Article 35(1).

[1268] Kretzmer (2009) (n 1013) 42.

[1269] The *Targeted Killings* case (n 1172) para 40.

[1270] Melzer (2009) (n 1140) 78.

[1271] Nils Melzer, 'Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare' (Directorate-General for External Policies of the Union, 2013) 28.

[1272] Joint Service Manual (n 550) 22.

humanity, the corollary of military necessity, prohibits the infliction of death or injury beyond that which is necessary to accomplish legitimate military purposes.[1273] Consequently, force available to a belligerent party is that which is necessary, rather than that which is not expressly prohibited.[1274] Support comes from the ICJ's reference to IHL principles limiting the use of a weapon when it produces 'a harm greater than that unavoidable to achieve legitimate military objectives',[1275] and the Commentary to the APs, which claims that military necessity 'can never justify a degree of violence which exceeds the level … strictly necessary to ensure the success of a particular operation in a particular case.'[1276]

The possibility that capture operations should be favoured has received much criticism. It has been argued that the absence of supportive treaty or customary law renders the position either unwarranted and unsustainable,[1277] or wrong.[1278] Melzer has argued in response that this is not fatal due to the notion's avowed basis in IHL principle rather than rules,[1279] and its apparent adoption by the Israel Supreme Court.[1280] Nevertheless, it has been argued that it is unclear whether the presence of the obligation in the *Targeted Killings* case was in fact based on IHL,[1281] reducing the normative impact of the decision in terms of IHL.

Consequently, the approach favouring capture rather than kill operations seems more to be a specific interpretation of the IHL principles of military necessity and humanity rather than a natural consequence of them. The interpretation is highly restrictive of states' abilities to conduct forcible operations and does not appear supported by doctrine. The

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[1273] ibid 23.

[1274] Melzer (2009) (n 1140)79.

[1275] *Nuclear weapons* (n 355) para 78.

[1276] ICRC AP Commentary (n 581) para 1395.

[1277] Akande (2010) (n 1158) 191-2.

[1278] W Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42(3) New York University Journal of International Law and Politics 769, 806; Dinstein (2015) (n 553) 59.

[1279] Melzer (2010) (n 1153) 907; Pejić (2014) (n 623) 91.

[1280] Melzer (2010) (n 1153) 912.

[1281] Akande (2010) (n 1158) 191.

principle of military necessity is present in numerous military manuals but is generally interpreted as allowing states to use force within the scope of IHL to achieve a legitimate military aim[1282] rather than actively restricting the use of force. By requiring that force is appropriate to achieve legitimate military aims, military manuals ultimately provide a wide spectrum for uses of force. Official US guidance on targeted killing demonstrates a preference for capture but this arises out of an institutional desire to prosecute, rather than a perceived obligation under international law.[1283]

It appears, therefore, that there is no specific obligation upon states to capture rather than kill but a principle-based argument that can be made in favour of such a practice. Though this may transmute into a rule of customary international law, it cannot be said to have done so yet. Thus, when an individual directly participates in hostilities according to the analytical matrix depicted above, states are permitted to use lethal force against them with no extra restriction beyond those arising out of IHL rules emphasising military necessity and humanity.

3.2.3 US drone strikes and targeting within NIAC

Having assessed relevant IHL on targeting, and its contested parameters, this will be applied to US drone strikes. This is done with a view to assessing the degree to which drone strikes may violate or adhere to IHL, the outcome of which can be that drone strikes violate IHL *per se*, that they are prone to violations of IHL, that they predominantly adhere to IHL, or that their use ought to be condoned during armed conflict due to their ability to adhere to IHL.

[1282] NATO, *Glossary of Terms and Definitions* (North Atlantic Treaty Organization 2017) 73; Joint Service Manual (n 550) 22; Department of Defense Manual (n 1204) 52.

[1283] 'Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities' (US Department of Justice, 22 May 2013) https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets (Presidential Policy Guidance) 1 and 11.

There is a tendency in the literature (as opposed to factual assessments carried out by international organisations) towards analysing the IHL implications of drones in the abstract. This is important, but it fails to consider the context in which specific strikes are undertaken. As will be shown, drone strikes are better considered as a 'method' of warfare, rather than a 'means', which necessitates them being viewed more as a *process* than a *thing*. Though the process of a drone strike can be assessed in the abstract (for instance, the ability of a drone's sensor to distinguish between civilians and combatants), it cannot be fully understood without taking into account the surrounding facts exemplifying *how* drone strikes are used. Therefore, in addition to abstract analysis, this section will assess concrete examples of drone strikes. It is not possible to consider every strike that has been undertaken, both due to constraints of space and because the classified nature of most strikes means that their factual contexts are unclear.

This section will proceed by explaining why it is necessary to consider drone strikes as a method rather than a means of warfare, before considering their abstract lawfulness under IHL. It will then focus on the two key types of drone targeting ('personality strikes' and 'signature strikes') and consider whether these adhere to IHL. Case-study examples will be considered to provide contextual analysis. Finally, drone strikes will be considered against the related IHL rules on precaution.

3.2.3.1 Abstract lawfulness: the means/method distinction

When assessing the IHL lawfulness of drone strikes, the analysis may initially be split between the lawfulness of drones as things in and of themselves, and consideration of the lawfulness of the way they are used. This reflects the dichotomy in IHL between 'the means of warfare and the manner in which they are used'.[1284] This means/method dichotomy is explicit throughout AP I,[1285] though not AP II. Nonetheless, it was recognised in the commentary to Article 13 AP II, which was asserted to 'impl[y] an

[1284] ICRC, 'A guide to the legal review of new weapons, means and methods of warfare: measures to implement Article 36 of Additional Protocol I of 1977' (2006) 88(864) International Review of the Red Cross 931.

[1285] Additional Protocol I Articles 35, 36, 51(4)(b), 51(4)(c), 51(5)(a), 55, 57(2)(a)(ii).

absolute prohibition of certain *methods* of combat'.[1286] Furthermore, it has been held to be CIHL, applicable to NIACs.[1287] The means/methods dichotomy therefore requires analysis of both these aspects of drone strikes.

If drone strikes violate IHL as a *means* of warfare, then their use would be unlawful *per se*, it being impossible to use them in accordance with IHL. This argument lacks support and appears not generally accepted. Drones are a platform from which weapons are deployed, they are not weapons themselves, meaning their lawfulness as a means of warfare is divorced from the manner of their use. To illustrate this, if a drone were to fire a missile that constituted a chemical weapon, the missile would be unlawful,[1288] *inter alia* because it would represent a means of combat unable to be directed at a specific military objective, and its use would constitute an indiscriminate attack.[1289] However, the drone itself would not be unlawful *per se*, in the same way that a tank would not be if it had fired the missile. Alston has made this point, stating that 'a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles.'[1290] This is a common understanding;[1291] that

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[1286] ICRC AP Commentary (n 581) para 4759.

[1287] Henckaerts and Doswald-Beck 'Rules' (n 542) 57-8, Rule 17.

[1288] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 13 January 1993, entered into force 29 April 1997) 1975 UNTS 45 Article 1.

[1289] Additional Protocol I Article 51(4)(b).

[1290] UNHRC UN Doc A/HRC/14/24/Add.6 (n 298) para 79.

[1291] Casey-Maslen (n 2) 606; Oren Gross, 'The New Way of War: Is there a Duty to Use Drones?' (2015) 67 Florida Law Review 1, 26; Molly McNab and Megan Matthews 'Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law' (2011) 39(4) Denver Journal of International Law and Policy 661, 691; Schmitt 'Drone Attacks' (2010) (n 2) 322; David Turns, 'Droning on: Some International Humanitarian Law Aspects of the Use of Unmanned Aerial Vehicles in Contemporary Armed Conflicts' in Caroline Harvey, James Summers and Nigel White (eds), *Contemporary Challenges to the Laws of War* (Cambridge University Press 2014) 199-201; Ryan J Vogel, 'Droning On: Controversy Surrounding Drone Warfare is not Really About Drones' (2012) 19 Brown Journal of World Affairs 111, 112.

a weapon or weapon system may be used indiscriminately does not render it inherently unlawful.[1292]

Nonetheless, Shah has argued that 'there are certain distinct qualities and properties inherent in how [drones] have to function in order to be militarily efficacious that render them forbidden *per se*.'[1293] These are said to be an inability to distinguish combatants from civilians (akin to landmines), the fact that they engage in prolonged surveillance, the automated nature of some target identification and the distance at which they are operated.[1294] However, these are all better considered as aspects of the *manner* in which drones are used, rather than as inherent characteristics of drones; therefore, in this writer's view, Shah is mistaken in suggesting that these characteristics render drones unlawful *per se*. Consequently, drones are not inherently contrary to IHL as a means of warfare, and so the question of the lawfulness of their use rests on the way they are employed.

In assessing the lawfulness of methods of drone strikes, they must be considered as a process, encompassing target acquisition, the determination that the target is lawful and the kinetic strike. Therefore, it is necessary to consider the approaches to targeting adopted, the manner in which a drone's capabilities are employed during strikes, and the extent to which these have adhered to IHL. This section will therefore consider the process of drone strikes in the abstract, before moving on to consider the specific methods of drone strikes carried out by the US.

[1292] Laurie R Blank, 'After "Top Gun": How Drone Strikes Impact the Law of War' (2012) 33(3) University of Pennsylvania Journal of International Law 675, 687.

[1293] Shah (2015) (n 4) 164.

[1294] ibid 166.

The only US drones capable of conducting lethal strikes are the MQ-1B Predator,[1295] (retired in March 2017[1296]) the MQ-1C Gray Eagle,[1297] and the MQ-9 Reaper.[1298] The USAF have used Predator and Reaper drones for lethal operations in Pakistan,[1299] Yemen[1300] and Somalia,[1301] thus it is necessary to consider their characteristics through the prism of IHL. The Gray Eagle is operated by the Army and is confined to Iraq,[1302] and so will not be considered here.

The Predator, the US's first multi-mission drone capable of lethal strikes, utilises an advanced on-board 'Multi-Spectral Targeting System' for identifying targets (and surveillance), which comprises 'an infrared sensor, color/monochrome daylight TV camera, image-intensified TV camera, laser designator and laser illuminator.'[1303] The

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[1295] 'MQ-1B Predator' (US Air Force, 23 September 2015) https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104469/mq-1b-predator/.

[1296] Edward Helmore, 'US Retires Predator Drones After 15 Years that Changed the "War on Terror"' *The Guardian* (13 March 2017) https://www.theguardian.com/world/2017/mar/13/predator-drone-retire-reaper-us-military-obama.

[1297] 'MQ-1C Gray Eagle Unmanned Aircraft System' (US Army) http://asc.army.mil/web/portfolio-item/aviation_gray-eagle-uas/.

[1298] 'MQ-9 Reaper' (US Air Force, 23 September 2015) https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/.

[1299] Greg Miller and Julie Tate, 'CIA Shifts Focus to Killing Targets' *Washington Post* (1 September 2011) https://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html?utm_term=.911db0c0c7aa.

[1300] Spencer Ackerman, 'Massive US Airstrike in Yemen Kills "Dozens" of People, Pentagon Says' *The Guardian* (New York, 23 March 2016) https://www.theguardian.com/world/2016/mar/22/us-airstrike-yemen-dozens-dead-al-qaida-terrorism-training-camp; Associated Press, 'US Kills al-Qaeda Suspects in Yemen' *USA Today* (Washington, 11 May 2002) http://usatoday30.usatoday.com/news/world/2002-11-04-yemen-explosion_x.htm.

[1301] David Blair, 'US Strike Kills "150 al-Shabaab Terrorists" in Somalia' *The Telegraph* (7 March 2016) http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/12186750/Deadliest-US-drone-strike-kills-150-al-Shabaab-terrorists-in-Somalia.html.

[1302] 'General Atomics MQ-1C Gray Eagle (Sky Warrior) Unmanned Combat Air Vehicle' (*Military Factory*, 14 March 2017) http://www.militaryfactory.com/aircraft/detail.asp?aircraft_id=785.

[1303] Predator Fact Sheet (n 1295).

Predator has a 'significant loiter time'[1304] of up to 14 hours.[1305] In addition, the Predator can carry two laser-guided AGM-114 Hellfire missiles,[1306] which is a guided anti-tank missile.[1307]

The Reaper is also a multi-mission aircraft but its primary purpose is striking. It carries the same 'Multi-Spectral Targeting System' as the Predator but also utilises a 'laser range finder/designator' enabling it to be equipped with guided bombs (GBU-12 Paveway II and GBU-38 Joint Direct Attack Munitions) in addition to four Hellfire missiles.[1308] Like the Predator, the Reaper has a loiter time of up to 14 hours when armed.[1309]

In flight, both the Predator and Reaper have a crew comprising a pilot, and a sensor operator, whose role is to acquire and monitor potential targets, and to '[d]etect[], analyse[] and discriminate[] between valid and invalid targets'.[1310] In addition to the crew, other personnel analyse data to aid target identification and provide situational awareness for the crew, an attribute unique to drones.[1311]

These capabilities, considered in the abstract, appear to render drones able to distinguish legitimate from illegitimate targets, the ability to loiter allowing intelligence assessments and consideration of international law, suggesting a particular ability to adhere to IHL. This is the view of the US government, which has proclaimed that drones 'can often enhance the United States' ability to implement its obligations under the law of armed conflict', stating that 'Precision-guided munitions, enhanced sensors, and the ability to

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[1304] ibid.

[1305] US Drones *Tech FAQ* http://www.tech-faq.com/us-drones.html.

[1306] Predator Fact Sheet (n 1295).

[1307] 'AGM-114 Hellfire' (*Military Today*) http://www.military-today.com/missiles/hellfire.htm.

[1308] Reaper Fact Sheet (n 1298).

[1309] Winslow Wheeler, 'The MQ-9's Cost and Performance' *Time* (28 February 2012) http://nation.time.com/2012/02/28/2-the-mq-9s-cost-and-performance/.

[1310] Rod Powers, 'Air Force Enlisted Job Descriptions: AFSC 1U0X1, Unmanned Aerospace System (UAS) Sensor Operator' (*The Balance*, 10 November 2016) https://www.thebalance.com/air-force-enlisted-job-descriptions-3344226.

[1311] Chris Woods, 'Drone Warfare: Life on the New Frontline' *The Guardian* (24 February 2015) https://www.theguardian.com/world/2015/feb/24/drone-warfare-life-on-the-new-frontline.

monitor targets for extended periods of time can allow the United States to distinguish more effectively between a member of the enemy forces and a civilian.'[1312]

Many commentators have reached similar conclusions, equating technological capacity with the ability to distinguish,[1313] comparing the enhanced ability of legal advisers and commanders to assess a drone strike with the more limited scope for assessment when conventional aircraft or special forces are used.[1314] It has been suggested that the ability of drones to adhere to IHL has been more important for the proliferation of drones than their operational advantages.[1315]

In contrast, Shah has argued that '[w]hen it comes to the principle of distinction, drones are quite analogous to landmines', though the basis of this statement is unclear.[1316] Shah refers to an 'inability' of drones to comply with IHL rules,[1317] but it is submitted that this characterisation is unsustainable, in light of the description of drones above. There have been media reports that drone operators have acted in a way that undermines the abilities of drones to adhere to IHL,[1318] however, this does not bear upon the abstract ability of

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[1312] Report on Legal and Policy Frameworks (n 259)20.

[1313] Sascha-Dominik Bachmann, 'Targeted Killings: Contemporary Challenges, Risks and Opportunities' (2013) 18(2) Journal of Conflict and Security Law 259, 277; Michael J Deegan, 'Unmanned Aerial Vehicles: Legitimate Weapon Systems or Unlawful Angels of Death?' (2014) 29 Pace International Law Review 249, 274; Yoram Dinstein, 'Air and Missile Warfare Under International Humanitarian Law' (2013) 52(1) Military Law and the Law of War Review 81, 86-7; Drake (n 3) 644; Heeyong D Jang, 'The Lawfulness of and Case for Combat Drones in the Fight Against Terrorism' (2013) 2 National Security Law Journal 1, 12-3; Vivek Sehrawat, 'Legal Status of Drones Under LOAC and International Law' (2017) 5(1) Penn State Journal of Law and International Affairs 164, 188; Vogel (2012) (n 1291) 112; Vogel (2010) (n 690) 124.

[1314] Drake (n 3) 642; Michael W Lewis and Emily Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones' (2013) 44 Georgetown Journal of International Law 1127, 1154-5; Schmitt 'Drone Attacks' (2010) (n 2) 320-1.

[1315] Lewis and Crawford (n 1314)1156-7.

[1316] Shah (2015) (n 4) 166.

[1317] ibid 166.

[1318] Heather Linebaugh, 'I Worked on the US Drone Program. The Public Should Know what Really Goes on' *The Guardian* (29 December 2013) https://www.theguardian.com/commentisfree/2013/dec/29/drones-us-military; Ed Pilkington, 'Life as a Drone Operator: "Ever Step on Ants and Never Give it Another Thought?"' *The Guardian* (New York,

drones to comply. Therefore, at least in terms of abstract lawfulness, it is submitted that Shah's contention lacks support and, consequently, the argument that drones are capable of adhering to IHL appears the most convincing.

In terms of design and characteristics, drones do not violate IHL. Their sensor arrays demonstrate that drones are not incapable of distinguishing between lawful and unlawful targets. Similarly, drones appear able to direct attacks against specific military objectives and so are not inherently indiscriminate.[1319] Nor is there anything to suggest drone use inherently results in excessive civilian harm.

However, the ability to adhere to IHL rests on the extent to which legal consideration features within the process of drone strikes. Generally, drone operations sit within a military command structure that emphasises an ongoing dialogue 'across all levels of command'[1320] to ensure targeting respects *inter alia* IHL.[1321] It has been stated by a senior military legal adviser that all lethal drone, strikes in which that adviser was involved, were confirmed by a military lawyer to be in accordance with international law in the moments before they were carried out.[1322]

This is purported to be the procedure for counterterrorist drone operations (which includes Pakistan, Yemen and Somalia), during which US National Security Staff Legal Advisers are involved in the decision to carry out a strike.[1323] However, it has been reported that the situation has changed since September 2017, making it easier to conduct

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19 November 2015) https://www.theguardian.com/world/2015/nov/18/life-as-a-drone-pilot-creech-air-force-base-nevada.

[1319] Additional Protocol I Article 51(4)(b).

[1320] 'Joint Targeting' (US Joint Chiefs of Staff, 13 April 2007) I-6.

[1321] Joint Targeting (n 1320) I-8.

[1322] Ian Park, 'The Role of Rules of Engagement, Tactical Directives and Targeting Directives in Regulation of the Use of Force During Armed Conflict' (5 December 2016) Axis of Protection: Human Rights in International Law, seminar at the University of Reading. It is important to note that this comment was made in terms of drone strikes carried out in Afghanistan, an 'area of active hostilities'; as such operations are 'counterinsurgency' rather than 'counterterrorist' the comment is not necessarily indicative of a generalised policy across all drone strikes.

[1323] Presidential Policy Guidance (n 1283) 3.

a lethal drone strike.[1324] The new guidance has not been published but if there is now less legal scrutiny, this will likely undermine the abstract ability of drones to adhere to IHL.

Beyond this abstract consideration of the process of drone strikes, it is necessary to consider the concrete approaches adopted, in order to produce a fuller picture of their lawfulness under IHL. Some have rejected this approach, arguing that the question of the lawfulness of drones stops outside the abstract realm; considerations of the lawfulness of targeting are, it is argued, distinct from those of the lawfulness of the weapon system.[1325] This is understandable—drone-launched missiles are no different from others—but it fails to account for the fact that, due to their unique characteristics, drones enable, or at least expand the scope for, certain methods of warfare, such that an analysis of their lawfulness cannot be separated from how they are used. Drones may be employed in the same manner as traditional aircraft but they also enable more controversial, covert practices of the kind in Pakistan, Yemen and Somalia. To accurately assess the IHL lawfulness of drones it is necessary to step out of abstraction and examine actual practice. Therefore, the next section will consider how US drone strikes have occurred in Pakistan, Yemen and Somalia.

3.2.3.2 Specific methods of drone targeting

The US demonstrates two approaches to targeting with drones, one based around known individuals ('personality strikes') and another based around the behaviour of unknown individuals ('signature strikes').[1326] Individuals are targeted due to DPH or OAG membership, as they are not members of any state's armed forces. These two bases for targeting map relatively well onto the two targeting methodologies of the US, and

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[1324] Charlie Savage and Eric Schmidt, 'Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids' *New York Times* (Washington, 21 September 2017) https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html.

[1325] Jang (n 1313) 14-5; Schmitt 'Drone Attacks' (2010) (n 2) 322.

[1326] 'Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan' (International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), September 2012) https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-Living-Under-Drones.pdf 12-3.

therefore, this section will be subdivided, first assessing the lawfulness of personality strikes, primarily in terms of OAG membership, before going on to examine signature strikes, primarily through acts of DPH.

3.2.3.2.1 Personality strikes

Lethal strikes against known individuals are not inherently contrary to IHL. While IHL applicable in NIAC does not specifically provide a basis for killing, there are treaty provisions and customary rules governing the loss of an individual's protection.[1327] So, despite fairly widespread antipathy toward the notion of drone strikes against individuals on so-called 'kill lists',[1328] there is nothing about the targeting of known individuals that necessarily violates IHL. Distinction is, at its core, a principle that emphasises the targeting of specific individuals. Issues may arise in terms of IHRL however, under which status-based targeting is prohibited.[1329] IHRL is preeminent during a NIAC where a government maintains control over the territory in which an operation is undertaken, and where fighting is low-intensity.[1330] Thus it is necessary to consider on a case-by-case basis whether a drone operation can be said to have occurred in such a situation, in order to determine whether an assessment of lawfulness under IHRL is necessary.

Personality strikes against 'high value individuals' in Yemen and Somalia during the Obama administration were approved in advance by the President of the US,[1331] a

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[1327] Discussed in Section 3.2.2.2.

[1328] Jo Becker and Scott Shane, 'Secret "Kill List" Proves a Test of Obama's Principles and Will' *New York Times* (Washington, 29 May 2012) http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html; Cora Currier, 'The Kill Chain: The Lethal Bureaucracy Behind Obama's Drone War' The Intercept (15 October 2015) https://theintercept.com/drone-papers/the-kill-chain/; Jeremy Scahill, 'The Assassination Complex' *The Intercept* (15 October 2015) https://theintercept.com/drone-papers/the-assassination-complex/.

[1329] Murray (n 1013) 124.

[1330] ibid 94.

[1331] 'ISR Support to Small Footprint CT Operations—Somalia/Yemen' (US Department of Defense, Intelligence, Surveillance and Reconnaissance Task Force, February 2013) https://theintercept.com/document/2015/10/14/small-footprint-operations-2-13/ 6.

decision that 'usually requires several months of intel[ligence]'.[1332] In two leaked examples of personality strikes, several years of intelligence gathering occurred before the strikes were carried out.[1333] In terms of personality strikes in Pakistan, it has been reported that, under Obama, only a third were sent to the President for authorisation,[1334] the rest being authorised by the director of the CIA.[1335]

During the Obama administration, personality strikes in Pakistan, Yemen and Somalia sat beneath a bureaucratic architecture emphasising scrutiny. Each strike would 'undergo a legal review to ensure that the activity [was] lawful and [could] be conducted in accordance with applicable law'[1336] and any strike proposal was required to 'indicate with precision … [t]he international legal basis for taking action'.[1337] The nomination of an individual to be killed began with a profile being prepared by the agency proposing their targeting (either the CIA or Department of Defense), but only after that agency's General Counsel confirmed 'the individual would be a lawful target'.[1338] This report would then be sent to the National Security Staff Legal Adviser to be examined in consultation with the Department of Justice, before legal conclusions were submitted to the National Security Staff Senior Director for Counterterrorism.[1339] Additionally, during the planning and execution of drone strikes, it was mandated that a Staff Judge Advocate 'must be immediately available and should be consulted at all levels of command'.[1340] Thus, for

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[1332] ibid 8.

[1333] In the case of 'Objective Peckham' intelligence gathering began in 2006 and culminated in three strikes in June 2011 and January 2012 resulting in the target's death: ibid 22. In the case of 'Objective Rhodes' intelligence gathering began in 2009 and culminated in two strikes in April and July 2012, the second of which was successful: ibid 23.

[1334] Becker and Shane (n 1328).

[1335] Cora Currier, 'Everything We Know So Far About Drone Strikes' *ProPublica* (5 February 2013) https://www.propublica.org/article/everything-we-know-so-far-about-drone-strikes; Tara McKelvey, 'Inside the Killing Machine' (2 December 2011) *Newsweek* http://europe.newsweek.com/inside-killing-machine-68771?rm=eu.

[1336] 'Report on Process for Determining Targeted of Lethal or Capture Operations' (US Department of Defense, 2014) 2.

[1337] Presidential Policy Guidance (n 1283) 3.

[1338] ibid 11.

[1339] ibid 12.

[1340] Joint Targeting (n 1320) E-6.

strikes based on the identity of the person targeted, engagement with international law appears to have been a key part of the process.

It is clearly not the case that personality strikes, as described, contradict the IHL principle of distinction, which they would if, for instance, no consideration of relevant international law was carried out. On the contrary, the process points to an entrenchment of the aim of adherence to IHL. As this process is enabled by the unique capabilities of drones, it seems *prima facie* the case that, during that period, they were more able to abide by IHL than traditional tools. Indeed, this is how many academic commentators view the situation.[1341]

As discussed, it is reported that many of the hurdles before a strike can be initiated were removed under the Trump administration in September 2017.[1342] The new policy (the 'Principles, Standards and Procedures'[1343]) has not been published, but emphasis has been placed on its retention, not of general legal scrutiny, but of the imperative that drone strikes only occur with 'near certainty that non-combatants will not be injured or killed'.[1344] Thus it may be that scrutiny of targets has been reduced, leaving open the possibility that IHL no longer has a privileged position within the targeting process, though it seems unlikely that it does not feature at all. Nonetheless, in the absence of further information, this remains speculative.

Therefore, at least prior to September 2017, the issue of the IHL lawfulness of drone strikes lies not with the process by which strikes are undertaken: consideration of IHL seemed to feature from the early stages of a personality strike. It is likely that IHL still plays a role, though to what extent is unclear.

Instead, IHL lawfulness depends upon the nature of the specific interpretations given to the rules that inform the determinations of lawfulness upon which strikes are authorised:

[1341] Blank (n 1292) 692; Jenks (n 735) 666; Gross (n 1291) 51; Turns (n 1291) 207;

[1342] Charlie Savage and Eric Schmidt, 'Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids' *New York Times* (Washington, 21 September 2017) https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html.

[1343] Savage and Schmitt (n 1324).

[1344] Presidential Policy Guidance (n 1283) 11.

if a strike is undertaken on the basis that it is lawful, but the interpretation of the law informing the decision is particularly broad, then, despite the role of IHL within the decision-making process, there may be compelling arguments that the strike is unlawful. This is an issue for all weapon systems but has been argued to be particularly acute in relation to drone strikes.[1345]

As personality strikes are authorised in advance, the individuals targeted must be deemed to be targetable at all times. As has been illustrated, such scope for targeting is only permitted under IHL through OAG membership,[1346] thus the meaning of 'membership' is crucial to IHL lawfulness. This has been rendered more stark since September 2017, as part of the revised guidance has been a reported extension of personality strikes from targeting only operationally significant members to include 'foot-soldiers' with 'no special skills or leadership roles'.[1347] In targeting lower-level members, decisions are more likely to rely on contested interpretations of membership, thereby making them less legally sound and more susceptible to the charge of unlawfulness. Therefore, it is necessary to consider the criteria by which the US assesses an individual to be a member of an OAG and how this accords with IHL.

Unfortunately, the US has not made clear its interpretation of relevant IHL. There have been implications that personality strikes are carried out based on OAG membership,[1348] but this gives little indication of *how* membership is conceived. Nonetheless, it is possible to build a picture of the US position by examining policy documents that have either been leaked, declassified or are readily available.

The Department of Justice has asserted that targeting an individual 'who has *joined* al-Qa'ida or its associated forces would be lawful under US and international law'.[1349] This clearly requires membership for a personality strike, and appears to characterise

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[1345] Thomas Gregory, 'Targeted Killings: Drones, Noncombatant Immunity, and the Politics of Killing' (2017) 38(2) Contemporary Security Policy 212, 224.

[1346] Section 3.2.2.2.1.

[1347] Savage and Schmitt (n 1324).

[1348] Koh (2010) (n 10).

[1349] Department of Justice White Paper (n 49) 1 (emphasis added).

membership through the act of having joined, rather than through the function carried out for that group, pointing to an understanding of membership on the contested grounds of formality. Nonetheless, the subject of the white paper is 'a Senior Operational Leader', and it also refers to an individual who 'is actively engaged in planning operations to kill Americans', who represents 'an imminent threat of violent attack',[1350] which suggests functionality is a key determinant for membership.

The Department of Defense *Law of War Manual* provides extensive illustration of the US understanding of membership of OAGs. It states that 'individuals who are *formally or functionally* part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent'[1351] and there are numerous other examples of the adoption of a formal as well as functional approach to membership.[1352] Factors evidencing formal membership include 'rank, title, or style of communication', 'taking an oath of loyalty', 'wearing a uniform or other clothing, adornments, or body markings that identify members of the group' and 'membership lists, identity cards, or membership applications'.[1353] References to the formal and functional understanding of membership in other documents confirm this broad approach to targeting.[1354]

Despite the inclusion of formal membership, documents indicating the US approach to targeting demonstrate an acceptance that assessment of membership due to function is likely to be easier than that of formal membership, and will, therefore, more commonly form the basis for targeting.[1355] Nonetheless, regardless of this recognition, the fact that formal factors *can* be used to identify targets widens the scope for drone targeting beyond

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[1350] ibid 3 (accessed 5 January 2017).

[1351] Department of Defense Manual (n 1204) 218 (emphasis added).

[1352] ibid 160-1, 216-20.

[1353] ibid 218.

[1354] Report on Legal and Policy Frameworks (n 259) 20

[1355] ibid 29 (though this section specifically deals with classifications with a view to detention during armed conflict); Department of Defense Manual (n 1204) 217-20. The US Court of Appeals for the DC Circuit assert that 'determining whether an individual is part of al Qaeda, the Taliban, or an associated force almost always requires drawing inferences from circumstantial evidence … So we must look to other indicia to determine membership in an enemy force.' *Ali v Obama* 736 F.3d 542 (DCC 2013), 546.

that identified by the ICRC and others, for whom OAG membership is contingent on an individual's CCF. Therefore, personality strikes undertaken by drone may, potentially, have been carried out in the penumbra of legality at the fringes of the interpretation of membership, with the distinct risk that these will violate IHL and the right to life.

Due to the disputed nature of the law it cannot be said with certainty that strikes in Pakistan, Yemen and Somalia against formal OAG members without a CCF are unlawful, but neither is it possible to state that they are certainly lawful. Such strikes are problematic for being based on a contentious interpretation of an already contentious area of IHL, but that is as close as one can come to a conclusion as to their lawfulness.

Conversely, if the absence of a notion of non-state combatants in the IHL governing NIACs means that targeting can only be based on DPH, then strikes against formal members with no CCF will certainly violate the principle of distinction where an individual is not directly participating in hostilities. As detailed above, this outcome is unlikely, due *inter alia* to the apparent separation in common Article 3 of civilians and non-state 'armed forces'.[1356]

Alternately, if members are targetable *per se*, and membership is defined functionally through an individual's CCF then such strikes will violate the principle of distinction when the targeted individual has no CCF; for instance, where a targeting decision is based on an individual's pledge of allegiance rather than evidence of ongoing participation. Strikes based on formal membership alone will only accord with the principle of distinction if a wide understanding of the IHL governing membership is adopted. As a result, drone targeting on this basis rests upon highly contentious legal foundations and, where this represents the only justification, may well be unlawful under both IHL and IHRL.

Given the practical problems in ascertaining formal membership of an OAG, and the surveillance and intelligence architecture surrounding the use of drones in Pakistan, Yemen and Somalia, it seems likely that the majority of personality drone strikes involve

[1356] Text from n 1105 to n 1147.

factual evidence of the targeted individual's function. Therefore it is also necessary to consider the US criteria for gauging functional membership. General criteria include: 'acting at the direction of the group or within its command structure'; 'performing a function … that is analogous to a function normally performed by a member of a State's armed forces'; 'taking a direct part in hostilities'; 'accessing facilities … used by the group that outsiders would not be permitted to access'; 'traveling along specific clandestine routes used by those groups;' 'traveling with members of the group in remote locations or while the group conducts operations';[1357] or 'following directions issued by the group'.[1358]

Metrics for function-centric targeting specifically for drone strikes in Pakistan, Yemen and Somalia have not been published, though it is reasonable to assume that the general criteria are involved. While some are uncontroversial in terms of IHL (i.e. 'performing a function … normally performed by a member of a State's armed forces'), others are less so (i.e. 'traveling along specific clandestine routes used by [OAGs]') and are at odds with interpretations provided by *inter alia* the ICRC.

The ICRC's CCF may be evidenced by 'lasting integration' within an OAG, 'the preparation, execution, or command of acts or operations amounting to [DPH]' on a continuous basis, or training with a view to continuous participation in hostilities.[1359] These criteria are more closely linked to combat than those used by the US. For instance, if taken alone, the US criterion of 'traveling with members of the group in remote locations or while the group conducts operations' could expand drone targeting to include individuals with a non-combat role. While this approach to functional membership is supported by some,[1360] it remains controversial and cannot be seen as a definitive interpretation of IHL.

Therefore, drone strikes undertaken on the basis of perceived non-combat functional membership are within the penumbra of IHL and may violate the principle of distinction,

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[1357] Department of Defense Manual (n 1204) 217-8.

[1358] ibid 220.

[1359] Melzer (2009) (n 1140) 34.

[1360] Schmitt 'Interpretive Guidance' (2010) (n 1144) 23; Watkin (n 1164) 675-7.

and implicate the right to life. Nonetheless, as with formal membership targeting, it is not entirely certain that such targeting violates IHL, due to the lack of clarity surrounding the law and the absence of consensus as to its interpretation. It must suffice to assert that such targeting is problematic due to the weak justification provided by the interpretation of IHL adopted, if unsupported by other factors more connected with DPH. Additionally, the regulatory impact of relevant IHRL provisions upon operations conducted on these controversial readings of IHL will increase, resulting in a greater likelihood of the right to life of those targeted, and civilians killed incidentally, being violated.

The assessment of personality strikes by drones in Pakistan, Yemen and Somalia is hampered by secrecy and a lack of available data. Nevertheless, it has been possible to create a picture of the process by which targeting decisions are made and to conject that the scope exists for targeting to occur in a way that can only be lawful when considered through a broad interpretation of IHL. Any strike carried out on such a basis will risk violating the principle of distinction, by directly targeting individuals who should properly be viewed as civilians.

To contextualise the analysis of drone strikes and IHL, some case-studies of strikes against individuals will be considered. While these case-studies are useful, it is important to remember that, due to the secretive nature of drone strikes, it is entirely conceivable that those strikes that are public may be so precisely because they adhere to relevant rules and therefore these vignettes cannot be taken as representative of all personality strikes.

3.2.3.2.1.1 Baitullah Mehsud (Pakistan)

Baitullah Mehsud was killed by a drone strike in South Waziristan, Pakistan, on 5 August 2009. Occurring in 2009, the strike clearly falls within the NIAC and may be assessed under IHL, though it is nevertheless necessary to consider the extent to which IHRL applies. Though the ICJ has interpreted the term ‘arbitrary’ during armed conflict to mean lethal force that violates IHL, IHL does not necessarily provide a blanket reduction in the protection of rights enjoyed by those in the state that is hosting a NIAC. Murray has proposed that IHRL provides the primary source of law within a NIAC where the government retains control over the territory in which an operation occurs, and in

situations of low-level violence.[1361] In such situations, status-based killing would be prohibited, with lethal force only acceptable as a last resort with the objective of protecting life.[1362] As discussed, government control over South Waziristan is tenuous, in part due to constitutional autonomy in FATA, but also due to the presence of insurgents.[1363] Though there is sufficient control by the government to enable it to consent to the use of force by the US, it may well lack control over individual geographical pockets to the extent that IHRL cannot be said to apply in the manner that it would outside of NIAC. For IHLR to apply, control must be such that the government is actually able to regulate a situation under IHRL provisions.[1364] Directly after the killing of Mehsud, it was reported that fighters occupied surrounding villages, preventing people from leaving[1365] and a gun battle between factions occurred causing 14 deaths.[1366] This suggests that the government may not have had sufficient control for IHLR to provide the primary source of rules regulating the operation, and therefore the present analysis must be undertaken through the lens of IHL.

When killed, Mehsud was reported to have been receiving dialysis on the roof of the house of his parents-in-law[1367] so is unlikely to have been targeted due to direct participation in a specific hostile act. It follows therefore that Mehsud must have been deemed targetable on a constant basis, due to OAG membership. In support is the fact that the US reportedly targeted Mehsud in seven strikes between June 2008 and August 2009.[1368]

[1361] Murray (n 1013) 93-4.

[1362] ibid 124. See also text from n 1863 to n 1875.

[1363] Text from n 116 to n 123.

[1364] Murray (n 1013) 97.

[1365] Declan Walsh, 'Air strike kills Taliban leader Baitullah Mehsud' *The Guardian* (Islamabad, 7 August 2009) https://www.theguardian.com/world/2009/aug/07/baitullah-mehsud-dead-taliban-pakistan.

[1366] Declan Walsh, 'Pakistan's top Taliban leader Baitullah Mehsud killed in US drone attack' *The Guardian* (Islamabad, 7 August 2009) https://www.theguardian.com/world/2009/aug/07/taliban-leader-baitullah-mehsud-killed.

[1367] Pir Z Shah, Sabrina Tavernise and Mark Mazzetti, 'Taliban Leader in Pakistan is Reportedly Killed' *New York Times* (Islamabad, 7 August 2009) http://www.nytimes.com/2009/08/08/world/asia/08pstan.html?_r=3&hp&.

[1368] 'You Never Die Twice: Multiple kills in the US Drone Program' (*Reprieve*, 2014) https://reprieve.org/wp-content/uploads/2014_11_24_PUB-You-Never-Die-Twice-Multiple-Kills-in-the-

Mehsud was certainly a formal member of TTP, having been identified as the organisation's leader.[1369] He also seemingly had a CCF, directly commanding '20,000 pro-Taliban militants'[1370] and being described as responsible for multiple attacks in Pakistan, including the January 2007 attack on a hotel in Islamabad and the assassination of former Prime Minister of Pakistan, Benazir Bhutto.[1371] Attacks he orchestrated reportedly caused the deaths of around 2,000 people in 2008.[1372] In addition, Mehsud had suggested he was organising an attack in Washington.[1373]

Clearly Mehsud was both a formal and functional OAG member. '[C]ommand of acts or operations amounting to direct participation in hostilities' was clearly posited by the ICRC as equating to a CCF, so even by that stricter interpretation of membership, Mehsud would fall into this category. Thus, the strike itself appears convincingly to have adhered to the principle of distinction, a view adopted by commentators.[1374]

Despite his clear OAG membership, it has been suggested that Mehsud may have been *hors de combat* at the time of the strike, as he was being treated for a kidney ailment, though this is speculation 'without specific medical information regarding his conditions'.[1375] Additionally, if Mehsud was still actively involved in leading TTP then

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US-Drone-Program-1.pdf 7, stating that the organisation 'defined Baitullah Mehsud as the target in situations where he was either reported killed (thus indicating a belief he was present where the missile struck) or that the strike was on a house or car he owned.'

[1369] 'Naming the Dead: Baitullah Mehsud' (*The Bureau of Investigative Journalism*) https://www.thebureauinvestigates.com/namingthedead/people/nd223/?lang=en.

[1370] 'Obituary: Baitullah Mehsud' *BBC* (25 August 2009) http://news.bbc.co.uk/1/hi/world/south_asia/7163626.stm.

[1371] Gordon Duguid, 'Rewards for Justice: Baitullah Mehsud' (US Department of State, 25 March 2009) https://2009-2017.state.gov/r/pa/prs/ps/2009/03/120863.htm.

[1372] Declan Walsh, 'Profile: Baitullah Mehsud' *The Guardian* (7 August 2009) https://www.theguardian.com/world/2009/aug/07/baitullah-mehsud-profile.

[1373] Dera I Khan, 'Taliban Chief Vows "Amazing" Attack on Washington' (Pakistan, 14 July 2009) *NBC* http://www.nbcwashington.com/news/local/Taliban-Chief-Vows-Amazing-Attack-on-Washington.html.

[1374] David Akerson, 'Applying *Jus in Bello* Proportionality to Drone Warfare' (2014) 16 Oregon Review of International Law 173, 177; McDonnell (n 197) 314; McNab and Matthews (n 1291) 693.

[1375] O'Connell (2012) (n 4) 289.

an argument that he was *hors de combat* is difficult to support. Therefore it seems that, in terms of distinction, Mehsud represented a lawful target.

Further questions of lawfulness are raised by the fact that the strike also killed Mehsud's wife, parents-in-law and seven 'bodyguards'.[1376] The principle of distinction requires that '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.'[1377] As Mehsud was the object of the drone strike, not the nearby civilians, the fact that civilians were killed does not contravene the principle of distinction. Civilians killed as a product of the drone strike were collateral to it, rather than the object of it, meaning that they should be considered under the IHL rubric of proportionality.

The question, then, is whether the collateral deaths were excessive in relation to the perceived concrete and direct military advantage gained by killing Mehsud. Some have touched upon this aspect of the Mehsud strike but, on the whole, treatment has been cautious. Jenks has stated that the deaths of those categorised as civilian must be balanced against the removal of Mehsud as leader of TTP but goes no further.[1378] Akerson has claimed that '[a]s the leader of the Pakistani Taliban, it could be argued that [Mehsud] inherently constitutes a significant military objective'[1379] but does not go so far as to make a claim regarding the lawfulness of the strike in terms of proportionality. O'Connell is similarly cagey, asserting the problematic character of the strike though stopping short of declaring it unlawful.[1380] Barnidge goes further, concluding that the strike was not a violation of IHL rules on proportionality due to Mehsud's leadership role, 'despite the reasonable foreseeability of collateral damage.'[1381]

To make a determination, or at least to arrive at an indication of whether the strike was proportionate, it is necessary to attempt to balance foreseen collateral damage with

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[1376] Jane Mayer, 'The Predator War: What are the Risks of the CIA's Covert Drone Program?' *The New Yorker* (26 October 2009) http://www.newyorker.com/magazine/2009/10/26/the-predator-war#ixzz1PuIWKxSI.

[1377] Additional Protocol I Article 51(2); Additional Protocol II+ 0+zArticle 13(2).

[1378] Jenks (n 735) 667-8.

[1379] Akerson (n 1374) 195.

[1380] O'Connell (2012) (n 4) 289-90.

[1381] Barnidge (n 469) 441.

anticipated military advantage to be gained, from the perspective of a 'reasonable military commander'.[1382] Though an objective standard,[1383] there is a margin of appreciation in making this determination,[1384] and it has been suggested that in 'close' cases, various 'reasonable commanders', with different backgrounds and experience, may differ as to whether a strike is proportionate.[1385] This is the unsurprising result of a calculation that requires the comparison of two ostensibly incomparable values: while collateral damage is relatively quantifiable, military advantage is qualitative and abstract. Outside this grey area, however, there are cases that are 'clearly disproportionate' in which agreement between reasonable commanders can generally be expected.[1386]

First, the military advantage gained by targeting Mehsud must be considered. Military advantage is described in the commentary to the Additional Protocols as 'ground gained and in annihilating or weakening the enemy armed forces.'[1387] As the leader of TTP, in command of 20,000 fighters, and reputedly behind numerous attacks in Pakistan, the killing of Mehsud would have certainly weakened enemy forces, and so doubtless represented a significant military advantage that was both concrete and direct.

Against that advantage must be considered the civilian cost of the strike. Assuming that the seven 'bodyguards' identified as having also perished were lawful targets due to DPH or CCF and are consequently excluded from the proportionality calculation, the strike resulted in the collateral deaths of Mehsud's wife and parents-in-law. Guidance can be sought from previous determinations of proportionality. In the case of the targeted killing

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[1382] 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 8 June 2000' (2000) 39 International Legal Materials 1257 para 50.

[1383] ILA (n 1080) 369.

[1384] The *Targeted Killings* case (n 1172) para 58; Gardam has asserted that proportionality contains a 'considerable degree of latitude for interpretation': Judith Gail Gardam, 'Proportionality and Force in International Law' (1993) 87 American Journal of International Law 391, 407. See also, Ben Clarke, 'Proportionality in Armed Conflicts: A Principle in Need of Clarification?' (2012) 3 International Humanitarian Legal Studies 73, 78.

[1385] ICTY Committee Report (2000) (n 1382) para 50.

[1386] ibid para 50.

[1387] ICRC AP Commentary (n 581) para 2218.

of Salah Shehadeh by the Israel Defense Forces, 13 civilians were killed and 150 injured by the blast from a one-ton bomb.[1388] This was held by the Commission investigating the strike to be disproportionate, though the lower level of collateral damage that was anticipated was not.[1389] Thus it can be argued that if a strike was carried out in the anticipation of killing one enemy commander at the cost of 13 civilian deaths and 150 injuries, this may well be disproportionate. Nevertheless, this has been disputed: Blum and Heymann have argued that this scenario ought generally to be considered proportionate.[1390] The lack of consensus points to the fact that, even in that case, the incident was not one that was 'clearly disproportionate.'

In the ICTY's assessment of the NATO bombing campaign in Yugoslavia, it was found that 10-17 deaths caused as a consequence of the bombing of the RTS radio and TV station were not 'clearly disproportionate', assuming the station represented a legitimate military objective.[1391]

On this basis, under a purely doctrinal application of the law, the incidental civilian harm that resulted from the Mehsud strike was likely not clearly disproportionate to the military advantage gained. The interpretive scope of IHL proportionality operates such that the deaths of three civilians, in this instance, cannot be argued to be so out of proportion with the military advantage gained as to render the strike unlawful.

However, while only three civilians were killed as a result of the 5 August 2009 strike against Mehsud, there had been several others in the preceding 14 months that also produced significant civilian deaths. It has been reported that, over the period, seven strikes targeted Mehsud, resulting in up to 164 additional deaths.[1392] Thus there is a question as to how these incidents should be treated, in terms of proportionality: either

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[1388] Alston (n 45) 416.

[1389] 'Salah Shehadeh: Special Investigatory Commission' (Israel Ministry of Foreign Affairs, 27 February 2007) paras 10-11 http://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Salah_Shehadeh-Special_Investigatory_Commission_27-Feb-2011.aspx.

[1390] Gabriella Blum and Philip Heymann, 'Law and Policy of Targeted Killing' (2010) 1 Harvard National Security Journal 145, 154.

[1391] ICTY Committee Report (2000) (n 1382) para 77.

[1392] Reprieve (n 1368) 7.

each discrete event can be considered in isolation, or they can be accumulated into a single campaign against Mehsud, in which the overall civilian cost should be assessed against the military advantage gained by targeting him.

Article 51(5)(b) AP I refers to a singular 'attack' in relation to proportionality suggesting that each should be considered alone. Indeed, in *Galić* the Trial Chamber individually considered sniping and shelling incidents that comprised a campaign from September 1992 until August 1994.[1393] However, in the *Kuperškić* decision, reference was made to the 'cumulative effect of attacks on military objectives causing incidental damage to civilians' in which a series of attacks, 'all or most of them falling within the grey area between indisputable legality and unlawfulness', may be considered as a whole with the result that they are cumulatively disproportionate.[1394] This recalls the notion of strikes that are not 'clearly disproportionate'—when a series of these are taken together it is possible that they may take on a more overt character of disproportionality. Gardam has rejected the notion of cumulative effect in terms of the identification of military advantage but without discussing whether it might apply to collateral damage.[1395] On this basis, it may be that, under the unique circumstances of a series of attacks with the same objective, the collateral damage stemming from each can be considered cumulatively. Applying this approach to the campaign against Mehsud seemingly brings it within the realm of what is 'clearly disproportionate'.

Nevertheless, the cumulative effect approach used in *Kuperškić* has been described as 'a progressive statement of the applicable law' but also 'ambiguous and its application far from clear'.[1396] Indeed it does not seem to fit with the plain meaning of Article 51(5)(b), despite its attractiveness in strengthening the protection of civilians. It is submitted, therefore, that the collateral damage produced by the campaign against Mehsud cannot, as part of the present inquiry, be analysed as a whole in terms of proportionality.

[1393] *Galić* (n 1053) paras 181 and 498.

[1394] *Kupreškić* (n 1009) para 526.

[1395] Gardam (1993) (n 1384) 407.

[1396] ICTY Committee Report (2000) (n 1382) para 52.

Therefore it is necessary to consider individually these unsuccessful personality strikes against Mehsud. Of those that have been reported, most of those killed incidentally were deemed fellow fighters;[1397] as legitimate targets they do not feature in the proportionality calculation. Of those about which reports exist, the strikes have generally produced low-levels of civilian causalities that are not clearly disproportionate. However, one strike—on 23 June 2009, while Mehsud attended a funeral—resulted in up to 86 additional deaths,[1398] of which, it has been claimed, between 18 and 50 were civilian,[1399] immediately raising the question of proportionality. That 50 civilian deaths is extensive does not mean that it is necessarily excessive and therefore disproportionate,[1400] for two reasons. First, the question of proportionality considers the harm expected, not the harm that actually resulted, thus if a lower level of harm was foreseen, it is that which is balanced against the military advantage. Second, even if a high level of civilian harm was expected, the military advantage gained may have been such that it outweighed this harm.

So, in order to assess the proportionality of this failed strike against Mehsud it is first necessary to consider the expected civilian harm when the decision to strike was made. The approach adopted by the ICTY is to ask 'whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'[1401] This assessment is speculative due to the secrecy surrounding the strike, however it seems reasonable to assume that the surveillance capacity of the drones used are such that it would have been clear that the targeted gathering was a funeral. It also seems likely that 'a reasonably well informed person in the circumstances' would have been of the opinion that a funeral is an archetypal example of an occasion attracting a wide variety of individuals, including those with civilian protection. Though the funeral was for Khwaz Wali Mehsud, a TTP commander, that does not mean everyone attending

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[1397] Mayer (n 1376).

[1398] ibid.

[1399] TBIJ 'Mehsud' (n 1369).

[1400] cf Mary-Ellen O'Connell who has stated that a strike killing 50 civilians in order to target one suspected combatant as being 'a textbook example of a violation of the proportionality principle': O'Connell (2012) (n 4) 288.

[1401] *Galić* (n 1053) para 58.

would have necessarily been an active member for TTP or al-Qaeda; funerals generally attract more than solely the deceased's work colleagues. Therefore it seems reasonable to expect the presence of civilian family members as well as others not involved in hostilities. As a result it is submitted that the decision to carry out the drone strike was likely made with the expectation that it would result in a high level of civilian casualties.

Therefore, the question is whether this expected high level of civilian casualties was excessive in relation to the military advantage gained by targeting Mehsud. In *Galić*, the ICTY found that targeting soldiers with shells while they played and watched football with civilians produced expected civilian harm that was excessive.[1402] As a social event attended by both civilians and non-civilians, this is analogous to the funeral strike, supporting a conclusion that it was disproportionate. Nevertheless there is no suggestion that commanders were present at the football match, distinguishing it from that against Mehsud as the respective anticipated military advantages to be gained from each operation was different. It is, therefore, still possible that Mehsud represented a sufficiently significant military objective that the strike was not disproportionate in the same way as that in *Galić*. The vague nature of proportionality is such that it is difficult to say that the strike was 'clearly disproportionate', but it is equally difficult to say that it was certainly proportionate.

Leaving the issue of proportionality, though remaining with the funeral strike, states have a duty under IHL to 'take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects'.[1403] Thus it must be asked whether there was an alternative way that Mehsud could have been targeted producing less harm to civilians, though any alternative must have been 'practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.'[1404]

[1402] ibid para 387.

[1403] Additional Protocol I Article 57(2)(a)(ii).

[1404] Protocol on Incendiary Weapons Article 1(5). This definition, and ones like it, are also present in numerous military manuals and other examples of state practice, supporting a claim that the imperative is also a customary one: Henckaerts and Doswald-Beck 'Practice' (n 1096) 357-8.

It appears that the strike occurred at the end of the funeral as mourners were leaving.[1405] Due to the purported quality of the video feed from a drone it seems reasonable to assume that there was visual confirmation of Mehsud's presence. It follows that, due to the ability of a drone to loiter over an area for extended periods and to monitor individuals in transit, it would have been practicable or practically possible to delay the strike until Mehsud was away from the large concentration of civilians. Additionally, the fact that so many strikes were attempted against Mehsud suggests opportunities to target him were not unusual, perhaps adding to the notion that the funeral strike should have been delayed.[1406] It may be argued in the alternative that the fact that so many strikes failed meant that the US needed to take whatever opportunity arose, thereby raising the threshold of acceptable civilian harm. Regardless, it is hard not to conclude that the strike could have been undertaken once Mehsud had left the crowd, which may have increased its chances of success and would certainly have reduced the level of civilian casualties. Likewise, on the basis of the drone's technical ability, perhaps the August 2009 strike in which Mehsud was killed could have been delayed until he had left the building, thereby avoiding collateral deaths.

It is submitted that the funeral strike appears likely to have been unlawful due to insufficient precaution to avoid and minimise civilian harm. It is further submitted that the expected civilian harm may have been excessive in relation to the anticipated military advantage, but this is said with less certainty. The August 2009 strike may be unlawful for a lack of precaution but this is not certain, and in other respects the strike appears lawful.

This analysis of the operations against Mehsud demonstrates two interesting points regarding personality drone strikes. First, due to the targeted nature of personality strikes it seems unlikely that they will breach the IHL principle of distinction. Instead, it is proportionality that becomes key as, though the strikes target a specific and identified

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[1405] 'US Drone Attack Kills 45 Militants in Pakistan, Officials Say' *The Telegraph* (23 June 2009) http://www.telegraph.co.uk/news/worldnews/asia/pakistan/5616262/US-drone-attack-kills-45-militants-in-Pakistan-officials-say.html.

[1406] The funeral strike against Mehsud was the fourth to target him: Reprieve (n 1368) 7, n 21.

military objective, this does not mean they are precise in terms of avoiding civilian harm. Second, the capabilities of armed drones render them potentially more susceptible to critique on the basis of a failure to take precautions than more traditional weapons. There are precautions that are practicable or practically possible for drone strikes that would be far less possible with other smart weapons, such as cruise missiles. This points to a reflexive element within IHL that may play an important role in the future regulation of drone use.

3.2.3.2.1.2 Anwar al-Aulaqi (Yemen)

Anwar al-Aulaqi was targeted and killed in Yemen on 30 September 2011, placing the strike within the NIAC in Yemen. It has been argued that al-Aulaqi's targeting took place outside armed conflict,[1407] but the present author submits that this is incorrect, for the reasons provided above.[1408] Nevertheless, it is possible that, despite the strike occurring during a NIAC, IHRL may provide the primary framework governing its lawfulness. Therefore it is necessary to conduct a preliminary examination into the circumstances surrounding the strike to determine whether it occurred in a situation of limited government control or fighting that was sufficiently intense to point to IHL as the primary body of law.

This is not an analysis that has been conducted in previous examinations of the strike; where writers have recognised that a NIAC exists, there has been a tendency to apply IHL exclusively.[1409] Chesney (writing before the strike but in relation to the widely accepted idea that al-Aulaqi had been identified as a target) and van Schaack each used *lex specialis* to claim the sole application of IHL,[1410] while Alston simply asserted that the operation of IHL relative to the strike 'render[s] inapplicable' IHLR.[1411] That IHRL has not been

[1407] McDonnell (n 197) 314; Jake William Rylatt, 'An Evaluation of the US Policy of "Targeted Killing" Under International Law: the Case of Anwar al-Aulaqi (Part II)' (2014) 44(2) California Western International Law Journal 115, 120-32.

[1408] Section 3.1.5.3.2.

[1409] Farley (n 816) 77.

[1410] Chesney (n 816) 49-50; van Schaack (2011) (n 733) 309.

[1411] Alston (n 45) 396

previously considered demonstrates the lack of consensus over IHRL's place in armed conflict, but also emphasises the present need to consider whether IHRL applies.

As discussed[1412] it has been suggested that IHRL may take primacy during a NIAC where the government retains control over the territory in which an operation occurs or where violence is at a low level in a given area.[1413] In terms of government control over the relevant area, the strike killing al-Aulaqi occurred 90 miles northeast of Sana'a,[1414] in Jawf Province, which was at the time not controlled by AQAP.[1415] However, neither was it controlled by the government, instead being in the hands of the Houthis.[1416] This suggests a lack of government control, resulting in the primacy of IHL.

It may be asked whether, in order for IHL to be preeminent on this basis, the lack of control must arise as a result of the specific NIAC in which force is used, rather than as a result of something else, for instance a second NIAC, as is the case in this situation. If correct, force used against the Houthi rebels would be governed by IHL while that against AQAP may potentially still be governed by IHRL. This can be answered quickly in the negative. The requirement of control asks whether a government has 'control sufficient to conduct law enforcement operations within a conflict situation':[1417] the determination of control is not linked with the personalities involved in a specific NIAC but the extent to which the government can operate in an area. Where a government lacks sufficient control to undertake law enforcement, IHL provides the primary source of rules, and that is the case in terms of the al-Aulaqi strike.

[1412] Section 3.2.1.

[1413] Murray (n 1013) 93-4.

[1414] *Al-Aulaqi and others v Panetta and others* 35 F Supp 3d 56, 60 (DDC 2014).

[1415] 'Houthis Close to Control Hajjah Governorate, Amid Expectations of Expansion of Control of Large Parts of Northern Yemen' *English Islam Times* (9 November 2011) https://www.islamtimes.org/en/news/112627/houthis-close-to-control-hajjah-governorate-amid-expectations-of-expansion-over-large-parts-northern-yemen.

[1416] Hakim Almasmari, 'Medics: Militants Raid Yemen Town, Killing Dozens' *CNN* (27 November 2011) http://edition.cnn.com/2011/11/27/world/meast/yemen-clashes/.

[1417] Murray (n 1013) 91.

This is important as, in terms of the intensity of fighting, at the moment of the strike al-Aulaqi was described as having eaten breakfast with colleagues, before joining the vehicle convoy that was targeted.[1418] This situation does not immediately suggest fighting that is such that IHL is clearly the primary framework. Furthermore, it has been reported that the US (in particular the CIA, which controlled the operation to target al-Aulaqi) was primarily keen to capture al-Aulaqi,[1419] though it was asserted that, at least in July 2010, neither the CIA nor Department of Defense felt this was feasible.[1420] Taken alone, the absence of intense fighting can reduce the influence of IHL relative to IHRL, and so the lack of governmental control over Jawf Province is crucial for confirming IHL as the dominant framework regulating the drone strike against al-Aulaqi. It appears that, in this way, the US operation has 'piggy-backed' on the NIAC between the Yemeni government and the Houthis. This demonstrates both the complex nature of military operations in Yemen and the fact that drone strikes often occur on a knife-edge of lawfulness, capitalising on the malleability of international law and unique conflict situations.

Having asserted the primacy of IHL, the lawfulness of the strike can be assessed. It has been reported that al-Aulaqi was added to a list of potential targets by the CIA prior to the strike,[1421] and officials have stated that al-Aulaqi was specifically targeted.[1422] Thus the operation was clearly a personality strike, indicating the US assessed him to be a member of AQAP in a manner allowing for his targeting at any time, rather than during

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[1418] Mark Mazzetti, Charlie Savage and Scott Shane, 'How a US Citizen Came to Be in America's Cross Hairs' *New York Times* (Washington, 9 March 2013) http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?hp&pagewanted=all&_r=2&&pagewanted=print.

[1419] Jeremy Scahill, 'Inside America's Dirty Wars: How Three US Citizens were Killed by their own Government in the Space of one Month in 2011' *The Nation* (24 April 2013) https://www.thenation.com/article/inside-americas-dirty-wars/.

[1420] 'Memorandum for the Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi' (US Department of Justice, 16 July 2010) 30.

[1421] Margaret Coker, Adam Entous and Julian E Barnes, 'Drone Targets Yemini Cleric' *Wall Street Journal* (7 May 2011) http://www.wsj.com/articles/SB10001424052748703992704576307594129219756.

[1422] Letter from Eric Holder to Patrick J Leahy (Office of the Attorney General, 22 May 2013) https://www.justice.gov/slideshow/AG-letter-5-22-13.pdf.

an instance of DPH. Accordingly, al-Aulaqi was targeted after breakfast and having joined a convoy, rather than while directly participating in hostilities (even the most gung-ho IHL scholars would struggle to argue that eating breakfast is sufficiently connected to potential subsequent hostile acts to qualify as DPH).

It is not clear whether al-Aulaqi's convoy was heading towards combat with the intention of becoming involved, an activity engaging the 'for such time' of DPH.[1423] Though the attack occurred around 100km from Marib, the nearest town held by AQAP at the time, the battle over control of that area did not occur until early 2012,[1424] so it seems unlikely that, even if heading that way, al-Aulaqi was traveling to directly participate in hostilities. In accordance with the civilian presumption in cases of doubt, there is a strong argument to be made that this act of driving in a convoy should not, in and of itself, be construed as DPH.[1425]

DPH not being a possible avenue of lawfulness, it is necessary to consider the nature of al-Aulaqi's membership of AQAP and whether this provides a basis for his targeting. al-Aulaqi was a US citizen who travelled to Yemen in 2002, becoming a 'leading propagandist and recruiter' of AQAP.[1426] He was a formal member of AQAP, having 'pledged an oath of loyalty to AQAP emir Nasir al-Wahishi' but was also purported to have a functional role, 'setting the strategic direction for AQAP … recruit[ing] individuals …, facilitat[ing] training camps in Yemen in support of acts of terrorism, and help[ing] focus AQAP's attention on planning attacks on US interests.'[1427] An example of this was 'preparing Umar Farouk Abdulmutallab in his attempt to detonate an

[1423] ICRC AP Commentary (n 581) para 1943.

[1424] Roggio (n 829).

[1425] Section 3.2.2.2.2.3.

[1426] David Morgan, 'Who was Anwar al-Awlaki?' *CBS News* (30 September 2011) http://www.cbsnews.com/news/who-was-anwar-al-awlaki/.

[1427] *Al-Aulaqi v Obama* No 10-CV-1469 (DDC 2010), Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, Exhibit 1, Unclassified Declaration in Support of Formal Claim of State Secrets Privilege by James R Clapper, Director of National Intelligence para 14.

explosive device … on Christmas Day 2009'.[1428] After the strike, President Obama claimed al-Aulaqi had been 'a lead in planning and directing efforts to murder innocent Americans' and was 'directly responsible for the death of many Yemeni citizens'.[1429]

Interestingly, in 2010 al-Aulaqi was described as 'inspirational rather than operational',[1430] a designation indicating formal rather than functional membership. However, government documents suggest his inclusion on a targeting list came after he 'shifted from encouraging attacks to directly participating in them.'[1431] Indeed, in his letter to the Judiciary Committee of the US Senate, Holder stated that al-Aulaqi was targeted due to his actions in relation to hostile acts above all else.[1432] As an interesting aside, it can be inferred from this that, at least in some cases, drone strikes based on more contentious targeting grounds have not been favoured by the US, which has instead waited for the quality of membership to shift from formal to functional. Nevertheless, this should not be overstated, and certainly should not raise a presumption that this is the case in all personality strikes.

al-Aulaqi therefore appears to have satisfied the more restrictive conception of membership promulgated by the ICRC, having a CCF, going beyond activities that were merely supportive.[1433] Clearly this also means he satisfied the broader criteria put forward by the US. He had therefore lost his civilian protection at the time of the drone strike against him and as a consequence it does not appear to have violated the IHL principle of distinction.

[1428] *Al-Aulaqi v Obama* No 10-CV-1469 (DDC 2010), Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss.

[1429] 'Islamist Cleric Anwar al-Awlaki Killed in Yemen' *BBC* (30 September 2011) http://www.bbc.co.uk/news/world-middle-east-15121879.

[1430] Bobby Ghosh, 'How Dangerous is the Cleric Anwar al-Awlaki?' *Time* (13 January 2010) http://content.time.com/time/world/article/0,8599,1953426,00.html.

[1431] Scott Shane, 'US Approves Targeted Killing of American Cleric' *New York Times* (Washington, 6 April 2010) http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html.

[1432] Holder, Leahy Letter (n 1422).

[1433] Chesney (n 816) 44-5; Farley (n 816) 77.

al-Aulaqi was killed along with three others who were not specifically targeted, raising the question of proportionality. This has not previously featured within analyses of the al-Aulaqi strike,[1434] necessitating the present detailed examination.

Those killed in addition to al-Aulaqi will be excluded from a proportionality calculation if 'a reasonably well-informed person in the circumstances of the actual perpetrator'[1435] would have believed them to have lost their civilian protection at the time of the attack.[1436] One of those killed, Samir Khan, was editor of AQAP magazine *Inspire*.[1437] The others have been called 'senior associates'[1438] and were referred to by AQAP, in a statement announcing the death of al-Aulaqi, as 'companions',[1439] which says nothing about whether they were lawful targets. Under the US's approach to determining membership of an OAG[1440] they may have been assumed to be operational members of AQAP due to their association with al-Aulaqi. This broad approach, as argued above, does not reflect the general consensus and is particularly at odds with the ICRC position.[1441] Under the ICRC approach, propaganda and media activities are 'war-sustaining' rather than DPH, having no direct causal connection to the military campaign.[1442] As such, unless Khan

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[1434] Chesney (n 816) 38; van Schaack (2011) (n 733); Farley (n 816).

[1435] *Galić* (n 1053) para 58.

[1436] Additional Protocol I Article 51(5)(b); Henckaerts and Doswald-Beck 'Rules' (n 542) 46, Rule 14.

[1437] 'Yemen: Reported US Covert Actions 2001-2011' (*The Bureau of Investigative Journalism* 29 March 2012) https://www.thebureauinvestigates.com/drone-war/data/yemen-reported-us-covert-actions-2001-2011.

[1438] Damien McElroy, Adrian Blomfield and Nasser Arrabyee, 'Anwar al-Awlaki: Drone Kills US-born Preacher who Inspired Lone Wolf Terrorists' *The Telegraph* (Sana'a, 30 September 2011) http://www.telegraph.co.uk/news/worldnews/al-qaeda/8800346/Anwar-al-Awlaki-Drone-kills-US-born-preacher-who-inspired-lone-wolf-terrorists.html.

[1439] Al-Qaida in the Arabian Peninsula Statement on the Death of Anwar al-Awlaki and Samir Khan (*AQAP*, 10 October 2011) https://azelin.files.wordpress.com/2011/10/al-qc481_idah-in-the-arabian-peninsula-blood-of-the-martyr-is-light-and-fire-statement-on-the-martyrdom-of-shaykh-anwar-al-awlaqc4ab-and-his-colleagues-en.pdf (accessed 4 September 2017).

[1440] Department of Defense Manual (n 1204) 217-8.

[1441] Text from n 1357 to n 1359.

[1442] Melzer (2009) (n 1140) 51.

had a CCF in addition to editing *Inspire*, he would have retained his civilian protection at the time of the strike.[1443]

There is no publicly available evidence regarding the roles or affiliations of the other two killed, named as Muhsen al Maribi and Salem al Marwani.[1444] However, after the strike it was erroneously claimed that Ibrahim Hassan Tali al Asiri, described as AQAP's top bomb-maker, was killed.[1445] Though this was incorrect,[1446] it suggests that faulty intelligence may have led the US to believe al Asiri was among those targeted. As proportionality is determined on what was anticipated, 'making reasonable use of the information available',[1447] the calculation should proceed as if al Asiri was present, therefore reducing the number of possible civilians. This means that, bearing in mind the IHL civilian presumption in cases of doubt, it is plausible to conclude that, of those incidentally killed, at least one can be viewed as lacking their civilian protection.

Therefore the deaths of up to three civilians, though perhaps only two, must be balanced against the concrete and direct military advantage anticipated from killing al-Aulaqi. The military advantage of killing al-Aulaqi does appear 'concrete and direct', due to his seniority within AQAP and reported material involvement in planning attacks against the US and Yemen. Due to his leadership role, the military advantage to be gained by killing al-Aulaqi was large. Considering the examples of the NATO strike on the RTS TV station in Yugoslavia and IDF strike against Salah Shehadeh,[1448] it seems, on balance, that the strike was not clearly disproportionate, meaning that, overall, the strike was likely lawful under IHL.

[1443] ibid 34; The *Targeted Killings* case (n 1172) para 35.

[1444] AQAP (n 1439); TBIJ 'Yemen 2001-11' (n 1437).

[1445] Bill Roggio, 'AQAP Bomb Maker Asiri Thought Killed in Yemen Predator Strike' (1 October 2011) *Long War Journal* http://www.longwarjournal.org/archives/2011/10/aqap_bomb_maker_asiri_thought.php.

[1446] 'Profile: Al-Qaeda "bomb maker" Ibrahim al-Asiri' *BBC* (4 July 2014) http://www.bbc.co.uk/news/world-middle-east-11662143.

[1447] *Galić* (n 1053) para 58.

[1448] Text from n 1388 to 1391.

3.2.3.2.1.3 Hassan Ali Dhoore (Somalia)

Hassan Ali Dhoore was killed in a US drone strike on 31 March 2016 near Jilib, Somalia, therefore occurring during NIAC.[1449] US intervention has been invited by the Somali government, although only insofar as it targets foreign members of al-Shabaab.[1450] Dhoore's nationality is unclear, but even if he was Somali, the strike was reportedly supported by the government of Somalia, suggesting possible individualised consent in this case.[1451] Therefore, the situation is governed by IHL. However, as with the Mehsud and al-Aulaqi strikes, it is necessary to consider how IHL and IHRL relate during the strike and which of them provides the dominant regulative framework.

During the period of Dhoore's death, fighting in the proximity of the strike (temporally and spatially) was of a character that does not imply the untrammelled application of IHL. There were 20 al-Shabaab attacks in the year prior to the strike, but none of these took place as far south as Jilib, the closest being nearly 300km away in Qoryoley.[1452] Though Dhoore was likely involved in these attacks, that these battle zones are so removed from where he was targeted raises the possibility that a law enforcement operation may have been possible, thereby increasing the normative influence of IHRL over the operation. Despite this, the area was, at the time, outside of governmental control, being within a rural area controlled by al-Shabaab.[1453] Considering the government's limited control over the areas under its authority, requiring the support of Ethiopian and AMISOM forces, it cannot be considered to have had sufficient control over Jilib and its vicinity to

[1449] Section 3.1.5.3.2.

[1450] Text from n 181 to n 184.

[1451] Dan Lamothe, 'Pentagon: US Military Launches Drone Strike on al-Shabab Leader in Somalia' *Washington Post* (1 April 2016) https://www.washingtonpost.com/news/checkpoint/wp/2016/04/01/pentagon-u-s-military-launches-drone-strike-on-al-shabab-leader-in-somalia/?utm_term=.d1a49bc0a7da.

[1452] Mohsin Ali and Sebastien Billard-Arbelaez, 'Al-Shabab attacks in Somalia (2006-2017)' *Al Jazeera* (25 January 2017) http://www.aljazeera.com/indepth/interactive/2016/08/al-shabab-attacks-somalia-2006-2016-160830110231063.html.

[1453] 'Who are Somalia's al-Shabab?' *BBC* (22 December 2017) http://www.bbc.co.uk/news/world-africa-15336689.

have engaged Dhoore with law enforcement. As such, IHL provides the primary framework governing this drone strike.

Despite being publicised by the Pentagon, less is known about the Dhoore strike than those against al-Aulaqi and Mehsud, so analysis is based on inference to a larger extent. It nevertheless appears fairly certain that the drone operation against Dhoore was a personality strike. According to anonymous officials at the US Department of Defence, the US had been 'watching [Dhoore] off and on for a long time' and information from the Somali government led directly to the attack,[1454] suggesting the strike was the product of an operation with Dhoore as the specific object. Additionally, it has not been reported that Dhoore was engaged in DPH. Assuming this means he was not in fact participating, it seems likely Dhoore was viewed as targetable at all times, meaning he was understood to be a member of an OAG. [1455] The question is whether and to what extent Dhoore satisfied the criteria for membership at the time he was targeted.

Before considering the available facts, it is necessary to highlight that they come mainly from the US government itself, either as press briefings or anonymous leaks, or from news reports based on this information. Therefore, a legitimate question remains as to the veracity and partiality of the information, though it is all that is available and al-Shabaab has not refuted the US account. Dhoore was reported to be 'a senior leader of al-Shabaab' who 'played a direct role' in a 2014 attack, killing UN soldiers and a US citizen, and was 'directly responsible' for a 2015 attack on a Mogadishu hotel that killed 15 people, including one US national.[1456] Further, Dhoore was claimed to be involved in 'operational planning and … conduct[ing] attacks against the government of the Federal Republic of Somalia, its citizens, US partners in the region, and against Americans abroad.'[1457]

These factors indicate that Dhoore had a CCF within al-Shabaab, rendering him lawfully targetable at all times. Once again, this case-study provides an example of a targeted individual who satisfies the more restrictive criteria of the ICRC, meaning that, at least

[1454] Lamothe (n 1451).

[1455] Section 3.2.2.2.1.

[1456] Cook Statement (1 April 2016) (n 980).

[1457] ibid.

in this isolated incident, the broad and contentious approach to membership promulgated by the US is more of an abstract than concrete issue.

In addition to Dhoore, two others were killed during the strike,[1458] opening up the question of proportionality. Reports on the identity of these individuals killed describe them as al-Shabaab fighters,[1459] which would indicate a CCF. If correct, then their deaths will not feature in a proportionality calculation, regardless of which interpretation of OAG membership is favoured. Conversely, it may be that they were civilians involved with al-Shabaab sporadically, in which case, whether they feature within the proportionality calculation will be based on the interpretation of DPH. Under the more expansive approach, in which individuals who participate on multiple occasions are targetable during the periods between acts of hostilities,[1460] Dhoore's companions may well be deemed targetable and therefore not part of the proportionality calculation. Conversely, under the more restrictive 'revolving door of protection', they would be considered to maintain their civilian protection unless traveling to or returning from an act of hostilities.[1461] As civilian deaths, they would need to be outweighed by the military advantage of killing Dhoore for the strike to be lawful.

If the proportionality calculation does need to be made, Dhoore's seniority within al-Shabaab likely renders the strike proportionate. Dhoore's death was described as 'a significant blow to al-Shabaab's operational planning and ability to conduct attacks',[1462] representing a clear concrete and direct military advantage, outweighing the deaths of his companions.

[1458] 'Al-Shabaab leader Hassan Ali Dhoore "killed by US drone strike"' (1 April 2016) *Telegraph* http://www.telegraph.co.uk/news/2016/04/01/al-shabaab-leader-hassan-ali-dhoore-killed-by-us-drone-strike/.

[1459] TBIJ 'Somalia 2017' (n 21).

[1460] Text from n 1247 to n 1249.

[1461] Text from n 1241 to n 1246.

[1462] Lizzie Dearden, 'Al-Shabaab Leader Hassan Ali Dhoore 'killed' in US Drone Strike in Somalia' *The Independent* (2 April 2016) http://www.independent.co.uk/news/world/africa/al-shabaab-leader-hassan-ali-dhoore-killed-in-us-drone-strike-in-somalia-a6964736.html.

3.2.3.2.1.4 Personality strikes: conclusion

Based on available information, personality strikes conducted by drones appear generally to be lawful in terms of IHL distinction and its constituent rules. Indeed, the operation of distinction creates the imperative that targeting is conducted in as precise a manner as possible, which fits with identity based strikes. The lawfulness, or the strength of arguments asserting lawfulness, of personality drone strikes depends on the interpretation given to relevant IHL rules. The lawfulness of each personality strike will depend on the specific facts leading to it, and, in particular, the role of the individual targeted. The closer their function is to hostilities, the more likely it is that they were a lawful target. As an individual's membership of an OAG becomes further removed from hostilities, and becomes instead based purely on their formal role, then the basis for lawful targeting is weaker. Though none of the case-studies involved individuals targeted purely due to formal membership, the law has been liberally interpreted by the US to potentially allow this method of targeting. There is a strong argument that drone strikes undertaken on that basis will violate the principle of distinction.

In terms of proportionality, as with distinction, the issue rests on the facts. Where the targeted nature of a personality strike augers towards compliance with the principle of distinction this has no impact on proportionality. However, there is a relationship between the targeted nature of personality strikes and the principle of proportionality, which must be considered when assessing drone strikes from this perspective: personality strikes are often targeted against high-level individuals, but this should not create a presumption that civilian casualties in these circumstances are necessarily proportionate; there will always be a point at which civilian harm outweighs military advantage. The planned nature of personality strikes ought, arguably, to lower this threshold as opposed to strikes against emerging threats.[1463]

[1463] Clarke (n 1384) 81.

3.2.3.2.2 Signature Strikes

Like personality strikes, the targeting of unknown individuals based on their behaviour does not inherently violate the IHL principle of distinction.[1464] It is a practice that is arguably more clearly recognisable within IHL rules on distinction than the targeting of known members of OAGs: the former is written into IHL treaties in the form of the loss of civilian protection through DPH,[1465] whereas the latter has arisen through the interpretation of those rules. Acquiring targets in this manner focuses on the 'signature' of individuals' behaviour and so they are often called 'signature strikes', although they are also referred to as 'dynamic targeting'.[1466] Signature strikes reportedly represent the majority of US lethal armed drone operations, accounting for 93 percent of all strikes in Pakistan between 2008 and 2010.[1467] Indeed, the Reaper drone is described by the US government as being 'employed primarily against dynamic execution targets'.[1468]

The practice of drone signature strikes is controversial, with some commentators suggesting it is inherently unable to adequately distinguish between lawful targets and protected civilians,[1469] and others seeing them as potentially difficult to justify.[1470] Nevertheless, this does not reflect the majority of opinion. Instead, the issue of lawfulness rests upon the interpretation of the law on DPH and the 'signature' of behaviour that is based upon that interpretation. This requires that the signatures informing a decision to

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[1464] This section will examine the use of drones for signature strikes exclusively from an IHL perspective without engaging in a discussion of the possibility that IHRL may at time provide the principle framework for analysis during NIAC, as discussed above in Section 3.2.1. This is due to the situation specific nature of IHRL's application as a primary framework, to engage in such an analysis more generally is more suited to occurring within a broader IHRL-focused analytical framework. As such, the examination of signature strikes from the perspective of IHRL can be found in the IHRL section of this work.

[1465] Geneva Conventions I-IV, Common Article 3; Additional Protocol I, Article 51(3); Additional Protocol II, Article 13(3).

[1466] Joint Targeting (n 1320) x.

[1467] 'Living Under Drones' (n 1326) 31.

[1468] Reaper Fact Sheet (n 1298).

[1469] Martin S Flaherty, 'The Constitution Follows the Drone: Targeted Killings, Legal Constraints and Judicial Safeguards' (2015) 38 Harvard Journal of Law and Public Policy 21, 32; Shah (2015) (n 4) 165.

[1470] Boyle (n 428) 114-5.

strike point to the targeted individual actually directly participating in hostilities, or being a member of an OAG. It is this aspect of the law on distinction that many have seen as crucial in assessing signature strikes.[1471]

Before considering relevant interpretations of IHL, the ability of signature drone strikes against dynamic targets to accord with distinction as an abstract process (including the legal architecture surrounding the decision to strike), will be examined. The US seemingly does not undertake signature strikes capriciously: a detailed breakdown of the relevant procedure is provided in the 2007 Joint Targeting manual, which depicts a five-step iterative process of find, fix, track, target and engage, followed by a post-strike assessment ('F2T2EA').[1472] Evaluation of a potential target's lawfulness (an aspect of target 'validation'[1473]) is made and confirmed repeatedly during the process, featuring heavily at the 'find' step, in which potential targets are first identified.[1474] During the 'fix' and 'track' steps, targets are monitored and windows of vulnerability identified.[1475] The 'target' step comprises the final decision whether to engage a target, and includes further consideration of any IHL reasons that may restrict the strike.[1476] Thus the F2T2EA process emphasises international law in the determination of the lawfulness of a target. Thus, if this approach is employed for each strike, drone operations do not disregard operative rules of IHL.

Throughout the process, drones' sensors are used to evaluate and confirm target identification and inform assessments of DPH.[1477] As depicted,[1478] the Predator and Reaper drones' sensors are powerful and, coupled with the ability to loiter, provide the potential for extensive surveillance and target verification—the US government itself has lauded drones as providing 'laser-like precision'.[1479] This has been argued to make drones

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[1471] Heyns and others (n 2) 813; Pejić (2014) (n 623) 92; Schmitt and Widmar (n 1162) 390.

[1472] Joint Targeting (n 1320) II-12.

[1473] ibid II-8.

[1474] ibid II-12.

[1475] ibid II-15-7.

[1476] ibid II-17.

[1477] ibid II-16.

[1478] Text from n 1303 and n 1309.

[1479] Brennan (2012) (n 48).

particularly able to distinguish lawful targets who directly participate in hostilities from civilians.[1480] Based on the framework set out, and the relevant drones' capabilities, this conclusion is understandable. Additionally, the F2T2EA process of a strike, coupled with the surveillance capabilities of the relevant drones, points towards an ability to choose an optimal strike location and time in order to increase distinction and limit the incidental damage of a strike.

However, the guidance for drone targeting, in acknowledging that opportunities for signature strikes may present themselves in time sensitive situations, allows for the possibility that the F2T2EA process may be compressed, such that 'the find and fix steps [are] completed nearly simultaneously without the need for traditional ISR'.[1481] This concentrates much of the work of validation with those operating the drone, though presumably still with the input of legal advisers. Additionally, such circumstances may result in 'the target and engage phases being completed with a much abbreviated coordination and approval process,'[1482] further reducing the opportunities to confirm the lawfulness of an operation.

In such situations, the comprehensive validation procedures in normal targeting may be compromised, thus increasing the scope for violation of the principle of distinction by resultant drone strikes, while undermining the potential for drone strikes to limit proportionality. Though speculative, this assertion chimes with testimony of former drone pilots, whose accounts of operating US drones depict lax oversight and a cavalier approach to targeting, with examples including children described as 'fun-sized terrorists' and groups of men targeted with no apparent confirmation as to status.[1483] A related possible problem is indicated by reports that the video feed from a drone camera can, at times, be 'so pixelated' as to make a distinction between a shovel and a weapon very difficult, for instance.[1484] In the time-sensitive environment of a signature strike, by its nature against a target of fleeting opportunity, these issues may stymie the otherwise

[1480] Blank (n 1292) 693; Gross (n 1291) 51-2.

[1481] Joint Targeting (n 1320) II-14-5.

[1482] ibid II-14-5.

[1483] Pilkington (n 1318).

[1484] Linebaugh (n 1318).

thorough validation architecture built around drone targeting, thereby undermining adherence to principles of distinction and proportionality.

Despite these accounts, evidence generally points towards drones being capable of distinction, and perhaps even tending towards it more than other weapon systems. There is scope for IHL violations, but the architecture around drones strikes, and the technology itself, is geared towards adherence. Therefore, as with personality strikes, the question of lawfulness sits not with the abstract capabilities of drones, but the interpretations of targeting rules and how these are operationalised. If the notion of DPH is understood in a manner inconsistent with the principle of distinction, then the signatures used to identify 'legitimate' targets for drone strikes will also conflict with the principle, and so will the resulting strikes. Therefore, it is necessary to evaluate possible signatures used in US drone strikes, and assess the degree to which they accord with IHL. As ever, the secrecy of the drone programmes in Pakistan, Yemen and Somalia significantly hampers the identification and assessment of signatures. It is nonetheless possible to infer signatures based on media reports and to arrive at broad conclusions as to their compliance with distinction and its attendant rules.

Signature strikes are certainly controversial, with many arguing that the metrics adopted by the US auger towards the violation of IHL.[1485] Nevertheless, there is limited sustained analysis of this method of drone strike. Heller has produced a typology of signatures ostensibly employed in US drone strikes,[1486] which will be used here, along with the more recently produced US *Law of War Manual*, to assess possible signatures. Identified signatures are: planning attacks, transporting weapons, handling explosives, and, generally, compounds and training camps belonging to a party to an armed conflict.[1487] These bases of targeting are present in the *Law of War Manual* and so their use in US drone strikes is likely.[1488] Heller has argued that each of these is a lawful basis for

[1485] Benson (n 733) 31-4.

[1486] Heller (n 721).

[1487] ibid 94-6.

[1488] Department of Defense Manual (n 1204) 207-8 (military bases), 219 (training camps) and 227 (taking part in an attack, handing and transporting weapons).

targeting as each equates to DPH,[1489] however, it is submitted that the lawfulness of some of these is not quite so straightforward.

Planning attacks is the least controversial basis for targeting. Assuming the planned attack is likely to harm an adversary, to the benefit of a party to the conflict, then those planning it will be direct participants in hostilities under the ICRC interpretation, their activity being either one causal step away from the act of hostilities, or constituting an integral part thereof.[1490] In satisfying the more demanding ICRC criteria, the category also satisfies the broader interpretation of DPH adopted by the US, as planning attacks constitutes 'effective[] and substantial[] contribut[ion] to an adversary's ability to conduct or sustain combat operations'.[1491] Therefore, the planning of attacks is a lawful basis for targeting.

Targeting on the basis of transporting weapons is less certainly an example of DPH. Although a truck carrying weapons is a military objective, it is debatable whether the driver would necessarily be a direct participant in hostilities. The ICRC's view is that transporting weapons must be an '"integral" part of a concrete military operation' to be DPH,[1492] simply driving an ammunition truck to a storehouse from a factory is too remote.[1493] This view was adopted by some experts during the drafting of the guidance but not all.[1494]

In the *Targeted Killings* case, the Israel Supreme Court held that the driver of an ammunition truck would be targetable when 'driving the ammunition to the place from which it will be used for the purposes of hostilities',[1495] echoing the ICRC approach. This view also appears in ICTY jurisprudence, which found that 'transporting weapons in proximity to combat operations' was DPH, whereas transporting weapons without the

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[1489] Heller (n 721) 94-6.

[1490] Melzer (2009) (n 1140) 51.

[1491] Department of Defense Manual (n 1204) 224-5.

[1492] Expert Meeting 4th Report (n 1145) 47-8.

[1493] Melzer (2009) (n 1140) 56.

[1494] Expert Meeting 3rd Report (n 1246) 32-3.

[1495] The *Targeted Killings* case (n 1172) para 35.

link to combat operations was insufficiently direct.[1496] However, there remains no academic consensus regarding the status of 'the driver',[1497] so by adopting it as a basis for drone strikes the US has opened up the possibility of strikes based on uncertain ground in terms of distinction.

As stated,[1498] the ICRC view is that an act more than one step removed from an act of hostilities will constitute DPH where it 'constitutes *an integral part* of a concrete and coordinated tactical operation that directly causes such harm.'[1499] Integrality features within the US *Law of War Manual*, which requires that actions be 'an integral part of combat operations'[1500] to be DPH, thus raising the question of the extent to which this signature even accords with the broad US view of DPH, though it may be part of the wider category of acts 'that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations'.[1501] Ultimately, the driver of an ammunition truck would be a proportionate collateral casualty to the lawful targeting of an ammunition truck, thereby rendering this disagreement of limited practical impact. As such, it is submitted that, this basis for drone targeting seems to reflect relevant rules of IHL distinction.

Similarly, the handling of explosives is not universally viewed as inherently DPH. The ICRC held that those manufacturing and storing IEDs were not necessarily lawful targets *per se*.[1502] This is controversial[1503] but nonetheless demonstrates that it is arguable that such individuals retain their civilian protection. The explosives themselves are targetable

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[1496] *Struga* (n 1178) para 177.

[1497] Yoram Dinstein, 'Distinction and Loss of Civilian Protection in International Armed Conflicts' (2008) 84 International Law Studies 183, 191-2; William J Fenrick, 'The *Targeted Killings* Judgment and the Scope of Direct Participation in Hostilities' (2007) 5(2) Journal of International Criminal Justice 332, 336; APV Rogers, *Law on the Battlefield* (2nd edn, Manchester University Press 2004) 9-12; Lisa L Turner and Lynn G Norton, 'Civilians as the Tip of the Spear' (2001) 51 Air Force Law Review 1, 32.

[1498] Text from n 1202 to n 1203.

[1499] Melzer (2009) (n 1140) 54-5 (emphasis added).

[1500] Department of Defense Manual (n 1204) 224-5.

[1501] ibid 224-5.

[1502] Melzer (2009) (n 1140) 53-4.

[1503] Dinstein (2013) (n 1211) 11; Schmitt 'Deconstructing' (2010) (n 1196) 731.

as military objectives[1504] but the individual handling them may need to be considered as part of a proportionality calculation. The lawfulness of the strike would be less certain if the individual handling explosives was targeted separately, after depositing them elsewhere. In this case, targeting would contravene the principle of distinction as understood by the ICRC, as the conduct of the individual would be more than one step removed from acts of hostilities.

That training camps and compounds belonging to OAGs are lawful targets is not a question of DPH but of whether they are military objectives. If such camps and compounds do belong to an OAG they will be military objectives by 'mak[ing] an effective contribution to military action' and because their 'total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage'.[1505] Nevertheless, if an individual is present at a camp or compound they are not automatically a direct participant in hostilities, though the US does infer formal OAG membership from it.[1506] Under the ICRC approach, an individual's behaviour must directly cause an act of hostilities before it can be deemed DPH. In the absence of this the individual would remain a civilian, considered within a proportionality calculation if likely to be killed in a drone strike.

Heller's typology details a number of signatures that he suggests *may* provide a lawful basis for lethal targeting. The first is 'groups of armed men traveling towards conflict'.[1507] This signature does not map onto those present in the US *Law of War Manual*, the most similar of which requires groups of individuals to at least partially comprise members of an OAG before they can be targeted as a collection of presumed formal members of that group.[1508] Nonetheless, targeting on the basis of this signature has been confirmed by US officials, though is seemingly restricted to Pakistan, where drones 'are allowed to strike

[1504] Additional Protocol I Article 52(2).

[1505] Additional Protocol I Article 52(2).

[1506] Department of Defense Manual (n 1204) 218.

[1507] Heller (n 721) 100-1.

[1508] Department of Defense Manual (n 1204) 219.

groups of armed militants traveling by truck toward the war in Afghanistan'.[1509] This signature exists at the periphery of those accepted by the ICRC, insofar as the circumstances surrounding the group's travel connect it sufficiently with acts of hostilities, otherwise the need for 'direct causation' would be unsatisfied. Even under the US *Law of War Manual* requirement that conduct 'effectively and substantially contribute[s] to an adversary's ability to conduct or sustain combat operations'[1510] it would be necessary to demonstrate an additional link with hostilities. If targeting occurs without knowledge of additional factors suggesting DPH it is conceivable that such strikes may violate the principle of distinction. Related to this, it has been argued that cultural misunderstandings may affect the analysis of behaviour, with innocent acts potentially viewed as suspicious.[1511] This issue is relevant to this particular signature, because civilian ownership of weapons in FATA[1512] and Yemen[1513] is commonplace. Thus, using such a signature as an indicator that a group is a lawful target risks failing to distinguish adequately, with individuals targeted who have no link to hostilities.

Heller's typology includes the signature of '[o]perating an [al-Qaeda] training camp'; he argues that this is a lawful basis for targeting while 'targeted individuals are in geographic proximity to the training camp itself'.[1514] Heller states that this is because trainers with non-combat functions may not be targeted unless they are training recruits for a specific operation,[1515] echoing the ICRC's CCF approach. This means that, in the absence of DPH through the act of training others 'with a view to the execution of a specific hostile

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[1509] Greg Miller, 'White House Approves Broader Yemen Drone Campaign' *Washington Post* (26 April 2011) http://www.washingtonpost.com/world/national-security/white-house-approves-broader-yemen-drone-campaign/2012/04/25/gIQA82U6hT_story.html.

[1510] Department of Defense Manual (n 1204) 224-5.

[1511] 'The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions' (Center for Civilians in Conflict and Columbia Law School Human Rights Clinic, 2012) https://civiliansinconflict.org/wp-content/uploads/2017/09/The_Civilian_Impact_of_Drones_w_cover.pdf 41.

[1512] Shah (2015) (n 4) 175.

[1513] Tik Root, 'Gun Control, Yemen-Style' *The Atlantic* (Sana'a, 12 February 2013) http://www.theatlantic.com/international/archive/2013/02/gun-control-yemen-style/273058/.

[1514] Heller (n 721) 101.

[1515] ibid 101.

act',[1516] a person operating a training camp may not be targeted. Adopting the view of DPH espoused by the US would not produce the same result, as under that approach a camp operator would be targetable at any time as a formal OAG member.

Relatedly, training to join an OAG is a signature identified as providing a lawful basis for targeting.[1517] This would arguably be valid under all interpretations of DPH as the ICRC has specifically asserted that a member trained for a CCF is targetable 'before he or she first carries out a hostile act.'[1518] Likewise, the US has interpreted the attendance of a training camp as evidence of formal membership of an NSA. Thus, under either the narrow approach of the ICRC or the broader US approach, such individuals would be targetable.

An unclear aspect of US signature strikes is the targeting of those involved in facilitating the activity of its adversaries, with conflicting reports as to the extent to which this behaviour forms a basis for targeting.[1519] Vogel, writing while policy adviser to the US Department of Defense, explicitly referred to the decision to target 'facilitators' and 'propagandists' with drone strikes,[1520] suggesting that such individuals are viewed as targetable. It is conceivable that this statement was made on the understanding that facilitators would be formal members of OAGs and, therefore, targetable in the view of the US.[1521] The Israel Supreme Court has held that 'logistical, general support, including monetary aid' to an OAG does not equate to DPH, instead being indirect participation,[1522] supporting the view that facilitation lacks sufficient causation to be DPH. Likewise, the ICRC has stated that facilitators who are not members of OAGs are not sufficiently

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[1516] Melzer (2009) (n 1140) 66.

[1517] Heller (n 721) 102.

[1518] Melzer (2009) (n 1140) 34.

[1519] David Cloud, 'CIA drones have broader list of targets' *Los Angeles Times* (5 May 2010) http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506/2; 'US Official: Greater Use of Drones Goes Back to Bush Era' *CNN* (Washington, 4 May 2010) http://afghanistan.blogs.cnn.com/2010/05/04/obama-administrations-greater-use-of-drones-goes-back-to-bush-era/.

[1520] Vogel (2012) (n 1291) 116.

[1521] Text from n 1349 to n 1354.

[1522] The *Targeted Killings* case (n 1172) para 35.

causally connected to hostilities to be direct participants.[1523] On this basis Heller has argued that some targeting carried out due to facilitation may have breached the principle of distinction.[1524] This aspect of the ICRC's guidance has not proven to be as controversial as others,[1525] so the idea that targeting due to facilitation may violate the principle of distinction when the act is causally removed from hostilities is persuasive. This, therefore, questions the lawfulness of any US strikes undertaken in this manner, without further target validation.

There are a number of signatures identified that are far more likely to violate the principle of distinction. The most obvious is the designation that all military-aged males in 'an area of known terrorist activity' are targetable. This enormously broad category was widely reported when leaked by anonymous US officials in 2012,[1526] though in 2016 the practice was rejected by the US government, which stated that '[m]ales of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants'.[1527] Therefore, it is difficult to assess whether this signature has featured as an interpretation of DPH upon which drone strikes have been undertaken, or whether it is a product of the attitudes of some drone crews. The latter is conceivable when examining the language purportedly used by drone operators, with targeting described as 'pulling the weeds' and 'step[ping] on ants',[1528] suggesting a cavalier approach to targeting that may go beyond official legal guidance.

[1523] Melzer (2009) (n 1140) 51.

[1524] Heller (n 721) 102-3.

[1525] Heyns and others (n 2) 810; Watkin (n 1164) 656.

[1526] Becker and Shane (n 1328); Radly Balko, 'US Drone Policy: Standing Near Terrorists Makes you a Terrorist' *Huffington Post* (29 May 2912) http://www.huffingtonpost.com/2012/05/29/drone-attacks-innocent-civilians_n_1554380.html; Conor Friedersdorf, 'Under Obama, Men Killed by Drones are Presumed to be Terrorists' *The Atlantic* (29 May 2012) http://www.theatlantic.com/politics/archive/2012/05/under-obama-men-killed-by-drones-are-presumed-to-be-terrorists/257749/.

[1527] 'Summary of Information Regarding US Counterterrorism Strikes Outside Areas of Active Hostilities' (Director of National Intelligence, July 2016) https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF.

[1528] Pilkington (n 1318).

Nevertheless, the US government has stated that between January 2009 and December 2015, 64-116 civilians were killed by 473 drone or other covert strikes 'outside areas of active hostilities'.[1529] However, for the same period, NGOs have provided figures indicating far more civilian casualties. For instance, TBIJ recorded 321-741 civilians killed out of 499-523 drone strikes in the same regions,[1530] based on news media and local sources where those killed were 'credibly reported' as being civilian.[1531] Data from the New America Foundation on covert operations—including drone strikes—in the same regions, identified 508 strikes and 216-254 civilian deaths.[1532] These data are based on at least 'two credible media sources' with casualties labelled 'civilian' where reported by multiple sources—otherwise being categorised as 'unknown'.[1533]

This disparity between US government and NGO statistics could be explained by the adoption of a broader metric in terms of identifying casualties as civilian, thereby supporting the suggestion that the US may view (or be more likely to view) military-aged males as combatants for targeting and proportionality purposes. However, this is inferential, and is not unproblematic. First, it is possible that while an international lawyer would correctly classify a civilian directly participating in hostilities as lawfully targetable, a media outlet may instead report them as a civilian. This is, of course, correct: the individual *is* a civilian, but not in the manner that is intended when 'civilian casualties' are discussed. Second, it is possible that the US has intelligence beyond that gathered by media sources, which could be demonstrative of DPH. Ultimately, while the disparity in

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[1529] DNI Summary (n 1527).

[1530] 'Get the Data: Drone Wars' (*The Bureau of Investigative Journalism*) https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/.

[1531] 'Covert US Strikes in Pakistan, Yemen and Somalia—Our Methodology' (*The Bureau of Investigative Journalism*, 10 August 2011) https://www.thebureauinvestigates.com/2011/08/10/pakistan-drone-strikes-the-methodology2/.

[1532] 'Drone Strikes: Pakistan' (*New America Foundation*) https://www.newamerica.org/in-depth/americas-counterterrorism-wars/pakistan/; 'Drone Strikes: Yemen' (*New America Foundation*) https://www.newamerica.org/in-depth/americas-counterterrorism-wars/us-targeted-killing-program-yemen/; 'Drone Strikes: Somalia' (*New America Foundation*) https://www.newamerica.org/in-depth/americas-counterterrorism-wars/somalia/.

[1533] 'Drone Wars Methodology' (*New America Foundation*) http://securitydata.newamerica.net/drones/methodology.html.

statistics appears to support the existence of a 'military-aged males' signature, the initial claim was made by a single anonymous official, and the speculative nature of subsequent considerations means that it cannot be seen as certain that targeting solely on the basis of this signature has occurred.

Were such a signature used for drone strikes, it would be manifestly contrary to the principle of distinction,[1534] reversing the civilian presumption in cases of doubt.[1535] Such targeting would fail to satisfy all three steps of the ICRC's test for DPH. The same is the case under the US *Law of War Manual* interpretation of DPH as 'effectively and substantially contribut[ing] to an adversary's ability to conduct or sustain combat operations'.[1536] Clearly this signature comes nowhere close to any interpretation of DPH. Furthermore, Rule 3 of the ICRC CIHL study, on the definition of combatants, asserts that '[p]otential mobilisation does not render [a] person … liable to attack'[1537] and this has been argued to prohibit exactly this sort of signature.[1538] Thus, any strikes carried out on this basis will be unlawful without additional intelligence informing the targeting process. Nevertheless, without further evidence as to whether this does inform targeting decisions, it is impossible to conclude to what extent drone strikes have occurred on this basis.

Other potential signatures identified and deemed unlawful are 'armed men travelling in trucks in [NSA] controlled area[s]'[1539] and '"suspicious" compounds in areas controlled by militants'.[1540] These are variations on the 'military-aged males' signature and would likewise violate the principle of distinction. These signatures recall the issue of cultural practices being interpreted as suspicious and informing targeting practices, discussed above:[1541] neither being camped in a given area, nor being armed necessarily satisfies either the requirement of direct causation inherent in the ICRC approach to DPH or the

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[1534] Benson (n 733) 31; Heyns and others (n 2) 813; Pejić (2014) (n 623) 93.

[1535] Article 50(1) AP I; ICRC AP Commentary (n 581) para 4789.

[1536] Department of Defense Manual (n 1204) 228.

[1537] Henckaerts and Doswald-Beck 'Rules' (n 542) 14, Rule 3.

[1538] Rogers (n 1136) 111.

[1539] Heller (n 721) 98-9.

[1540] ibid 99-100.

[1541] **Cross-reference to relevant section.**

broader US requirement of 'effectively and substantially contribut[ing] to an adversary's ability to conduct or sustain combat operations'.[1542]

The ICTY has held that possession of weapons does not rebut the presumption of civilian status.[1543] Thus, without intelligence evidencing DPH, reliance upon these signatures will violate the principle of distinction. Again, due to secrecy, questions remain as to the extent to which these signatures are actually used by the US—neither appear in the US *Law of War Manual*. Heller refers to a single article on an NGO's website identifying the practice of targeting on the basis of armed men traveling by truck,[1544] and it is not clear that this signature was the operative basis of the relevant strike. Similarly, Heller's assertion of the signature of camps in OAG areas is based on a single media source, itself based on a 'report', which is in fact a highly cited *New York Times* article.[1545] The claim that camps are targeted is not attributed to any source, but, instead, seems to have been inferred by the authors. As stated above, it may be that a cavalier approach to targeting has been adopted by some drone crews, but without further evidence it is important not to overstate the influence of these signatures in the US drone programme. If they have been used, then drone strikes carried out on that basis will have certainly violated the principle of distinction. However, at present, there is insufficient evidence to conclude that this is the case.

A final signature discussed by Heller is 'consorting with known militants', which he asserts does not provide a lawful basis for targeting.[1546] As with other controversial signatures, a single media source is provided,[1547] and that source refers to an anonymous 'high-level American official'.[1548] However, unlike other expansive signatures asserted, it appears that this—or at least a permutation of it—is identifiable within US

[1542] Department of Defense Manual (n 1204) 224-5.

[1543] *Prosecutor v Simić* (Trial Chamber Judgment) IT-95-9-T (17 October 2003), para 659.

[1544] Heller (n 721) 98; Bill Roggio, 'US Predators Strike Again in Southern Yemen' *Long War Journal* (16 April 2012) http://www.longwarjournal.org/archives/2012/04/us_predators_strike_35.php.

[1545] Becker and Shane (n 1328).

[1546] Heller (n 721) 97.

[1547] ibid 97.

[1548] Dexter Filkins, 'The Journalist and the Spies' *The New Yorker* (19 September 2011) http://www.newyorker.com/magazine/2011/09/19/the-journalist-and-the-spies.

interpretations of IHL targeting rules. The *Law of War Manual* asserts that 'traveling with members' of an OAG may provide evidence of membership.[1549] It is possible to conceive that this signature might be imputed to an individual consorting with known militants, though this is a logical stretch. This signature is not employed by the US to identify DPH, but as evidence of formal OAG membership under the wide interpretation in the *Law of War Manual*.

As discussed, the assertion of OAG membership is a contested concept;[1550] considered through the lens of the ICRC approach this would be insufficient to equate to a CCF, and so would need to be assessed as individual DPH. Consorting with militants does not satisfy the ICRC's three-step interpretation of DPH, not least because there is no causal relationship between the behaviour and an act of hostilities. Similarly, 'accompanying … one of the parties to the conflict' was held by the ICTY to constitute *indirect* participation—in at least some cases, like supplying food—and therefore did not result in loss of protection.[1551] However, due to the unclear nature of this area, it is not possible categorically to conclude that targeting on this basis would violate the principle of distinction, if the broad US understanding of OAG membership is used. Conversely, if it provided the sole basis of a signature strike due to DPH, it would very likely violate the principle of distinction as it neither demonstrates a direct causal link to an act of hostilities, nor 'effectively and substantially contribute[s] to an adversary's ability to conduct or sustain combat operations'.[1552]

Drone strikes based on the signature or pattern of an individual's behaviour are not inherently unlawful under the principle of distinction and relevant rules of IHL. However, it is highly problematic that the signatures upon which the majority of US drone strikes in Pakistan, Yemen and Somalia are based remain secret. This secrecy stymies analysis of those strikes, necessitating the use of unconfirmed reports and anonymous leaks. Therefore, it has been impossible to identify specific drone strikes based on signatures that certainly violate the principle of distinction. Further, the lack of clarity surrounding

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[1549] Department of Defense Manual (n 1204) 219.

[1550] Text from n 1351 to n 1354.

[1551] *Struga* (n 1178) para 177.

[1552] Department of Defense Manual (n 1204) 224-5.

DPH hampers the concept's normative power; many purported signatures employed in the US drone programme were shown only to be lawful when the law is interpreted broadly, in ways not generally accepted.

Despite these problems of identification, of both practice and law, it has been possible to consider many potential and purported signatures and to assess their lawfulness in terms of competing interpretations of IHL. While some signature strikes comfortably satisfy the principle of distinction (targeting individuals planning attacks, transporting weapons to combat operations, travelling to acts of hostilities, providing and receiving training for acts of hostilities as well as the camps and compounds of OAGs), and others only satisfy a broad interpretation (targeting the transport of weapons generally, handling explosives, facilitating the activities of an OAG and consorting with known militants), there are some that violate the IHL principle of distinction even when interpreted broadly (targeting military-aged males, armed men traveling in trucks, and compounds in areas controlled by OAGs). Any drone strikes conducted on these bases are manifestly unlawful, though it is currently impossible to know the extent to which they have been employed.

3.2.3.2.3 Other bases for targeting

Attention now turns to the possibility of another basis upon which the US might target individuals. There have been periodic references by the US government, in relation to its drone programmes, to the notion of individuals who are 'otherwise targetable in the exercise of national self-defense.'[1553] This category of individuals is posited alongside those targetable due to OAG membership or DPH, seemingly representing an additional basis for targeting, while the inclusion of the term 'self-defense' suggests a cross-pollination between IHL and *jus ad bellum*.

It may be that this reference is simply tautological, in that drone strikes are claimed to be an exercise of self-defence, but it is not self-defence that authorises specific targeting: targeting as an exercise of self-defence must still abide by IHL. However, the phrase

[1553] DNI Summary (n 1527) 2; Department of Defense Process Report (n 1336) 5; Presidential Policy Guidance (n 1283) 1.

'*otherwise* targetable' stands out, apparently positing self-defence targeting as an alternative to that governed by IHL. It is difficult to understand why this language is used as the US is unlikely to need to transcend the parameters for lawful targeting under IHL; with the wide interpretations of IHL that it promulgates, it seems unnecessary to violate the parameters of IHL so explicitly.

It may be that this basis is an articulation of 'naked self-defence',[1554] where lethal force under IHL is available in the absence of an armed conflict, once the requirements of self-defence are satisfied. However, even if 'naked self-defence' is accepted in a conceptual sense, it does not fit in this context, as the concept is not held to avoid the IHL rules on targeting but to allow their application outside armed conflict. A related possibility is that the reference to those 'otherwise targetable in the exercise of national self-defence' has in mind the use of lethal force outside of NIAC and within the paradigm of IHRL.[1555] As will be demonstrated in the following chapter, lethal force is not anathema to IHRL protection, though it is heavily restricted.[1556] Nevertheless, it is academic commentary rather than the US administration that has proffered the use of IHL rules outside of armed conflict,[1557] and it has been a controversial proposal.[1558]

Without further information as to the motivation behind the use of the phrase it is impossible to assess its implications in terms of US drone strikes. It is almost beside the point whether this term is intended to widen the scope for lethal targeting as, in the absence of any similar invocations by other states, it is incapable of fostering new

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[1554] Kenneth Anderson, 'Targeted Killing and Drone Warfare: How we Came to Debate Whether There is a "Legal Geography of War"' (2011) Koret-Taube Task Force on National Security and Law, Stanford University http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf 8-9.

[1555] Jordan J Paust, 'Propriety of Self-Defense Targetings of Members of Al Qaeda and Applicable Principles of Distinction and Proportionality' (2012) 18 ILSA Journal of International and Comparative Law 565, 574-5, arguing that, in some cases, neither IHL nor IHRL are applicable due to the territorially bounded nature of IHRL (a position rejected by the present author).

[1556] Section 4.3.

[1557] Anderson (n 1554) 8-9.

[1558] Corn (2012) (n 540) 59; Ian Henderson and Bryan Cavanagh, 'Unmanned Aerial Vehicles (UAVs): Do They Pose Legal Challenges?' in Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict* (Asser Press 2014) 199; Pejić (2014) (n 623) 75.

customary international law. Therefore, any targeting undertaken on the basis of 'national self-defence' will continue to be regulated by the IHL rules of targeting when it occurs during armed conflict, and the stricter IHRL framework during peacetime.

3.2.3.2.4 Capture rather than kill

Having considered the methods by which drone strikes are undertaken, it is necessary to ask whether they have violated IHL by failing to attempt capture prior to resorting to lethal force. This is a question in which the relative primacy of IHL and IHRL is particularly important. Based on the circumstances surrounding a strike during a NIAC, if IHRL provides the primary regulative framework then obligations to exhaust non-lethal alternatives will arise under IHRL necessity. This is considered more in the next chapter[1559] but it suffices at present to state that failing to attempt capture before using lethal force can violate the right to life in many circumstances.

The situation is very different under IHL. As discussed[1560] no specific IHL rule mandates the use of non-lethal force against an individual directly participating in hostilities. It is an argument based on principle rather than rules, which is not represented in CIHL. It is an issue of interpretation; those arguing for the imperative to capture present a particularly restrictive interpretation of IHL. The use of drones could inherently violate such an interpretation by foreclosing the possibility of capture by removing all physical presence on the ground. This appears to be the conclusion of some who consider there to be 'duty' to capture[1561] but this is a minority view. As there is no obligation to capture rather than kill, the fact that drone strikes effectively render capture operations impossible does not implicate their lawfulness under IHL.

[1559] Section 4.3.1.

[1560] Section 3.2.2.2.2.4.

[1561] Claire Finkelstein, 'Targeted Killing as Preemptive Action' in Claire Finelstein, Jens D Ohlin and others (eds), *Targeted Killings: Law and Morality in the Asymmetrical World* (Oxford University Press 2012) 172.

3.2.3.3 Precaution in attack

Finally, it is necessary to consider whether drone strikes are able to adhere to IHL rules on precaution. The requirement that a party to an armed conflict takes precautions puts an obligation upon planners to ensure targets are non-civilian,[1562] and that attacks are planned to avoid or limit incidental civilian casualties.[1563]

As demonstrated, the duty to take precautions requires that parties 'do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects,'[1564] a rule of CIHL applicable in IACs and NIACs.[1565] Therefore it is necessary to consider how drone strikes interact with, and adhere to, this imperative. The notion of feasibility, at the drafting of the Additional Protocols, was generally understood to mean 'everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations'[1566] a view with contemporary relevance.[1567]

The technological capabilities of the Predator and Reaper (depicted above[1568])—their sensors, and ability to loiter out of harm's way—means they are well equipped to undertake precautions, a view widely recognised within the literature.[1569] However, that drones have the *potential* to undertake precautions does not satisfy the need for precaution *per se*. It has been argued that the use of drones is, in itself, evidence of precaution,[1570]

[1562] Additional Protocol I Article 57(2)(a)(i).

[1563] Additional Protocol I Articles 57(2)(a)(ii) and (iii)

[1564] Additional Protocol I Article 57(2)(a)(i).

[1565] Text from n 1097 to n 1098.

[1566] ICRC AP Commentary (n 581) para 2198.

[1567] *Eritrea-Ethiopia Claims Commission* (Partial Award: Western and Eastern Fronts, Ethiopia's Claims 1 and 3) (2005) 26 RIAA 351, para 33.

[1568] Text from n 1303 to n 1309.

[1569] Casey-Maslen (n 2) 607; ILA (n 1080) 377; UNGA, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (18 September 2013) UN Doc A/68/389 para 28; Schmitt and Widmar (n 1162) 401.

[1570] Hitomi Takemura, 'Unmanned Aerial Vehicles: Humanization From International Humanitarian Law' (2014) 32 Wisconsin International Law Journal 521, 532.

but this views errs in the application of the principle. The use of a drone is part of the set of facts leading to lethal targeting; their employment is one of the 'circumstances at the time of the attack'.[1571] These circumstances clearly include available weapons and weapon systems, intelligence and other capacities available to the party. Therefore, the question is whether, in a particular drone strike, everything practicable or practically possible was done to verify that a target was not a civilian, which includes making use of a drone's surveillance capacity as well as other means of intelligence gathering.[1572] Thus it is *how* a drone is used that determines precaution, not *that* one is used.

Questions of IHL are dealt with on a case-by-case basis[1573] and, once again, this analysis is hampered by secrecy. Certainly, the architecture surrounding drone strikes—the intelligence-based identification process in personality strikes and the F2T2EA process in signature strikes—implies a high degree of precaution. However, as stated above, the F2T2EA approval process may be truncated in cases of time-sensitive targets.[1574] It is possible that, if overly abbreviated, target validation may be compromised. Despite this, it could be argued that, even with an abbreviated validation process, drones are still able to undertake precaution to a greater extent than traditional methods of warfare. In response it must be recalled that the concept of feasibility in terms of precaution takes account of 'everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack';[1575] thus, failure to utilise fully the available validation capabilities of a drone could be an example of not doing everything practicable or practically possible, even if what was done was more than would have been otherwise possible with another weapon system.

Thus, drones have the capacity to enable precautions to be taken, but it is whether this capacity is utilised that determines adherence with this principle of IHL. Anecdotal

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[1571] ICRC AP Commentary (n 581) para 2198.

[1572] William Boothby, 'Some Legal Challenges Posed by Remote Attack' (2012) 94(886) International Review of the Red Cross 579, 584; O'Connell (2012) (n 4) 288; Schmitt 'Unmanned Combat Aircraft Systems' (2012) (n 1071) 614.

[1573] *Struga* (n 1178) para 616.

[1574] Joint Targeting (n 1320) II-14-5.

[1575] ICRC AP Commentary (n 581) para 2198.

evidence from ex-pilots suggests that, on occasions, everything feasible was not done to verify that objectives targeted were not civilian.[1576] Additionally, there are examples of drone strikes in which those targeted appear to have been civilian with no discernible ties to OAGs or indications of DPH. One example is the October 2012 killing of Mamana Bibi in North Waziristan, a 68-year-old grandparent targeted while gathering vegetables near her house.[1577] It was speculated by sources from the Pakistani intelligence services that a satellite phone was used by a TTP fighter nearby, which may have resulted in Bibi being targeted. However, a subsequent investigation found that this likely occurred 930 feet from where the strike impacted.[1578] Thus, it appears that the requirement to take all feasible precautions may have been violated as the drone's sensor capabilities were apparently not used to confirm that the individual targeted was the person identified through the phone signal.

To compensate for the absence of information surrounding specific US drone strikes, it is necessary to make conservative inferences about the extent to which precaution has been exercised based on available data. It is submitted that, in situations where drone strikes have killed *only* civilians, and where there was no apparently lawful target who survived (in which case the civilians would instead be viewed as potentially proportionate collateral damage), it can be inferred that insufficient precaution may have been taken. This is an imperfect approach, but provides the only real method of assessment.

Based on TBIJ data, between 2004 and June 2013, when the US had consent to strike in Pakistan, there were seven drone strikes that appear to have targeted civilians only. [1579]

[1576] Pilkington (n 1318).

[1577] '"Will I be Next?" US Drone Strikes in Pakistan' (*Amnesty International*, 2013) https://www.amnestyusa.org/files/asa330132013en.pdf 18.

[1578] ibid 21.

[1579] This is assessed by taking the minimum total deaths reported during a strike and subtracting from that the minimum number of civilian deaths, then taking the maximum total deaths reported during a strike and subtracting from that the maximum number of civilians deaths. Where the answer to both is zero a strike is deemed to have targeted civilians (those with a minimum casualty count of zero were excluded). These strikes were subsequently cross-referenced against media reports of the strike. Where a specific individual involved in the conflict was targeted but survived, the strike has been excluded as targeting

Applying the same methodology to Yemen, during the NIAC, three strikes appear to have targeted civilians only, though the data is weaker and only one was certainly a US drone strike rather than a Yemeni airstrike.[1580] In Somalia, this methodological approach reveals no drone strikes solely targeting civilians.[1581] On this basis, 10 strikes can be said to have likely carried out insufficient precautions to determine whether the target was civilian or not. This represents a very small portion of all drone strikes in Pakistan, Yemen and Somalia, but nonetheless illustrates that sufficient precaution, in terms of distinction, may not always be taken.

3.3 Conclusion

The analysis of US drone strikes in light of relevant IHL rules and principles has demonstrated that, in the abstract, drones represent a tool capable of adhering to IHL. Their design enables extensive surveillance, and their removal of operators from the vicissitudes of combat means that decisions to strike can be made calmly, with emphasis placed on target verification in a manner impossible with traditional methods of warfare. There is nothing about drones that renders their use during an armed conflict unlawful *per se*.

Nevertheless, a gulf was demonstrated between the abstract ability of drones to adhere to IHL and the concrete fact of whether this adherence occurs in practice. The use of drones for personality strikes against known individuals is comparatively unproblematic, though there continues to be a question mark over the operationalisation of wide interpretations of IHL. Similarly, drone targeting based on individual behaviour is not a violation of IHL, and available evidence supports a conclusion that drone strikes have, by-and-large, remained within the realms of the principle of distinction, interpreted broadly. Nevertheless, the potential was demonstrated for the validation process to be compromised in time-sensitive operations, meaning that the realities of warfare may

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such an individual would have been an exercise of distinction, the civilian deaths being collateral. The data came from TBIJ 'Pakistan 2004 to Present' (n 11).

[1580] The data came from TBIJ 'Yemen 2002 to present' (n 15).

[1581] 'Somalia: Reported US Covert Actions 2001-2017' (*Bureau of Investigative Journalism*) https://v1.thebureauinvestigates.com/2012/02/22/get-the-data-somalias-hidden-war/.

undermine the apparently prominent role of distinction in drone strikes. Finally, it was demonstrated that, aside from some examples, the use of drones appears to aid the taking of precautions, with comparatively few instances of drone strikes apparently targeting only individuals who appear fairly certainly to have been civilian.

In areas of contestation, drones have served to highlight the vagueness of specific legal concepts. There is a clash between the potential precision of a drone strike and the blunt nature of the legal framework governing them. The principal issue of US drone strikes carried out during NIAC is the broad interpretations of the law adopted by the US, against which targets are validated. The interpretations of the relevant legal concepts proffered by the US contrast with those offered by others with the result that, while the lawfulness of many strikes would be generally accepted, others will have occurred in a grey area of legal uncertainty, with potentially very weak claims to lawfulness. The interpretation by the US of what constitutes OAG membership, and what behaviours equate to DPH, at times greatly exceeds that proposed by the ICRC. There is a risk that, as drones enable regular low-level uses of force of the kind in Pakistan, Yemen and Somalia, they may serve to strengthen practice in favour of the development of customary international law understandings of lawful targeting along more permissive lines.

CHAPTER 4 — DRONE STRIKES AND IHRL

The use of drones has the potential to impact upon various human rights. For instance, sustained drone programmes are reported to cause people in affected areas to stop gathering in groups for fear of being targeted,[1582] implicating the freedom of association. The documented psychological stress of those living beneath regular drone flights[1583] may infringe on the freedom from torture and cruel, inhuman and degrading treatment. Most overtly, lethal drone strikes have the capacity to impact on the right to life of those killed by them. Due to constraints of space, it is this right that will form the focus of this chapter.

This chapter will first consider conventional IHRL, focusing on the nature of jurisdiction within relevant IHRL treaties. It will then consider customary IHRL. Having established the applicability of the right to life with regard to extraterritorial drone strikes, the right will be considered in the abstract, to determine whether such strikes are capable of adhering to the right to life *per se*. Finally, case-studies of US drone strikes in Pakistan, Yemen and Somalia will be analysed in terms of the right to life.

4.1 Drone strikes and conventional IHRL

When considering US drone strikes under conventional IHRL, the field is limited in terms of applicable instruments: of all relevant IHRL treaties, the US is party only to the ICCPR. Therefore, this analysis will proceed with an examination of the relevant rights under the ICCPR and the extent to which they apply to US drone strikes.

Article 6(1) ICCPR states that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of [their] life.' Additionally, states are obliged to investigate uses of lethal force, in order both to promote accountability and to revise future practice.[1584]

[1582] 'Living Under Drones' (n 1326) 55.

[1583] ibid 82.

[1584] UN Human Rights Committee, Draft General Comment 36 (n 1013) para 29.

The analysis below[1585] will question whether drone strikes have resulted in deaths that are 'arbitrary', however, first it is necessary to establish whether the conventional right to life applies to extraterritorial drone strikes, due to the nature of 'jurisdiction' within that instrument.

4.1.1 Jurisdiction

Jurisdiction delineates the application of human rights obligations, determining whether or not a state is required to secure or respect a given right. Rights are owed to individuals by states, but only on the basis that it is possible for the state to provide a right in a specific situation, and it is through jurisdiction that this 'possibility' arises. Jurisdiction is, therefore, a 'threshold criterion'[1586] to be satisfied before any analysis of the interrelation between a state's conduct and its conventional IHRL obligations can be undertaken.

4.1.1.1 Extraterritorial application of human rights treaties

Jurisdiction clauses are present in many human rights treaties and agreements[1587] though are absent from the ADHR and the African Charter of Human and People's Rights, and only implicit in the preamble of the Universal Declaration of Human Rights. The most obvious manifestation of jurisdiction is that exercised by a state over its own territory, with states owing obligations to secure and respect the rights of those within it.

[1585] Section 4.4.

[1586] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policies* (Oxford University Press 2011) 19.

[1587] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 2(1); European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS 005 (ECHR) Article 1; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (American Convention), Article 1; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 16 March 2008) (2005) 12 International Human Rights Reports 893 (Arab Charter) Article 2.

Territoriality is commonly depicted as the 'ordinary and essential[]' basis of jurisdiction, the extraterritorial application of human rights treaties being exceptional.[1588] As this work is concerned with the extraterritorial use of armed drones, it is necessary to consider whether IHRL obligations may be applied to extraterritorial operations.

The extraterritorial application of IHRL obligations is complex, disputed, and cannot be dealt with comprehensively within this work. Neither, however, can it be glossed over and, as such, this section will consider the key elements of the issue, putting forward an argument in favour of the potential extraterritorial application of human rights treaties. The principal focus of this analysis will be the ICCPR, as the key treaty implicated by US drone strikes in Pakistan, Yemen and Somalia.

While the ECHR and American Convention on Human Rights both refer to rights obligations in relation to individuals 'within' or 'subject to' their jurisdiction,[1589] the ICCPR (and Arab Charter on Human Rights) imposes human rights obligations upon a state in relation 'to all individuals within its territory and subject to its jurisdiction'.[1590] The issue is whether this clause should be interpreted conjunctively, applying only to individuals both within a state's territory *and* subject to its jurisdiction, or disjunctively, applying to individuals within a state's territory and, additionally, to individuals subject to the state's jurisdiction.[1591]

4.1.1.1.1 The possible application of the VCLT to the ICCPR

This is therefore a matter of treaty interpretation, and so reference must be made to the rules of treaty interpretation within Section 3 of the VCLT. However, as the perennial *enfant terrible* of international law, the US is not a party to the VCLT and so it is necessary to establish whether these rules are applicable as customary international law.

[1588] *Al-Skeini and Others v United Kingdom* [GC] ECHR 2011-VI 99 para 31; Murray (n 1013) 56.

[1589] ECHR Article 2; American Convention Article 1.

[1590] ICCPR Article 2(1); Arab Charter Article 2.

[1591] Orna Ben-Naftali and Yuval Shany, 'Living in Denial: the Application of Human Rights in the Occupied Territories' (2003) 37 Israel Law Review 17, 68; Milanovic (2011) (n 1586) 222; Park (n 1013) 90.

Additionally, the ICCPR was drafted in 1966 and entered into force in 1976, while the VCLT was drafted in 1969 and did not enter into force until 1980; therefore, *if* the rules are customary, it is additionally necessary to establish *when* they became binding and whether they applied prior to the entry into force of the VCLT, which specifically restricts its application to only those treaties drafted after the VCLT entered into force.[1592]

On the first point, the US itself 'considers many of the provisions of the [VCLT] to constitute customary international law on the law of treaties',[1593] though it is unclear whether this includes the rules on treaty interpretation. The ICJ has ruled that the VCLT 'may in many respects be considered as a codification of existing customary law', though this was specifically in relation to the termination of a treaty relationship.[1594] The PCA identified the rules of treaty interpretation under Articles 31 and 32 VCLT as a codification of customary international law,[1595] and it has used the general rule under Article 31 VCLT to interpret a treaty from 1881.[1596] There is thus a strong case in favour of the rules of treaty interpretation being customary, and that, as they were codified rather than crystallised by the VCLT, those rules existed *prior* to the entry into force of the VCLT and may therefore be used to interpret earlier treaties, such as the ICCPR. This reflects conclusions present within relevant commentary.[1597]

[1592] VCLT Article 4.

[1593] 'Vienna Convention on the Law of Treaties' (US Department of State) https://www.state.gov/s/l/treaty/faqs/70139.htm.

[1594] *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v Iceland),* (Jurisdiction of the Court) [1973] ICJ Reports 3, para 36; *Territorial Dispute (Libya v Chad)* [1994] ICJ Reports 6, para 41; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Reports 7, para 46; *Oil Platforms* (n 288) para 23.

[1595] *Case concerning the Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976* (2004) 25 RIAA 267, paras 57-9; *Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway (Belgium v Netherlands)* (2005) 27 RIAA 35, para 45.

[1596] *Dispute between Argentina and Chile concerning the Beagle Channel* (1977) 16 RIAA 53, para 15.

[1597] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2013) 10-1; Hazel Fox, 'Article 31(3) (A) and (B) of the Vienna Convention and the *Kasikili/Sedudu Island Case*' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010) 66; Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 13-20; Panos Merkouris, 'Introduction:

4.1.1.1.2 Interpretation of Article 2(1) ICCPR via Article 31 VCLT

To begin, Article 31(1) VCLT requires that treaties be interpreted in 'good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The 'context' of a treaty comprises the text, preamble and annexes, as well as any agreements and instruments made in connection with the conclusion of a treaty.[1598] Additionally, it is necessary to consider subsequent agreements between parties regarding interpretation, subsequent practice of parties and relevant rules of international law.[1599] These elements combine to form the general rule of interpretation, which therefore must serve as a guide to establishing the meaning of jurisdiction. Thus, to answer the present question, it is necessary to determine which of the two interpretations (disjunctive or conjunctive) fits with the ordinary meaning of the terms of the ICCPR, in accordance with its context and object and purpose, as well as subsequent agreements and practice.

The US views Article 2(1) ICCPR as territorially restricted.[1600] This is based on its understanding of the ordinary meaning of the article's terms as extending protections 'only to individuals who are both *within* the territory of a State Party and *subject* to that State Party's sovereign authority.'[1601] However, the law of treaty interpretation invites the possibility that there may be more than one 'ordinary' meaning attributable to a given term.[1602] The US view of jurisdiction in Article 2(1) is one *possible* reading of the ordinary meaning of Article 2(1), but it is not the only one. The fact that the conjunctive

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Interpretation is a Science, is an Art, is a Science' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010) 5.

[1598] VCLT Article 31(2).

[1599] VCLT Article 31(3)(a) and (b).

[1600] Department of Defense Manual (n 1204) 24.

[1601] UN Human Rights Committee, Third Periodic Report: United States of America (28 November 2005) UN Doc CCPR/C/USA/3 Annex 1 (original emphasis); 'US Observations on Human Rights Committee General Comment 31' (US Department of State, 27 December 2007) https://2001-2009.state.gov/s/l/2007/112674.htm para 4 (original emphasis).

[1602] Gardiner (n 1597) 184.

reading of Article 2(1) is a possibility does not preclude the possibility of the disjunctive one.

Crucially, Article 31(1) VCLT does not isolate and privilege the plain text of a term as supreme in the process of interpretation, mandating consideration of a treaty's 'context and … its object and purpose.' Therefore it is wrong to base the meaning of a term solely on textual analysis: an ordinary meaning cannot be ascribed to a term if it clashes with a treaty's context and its object and purpose.[1603]

4.1.1.1.2.1 The context of Article 2(1) ICCPR

The context of a treaty serves as 'a modifier of any over-literal approach to interpretation'[1604] and, concordantly, the context of the ICCPR may serve to mitigate a restrictive reading of Article 2(1). Under Article 31(2), context includes the text of a treaty, its preamble and annexes, as well as agreements and instruments agreed by states parties in connection with the conclusion of the treaty.

The preamble of the ICCPR refers to the inherent and universal nature of rights held by '*all* members of the human family', emphasising the aspiration that '*everyone* may enjoy [their] civil and political rights'.[1605] This arguably supports the wider, disjunctive interpretation of Article 2(1) to avoid vitiating individual rights during extraterritorial operations. In addition, Article 2(1) contains a non-discrimination clause, confirming rights obligations are owed 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' This lends further support to an interpretation of the jurisdiction clause in a manner that does not prevent the application of obligations under the treaty, and which would undermine the rights inherent to humans, a view adopted by the Inter-American

[1603] United Nations Conference on the Law of Treaties, First Session (Vienna, 26 March-24 May 1968) UN Doc A/CONF.39/11 170-1.

[1604] Gardiner (n 1597) 197.

[1605] ICCPR preamble (emphasis added).

Commission on Human Rights to emphasise the universality of rights under the American Declaration of the Rights and Duties of Man.[1606]

Finally, Article 5(1) ICCPR specifically asserts that:

> '[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.'

This suggests a presumption against interpretations of the ICCPR that serve to limit the rights it provides. Indeed, it was on the basis of Article 5(1) that the UNHRC held that 'it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[1607]

4.1.1.1.2.2 The object and purpose of Article 2(1) ICCPR

Recourse to the object and purpose of a treaty demands a teleological consideration within the initial interpretation process to ensure *effectiveness*.[1608] As with establishing the context, when identifying object and purpose, consideration of the preamble is 'practically universal'[1609] and features in many international arbitral decisions.[1610]

[1606] *Alejandre v Cuba* Inter-American Commission on Human Rights No. 86/99 (29 September 1999), para 23.

[1607] UN Human Rights Committee, *López Burgos v Uruguay* Communication No R.12/52 (1981) UN Doc A/36/40(SUPP) 176, para 12.3; UN Human Rights Committee, *Celiberti de Casariego v Uruguay* Communication No R.13/56 (1981) UN Doc A/36/40(SUPP) 185, para 10.3.

[1608] Gardiner (n 1597) 211.

[1609] Max Hulme, 'Preambles in Treaty Interpretation' (2016) 164 University of Pennsylvania Law Review 1281, 1300.

[1610] For instance, *Asylum Case (Colombia v Peru)* [1950] ICJ Reports 266, 282; *Armed Activities* (n 72) para 275; *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, para 12; *Romak SA v Uzbekistan* (award) (2009) 2007-07/AA280, para 181.

The preamble of the ICCPR emphasises the achievement of 'the ideal of free human beings enjoying civil and political freedom and freedom from fear and want', 'the promotion and observance of the rights recognized in the present Covenant' and 'universal respect for, and observance of, human rights and freedoms'. This points towards an object and purpose concerned with the broad application of and respect for the rights of individuals, auguring against their restriction geographically.

Establishing the object and purpose of a treaty requires the whole text of a treaty to be taken into account,[1611] and the gesture towards universal application is present throughout the ICCPR. For instance, Article 6(1) states that '[*e*]*very* human being has the *inherent* right to life',[1612] further supporting an object and purpose concerned with the realisation and protection of rights that are intrinsic to human existence and not contingent on the territorial relationship between an individual and a state. Though it has been suggested that 'most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes',[1613] one can reasonably hold that the object and purpose of the ICCPR is, broadly, concerned with the extension of protections rather than their limitation. Considered thus, the expansive, disjunctive interpretation of Article 2(1) is more congruent with this object and purpose than the conjunctive interpretation that circumscribes their scope. This accords with the ICJ's view in the *Wall* advisory opinion that the ICCPR's object and purpose supports its application to extraterritorial operations, though without elaborating what that object and purpose might be.[1614]

Importantly, use of the object and purpose must be nuanced, identifying the ordinary meaning of terms 'in their light' while not 'allowing the general purpose of a treaty to override its text.'[1615] Therefore, it could be argued that using the object and purpose of

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[1611] Isabelle Buffard and Karl Zamanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 Austrian Review of International Law 311, 333; Gardiner (n 1597) 213.

[1612] Emphasis added.

[1613] Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 130.

[1614] *Wall* (n 214) para 109.

[1615] Gardiner (n 1597) 211.

the ICCPR to read 'and' disjunctively as 'or', within the term 'all individuals within its territory *and* subject to its jurisdiction' unduly overrides the text. This is not a convincing reason to favour the conjunctive approach however, as it is quite conceivable that the 'and' does not refer to individuals who are both within a state's territory and subject to its jurisdiction, but to two distinct groups: individuals within a state's territory *and* individuals subject to its jurisdiction. In this way the disjunctive approach can be achieved without syntactic fudging. While the disjunctive approach would override the text in the sense of prohibiting the conjunctive interpretation, it would not override the text of the term *per se*. Therefore it is submitted that this is not a barrier to the disjunctive reading, which, in broadening the application of ICCPR rights, appears more in keeping with the object and purpose of the promotion and observance of those rights.

4.1.1.1.2.3 Article 2(1) ICCPR and the subsequent practice of states parties

Finally, Article 31(3) VCLT provides additional factors to be considered when interpreting the terms of a treaty, the most relevant being 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[1616] The factors under Article 31(3) are part of the general rule on interpretation rather than being supplementary or additional and, as such, they must form part of the initial interpretation of a term, rather than being subordinate to the 'ordinary meaning'.

Subsequent practice relating to the ICCPR is mixed, with states such as the US and Israel denying the extraterritorial application of Article 2(1), while others, such as Belgium, France, Italy, Poland, Sweden and Switzerland, have viewed it as operating extraterritorially.[1617] Dennis has argued that states have 'expressed disagreement' with the extraterritorial interpretation of Article 2(1),[1618] citing the Netherlands' denial that the

[1616] VCLT Article 31(3)(b).

[1617] Park (n 1013) 93-4.

[1618] Michael Dennis, 'Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?' (2006) 12 ILSA Journal of International and Comparative Law 459, 467.

ICCPR applied to its forces in Srebrenica.[1619] He has also stated that the lack of derogations by states conducting extraterritorial military operations overseas suggests a view among those states that human rights obligations do not apply extraterritorially.[1620] Relatedly, the Grand Chamber of the ECtHR made a similar finding (in relation to the ECHR) in its decision on admissibility in *Banković*. In that decision the absence of derogations from the Convention was seen to be evidence of state practice 'indicative of a lack of any apprehension on the part of the Contracting States of their extra-territorial responsibility' under the Convention[1621] (though, as the jurisdiction clause in Article 1 ECHR contains no reference to territory, this analogy is of limited impact on the interpretation of the ICCPR).

It is debatable, however, whether the lack of derogations does represent subsequent practice evidencing a non-extraterritorial character of the ICCPR, and it has been argued potentially to have been a result of states' understandings of the interrelation and respective application of IHL and IHRL at that time.[1622] In addition, the two Optional Protocols to the ICCPR both contain a jurisdiction clause, but neither contains the territorial reference of the original Covenant, referring instead to 'individuals subject to its jurisdiction'[1623] and those 'within the jurisdiction of a State Party'.[1624] This suggests agreement that augers against the territorially limited application of human rights obligations, at least between the 116 and 84 states that are respectively party to the two protocols.

[1619] UN Human Rights Committee, Concluding Observations of the Human Rights Committee: The Netherlands, Addendum (29 April 2003) UN Doc CCPR/CO/72/NET/Add.1 para 19.

[1620] Dennis (n 1618) 468.

[1621] *Banković and others v Belgium and others* (dec) [GC] ECHR 2001-XII 333, para 62.

[1622] Lubell (2010) (n 206) 198.

[1623] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 1.

[1624] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414 Article 1(1).

Importantly, for the practice of states parties to be deemed 'subsequent practice' in the Article 31 sense, it must 'establish[] the agreement of the parties'.[1625] Use of the definite article demonstrates that agreement must be between all parties, rather than a majority. To influence interpretation, the practice of states must be 'concordant' among states parties, or 'if the conduct is unilateral, that it reveals the agreement of the other … parties.'[1626] Therefore, to support either reading of Article 2(1), practice favouring either an extraterritorial or territorially-bounded application of the ICCPR must be broadly similar, and certainly should not demonstrate conflicting interpretations. While the Netherlands, US and Israel[1627] have all interpreted Article 2(1) in a manner that restricts application of the ICCPR to a state's territory, this is far from universal. Germany has stated that '[w]herever its police or armed forces are deployed abroad, … Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.'[1628] Similarly, Italy has amended legislation with the express purpose of ensuring the extraterritorial application of the ICCPR.[1629]

Indeed, this lack of uniformity and consistency arguably extends to US practice. In 1992 the US ratified the ICCPR *after* decisions by the UNHRC endorsing the Covenant's extraterritorial reach,[1630] without submitting a reservation, declaration or understanding regarding its territorial scope.[1631] After ratification the US asserted that the territorial aspect of Article 2(1) has the effect of 'restricting the scope of the Covenant to persons

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[1625] VCLT Article 31(3)(b).

[1626] Gardiner (n 1597) 255. See also, Aust (n 1597) 215.

[1627] UN Human Rights Committee, Second Periodic Report of Israel, Addendum (4 December 2001) UN Doc CCPR/C/ISR/2001/2 5.

[1628] UN Human Rights Committee, Comments by The Government Of Germany to the Concluding Observations of the Human Rights Committee (11 April 2005) UN Doc CCPR/CO/80/DEU/Add.1 3.

[1629] UN Human Rights Committee, Summary Record of the 2317th Meeting (26 October 2005) UN Doc CCPR/C/SR.2317 para 39. Relatedly, the UK has recently expressed that it will derogate from the ECHR in future conflicts as a result of its extraterritorial application, though as this treaty lacks a reference to 'territory' in its jurisdiction clause this is of limited analogous value when considering the ICCPR: HC Deb 10 October 2016, vol 615, col 3W.

[1630] *López Burgos* (n 1607); *Celiberti de Casariego* (n 1607), considered further below.

[1631] Beth Van Schaack, 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change' (2014) 90 International Law Studies 20, 31.

under United States jurisdiction and within United States territory',[1632] a position reiterated subsequently.[1633] However, a softening of its stance may be discernible in its fourth report to the UNHRC, which asserted that, while previously maintaining the territorial restriction to the ICCPR, the US is 'mindful' of the UNHRC's position on extraterritoriality in General Comment 31, and is 'aware' of the position of the ICJ and other states favouring extraterritorial application.[1634] This alone does not necessarily undermine the US's objection to the extraterritoriality of the ICCPR, but it is notable that it did not repeat its objection to the extraterritorial interpretation of Article 2(1).

The US's fourth report to the UNHRC came not long after an internal memo by Koh, while Legal Adviser to the Department of State, in which he advocated against the maintenance of the US position on Article 2(1), arguing this was 'in significant tension with the treaty's language, context, and object and purpose, as well as with interpretations of important US allies, the Human Rights Committee and the ICJ, and developments in related bodies of law'.[1635] In the fourth report itself, in an about-face with regard to its previous position on the displacement of IHRL by IHL, the US asserted that during an armed conflict '[d]etermining the international law rule that applies … is a fact-specific determination'.[1636] That the US acknowledged a determination between IHL and IHRL is required during an armed conflict suggests the door may be open to the extraterritorial application of IHRL obligations. This point should not be overstated, however, as the report says that this determination 'raises especially complex issues in the context of non-international armed conflicts occurring within a State's own territory',[1637] thus leaving open the possibility that human rights obligations remain territorially bounded, applying only to armed conflicts within a state's territory. It is nonetheless submitted that the position of the US is not as written in stone as it first appears.

[1632] UN Human Rights Committee, Summary Record of the 1405th Meeting (24 April 1995) UN Doc CCPR/C/SR.1405 para 20.

[1633] US Observations (n 1601) para 4.

[1634] UN Human Rights Committee, Fourth report of the United States of America (22 May 2012) UN Doc CCPR/C/USA/4 para 505.

[1635] 'Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights' (US Department of State, 19 October 2010) 4.

[1636] UN Human Rights Committee, US 4th Report (n 1634) para 507.

[1637] ibid para 507.

As a consequence of this consideration of the varied approaches of states, it is clear that with regard to human rights treaties generally, and the ICCPR in particular, state practice is insufficiently consistent to evidence the agreement necessary to be 'subsequent practice' informing an interpretation of Article 2(1). Therefore, under the Article 31 VCLT general rule, the meaning of the Article 2(1) clause rests on the context and object and purpose of the Covenant. As is clear from the foregoing analysis, reliance on these elements produces ambiguity as to the extraterritoriality of the ICCPR.

4.1.1.1.3 Interpretation of Article 2(1) ICCPR via Article 32 VCLT: the *travaux préparatoires*

Under Article 32 VCLT, the production of an ambiguous meaning by the application of Article 31 permits recourse to 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion'.[1638] Therefore, it is necessary to consider the *travaux préparatoires* of Article 2(1) ICCPR.

Article 2(1) did not initially contain the phrase 'within its territory', which was inserted via an amendment proposed by the US.[1639] It has been suggested that the US delegation's inclusion of this element in Article 2(1), and the arguments put forward in favour of it, supports the territorial restriction of the ICCPR.[1640] However, it is not clear that the inclusion of the reference to territory within Article 2(1) was intended to deny the application of ICCPR obligations to *all* extraterritorial operations. The US representative specifically asserted that 'her delegation had used the word "territory" to allow for such temporary situations as the occupation of Germany, for instance.'[1641] Thus it is possible that the insertion of 'within its territory' was intended not to vitiate the application of the

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[1638] VCLT Article 32.

[1639] UN Commission on Human Rights, Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles (22 March 1950) UN Doc E/CN.4/365 14.

[1640] Dennis (n 1618) 463-4; US Observations (n 1601).

[1641] UN Commission on Human Rights, Summary Record of the 125th Meeting (22 June 1949) UN Doc E/CN.4/SR.125 17.

ICCPR to extraterritorial activities *per se*, but to remove the potential burden to 'ensure' the full corpus of ICCPR rights to populations under occupation.

Indeed, this position is given support by later statements of the US delegation that the addition of 'within its territory' was to avoid the Covenant being 'construed as obliging the contracting States to enact legislation concerning persons who, although outside its territory were technically within its jurisdiction for certain purposes', with the occupation of Germany, Austria and Japan given as examples.[1642] These statements have been read by some commentators to mean that the US addition of territory to Article 2(1) was aimed at preventing the expansion of *prescriptive* jurisdiction to areas in which states did not have the competence to legislate, and that they should not be read to exclude extraterritorial jurisdiction *per se*.[1643] This reading is plausible but is not the only one possible, particularly given that the US representative did not disabuse the UK, Lebanon and Uruguay of concerns that the amendment 'restricted the guarantee of those rights to individuals actually on the territory of a state, while the original text extended it to all individuals within its jurisdiction'.[1644]

Ultimately, the *travaux préparatoires* do not provide a conclusive answer. On balance, the evidence supports the notion that the territorial reference was added to avoid the obligation to legislate on behalf of the citizens of occupied states rather than to provide a blanket territorial restriction on the application of the Covenant, but this cannot be said with certainty.

4.1.1.1.4 Additional indicative factors: jurisprudence and treaties

So, where does this leave the interpretation of Article 2(1)? A definitive conclusion as to the conjunctive or disjunctive reading of the term 'within its territory and subject to its

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[1642] UN Commission on Human Rights, Summary Record of the 138th Meeting (6 April 1950) UN Doc E/CN.4/SR.138 10-1.

[1643] Karen Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2013) 27; Lubell (2010) (n 206) 201; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein 1993) 43.

[1644] UN Commission on Human Rights, UN Doc E/CN.4/SR.125 (n 1641) 7-10.

jurisdiction' remains elusive. It is submitted that the disjunctive reading better fits with the context, and object and purpose of the Covenant, which, in the view of this author, makes it the more convincing approach—but this conclusion is not concrete. However, while a conclusive interpretation of Article 2(1) remains out of reach, a trend is identifiable within the international community, apparently favouring the disjunctive approach, and this may become the conclusive interpretation in the future.

Jurisprudence and commentary of the UNHRC has consistently emphasised the disjunctive approach. As the treaty body tasked with monitoring the implementation of the ICCPR,[1645] interpreting its provisions[1646] and adjudicating complaints,[1647] statements of the Committee are viewed as authoritative statements of the law, although they are not binding.[1648] In *Burgos v Uruguay* and *Casariego v Uruguay* the Committee held that Article 2(1) ICCPR 'does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it.'[1649]

This unambiguous recognition of the extraterritorial application of ICCPR obligations was reiterated by the Committee two decades later in its General Comment 31, which confirmed that 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, *even if not situated within the territory of the State Party*'.[1650] This approach has also featured within the UNHRC's concluding observations on periodic reports of states.[1651] Likewise the ICJ has

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[1645] ICCPR Article 40.

[1646] ICCPR Article 40(4).

[1647] ICCPR Article 41; Optional Protocol to the ICCPR, Article 1.

[1648] UN Human Rights Committee, Summary Record of the 2380th Meeting (27 July 2006) UN Doc CCPR/C/SR.2380 para 57.

[1649] *López Burgos* (n 1607) para 12.2; *Celiberti de Casariego* (n 1607) para 10.2.

[1650] UN Human Rights Committee, General Comment 31 (n 1013) para 10 (emphasis added).

[1651] UN Human Rights Committee, Concluding Observations of the Human Rights Committee, Belgium (19 November 1998) UN Doc CCPR/C/79/Add.99 para 5; UN Human Rights Committee, Concluding Observations of the Human Rights Committee, Poland (2 December 2004) UN Doc CCPR/CO/82/POL para 3; UN Human Rights Committee, Concluding Observations of the Human Rights Committee, Italy

held that the jurisdiction of states in terms of their obligations under the ICCPR 'may sometimes be exercised outside the national territory'[1652] and has confirmed their application during armed conflict, implying extraterritorial reach.[1653]

Indicative of a trend towards the disjunctive approach, subsequent treaties dealing with jurisdiction and IHRL obligations have removed or otherwise mitigated the territorial element of Article 2(1). As stated, neither of the two Optional Protocols to the ICCPR contain a reference to territory in relation to jurisdiction.[1654] There is also no reference to territory within the jurisdiction clauses of the Convention on the Rights of the Child[1655] or the Convention on the Elimination of All Forms of Racial Discrimination.[1656] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families maintains the reference to territory but, distinct from the ICCPR, refers to those migrant workers 'within their territory *or* subject to their jurisdiction'.[1657] The Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities contain no jurisdiction clause at all. These all point towards an emphasis on wider legal practice away from a territorially-bounded notion of IHRL obligations.

Regional human rights treaties have also, on the whole, dispensed with the territorial element of jurisdiction. Article 1 of the American Convention on Human Rights places obligations upon states parties with regard to 'all persons subject to their jurisdiction',

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(24 April 2006) UN Doc CCPR/C/ITA/CO/5 para 3; UN Human Rights Committee, Concluding Observations of the Human Rights Committee, United Kingdom (30 July 2008) UN Doc CCPR/C/GBR/CO/6 para 14.

[1652] *Wall* (n 214) para 109.

[1653] *Nuclear weapons* (n 355) para 25.

[1654] Text from n 1623 to n 1624.

[1655] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 Article 2(1).

[1656] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) Article 3.

[1657] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) Article 7 (emphasis added).

held by the Inter-American Commission on Human Rights to mean that a state party 'may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory'.[1658] Similarly, Article 1 ECHR refers to rights owed 'to everyone within their jurisdiction', wording that, for present purposes, is tellingly distinct from its original draft formulation that states 'shall guarantee to all persons within its territory the following rights'.[1659] The extraterritorial application of the Convention by virtue of Article 1 has been asserted on numerous occasions, both by the European Commission on Human Rights[1660] and the ECtHR,[1661] such that its territorially-unbounded nature is beyond doubt, even while the specific contours of that nature remain controversial.[1662]

Where regional human rights treaties lack a jurisdiction clause, they have been interpreted as applying to extraterritorial operations. The Inter-American Commission on Human Rights has specifically held that states parties to the American Declaration of Human Rights owe obligations to those individuals within their jurisdiction, including

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[1658] *Saldano v Argentina* Inter-American Commission on Human Rights Report No 38/99 (11 March 1999), para 17.

[1659] Convention for the Collective Protection of Individual Rights and Democratic Liberties by the States, Members of the Council of Europe, and for the Establishment of a European Court of Human Rights to Ensure Observance of the Convention, cited in William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 84.

[1660] *X v Federal Republic of Germany* (1965) VI CD 40, 168; *Hess v United Kingdom* (1975) 2 DR 72, 73; *X and Y v Switzerland* (1977) 9 DR 57, 71; *Bui Van Thanh and others v United Kingdom* (1990) 65-A DR 330, para 4.

[1661] *Al-Saadoon and Mufdhi v United Kingdom* (dec) App no 61498/08, (ECtHR, 30 June 2009), para 85; *Al-Skeini* (n 1588) para 131-2; *Banković* (dec) (n 1621) para 61; *Catan and others v Moldova and Russia* [GC] ECHR 2012-V 309, para 104-5; *Chiragov and Others v Armenia* [GC] ECHR 2015, para 167; *Drozd and Janousek v France and Spain* (1992) Series A no 240, para 91; *Ilaşcu and Others v Moldova and Russia* [GC] ECHR 2004-VII 1, para 312; *Issa and others v Turkey* App no 31821/96 (ECtHR, 16 November 2004), para 68; *Jaloud v Netherlands* [GC] ECHR 2014-VI 229, para 139; *Loizidou v Turkey* (preliminary objections) (1995) Series A no 310, para 62.

[1662] Discussed in Section 4.1.1.2.

extraterritorial conduct.[1663] Likewise the ACHPR has applied the African Charter on Human and People's Rights to extraterritorial operations without caveat.[1664]

The Arab Charter on Human Rights is the only other IHRL treaty that replicates the ICCPR term 'within its territory and subject to its Jurisdiction'.[1665] Unlike the ICCPR, the Arab Charter does not provide for a body akin to the UNHRC, its expert committee being empowered solely to consider reports from states on measures taken to give effect to Charter obligations.[1666] As a result there is no jurisprudence or commentary equivalent to that of the UNHRC with which to determine the possible extraterritorial scope of the Charter. Nevertheless, the Arab Charter has only 13 parties, many of which are also party to other treaties with a more explicitly broad approach to jurisdiction. Therefore, that the Arab Charter includes a reference to territory does not undermine the overall trend away from territory as a facet of jurisdiction within IHRL.

Thus, the weight of evidence appears to support there being a trend towards IHRL obligations operating extraterritorially, a position supported by commentators,[1667] albeit with opposition.[1668] This trend does not mean that the interpretation of Article 2(1) ICCPR is settled but, when combined with the Article 31 VCLT process, suggests the disjunctive reading is more representative than the conjunctive of the ultimate meaning of Article 2(1). While subsequent practice has yet to demonstrate the 'agreement' required under

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[1663] *Alejandre* (n 1606) para 23; *Coard* (n 1013) para 37.

[1664] *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

[1665] Arab Charter Article 3.

[1666] Arab Charter Article 48.

[1667] Ben-Naftali and Shany (n 1591) 60-3; Da Costa (n 1643) 91; Hathaway and others (n 1013) 1893; Lubell (2010) (n 206) 205; Melzer (2008) (n 623) 135; Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89(1) American Journal of International Law 78, 79-82; Milanovic (2011) (n 1586) 118-228; Park (n 1013) 96-7; van Schaack (2014) (n 1631) 32-3.

[1668] Chesney (n 816); Robert J Delahunty and John C Yoo, 'What is the Role of International Human Rights in the War on Terror' (2010) 59 DePaul Law Review 803, 826; Dennis (n 1618) 462-3; Paust (2010) (n 3) 264-5; Dietrich Schindler, 'Human Rights and Humanitarian Law: Interrelationship of the Laws' (1982) 31 American University Law Review 935, 939.

Article 31(3)(b) to provide evidence of a settled interpretation, this may be forthcoming in the future.

Therefore, while it is not yet a certainty, it is submitted that, based on the text of Article 2(1), its context and the object and purpose of the treaty, as well as the holdings of relevant international bodies and states, it is appropriate to consider the implications of the ICCPR with regard to US drone strikes conducted extraterritorially. The contrary position of the US seems based almost entirely on a very strict reading of the text of Article 2(1). One might note that in 1968, at the 31st meeting of the UN Conference on the Law of Treaties, the US argued against a rigid use of the ordinary meaning of a treaty's text at the expense of wider considerations of context and object and purpose[1669]—it appears that precisely such a technique has been adopted by the US in relation to the interpretation of Article 2(1) ICCPR.

4.1.1.2 The nature of extraterritorial jurisdiction

Having argued that IHRL obligations transcend national boundaries, it is necessary to demonstrate how jurisdiction manifests extraterritorially. Unsurprisingly, this issue is not free from controversy. The way jurisdiction manifests is crucial when analysing extraterritorial drone strikes as it provides a threshold before IHRL treaty obligations apply. Drone strikes greatly reduce the presence of a state's military within the area in which force is used; thus if 'jurisdiction' requires, for instance, a sufficient degree of control over an area, it is quite possible that drone use on its own may fall short of the threshold, thereby not engaging IHRL protections. Conversely, if the threshold is based on the *impact* of an action on an individual, there is a greater chance of a drone strike implicating IHRL obligations. Finally, it is possible that different rights may come with different thresholds of jurisdiction. This issue is immensely complex, but it is necessary to provide a sketch upon which to ground later analysis of drone strikes.

[1669] UN Conference on the Law of Treaties (n 1603) para 38-42.

4.1.1.2.1 The various bases of jurisdiction

The possible bases upon which IHRL jurisdiction can be asserted extraterritorially are discernible from international jurisprudence. The UNHRC, in line with its recognition of the extraterritorial application of IHRL obligations, has based jurisdiction under Article 1 of the Optional Protocol to the ICCPR ('individuals subject to [a state party's] jurisdiction') on the 'the *relationship* between the individual and the State in relation to a violation of any of the rights set forth in the Covenant',[1670] implying a wide 'personal' basis for jurisdiction,[1671] albeit that the specific contours of this are unclear. Subsequently, the UNHRC held that Article 2(1) ICCPR

> 'means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the *power or effective control* of that State Party, even if not situated within the territory of the State Party … regardless of the circumstances in which such power or effective control was obtained'.[1672]

Similarly, the Inter-American Commission on Human Rights based the inquiry into potential violations of the American Declaration of the Rights and Duties of Man on 'whether … the state observed the rights of a person subject to its authority and control.'[1673] In the *Alejandre* decision, the Commission further asserted that 'when agents of a state, whether military or civilian, exercise power and authority over persons outside national territory, the state's obligation to respect human rights continues'.[1674] Importantly, though these decisions relate to the American Declaration, which lacks an explicit jurisdiction clause, the Commission was making a statement about rights obligations in general, setting out the power, authority and control requirements before applying them to the American Declaration.[1675] This implies that the test of authority and

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[1670] *Celiberti de Casariego* (n 1607) para 10.2; *López Burgos* (n 1607) para 12.2 (emphasis added).

[1671] Melzer (2008) (n 623) 124-5; Milanovic (2011) (n 1586) 175-9.

[1672] UN Human Rights Committee, General Comment 31 (n 1013) para 10 (emphasis added).

[1673] *Alejandre* (n 1606) para 23; *Coard* (n 1013) para 37.

[1674] *Alejandre* (n 1606) para 25.

[1675] ibid.

control (or power and authority) may be used to establish the operation of obligations under any IHRL treaty, providing a general test for jurisdiction. 'Authority and control' has featured within the jurisprudence of the ECtHR,[1676] supporting the assertion that it is a test of general application.

Conceived of in this manner, jurisdiction does not arise as a result of an individual's location, or their legal relationship with a state, but as a function of the fact of a state's power or control over them. This provides an idea of what extraterritorial jurisdiction looks like, but it remains vague as to what a state party's 'power or effective control' *is*: whether it includes the very broad power to determine whether an individual lives or dies, or, more restrictively, whether it requires more direct control (such as, detention). This is critical for the present analysis as drone strikes would clearly come outside the scope of relevant IHRL obligations if jurisdiction necessitates a link beyond just the impact on an individual of the action of a state, the so-called 'cause-and-effect notion of jurisdiction'.[1677]

This issue has featured extensively in ECtHR jurisprudence, which provides a nuanced approach to the contours of extraterritorial jurisdiction, fleshing out the concepts of control, power and authority, giving a more certain basis upon which to assert the existence of obligations under human rights treaties. In particular, the judgment of the Grand Chamber in *Al-Skeini* provides a typology of jurisdictional bases, grouped within the categories of territoriality,[1678] state agent authority and control,[1679] effective control over an area,[1680] and the legal space ('*espace juridique*') of the ECHR.[1681] These have been described by the UK Supreme Court as a 'comprehensive statement of general principles'.[1682]

[1676] *Al-Skeini* (n 1588) para 133; *Issa* (n 1661) para 71; *Pad and others v Turkey* (dec) App no 60167/00 (ECtHR, 28 June 2007), para 53.

[1677] *Banković* (dec) (n 1621).

[1678] *Al-Skeini* (n 1588) para 131.

[1679] ibid para 133.

[1680] ibid para 138.

[1681] ibid para 141.

[1682] *Smith and others v Ministry of Defence* [2013] UKSC 41, [2014] AC 52 [27].

Clearly, the bases of territoriality and *espace juridique* are inapplicable to US drone strikes (the latter having been limited to such an extent in *Al-Skeini* as to be effectively insignificant[1683]) and so need not be examined here. The bases of effective control and state agent authority and control, however, represent two possible ways in which extraterritorial jurisdiction may be established, and so the extent to which each may apply to drone strikes will be considered.

4.1.1.2.1.1 Drones and effective control of an area

Effective control over an area, as a basis for extraterritorial jurisdiction, 'occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory.'[1684] It is premised on a state's factual control over a geographical area, either directly, as a result of military force, or indirectly, by supporting a local administration.[1685] In *Al-Skeini* the ECtHR firmly grounded the determination of effective control on the factual question of a state's ability 'to secure, within the area under its control, *the entire range* of substantive rights set out in the Convention and those additional Protocols which it has ratified.'[1686] This retains, at least insofar as jurisdiction is based on effective control, the ECtHR's assertion in *Banković* that obligations under the ECHR cannot be divided and tailored.[1687] The threshold necessary to establish justification through effective control is, therefore, a high one.

With regard to the current enquiry it is necessary to ask whether the use of armed drones over an area is sufficient to enable the US to secure the full corpus of rights provided for under the ICCPR. In *Al-Skeini* the ECtHR asserted that a finding of effective control over

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[1683] David Goddard, 'Applying the European Convention on Human Rights to the Use of Physical Force: *Al-Saadoon*' (2015) 91 International Law Studies 402, 412.

[1684] *Al-Skeini* (n 1588) para 138.

[1685] ibid para 138; *Ilaşcu* (n 1661) para 314; *Issa* (n 1661) para 69; *Loizidou* (preliminary objections) (n 1661) para 62; *Loizidou v Turkey* (merits) ECHR 1996-VI, para 52; *Mozer v the Republic of Moldova and Russia* [GC] ECHR 2016, para 101.

[1686] *Al-Skeini* (n 1588) para 138.

[1687] *Banković* (dec) (n 1621) para 73.

an area is a determination made primarily with 'reference to the strength of the State's military presence in the area'.[1688] In *Loizidou*, the presence of 30,000 active troops was sufficient to establish effective control,[1689] while in *Banković* bombing from aircraft with no troops on the ground was not,[1690] despite the extent of NATO control of the airspace over Belgrade.[1691] This points to the need for a substantial physical presence.

Drone operations in and of themselves, given that their use is characterised by the radical removal of military personal from a combat situation, do not establish this level of territorial control. Though having the potential to significantly pervade a state's airspace, drones are incapable of securing almost any substantive rights under the ICCPR and as such their use in isolation will always be insufficient to establish jurisdiction through effective control of an area, based on the law as it stands. It has been argued that the surveillance technology of drones coupled with their quasi-omnipresent ability to deliver lethal force may be sufficient to be effective control,[1692] but, while this argument has a great deal of potential as a critique of the law, it cannot be viewed as accurate in light of relevant international legal doctrine, which requires a more imbricated presence within an area.

4.1.1.2.1.2 Drones and state agent authority and control

It is nonetheless possible that human rights jurisdiction may be identifiable on the basis of state agent authority and control over an individual. Set out most comprehensively by the ECtHR Grand Chamber in the *Al-Skeini* judgment, this represents a codification of the *personal* interpretation of jurisdiction present in decisions of the UNHRC, Inter-

[1688] *Al-Skeini* (n 1588) para 139.

[1689] *Loizidou* (merits) (n 1685) para 56.

[1690] *Banković* (dec) (n 1621) para 62.

[1691] ibid para 74.

[1692] Frederik Rosén, 'Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility' (2014) 19(1) Journal of Conflict and Security Law 113, 121.

American Commission on Human Rights,[1693] and European Commission of Human Rights.[1694]

This notion of jurisdiction was previously rejected by the ECtHR in *Banković*, on the basis that it would be 'tantamount to arguing that anyone adversely affected by an act imputable to a contracting state, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that state'.[1695] Furthermore, the Court asserted that such an approach to jurisdiction would result in the dividing and tailoring of the rights under the ECHR for which there was no provision within the Convention.[1696]

However, since *Banković*, this approach to jurisdiction has been adopted by the ECtHR in numerous cases.[1697] Also, in a reversal of the position in *Banković*, the ECtHR has asserted that, when establishing *personal* jurisdiction, the Convention *can* be divided and tailored in relation to the degree of control a state exercises.[1698] Therefore it seems certain that state agent authority and control is an acceptable basis upon which to determine jurisdiction.

The ECtHR has provided various ways in which authority and control may manifest: through 'the acts of diplomatic and consular agents, … present on foreign territory';[1699] where, 'through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government';[1700] and the 'exercise of physical power and control' over an individual.[1701]

[1693] Text from n 1672 to n 1675.

[1694] *Cyprus v Turkey* (1975) 2 DR 125 para 8.

[1695] *Banković* (dec) (n 1621) para 73.

[1696] ibid para 75.

[1697] *Al-Skeini* (n 1588) para 133; *Hassan v the United Kingdom* [GC] ECHR 2014-VI 1, para 76; *Issa* (n 1661) para 71; *Jaloud* (n 1661) para 152; *Mozer* (n 1685) para 101; *Öcalan v Turkey* [GC] ECHR 2005-IV 47, para 91; *Pad* (n 1676) para 53.

[1698] *Al-Skeini* (n 1588) para 137; *Sargsyan v Azerbaijan* [GC] ECHR 2015, para 131.

[1699] *Al-Skeini* (n 1588) para 134.

[1700] ibid para 135.

[1701] ibid para 136.

Clearly the use of drones does not involve acts of diplomatic and consular agents so this initial basis for jurisdiction can be disregarded. However, the latter two bases are both conceivable avenues by which to assert US IHRL jurisdiction with regard to its drone strikes. Therefore these two bases will now be considered in detail.

4.1.1.2.1.2.1 Drone strikes and the exercise of physical power and control

The ECtHR stated in *Al-Skeini* that the exercise of physical power or control can establish jurisdiction 'in certain circumstances',[1702] without specifying what these circumstances might be. In setting out authority for the exercise of physical power and control as a basis for jurisdiction, the ECtHR referred to four of its own decisions, all of which found control as a result of detention,[1703] or exclusive control of a space inside which individuals were confined,[1704] rather than solely as a result of lethal force. The key question, therefore, is whether the 'certain circumstances', under which the exercise of physical power and control as a jurisdictional threshold may be satisfied, requires detention or close physical proximity, or whether it can include lethal force delivered from a distance. If the former, then it is difficult to imagine how this could be used to assert US IHRL jurisdiction over the individuals targeted by its drones. Conversely, if the latter, then the use of drones for the delivery of lethal force would inherently bring any individuals targeted within the human rights jurisdiction of the US.

Al-Skeini concerned the deaths of six Iraqi civilians at the hands of the UK armed forces, during the period after the conclusion of the 2003 Iraq war, while Iraq was occupied by the US and UK. Of the six, four were shot and killed during UK-led security operations and two were killed post-arrest by UK forces, one by drowning—having been beaten and forced into a river,[1705]—the other by ill-treatment during detention.[1706] Therefore, if the exercise of physical power or control included lethal force on its own, without proximate

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[1702] *Al-Skeini* (n 1588) para 136.

[1703] *Al-Saadoon and Mufdhi* (n 1661) paras 86-9; *Issa* (n 1661) para 72; *Öcalan* (n 1697) para 91.

[1704] Namely, a ship in international waters: *Medvedyev and Others v France* [GC] ECHR 2001-III, para 67.

[1705] *Al-Skeini* (n 1588) para 55-62.

[1706] ibid para 63-71.

control, it would be assumed that the Court would have established jurisdiction on this basis. However, instead the Court established that the UK exercised 'some of the public powers normally to be exercised by a sovereign government', in particular through the assumption of 'authority and responsibility for the maintenance of security in south-east Iraq.'[1707] The Court asserted that:

> 'In these exceptional circumstances, … the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.'[1708]

Thus state agent authority and control jurisdiction was found not on the basis of lethal force as a manifestation of the exercise of physical power and control, but due to the exercise of public powers, though even then the Court appeared to require more than *just* the exercise of public powers, linking it to physical 'security operations'.[1709] Crucially, the Court described these circumstances as 'exceptional', which, coupled with the fact that the exercise of physical power and control was not considered as a possible basis for jurisdiction, appears to auger against the possibility of lethal force establishing a jurisdictional link. Along these lines, commentators have argued that, in basing jurisdiction on the exercise of public powers, the ECtHR effectively maintained the position that lethal force alone, *without* the exercise of such public power (e.g. through airstrikes), cannot be a basis for establishing jurisdiction, replicating the finding in *Banković*.[1710]

[1707] ibid para 149.

[1708] ibid para 149.

[1709] Marko Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg' (2012) 23(1) European Journal of International Law 121, 131; Aurel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in *Jaloud v. Netherlands*: Old Problem, New Solutions?' (2014) 53(2) Military Law and the Law of War Review 287, 298.

[1710] Alex Conte, 'Human Rights Beyond Borders: A New Era in Human Rights Accountability for Transnational Counter-Terrorism Operations?' (2013) 18(2) Journal of Conflict and Security Law 233, 249-50; Anna Cowan, 'A New Watershed? Re-evaluating *Banković* in Light of *Al-Skeini*' (2012) 1(1)

This argument is not unassailable as, while not finding jurisdiction on the basis of the exercise of physical power and control through lethal force, neither did the Court in *Al-Skeini* find jurisdiction on that basis for those killed while in detention, yet this does not mean that it is no longer possible to establish jurisdiction over detainees in the absence of the exercise of public powers. Indeed, as has been emphasised, in *Al-Skeini* the Court specifically stated that the exercise of physical power and control could establish jurisdiction '*in certain circumstances*';[1711] it would be bizarre for this to be proffered as a basis for jurisdiction and then removed in the space of a dozen or so paragraphs. Indeed, the specific assertion that the ECHR may be divided and tailored according to the degree of authority and control[1712] leaves open the possibility that the right to life may be implicated as a result of a state's jurisdiction, through physical power and control in the form of lethal force alone.[1713] To assert that this is the definite result of the decision in *Al-Skeini* would be stretching the text too far; however, the situation is not as clear cut as some commentators suggest.

In contrast to *Al-Skeini*, other decisions have treated lethal force on its own as a circumstance capable of establishing jurisdiction. The ICJ has asserted that the right to life under Article 6 ICCPR applies during armed conflict, implying that jurisdiction may be satisfied by lethal force.[1714] The Inter-American Commission of Human Rights has held that civilians in an airplane targeted and shot down by state agents of another state's air force, operating outside of that state's territory, were 'placed … under [the state agent's] authority', thereby implicating the state's obligations under the American Declaration of the Rights and Duties of Man.[1715] Thus, in circumstances comparable with

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Cambridge Journal of International and Comparative Law 213, 224; Milanovic (2012) (n 1709) 130; Richard Reynolds, 'Human Rights in the Line of Fire: *Al-Skeini v United Kingdom*' (2011) 16 Judicial Review 399, 403-4.

[1711] *Al-Skeini* (n 1588) para 136.

[1712] ibid para 137.

[1713] Marek Szydło, 'Extra-Territorial Application of the European Convention on Human Rights after *AI-Skeini* and *AI-Jedda*' (2012) 12 International Criminal Law Review 271, 288-9.

[1714] *Nuclear weapons* (n 355) para 25.

[1715] *Alejandre* (n 1606) para 25.

extraterritorial targeting by armed drones, individuals subject to lethal force alone were held to be under the power of the state in question.

The ECtHR has produced similar conclusions. In *Pad v Turkey* Iranian nationals were killed in Iran by a Turkish helicopter, and the Court held that the individuals were within the jurisdiction of Turkey.[1716] However, it is unclear whether jurisdiction in this case was a function of the lethal force, as jurisdiction was not in dispute,[1717] so while it appears the Court was willing to accept jurisdiction on the basis of lethal force, this is not certain.

Conversely, in the admissibility decision of *Isaak v Turkey*, the ECtHR found that an individual beaten to death by a group in an area outside of Turkish effective control was nonetheless within Turkish jurisdiction by virtue of his being under the authority of state agents who were members of the group.[1718] This decision thus presents an instance of jurisdiction established on the basis of lethal force.

Finally, in *Andreou v Turkey*, an individual, shot by Turkish or Turkish Cypriot state agents while within the UN buffer zone in Cyprus, was found to be within Turkey's jurisdiction despite being outside Turkey's effective control.[1719] The ECtHR held that 'the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as "within [the] jurisdiction" of Turkey'.[1720] Thus, this case is an unambiguous example of jurisdiction based on lethal force with no detention or other factors bringing the individual into physical proximity with the state.

While in *Isaak* it may be possible to argue that the nature of proximity between the victim and the state agents may have been akin to detention (he was surrounded by a mob) thus helping the Court find jurisdiction, the same cannot be said of *Andreou*. In that case, force

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[1716] Pad (n 1676) para 55.

[1717] ibid para 54.

[1718] *Isaak and others v Turkey* (dec) App no 44587/98 (ECtHR, 24 June 2008), 21.

[1719] *Andreou v Turkey* (dec) App no 45653/99 (ECtHR, 3 June 2008), 11; the finding was confirmed in the judgment: *Andreou v Turkey*, App no 45653/99 (ECtHR, 27 October 2009).

[1720] *Andreou* (dec) (n 1719) 11.

was used over a distance (though admittedly 'close range'), against an individual who was outside the state's control. The findings of jurisdiction in these cases plainly go against *Banković* and appear to allow for the possibility that lethal force may be a circumstance under which jurisdiction, through the exercise of physical power and control, can be established. Though these decisions were omitted by the ECtHR in its discussion of physical power and control in *Al-Skeini*, this does not mean they no longer provide authoritative jurisprudence. Indeed, it has been argued elsewhere that, on the basis of *Pad* alone, extraterritorial uses of force bring targeted individuals into a state's jurisdiction.[1721]

In the more recent case of *Jaloud v the Netherlands*, the passenger of a car that was speeding towards a checkpoint was killed, when the car was shot by soldiers manning the checkpoint. As in *Al-Skeini*, the possibility was there for the Grand Chamber to find jurisdiction on the basis of lethal force, if it recognised this as a possible basis. It did not do so, instead holding that the victim was in the jurisdiction of the Netherlands because its armed forces were acting as part of the Stabilisation Force in Iraq in pursuance of UNSC Resolution 1483 (which tasked coalition states with effecting stability and security in the country).[1722]

As an aspect of the role played by the Netherlands' armed forces, the Court held that it was 'asserting authority and control over persons passing through the checkpoint.'[1723] The Court did not explicitly state whether the finding of jurisdiction was as a result of the exercise of public powers or physical power and control: it is therefore not possible to make a certain conclusion as to its development of the doctrine. However the reference to the Netherlands' security role appears similar to that in *Al-Skeini*, suggesting jurisdiction as a result of the exercise of public powers, linked to the physical act of securing a checkpoint.[1724] The fact that the use of lethal force was not given as a basis for jurisdiction lends support to the contentions of those who reject jurisdiction on that basis. Nonetheless, as stated, the fact that a particular basis for jurisdiction was not used does

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[1721] Murray (n 1013) 74.

[1722] *Jaloud* (n 1661) paras 93 and 152.

[1723] ibid para 152.

[1724] Sari (n 1709) 298.

not necessarily mean that it has been ruled out. Therefore, lethal force may yet be held to provide a sufficient link on which to establish jurisdiction, one example of the 'certain circumstances' envisaged by the ECtHR in *Al-Skeini*.

This issue has been considered in the UK, in a series of cases regarding multiple deaths caused by UK armed forces undertaking security operations in Iraq. The High Court in *Al-Saadoon v Secretary of State for Defence* held that, after *Al-Skeini* raised the possibility of jurisdiction on the basis of state agent authority and control through the 'exercise of physical power and control', it is 'impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being.'[1725] Further, it was held that, since the removal of the *Banković* prohibition on dividing and tailoring the ECHR, 'the fact that an individual is taken into custody can only be relevant … to the extent of the rights which must be secured.'[1726] In that case, the UK was found to have jurisdiction over individuals killed in security operations *both* as a result of the exercise of public powers *and* the exercise of physical power and control manifested through lethal force,[1727] in the absence of detention or similar control.[1728]

This aspect of the judgment has since been overturned by the UK Court of Appeal, which, in line with the majority of commentators, held that the absence of a finding of jurisdiction on this basis in *Al-Skeini* serves to preclude its application as a basis for extraterritorial jurisdiction,[1729] emphasising the fact that, in *Al-Skeini*, the ECtHR referred only to cases where there was a form of detention, rather than those in which lethal force alone provided a jurisdictional link (*Pad*, *Isaak* and *Andreou*).[1730] As a result, the Court went on to state

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[1725] *Al-Saadoon and others v Secretary of State for Defence* [2015] EWHC 715 (Admin), [2015] 3 WLR 503 [95].

[1726] ibid [98].

[1727] ibid [117] – [118].

[1728] ibid [80] and [87].

[1729] *R (Al-Saadoon and others) v Secretary of State for Defence* [2016] EWCA Civ 811, [2017] QB 1015 [65] and [67].

[1730] ibid [67].

that to be a basis for jurisdiction, physical power and control requires 'an element of control of the individual prior to the use of lethal force'.[1731]

It is entirely unclear what this 'element of control' might consist of, particularly in light of the earlier decisions of *Pad*, *Isaak* and *Andreou*, which, though indeed not referred to in *Al-Skeini*, were not overruled. Nevertheless, the Court did not rule out the possibility that the ECtHR in *Al-Skeini* may have intended extraterritorial uses of force to trigger a state's jurisdiction, but asserted that such a clarification could only be made by the ECtHR itself,[1732] leaving it to the Strasbourg court to resolve this complicated mess. It is hoped that, if *Al-Saadoon* reaches the ECtHR, the issue may be definitively resolved.

Thus, it remains unclear whether US drone strikes will *per se* bring targeted individuals into its IHRL jurisdiction. Perhaps, if *Banković* was an isolated decision, it would be possible to argue more strongly that the refusal to base jurisdiction solely on lethal force has been overridden by subsequent jurisprudence. However, the Court's failure to establish jurisdiction on this basis in *Al-Skeini* and *Jaloud* makes this argument weaker. Nevertheless, it is submitted that there remains a compelling case in favour of establishing jurisdiction on this basis as the law stands: lethal force as establishing jurisdiction through physical power and control has not been removed as a possibility. If this were the situation there would be a large gap in the law in which those targeted by drone strikes would have no IHRL or other protections if targeted outside of an armed conflict, an outcome that appears entirely contrary to the object and purpose of human rights treaties generally,[1733] and the ICCPR in particular.

As discussed, in three cases before the ECtHR, jurisdiction was established through the use of lethal force alone.[1734] *Pad* is particularly relevant to drone strikes as jurisdiction was established through lethal airstrikes.[1735] This is, however, directly contrary to the

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[1731] ibid [69].

[1732] ibid [70].

[1733] Noam Lubell and Nancie Prud'homme, 'Impact of Human Rights Law' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 110.

[1734] *Andreou* (dec) n 1719) 11; *Isaak* (n 1718) 21; *Pad* (n 1676) para 55.

[1735] Pad (n 1676) para 55.

conclusion in *Banković*, in which aerial bombing could not provide a basis for jurisdiction.[1736] *Banković* has not been overruled, and the existence of the two cases creates conceptual difficulty in the analysis of drone strikes.

It is arguable that the targeted nature of lethal force delivered by helicopter in *Pad* renders it sufficiently distinct from the high-altitude bombing in *Banković* to explain the finding of jurisdiction in the former and not the latter. The guided missiles and extensive surveillance that characterise drone strikes are more akin to the situation of *Pad* and therefore jurisdiction may be more readily discernible in drone strikes. This accords with the position put forward by Melzer that while 'collective and depersonalized' uses of force are unlikely to produce a jurisdictional link between states and affected individuals, those which are 'selective and individualized' may provide such a link,[1737] a conclusion that has been supported by other commentators.[1738] Importantly, though Melzer's original conclusion was made prior to *Al-Skeini* and *Jaloud*, he and others have maintained the claim since these decisions were made.[1739]

On this basis, personality strikes would produce a jurisdictional link between the US and the individual targeted due to their intensely targeted nature, characterised by multiple types of identification, surveillance and tracking, being the opposite of the 'collective and depersonalised' aerial bombardment of *Banković*. This is a position advocated by White, who—channelling the sentiment of Leggatt J in *Al-Saadoon*—saw lethal force, including through drone strikes, as the 'ultimate assertion of jurisdiction in the form of the exercise of physical power and control by a state'.[1740]

[1736] *Banković* (dec) (n 1621) para 62.

[1737] Melzer (2008) (n 623)137.

[1738] Heyns and others (n 2) 824-5; Lubell (2010) (n 206) 223; Michael Ramsden, 'British Air Strikes Against ISIS in Syria: Legal Issues Under the European Convention on Human Rights' (2016) European Human Rights Law Review 151, 155.

[1739] Melzer (2013) (n 1271)16; Heyns and others (n 2) 824-5.

[1740] Nigel White, 'The Joint Committee, Drone Strikes and Self-Defence: Caught in no Man's Land?' (2016) 3(2) Journal on the Use of Force and International Law 210, 214. See also, Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing* (2015-16, HL 141, HC 574) para 52.

Signature strikes, not targeting known individuals in the manner of personality strikes, would likely also produce a jurisdictional link, due to the manner in which individuals are identified within the F2T2EA targeting procedure detailed above.[1741] It is possible that in such situations, the jurisdictional link would depend in part on the extent to which the US could carry out the find, fix and track aspects of the F2T2EA procedure. The more spontaneous a strike and the less an individual is able to be found, fixed and tracked—for instance during a heated battle—the less it may produce human rights jurisdiction.[1742] Ultimately, however, this is not decisively supported by the law; it is not possible to claim with certainty, in light of the ECtHR's case law, that drone strikes will bring targeted individuals within the jurisdiction of the US, despite the attractiveness of such a position.

It must be recalled that decisions of the ECtHR are only directly relevant in terms of the interpretation of the jurisdiction clause under Article 1 ECHR. While decisions of the regional and global human rights bodies are interpolated in a complex cross-pollination, the findings of one will inform, rather than bind, others. Therefore it is conceivable that jurisdiction regarding obligations under the ICCPR may be interpreted more broadly than those of the ECHR, drawing on the historic tendency of the UNHRC to promote an expansive view of the Covenant. However, relevant decisions of the UNHRC dealt with instances of abduction of individuals from one state by the agents of another rather than the use of lethal force,[1743] thereby replicating the problem from *Al-Skeini* of determining which 'certain circumstances' create jurisdiction. It is, thus, speculative to conclude how the UNHRC would treat a situation akin to drone strikes, and is not a sound basis upon which to ground firm legal conclusions.

Ultimately, there are arguments of doctrine, policy and philosophy in support of the establishment of a jurisdictional link on the basis of lethal drone strikes being an exercise of power and control over an individual, which is a form of state agent authority and control jurisdiction. However, the waters have been muddied by *Banković*, *Al-Skeini* and *Jaloud*, to the extent that it is not possible to assert definitively that drone strikes bring a targeted individual within the jurisdiction of the targeting state.

[1741] Text from n 1472 to n 1476.

[1742] Lubell (2010) (n 206) 227.

[1743] *Celiberti de Casariego* (n 1607); *López Burgos* (n 1607).

Some commentators have suggested that IHRL is evolving such that negative rights are not subject to questions of jurisdiction.[1744] This approach would immediately implicate the right to life during drone strikes, thereby removing the complex issue of establishing personal jurisdiction through uses of force; however, though an attractive proposal, at this stage it would be wrong to suggest it reflects doctrinal reality. Jurisdiction must be established to engage US obligations under the ICCPR and it cannot be said that this is definitively possible by appealing to the notion of the exercise of power and control. Therefore, it is necessary to ascertain whether an alternative basis is available.

4.1.1.2.1.2.2 Drones and the exercise of public powers with territorial state consent

The exercise of public powers is also a basis upon which jurisdiction through state agent authority and control can be established, asserted repeatedly by the ECtHR.[1745] This jurisdiction arises where 'through the *consent, invitation or acquiescence* of the Government of that territory, [an intervening state] exercises all or some of the public powers normally to be exercised by that Government'.[1746] Thus, consent to third state uses of force against an NSA has relevance beyond the realm of *jus ad bellum* and may contribute to bringing targeted individuals into the IHRL jurisdiction of the third state.

Despite this, the question of jurisdiction as a product of consent has not featured within the drone literature and so the present analysis is particularly necessary. As has been demonstrated, each of Pakistan, Yemen and Somalia have consented to US drone strikes against resident NSAs during specific periods.[1747] Therefore, the question is whether the use of drones can be said to constitute the exercise of public powers normally exercised by the territorial state government. In answering this it is necessary to define 'public powers'.

[1744] Milanovic (2011) (n 1586) 210.

[1745] *Al-Skeini* (n 1588) para 135; *Banković* (dec) (n 1621) para 71; *Belozorov v Russia and Ukraine* App no 43611/02 (ECtHR, 15 October 2015), para 87; *Hassan* (n 1697) para 135; *Jaloud* (n 1661) para 129.

[1746] *Al-Skeini* (n 1588) para 135 (emphasis added).

[1747] Section 2.2.2.

The notion of public powers has been promulgated by the ECtHR, and has developed in intriguing ways. In *Banković*, the Court linked public powers with the effective control of territory rather than authority and control over individuals. This made public powers a very high threshold for jurisdiction, requiring substantive administration of a territory.[1748] Under this approach, there is no way that the use of drones would satisfy the test, in the same way that their use fails to establish effective control.[1749]

However, this approach was subsequently transformed in *Al-Skeini*, where the concept was applied to the establishment of jurisdiction through authority and control.[1750] In the case, the UK was held to have exercised some of the public powers that were otherwise the preserve of the state government, and this was held to evidence authority and control jurisdiction.[1751] The link between public powers and effective control was, therefore, severed.

The exercise of public powers constitutes 'carry[ing] out executive or judicial functions'.[1752] Public powers exercised in *Al-Skeini* involved the occupation of Iraq by the UK, US and coalition partners forming the Coalition Provisional Authority, which assumed 'authority and responsibility for the maintenance of security in south-east Iraq'.[1753] Within this, 'British forces … took responsibility for maintaining security and supporting the civil administration' involving 'patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations'.[1754] This array of powers is clearly broad, and the Court did not indicate whether lesser involvement would also lead to IHRL jurisdiction.

Therefore, the nature of the conduct necessary to be deemed the exercise of public powers is unclear. While the maintenance of security and support for a civil administration in the

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[1748] Milanovic (2011) (n 1586) 137.

[1749] Section 4.1.1.2.1.1.

[1750] *Al-Skeini* (n 1588) para 135.

[1751] ibid para 149.

[1752] ibid para 135.

[1753] ibid para 149.

[1754] ibid para 147.

form of 'patrols, arrests, anti-terrorist operations, policing of civil demonstrations, protection of essential utilities and infrastructure and protecting police stations' evidences the exercise of public powers,[1755] it is not clear whether anti-terrorist operations in isolation would do so. This is a crucial question in the establishment of the human rights jurisdiction of states carrying out drone strikes extraterritorially, as such strikes, if carried out by territorial governments, would likely be anti-terrorist operations.

In *Jaloud*, though the ECtHR did not explicitly state that the Netherlands had jurisdiction by virtue of exercising public powers, it appears that this formed the basis of establishing jurisdiction, despite the fact that the Netherlands was enforcing the authority of the Coalition Provisional Authority in Iraq rather than forming part of it, as was the case of the UK in *Al-Skeini*.[1756] This implies that a lower level of involvement may produce jurisdiction, though in *Jaloud* the Netherlands was acting as part of a Stabilisation Force under UNSC Resolution 1483,[1757] and its armed forces were present in Iraq in 'battalion strength'[1758] with a mission 'to contribute to the creation of a safe and stable environment in Iraq to make possible the reconstruction of the country and the transition to representative self-government'.[1759] In enforcing the authority of the Coalition Provisional Authority the troops' presence clearly occurred with the consent of that authority.

Crucially, it is not necessary for a state to exercise the full range of public powers, simply '*some*' of those otherwise carried out by the territorial state.[1760] Thus, a finding of jurisdiction due to the exercise of public powers requires a state to carry out some executive functions. The word 'some' implies more than one, but ultimately denotes an unspecified quantity, leaving open the possibility that a state need only carry out a single executive function to produce a jurisdictional link. As counter-terrorism has been identified as an executive function ordinarily exercised by domestic governments, it is

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[1755] ibid para 147.

[1756] *Jaloud* (n 1661) para 152.

[1757] ibid paras 93 and 152.

[1758] ibid para 53.

[1759] ibid para 59.

[1760] *Al-Skeini* (n 1588) para 135.

perhaps not too much of a stretch to suggest that anti-terrorist drone strikes may establish jurisdiction for the drone-launching state.

Despite being hampered by secrecy, analysis of the US drone programmes in Pakistan, Yemen and Somalia enables some tentative conclusions. All three drone programmes are counter-terrorist operations, an activity cited by the ECtHR as an example of public powers.[1761] Yet they are hallmarked by a much less overt presence within each state than was the case in *Al-Skeini* and *Jaloud* and it could be argued that this may auger against drone strikes being an exercise of public powers. As noted above,[1762] when US drone strikes in Pakistan were undertaken with the consent of the government, 'low key' military co-operation between Pakistan and the US was emphasised by the Chief of Army Staff in Pakistan, due to 'the current political climate.'[1763] Indeed, the approach of the military to US drone strikes during the period was to allow the strikes privately but to publicly protest them in the National Assembly and then ignore them.[1764] Nevertheless, it is submitted that the covert nature of drone strikes does not detract from the possibility of them being an exercise of public powers. Counter-terrorism has been cited as an executive function which may be a public power; such operations are often covert but this does not detract from the fact that they remain an executive function. For instance, covert counter-terrorism operations conducted in the UK under the Regulation of Investigatory Powers Act 2000 constitute the exercise of an executive function, despite their secrecy.

However, the choice of targets generally appears to have come from the US, with one official, cited through WikiLeaks, stating that '[o]n the Predators, we made it very clear to them that if they weren't going to prosecute these targets, we were, and there was

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[1761] ibid para 147.

[1762] Text from n 100 to n 101.

[1763] 'CODEL Lieberman's Meeting with Pakistan COAS Kayani' *The Telegraph* (1 February 2008) https://www.telegraph.co.uk/news/wikileaks-files/september-11-wikileaks/8297239/CODEL-LIEBERMANS-MEETING-WITH-PAKISTAN-COAS-KAYANI.html.

[1764] Rob Crilly, 'Wikileaks: Pakistan Privately Approved Drone Strikes' *The Telegraph* (Islamabad, 1 December 2010) http://www.telegraph.co.uk/news/worldnews/wikileaks/8172922/Wikileaks-Pakistan-privately-approved-drone-strikes.html.

nothing they could do to stop us taking unilateral action.'[1765] While this approach may not vitiate consent in terms of *jus ad bellum*, it may undermine a claim that the US was exercising public powers *otherwise exercised by the territorial government*, appearing instead to have been pursuing its own agenda. It is submitted that this is unconvincing for two reasons. First, consent ultimately *was* given to the drone strikes (for a time), regardless of whether the US would have otherwise acted unilaterally. Thus, the fact that the US would have acted unilaterally does not undermine the fact that Pakistan undertook a covert policy enabling the drone strikes, therefore bringing them within the programme of the government. Considered differently, if, instead of allowing the US drone strikes the government of Pakistan had undertaken them itself, they would clearly have constituted the exercise of public powers. Secondly, were this to preclude the possibility of jurisdiction on the basis of public powers, it would provide a perverse incentive for states to act unilaterally to avoid engaging the IHRL protections of those targeted.

It is important to note that many of those targeted by the US have been members of armed groups subject to domestic uses of force by Pakistani armed forces. As stated,[1766] the US has targeted members of TTP, al-Qaeda and the Haqqani Network, the first two of which had been engaged in a NIAC with the government of Pakistan during the period of consent.[1767] The fact that drones were used to target a group that was also being engaged by Pakistan under operation Zar-e-Azb lends support to the notion that the drone strikes represent an executive function and, therefore, the exercise of public powers. As a result of this and the above reasoning, it is submitted that it is very likely that while Pakistan consented to US drone strikes, they can be viewed as an exercise of public powers and therefore establish human rights jurisdiction for the US over those targeted.

In Yemen, operations have been conducted with apparently unequivocal consent from the government[1768] and are targeted against AQAP, a group that the government of Yemen

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[1765] Declan Walsh, 'Osama bin Laden Mission Agreed in Secret 10 Years Ago by US and Pakistan' *The Guardian* (Islamabad, 9 May 2011) https://www.theguardian.com/world/2011/may/09/osama-bin-laden-us-pakistan-deal.

[1766] n 202.

[1767] Section 3.1.5.2.2.

[1768] Section 2.2.2.2.

have been militarily engaged with since 2001.[1769] The same is the case with drone strikes in Somalia against al-Shabaab, with which the government has been engaged in a NIAC for a long period.[1770] Therefore, in the likely case that counter-terrorism operations are an exercise of public powers normally carried out by the territorial government, drone strikes in the period during which the governments of Yemen and Somalia have given consent will certainly bring those targeted into the jurisdiction of the US.

4.1.1.3 Interim conclusion: jurisdiction under the ICCPR

As a result of this section, there is a strong case that jurisdiction under the ICCPR can be established with regard to drone strikes that have been consented to by the governments of Pakistan, Yemen and Somalia. There have been, however, a number of strikes undertaken without consent or outside of the parameters of consent. There is a compelling argument in favour of these strikes also being within US jurisdiction for purposes of its ICCPR obligations: the nature of signature and personality strikes carried out in Pakistan, Yemen and Somalia is of authority and control over targeted individuals. It appears logical that they are within the power and control of the US during the find, fix and track aspects of the F2T2EA procedure of a signature strike and also during the supremely targeted nature of a personality strike.

This is a very attractive argument, but it represents only one of two alternatives in the development of the law. As it stands, the *lex lata* also supports the case that IHRL jurisdiction requires an element of physical control or detention. While the first alternative is the more appealing and logical, the second cannot be ruled out, despite the fact that it would produce a gap in the protection of individuals by international law, arguably incentivising states to carry out lethal operations without the consent of a territorial state in order to avoid obligations under IHRL treaties. Therefore, it is not possible to claim definitively that jurisdiction under the ICCPR will be established with regard to drone strikes occurring without territorial state consent. Further alternatives must be sought to provide a more certain basis upon which to establish jurisdiction.

[1769] Section 3.1.5.3.2.

[1770] Section 3.1.5.4.1.

4.2 Drone strikes and customary IHRL

As the definitive understanding of 'jurisdiction' under the ICCPR remains elusive, customary IHRL may provide a surer footing upon which to ground the human rights obligations of the US during its extraterritorial drone operations. This is due to the fact that customary IHRL obligations may lack the jurisdictional elements of conventional rights and, as customary international law, have the potential to bind states that have otherwise been resistant to IHRL treaties.[1771]

This section will consider whether it is indeed the case that IHRL obligations apply to US drone strikes as a result of customary international law. The analysis will consider whether the right to life exists as customary international law, and, if so, whether it contains the same potential territorial limitations as the ICCPR.

4.2.1 Is there a customary right to life?

The linked questions of whether human rights generally are capable of existing in customary international law, and whether the right to life is one such rule, have been extensively examined within human rights literature. A great many commentators see the right to life as a rule of customary international law, to the extent that this position appears generally accepted.[1772] Several authors writing on armed drones have posited the

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[1771] This is in the sense that the requirement of 'general practice', under Article 38(1)(b) of the ICJ Statue has been interpreted as requiring practice that is 'sufficiently widespread and representative' (ILC UN Doc A/CN.4/L.872 (n 1124) draft conclusion 8), or 'sufficiently extensive and representative' (Committee on Formation of Customary (General) International Law, 'Statement of Principles Applicable to the Formation Of General Customary International Law' in International Law Association Report on the Sixty-Ninth Conference (London, 2000) 8). As practice need only be 'sufficiently widespread' or 'extensive' it is not required to be universal; as customary international law is binding on all states, (Principles Applicable to the Formation Of General Customary International Law (n 1771) 80) those states that did not engage in requisite practice, but do not qualify as persistent objectors, will be bound.

[1772] *Restatement of the Law Third, Restatement of the Foreign Relations of the Law of the United States, Volume 2* (American Law Institute Publishers 1987) §702, 161-4; Jeffrey M Blum and Ralph G Steinhardt, 'Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act

existence of the right to life in customary international law as axiomatic,[1773] though some have been less categorical, instead '[*a*]*ssuming* … that there is … a customary international human rights law right to life.'[1774]

Nevertheless, due to their nature as obligations regulating interaction between a state and its citizens rather than between states,[1775] some have questioned whether, in fact, human

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After *Filartige v Peña-Irala*' (1981) 22(1) Harvard International Law Journal 53, 90; Anthony P Della Pietra Jr, 'Limiting the Scope of Federal Jurisdiction Under the Alien Tort Statute' (1984) 24(4) Virginia Journal of International Law 941, 957-8; Vojin Dimitrijevic, 'Customary Law as an Instrument for the Protection of Human Rights' (2006) Instituto per GLI Studi di Politica Internazionale, Working Paper 7 https://www.ispionline.it/it/documents/wp_7_2006.pdf; Yoram Dinstein, 'Right to Life, Physical Integrity and Liberty' in Louis Henkin (ed), *International Bill of Rights Covenant on Civil and Political Rights* (Columbia University Press 1981) 115; W Paul Gormley 'Right to Life and the Rule of Non-Derogability' in Bertrand Ramcharan (ed.) *The Right to Life in International Law* (Matinus Nijhoff 1985) 136; Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 Georgia Journal of International and Comparative Law 287, 342; John Humphrey, 'The International Bill of Rights: Scope and Implementation' (1976) 17 William and Mary Law Review 527, 529; Anne Lowe, 'Customary International Law and International Human Rights Law: A Proposal for the Expansion of the Alien Tort Statute' (2013) 23(3) Indiana International and Comparative Law Review 523, 537; Richard B Lillich, 'The Growing Importance of the Customary International Human Rights Law' (1996) 25 Georgia Journal of International and Comparative Law 1, 5; Lubell (2010) (n 206) 170; Melzer (2008) (n 623) 189; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 94-5; Bertrand Ramcharan, 'The Concept and Dimensions of the Right to Life' in Bertrand Ramcharan (ed), *The Right to Life in International Law* (Matinus Nijhoff 1985) 3; Nigel Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court' (1989) 38 International and Comparative Law Quarterly 321, 333; Andrew M Scoble, 'Enforcing the Customary International Law of Human Rights in Federal Court' (1986) 74(1) California Law Review 127, 165; Louis Sohn, 'The Human Rights Law of the Charter' (1977) 12 Texas International Law Review 129, 133.

[1773] Chesney (n 816) 50; Orr (n 197) 745-6; Conte (n 1710) 257; Heyns and others (n 2) 818-9; Craig Martin, 'A Means-Methods Paradox and the Legality of Drone Strikes in Armed Conflict' (2015) 19(2) International Journal of Human Rights 142, 151; Jaume Saura, 'On the Implications of the Use of Drones in International Law' (2016) 12 Journal of International Law and International Relations 120, 142; UNGA UN Doc A/68/382 (n 138) paras 30 and 47; White (n 1740) 1.

[1774] Schmitt 'Extraterritorial Lethal Targeting' (2013) (n 66) 110 (emphasis added).

[1775] Restatement (n 1772) §701, 154; Meron (n 1772) 100-1; Louis Henkin, 'Human Rights and State "Sovereignty"' (1996) 25 Georgia Journal of International and Comparative Law 31, 38; Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law,*

rights have become customary to the extent suggested by the apparent majority of writers.[1776] Simma and Alston have argued that the expansion of human rights into customary international law has been fostered by a move away from the 'traditional', 'inductive' methodology of establishing custom, in which 'practice had priority over *opinio juris*' towards one in which 'practice no longer has any constitutive role to play in the establishment of customary law; rather it serves a purely evidentiary function.'[1777] This is based on the fact that while *opinio juris* supporting the existence of a corpus of customary IHRL may well be present, 'it is still customary for a depressingly large number of States to trample upon the human rights of their nationals'.[1778]

Simma and Alston have argued that the norms generally presented as possessing a basis in customary international law reflect those protected within the legal system of the US, excluding those that fall outside the US system (principally prohibitions on the death penalty for juveniles, and socio-economic rights), and on this basis they allege 'normative chauvinism'.[1779] The issues of normative chauvinism and human rights imperialism are beyond the scope of this work, but the issue of the methodological determination of customary IHRL is crucial. In terms of the ILC's work on the identification of customary international law, Wood has confirmed the classic two stage test for identifying customary IHRL, though also asserted that, due to the flexibility of the test, it is possible that activities evidencing customary IHRL may differ from those establishing other rules of customary international law.[1780] On that basis, customary IHRL may be established in

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Recueil des Cours 1982 V (Martinus Nijhoff 1985) 334-5; Hugh Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some of the Issues' (2015) 28 Leiden Journal of International Law 495, 497;

[1776] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1992) 12 Australian Year Book of International Law 82; Henkin (n 1775) 37; Thirlway (2015) (n 1775) 499-500; Arthur M Weisburd, 'The Effect of Treaties and Other Formal International Actors on the Customary Law of Human Rights' (1996) 25 Georgia Journal of International and Comparative Law 99, 113-7.

[1777] Simma and Alston (n 1776) 88-9.

[1778] ibid 90.

[1779] ibid 94-5.

[1780] Michael Wood, 'Customary International Law and Human Rights' (2016) European University Institute, Academy of European Law Lecture, EUI Working Paper AEL 2016/03 http://cadmus.eui.eu/handle/1814/44445 6-7.

a way that accords with the traditional approach to the formation of customary international law, though in a manner that accounts for the unique citizen-centric nature of state practice in relation to human rights. This is, understandably, congruent with the draft conclusions of the ILC regarding the formation of customary international law, in which both state practice and *opinio juris* continue to be necessary[1781]—reiterating Article 38(1)(b) of the ICJ Statute—but evidence of which is assessed in light of 'the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.'[1782]

Ultimately, it appears uncontroversial that, though debate may rage over the existence of certain contentious human rights as customary international law, human rights are not *per se* precluded from being binding as custom. Indeed, critics have conceded that, while the wholesale rendering of human rights as customary international law has not occurred, human rights are not inherently incapable of possessing a basis within customary international law.[1783] Thus, notwithstanding arguments surrounding the incorporation of human rights rules *en masse* into customary international law, one may conclude that certain fundamental rights are customary in nature.

The right to life (or, perhaps more accurately the prohibition of the arbitrary deprivation of life) arguably represents one such fundamental right. Evidence for its existence as a right protected within customary international law can be found in myriad instances of actions constituting state practice or evidencing *opinio juris*.

The prohibition of 'murder as state policy' within the Restatement of the Law (Third) provides a clear example of acceptance of the right as law by the US.[1784] Other states have identified the right to life as 'transcending all others'[1785] and as being part of an

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[1781] ILC UN Doc A/CN.4/L.872 (n 1124) draft conclusion 2.

[1782] ibid draft conclusion 3.1.

[1783] Simma and Alston (n 1776)100; Thirlway (2015) (n 1775) 506.

[1784] Restatement (n 1772) §702, 161.

[1785] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (advisory opinion) [1996] ICJ Reports 66, Written statement of the Government of Malaysia https://www.icj-cij.org/files/case-related/93/8786.pdf 12.

'irreducible core' of 'non-derogable' human rights, existing as customary international law.[1786] More recently, and in the context of its own use of drones, the UK has identified the right to life as being a rule of customary international law.[1787]

The right to life is protected by multiple international and regional treaties, providing evidence of *opinio juris*.[1788] The foremost is Article 6 ICCPR, protecting the 'inherent right to life' of every human being. Dinstein has argued that the term 'inherent' could indicate that Article 6 is declaratory of a pre-existing customary right to life.[1789] Further, the ICJ has held that 'widespread and representative participation' in a convention may satisfy the requirements necessary for establishing a rule of customary international law,[1790] therefore the fact that there are 169 states parties to the ICCPR provides strong evidence that the rule is also customary in nature. The right to life also features within the Universal Declaration on Human Rights,[1791] the American Declaration of the Rights and Duties of Man,[1792] the ECHR,[1793] the American Convention on Human Rights,[1794] the African Charter on Human and Peoples' Rights,[1795] and the Arab Charter on Human Rights,[1796] which collectively represent the vast majority of states. In addition, the right

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[1786] *WHO Nuclear weapons* (n 1785) Written Statement of the Government of Mexico https://www.icj-cij.org/files/case-related/93/8776.pdf (9 June 1994) 8.

[1787] Joint Committee on Human Rights (n 1740) Annex 1 para 46.

[1788] ILC UN Doc A/CN.4/L.872 (n 1124) draft conclusion 10.2.

[1789] Dinstein (1981) (n 1772) 15.

[1790] *North Sea Continental Shelf* (n 277) para 73.

[1791] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) UN Doc A/RES/217 (UDHR) Article 3.

[1792] American Declaration of the Rights and Duties of Man OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the InterAmerican System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) (American Declaration) Article 1.

[1793] ECHR Article 2.

[1794] American Convention Article 4.

[1795] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 International Legal Materials 58 (African Charter) Article 4.

[1796] Arab Charter Article 5.

to life is included within many regional declarations,[1797] some of the signatories of which are not party to human rights treaties, demonstrating the massive extent of acceptance of the right to life.[1798] The conventional human rights regime thus provides far-reaching evidence of state practice and *opinio juris* in favour of the existence of a customary right to life.

Due to the special nature of practice surrounding human rights, and the methodological flexibility of the identification of customary international law, when confirming the customary character of the right to life it is appropriate to draw evidence from a broad array of sources. Importantly, draft Conclusion 4 of the ILC's draft conclusions on the identification of customary international law states that '[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.'[1799] Though this subparagraph is contentious,[1800] it illustrates the role that may be played by the activities of international organisations in providing supporting evidence for the identification of customary IHRL.

The UNSC has frequently condemned the killing of citizens by their governments,[1801] which has been argued to reflect a reaffirmation of the right to life.[1802] The right to life (among other rights present in human rights conventions) has been confirmed by the

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[1797] ASEAN Human Rights Declaration (adopted at the 21st ASEAN Summit, Phnom Penh, Cambodia, 19 November 2012) Article 11; Cairo Declaration on Human Rights in Islam (adopted 5 August 1990) UN Doc A/CONF/.157/PC/62/Add.18 Article 2(a); Charter of Fundamental Rights of the European Union (adopted 12 December 2007, entered into force 1 December 2009) [2000] OJ C364/1 Article 2.

[1798] Melzer (2008) (n 623) 188.

[1799] ILC UN Doc A/CN.4/L.872 (n 1124) draft conclusion 4.2.

[1800] ILC, Fourth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur (8 March 2016) UN Doc. A/CN.4/695 Article 19.

[1801] UNSC Res 392 (19 June 1976) UN Doc S/RES/392; UNSC Res 417 (31 October 1977) UN Doc S/RES/417; UNSC Res 473 (13 June 1980) UN Doc S/RES/473; UNSC Res 556 (23 October 1984) UN Doc S/RES/556; UNSC Res 560 (12 March 1985) UN Doc S/RES/560; UNSC Res 569 (26 July 1985) UN Doc S/RES/569.

[1802] Melzer (2008) (n 623) 185.

UNGA to apply to national law enforcement agents via national and international law.[1803] Additionally, the UN Economic and Social Council has confirmed the imperative upon states to prohibit all 'extra-legal, arbitrary and summary executions',[1804] a resolution welcomed by the UNGA.[1805] Arguably providing additional evidence of states' *opinio juris* though without constituting it in and of itself, is the fact that the right to life has repeatedly featured within resolutions of the Commission on Human Rights[1806] and Human Rights Council.[1807] Further, the UN Human Rights Committee has explicitly stated that, as an ICCPR provision in relation to which reservations may not be made, the prohibition on the arbitrary deprivation of life is a rule of customary international law.[1808] Finally, the right to life has been specifically identified by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions as a rule of customary international law.[1809]

[1803] UNGA Res 34/169 'Code of Conduct for Law Enforcement Officials' (17 December 1979) UN Doc A/RES/34/169 (UN Code of Conduct) Article 2; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) UN Doc A/CONF.144/28/Rev.1, 110 (Basic Principles) preamble.

[1804] UN Economic and Social Council Res 1989/65 'Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (24 May 1989) UN Doc E/RES/1989/65.

[1805] UNGA Res 44/159 (15 December 1989) UN Doc A/RES/44/159.

[1806] UN Commission on Human Rights Res (11 March 1982) UN Doc E/CN.4/RES/1982/29; UN Commission on Human Rights Res (3 April 1998) E/CN.4/RES/1998/8; UN Commission on Human Rights Res (28 April 1999) E/CN.4/RES/1999/61; UN Commission on Human Rights Res (26 April 2000) E/CN.4/RES/2000/65; UN Commission on Human Rights Res (25 April 2001) E/CN.4/RES/2001/68; UN Commission on Human Rights Res (25 April 2002) E/CN.4/RES/2002/77; UN Commission on Human Rights Res (26 April 2003) E/CN.4/RES/2003/67; UN Commission on Human Rights Res (21 April 20004 E/CN.4/RES/2004/59; UN Commission on Human Rights Res (20 April 2005) E/CN.4/RES/2005/59.

[1807] UNHRC Res (10 April 2012) UN Doc A/HRC/RES/19/1; UNHRC Res (10 April 2012) UN Doc A/HRC/RES/19/16; UNHRC Res (12 April 2013) UN Doc A/HRC/RES/22/24; UNHRC Res (16 April 2013) UN Doc A/HRC/RES/22/26; UNHRC Res (11 July 2014) UN Doc A/HRC/RES/26/12; UNHRC Res (22 July 2015) UN Doc A/HRC/RES/29/18; UNHRC Res (12 October 2015) UN Doc A/HRC/RES/30/5; UNHRC Res (11 April 2017) UN Doc A/HRC/RES/34/30.

[1808] UN Human Rights Committee, General Comment No 24 (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6 para 8.

[1809] UNHRC, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns (1 April 2014) UN Doc A/HRC/26/36 para 42. See also, UNHRC, Report of the Special

On the basis of this brief analysis, and following extensive academic opinion, it is submitted that the human rights prohibition on the arbitrary deprivation of life is a rule of customary international law and, as such, is binding on all states.[1810] Further still, the right to life has been consistently identified as one of the few rules of customary international human rights law that has achieved the status of *jus cogens*,[1811] and so operates in 'an absolute and unconditional way.'[1812] This, and the fact that the US has itself confirmed

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Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns (23 May 2011) UN Doc A/HRC/17/28 para 43; UNGA UN Doc A/68/382 (n 138) para 30; UNHRC, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns (9 April 2013) UN Doc A/HRC/23/47 para 36.

[1810] Principles Applicable to the Formation Of General Customary International Law (n 1771) 80; Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 54.

[1811] Federico Andreu-Guzmán 'Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction' Practitioners Guide No 9 (2015) International Commission of Jurists 80; Kretzmer (2005) (n 1139) 185; Theodor Meron, 'On a Hierarchy of International Rights' (1986) 80 American Journal of International Law 1, 11; Hansje Plagman, 'The Status of the Right to Life and the Prohibition of Torture Under International Law: Its Implications for the United States' (2003) 3 Journal of the Institute of Justice and International Studies 172, 173; Dinah Shelton, 'Are There Differentiations Among Human Rights? Jus Cogens, Core Human Rights, Obligations *Erga Omnes* And Non-Derogability' (2005) Report, European Commission for Democracy Through Law http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UD(2005)020rep-e 11; Ulrich Sheuner, 'Conflict of Treaty Provisions with a Peremptory Norm of General International Law' (1969) 29 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 28, 33-4; Simma and Alston (n 1776) 103; Restatement (n 1772) §702, 174; *Victims of the Tugboat '13 de Marzo' v Cuba* Inter-American Commission on Human Rights Report No 47/96 (16 October 1996), para 79; *Sequeira Mangas v Nicaragua* Inter-American Commission on Human Rights Report No 52/97 (18 February 1998), para 145; Inter-American Court of Human Rights, *Gómez Paquiyauri Brothers v Peru*, Judgment, Series C No 110 (8 July 2004), para 76; Inter-American Court of Human Rights, *Huilca Tecse v Peru*, Judgment, Series C No 121 (3 March 2005), para 65; DASR Article 26 para 6; UN Human Rights Committee, Draft General Comment 36 (n 1013) para 69; UN Human Rights Committee, General Comment 29 (n 1013) para 11; African Commission on Human and Peoples' Rights, General Comment No 3 'The Right to Life (Article 4)' (2015) http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf 8.

[1812] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 67.

the customary nature of the rule, means that the right to life applies to that state's activities.

4.2.2 The extraterritorial application of the customary right to life

Having established that the prohibition on the arbitrary deprivation of life exists in customary international law, it is necessary to establish whether it can be applied to extraterritorial drone strikes. As with the issue of the extraterritorial application of the conventional right to life, jurisdiction is critical in establishing whether a human rights analysis of US drone strikes can be undertaken. It is necessary to establish whether the customary right to life contains the controversial jurisdiction clause present within the ICCPR, or whether it possesses no similar clause and so automatically applies extraterritorially.

The literature on drones has, on the whole, proceeded on the basis that the customary right to life is not territorially limited. Often the extraterritorial application of the customary right to life is presumed,[1813] or is asserted on the basis of a brief summary of applicable international legal instruments[1814] and judicial decisions.[1815] It is apparently only a small minority of commentators who have argued that extraterritorial drone strikes by the US are immune from the application of the customary right to life due to it being limited to the territory to the state carrying out forcible operations.[1816] Generally, however, the literature does not provide a systemic analysis of the extraterritoriality of the customary right to life in the context of drone use. Thus, though the majority of writers analyse the use of drones through the right to life as a customary rule (in addition, in some cases, to the right under Article 6 ICCPR), it is necessary here to go a little further and examine whether the territoriality of the customary right to life is indeed not subject to a territorial limitation.

[1813] Martin (2015) (n 1773) 151; Saura (n 1773) 142; Schmitt 'Extraterritorial Lethal Targeting' (2013) (n 66) 110.

[1814] Heyns and others (n 2) 823; Paust (2015) (n 108) 190.

[1815] McNab and Matthews (n 1291) 673.

[1816] Orr (n 197) 745-6.

There are some who argue that the conventional and customary right to life are imbricated to such an extent that the jurisdictional provisions of the former cannot but exist within the latter. Milanovic has argued that the entanglement between conventional and customary IHRL is such that 'it is quite unlikely that states have assumed more extensive obligations under customary human rights law than they have done under treaty law'.[1817] Similarly, though more bluntly, Orr has asserted that Article 6 ICCPR reflects the customary right to life, and that both therefore contain a jurisdictional limitation, which he interprets as restricting the application of the right to the attacking state's territory.[1818] As such, his analysis of US drone use in Pakistan concludes that there is no human rights protection available to those targeted extraterritorially.[1819] Writing earlier, Dinstein interpreted the word 'inherent' within Article 6 ICCPR to mean that the provisions are declaratory of pre-existing customary international law.[1820] This could be read to mean that the jurisdiction clause of the ICCPR applied already to the pre-existing customary right. However, it is also possible that, as the term 'inherent' is used specifically in this instance in relation to Article 6, it is the right to life that pre-existed as customary international law, not the rest of the ICCPR, meaning that the jurisdiction clause was subsequently coupled with the customary right and does not itself possess a customary basis. Indeed, this is the more convincing interpretation of Dinstein's claim: Article 6 ICCPR may be seen to have built on the fundamental and customary negative obligation not to arbitrarily deprive individuals of their lives, adding to that the positive obligation to protect the right to life through the enactment of national laws. This accords with the view espoused by Heyns that the ICCPR adds 'a *further* layer of protection' to the right to life, which otherwise exists as customary international law.[1821]

[1817] Milanovic (2011) (n 1586) 3. It should be noted that, while Milanovic argues that the customary right to life mirrors that of Article 6 ICCPR and so possesses the same rules on jurisdiction, his interpretation of human rights jurisdiction under the ICCPR is that while the positive obligation to enact laws to protect the right to life is subject to a territorial jurisdiction clause, the negative obligation not to arbitrarily deprive individuals of their lives is not (ibid 119).

[1818] Orr (n 197) 745-6.

[1819] ibid 746.

[1820] Dinstein (1981) (n 1772) 115.

[1821] UNGA UN Doc A/68/382 (n 138) para 31 (emphasis added).

These approaches privilege the conventional right to life in the determination of the existence of a customary right and, as such, it is unsurprising that the arguments favour the territorial limitation of the customary right to life. However, it is submitted that it is blinkered to limit the analysis in this way. Writing on the nature of the customary right to life, Ramcharan has emphasised the need to 'have recourse to the totality of the evidence and the practice available within the international community.'[1822]

Considering the evidence more widely reveals an emphasis on the universal nature of human rights and an absence of jurisdiction clauses. The UN Charter is replete with rhetoric auguring towards the universal application of human rights, emphasising the role of the UN in 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.[1823] Furthermore, the Charter seeks to promote '*universal* respect for, and observance of, human rights',[1824] which seems contrary to the notion of a jurisdictionally limited customary right to life.

The Universal Declaration of Human Rights also contains no jurisdiction clause and specifically states that 'no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs'.[1825] The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has described the right to life as 'a foundational and universally recognized right, applicable at all times and in all circumstances',[1826] elsewhere holding that 'irrespective of the applicability of treaty provisions recognizing the right to life, States are bound to ensure the realization of the right to life when they use force, whether inside or outside their borders.'[1827]

[1822] Ramcharan (n 1772) 3.

[1823] UN Charter Article 1(3).

[1824] UN Charter Article 55(c).

[1825] UDHR Article 2.

[1826] UNGA, Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions (15 August 2017) UN Doc A/72/335 para 14.

[1827] UNGA, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (13 September 2013) UN Doc A/68/382 para 43.

In the *Barcelona Traction* case, the ICJ identified the 'basic rights of the human person' as producing obligations *erga omnes*.[1828] As one of these basic rights, the right to life is itself *erga omnes* and so creates obligations owed to all, further emphasising its universal nature. On this basis it has been argued that there is a fundamental incompatibility between the imperative that states aim towards the universal respect for the right to life while also being able to side-step their obligations in relation to individuals based outside their territory.[1829]

Among the most significant pieces of evidence in favour of the extraterritorial application of the customary right to life is the general approach of the US to human rights obligations that arise through customary international law. Despite promulgating a restrictive reading of the obligations under the ICCPR, the US has accepted the application of the right to life (among other 'fundamental' human rights) as being applicable to extraterritorial operations. In its *Law of War Handbook*, in reference to extraterritorial operations, the '[f]reedom from murder, kidnapping, and other physical violence' is declared a 'first tier protection', applicable to all civilians.[1830] Further, in the *Operational Law Handbook* it is stated that '[i]f a specific human right falls within the category of customary international law, it should be considered a "fundamental" human right. As such, it is binding on US forces during all overseas operations.'[1831] The US itself declaring that the right to life is present within customary international law provides particularly apposite evidence in support of the conclusion that this right is an obligation binding upon all extraterritorial operations of the US.

Therefore, it is submitted that all US extraterritorial drone strikes are capable of being analysed through the lens of the customary IHRL prohibition on the arbitrary deprivation of life. This negative aspect of the right to life, the obligation not to cause arbitrary deaths,

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[1828] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) Second Phase* [1970] ICJ Reports 3, para 34.

[1829] Kretzmer (2005) (n 1139) 184-5; Lubell (2010) (n 206) 234.

[1830] Keith E Puls, *Law of War Handbook* (US Army, International and Operational Law Department 2004) 247-50.

[1831] Joseph B Berger III, Derek Grimes and Eric T Jensen, *Operational Law Handbook* (US Army, International and Operational Law Department 2004) 42.

is applicable equally and in the same manner whether it arises through customary international law, or under the ICCPR. Having reached this conclusion, the substantive nature of the right to life will now be considered.

4.3 The substantive features of the right to life

Having set out a case in favour of the application of the right to life to extraterritorial drone strikes, under both treaty and customary international law, it is now necessary to examine the substance of that right.

Throughout this section, authority from across jurisdictions will be used to map the substance of the right to life. Principally this will comprise references to the ICCPR and ECHR and those conventions' respective jurisprudence. Though these conventions put forward a different formulation of the right to life (in that deprivation of life will violate that right if it is either 'arbitrary',[1832] under the ICCPR, or 'intentional',[1833] under the ECHR), they have nonetheless repeatedly been recognised as converging as regards the substance of the right to life.[1834]

Kretzmer has argued that the ECHR 'provides a fair statement of cases in which such force may be regarded as non-arbitrary.'[1835] The UNHRC has, within its jurisprudence on the ICCPR and arbitrary killing, discussed the 'intentional' deprivation of life,[1836] which has been argued to demonstrate the convergence of the two regimes.[1837] Likewise, while assessing Article 2 ECHR, the ECtHR has made reference to Article 6 ICCPR[1838] and

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[1832] ICCPR Article 6(1).

[1833] ECHR Article 2(1).

[1834] Nowak (n 1643) 111. See also, Park (n 1013) 61.

[1835] Kretzmer (2005) (n 1139) 177.

[1836] UN Human Rights Committee, *Khemraadi Baboeram and others v Suriname* Communication Nos 146/1983 and 148 to 154/1983 UN Doc A/40/40(SUPP) para 14.3; UN Human Rights Committee, *Suarez de Guerrero v Colombia* Communication No R.11/45 (1982) UN Doc A/37/40(SUPP) para 13.2.

[1837] Melzer (2008) (n 623) 119.

[1838] *Makaratzis v Greece* [GC] ECHR 2004-XI 195, para 24 (describing Article 6 ICCPR as 'relevant international law').

UNHRC General Comment 6.[1839] The Inter-American Commission on Human Rights has referred to ECtHR jurisprudence in determining the substance of the right to life under the American Declaration of the Rights and Duties of Man.[1840] Finally, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions has cited together jurisprudence from the UNHRC, ECtHR and Inter-American Court of Human Rights.[1841] In light of the wide adoption of this approach of mutual application of human rights conventions the same approach will be adopted within this work.

The basic element of the right to life is that the deprivation of life will be unlawful if it is arbitrary.[1842] The fact that violation is premised on the characterisation of a deprivation of life as arbitrary makes it clear that not all deprivations will violate the right: those that are non-arbitrary will not be violations. It has been shown above that during an armed conflict and in circumstances in which IHL is the dominant governing paradigm, lethal force will not be arbitrary where the use of force accords with IHL.[1843]

Outside of armed conflict the situation is different, and the right to life has a specific composition of elements, each of which must be adhered to for a deprivation of life to be non-arbitrary. It is with these that the present chapter is principally concerned. Formulations have differed slightly between authorities, but overarching patterns are discernible, allowing the identification of elements of the right to life that are generally applicable. These will be sketched before a deeper examination of their discrete features is undertaken within subsequent sections.

Of these elements, the two that are most prominent are that lethal force must be necessary and proportionate.[1844] Necessity is explicit within Article 2 ECHR, which states that any

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[1839] *Makaratzis* (n 1838) para 58.

[1840] *Alejandre* (n 1606) para 44.

[1841] UNHRC UN Doc A/HRC/17/28 (n 1809) pare 49 n 21.

[1842] ICCPR Article 6(1).

[1843] Section 3.2.1.

[1844] Mike Dreyfuss, 'My Fellow Americans, We are Going to Kill You: the Legality of Targeting and Killing US Citizens Abroad' (2012) 65 Vanderbilt Law Review 249, 264; Park (n 1013) 26-7; Tom Ruys, 'Licence to Kill—State-Sponsored Assassination Under International Law' (2005) 44 Military Law and Law of War Review 13, 20.

deprivation of life will violate the Convention unless 'absolutely necessary'. Both necessity and proportionality have featured repeatedly within the decisions of international and regional tribunals with human rights competencies.[1845] Similarly each has been prominent within relevant reports from the UNHRC,[1846] Inter-American Commission on Human Rights,[1847] African Commission on Human and Peoples' Rights[1848] and Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.[1849] The requirements of necessity and proportionality have been widely recognised as forming the bedrock of the right to life.[1850] Consequently it is reasonable to adopt these two elements as the principal features of an analysis of the human rights implications of drone strikes, as is the case within this work.

In addition to the requirements of necessity and proportionality, the right to life has been asserted to require that any deprivation of life has a basis within law,[1851] and, more

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[1845] *Alejandre* (n 1606) para 42; *Atiman v Turkey* App no. 62279/09, (ECtHR, 23 September 2014), para 29; *Gül v Turkey* App no 22676/93 (ECtHR, 14 December 2000) para 82-3; *McCann v United Kingdom* [GC] (1995) Series A no 324, para 149; Inter-American Court of Human Rights, *Nadege Dorzema and others v Dominican Republic*, Judgment, Series C No 251 (24 October 2012), para 97; *Suarez de Guerrero* (n 1836) paras 13.2-3.

[1846] UN Human Rights Committee, Draft General Comment 36 (n 1013) para 18.

[1847] Organization of American States, Third Report on the Human Rights Situation in Colombia (26 February 1999) OEA/Ser.L/V/II.102 para 213; Organization of American States, Fifth Report on the Situation of Human Rights in Guatemala (6 April 2001) OEA/Ser.L/V/II.111 para 50; Organization of American States, Report on Terrorism and Human Rights (22 October 2002) OEA/Ser.L/V/II.116 para 87.

[1848] ACHPR General Comment 3 (n 1811) para 27.

[1849] UNHRC UN Doc A/HRC/14/24/Add.6 (n 298) para 32; UNHRC UN Doc A/HRC/17/28 (n 1809) para 60; UNHRC UN Doc A/HRC/26/36 (n 1809) para 66.

[1850] See, for instance, Alston (n 45) 303; Melzer (2008) (n 623) 101; APV Rogers and Dominic McGoldrick, 'Assassination and Targeted Killing—the Killing of Osama Bin Laden' (2013) 60 International and Comparative Law Quarterly 778, 786; Ruys 'Licence' (n 1844) 20.

[1851] *Khemraadi Baboeram* (n 1836) para 14.3; *Suarez de Guerrero* (n 1836) para 13.1; UNHRC UN Doc A/HRC/26/36 (n 1809) para 56.

importantly for the present analysis, that a deprivation will be arbitrary where insufficient precaution has been taken.[1852]

The UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials both feature the constitutive right to life elements of necessity,[1853] proportionality,[1854] the requirement of a basis within law,[1855] and precaution.[1856] These instruments have been argued to be indicative of customary international law on the use of lethal force, illustrating that the customary right to life is congruent with that of the conventional right.[1857] It is submitted that the extensive jurisprudential citation of both the Code of Conduct[1858] and Basic Principles[1859] supports this view.

Thus, it is reasonable to conclude that the assessment of arbitrariness within the right to life can be made generally with reference to the requirements of necessity, proportionality, and precaution. This work will examine these elements to establish a detailed analytical framework of the right to life, which will be subsequently used to assess the lawfulness of those lethal drone strikes governed by the right to life outside of armed conflict. The notion that drone strikes require a basis in law will not be considered, primarily because the relevant analysis of domestic law required to make such a

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[1852] *Haász and Szabó v Hungary* App nos 11327/14 and 11613/14 (ECtHR, 13 October 2015), para 59; *McCann* (n 1845) para 194; *Suarez de Guerrero* (n 1836) para 13.2; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (2 September 2016) UN Doc A/71/372 para 53.

[1853] UN Code of Conduct Article 3; Basic Principles Principle 9.

[1854] UN Code of Conduct Article 3, official commentary, (b); Basic Principles Principle 5(a).

[1855] UN Code of Conduct Article 1; Basic Principles Principle 1.

[1856] UN Code of Conduct Article 3, official commentary, (c); Basic Principles Principle 5(b).

[1857] Melzer (2008) (n 623) 190.

[1858] *Armani da Silva v United Kingdom* [GC] ECHR 2016 joint dissenting opinion of Judges Karakaş, Wojtyczek and Dedov, para 3; *Simsek and others v Turkey* App nos 35072/97 and 37194/97 (ECtHR, 26 July 2005), para 92; *Muradova v Azerbaijan* App no 22684/05 (ECtHR, 2 April 2009), para 69; *Tahirove v Azerbaijan* App no 47137/07 ECtHR, 3 October 2013), para 28; *Greene v New Brunswick* [2014] NBBR 168 (Canada) [103].

[1859] *Cestaro v Italy* App no 6884/11 ECtHR 7 April 2015), para 111; *Muradova* (n 1858) para 70; *Nachova and other v Bulgaria* [GC] ECHR 2005-VII 1 para 71; *Primov and Others v Russia* App no 17391/06 (ECtHR 12 June 2014), para 15; *Simsek* (n 1858), para 91; *Tahirove* (n 1858), para 29.

determination is beyond the scope of this work, which is concerned with international law. The US domestic law basis for the use of drones has been analysed elsewhere.[1860]

4.3.1 Necessity

As stated, necessity is an integral part of the conventional and customary right to life. Principle 9 of the UN Basic Principles asserts that 'intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.' Adopting a 'common sense understanding', the reference to firearms includes 'all weapons that are designed and are likely to be lethal …, including heavy weapons such as bombs and (drone) missiles'.[1861] Under Article 2(2) ECHR, lethal force will not violate the right to life where it is 'absolutely necessary … in defence of any person from unlawful violence'.[1862] This has been read to mean defence from the perceived risk of death or serious injury,[1863] though where intentional (rather than incidental) lethal force was used, the ECtHR appears to have required a threat of death, rather than 'just' serious injury.[1864] Thus necessity within the ECHR informs and reinforces the general notion that lethal force will only accord with the right to life where its use is specifically necessary to protect life.

Melzer has called this aspect of necessity 'qualitative necessity', asserting, in relation to targeted killing, that deprivation of life will be arbitrary where it:

> 'is not "strictly unavoidable" or "strictly necessary" to protect any person, including the law enforcement officials themselves, from imminent death or serious injury, to effect an arrest or prevent the escape of a person suspected of a serious crime, or to otherwise maintain law and order or to protect the security of all'.[1865]

[1860] See, for instance, Lotrionte (n 715) 29-40.

[1861] UNHRC UN Doc A/HRC/26/36 (n 1809) para 71.

[1862] ECHR Article 2(2)(a)

[1863] Schabas (n 1659) 148-9.

[1864] *Bubbins v the United Kingdom* ECHR 2005-II 169, para 140.

[1865] Melzer (2008) (n 623) 101.

The inclusion of the possibility of lethal force 'to otherwise maintain law and order or to protect the security of all' is interesting. This appears to open up the potential for lawful intentional lethal force beyond that of the Basic Principles[1866] and Code of Conduct.[1867] Conversely, Heyns, as Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, has emphasised the restrictive position that:

> 'Under [IHRL] standards, the intentional, premeditated killing of an individual would generally be unlawful. Where intentional killing is the only way to protect against an imminent threat to life, it may be used. This could be the case, for example, during some hostage situations or in response to a truly imminent threat.'[1868]

This approach finds support in the literature[1869] and is evident within the UNHRC's draft General Comment 36, which asserts that 'the threat responded to must be extreme, involving imminent death or serious injury'.[1870] Similarly, the ACHPR has stated that '[t]he intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life'.[1871]

Apparently taking the opposite view, the Inter-American Commission on Human Rights' 2001 Guatemala report envisaged the use of force 'to effectuate a lawful arrest of a suspected offender'.[1872] Further, the Commission's 2002 Report on Terrorism and Human Rights held that law enforcement officials may use lethal force 'to protect themselves or other persons from imminent threat of death or serious injury, *or to otherwise maintain law and order where strictly necessary and proportionate*'.[1873] These approaches appear

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[1866] '[I]ntentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.' Basic Principles Principle 9.

[1867] 'In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others': UN Code of Conduct Article 3, Commentary (c).

[1868] UNGA UN Doc A/68/382 (n 138) para 35.

[1869] Park (n 1013) 24.

[1870] UN Human Rights Committee, Draft General Comment 36 (n 1013) para 18.

[1871] ACHPR General Comment 3 (n 1811) para 27.

[1872] OAS 5th Guatemala Report (n 1847) para 50.

[1873] OAS Report on Terrorism and Human Rights (n 1847) para 87 (emphasis added).

to reduce the restriction on lethal or potentially lethal force, apparently allowing it in situations with no threat to life.

That these ostensibly opposing views have been posited by influential authorities suggests the law is unsettled. However, a middle ground may be found by emphasising the distinction between uses of force that *intend* to result in the deprivation of life and uses of force that *may* result in deprivation of life. The former would only accord with the right to life in situations where there is a threat of death or serious injury, while the latter would not be a violation during operations to maintain law and order. This understanding seems to be reflected in the approach of the ECtHR in *Bubbins*, in which intentional lethal force was explicitly held to have remained within the bounds of what was 'absolutely necessary' due to the presence of a threat to life,[1874] providing support to the notion that intentional lethal force may have a higher threshold.

In addition to the *qualitative* element of necessity, it has also been suggested that necessity comprises *quantitative* and *temporal* elements.[1875] Quantitative necessity requires that a 'graduated' approach to force is adopted in which the minimum necessary to achieve a legitimate aim (of responding to a threat to life) is employed.[1876] This aspect of necessity replicates, to a degree, the need for lethal force to be proportionate, evidenced by the ECtHR's understanding of 'absolute necessity' under the ECHR as requiring that 'force used must be strictly proportionate to the achievement of the aims [of Article 2(2)(b)].'[1877] The Basic Principles allow the use of firearms (and therefore missiles and other weapons) 'only when less extreme means are insufficient to achieve these

[1874] *Bubbins* (n 1864) para 140.

[1875] UNHRC UN Doc A/HRC/26/36 (n 1809) para 60; Melzer (2008) (n 623) 101; UNGA UN Doc A/71/372 (n 1852) para 51.

[1876] UNHRC UN Doc A/HRC/26/36 (n 1809) para 59; Melzer (2008) (n 623) 101; Ruys (2005) (n 1844) 20-1.

[1877] *Andronicou and Constantinou* ECHR 1997-VI, para 171; *Finogenov and others v Russia* ECHR 2011-VI 365, para 210; *Gül* (n 1845) para 77; *McCann* (n 1845) para 149; *Nachova* (n 1859) para 93; *Shanaghan v United Kingdom* Add no 37715/97 (ECtHR 4 May 2001), para 87.

objectives.'[1878] Likewise in the Code of Conduct, force may only be used where 'less extreme measures are not sufficient to restrain or apprehend the suspected offender'.[1879] This requirement is commonly cited as an aspect of necessity[1880] and appears to be part of the general right to life.

The temporal element of necessity, where a threat is over or has yet to materialise,[1881] is implied by the requirement of quantitative necessity, as the possibility of alternate methods of responding to a threat has a direct bearing on its imminence. Principle 9 of the Basic Principles states that firearms may only be used 'against the imminent threat of death or serious injury' and in an intentionally lethal manner only 'when strictly unavoidable in order to protect life'. Imminence is also identified by the ACHPR as a central requirement for the lawful use of force.[1882]

Imminence in relation to intentionally lethal force has been described as 'normally measured in seconds rather than hours'[1883] though the Special Rapporteur, in the cited reports, was primarily referring to domestic policing operations. In terms of atypical law enforcement forcible operations, of which drone strikes are an example, it is perhaps less apposite to consider imminence in such terms. Commentators have instead suggested that a more suitable approach would be one that asks whether the point in time at which a strike is undertaken is 'likely to be the last opportunity for preventing [an attack]'.[1884] This approach fits better with the quantitative necessity requirement that the use of lethal force is the only remaining course of action available to respond to a threat.

[1878] Basic Principles Principle 9. See also Principle 4, which states that law enforcement officials 'use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.'

[1879] UN Code of Conduct Article 3, Commentary (c).

[1880] OAS 3rd Colombia Report (n 1847) para 213; UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Israel (21 August 2003) UN Doc CCPR/CO/78/ISR para 15; UNHRC UN Doc A/HRC/17/28 (n 1809) para 49; UNHRC UN Doc A/HRC/26/36 (n 1809) para 61; *Güleç v Turkey* ECHR 1998-IV, para 71; *Nachova* (n 1859) para 108.

[1881] Melzer (2008) (n 623) 101.

[1882] ACHPR General Comment 3 (n 1811) para 27.

[1883] UNGA UN Doc A/71/372 (n 1852) para 56; UNHRC UN Doc A/HRC/26/36 (n 1809) para 59.

[1884] Melzer (2013) (n 1271) 31.

Thus, in order to be viewed as necessary through the lens of the right to life, each drone strike must satisfy the elements identified above. It must be undertaken in response to a threat to life that will be realised if the drone strike is not carried out, and which cannot be prevented by any alternate and less lethal method. This is a high threshold, emphasising the exceptional nature of the use of lethal force under IHRL, a characteristic repeated within the other elements of the right to life, now considered.

4.3.2 Proportionality

Proportionality has been significantly emphasised within international jurisprudence on lethal force and the right to life.[1885] As with necessity, the fine detail of proportionality is key to its employment as an analytical tool and so its specifics will be set out here.

Despite the ubiquity of proportionality within discussions of the right to life, its constituent features are not agreed upon. The principle interpretive disagreement among commentators is the metric by which proportionality is measured: whether it is assessed against the threat to which force is a response, or the objective of the operation in which force is used.[1886] The former is arguably more restrictive of intentionally lethal force, it being proportionate only in the face of an imminent threat to life. The latter could conceivably be opened up to include lethal force that is proportionate to the specific goal of an operation, for instance to halt the extensive criminal actions of a group, but in which there is no imminent threat to life. This is reflective of institutional differences in the interpretation of qualitative necessity, discussed above,[1887] in which the ECtHR arguably

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[1885] UN Code of Conduct Article 3, Commentary (b); Basic Principles Principle 5(a); *Alejandre* (n 1606) para 37; *Gül* (n 1845) para 83; *Nadege Dorzema* (n 1845) para 97; Inter-American Court of Human Rights, *Neira-Alegría and others v Peru*, Judgment (merits), Series C No 29 (19 January 1995), para 72; *Suarez de Guerrero* (n 1836) para 13.3; OAS 3rd Colombia Report (n 1847) para 169; OAS 5th Guatemala Report (n 1847) para 50; OAS Report on Terrorism and Human Rights (n 1847) para 87; ACHPR General Comment 3 (n 1811) para 27.

[1886] See, for instance, Kretzmer (2005) (n 1139) 203; Park (n 1013) 26 (both favouring a threat-based approach); Ruys (2005) (n 1844) 21 (favouring an objective-based approach).

[1887] Text from n 1861 to n 1874.

saw intentionally lethal force as only ever permissible in response to the threat of death or serious injury, whereas the Inter-American Commission appeared to view it as permissible in order to effect lawful arrest or maintain law and order.[1888]

In its 2001 Guatemala Report the Inter-American Commission on Human Rights stated that 'force may only be applied when proportional to the legitimate objective to be applied',[1889] positing an operation's objective as the metric by which proportionality is assessed. This appears to have support within those international law documents dealing with law enforcement activities: the commentary to Article 3 of the UN Code of Conduct states that its provisions should not 'be interpreted to authorize the use of force which is disproportionate to the *legitimate objective to be achieved*.'[1890] Likewise, Principle 5 of the UN Basic Principles provides that, in using force, law enforcement officials shall '[e]xercise restraint in such use and act in proportion to the seriousness of the offence *and the legitimate objective to be achieved*'.[1891] Clearly both of these emphasise proportionality in relation to the objective of an operation; however, it must be noted that they relate to the use of force generally and not intentionally lethal force. Indeed, when discussing the use of firearms, the commentary to the Code of Conduct states that 'firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others'.[1892] This is made without distinguishing between intentionally or incidentally lethal force, thereby setting the threshold high and having specific regard to the threat responded to, regardless of whether force is intentionally lethal or lethality simply is a possible result.

More explicitly favouring the threat-based metric for assessing proportionality, the ACHPR has stated that '[t]he intentional lethal use of force by law enforcement officials and others is prohibited unless it is strictly unavoidable in order to protect life (making it proportionate).'[1893] A similar approach has been adopted by the UNHRC, which has

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[1888] Text from n 1872 to n 1874.

[1889] OAS 5th Guatemala Report (n 1847) para 50.

[1890] UN Code of Conduct Article 3, Commentary (b) (emphasis added).

[1891] Basic Principles Principle 5(a).

[1892] UN Code of Conduct Article 3, Commentary (c).

[1893] ACHPR General Comment 3 (n 1811) para 27.

stated (in draft) that in order for a deprivation of life not to be arbitrary 'the amount of force applied cannot exceed the amount strictly needed for responding to the threat'.[1894] By placing such reliance on the threat posed, this approach appears to conflate, to the point of fusion, the proportionality assessment and the qualitative aspect of necessity. Nevertheless, this does not mean that a threat should not be used to determine proportionality, not least because necessity and proportionality each ask a different question. While necessity is concerned with whether the *resort* to (*inter alia*) intentionally lethal force was appropriate, proportionality considers the concrete issue of the force that was in fact used; in a sense, the former has a prospective perspective, whereas the latter is *post facto*. The point is that perceived overlap between necessity and proportionality should not prevent the use of a threat-based analytic of proportionality.

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has cut a middle way between the two approaches that, it is submitted, reconciles the two. The Special Rapporteur has stated that proportionality 'requires that the benefits attached to the objective pursued should outweigh the damage that would be caused through the violence',[1895] which clearly sees objective as crucial to the assessment. However, in later reports, the notion of what is permissible as an objective of an operation was narrowed. Based on Principle 9 of the Basic Principles, potentially lethal force was held to be only ever proportionate when the objective of an operation was to protect life or to prevent a similarly serious threat.[1896] Going even further, intentionally lethal force could only ever be proportionate when the objective was to respond to a threat to life.[1897] In this way, the proportionality of intentionally lethal force is assessed by reference to the objective of an operation but that objective can only ever be to respond to a threat to life. Adopting this approach settles the question of the metric by which proportionality is judged and does so in a manner congruent with the restrictive nature of necessity, emphasising the need for a threat to life.

[1894] UN Human Rights Committee, General Comment 31 (n 1013) para 18.

[1895] UNHRC UN Doc A/HRC/17/28 (n 1809) para 49.

[1896] UNHRC UN Doc A/HRC/26/36 (n 1809) para 70.

[1897] ibid para 70.

As such, because drone strikes cannot but be seen to be intentionally lethal force, their use will only be proportionate when conducted as part of an operation with the aim of responding to a threat to life, an issue considered in more detail below.[1898]

4.3.3 Precaution

The need to take precautions in operations involving the use of force is widely recognised as an element of the right to life. While not explicated by the ICCPR or ECHR, the requirement is recognisable within the UN Code of Conduct, which states that '[e]very effort should be made to exclude the use of firearms'.[1899] Similarly, the UN Basic Principles require that '[w]henever the lawful use of force and firearms is unavoidable, law enforcement officials shall … [m]inimize damage and injury, and respect and preserve human life'.[1900]

In international jurisprudence, precaution as an aspect of the right to life is identifiable through the censure of states where warnings were not given to those targeted,[1901] and where there has been an absence of the opportunity to surrender.[1902] Going further, the ECtHR has mandated a holistic analysis of operations in cases of intentional lethal force, which takes 'into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.'[1903] In making such an assessment the Court has held that it is necessary to consider whether operations were 'planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.'[1904]

[1898] Section 4.4.1.1.

[1899] UN Code of Conduct Article 3, official commentary, (c).

[1900] Basic Principles Principle 5(b).

[1901] *Alejandre* (n 1606) para 42; *Suarez de Guerrero* (n 1836) para 13.2.

[1902] *Suarez de Guerrero* (n 1836) para 13.2.

[1903] *Andronicou and Constantinou* (n 1877) para 171; *Aytekin v Turkey* ECHR 1998-VII, para 97; *Gül* (n 1845) para 84; *Makaratzis* (n 1838) para 59; *McCann* (n 1845) para 150; *Nachova* (n 1859) para 93.

[1904] *Gül* (n 1845) para 84; *Haász and Szabó* (n 1852) para 59; *McCann* (n 1845) para 194.

In the *McCann* case, the shooting of three members of the Irish Republican Army in Gibraltar was not found to have violated their right to life insofar as the soldiers who employed lethal force acted on the basis of an honestly held belief that those targeted were in the process of detonating a car bomb, meaning that lethal force appeared absolutely necessary and proportionate.[1905] However, the operation considered as a whole, which included erroneous assumptions as to the actions of those targeted, and failure to prevent a situation from arising in which lethal force was inevitable, was deemed to have been in violation of Article 2 ECHR, having failed to minimise the recourse to lethal force.[1906]

In the *Haász and Szabó* judgment, an off duty police officer opened fire at a car that he believed was attempting to escape and which posed a danger to his associate. This potentially lethal force was not, in itself, held by the ECtHR to violate Article 2 but, taking account of all the circumstance, the right to life was nevertheless violated by the fact that the officer had allowed the situation to evolve in such a way as to increase the chance of potentially lethal force being used.[1907]

In line with these decisions, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has expressed the need for 'upstream' measures to be taken to prevent situations in which the use of force becomes a possibility.[1908] Likewise, the UNHRC's Draft General Comment 36 emphasises the duty upon states to 'adequately plan their actions and introduce appropriate safeguards in order to minimize the risk posed to human life'.[1909]

The precautions that should be taken against the use of force are relative to the situation. In *Andronicou and Constantinou* the ECtHR asserted that 'the Court must have particular regard to the context' of an operation and that precautions taken must be 'reasonable in

[1905] *McCann* (n 1845) para 200.

[1906] ibid paras 213-4.

[1907] *Haász and Szabó* (n 1852) paras 62-6.

[1908] UNHRC UN Doc A/HRC/26/36 (n 1809) para 63; UNGA UN Doc A/71/372 (n 1852) para 53.

[1909] UN Human Rights Committee, Draft General Comment 36 (n 1013) para 11.

the circumstances.'[1910] Additionally, where the decision to use force 'is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken' the right to life is not violated.[1911]

In relation to the use of drones, therefore, there is an imperative upon those operating them to plan and control operations involving their use, to minimise the chances of lethal force being used. This is a difficult requirement to square with the use of a weapon that is inherently lethal. There is no ability for the pilots of a drone to warn those that are being targeted, nor to give them an opportunity to surrender. Additionally, due to the hostile and remote nature of the situations in which they are operated, it is difficult to imagine what can be done to minimise the chances of their being used to conduct lethal strikes. As the requirement to take precautions is context-dependent, it seems arguable that in a situation in which an individual represents an imminent threat to life, which cannot be addressed by any other means, the fact that it is impossible to take precautions against the lethality of an operation involving a drone strike will not *per se* result in a violation of the right to life.

4.3.4 A basis in law

Finally, in addition to those elements of the right to life dealing with the operational characteristics of the use of lethal force, it is necessary that the use of lethal force has a legal basis, and that its exercise is limited by law.

Article 6(1) ICCPR states that the right to life 'shall be protected by law', a provision almost exactly mirrored by that of Article 2(1) ECHR which holds that '[e]veryone's right to life shall be protected by law.' This requirement is clear within international law materials on the use of force for law enforcement. The UNHRC's General Comment 6 on the right to life states that 'the law must strictly control and limit the circumstances in which a person may be deprived of [their] life'.[1912] The Basic Principles require that

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[1910] *Andronicou and Constantinou* (n 1877) paras 182-3.

[1911] ibid para 192; *Haász and Szabó* (n 1852) para 51; *McCann* (n 1845) para 200.

[1912] UN Human Rights Committee, General Comment No 6 (Sixteenth session, 1982) in (29 July 1994) UN Doc HRI/GEN/1/Rev.1 para 3.

governments enact regulations on the use of force and firearms,[1913] while the Code of Conduct refers to the 'the duty imposed … by law' upon law enforcement officials.[1914] On the basis of these provisions the Grand Chamber of the ECtHR has held that, at a domestic level, policing operations should be authorised and regulated by national law and that 'a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms'.[1915]

Clearly, there is a positive obligation upon states actively to protect individuals' right to life through law, but also there is an implicit adjunct that any use of force must be based on a sufficiently comprehensive legal framework, which controls and limits the resort to lethal force.[1916] Thus, in the *Suarez de Guerrero* case, where individuals were killed on the basis of Colombian law, it was held that 'the right to life was not adequately protected by the law … as required by article 6(1).'[1917]

Therefore, in order to accord with the right to life, any drone strike outside of an armed conflict must have some basis within law, in addition to satisfying the more operational requirements of necessity, proportionality and precaution. As stated, this aspect of the right to life falls outside the scope of the present analysis.

4.4 Armed drone use and the substantive right to life

Having set out the key features of the right to life, these can be applied to the use of armed drones to assess the extent to which they are capable of complying with the right. In this section, consideration will be undertaken of the ability of drones to comply with the right to life in the abstract, assessing whether their use violates the right to life in all circumstances. Subsequently, having set out the position that their use does not inherently violate the right to life, some specific instances of US drone strikes will be considered to

[1913] Basic Principles Principle 1.

[1914] UN Code of Conduct Article 1.

[1915] *Makaratzis* (n 1838) para 57-9; *Nachova* (n 1859) para 96.

[1916] Melzer (2008) (n 623) 100.

[1917] *Suarez de Guerrero* (n 1836) para 13.3.

assess whether the methods by which armed drones have been used have resulted in violations of the right to life.

4.4.1 Abstract drone strikes and the right to life

The fact that drone strikes kill people does not mean that drones themselves are necessarily incapable of complying with the right to life. As with their use within armed conflict under the rules of IHL, lawfulness depends on the manner in which drones are used. The literature on drones and IHRL conveys a predominantly pragmatic understanding of the relationship between the two, such that drones are not inherently prohibited, but their use is greatly restricted by the operation of the law. Some authors have suggested that armed drones are effectively irreconcilable with IHRL,[1918] arguing that aspects of IHRL render their use outside armed conflict 'almost certainly illegal'.[1919] O'Connell has stated that the necessity requirement presents 'a standard that the current generation of drones can rarely meet.'[1920] Elsewhere, however, O'Connell is more categorical, arguing that, outside armed conflicts, in the realm of pure IHRL, the use of drones 'would be unlawful',[1921] and that the lethal use of drones can be 'lawful only in armed conflict hostilities'.[1922] O'Connell bases this on the restrictive necessity and proportionality elements of IHRL, arguing that the munitions used in drone strikes is incompatible with these standards[1923] and that IHRL outside of armed conflict 'effectively prohibit[s] the use of drone-launched missiles.'[1924] This argument is understandable,

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[1918] McDonnell (n 197) 276; Leila N Sadat, 'America's Drone Wars' (2012) 45 Cape Western Reserve Journal of International Law 215, 225.

[1919] Tony Nasser, 'Modern War Crimes by the United States: Do Drone Strikes Violate International Law – Questioning the Legality of US Drone Strikes and Analyzing the United States' Response to International Reproach Based on the Realism Theory of International Relations' (2015) 24 Southern California Interdisciplinary Law Journal 28, 296-7.

[1920] O'Connell (2010) (n 1013) 346.

[1921] O'Connell (2011) (n 1013) 586.

[1922] ibid 589.

[1923] ibid 588-9.

[1924] Mary Ellen O'Connell, 'The Law on Lethal Force Begins with the Right to Life' (2016) 3(2) Journal on the Use of Force and International Law 205, 206.

particularly in light of the argument that a Hellfire missile launched from a drone is 'too imprecise for use outside an armed conflict zone', due to the risk for bystanders.[1925]

Others, acknowledging the limited scope for non-arbitrary killing with drones, nonetheless identify that it is possible, albeit exceptionally.[1926] Special Rapporteurs on Extrajudicial, Summary and Arbitrary Executions Alston and Heyns have asserted that drone strikes outside of armed conflict are '*almost* never likely to be legal'[1927] and '*almost* certainly' do not satisfy IHRL.[1928] This conclusion is reflected by Dorsey and Paulussen who have suggested that while drone strikes will be lawful under IHRL if they adhere to the requirements of the right to life, the nature of these requirements is such that drone strikes will 'almost never' be lawful.[1929] Pejić has emphasised that there are circumstances outside of armed conflict in which drone strikes will not violate the right to life, but that these are 'very exceptional',[1930] a view shared by others.[1931] Directly responding to O'Connell's categoricalness, McNab and Matthews emphasise that, though drone strikes may breach the right to life in many situations, there are 'limited exceptions for imminent threats.'[1932]

Shah has focused on the fact that drone strikes will be unlawful under IHRL where not conducted in response to an imminent threat,[1933] thereby rejecting the categorical prohibition of drones under IHRL. Likewise Blum and Heymann have emphasised that adherence to the contours of the right to life during a drone strike will result in deaths that are not arbitrary or unlawful.[1934] Similar sentiment can be inferred from Saura, who states that targeted killing with drones is necessarily contrary to the right to life, though

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[1925] O'Connell (2016) (n 1924) 206.

[1926] Bachman (n 689) 907; Boyle (n 428) 119.

[1927] UNHRC UN Doc A/HRC/14/24/Add.6 (n 298) para 85 (emphasis added).

[1928] UNHRC UN Doc A/HRC/26/36 (n 1809) para 136 (emphasis added).

[1929] Dorsey and Paulussen (n 268) 14.

[1930] Pejić (2014) (n 623) 104.

[1931] Geert-Jan A Knoops, 'Legal, Political and Ethical Dimensions of Drone Warfare under International Law: A Preliminary Survey' (2012) 12 International Criminal Law Review 697, 713-5.

[1932] McNab and Matthews (n 1291) 672.

[1933] Shah (2015) (n 4) 142.

[1934] Blum and Heyman (n 1390) 146.

accepting that a reactive strike in response to an imminent threat to life can be lawful in certain circumstances.[1935] Suara's position, however, is that the possibility of a lawful drone strike outside of an armed conflict is non-existent, arguing that all drone strikes are targeted killings.[1936]

A minority of writers have argued that IHRL is less of a limitation on drone strikes, though this appears to be exclusively the result of broad interpretations of IHRL rather than claiming that drones have a strong capacity to adhere to the law. Ramsden has argued that those involved in planning acts of terrorism and with an operational role, may be lawfully targeted outside of an armed conflict, demonstrating an expansive reading of applicable IHRL rules.[1937] Farer and Bernard seem to suggest that it will be possible for drone strikes not carried out to protect life to be lawful under IHRL, stating only that such strikes are 'not easily reconciled' with the law.[1938]

On the whole, therefore, it seems the literature identifies a limited possibility that drone strikes can be carried out in accordance with IHRL, when used in a situation that satisfies the requirements of non-arbitrary killing. In a sense, this is unsurprising—an act will naturally be lawful if it adheres to the law. It appears there are two issues dividing commentators: for those who see drone strikes outside armed conflict as inherently—or almost certainly—unlawful, there seems to be a sense that the military character of drone strikes can never be reconciled with the rules of IHRL.[1939] Conversely, those who see drone strikes as relatively unproblematic from the perspective of IHRL generally appear to adopt wider interpretations of the provisions of IHRL, which are thereby permissive of a greater degree of forcible action.

A conclusion on the lawfulness of drone strikes under IHRL cannot be reached without an application of the right to life to drone strikes generally. If any aspect of a drone strike

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[1935] Saura (n 1773) 142.

[1936] ibid 142-3.

[1937] Ramsden (n 812) 399.

[1938] Tom Farer and Frederic Bernard, 'Killing by Drone: Towards Uneasy Reconciliation with the Values of a Liberal State' (2016) 38 Human Rights Quarterly 108, 117.

[1939] O'Connell (2011) (n 1013) 589.

is irreconcilable with any element of the right to life, then drone strikes generally will be contrary to that right, and so any lethal drone strike outside armed conflict will automatically be an arbitrary—and unlawful—killing. Therefore the next section will consider drone strikes in light of the elements of the right to life.

4.4.1.1 Drone strikes and necessity

Necessity is an inapposite test for considering the general lawfulness of a particular weapon or weapon system. Necessity is applied to the undertaking of an act—the analysis of a process, rather than something that can be said of a thing in and of itself. 'Are drone strikes necessary?' makes no sense in the abstract. They may be, but it depends on the situation. It has been shown that necessity can be conceived of as comprising three elements—qualitative, quantitative and temporal necessity[1940]—but these all relate to the facts of a particular killing, asking whether it was necessary to save life, whether alternatives were exhausted or unavailable, and whether the threat against which the strike was taken was imminent. The context-specific nature of these categories makes them unsuitable to be used in a general sense.

There is one possible exception, which is the extent to which it may be argued that drone strikes inherently violate the *quantitative* aspect of necessity. Proulx has argued that '[t]o remove a suspected terrorist with an unmanned drone excises the possibility of arrest, detention, and interrogation altogether from the equation.'[1941] The argument goes like this: one of a drone's unique features is its ability to access hard to reach areas, too remote for traditional weapon systems, particularly ground troops. Therefore drone strikes are used for operations in which it is *per se* impossible to exercise any alternative to the use of lethal force. As such, their use is automatically contrary to qualitative necessity, as it removes the possibility of alternatives to lethal force.

[1940] Section 4.3.1.

[1941] Vincent-Joël Proulx, 'If the Hat Fits, Wear it, if the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists' (2004) 56 Hastings Law Journal 801, 887. See also Bachman (n 689) 909.

It is submitted that this argument fails for two reasons. First, it is wrong to claim that drones are only ever used in this manner. For instance, they have regularly been used in operations to support ground troops during combat, or to dispose of improvised explosive devices[1942] demonstrating that they can be used other than for targeted killing. Second, the fact that capture or alternatives to lethal force are impossible does not mean that lethal force is not necessary. Melzer's conception of qualitative necessity will be satisfied where 'other means remain ineffective or without any promise of achieving the purpose of the operation'.[1943] Therefore, the fact that non-lethal alternatives are impossible does not *per se* contravene the necessity requirement. It has been argued elsewhere that the impossibility of non-lethal alternatives in fact means that 'the duty to employ non-lethal means is fulfilled.'[1944] Indeed, it cannot be the case that IHRL requires the impossible to be attempted in order for lethal force to be lawful. The relationship between quantitative, temporal and qualitative necessity is dynamic, such that as a threat to life becomes more imminent, the requirement that alternative measures are used is reduced. In *McCann* the lethal shooting of individuals suspected of being in the process of detonating a car bomb (considered in isolation from the overall operation) satisfied the necessity requirement, even though non-lethal alternatives were not attempted.[1945] Thus it is clear that, where alternatives are impossible, there is no requirement to attempt non-lethal alternative means of dealing with a threat. As such, drone strikes will not *per se* breach this element of qualitative necessity where they occur in an environment that precludes non-lethal operations.

Nevertheless, what this argument does highlight is that the nature of drones strikes, when carried out in remote areas, makes them particularly susceptible to critique through the lens of qualitative necessity. As with *McCann*, while a specific strike itself may be necessary under the circumstances, the surrounding operation and decision making, as

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[1942] 'RAF air strikes in Iraq and Syria: 12 and 16 November 2017' (UK Ministry of Defence, 28 December 2017) https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list/november-2017.

[1943] Melzer (2008) (n 623) 228.

[1944] Rylatt (2014) (n 1407) 140.

[1945] *McCann* (n 1845) para 200.

well as the potential failure to act earlier to prevent the need to use lethal force, could well result in an operation violating the right to life by reason of necessity.

4.4.1.2 Drone strikes, proportionality and incidental deaths

Proportionality is also difficult to apply to drone strikes in the abstract. As depicted above[1946] an instance of lethal force will be proportionate where the objective pursued is the protection of life. As with necessity, this is an issue of context, a lens through which to examine the lawfulness of a particular strike. In the abstract, it must be asked whether there is any aspect inherent to drone strikes that makes them disproportionate when used in a purely IHRL context.

O'Connell has raised the possibility that the nature of the munitions used by armed drones are, at present, unable to satisfy the requirement of proportionality. She has stated that the Hellfire missile used in many drone strikes is 'too imprecise for use outside an armed conflict zone' as it risks the lives of any bystanders.[1947] Under IHRL, the killing of any person other than the individual specifically targeted will be a violation of the right to life.[1948] In this way, the issue of potential collateral deaths as a product of drone strikes is, in a sense, outside the scope of proportionality, rendering a strike unlawful regardless of any further consideration of the elements of the right to life. However, it will be considered presently as a related issue.

The USAF describes the Hellfire missiles used by armed drones as 'highly accurate, low-collateral damage,'[1949] which evidences the fact that they are anticipated to produce some collateral damage, albeit 'low'. Through the lens of IHL they may well be 'highly accurate', but under the much more restrictive regime of IHRL this is not correct in the same way. Statistics as to the impacts of the munitions used by armed drones are rare, but it has been claimed that Hellfire missiles may kill any individual within a 15 metre

[1946] Section 4.3.2.

[1947] O'Connell (2016) (n 1924) 206.

[1948] UNHRC UN Doc A/HRC/14/24/Add.6 (n 298) para 86; Rylatt (2014) (n 1407) 143-4.

[1949] Reaper Fact Sheet (n 1298).

radius,[1950] while the standard Mk 82 500lb warhead carried by a GBU-12 Paveway II has a lethal area of 80m by 30m, increasing to 240m by 80m in some variants.[1951]

This supports O'Connell's contention and appears to render drone strikes inherently unlawful when not regulated by IHL. However, this is still a circumstantial rather than categorical conclusion. Ultimately, there may be circumstances when the use of such a powerful missile would kill only the person targeted, and so this argument is not fatal to the use of armed drones *per se*. It does, however, mean that drone strikes may only be undertaken in a very narrow set of circumstances. While proportionality—and the related issue of collateral deaths—does not render armed drones automatically unlawful, they are very likely to be implicated in the assessment of individual strikes and may well result in a large number of drone strikes outside armed conflicts being unlawful.

4.4.1.3 Drone strikes and precaution

As with the other elements of the right to life, the duty to take precautions is context dependent,[1952] and therefore is difficult to apply generally to the use of armed drones. As stated above, the requirement to take precautions under the right to life hinges on whether operations were 'planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.'[1953] Thus the question of precaution, applied to armed drones, will take in not just the immediate lethal strike but planning and control leading up to the strike itself.

As discussed in relation to targeting within armed conflict, the use of armed drones sits within a validation architecture with multiple points at which the lawfulness of a strike is examined.[1954] Though this does not, in itself, say anything about whether a specific strike was undertaken in such a way as to minimise recourse to lethal force, it does demonstrate

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[1950] Chamayou (n 6) 141.

[1951] *Mk 82 Aircraft Bomb* (Geneva International Centre for Humanitarian Demining 2017) http://characterisationexplosiveweapons.org/studies/annex-e-mk82-aircraft-bombs/ 6.

[1952] *Andronicou and Constantinou* (n 1877) paras 182-3.

[1953] *Gül* (n 1845) para 84; *Haász and Szabó* (n 1852) para 59; *McCann* (n 1845) para 194.

[1954] Text from n 1320 to n 1322 and 1472 to n 1476.

that armed drones are *capable* of being operated in this way. It has been widely recognised that the technological capacity of armed drones allows them to undertake precautions necessary for IHL,[1955] and these same attributes also give them the capacity to undertake the requisite level of precaution under IHRL. That drones have powerful sensors and an ability to monitor situations means that, certainly in the abstract, there is nothing about them that inherently violates this aspect of IHRL.

On the other hand, international arbitral bodies have found states to have violated the right to life due to a lack of precautions, *inter alia*, where lethal force occurred without warnings being given to those targeted,[1956] and where there was no ability for a targeted person to surrender.[1957] If these factors are determinative, it would be arguable that armed drones, being far removed from the target, and generally striking without any awareness on the part of the victim (let alone giving a warning) are incapable of being reconciled with the right to life on this basis.

However, as stated by the ECtHR, the right to life and the precautions that it entails, are context specific.[1958] Thus the level of precaution required will vary depending on the necessity of the use of lethal force. This is evidenced in the *McCann* decision, where the act of using lethal forced with no warning, but in the face of a perceived serious and immediate threat to life, was not found to have violated the victims' rights to life.[1959] Therefore, the fact that neither warnings nor opportunity for surrender can be given during a drone strike does not mean that armed drones cannot satisfy the precaution aspect of the right to life. The determination of whether adequate precautions have been taken is more likely to be based on whether the operation considered as a whole was 'adequately plan[ned]' and contained 'appropriate safeguards in order to minimize the risk posed to human life'.[1960]

[1955] Casey-Maslen (n 2) 607; UNGA UN Doc A/68/389 (n 1569) para 28; Schmitt and Widmar (n 1162) 401.

[1956] *Alejandre* (n 1606) para 42; *Suarez de Guerrero* (n 1836) para 13.2.

[1957] *Suarez de Guerrero* (n 1836) para 13.2.

[1958] *Andronicou and Constantinou* (n 1877) paras 182-3.

[1959] *McCann* (n 1845) para 200.

[1960] UN Human Rights Committee, Draft General Comment 36 (n 1013) para 11.

It is clear from the above that, considered in the abstract, drone use cannot be said to certainly violate the right to life. However, the circumstances in which a drone strike will not breach the right to life of those targeted are very narrow, and any drone strikes primarily governed by IHRL run a clear risk of violating an aspect of the right, meaning the entire right is violated. Outside of an armed conflict, any drone strike carried out other than to counter a specific threat to life and where anyone other than the target is killed, will violate the right to life. Therefore it seems likely that drone strikes occurring outside of armed conflict will violate the right, though this cannot be said with conviction without an examination the facts of specific strikes, a task that will be undertaken in the final sections of this chapter.

4.4.2 Specific drone strikes and IHRL

Consideration will now turn to some specific US drone strikes and the extent to which they comport with, or violate, the multiple elements of the right to life. This is done for two principal reasons. First, doing so provides a form of ecological validity not otherwise captured by the abstract analysis of drone strikes and IHRL. Relatedly, looking at real-world examples brings into view the process surrounding drone strikes, in a way that is not possible in the abstract. For instance, in the abstract, drones have the capability to follow individuals and ensure they are targeted away from others, or at the final available opportunity before they carry out a threat to life—the question of whether these capabilities are actually used is not captured by an abstract examination. Thus, consideration of case studies can reveal more of the reality of drone strikes, which might otherwise be obscured.

Second, examining case studies allows the production of conclusions as to the lawfulness under IHRL of particular examples of US drone strikes. Though it would be preferable to conduct an IHRL analysis of every drone strike that has occurred, such an undertaking is far larger than can be accommodated here and, therefore, a sample of drone strikes have been selected. The strikes analysed have been chosen for several reasons. First, they are strikes that clearly fall into the purview of IHRL. Second, all have been reported with enough detail to enable the analysis to be conducted effectively. Third, they cover each

of the regions considered by this work, allowing the analysis to take account of possible variations in drone strikes between theatres. Fourth, they span almost the full time period in which US drone strikes have occurred in the relevant areas. Fifth, they cover the three administrations in power during the period of large-scale programmes of lethal drone strikes (Bush, Obama and Trump). Sixth, the strikes selected give the fullest picture of the methods in which drones are deployed, covering both personality and signature strikes; the latter is particularly difficult to assess with sufficient detail as they are often less well reported than those against high-level, pre-selected targets. On this basis, it is submitted that the examples presented here give a clear representation of the reality of drone strikes carried out under IHRL.

4.4.2.1 Pakistan – June 2004

As discussed above, US operations in Pakistan are only governed by IHL where they form part of the spill-over conflict in Afghanistan or the NIAC between the Pakistani government and TTP/al-Qaeda, during the period that US support was requested by the Pakistani government.[1961] All other drone strikes in Pakistan are within the purview of IHRL, un-augmented by IHL. Due to the secretive nature of these operations, clear facts about specific strikes are limited, but it is possible to create a sense of whether or not these strikes were arbitrary, based on the information that is available. It can be conservatively estimated that approximately 61 strikes have been carried out by the US after consent was withdrawn[1962] and therefore outside of the NIAC between the government, and only 25 of these appear to fall into the spill-over conflict in Afghanistan.[1963] Prior to the start of the NIAC in 2008 there were 11 drone strikes, only one of which is confirmed as being linked to the conflict in Afghanistan.[1964] Therefore there are approximately 46 drone strikes that appear to be governed solely by IHRL, a prominent example of which is considered here.

[1961] Text from n 802.

[1962] Text from n 138.

[1963] Text from n 764.

[1964] 'The Bush Years: Pakistan Strikes 2004-2009' (*The Bureau of Investigative Journalism*) https://www.thebureauinvestigates.com/drone-war/data/the-bush-years-pakistan-strikes-2004-2009.

Occurring in June 2004, this particular drone strike was the first carried out by the US in Pakistan. The targeted individual was Nek Mohammed, the commander of a tribal group supporting the Taliban and fighting against the government of Pakistan.[1965] Responsibility for the strike was initially claimed by the government, though it has since been revealed as a US drones strike undertaken as part of a deal to allow drone flights in Pakistan.[1966] During the strike, Mohammed was killed along with eight others, two of whom were children.[1967] Mohammed was reportedly targeted by the CIA specifically,[1968] at the request of the Pakistani government, demonstrating that this was apparently a personality strike.

Mohammed was engaged in fighting within Pakistan, although he had links to fighters in Afghanistan.[1969] These links alone are not enough to bring him within the NIAC in Afghanistan. Further, the strike occurred several years before the NIAC in Pakistan began, and as such will not come into the scope of that conflict. Therefore, it is it is clear that the strike is governed by IHRL, with no possible application of IHL.

As stated, two children were killed during the drone strike, which immediately renders it an arbitrary killing.[1970] This is regardless of the activities of others who were targeted, due to the children's lack of involvement in any act that may have made their deaths lawful under IHRL. The collateral deaths are not outweighed by the threat prevented by the strike (as may be the case with IHL proportionality), reflecting O'Connell's argument that the nature of this military force, and the risk of collateral deaths, will often be its undoing within an IHRL environment.[1971]

[1965] Rahimullah Yusufzai, 'Profile: Nek Mohammed' *BBC* (Peshawar, 18 June 2004) http://news.bbc.co.uk/1/hi/world/south_asia/3819871.stm.

[1966] Mazzetti (n 100).

[1967] 'South Waziristan 17/06/2004—TBIJ strike ID: B1' (*The Bureau of Investigative Journalism*) https://v1.thebureauinvestigates.com/namingthedead/strikes/b1/?lang=en.

[1968] Mazzetti (n 100).

[1969] Yusufzai (n 1965).

[1970] Syed S Shahzad, 'Pakistan Gets its Man—Dead' *Asia Times* (Karachi, 19 June 2004) http://www.atimes.com/atimes/South_Asia/FF19Df04.html.

[1971] O'Connell (2016) (n 1924) 206.

The deaths of these children renders the whole strike unlawful under IHRL. However, for completeness, it is beneficial to consider whether it would have been lawful if they had not been killed. The adults targeted were alleged to be militants[1972] but, regardless, their deaths would only have been non-arbitrary where the use of lethal force satisfied the requirements of necessity, proportionality and precaution.

To be necessary the strike must have been required to prevent an imminent threat, posed by Mohammed and his colleagues, of unlawful violence, representing temporal and qualitative necessity.[1973] Further, there must have been no non-lethal alternatives reasonably available to prevent the unlawful violence (quantitative necessity).[1974] There is no evidence that the group represented a concrete threat to which the lethal force was responding. Instead it seems that Mohammed was a general threat to the Pakistani government due to his position as a militant commander.

Mohammed was reported to have previously repelled six military operations against him,[1975] suggesting that perhaps there was no reasonably available non-lethal method for responding to any threat that he may have posed, which therefore seems to satisfy the requirement of quantitative necessity. The requirements of qualitative and temporal necessity, however, appear far from satisfied: that the US carried out the strike at the request of the government in exchange for permission to conduct further drone strikes clearly demonstrates that it was a personality strike. Though this does not mean that it breached IHRL *per se*, it will have if it occurred in the absence of a specific imminent threat. The apparent lack of such a threat is, therefore, an additional basis upon which to conclude that the drone strike targeting Mohammed was unlawful under IHRL. This raises a broader point about drone strikes and IHRL: where personality strikes are carried out targeting an individual as a result of their affiliation or previous acts, the right to life will certainly be violated. This common method of drone strike will always be unlawful,

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[1972] 'Pakistan Kills Tribal Leader' *CNN* (Islamabad, 18 June 2004) http://edition.cnn.com/2004/WORLD/asiapcf/06/18/pakistan.tribal/.

[1973] Section 4.3.1.

[1974] Text from n 1875 to n 1880.

[1975] Yusufzai (n 1965).

unless it coincides with a threat to life being carried out, which, though not inconceivable, is a high threshold.

The absence of a threat to life posed by Mohammed also means the drone strike against him cannot have been proportionate. The requirement of precaution, that operations must be 'planned and controlled … so as to minimise, to the greatest extent possible, recourse to lethal force',[1976] has not been adhered to in this instance, based on available reports. Mohammed was targeted while inside a compound[1977] rather than in the open, and it is not unreasonable to assume that the surveillance capabilities of the drone that killed him would have provided knowledge of the presence of others. Thus, precaution does not appear to be satisfied.

On the basis of this analysis, the drone strike against Mohammed and his associates is a clear violation of the right to life, failing to satisfy almost all of that right's elementary requirements. That the strike would *prima facie* appear lawful under IHL, due to the nature and roles of the individuals targeted, emphasises that lethal drone strikes are only reconcilable with IHRL in extremely limited circumstances as result of the much more restrictive nature of that body of law.

4.4.2.2 Yemen – November 2002

As demonstrated, an armed conflict between AQAP and the Yemeni government has existed in Yemen since around May 2011, which may or may not have ceased between June 2012 and March 2015, though is ongoing at present.[1978] Thus, the US drone strike on 2 November 2002 occurred outside of armed conflict, and therefore must be analysed solely through the lens of IHRL. The target of the operation was Ali Qaed Senyan al-Harthi, who was killed in the strike along with five others.[1979] al-Harthi was suspected of involvement in the attack on the *USS Cole* in 2000, and had previously evaded capture

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[1976] *Gül* (n 1845) para 84; *Haász and Szabó* (n 1852) para 59; *McCann* (n 1845) para 194.

[1977] Mazzetti (n 100).

[1978] Section 3.1.5.3.2.

[1979] 'CIA "Killed al-Qaeda Suspects" in Yemen' *BBC* (5 November 2002) http://news.bbc.co.uk/1/hi/2402479.stm.

by Yemeni forces.[1980] The group were struck while in a car around 100 miles from Sana'a.[1981]

Of drone strikes in Yemen, this has been chosen as a (relatively) detailed picture of the strike has emerged, from media reports and statements by the US government, making a more thorough analysis possible. Further, being the first US drone strike outside of Afghanistan, the operation has received a degree of academic analysis.[1982] Soon after the strike took place, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Jahangir) branded it 'a clear case of extrajudicial killing'.[1983]

As regards the lawfulness of the strike, those who argue that it was lawful do so by stating that the strike occurred during an armed conflict, basing this on the unsustainable notion of the US's global armed conflict with al-Qaeda.[1984] However, the majority of academic voices have argued that, considered through the lens of IHRL, the strike was unlawful. Some have resisted categorising the context of the strike, but have nonetheless stated that *if* IHRL was the operative paradigm then the strike will have violated the right to life.[1985]

In terms of the lawfulness of this strike, it must be demonstrated to be necessary and proportionate, and it must have been carried out with sufficient precaution.

[1980] 'Profile: Ali Qaed Senyan al-Harthi' *BBC* (5 November 2002) http://news.bbc.co.uk/1/hi/world/middle_east/2404443.stm.

[1981] Associated Press (n 1300).

[1982] n 1984 and n 1985.

[1983] UN Economic and Social Council, Report of the Special Rapporteur, Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2002/36 (13 January 2003) UN Doc E/CN.4/2003/3 para 39.

[1984] UN Economic and Social Council, Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights (22 April 2003) UN Doc E/CN.4/2003/G/80 paras 2-3; Delahunty and Yoo (n 1668) 843-5; Printer (n 4) 370-9; Kenneth Roth and Robert Turner, 'Debating the Issues' (2006) 81 International Law Studies 395, 398.

[1985] Downes (n 197) 281; Kretzmer (2005) (n 1139) 204-5; Vaugh Lowe, '"Clear and Present Danger": Responses to Terrorism' (2005) 54 International and Comparative Law Quarterly 185, 186-7.

Under the 'qualitative' aspect of necessity, the use of lethal force must be 'absolutely necessary: … in defence of any person from unlawful violence',[1986] taken here to require the prevention of death where intentionally lethal force is used.[1987] Further, under the 'temporal' element of necessity, the violence prevented must be imminent. The strike against al-Harthi therefore must have been undertaken in order to prevent him from carrying out an imminent, potentially lethal act. Lubell has stated that in the apparent absence of an imminent threat the strike will have violated the right to life,[1988] a point also made by Kretzmer.[1989]

The facts generally appear to support these viewpoints. A Yemeni official was quoted as saying that 'it was suspected that [the group] were going to a target',[1990] which, if correct, could demonstrate the satisfaction of qualitative necessity. However, elsewhere there are reports that al-Harthi was located not long before the strike: his phone was identified and located, and then his vehicle targeted.[1991] This appears to suggest that the operation occurred as a response to al-Harthi having been located, not because he was about to be involved in a violent act. Furthermore, after the strike, then-Vice President Cheney referred to the attack on al-Harthi in the context of praising the success of the US's campaign to kill or capture senior members of al-Qaeda.[1992] This puts the strike firmly within that campaign, suggesting it was undertaken due to al-Harthi's past acts and position in al-Qaeda rather than out of necessity to prevent a violent act. Additional evidence in support of this contention is in the description of the strike, by then-US

[1986] ECHR Article 2(2)(a)

[1987] Text immediately before n 1874.

[1988] Lubell (2010) (n 206) 177.

[1989] Kretzmer (2005) (n 1139) 205.

[1990] Seymour M Hersh, 'Manhunt: The Bush Administration's New Strategy in the War Against Terrorism' *The New Yorker* (23 December 2002) https://www.newyorker.com/magazine/2002/12/23/manhunt.

[1991] David Axe and Robert Beckhusen, 'Anatomy of an Air Strike: Three Intelligence Streams Working in Concert' *Reuters* (21 August 2014) http://blogs.reuters.com/great-debate/2014/08/21/anatomy-of-an-air-strike-three-intelligence-streams-working-in-concert/.

[1992] 'Remarks by the Vice President at the Air National Guard Senior Leadership Conference' (The White House, 2 December 2002) https://georgewbush-whitehouse.archives.gov/news/releases/2002/12/20021202-4.html.

Deputy Defence Secretary Paul Wolfowitz, as 'a very successful tactical operation' which 'got rid[] of somebody dangerous'.[1993] These statements suggest the operative factor in the decision to strike al-Harthi being his identity, not his activity at the time. It seems plausible that al-Harthi was targeted due to his seniority in AQAP and his purported involvement in the *USS Cole* bombing; if so the operation is a clear example of a personality strike. As such, the presumption is raised that the strike breached IHRL as, without the existence of an imminent threat to life, personality strikes will always violate the right to life of those targeted.

If the aim of the strike was to prevent a violent act then it will be arbitrary if non-lethal alternatives could have been employed, reflecting the 'quantitative' aspect of necessity. Ruys argues that the strike was not necessary on this basis as 'it seems that if the suspects could be tracked down in the middle of the desert, they could also have been arrested.'[1994] Likewise, Lubell questions why, if al-Harthi had been pursued for a long period prior to the strike, an attempt to detain was not made.[1995]

These points are compelling but it is submitted that they miss some of the realities surrounding the attack. In December 2001 Yemeni authorities attempted to detain al-Harthi in Marib—a reportedly lawless region east of the capital Sana'a—but were attacked and 18 soldiers killed.[1996] When killed, al-Harthi was again in Marib, which may provide some justification for why an arrest was not attempted. Furthermore, the then-Deputy Commander of US Central Command has since stated that US forces were 'preparing to storm in when [al-Harthi] exited with five of his associates. They got into SUVs and took off.'[1997] Thus it appears that the US may have been planning to use a non-lethal alternative, which would potentially satisfy the quantitative element of necessity. This point is made by Ramsden, suggesting that the previous problems in arresting al-

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[1993] 'US "Still Opposes" Targeted Killings' *BBC* (6 November 2002) http://news.bbc.co.uk/1/hi/world/middle_east/2408031.stm.

[1994] Ruys (2005) (n 1844) 23.

[1995] Lubell (2010) (n 206) 176-7.

[1996] BBC (5 November 2002) (n 1980).

[1997] Jeremy Scahill, 'The Dangerous US Game in Yemen' *The Nation* (30 March 2011) https://www.thenation.com/article/dangerous-us-game-yemen/.

Harthi satisfy the necessity requirement of lethal force under the right to life,[1998] but this only accounts for one aspect of necessity, preventing a conclusion of lawfulness solely on that basis.

In terms of proportionality, it cannot be said whether the use of lethal force was proportionate to the goal of the operation as not enough is known of its purpose. Ruys argues that, by tracking the group as they travelled away from civilians before carrying out the attack, it was likely proportionate,[1999] but this suggests an understanding of proportionality more akin to IHL than IHRL. The avoidance of civilians speaks more of IHRL precaution than proportionality. While there is some evidence to suggest al-Harthi was on the way to an attack this is unconfirmed. Instead, as an apparent personality strike, it seems the drone strike on al-Harthi was part of a campaign to target senior members of al-Qaeda, the pursuit of which cannot be said to render lethal force proportionate.

Similarly, without more details of the operation, it cannot be said whether sufficient precautions were undertaken. In making such a determination regard must be had to the context of the operation,[2000] which is unclear in the present scenario.

In terms of the other members of al-Harthi's group, it is not clear whether they were intentionally killed, though comments from US officials suggest that, though all were 'known al Qaeda operatives',[2001] they were not intended targets.[2002] If they were involved in an imminent threat to life, then their deaths will fall within the same justification of necessity as that of al-Harthi. However, if, as seems more likely, there was no imminent threat, then their rights to life will have been violated, having no basis in necessity. Further, if they were not intentionally killed, this betrays a lack of precaution within the drone strike.

[1998] Ramsden (n 812) 398.

[1999] Ruys (2005) (n 1844) 23. Though, cf Ramsden (n 812) 398.

[2000] *Andronicou and Constantinou* (n 1877) para 182-3.

[2001] TBIJ 'Yemen 2001-11' (n 1437).

[2002] Hersh (n 1990).

As with many US drone strikes, assessment of this operation is stymied by secrecy. Nonetheless, based on available information, a picture emerges of a strike that very likely violated the right to life of both al-Harthi and his companions. Though some aspects of the operation potentially accord with the right to life, a convincing case can be made that the strike was arbitrary, as it appears to have been based on the identity of al-Harthi, rather than to prevent an imminent threat. This is a key way in which drone strikes occurring outside of armed conflicts may be unlawful: by allowing the targeting of specific individuals who have committed previous violent acts, a tendency may emerge to target those people when the opportunity arises, rather pursuing less 'simple' law enforcement methods. However, the fact that an individual is a prolific and dangerous criminal and is in a hard to reach area, does not mean that it is permissible to kill them to remove the generalised threat that they pose, and to satisfy the desire for vengeance.

4.4.2.3 Somalia – May 2016 and November 2015

As stated, since 2013 the Somali government's request for US support in its NIAC with al-Shabaab apparently extends only to operations against foreign fighters.[2003] Therefore, it is possible to argue that drone strikes against Somali members of al-Shabaab should be considered through the lens of IHRL. Due to a lack of information regarding the backgrounds of those killed, it is very difficult to identify drone strikes that fall within this category. However, in May 2016 one such example seems to have occurred, in which a drone targeted Abdullahi Haji Da'ud, who appears very likely to have been Somali.[2004] It is therefore possible to make the tentative claim that this strike should be seen as being governed solely by IHRL, and that, as such, it is a suitable case-study for the analysis of IHRL and drone strikes in Somalia.

In the strike, Da'ud was the only person killed,[2005] and the lack of collateral deaths means that it more likely has the potential to be non-arbitrary than those strikes considered previously in this section, as long as it was necessary and proportionate, with sufficient

[2003] n 182.

[2004] Discussed above, text from n 186 to n 187.

[2005] 'Africom Assessment (n 186).

precautions taken. Therefore, the strike must have been necessary to protect others from an imminent lethal threat, and there must have been no reasonably available non-lethal alternatives.

Reports into the strike by the Pentagon and US Africa Command do not demonstrate any threat to life in response to which the strike was carried out.[2006] Instead, there is emphasis on the identity of Da'ud and his role as a senior military planner and 'principal coordinator of al-Shabaab's militia attacks in Somalia, Kenya, and Uganda', as well as his 'responsib[ility] for the loss of many innocent lives through attacks he has planned and carried out'.[2007] This suggests Da'ud was targeted in a personality strike due to his identity, rather than to prevent a concrete and imminent threat. If this is so then, regardless of his previous crimes, his lethal targeting would have been in violation of the right to life. It was also stated that officials were 'confident' the strike would 'disrupt near-term attack planning, potentially saving many innocent lives.'[2008] That lives were 'potentially' saved demonstrates that the strike was not undertaken in relation to a specific imminent threat posed by Da'ud, but rather due to the general threat he posed. The threat was described as 'near-term attack planning, which is clearly a longer period than a threat that is imminent as the term is understood within IHRL. As a result, the requirements of temporal and qualitative necessity were evidently not satisfied, and the strike can be said to have been arbitrary on this basis.

Due to the lack of surrounding factual information, it is impossible to say with certainty whether the strike was proportionate. Without knowing details of the threat to which the strike was a response it cannot be asserted whether lethal force was proportionate. Given that it seems there was likely no threat, the drone strike is also likely to be disproportionate.

[2006] ibid; 'Statement by Pentagon Press Secretary Peter Cook on US Airstrike in Somalia' (US Department of Defense, 1 June 2016) https://www.defense.gov/News/News-Releases/News-Release-View/Article/788062/statement-by-pentagon-press-secretary-peter-cook-on-us-airstrike-in-somalia/.

[2007] Cook Statement (1 June 2016) (n 2005).

[2008] ibid.

The paucity of information also hampers the question of whether sufficient precaution was taken. The fact that the strike was carried out in such a manner that only Da'ud was killed does not mean that precautions were necessarily taken—precaution requires that the operation is planned to 'minimise, to the greatest extent possible, recourse to lethal force,'[2009] not to minimise the risk of incidental casualties. It seems possible that the manner in which the operation was planned and controlled—the use of a drone apparently being in lieu of an attempt to use non-lethal methods—was geared towards the specific goal of killing Da'ud, which violates the imperative within precaution.

It is therefore submitted that the strike on Da'ud is very likely to have violated his right to life, and represents a further instance of a drone strike being an arbitrary killing. Admittedly, this conclusion rests on the categorisation of the strike as one governed by IHRL, which is not a certainty in the context of Somalia. The language of the Department of Defense statement reads as if presenting a justification under IHL, on which basis the strike would probably be lawful. The fact that there is such opacity regarding US drone strikes in Somalia emphasises a highly problematic aspect of remote weapons: where the operative legal paradigm is unclear, uses of lethal force that would certainly violate the right to life can appear lawful or, at least, their lawfulness is uncertain and cannot properly be scrutinised.

The second strike to be considered occurred in November 2015, and has been selected to provide an example of a signature strike, where individuals are targeted based on their behaviour rather than their identities. In such a scenario, it is perhaps more likely that a drone strike will adhere to IHRL as it is a dynamic response to conduct. Where this conduct presents an imminent threat to life, a drone strike may be arguably necessary.

There is very little information available about this strike, though it was reported that eight individuals were killed when an al-Shabaab base was targeted.[2010] Reports of the strike have not confirmed whether or not any of those targeted were Somali but, in order to enable the analysis of an apparent signature strike within the analysis, it is included as

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[2009] *Gül* (n 1845) para 84; *Haász and Szabó* (n 1852) para 59; *McCann* (n 1845) para 194.

[2010] Harun Maruf, 'Airstrike Kills 8 al-Shabaab Militants in Somalia' *Voice of America* (22 November 2015) https://www.voanews.com/a/airstrike-kills-8-al-shabab-militants-in-somalia/3068881.html.

a case-study. Further, due to the numbers killed, it is very possible that at least one of those targeted would have been Somali, which would bring it within the purview of IHRL.

A spokesperson from the US stated that those targeted 'were preparing to attack US and SNA forces',[2011] suggesting there was potentially a threat to life to which the drone strike was a response. Depending on the extent to which preparations to attack were complete, it may have been sufficiently imminent, meaning that qualitative and temporal necessity could be satisfied. Given the fact that a conflict was occurring at the time, it may be possible that non-lethal alternatives to the drone strike were not reasonably available. If not, the drone strike could arguably be quantitatively necessary, thereby rendering the strike necessary overall, from a right to life perspective.

That the threat responded to was an attack on US and SNA forces suggests that the use of lethal force could have been proportionate, where the purpose of the operation was to prevent the threat from being carried out. There are no other details available in relation to the strike, therefore it is impossible to assess whether the operation was conducted with sufficient precaution, but given the environment in which it occurred, it seems that lethal force was a likely outcome of the operation, thereby reducing the extent to which the use of lethal force could be expected to be minimised.

Analysis of this drone strike is clearly hampered by a lack of information, but it nevertheless raises the important distinction between personality and signature strikes. During periods where IHRL is the dominant paradigm, it seems that only signature strikes have the potential to be lawful. Where a drone strike is carried out in response to observed behaviour it may be lawful under IHRL, but only insofar as the behaviour reveals an imminent threat to life. Without such a threat a drone strike will not be lawful. This is, however, something that appears a rare occurrence, the reports of most strikes seeming to suggest that a specific operational individual was targeted as a result of their identity. Thus, while some strikes may arguably have been lawful under IHRL, it is submitted that this does not generally appear to be the case.

[2011] TBIJ 'Somalia 2001-17' (n 1581) SOM027.

4.5 Conclusion

This chapter has demonstrated that, from an IHRL perspective, US drone strikes often sit within a web of interpretive controversies, making it difficult accurately to assess their lawfulness. The right to life under the ICCPR binds the US, and a strong case can be made that this right applies extraterritorially, extending jurisdiction beyond the borders of states parties.

Furthermore, it may be argued that the nature of IHRL jurisdiction is such that the right to life will be engaged when a state exercises power and control over an individual, and that this can manifest through the use of lethal force. This is not a dominant viewpoint within IHRL scholarship and it is disputed, but it is nevertheless defensible. In addition, jurisdiction can manifest through the exercise of public powers, of which the use of drones on behalf of a government in the pursuit of counterterrorism is an example, thereby engaging the right to life. Again, this is not a universal interpretation—the conventional right to life is an area of seemingly intractable controversy. Nevertheless, the right to life is additionally engaged through customary international law, which appears to have fewer caveats, in particular lacking a jurisdiction element. On the basis of these points, it has been submitted that it cannot but be concluded that the use of drones by the US, extraterritorially and outside of armed conflicts, is governed *inter alia* by the right to life.

This right is highly restrictive, and does not prevent the lethal use of drones in all circumstances. It creates a legal space in which the use of military force, such as drone strikes, is highly constrained but not forbidden outright. Where a drone strike adheres to the requirements of necessity, proportionality and precaution, the death it causes will not be arbitrary. Nevertheless, the military nature of drone strikes makes this a difficult threshold to achieve, and in the majority of the examples considered above, there appears to be a failure to satisfy every element of the right to life, rendering them arbitrary killings. In particular, it seems that the requirement that lethal force be in response to an imminent threat to life has repeatedly been unsatisfied. This consistent failure to satisfy the requirements of the right to life seems likely to be a result of the nature of drones as a military tool, and the fact that they are being used for a non-military task.

Drone strikes generally appear not to be used as a law enforcement tool, responding to specific and imminent threats when they arise. They are instead used to disrupt NSAs and target prominent members, providing lethal force retributively in the face of previous attacks from these groups and to prevent possible future attacks. It is submitted that the way in which US drone strikes operate betrays an IHL mind-set, suggesting an irresistible urge to capitalise on the drone's capacity to reach and target members of non-state armed groups, regardless of the operative paradigm of international law. This is perhaps the most problematic aspect of the use of drone strikes by the US, with the potential for this to be gradually expanded over time.

CHAPTER 5 — OVERALL CONCLUSION

The relationship between the use of armed drones and international law is undeniably complex, which is unsurprising given the multiple legal frameworks implicated when a drone is used to deliver lethal force. The process of a drone strike can only be said to be lawful when it satisfies the nested requirements of each framework as it becomes applicable. 'Lawfulness' does not come about through the satisfaction of any individual group of rules, but rather through the adherence to *every* applicable rule. Where a drone strike fails to adhere to even one element of just one rule, it will be unlawful, regardless of the extent to which it adhered to the rest.

The aim of this work has been to investigate the question of the lawfulness of drone strikes, both in the abstract, but also concretely, by considering their adoption and proliferation within US counterterrorist programmes in Pakistan, Yemen and Somalia. This analysis has focused on the applicable frameworks under *jus ad bellum*, IHL and IHRL, which are arguably the most relevant to the resort to drones by a state.

The growth of drones over the past decades has not happened within an academic vacuum and much has been written about aspects of their use. However, the key to understanding the question of lawfulness is the adoption of a holistic (that is, considering lawfulness in in the light of several overlapping legal frameworks) and in-depth approach of the sort adopted herein. In doing so it has been possible to arrive at broad conclusions regarding the use of drones in general and in specific cases, in a manner that will be able to inform future scholarship on drone use both generally and in relation to operations in Pakistan, Yemen and Somalia.

It has been demonstrated that the abstract use of drones is no different from the use of any other weapon system. The resort to their use must abide by the rules of consent and *jus ad bellum* to be lawful, and the way they are used must adhere, as with any other weapon system or weapon, to relevant rules of IHL or IHRL. There is nothing inherent about drones that means their use violates any relevant provision of international law *per se*. Like any other method of combat, they can be used in a way that violates the law, but this is not a necessary result of their use. This is particularly so in relation to the law on

the use of force and IHL, where the use of drones (as a military system) fits fairly neatly into the legal frameworks. This was shown to be less so in the case of IHRL, where the military nature of drones renders their use inclined towards violation of the right to life, but nevertheless this right is not *necessarily* violated: there exists a narrow set of facts in which drone strikes may be lawful under IHRL.

Thus, drones do not raise unique legal questions as a result of their pure existence. However, they do enable conduct that is of questionable lawfulness. Through a detailed engagement with the facts surrounding drone use generally and in a series of specific case-studies—the depth and scope of which are unprecedented in the drone literature—this work has demonstrated that drones may lend themselves to operations that are either likely to be unlawful, or balanced on the knife-edge of lawfulness. Drone strikes, while not raising new legal controversies, render stark those that already exist.

As convenient and politically acceptable, the resort to drones against NSAs amplifies issues of the relationship between NSAs and their host-states within self-defence, it highlights debates around the meaning and nature of an armed attack, as well as the extent to which necessity and proportionality are extended spatially and temporally from the original act upon which lawfulness rests. The type of risk-free combat and measured decision-making that drones enable raises the presumption that they are a weapon system that is uniquely capable of adhering to IHL. Nevertheless, by extending the targeting potential of a state's armed forces and enhancing its surveillance powers, drones allow the operationalisation of contested understandings of IHL, exaggerating, it is submitted, the contested categorises of members of OAGs and civilians directly participating in hostilities. Drones extend the reach of states over individuals far outside their territory, emphasising the problematic notion of jurisdiction and human rights—drones arguably represent a zenith of extraterritorial non-physical control, in a manner that is antagonistic towards current understandings of jurisdiction.

This precarious lawfulness presented by many drone strikes highlights the second important contribution of this work: the demonstration of how the practice of extraterritorial drone strikes is often premised on expansive interpretations of the law. While drone use raises critical issues of international law, in practice these are often resolved in favour of wide interpretations of the law. The result is that the lawfulness of

US drone strikes is, in many cases, only sustainable on the basis of these interpretations. As has consistently been demonstrated herein, the situation is one in which there are very few situations in which unlawfulness can be confidently asserted; there is usually an interpretation of the law that can be presented to legitimise a drone strike. It is as if drones have not just developed as a response to the law, but they have grown ivy-like into the law's controversial crevices, opening them up to allow quick and efficient lethal targeting to be presented as lawful. In reality this lawfulness is not concrete, particularly in the face of convincing alternatives.

As a consequence of their basis on expansive interpretations of the law, drone strikes raise serious questions as to the impact they may have on relevant areas of international law. As the foremost user of armed drones extraterritorially, the US is a potential norm entrepreneur, and its reliance on wide readings of the law poses the possibility of changes within customary international law and treaty interpretation as more states acquire armed drones, and potentially acquire the concordant expansive notions of lawfulness. This has arguably begun to occur in the UK as extraterritorial use of drones increases, as demonstrated by the various and controversial legal bases for the 2015 drone strike killing Reyaad Khan.[2012]

Though the research presented herein is original in its depth and scope, it was held back by a paucity of data—both in terms of the facts of the strikes analysed as case-studies and in the extent to which US legal interpretations remain classified—meaning that in some cases conclusions are less concrete than is desirable. To compensate for this weakness, findings have been presented in a way that demonstrates multiple outcomes, based on different legal interpretations and possible facts, allowing assertions of lawfulness in spite of the secrecy surrounding operations.

The strength of the cases-studies is the way in which they have allowed a contextual analysis of drone use, rather than consigning it to pure abstraction. In doing so, much about the practices enabled and perpetuated by drone use has been opened up for discussion which would otherwise remain hidden. For instance, the extent to which the

[2012] Intelligence and Security Committee, *UK Lethal Drone Strikes in Syria* (2016-17, HC 1152).

resort to drone strikes has been invited by third states; the manner in which the issue of proportionality has been implicated by the repeated targeting of specific individuals; and that, while strikes are not necessarily unlawful under IHRL, the majority of those analysed had violated the right to life of those targeted.

The use of case-studies allowed the production of specific conclusions as to how drones have been used. Despite the opacity surrounding many drone strikes, it was possible in some instances to state with a good degree of certainty that particular strikes were unlawful, and that others were lawful. In doing so, the interrogative potential of this work has been realised and expanded upon more so than would have been possible with a general analysis. The work has utilised its strongly doctrinal research framework to assess real-life situations, and achieved confident conclusions while acknowledging uncertainties.

The use of extraterritorial drone strikes will continue, and it will no doubt continue to occur on the fringes of conceivable lawfulness, at times straying outside of it. Additionally, in the same way that drones themselves developed in part as a response to the mandates of international law, the ways in which they are used will change as time goes by. This work represents an attempt to map the use of drones against the malleable body of international law implicated by their use. This work is intended as neither celebration nor indictment of drone use, but instead an impartial examination, a tool with which to understand their place within international law, one that it is anticipated will provide ongoing support for the assessment of drone strikes in particular, as well as in relation to the use of force more generally.

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