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# 'The Only Game in Town' But is it a Legal One? American Drone Strikes and International Law

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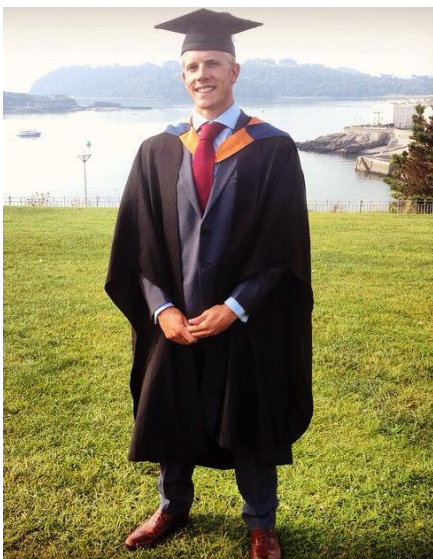
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## **‘THE ONLY GAME IN TOWN’ – BUT IS IT A LEGAL ONE?**

### **AMERICAN DRONE STRIKES AND INTERNATIONAL LAW**

*James Kirton*<sup>1</sup>

#### **Abstract:**

In 2002 a US Predator drone operating above Afghanistan’s Paktia province spotted three men in Zhawar Kili, a complex slightly north of the infamous Tora Bora cave system, an area used by al-Qaeda leadership to train and regroup. One of the men was tall; supposedly the others were acting reverently towards him. Convinced the tall man was Osama bin Laden a Hellfire missile was fired from the Predator, killing all three men instantly. The tall man was not bin Laden. None of the men were even affiliated with al-Qaeda or the Taliban; they were simply civilians in the wrong place at the wrong time. This strike and many others that are all too similar raise a multitude of questions, both legal and moral, regarding the US lethal drone strike programme. This article attempts to examine the legal implications of US drone strikes; not only in Afghanistan, but further afield from the more traditional and accepted battlefields in Pakistan, Yemen and Somalia.

**Keywords:** drone, UAV, armed conflict, *jus in bello*, *jus ad bellum*, international human rights law, al-Qaeda

#### **Introduction**<sup>2</sup>

*‘Autonomy is the Future*<sup>3</sup>

Some say the world changed forever after 9/11; certainly warfare did. The US began to arm their drone fleet; ‘the gloves were taken off’<sup>4</sup> and their lethal drone programme began in earnest.

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<sup>2</sup> This dissertation was concluded in April 2014 and as such does not consider drone strikes against ISIL (The Islamic State of Iraq and the Levant, The Islamic State of Iraq and Syria, Islamic State) targets in Iraq and Syria, which began around June 2014. However, much of the discussion is still relevant to this emerging ‘conflict’ and the principles deliberated can easily be applied to this insurgency.

<sup>3</sup> Singer, P., in Knoop, G-J, ‘Legal, Political and Ethical Dimensions of Drone Warfare under International Law: A Preliminary Survey’, (2012) 12 *International Criminal Law Review*, p.697.

<sup>4</sup> Singer, P, ‘Military Robots and the Laws of War’, (2009) 23 *The New Atlantis*, p.37.

The continued appearance and use of new and progressive technology in the history of armed conflict is certainly nothing new, warfare and technology have always had an intimate relationship, but such advancement has often come at a pace which the law has struggled to match.<sup>5</sup> It is against this backdrop that increasing pressure has been exerted on the United States over its controversial lethal drone strike programme.<sup>6</sup>

Unmanned aerial vehicles (UAVs or drones)<sup>7</sup> have become the weapon of choice in the United States' fight against terrorism.<sup>8</sup> They are deployed not only for intelligence and surveillance gathering purposes,<sup>9</sup> but also to conduct the targeted killings of suspected terrorists in remote and dangerous regions of the world.<sup>10</sup> Whilst their development and historical origins are sporadic and protracted,<sup>11</sup> their military utility is clear and since the first Gulf War there has not been a single conflict in which UAVs have not been deployed.<sup>12</sup> With the end of the Cold War militaries began to shrink, public tolerance for military risk drastically declined, prominently evidenced by the abrupt withdrawal of American troops from Somalia after the Black Hawk Down disaster,<sup>13</sup> and in the unwillingness to send in ground troops during genocides in Rwanda and the Balkans.<sup>14</sup> Additionally, UAVs began to receive ringing endorsements from American Officials. The then Director of the CIA, Leon Panetta, famously referred to the technology as 'the

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<sup>5</sup> Vogel, R, 'Drone Warfare and the Law of Armed Conflict', (2010) 39(1) *Denver Journal of International Law and Policy*, p.103; Roland, A, 'War and Technology', (2009) 14(2) *Foreign Policy Research Institute*, para.23.

<sup>6</sup> Bowcott, O, 'Drone strikes by US may violate international law, says UN', *The Guardian*, 18 October 2013; 'UN rapporteur Christof Heyns condemns use of drone strikes', *The Guardian*, 17 October 2013.

<sup>7</sup> The US Department of Defense defines drones as: 'powered aerial vehicles sustained in flight by aerodynamic lift over most of their flight path and guided without an onboard crew. They may be expendable or recoverable and can fly autonomously or be piloted remotely' see *Unmanned Aerial Vehicles*, (2003), para.1, <http://www.defense.gov/specials/uav2002/> 2 October 2014.

<sup>8</sup> Orr, A, 'Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law', (2011) 44 *Cornell International Law Journal*, p.730.

<sup>9</sup> O'Connell, M, The American Society of International Law, *The International Law of Drones*, (2010), para.2, [http://www.asil.org/sites/default/files/insights\\_101112.pdf0\\_.pdf](http://www.asil.org/sites/default/files/insights_101112.pdf0_.pdf) 2 October 2014.

<sup>10</sup> Breau, S, *Drone Attacks, International Law, and the Recording of Civilian Casualties of armed conflict*, (2011), p.1, [http://works.bepress.com/susan\\_breau/1/](http://works.bepress.com/susan_breau/1/) 2 October 2014.

<sup>11</sup> For example: Singer, P, *Wired for War*, (2010), pp.46-60.

<sup>12</sup> Armytechnology.com, *UAV evolution – how natural selection directed the drone revolution*, (2012), para.9, <http://www.army-technology.com/features/featureuav-evolution-natural-selection-drone-revolution/> 2 October 2014.

<sup>13</sup> After a successful UN sanctioned operation to provide humanitarian aid to a starving population, the US turned its attention toward nation building. On 3 October 1993, US Special Forces were tasked to capture two associates of notorious warlord, Mohamed Farrah Aidid. They got their men, but as the force withdrew, two Black Hawk helicopters were shot down. The ensuing battle to recover the downed personnel resulted in the deaths of 18 US servicemen. Shocking footage was beamed around the world of Aidid's men dragging three of the bodies through the streets of Mogadishu. Shortly afterward President Clinton ordered the entire US contingent to withdraw from Somali.

<sup>14</sup> Singer, *Wired for War*, p.59.

only game in town',<sup>15</sup> and the Pentagon seemingly agrees. The Department of Defense has made producing and evolving all aspects of its drone fleet a strategic and budgetary priority for the future.<sup>16</sup> 'Technological developments began to coincide with changing political winds';<sup>17</sup> the stage was now set for the age of the drone.

## 1 The Legal Position of the United States Government

*'...the United States must remain a standard bearer in the conduct of war'*<sup>18</sup>

The United States clearly intends to expand and advance its UAV programme, especially with regard to lethal strike operations.<sup>19</sup> In fact, more strikes were reported to have been conducted during President Obama's first year in office than in the previous eight years under George W Bush, and 2010 all but doubled that pace.<sup>20</sup> This expeditious increase has led to several government releases which aim to present the American legal justification for its use of force against al-Qaeda, the Taliban and associated forces in the various territories they manifest themselves. It is important to note at the outset that all strikes are based on the 2001 Authorization for the Use of Military Force (AUMF).<sup>21</sup> The joint resolution was passed in the wake of 9/11 at the behest of President Bush. Congress gave the President authorization to go to war with the architects of the attacks, namely members of al-Qaeda.<sup>22</sup> The AUMF gave the President authorization to use all military force against those:

nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>23</sup>

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<sup>15</sup> 'U.S. airstrikes in Pakistan called 'very effective'', CNNPolitics.com, 18 May 2009.

<sup>16</sup> Vogel, 'Drone Warfare', pp.104-105; US Department of Defense, *Unmanned Systems Integrated Roadmap FY2011-2036*, (2011), <http://www.acq.osd.mil/sts/docs/Unmanned%20Systems%20Integrated%20Roadmap%20FY2011-2036.pdf> 2 October 2014.

<sup>17</sup> Singer, *Wired for War*, p.59.

<sup>18</sup> Koh, H, US Department of State, *The Obama Administration and International Law*, (March 25, 2010), para.52, <http://www.state.gov/s/l/releases/remarks/139119.htm> 2 October 2014.

<sup>19</sup> Weinberger, S, 'The ultra-lethal drones of the future', *New York Post*, 17 May 2014; Horgan, J, 'The Drones Come Home', *National Geographic*, July 2010, paras.17-21.

<sup>20</sup> 'Pakistan denies U.S. request to expand drone access, officials say', *CNN*, 22 November 2010, <http://edition.cnn.com/2010/WORLD/asiapcf/11/22/pakistan.us.drones/> 2 October 2014.

<sup>21</sup> Authorization for the Use of Military Force, Pub.L. 107-40, 115 Stat. 224 (2001); Zenko, M, 'An Inconvenient Truth', *Foreign Policy*, 11 April 2013, [http://www.foreignpolicy.com/articles/2013/04/10/an\\_inconvenient\\_truth\\_drones#sthash.IN1vldy6.s8EG0qyn.dpbs](http://www.foreignpolicy.com/articles/2013/04/10/an_inconvenient_truth_drones#sthash.IN1vldy6.s8EG0qyn.dpbs) 2 October 2014.

<sup>22</sup> Maxwell, M, 'Rebutting the Civilian Presumption: Playing Whack-a-Mole Without a Mallet?' in Finkelstein, C *et al*, (eds), *Targeted Killings: Law and Morality in an Asymmetrical World*, (2012), pp.37-38.

<sup>23</sup> Authorization for the Use of Military Force (2001) s.2(a).

The resolution mirrored the speech given by Bush shortly after 9/11 where he declared: 'we will make no distinction between the terrorists who committed these acts and those who harbor them.'<sup>24</sup> More recently, after promptings by the UN and other organisations, the then US State Department Legal Advisor, Harold Hongju Koh, presented the 'considered view'<sup>25</sup> of the Obama Administration with regard to lethal targeting operations, including those using drones, asserting:

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.<sup>26</sup>

This is an important and illuminating statement as to how the US views its use of force against those 'responsible' for the 9/11 attacks. Firstly, the characterisation of the struggle between the US and al-Qaeda, the Taliban and associated forces, as an *armed conflict* means any lethal strike operations are viewed under international humanitarian law (IHL),<sup>27</sup> rather than under a law enforcement model where international human rights law (IHRL) would apply.<sup>28</sup> This is pivotal and a controversial point; it is potentially decisive in the determination of the legality of a strike owing to several distinct differences between each legal framework. Under IHL a lower standard of necessity is required compared to that of IHRL.<sup>29</sup> Necessity requires no more force or greater violence to be used to carry out an operation than is necessary in the circumstances.<sup>30</sup> IHL then, allows for a greater amount of force to be employed to achieve that end. Specifically: 'military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.'<sup>31</sup> IHRL does not allow for 'any amount or kind' of force and a killing is only permissible if it is required to halt an imminent threat to life,<sup>32</sup> and there

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<sup>24</sup> US Department of Defense, *Bush: No Distinction Between Attackers and Those Who Harbor Them*, (2001), <http://www.defense.gov/News/NewsArticle.aspx?ID=44910> 2 October 2014.

<sup>25</sup> Koh, *The Obama Administration*, para.64.

<sup>26</sup> *Ibid*, para.65.

<sup>27</sup> Orr, 'Unmanned, Unprecedented, and Unresolved', p.742; international humanitarian law, the laws of war, *jus in bello*, and the law of armed conflict are used interchangeably.

<sup>28</sup> Heller, K, 'One Hell of a Killing Machine', (2013) 11(1) *Journal of International Criminal Justice*, p.91.

<sup>29</sup> Knoops, 'Legal, Political and Ethical Dimensions of Drone Warfare', p.713.

<sup>30</sup> Solis, G, *The Law of Armed Conflict: International Humanitarian Law in War*, (2010), pp.258-259.

<sup>31</sup> *United States v. Wilhelm List, et al.* ("The Hostage Case") (1948) XI Trials of War Criminals Before the Nuremberg Military Tribunals at 1253.

<sup>32</sup> Heyns, C, United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, (2013, A/68/382), para.32, <http://justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-Heyns-Report-Drones.pdf> 3 October 2014.

are no other available means, such as capture, to prevent that threat.<sup>33</sup> Necessity in IHRL imposes an obligation to minimise the level of force, regardless of what is proportionate, unlike the same requirement under IHL.<sup>34</sup> Secondly, the IHL principle of proportionality permits a more flexible approach to collateral damage caused during the course of an operation. Art.57.2(b) Additional Protocol I prescribes:<sup>35</sup>

an attack shall be cancelled or suspended if it becomes apparent that the object is not a military one or....that the attack may be expected to cause incidental loss of human life, injury to civilians, damage to civilian objects, or a combination thereof, which may be excessive in relation to the concrete and direct military advantage anticipated.

The provision allows for some leeway between the expected military advantage and any collateral damage caused. In sharp contrast collateral damage can never be justified under IHRL.<sup>36</sup> Clearly, the US governs its use of force in this sense by recourse to IHL; essentially lowering the threshold for when lethal force may be employed, making justification of targeted killings that much easier. Whether it is appropriate, or indeed possible, to apply IHL to *all* US drone strikes will be considered shortly, the application hinges on the existence of an armed conflict.<sup>37</sup>

What is clear from various speeches and official sources is the American government exudes a united front. The struggle with al-Qaeda and its associated forces is classified as an armed conflict, specifically non-international in nature, meaning killings are to be viewed under IHL.<sup>38</sup> The US even argued that Abd al-Rahim al-Nashiri's 2000 attack on the *USS Cole* was governed

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<sup>33</sup> Alston, P, United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, (2010, A/HRC/14/24/Add.6), para.32, <http://unispal.un.org/pdfs/AHRC1424Add6.pdf> 3 October 2014.

<sup>34</sup> Solis, *The Law of Armed Conflict*, pp.258-259.

<sup>35</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 [Additional Protocol I], entered into force 7 December 1978. All Articles cited in this discussion refer to Protocol I unless otherwise stated.

<sup>36</sup> Knoops, 'Legal, Political and Ethical Dimensions of Drone Warfare', p.713; Breau, *Drone attacks*, p.13; Heller, 'One Hell of a Killing Machine', p.114.

<sup>37</sup> Lubell, N, and Derejko, N, 'A Global Battlefield?', (2013) 11 *Journal of International Criminal Justice*, p.87; Breau, *Drone attacks*, p.12.

<sup>38</sup> Koh, *The Obama Administration*, para.52; The White House: Office of the Press Secretary, *Remarks of John O. Brennan, "Strengthening our Security by Adhering to our Values and Laws"*, (2011), para.19, <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> 3 October 2014; *Hamdan v. Rumsfeld* 548 U.S. 557 at 628-631; The United States Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, (2013), pp.1-2, [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf) 3 October 2014; The United States Department of Justice, *Attorney General Eric Holder Speaks at Northwestern University School of Law*, (2012), para.36, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> 3 October 2014.

by IHL, despite taking place before 9/11 and long before hostilities between the US and al-Qaeda reached any level of significance.<sup>39</sup> Koh also addresses *when* the US may resort to such a use of force. Domestic authorization is derived from the AUMF, however under international law the US relies on 'its inherent right to self-defence'.<sup>40</sup> The right to national self-defence is enshrined in Art.51 UN Charter<sup>41</sup> which allows states to exercise self-defence in response to an armed attack. This again is important as the use of force within another state is generally considered unlawful but for self-defence, an authorization from the UN Security Council or host state consent.<sup>42</sup> In the absence of host state consent, (consent from the state where the strike occurs), if the US is incorrectly relying on Art.51 it is clearly breaching international law.

Lastly, it is worth outlining three conditions listed in a leaked Department of Justice White Paper. These set out the criteria which must be fulfilled before the US may proceed with an 'operation using lethal force in a foreign country against a US citizen who is a senior operational leader of al-Qa'ida [sic] or an associated force'.<sup>43</sup>

- 1 An informed, high level official of the US government determines the targeted individual poses an imminent threat of violent attack against the US.
- 2 Capture is infeasible and the US continues to monitor whether capture may become feasible.
- 3 The operation would be conducted consistent with the applicable law of war principles.

Whilst the White Paper is specific to the targeted killing of US citizens, it is probable the process would be analogous to that of any targeted killing, notwithstanding the nationality of the target, and with nothing more publicly released about who may be targeted and when, this is really the only assumption one can make.<sup>44</sup>

## **2 The *Jus ad Bellum* and Self-Defence**

*'There is little consensus...on when international law will permit unmanned aerial vehicles to target individuals'*<sup>45</sup>

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<sup>39</sup> Heller, 'One Hell of a Killing Machine', p.109; hostilities between the US and al-Qaeda are widely asserted to have intensified shortly after 9/11 and the passing of the AUMF.

<sup>40</sup> US Department of Justice, *Lawfulness of a Lethal Operation*, p.1.

<sup>41</sup> United Nations Charter, 26 June 1945, 1 UNTS XVI, entered into force 24 October 1945.

<sup>42</sup> Casey-Maslen, S, '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*, p.601.

<sup>43</sup> US Department of Justice, *Lawfulness of a Lethal Operation*, p.1.

<sup>44</sup> The White Paper was probably written around the time American citizen Anwar al-Awlaki was killed, in September 2011, by a drone in Yemen. Although it is devoid of a date due to the fact it was not intentionally made publicly available.

<sup>45</sup> Rozenberg, J, 'Drone Dialogue', (2013) *The Law Society Gazette*, para.1.

The *jus ad bellum* governs the resort to force between states, of which self-defence is a central concept. The US clearly relies upon 'its inherent right to self-defense' under Art.51 when conducting lethal drone strikes. Initially however, it should be recognised there is general prohibition on the use of force between states.<sup>46</sup> Art.2(4) UN Charter prescribes:

All Members [of the United Nations] 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.

The provision was drafted after two world wars and primarily aimed to prevent further conflict. It is reflective of customary international law and is of a *jus cogens*<sup>47</sup> nature, meaning it is a fundamental principle of modern day international order. It is not an absolute restriction though; this was recognised during the drafting of the Charter as wholly unrealistic.<sup>48</sup> Consequently Art.51 allows for a specific derogation; permitting a state to employ self-defensive measures in response to an armed attack:

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

Therefore any use of force against another state, whilst being a prima facie breach of Art.2(4), may be justified by recourse to Art.51. In the absence of host state consent<sup>49</sup> or UN Security Council authorization,<sup>50</sup> any resort to force against another state, or on another state's territory, is unquestionably a breach of international law unless it can be justified as a self-defensive action.<sup>51</sup> Accordingly, a legal dilemma only arises where the host state does not consent to force occurring within its borders; self-defence merely precludes the wrongfulness of what would otherwise be an infringement of the host state's sovereignty.<sup>52</sup> This is hardly controversial<sup>53</sup> as former Special Rapporteur Professor Alston affirms:

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<sup>46</sup> Milanovic, M, 'More on Drones, Self-Defense, and the Alston Report on Targeted Killings', (2010) *European Journal of International Law: Talk!*, para.20.

<sup>47</sup> *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (ICJ, Nicaragua v. United States of America)*, Judgment of 27 June 1986 (Merits), Separate Opinion of Judge Nagendra Singh, President.

<sup>48</sup> Lubell, *Extraterritorial Use of Force Against Non-State Actors*, p.26.

<sup>49</sup> Schmitt, M, 'Drone Attacks under the Jus ad Bellum And Jus in Bello: Clearing the 'Fog of Law'', (2010) *13 Yearbook of International Humanitarian Law*, p.315; for example: NATO's presence in Afghanistan is an example of host state consent to force occurring within a state's own borders.

<sup>50</sup> Lubell and Derejko, 'A Global Battlefield?', p.79; for example: UN Security Council Resolution 1973 authorized a no-fly zone and the use of force to protect civilians and civilian areas targeted by Colonel Muammar Al-Qadhafi and his allied forces in Libya.

<sup>51</sup> Casey-Maslen, 'Pandora's box?', p.601; Lubell and Derejko, 'A Global Battlefield?', p.87.

<sup>52</sup> Heller, 'One Hell of a Killing Machine', p.91; Milanovic, 'More on Drones', para.27.

<sup>53</sup> Cassese, A, *International Law*, (2001), p.305.



A targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if either the second State consents, or the first, targeting State, has a right under international law to use force in self-defence under Article 51 of the UN Charter, because the second State is responsible for an armed attack against the first State, or the second State is unwilling or unable to stop armed attacks against the first State launched from its territory.<sup>54</sup>

It would seem the US may employ self-defensive force within the borders of another state provided that state has consented, the UN Security Council has authorized as such, or in the absence of consent, where that second state is responsible for an armed attack, or is unwilling or unable to prevent an armed attack being launched from within its territory against the US. However, much uncertainty has arisen regarding such justification with several matters complicating the position.

### ***Identity of the Attacker***

Despite there being no express mention of state involvement in Art.51, it has been suggested that self-defence can only be initiated in response to an armed attack by, or on behalf of, a state.<sup>55</sup> This position was adopted by the International Court of Justice (ICJ) in *the Construction of a Wall*, additionally, before 11 September 2001 the idea of initiating self-defence in response to an attack by a non-state actor had not seriously been entertained.<sup>56</sup> Based on the Court's position it would seem the US would be unable to rely on Art.51 to justify its resort to force against those responsible for 9/11 (al-Qaeda, the Taliban and associated forces) who cannot be attributed to a state nor do they conduct violence on behalf of any state; they are a non-state actor.<sup>57</sup> However, there is increasing evidence which supports the view that non-state actors *can* be responsible for armed attacks for the purposes of Art.51.

First, Art.51 makes no explicit acknowledgement of the identity of the attacker, unlike the 2004 ICJ Advisory Opinion in *the Construction of a Wall* which concluded an armed attack must be 'by one State against another State'.<sup>58</sup> Notwithstanding this reasoning several judges expressed

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<sup>54</sup> Alston, *Report of the Special Rapporteur*, (2010), para.35.

<sup>55</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ICJ, The Wall Advisory Opinion)*, Advisory Opinion of 9 July 2004 at para.139; after two world wars, the drafters were very much concerned with the behaviour of states, reflected in the Preamble of the Charter.

<sup>56</sup> Heyns, *Report of the Special Rapporteur*, para.88.

<sup>57</sup> Lubell, *Extraterritorial Use of Force*, pp.14-15; it is recognised here that actions of the Taliban *may* have been attributable to Afghanistan before they were deposed from 'government' by the joint US and UK invasion of 2001, although even then they were not recognised as a legitimate government of the Nation by many.

<sup>58</sup> *ICJ, The Wall Advisory Opinion* at para.139.

dissatisfaction with the Court's conclusion,<sup>59</sup> a view propounded by commentators.<sup>60</sup> The Court subsequently had a chance to re-visit the issue in *Democratic Republic of the Congo v. Uganda* but largely avoided the question.<sup>61</sup> Lubell notes if the Court considered the issue had been correctly posited in *the Construction of a Wall* then they would simply have reaffirmed this position: the fact the Court declined to answer the question indicates it is very much open for debate.<sup>62</sup> Furthermore Judge Kooijmans, in his Separate Opinion in *Congo v. Uganda*, again declared non-state actors could be responsible for armed attacks:

If armed attacks are carried out by irregular bands from such territory against a neighbouring State, they are still armed attacks even if they cannot be attributed to the territorial State. It would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State.<sup>63</sup>

This appears rational; to deny the attacked state the possibility of self-defence simply because the attacker cannot be attributed to a state would seem wholly unreasonable. In fact, recent state practice appears to endorse this theory. Responding to the terrorist attacks of 9/11, which cannot be attributed to a state,<sup>64</sup> the UN Security Council issued Resolutions 1368 and 1373. Both Resolutions referred to the right to self-defence against those responsible,<sup>65</sup> furthermore a NATO press release referred to 9/11 as an armed attack.<sup>66</sup> Moreover, the *Caroline Case* widely considered as formative in the development of the rules of self-defence, involved Britain taking extraterritorial forcible measures against a non-state actor.<sup>67</sup> Clearly then the right to self-defence was recognised in response to attacks by non-state actors: 'the famous *Caroline*

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<sup>59</sup> Ibid, Separate Opinion of Judge Kooijmans at para.35; Declaration of Judge Buergenthal at para.6.

<sup>60</sup> Lubell, *Extraterritorial Use of Force*, p.32; Paust, J, 'Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond', (2002) 35 *Cornell International Law Journal*, pp.533-534; Greenwood, C, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', (2003) 4(7) *San Diego International Law Journal*, p.17.

<sup>61</sup> *Case Concerning Armed Activities on the Territory of the Congo (ICJ, Democratic Republic of the Congo v. Uganda)*, Judgment 19 December 2005 at paras.146-147.

<sup>62</sup> Lubell, *Extraterritorial Use of Force*, p.33.

<sup>63</sup> ICJ, *Democratic Republic of the Congo v. Uganda*, Separate Opinion of Judge Kooijmans at para.30.

<sup>64</sup> Paust, 'Use of Armed Force against Terrorists', pp.542-543; it is acknowledged that certain ties existed between al-Qaeda and the Taliban, who at the time of 9/11 exercised loose control over much of Afghanistan.

<sup>65</sup> United Nations Security Council, *Resolution 1368 (2001) Adopted by the Security Council at its 4370<sup>th</sup> meeting, on 12 September 2001*, (2001, S/RES/1368), para.4; United Nations Security Council, *Resolution 1373 (2001) Adopted by the Security Council at its 4385<sup>th</sup> meeting, on 28 September 2001*, (2001, S/RES/1373), para.5.

<sup>66</sup> NATO, *Press Release (2001) 124: Statement by the North Atlantic Council*, (2001), para.2.

<sup>67</sup> The *Caroline* incident involved British action against a ship being used by rebels supporting the insurrection in Canada, in US territory, and the subsequent diplomatic exchange between Britain and the US, see: The Avalon Project, *British-American Diplomacy: The Caroline Case*, (2008), [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp) 6 October 2014; Jennings, R, 'The Caroline and McLeod Cases', (1938) 32(1) *The American Journal of International Law*, pp.82-84.

dispute, itself shows that an armed attack need not emanate from a state'.<sup>68</sup> Quite why the ICJ has taken a differing stance is unclear. Thus it is advocated the US is absolutely entitled to employ self-defence in response to an attack by a non-state actor.

### ***Territorial State Sovereignty***

The US is unequivocal on this matter, stating in the absence of host state consent an operation may continue if 'the host nation is unable or unwilling to suppress the threat posed by the individual targeted'.<sup>69</sup> This is hardly controversial, and is endorsed by Professor Alston. To most it would seem clear that the main locations in which strikes occur: Afghanistan, Pakistan, Somalia and Yemen, meet the above criteria. Both Yemen and Somalia have consented to drone strikes within their borders,<sup>70</sup> and the government of Afghanistan has also consented to the US-led NATO presence within its country.<sup>71</sup> In any case, at present all seem unable to halt terrorist activity within their borders. However, with the consent of the state self-defence does not have to be invoked, there can be no infringement of the territorial state's sovereignty if it consents to the action.<sup>72</sup>

Pakistan presents a more complex matter. It is reported the CIA and US military cooperate with their Pakistani counterparts and the Pakistani military clears the airspace for US drones.<sup>73</sup> Furthermore, Pakistani troops have supposedly fought the Taliban on several occasions to recover downed American drones.<sup>74</sup> If consent was not forthcoming surely this level of *reported* cooperation would not exist.<sup>75</sup> Publicly the Pakistani government condemns the use of drones in a manner inconsistent with consent to these types of operations.<sup>76</sup> The situation is highly political. It would seem the Pakistani government is at least complicit in drone operations occurring within its territory. Nonetheless, even without consent, Pakistan certainly gives the impression of being unwilling or unable to disrupt terrorist activity occurring within its borders.

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<sup>68</sup> Greenwood, 'International Law', p.17.

<sup>69</sup> US Department of Justice, *Lawfulness of a Lethal Operation*, pp.1-2.

<sup>70</sup> Zenko, M, Council on Foreign Relations, *Reforming U.S. Drone Strike Policies*, (2013), Council Special Report No.65), p.11; Heyns, *Report of the Special Rapporteur*, para.52; Entous, A *et al*, 'U.S. Unease Over Drone Strikes: Obama Administration Charts Delicate Legal Path Defending Controversial Weapons', *The Wall Street Journal*, 26 September 2012; Al-Haj, A, 'Confirmed: US drone strike killed key al-Qa'ida leader Saeed al-Shihri in Yemen', *The Independent*, 17 July 2013.

<sup>71</sup> Schmitt, 'Drone Attacks', p.314.

<sup>72</sup> Martin, C, 'Going Medieval: Targeted Killing, Self-Defense and the *Jus Ad Bellum* Regime' in Finkelstein *et al*, (eds), *Targeted Killings*, pp.233-234.

<sup>73</sup> Allbritton, C, 'Exclusive: How Pakistan helps the U.S. drone campaign', *Reuters*, 22 January 2012.

<sup>74</sup> 'Pakistan troops fight Taliban after US drone crash', *BBC News*, 18 September 2011.

<sup>75</sup> Ignatius, D, 'A Quiet Deal With Pakistan', *The Washington Post*, 4 November 2008.

<sup>76</sup> Nauman, Q, 'Pakistan condemns U.S. drone strikes', *Reuters*, 4 June 2012.

The very man who was ultimately behind the 9/11 attacks was 'hiding' in a garrison town a mere 50 miles north of the capital, Islamabad.<sup>77</sup> Arguably, none of the discussed states suffer an infringement of their sovereignty, Art.51 aside, as they all consent on some level to the use of force within their borders.<sup>78</sup>

### ***Occurrence of an Armed Attack?***

Article 51 speaks of 'self-defence if an armed attack *occurs*', yet the leaked Department of Justice White Paper refers to 'an imminent threat of violent attack' in its criteria of when a lethal strike may lawfully proceed outside an area of active hostilities.<sup>79</sup> Evidently there is some difference between the actual occurrence, and the imminent threat of an armed attack. Whether self-defence can be engaged in such an anticipatory nature will be considered shortly. Firstly the term 'armed attack' should be considered, and as one might expect there is no universal or accepted definition. Some academics suggest a small border incident such as firing a shot at a patrol on the other side of an international border would suffice;<sup>80</sup> others submit the threshold for determination to be considerably higher.<sup>81</sup> The latter would appear more in line with the ICJ's interpretation in *Nicaragua*: 'if such operation because of its scale and effects, would have been classified as an armed attack rather than a mere frontier incident'.<sup>82</sup>

Despite it not being the Court's primary objective this statement suggests an 'armed attack' must go beyond a 'mere frontier incident'. Nevertheless this does not offer a conclusive test, problems can be found with the Court's cursory interpretation.<sup>83</sup> Dinstein finds particular issue with the idea of a frontier incident. He contends a rifle shot fired across an international border which hits only a cow or tree would not amount to an armed attack, but if the armed forces of one state ambush a border patrol of another, this, despite being a frontier incident, has to rank as an armed attack warranting a self-defensive response. He asserts it should be the scale and effect of the incident which must be considered before making a determination: anything more than 'trifling' is likely to pass the required threshold.<sup>84</sup> The existence of an armed attack is

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<sup>77</sup> Alleyne, R, 'Osama bin Laden found at the heart of Pakistan's military establishment', *The Telegraph*, 2 May 2011.

<sup>78</sup> Orr, 'Unmanned, Unprecedented, and Unresolved', p.736.

<sup>79</sup> US Department of Justice, *Lawfulness of a Lethal Operation*, p.1.

<sup>80</sup> Kunz, J, 'Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations', (1947) *41(4) The American Journal of International Law*, p.878.

<sup>81</sup> Casey-Maslen, 'Pandora's box?' p.602.

<sup>82</sup> ICJ, *Nicaragua v. United States of America* at para.195.

<sup>83</sup> Lubell, *Extraterritorial Use of Force*, pp.49-50.

<sup>84</sup> Dinstein, Y, *War, Aggression and Self-Defence*, (2005), p.195.

therefore not affected by its scale or effect, unless these are of a trifling nature, but the permitted self-defensive force will be, it should be proportionate to the ongoing danger posed.<sup>85</sup> This would seem tenable and all but endorsed by the ICJ in the subsequent *Case Concerning Oil Platforms*: 'The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the inherent right of self-defence'.<sup>86</sup> Seemingly the threshold is lower than some would suggest, but the determination would take place on a case-by-case basis. Whilst there is no question that 9/11 amounted to an armed attack, the US, some 13 years later is still acting in self-defence, but in an anticipatory manner to eradicate imminent threats, a policy expressly acknowledged in the leaked White Paper.<sup>87</sup>

### ***Anticipatory Self-Defence***

Drafting of the UN Charter began in San Francisco in spring 1945 with the aim 'to save succeeding generations from the scourge of war'.<sup>88</sup> The Charter codified, under Art.51, *when* inter-state force might be legally employed. The wording is somewhat ambiguous, although what *seems* clear is the Charter speaks of the possibility of self-defence only if an armed attack *occurs*. This seems perverse; even if a victim state has overwhelming evidence of a specific and imminent attack, it must still wait for the armed attack to take place before any recourse could be initiated under Art.51. Despite the Charter rightly wishing to restrain 'the threat or use of force'<sup>89</sup> this seems an absurdly narrow circumstance. Nonetheless, it was deliberate. Governor Stassen, a member of the US delegation stated: 'this was intentional and sound. We did not want exercised the right of self-defence before an armed attack had occurred.'<sup>90</sup> The provision appears at odds with the *Caroline Case*; widely cited as definitive as to the right of self-defence under customary international law. The ensuing diplomatic exchange between Britain and the US established two criteria for permissible self-defence: necessity and proportionality.<sup>91</sup> Proportionality simply prescribes that the self-defensive force employed is proportionate to the ongoing threat posed. Necessity was explained by Secretary of State Webster: 'necessity of that

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<sup>85</sup> Lubell, *Extraterritorial Use of Force*, pp.64-65.

<sup>86</sup> *Case Concerning Oil Platforms (ICJ, Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003 at para.72.

<sup>87</sup> US Department of Justice, *Lawfulness of a Lethal Operation*, pp.7-8.

<sup>88</sup> UN Charter Preamble.

<sup>89</sup> UN Charter Art.2(4).

<sup>90</sup> Minutes of 48<sup>th</sup> meeting of US delegation, SF (20 May 1945) 1 *Foreign Relations of the US* (1945) 813, p.818 quoted in Lubell, *Extraterritorial Use of Force*, (2011), p.56.

<sup>91</sup> Arend, A, 'International Law and the Pre-emptive Use of Military Force', (2003) 26(2) *The Washington Quarterly*, pp.90-91.

self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.<sup>92</sup>

Put simply, the state contemplating self-defence would need to show the use of force by the attacker was so imminent there was nothing other than forcible measures which would halt the attack. The criterion did not rule out acting in anticipation to a looming attack, although it would seem not to entertain the idea of pre-emptive action against future attacks which are neither specific nor imminent.<sup>93</sup> Whilst the customary test is difficult, although not impossible, to reconcile with Art.51<sup>94</sup> additional support can be found which reinforces this right to anticipatory self-defence. During the Cuban Missile Crisis of 1962, the US argued it should be allowed to initiate self-defensive action in advance of any Russian or Cuban use of force, regardless of UN Security Council authorization. The matter was discussed in the Security Council, and while in this case it was felt the criterion of necessity was not met, there was no express opposition to the notion of anticipatory self-defence.<sup>95</sup> Again during a Security Council debate concerning Israel's use of force against the United Arab Republic during the Six-Day War, there was no resistance to the general concept of anticipatory self-defence.<sup>96</sup> Indeed, Attorney General Lord Goldsmith confirmed: 'it has long been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent.'<sup>97</sup> Seemingly then anticipatory self-defence is widely accepted in order to respond to an *imminent* armed attack. However, the US appears to extend the notion of anticipatory self-defence, acting in a more remote, vague and *pre-emptive* manner.

### ***Pre-emptive Self-Defence***

Despite the US stating only those 'who pose an imminent threat of violent attack against the United States'<sup>98</sup> are targeted, very much in line with the principle of necessity, this is arguably not the case. Use of the word 'imminent' suggests at least superficial knowledge of an attack, yet the US contends 'the United States does not require...clear evidence that a specific attack

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<sup>92</sup> The Avalon Project, *British-American Diplomacy*, para.55.

<sup>93</sup> Lubell, *Extraterritorial Use of Force*, p.56.

<sup>94</sup> *Ibid*, p.58; Orr, 'Unmanned, Unprecedented, and Unresolved', p.740.

<sup>95</sup> Arend, 'International Law', p.94.

<sup>96</sup> *Ibid*, pp.94-95.

<sup>97</sup> Hansard HL Deb Vol.660 col.370, 21 April 2004.

<sup>98</sup> US Department of Justice, *Lawfulness of a Lethal Operation*, p.1.

on U.S. persons and interests will take place in the immediate future.<sup>99</sup> This widens the definition of imminent, relaxing the criterion of necessity laid down in the *Caroline* incident. Lubell notes this type of action to be pre-emptive rather than anticipatory self-defence; it is taken in the absence of information regarding a specific future event. Pre-emptive is therefore different to the notion of anticipatory self-defence which recognises a specific event which is known to be approaching 'leaving no choice of means, and no moment of deliberation.'<sup>100</sup> The US justifies this pre-emptive action by reference to the type of attacks modern terrorists are capable of, and that terrorist cells can so easily melt into the wider civilian environment immediately preceding an attack,<sup>101</sup> unlike the nature of a large scale military attack which would be easily recognisable and difficult to disguise.<sup>102</sup> The considerations appear in a 2005 Department of Defense report:

Terrorists have demonstrated that they can conduct devastating surprise attacks. Allowing opponents to strike first – particularly in an era of proliferation – is unacceptable. Therefore, the United States must defeat the most dangerous challenges early and at a safe distance, before they are allowed to mature.<sup>103</sup>

In addition terrorist attacks are usually aimed at civilian or 'soft targets' which are more difficult to defend than traditional military targets, potentially meaning that waiting for an attack to become imminent would not allow sufficient time to take appropriate self-defensive measures. The arguments are undoubtedly compelling, though at present there is little legal support to redefine self-defence in such a fashion.<sup>104</sup> The current position was enunciated by Lord Goldsmith during Parliamentary debate: 'international law permits the use of force in self-defence against an imminent attack but does not authorize the use of force to mount a pre-emptive strike against a threat that is more remote.'<sup>105</sup> He went on to state the concept of what constitutes an imminent armed attack will develop to meet new circumstances and threats. Perhaps this development is exactly what the US is currently in the process of, after all:

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<sup>99</sup> Ibid, p.7.

<sup>100</sup> The Avalon Project, *British-American Diplomacy*, para.55.

<sup>101</sup> US Department of Justice, *Lawfulness of a Lethal Operation*, p.7; Arend, 'International Law', p.98.

<sup>102</sup> For example: the amassing of troops and weaponry along or close to a border or the large scale movement of troops.

<sup>103</sup> *The National Defense Strategy of The United States of America*, (2005), p.9.

<sup>104</sup> Lubell, *Extraterritorial Use of Force*, p.61; for example: Israel was condemned for its pre-emptive use of force against the Osiraq nuclear reactor in Iraq; the threat was not of an imminent nature. Israel's immediate use of force breached international law (the criterion of necessity was not fulfilled) as it had not explored viable alternatives before resorting to force.

<sup>105</sup> Hansard HL Deb vol.660 col.370, 21 April 2004.

If you do something long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries...international law progresses through violations.<sup>106</sup>

Therefore whilst the US doctrine of pre-emptive self-defence is not consistent with current principles of international law, perhaps it is these very criteria which are at odds with modern day terrorist threats; 'neither WMD nor terrorist actors were envisioned in this framework [the UN Charter]'.<sup>107</sup>

### ***Self-Defence Against Whom?***

Grounding for the military response against al-Qaeda is found in the AUMF which specifically contemplates: 'nations, organizations, or persons [who] planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001'.<sup>108</sup> Drone strikes in Afghanistan and possibly Pakistan in the early days of the programme were specifically targeting those individuals.<sup>109</sup> However, with the expansion of the programme to Somalia and Yemen a distinct problem arises. The terrorists who are targeted in these countries are usually members of al-Shabaab, a nationalist group that has little in common with al-Qaeda, or al-Qaeda in the Arabian Peninsula (AQAP), who despite sharing a name are said to be quite independent of 'al-Qaeda proper'.<sup>110</sup> Whilst it is easy to assert these groups are affiliated or linked to al-Qaeda to accommodate a one-size-fits-all policy, in all likelihood they are not, and even if sufficient links could be established these groups were certainly *not* responsible for the 9/11 attacks.<sup>111</sup> This is significant: much of the US rhetoric talks of self-defence 'in response to the...9/11 attacks'<sup>112</sup> and targeting those who 'planned, authorized, committed or aided'<sup>113</sup> their commission, the aforementioned groups did not: 'those subsequent threats posed by different groups cannot be simply rolled into the 9/11 justification for the use of armed force against these states [Yemen and Somalia]'.<sup>114</sup>

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<sup>106</sup> Feldman, Y and Blau, U, 'Consent and advise', *Haaretz*, 29 January 2009, <http://www.haaretz.com/consent-and-advise-1.269127> 7 October 2014 – quoting Colonel Daniel Reisner, former head of the Israeli Defence Forces Legal Department.

<sup>107</sup> Arend, 'International Law', p.97.

<sup>108</sup> Authorization for the Use of Military Force (2001) s.2(a).

<sup>109</sup> Zenko, M, '10 Things You Didn't Know About Drones', *Foreign Policy*, April 2012, [http://www.foreignpolicy.com/articles/2012/02/27/10\\_things\\_you\\_didnt\\_know\\_about\\_drones](http://www.foreignpolicy.com/articles/2012/02/27/10_things_you_didnt_know_about_drones) 7 October 2014.

<sup>110</sup> Martin, 'Going Medieval', pp.245-246.

<sup>111</sup> Ibid, p.244.

<sup>112</sup> Koh, *The Obama Administration*, para.65.

<sup>113</sup> Authorization for the Use of Military Force (2001) s.2(a).

<sup>114</sup> Martin, 'Going Medieval', p.246.



It is not suggested here that these groups pose no threat to the US, but encapsulating them all in the same legal justification originally used to invade Afghanistan, depose the Taliban and target those responsible for 9/11, namely al-Qaeda, is problematic. It is submitted that to continue targeting these fragmented groups under the self-defensive justification the US must show these groups present a *separate* threat of imminent armed attack.<sup>115</sup> Clearly there are issues with the US reliance on self-defence to justify its recourse to force, namely the pre-emptive nature of many of the strikes, but with the current acquiescence of the discussed host states this is merely incidental, that is until consent is either withdrawn or withheld.

### **3 An Armed Conflict with al-Qaeda?**

*‘...like a tango, it takes two to war’*<sup>116</sup>

Two rights are potentially violated by any targeted killing: the territorial state’s sovereignty, and the targeted individual’s right to life. Compliance with Art.51 or host state consent says nothing about whether a targeted killing violates the individual’s right to life: this must be justified by recourse to either IHL or IHRL. Which regime applies will depend upon the legal characterisation of the situation where the strike occurs. The US clearly considers itself engaged in a global armed conflict with al-Qaeda<sup>117</sup> and those parties contemplated in the AUMF. If this assertion is correct its strikes must comply only with IHL,<sup>118</sup> effectively making them that much easier to justify. However, critics argue against this characterisation contending it is neither appropriate nor possible, and maintain a law enforcement response is more suitable in dealing with terrorism.<sup>119</sup>

Despite the Bush administration’s contention that the conflict with the AUMF parties was international in nature;<sup>120</sup> a curious assertion as an international armed conflict (IAC) can occur only between two or more states,<sup>121</sup> neither terror nor al-Qaeda are states. The current

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<sup>115</sup> Ibid, pp.247-248.

<sup>116</sup> Lubell and Derejko, ‘A Global Battlefield?’, (2013), p.78; although an armed conflict can involve three or more parties.

<sup>117</sup> Ratner, S, ‘Jus ad Bellum and Jus in Bello after September 11’, (2002) *96(4) The American Journal of International Law*, p.911.

<sup>118</sup> Heller, ‘One Hell of a Killing Machine’, p.109.

<sup>119</sup> O’Connell, M, ‘Unlawful Killing with Combat Drones’, (2010) *Notre Dame Law School Legal Studies Research Paper No. 09-43*, p.26.

<sup>120</sup> Vogel, ‘Drone Warfare’, p.113.

<sup>121</sup> Solis, *The Law of Armed Conflict*, p.150.

administration takes the position that it is actually a non-international armed conflict (NIAC),<sup>122</sup> following the Supreme Court's decision in *Hamdan v. Rumsfeld*.<sup>123</sup> What constitutes a NIAC must be examined before current US policy is considered. Neither the Geneva Conventions, of which only Common Art.3 applies to NIACs, nor the Additional Protocols accurately define armed conflict.<sup>124</sup> Art.1(2) Additional Protocol II merely states:

This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

What is now considered the authoritative test was established in *Tadic*<sup>125</sup> and later refined in *Boskoski*.<sup>126</sup> It is widely accepted a NIAC can exist between a state and a terrorist group or non-state actor;<sup>127</sup> however under the *Tadic* test the group must display an adequate level of organisation, and hostilities between the group and the state must attain an adequate level of intensity before a NIAC can be said to prevail.<sup>128</sup> Specifically, *Tadic* speaks of 'protracted armed violence between governmental authorities and organized armed groups'.<sup>129</sup> Therefore the US can only be involved in a NIAC with 'al-Qaeda, as well as the Taliban and associated forces'<sup>130</sup> if the various groups who call themselves, or are 'associated', with al-Qaeda can be considered an organised single party to the conflict, and whether hostilities between the US and 'al-Qaeda' reach an adequate level of intensity.<sup>131</sup> Unfortunately for the US problems can be noted with regard to both criteria.

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<sup>122</sup> Koh, *The Obama Administration*, para.57; Vogel, 'Drone Warfare', p.113; Lubell, *Extraterritorial Use of Force*, p.104.

<sup>123</sup> *Hamdan v. Rumsfeld* 548 U.S. 557 at 630.

<sup>124</sup> Orr, 'Unmanned, Unprecedented, and Unresolved', p.742; Solis, *The Law of Armed Conflict*, (2010), p.149.

<sup>125</sup> Emmerson, B, United Nations General Assembly, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, (2013, A/68/389), para.63; *Prosecutor v. Dusko Tadic*, Case No. IT-94-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (Appeals Chamber) at para.70.

<sup>126</sup> *Prosecutor v. Boskoski and Tarculovski*, Case No.IT-04-82-T, Judgment 10 July 2008 (Trial Chamber) at paras.175-206.

<sup>127</sup> Lubell, *Extraterritorial Use of Force*, p.121; Paulus, A and Vashakmadze, M, 'Asymmetrical war and the notion of armed conflict – a tentative conceptualization', (2009) 91(873) *International Review of the Red Cross*, pp.116-117.

<sup>128</sup> Solis, *The Law of Armed Conflict*, p.153.

<sup>129</sup> *Prosecutor v. Dusko Tadic*, Case No.IT-94-A at para.70.

<sup>130</sup> Koh, *The Obama Administration*, para.65.

<sup>131</sup> Heller, 'One Hell of a Killing Machine', p.110.

Firstly, those who support this categorisation of an armed conflict with al-Qaeda without boundaries<sup>132</sup> cite, at most, 15 attacks against American targets in the last 23 years. Most notably the 1996 bombing of the Khobar Towers American barracks in Saudi Arabia, the 2000 bombing of the *USS Cole* in a Yemini Harbour, and of course the attacks on the Pentagon and World Trade Center in 2001.<sup>133</sup> They also refer to numerous thwarted attacks, and al-Qaeda's open ambition to acquire a nuclear device whilst considering the intensity and nature of attacks in the aggregate.<sup>134</sup> This reasoning is debatable. First, it relies on reaching back through past years for evidence of attacks, despite the fact that Lubell notes determination of an armed conflict should focus more on current events and present hostilities.<sup>135</sup> Nevertheless, *Tadic* spoke of 'protracted armed violence' implying past events could be taken account of. However, it is usually asserted that the 'war' against al-Qaeda focuses upon 11 September 2001 as its starting point;<sup>136</sup> meaning reaching back further than this date becomes problematic. Second, is whether these acts, plots, and attacks cross the required threshold of intensity thus delineating an armed conflict. There is no conclusive answer to this point; some suggest this type of campaign to be precisely what Additional Protocol II to be referring when it mentioned 'sporadic acts of violence...as not being armed conflicts'.<sup>137</sup> Conversely others believe that attacks carried out by al-Qaeda, even since 11 September 2001, clearly meet the intensity threshold of a NIAC.

Since September 11<sup>th</sup>, 2001, there have been further brutal terrorist attacks in Bali (twice), Madrid, London, and Jordan. It is quite clear that the conflict with al-Qaeda is not an internal disturbance, nor is it isolated or sporadic.<sup>138</sup>

This is always going to be a contentious and relatively subjective test, yet it is submitted here, even after 9/11, that the level and frequency of attacks conducted by al-Qaeda are exactly what Additional Protocol II was drafted to apply.<sup>139</sup> Essentially, these very attacks are beyond the

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<sup>132</sup> Groves, S, The Heritage Foundation, *Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad*, (2013, Backgrounder #2788 on Terrorism), [http://www.heritage.org/research/reports/2013/04/drone-strikes-the-legality-of-us-targeting-terrorists-abroad#\\_ftn26](http://www.heritage.org/research/reports/2013/04/drone-strikes-the-legality-of-us-targeting-terrorists-abroad#_ftn26) 15 October 2014.

<sup>133</sup> Wedgwood, R, 'Al Qaeda, Terrorism, and Military Commissions', (2002) 96(2) *The American Journal of International Law*, p.330.

<sup>134</sup> Ibid; Groves, *Drone Strikes*, para.33.

<sup>135</sup> Lubell, *Extraterritorial Use of Force*, pp.116-117.

<sup>136</sup> Remarks by Alberto R. Gonzales, Counsel to the President, *Before the American Bar Association Standing Committee on Law and National Security*, Washington DC, (2004), p.3.

<sup>137</sup> O'Connell, ME, 'When Is a War Not a War? The Myth of the Global War on Terror', (2006) 12(2) *ILSA Journal of International and Comparative Law*, pp.537-538.

<sup>138</sup> Dalton, J, 'What is War? Terrorism as War after 9/11', (2006) 12(2) *ILSA Journal of International and Comparative Law*, p.527.

<sup>139</sup> Melzer, *Targeted Killing in International Law*, p.257.

ambit of law enforcement rules and methods,<sup>140</sup> they are to be dealt with militarily and as such reach the required threshold of intensity.

Notwithstanding the above a situation of armed conflict does not necessarily prevail. A second criterion must also be fulfilled; the parties to the conflict must display some degree of organisation.<sup>141</sup> In illustrating this point it is worth considering the Bush Administration's position with regard to the 'conflict', this is widely known and still referred to despite Obama's departure from the term, and for good reason.<sup>142</sup> In the days after 9/11 the US government coined the phrase; the Global War on Terror (GWOT) to characterise its response against those responsible, namely al-Qaeda. Initially the phrase was not analysed or even questioned; suffice to say 13 years later it has, and in abundance. Legally at least the term is erroneous. Terrorism cannot be considered a single party to a conflict, it is not an organised armed group as contemplated in *Tadic*:<sup>143</sup> 'No social phenomenon, whether terrorism, capitalism, nazism, communism, drug abuse or poverty can be a party to a conflict.'<sup>144</sup>

Despite distancing itself from the GWOT, the Obama administration is still behaving in a manner consistent with the Bush-era rhetoric. It has merely replaced terror with 'al-Qaeda...the Taliban and associated forces'. This, much like the GWOT, is precisely where the issue lies. Although it is submitted that attacks conducted by 'al-Qaeda' collectively reach the required threshold of violence necessary to delineate a NIAC, it is very difficult to attribute *all* these attacks to a single party or organisation known as 'al-Qaeda'.<sup>145</sup> As a minimum a party to a conflict must display a recognisable organisational structure.<sup>146</sup> In *Tadic* the ICJ spoke of 'individuals making up an organised and hierarchically structured group',<sup>147</sup> and whilst some suggest al-Qaeda in general to possess this level of organisation,<sup>148</sup> this is difficult to reconcile. Before the 2001 invasion of Afghanistan establishing this level of organisation *may* have been possible. Al-Qaeda at that

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<sup>140</sup> Ibid, p.256; Orr, 'Unmanned, Unprecedented, and Unresolved', p.752.

<sup>141</sup> Emerson, *Report of the Special Rapporteur*, para.63.

<sup>142</sup> Dudziak, M, 'This War Is Not Over Yet', *The New York Times – The Opinion Pages*, 15 February 2012; Shapiro, A, 'Obama Team Stops Saying 'Global War On Terror' But Doesn't Stop Waging It', *NPR*, 11 March 2013, <http://www.npr.org/blogs/itsallpolitics/2013/03/11/174034634/obama-team-stops-saying-global-war-on-terror-but-doesnt-stop-waging-it> 15 October 2014.

<sup>143</sup> Knoops, 'Legal, Political and Ethical Dimensions of Drone Warfare', p.707.

<sup>144</sup> Melzer, *Targeted Killing*, p.263.

<sup>145</sup> Heller, 'One Hell of a Killing Machine', p.110.

<sup>146</sup> Lubell, *Extraterritorial Use of Force*, pp.117-118.

<sup>147</sup> *Prosecutor v. Dusko Tadic*, Case No.IT-94-1-A, Judgment of 15 July 1999 (Appeals Chamber) at para.120.

<sup>148</sup> Orr, 'Unmanned, Unprecedented, and Unresolved', (2011), p.743.

point displayed a sort of hierarchical structure, possessing a 'chain of command' and 'a set of rules'.<sup>149</sup> However, with the subsequent invasion, and the recent killing of Osama bin Laden and many other key players,<sup>150</sup> this becomes increasingly difficult to establish. This view receives support from academics, Ken Anderson submits: 'Islamist terror appears to be fragmenting into loose networks of shared ideology and aspiration rather than tightly vertical organisations linked by command and control.'<sup>151</sup> Similarly Bruce Hoffman notes since 9/11 al-Qaeda: 'has become more an idea or a concept than an organization; an amorphous movement tenuously held together by a loosely networked transitional constituency rather than a monolithic, international terrorist organization with either a defined or identifiable command and control apparatus.'<sup>152</sup>

Whilst criticism will always emanate from academic circles it would seem even the FBI agrees. The then Director, Robert Mueller, characterised al-Qaeda as a 'three-tiered threat' with the core al-Qaeda organisation as the top tier, a middle tier of: 'small groups who have some ties to an established terrorist organization, but are largely self-directed. Think of them as al-Qaeda franchises – hybrids of homegrown radicals'. In this respect he notes the 7/7 bombers as an example of this middle tier, and a bottom tier who: 'are self-radicalizing, self-financing, and self-executing. They have no formal affiliation with al-Qaeda, but they are inspired by its message of violence.'<sup>153</sup>

Clearly there are difficulties in contending that all incidents and attacks are conducted by a single party or organisation, explicitly evidenced in the difficulties security services faced in connecting the attacks in Madrid in 2004 and London in 2005.<sup>154</sup> Therefore unless receiving inspiration from the same source would establish 'an organised and hierarchically structured group' it is not possible to gather all acts, plots and attacks against the US into a single armed

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<sup>149</sup> *Prosecutor v. Dusko Tadic*, at para.120; Sude, B, The New America Foundation, *Al-Qaeda Central: An Assessment of the Threat Posed by the Terrorist Group Headquartered on the Afghanistan-Pakistan Border*, (2010, Counterterrorism Strategy Initiative Policy Paper), p.2.

<sup>150</sup> Roggio, B and Mayer, A, The Long War Journal, *Senior al Qaeda and Taliban leaders killed in US airstrikes in Pakistan, 2004-2014*, (2014), <http://www.longwarjournal.org/pakistan-strikes-hvts.php> 15 October 2014.

<sup>151</sup> Anderson, K, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, (2009), Working Paper of the Series on Counterterrorism and American Statutory Law), p.4.

<sup>152</sup> Hoffman, B, 'The Changing Face of Al Qaeda and the Global War on Terrorism', (2010) 27(6) *Studies in Conflict & Terrorism*, p.552.

<sup>153</sup> Mueller, R, *From 9/11 to 7/7: Global Terrorism Today and the Challenges of Tomorrow*, (2008, Transcript of Chatham House Event), p.3, <http://www.chathamhouse.org/sites/default/files/public/Meetings/Meeting%20Transcripts/070408mueller.pdf> 15 October 2014.

<sup>154</sup> Lubell, *Extraterritorial Use of Force*, p.119.

conflict, much like terror 'al-Qaeda' in the aggregate cannot be a party to a conflict.<sup>155</sup> This reasoning however, does not necessarily mean the US cannot be involved in NIACs with specific terrorist groups, whether al-Qaeda affiliated or not, in specific geographical regions, provided the above criteria are met.<sup>156</sup> If this is in fact the case IHL would still apply to these localised NIACs. Accordingly, it is widely accepted the US is currently participating in a NIAC with al-Qaeda in Afghanistan.<sup>157</sup> Additionally most commentators accept there are currently NIACs in Somalia, between the Transitional Federal government and al-Shabaab,<sup>158</sup> and in Yemen, between the Yemeni government and AQAP.<sup>159</sup> The US is participating in both conflicts with the apparent consent of the respective governments.<sup>160</sup> Drone strikes occurring within these territories then are governed by IHL – that is those strikes occurring after the NIACs began.<sup>161</sup> The situation in Pakistan is anything but straightforward; is there a separate NIAC, is the neighbouring conflict in Afghanistan spilling over the border, or is there no armed conflict at all? The International Committee of the Red Cross (ICRC) completely discounts the possibility of targeting persons directly participating in hostilities who are located in non-belligerent states, i.e. members of al-Qaeda located in Pakistan who routinely involve themselves in the NIAC in Afghanistan:<sup>162</sup>

Advising otherwise would mean that the whole world is potentially a battlefield and that people moving around the world could be legitimate targets under international humanitarian law wherever they might be.

The ICRC's reasoning is clear; but it is at odds with academic opinion and actual state practice.<sup>163</sup> Examples of extraterritorial spill-over include the Vietnamese conflict during the 1960-70s which spilt over into neighbouring Cambodia; the Rwandan conflict during the 1990s which spread to the territory of the Democratic Republic of Congo; and the 2006 Israeli

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<sup>155</sup> Ibid, pp.119-120; Milanovic, M and Hadzi-Vidanovic, V, 'A Taxonomy of Armed Conflict', (2012) *Research Handbook on International Conflict and Security Law*, p.47.

<sup>156</sup> Melzer, *Targeted Killing*, p.267; Heller, 'One Hell of a Killing Machine', p.111.

<sup>157</sup> Lubell, *Extraterritorial Use of Force*, p.121; Geiß, R and Siegrist, M, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities', (2011) 93(881) *International Review of the Red Cross*, p.13.

<sup>158</sup> Milanovic and Hadzi-Vidanovic, 'A Taxonomy', p.31.

<sup>159</sup> Chesney, R, Lawfare, *Reactions to the ACLU Suit: There is Armed Conflict in Yemen, and the US Is Party to it*, (2012), para.4, <http://www.lawfareblog.com/2012/07/reactions-to-the-aclu-suit-there-is-armed-conflict-in-yemen-and-the-us-is-party-to-it/#.UtKHldJdWZs> 16 October 2014.

<sup>160</sup> Heller, 'One Hell of a Killing Machine', p.111.

<sup>161</sup> Lubell and Derejko, 'A Global Battlefield?' pp.78,83.

<sup>162</sup> International Committee of the Red Cross Resource Centre, *The use of armed drones must comply with laws*, (2013), para.11, <http://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm> 16 October 2014.

<sup>163</sup> Melzer, *Targeted Killing*, p.259; Lubell and Derejko, 'A Global Battlefield?' p.77.

offensive against Hezbollah in Lebanon.<sup>164</sup> As Bassiouni notes: 'the laws of armed conflict are not geographically bound',<sup>165</sup> and whilst IHL should not be applied *globally*, as the US advances, a middling approach would seem logical. To allow terrorists to partake in a neighbouring NIAC and not then be subject to IHL themselves, either because their involvement took place from a non-belligerent state, or because they have subsequently crossed an international border would seem *objectionable*.<sup>166</sup> Lubell and Derejko perhaps advocate the most coherent approach, where the targeted individual would fall under IHL relevant to the neighbouring armed conflict. They contend a nexus must be established between the individual and the relevant armed conflict by considering three criteria:

- 1 The target's geographical distance from the primary sphere of hostilities.
- 2 The level and nature of military operations occurring at the target area.
- 3 The link between the target and an already occurring armed conflict.<sup>167</sup>

The criteria would seem to limit the pervasive spread of IHL, whilst also affording those engaged in a specific conflict a common-sense approach to where individuals may be targeted. The issue is anything but agreed upon; however the above finds support with the majority of commentators.<sup>168</sup> Milanovic submits:

if there is a sufficient nexus between an ongoing NIAC and military operations that are occurring outside the areas in which the conflict and 'protracted armed violence' normally take place, these military operations will nevertheless be understood as part of the overall armed conflict. This reasoning can be extended by analogy to military operations *outside* the state.<sup>169</sup>

It is therefore asserted the majority of US drone strikes are likely governed by IHL; the strikes take place in locations where the US is participating in NIACs.<sup>170</sup> However, the US standpoint that *every* drone strike *anywhere* in the world is governed by IHL is legally problematic; a strike occurring outside an area of recognised armed conflict and without a sufficient nexus will be

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<sup>164</sup> Melzer, *Targeted Killing*, p.260.

<sup>165</sup> Bassiouni, C, 'Legal Control of International Terrorism: A Policy-Orientated Assessment', (2002) 43(1) *Harvard International Law Journal*, p.99.

<sup>166</sup> Milanovic and Hadzi-Vidanovic, 'A Taxonomy', pp.31-32.

<sup>167</sup> Lubell and Derejko, 'A Global Battlefield?', p.77.

<sup>168</sup> Schmitt, M, 'Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate', (2012) 30 *Boston University International Law Journal*, pp.604-605; Melzer, *Targeted Killing*, p.261; Lubell and Derejko, 'A Global Battlefield?', p.77; Heller, 'One Hell of a Killing Machine', p.111; Lubell, *Extraterritorial Use of Force*, p.103; Knoops, 'Legal, Political and Ethical Dimensions of Drone Warfare', p.706; Vogel, 'Drone Warfare', p.130.

<sup>169</sup> Milanovic and Hadzi-Vidanovic, 'A Taxonomy', p.32.

<sup>170</sup> Casey-Maslen, 'Pandora's box?', p.609; Afghanistan, Somalia, Yemen and Pakistan – as part of the neighbouring NIAC in Afghanistan.

regulated by IHL.<sup>171</sup> With the US' apparent intention to expand the programme further to encompass al-Qaeda in the Islamic Maghreb targets in North Africa, who have little or no 'involvement [with] al-Qaeda's central leadership in Pakistan', the question of which legal sphere operations fall under will become increasingly salient.<sup>172</sup>

#### **4 Drone Strikes under IHL's Cardinal Principles**

*'...the laws of war are not the laws of cricket and there is nothing 'unsporting' in not putting your pilots at risk.'*<sup>173</sup>

The US consistently notes that all targeting operations are 'conducted consistently with law of war principles' and 'great care is taken to adhere to these principles in both planning and execution'.<sup>174</sup> In light of these statements and the above conclusions, the US' use of lethal drone strikes will be considered in line with the cardinal principles of the *jus in bello*. Unlike the *jus ad bellum*, which governs the initial resort to force, the *jus in bello* determines the legality of individual operations. The analysis is highly strike and fact-specific, each and every strike must be weighed against these principles. Therefore, whilst the legality of specific strikes will likely be out-of-reach, owing to a lack of knowledge of US targeting decisions and strike results, the principles will be discussed contemplating the programme in the aggregate.

##### ***Military Necessity***

Military necessity is related to the primary aim of armed conflict, it is the very principle which drives targeting operations.<sup>175</sup> Necessity accepts the reality of conflict and can be defined as: 'that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.'<sup>176</sup>

The principle is of a customary nature and is referred to in Additional Protocol I, Art.23(g) Hague IV and Art.8 Rome Statute.<sup>177</sup> It applies to both IACs and NIACs, to states and non-state actors

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<sup>171</sup> Heller, 'One Hell of a Killing Machine', p.112.

<sup>172</sup> Barnes, J and Gorman, S, 'U.S. to Boost Effort Against al Qaeda Affiliate', *The Wall Street Journal*, 30 September 2012.

<sup>173</sup> Rozenberg, 'Drone Dialogue', para.1.

<sup>174</sup> Koh, *The Obama Administration*, paras.66,69.

<sup>175</sup> Corn, G *et al*, *The Law of Armed Conflict: An Operational Approach*, (2012), p.116.

<sup>176</sup> US Department of the Army Field Manual, *The Law of Land Warfare*, (1956, FM 27-10), para.3.

<sup>177</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, 36 Stat. 2277, 205 Consol. TS 277 [Hague IV]; Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art.8(2)(b)(xiii)



alike.<sup>178</sup> Essentially: 'military necessity justifies the application of force not forbidden by International Law, to the extent necessary, for the realization of the purpose of armed conflict.'<sup>179</sup> Accordingly, necessity can be analysed and concluded relatively easily. Given that senior officials have referred to strikes as 'very effective' and 'the only game in town in terms of confronting or trying to disrupt the al-Qaeda leadership',<sup>180</sup> coupled with the difficulties faced in inserting ground troops into the remote and dangerous locations in which drones are deployed,<sup>181</sup> the US would almost certainly contend that drones offer 'a definite military advantage'<sup>182</sup> and 'are indispensable for securing the complete submission of the enemy as soon as possible.' This would seem a reasonable assertion, although very much essential, as drones become an increasingly central part of the US military arsenal. To this end drones are no different from any other weapons platform. Each individual application must be analysed by the commander or operator, and they must answer in the affirmative whether the strike offers a distinct military advantage for the accomplishment of the goal.<sup>183</sup> However, the principle must be weighed against relevant international law, specifically the remaining IHL principles.

### ***Humanity/Unnecessary Suffering***

The principle of humanity provides a counter-balance to the necessities of war. It ensures a balance between hostile measures taken to subdue the enemy and the obligation to limit the associated suffering of armed conflict.<sup>184</sup> Humanity requires the parties to exercise restraint when an act would cause unnecessary suffering or injury, even if the act would satisfy the other principles of IHL.<sup>185</sup> Humanity is reflected in numerous treaty provisions,<sup>186</sup> notably in Common Art.3 of the Geneva Conventions of 1949. Humanity is therefore equally applicable to IACs and NIACs.<sup>187</sup> There is no evidence to suggest a drone strike would cause any more suffering or

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<sup>178</sup> Alston, *Report of the Special Rapporteur*, para.30.

<sup>179</sup> Office of the Judge Advocate General, Canadian Defense Forces, *Joint Doctrine Manual, Law of Armed Conflict: At the Operational and Tactical Levels*, (2001, B-GJ-005-104/FP-021), para.202.2.

<sup>180</sup> 'U.S airstrikes in Pakistan called 'very effective'', CNNPolitics.com, 18 May 2009.

<sup>181</sup> Shalal-Esa, A, 'Helicopter loss in bin Laden raid highlights risks', *Reuters*, 3 May 2011; Gorman, R and Zennie, M, 'SEAL Team 6 in daring raid after mall massacre: Troops attack Somali terror stronghold as Delta Force commandos simultaneously capture mastermind of 1998 US Embassy bombing in Libya', *Mail Online*, 6 October 2013.

<sup>182</sup> Art.52.2.

<sup>183</sup> Vogel, 'Drone Warfare', p.116.

<sup>184</sup> Corn, *et al*, *The Law of Armed Conflict*, (2012), p.117.

<sup>185</sup> Vogel, 'Drone Warfare', p.128.

<sup>186</sup> Hague IV Arts.22,23; Additional Protocol I Art.35; US Department of the Army Field Manual, (1956), paras.33,34.

<sup>187</sup> Corn, *et al*, *The Law of Armed Conflict*, p.118; Meyrowitz, H, 'The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977', (1994) 299 *International Review of the Red Cross*, pp.121-122.

injury than more traditional forms of aerial bombardment.<sup>188</sup> On the contrary, the majority of missiles fired from drones are said to have a smaller blast radius than munitions deployed from conventional platforms.<sup>189</sup> Nevertheless, it is not the munitions deployed that draw criticism; it is the locations in which they are deployed. Terrorists intentionally hide in civilian locations, purposely failing to distinguish themselves from the general population; they *deliberately* fail to wear any sort of 'uniform' to complicate identification. This has led to collateral damage, and it is this which irks critics.<sup>190</sup> However, there is no evidence to suggest drone strikes cause 'superfluous injury or unnecessary suffering'<sup>191</sup> compared with other available means. In fact utilising a drone which provides increased loiter times, reduced munitions damage and a real-time video feed will likely lead to a more precise and distinguishing attack, consequently reducing any collateral damage and unnecessary suffering. Therefore unless capture is feasible, which the US supposedly monitors, or a less injurious method is practicable, drone strikes are unlikely to violate the principle of humanity.

### ***Proportionality***

The very existence of the principle of proportionality is acceptance that collateral damage to civilians and civilian objects will inevitably occur during armed conflict. Much like necessity it accepts the realities of war and aims to 'minimize civilian casualties, not to eliminate them altogether.'<sup>192</sup> The principle is considered customary in nature and is codified in Art.51.5(b) and 57.2(b) Additional Protocol I. Respectively, the Articles relate to civilian protection generally, and necessary precautions to be taken in an attack on a military objective. The US Army Field Manual defines proportionality simply: 'loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.'<sup>193</sup> Essentially, any incidental harm to civilians or civilian objects must not outweigh the military advantage *expected* to be gained. The principle is not judged with the benefit of hindsight, but from the perspective of the-would-be attacker. The question is not whether the

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<sup>188</sup> Vogel, 'Drone Warfare', p.128, such as fast jets, artillery or cruise missiles.

<sup>189</sup> Casey-Maslen, 'Pandora's box?' p.607; United States Air Force, *MQ-1B Predator*, (2010), para.4, <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx> 16 October 2014; the AGM-114 Hellfire is said to provide low-collateral damage capabilities, however the GBU-12 Paveway II and GBU-38 JDAM capable of being deployed by the MQ-9 Reaper would likely have a larger blast radius owing to their increased size.

<sup>190</sup> In this sense humanity links in with the remaining cardinal principles of IHL, distinction and proportionality.

<sup>191</sup> Art.35.2.

<sup>192</sup> Dinstein, Y, 'Discussion: Reasonable Military Commanders and Reasonable Civilians', in Wall, A, (ed), *International Law Studies, 78 Legal and Ethical Lessons of NATO's Kosovo Campaign*, p.219.

<sup>193</sup> US Department of the Army Field Manual, (1956), para.41.

*actual* harm was excessive, but had the situation been as the attacker reasonably believed it to be, based on the intelligence, would the harm have been excessive?<sup>194</sup> This position is reinforced by use of the word ‘expected’ in Additional Protocol I. The archetypal example is a drone strike on a building thought to hold a senior al-Qaeda member, for argument’s sake let us say Osama bin Laden. The attacker possesses reliable intelligence that Osama is at home along with three civilians. He reasonably believes no other alternatives exist to a drone strike, and Osama will escape if the attack is delayed. Most would consider this attack to be proportionate, the collateral damage is not excessive compared to the concrete military advantage *expected* to be gained. Nonetheless, unbeknown to the attacker Osama has escaped and three more civilians have entered the house. The attack goes ahead and kills six civilians and no al-Qaeda members. In this case, the actual results of the attack have no bearing on its legality; it is proportionate based on the preceding reasonable judgment of the attacker.<sup>195</sup>

Whilst potentially making US strikes that much easier to justify, legally at least, another facet must be considered. Proportionality relies on the term ‘excessive’; yet there is no accepted definition of what harm is deemed excessive. The ICRC-published commentary on the Additional Protocols states; when there is hesitation between civilian losses and the anticipated military advantage, interests of the civilian population should prevail *and* that civilian harm should never be extensive. Determining what is excessive is clearly open for interpretation, the military advantage expected to be gained must simply be weighed against incidental civilian harm, which must never be ‘extensive’.<sup>196</sup> In this respect different countries’ interpretations of what is considered excessive seem to differ wildly.<sup>197</sup> Whilst the UK seemed to suggest the deaths of four Afghan civilians during a Reaper strike, which killed two insurgents and destroyed a large quantity of explosives, may have been disproportionate to the military advantage gained, the US appears to take a differing view.<sup>198</sup> In June 2009, the CIA killed a Pakistan Taliban Commander, Khwaz Wali Mehsud. The US planned to use his body as bait to target Baitullah Mehsud, the then leader of the Pakistan Taliban, who was expected to attend the funeral. Reportedly up to 5,000 people attended, not only Taliban fighters but also civilians. US drones struck, killing as many as 83 people. Reportedly up to 45 civilians were killed, including ten

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<sup>194</sup> Schmitt, ‘Drone Attacks’, p.322.

<sup>195</sup> *Ibid*, p.321.

<sup>196</sup> Sandoz, Y *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987), paras.1979-1980.

<sup>197</sup> Casey-Maslen, ‘Pandora’s box?’, p.613.

<sup>198</sup> Hopkins, N, ‘Afghan civilians killed by RAF drone’, *The Guardian*, 5 July 2011.

children and four tribal leaders. Baitullah escaped unharmed.<sup>199</sup> Despite during US counter-insurgency operations proportionality is 'calculated not in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained',<sup>200</sup> this would still seem to be precisely what the ICRC commentary was referring to by 'extensive' incidental losses or damages, even considering Baitullah's rank. Even if these losses were not deemed *extensive*, most would consider this type of attack to cause excessive loss of life and damage to property incidental to the 'concrete and direct military advantage expected to be gained.'<sup>201</sup> It is simply not possible to assess every strike conducted under the programme, although what is known is alarming. It should be noted news reports have been relied upon to analyse the issue, and facts are often difficult to ascertain in the remote regions in which strikes are carried out. Nevertheless, based on the above and the lacuna of official reports, the US has very probably breached this cardinal principle of IHL.<sup>202</sup>

### ***Distinction***

The concept of distinction is perhaps the most significant battlefield principle.<sup>203</sup> It is considered customary in nature<sup>204</sup> and simply obligates combatants to distinguish between lawful objects of attack and all other persons, places and things in the battle-space.<sup>205</sup> Additional Protocol I Art.48, states: 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives'.<sup>206</sup> Art.52.2 defines military objectives, while Arts.51.4 and 51.5 prohibit and define indiscriminate attacks. Art.13 Additional Protocol II, specific to NIACs, provides for civilian protection, albeit in diluted form. The principle seems clear; a drone operator may target only combatants and military objectives.<sup>207</sup> Targeting civilians and civilian objects is explicitly prohibited. However, a specific term serves to muddy

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<sup>199</sup> Woods, C and Lamb, C, *The Bureau of Investigative Journalism, CIA tactics in Pakistan include targeting rescuers and funerals*, (2012), paras.24-27  
<http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/> 17 October 2014.

<sup>200</sup> US Department of the Army Field Manual, *Counterinsurgency*, (2006, FM 3-24), para.7-30 quoted in Vogel, 'Drone Warfare', p.125.

<sup>201</sup> US Department of the Army Field Manual, (1956), para.41.

<sup>202</sup> Crilly, R, 'More Pakistanis killed by drones than US admits, UN claims', *The Telegraph*, 19 October 2013.

<sup>203</sup> Solis, *The Law of Armed Conflict*, p.251.

<sup>204</sup> Melzer, *Targeted Killing*, p.311.

<sup>205</sup> Corn, *et al*, *The Law of Armed Conflict*, p.120.

<sup>206</sup> See Spieker, H, 'Civilian Immunity' in Gutman, R *et al*, (eds), *Crimes of War: What the Public Should Know*, (2007), p.103.

<sup>207</sup> It is acknowledged that the term combatant is not used in situations of NIAC, however the term is employed here to encompass those who are members of the organised armed group and those civilians who directly participate in hostilities and thus may be targeted.

the waters. Both Additional Protocols forbid the targeting of civilians 'unless and for such time as they take a direct part in hostilities',<sup>208</sup> thus civilians must never be targeted *unless* they have forfeited their protected status by directly participating in hostilities (DPH).<sup>209</sup> The major difficulty in the majority of counter-insurgency operations 'is that the line between combatant and civilian, and military objective and civilian object is often blurry and undefined'.<sup>210</sup> The enemy *intentionally* fails to distinguish himself from the civilian population in an attempt to garner protection, thus making distinction a demanding task. To determine whether US strikes comply with the principle it must be decided whether they distinguish sufficiently between combatant and civilian, and whether strikes are conducted indiscriminately.

**i) *Distinction between Combatant and Civilian***

During a NIAC the US must ensure it targets only members of the organised armed group the US is involved in the conflict with, and civilians who DPH. The difficulty is most terrorists, at least relevant to this discussion, either pose as civilians or co-locate themselves within the general population.<sup>211</sup> Additionally many of their operations target civilians, with some utilising civilians in an attempt to protect themselves directly.<sup>212</sup> Thus simply distinguishing terrorists from civilians becomes a gruelling task; direct participation in hostilities further complicates the analysis. This makes deciding exactly *when* those who DPH may be targeted all the more important, and as one may imagine divergent opinions exist.<sup>213</sup> In an effort to clarify the situation the ICRC released interpretative guidance regarding the subject. The controversial report makes the distinction between members of organised armed groups belonging to a non-state party who assume a 'continuous combat function', and civilians who directly participate in hostilities.<sup>214</sup> Those who perform a continuous combat function, meaning they *continually* assume a function involving DPH, may be targeted for as long as their integration within the organisation lasts. The latter who participate 'on a merely spontaneous, sporadic or

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<sup>208</sup> Art.51.3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, 8 June 1977, 1125 UNTS 609 [Additional Protocol II], entered into force 7 December 1978 Art.13.3.

<sup>209</sup> Melzer, *Targeted Killing*, p.341.

<sup>210</sup> Vogel, 'Drone Warfare', (2010), p.118.

<sup>211</sup> The term terrorist is used here to define members of the organised armed group who assume a continuous combat function and are thus always targetable, for example: members of AQAP, but not civilians who directly participate in hostilities.

<sup>212</sup> Schmitt, M, 'Human Shields in International Humanitarian Law', (2009) *47 Columbia Journal of Transnational Law*, pp.295-296.

<sup>213</sup> Melzer, *Targeted Killing*, p.333; Alston, *Report of the Special Rapporteur*, para.59; Schmitt, M, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', (2010) *1 Harvard National Security Journal*, pp.5-44.

<sup>214</sup> Melzer, N, International Committee of the Red Cross, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, (2009), part I para.II.

unorganized basis, or who assume exclusively political, administrative or other non-combat functions'<sup>215</sup> may only be attacked for such time as they actually DPH.<sup>216</sup> The distinction is hardly decisive with little apparent difference between a continuous combat function and DPH, other than the duration of participation, and perhaps the level of integration within the group.

The US, unsurprisingly, appears to make no such distinction. Former Legal Advisor Koh asserted, 'individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law'<sup>217</sup> meaning they are targetable at any point.<sup>218</sup> There was no recognition of the combat function performed by the individual, which supposedly determines *when* and *if* they may be targeted. One would also assume, based on reports that military-age males in areas of known terrorist activity qualify as lawful targets,<sup>219</sup> the US would consider a civilian who directly participates, even on a sporadic basis, as a member of the armed group<sup>220</sup> and therefore targetable at any point, not merely during that moment of participation. This is perhaps not as controversial as one might imagine, Professor Dinstein contends:

a person is not allowed to wear simultaneously two caps: the hat of a civilian and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant. He is a combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status.<sup>221</sup>

Whilst this statement is made with regard to IACs, why should a civilian who DPH during a NIAC be treated any differently? Thus the ICRC's position is somewhat problematic. It seemingly affords individuals the best of both worlds: the ability to fight against the US, and the protections granted to civilians once the hostile act is completed. The guidance is somewhat skewed and appears to offer the non-state actor and civilian who DPH more protection than their adversaries,<sup>222</sup> not to mention almost shackling the US to a law enforcement paradigm of when 'civilians' may be targeted.<sup>223</sup> As Vogel asserts, the ICRC stance 'seems to misunderstand

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<sup>215</sup> Ibid, part II p.34.

<sup>216</sup> Ibid, part I para.VII

<sup>217</sup> Koh, *The Obama Administration*, para.71.

<sup>218</sup> Maxwell, 'Rebutting the Civilian Presumption', p.38.

<sup>219</sup> Becker, J and Shane, S, 'Secret Kill List Proves a Test of Obama's Principles and Will', *The New York Times*, 29 May 2012.

<sup>220</sup> Heller, 'One Hell of a Killing Machine', pp.105-106.

<sup>221</sup> Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, p.29.

<sup>222</sup> Schmitt, 'The Interpretive Guidance', p.44.

<sup>223</sup> Parks, W, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', (2010) *42 International Law and Politics*, p.797.

grossly the nature of the AUMF conflict<sup>224</sup> where terrorists routinely remove themselves from the physical battle to regroup, retrain and join sleeper cells.<sup>225</sup> Presumably these activities would not qualify as DPH, but to then afford these persons civilian status merely because they have momentarily set down their arms and been re-tasked would seem unconscionable. It is asserted here that those who DPH, no matter the length of participation, may be targeted at any subsequent point. They may not drop arms once confronted and claim civilian protection, 'for it is manifest that he who fights should be hung if he fights with a gun in one hand and a purwana [a permit given to civilians for their protection] in the other'.<sup>226</sup> Whether US strikes distinguish sufficiently depends upon which view is taken. If the ICRC's stance is adhered to those that occur away from traditional skirmishes with US forces, where the targeted individual is not engaged in a hostile act, would likely breach the principle. However, if one were to take the view propounded here: that those who DPH, no matter the length of participation, are to be considered members of the organised armed group and thus targetable at any point, the US can more easily be said to observe the principle.

**ii) Are Drone Strikes Indiscriminate?**

An indiscriminate attack is one in which the attacker takes no measures to ensure non-military objectives are not targeted, where the means and methods employed cannot be sufficiently directed, or whose effects cannot be limited.<sup>227</sup> Even if strikes sufficiently distinguish between civilian and combatant the US must still ensure they are conducted discriminately to comply with the principle of distinction.<sup>228</sup> Additional Protocol I Art.57, again considered to reflect customary law, states 'constant care' and 'all feasible precautions' shall be taken to spare the civilian population and civilian objects. An attacker must do 'everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects'.<sup>229</sup> Provided the attacker complies with this requirement and still has reasonable grounds to believe the target is a combatant, or a military object, the attack is lawful.<sup>230</sup> Attackers must therefore utilise the optimum means available to verify the status of the target, although the means must also make sense militarily. In this respect drones, which offer extensive loiter times and possess high quality video feeds, should offer the attacker enhanced target recognition capabilities. However,

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<sup>224</sup> Vogel, 'Drone Warfare', p.121.

<sup>225</sup> Ibid; GlobalSecurity.org, *Al-Qaida/Al-Qaeda Sleeper Cells*, (2012), <http://www.globalsecurity.org/military/world/para/al-qaida-sleeper-cells.htm> 17 October 2014.

<sup>226</sup> Kipling, R, *A Sahib's War and Other Stories*, (1971), p.19.

<sup>227</sup> Gutman, R and Kuttub, D, 'Indiscriminate Attack' in Gutman, *Crimes of War*, pp.239-240.

<sup>228</sup> Vogel, 'Drone Warfare', p.122.

<sup>229</sup> Art.57.2(a)(i).

<sup>230</sup> Schmitt, 'Drone Attacks', p.322.

if it makes military sense the drone should be teamed with other assets to ensure only the correct objectives are targeted.<sup>231</sup> In addition the method of attack must minimise harm to civilians and civilian objects; that is to the extent that no military advantage is sacrificed. Despite the criticism, drones *are* precise. They offer dramatically enhanced loiter times,<sup>232</sup> increased processing power and video imagery,<sup>233</sup> whilst additionally deploying low blast radius munitions. This increased precision *should* allow for far more distinguishing strikes compared with current alternatives; however it is ultimately US policy which determines levels of discrimination. Furthermore, Art.57.2(c) prescribes: 'effective advance warnings shall be given of attacks which may affect the civilian population, unless circumstances do not permit.' However, it is roundly accepted the need for surprise in certain attacks precludes the issuance of warnings.<sup>234</sup> In most drone strikes the need for surprise is critical to the mission's success; otherwise the target would simply flee. Therefore the need for advance warnings is thus negated. Drone technology has the potential to provide far more discriminating strikes compared with current alternatives. A drone can monitor a target for increased periods of time, striking only when the target is a distance from civilians and civilian objects, whilst also utilising low collateral damage munitions. Where civilians are killed it is not the fault of the technology, more the people and *policy* behind it.<sup>235</sup> Clearly then, drones should enhance levels of distinction, however the indiscriminate nature of some strikes mean the US has, at times, undoubtedly breached this fundamental principle.

## **5 Drone Strikes under IHRL**

*'Outside the context of armed conflict, the use of drones for targeted killings is almost never likely to be legal.'*<sup>236</sup>

Whilst most US strikes likely take place in situations of armed conflict the legal implications of a strike occurring away from such an area must be considered. Initially, it must be acknowledged

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<sup>231</sup> Ibid; for example: troops on the ground to provide additional target recognition. However, it must be considered the areas in which drones are usually deployed are remote and dangerous; it would not make sense militarily to deploy troops to these areas simply to aid in target recognition. In these scenarios it is the drone which makes sense militarily and therefore its video feed must be relied upon.

<sup>232</sup> Predator and Reaper drones can remain aloft for over 14 hours compared to four hours or less for an F-16 fighter jet.

<sup>233</sup> Singer, *Wired for War*, pp.397-398.

<sup>234</sup> Program on Humanitarian Policy and Conflict Research at Harvard University, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, (2010, Version 2.1), Section G II 37.6, p.133.

<sup>235</sup> Singer, *Wired for War*, p.398.

<sup>236</sup> Alston, *Report of the Special Rapporteur*, para.85.



the US consistently denies that IHRL applies extraterritorially,<sup>237</sup> instead arguing US domestic law, specifically the AUMF, would regulate any strike not governed by IHL.<sup>238</sup> This position has been argued against, and rightly so.<sup>239</sup> With no armed conflict in progress IHL would not apply to the targeted killing, and under the US admission IHRL would also not apply due to the killing taking place outside the US. Thus, in the absence of an armed conflict, those killed extraterritorially would have no protection under international law: an unacceptable position. The right to life is fundamental and is protected by every major IHRL instrument.<sup>240</sup> Nevertheless, the right is not absolute and individuals are only protected against being 'arbitrarily'<sup>241</sup> killed. A killing is not arbitrary provided the lethal force was both proportionate and necessary,<sup>242</sup> proportionate in the sense the force was required to protect life, and necessary in the sense that no other alternative, such as capture and arrest, could prevent that threat to life.<sup>243</sup> Essentially, a state may only use lethal force when a suspect poses an imminent threat to the lives of others, and when no other means can prevent that threat. The criterion of imminence ensures lethal force can only be employed against those who genuinely intend to launch an attack; it cannot be used simply because the suspect cannot be apprehended.<sup>244</sup>

Special Rapporteur Alston and various human rights groups suggest a targeted killing conducted using an armed drone could never be legal under IHRL.<sup>245</sup> This is incorrect.<sup>246</sup> There

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<sup>237</sup> Milanovic, 'More on Drones', para.43; U.S. Department of State Archive, *Opening Statement by Matthew Waxman on the Report Concerning the International Covenant on Civil and Political Rights (ICCPR)*, (2006), para.12, <http://2001-2009.state.gov/g/drl/rls/70392.htm> 20 October 2014.

<sup>238</sup> Heller, 'One Hell of a Killing Machine', p.112.

<sup>239</sup> Kretzmer, D, 'Targeted Killing of suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', (2005) 16(2) *The European Journal of International Law*, p.185; United Nations International Covenant on Civil and Political Rights, *General Comment No. 31[80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (2004, CCPR/C/21/Rev.1/Add.13), para.10, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement> 20 October 2014.

<sup>240</sup> Universal Declaration of Human Rights, 10 December 1948, 217 A (III) [UDHR] Art.3; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 [ICCPR] Art.6.1.

<sup>241</sup> ICCPR Art.6.1.

<sup>242</sup> Note by the Secretary General, United Nations General Assembly, *Extrajudicial, summary or arbitrary executions*, (2006, A/61/311), para.34, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/488/01/PDF/N0648801.pdf?OpenElement> 20 October 2014; Heller, 'One Hell of a Killing Machine', p.113.

<sup>243</sup> Alston, *Report of the Special Rapporteur*, para.32; United Nations, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 9.

<sup>244</sup> Kretzmer, 'Targeted Killing', p.182.

<sup>245</sup> Alston, *Report of the Special Rapporteur*, para.85; Stanford International Human Rights & Conflict Resolution Clinic, *Living Under Drones, Legal Analysis*, (2012), para.23, <http://www.livingunderdrones.org/report-legality/> 20 October 2014.

are certain, albeit *narrow*, situations in which a drone *could* legally target an individual outside an armed conflict. That said there is a vital difference between IHL and IHRL. Under the IHL principle of proportionality, killing individuals who are not lawful targets during the course of a strike does not necessarily render that strike unlawful. This however, is alien to IHRL where the attacking state must have an independent justification for every individual killed in a strike.<sup>247</sup> This effectively means killing *anyone* other than the target would violate IHRL. Accordingly, it would seem targeted killings can be lawfully effected under IHRL. However, it would need to be shown the targeted individual was involved in the planning or execution of an *imminent* attack which threatened human life;<sup>248</sup> that the target was currently located in a remote region to which there was no quick access, even for the territorial security services; that it was, therefore, impossible to effect a detention operation; that the only way of stopping the individual was via a missile launched from a distance from a drone; that there was no other less lethal option of targeting the individual; and if the individual was not targeted at that moment it would be impossible to locate him again before the imminent attack.<sup>249</sup>

In the case of *McCann*<sup>250</sup> the actual killings by the security services were not unlawful.<sup>251</sup> Soldiers from the SAS shot and killed three Provisional IRA members suspected to have been about to detonate a car bomb. The killings, at that moment, were considered necessary and proportionate to prevent an imminent threat to human life. Nevertheless, earlier opportunities to arrest the suspects were missed; the operation, therefore, breached IHRL.<sup>252</sup> The case illustrates, but for earlier failings, the distinct possibility of lawfully employing lethal force outside an area of armed conflict. The threat was clearly imminent: the soldiers thought the suspects were reaching for remote detonators to trigger a blast when all three were killed.<sup>253</sup> The major difficulty the US would have in justifying a lethal strike under IHRL would be showing the threat of an *imminent* armed attack, which could not be stopped using non-lethal methods. In a 2002 strike in Yemen, probably before armed conflict began in the country, the US killed Abu Ali al-

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<sup>246</sup> Heyns, *Report of the Special Rapporteur*, para.35.

<sup>247</sup> Heller, 'One Hell of a Killing Machine', p.114; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, (2002, OEA/Ser.L/V/II.116, Doc.5 rev.1 corr.), part III (A)(3) para.111, <http://www.cidh.org/terrorism/eng/toc.htm> 20 October 2014.

<sup>248</sup> Heller, 'One Hell of a Killing Machine', p.115.

<sup>249</sup> Lubell, *Extraterritorial Use of Force*, p.176.

<sup>250</sup> *McCann and others v. The United Kingdom* 21 EHRR 97.

<sup>251</sup> *Ibid*, at 200.

<sup>252</sup> *Ibid*, at 213; Lubell, *Extraterritorial Use of Force*, p.176.

<sup>253</sup> *Ibid*, at 61,78.

Harithi the supposed architect of the *USS Cole* bombing.<sup>254</sup> Evidence showed Yemeni authorities had been tracking al-Harithi for months before the strike. The subsequent strike very probably breached IHRL: the suspect could have been detained during the preceding months of surveillance; additionally it was unclear al-Harithi presented an *imminent* threat at that time.<sup>255</sup> The strike was seemingly a retrospective one, punishing al-Harithi for earlier offences which, however heinous, is not permitted under IHRL. This clearly shows the difficulties the US would face in justifying a strike under IHRL. However, despite the criteria being narrow, it is not impossible, unlike some suggest, to lawfully employ a lethal strike outside an armed conflict and therefore under IHRL.

## **Conclusion**

*'To the United States, a drone strike seems to have very little risk and very little pain. At the receiving end, it feels like war. Americans have got to understand that.'*<sup>256</sup>

Despite their equivocal and protracted development UAVs have become a fixture of the modern military arsenal.<sup>257</sup> Their versatility and relentless unerring gaze, combined with almost surgical lethality means,<sup>258</sup> perhaps, they really are 'the only game in town in terms of confronting or trying to disrupt the al-Qaeda leadership'.<sup>259</sup> However, problems are abundant although not necessarily with the technology. The UK operates a fleet of Reaper UAVs which sparks little controversy.<sup>260</sup> Perhaps the biggest problem with the US programme is the failure to acknowledge or release much of the information on which its strikes rely, or even publicly discuss the programme in the aggregate.<sup>261</sup> This shadowy and secretive approach only serves to strengthen the criticism, perhaps through a misunderstanding of the technology, the laws of war, disagreement with US legal justification or even mistaken or wrongly reported facts. Essentially, a more transparent programme would be a more acceptable programme.

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<sup>254</sup> 'CIA killed al-Qaeda suspects in Yemen', *BBC News*, 5 November 2002.

<sup>255</sup> Lubell, *Extraterritorial Use of Force*, p.177.

<sup>256</sup> Foreign Affairs, *Generation Kill: A Conversation With Stanley McChrystal*, (2013), para.61, <http://www.foreignaffairs.com/discussions/interviews/generation-kill> 20 October 2014.

<sup>257</sup> Slater, M, The Bureau of Investigative Journalism, *UK to spend half a billion on lethal drones by 2015*, (2011), <http://www.thebureauinvestigates.com/2011/11/21/britains-growing-fleet-of-deadly-drones/> 20 October 2014; Smith, R, 'As Europe Lags, America Builds a Drone Empire', *Daily Finance*, 15 November 2013.

<sup>258</sup> 'Don't Call it a Drone!', *From Our Own Correspondent*, BBC Radio 4, 1 February 2014.

<sup>259</sup> 'U.S. airstrikes in Pakistan called 'very effective'', CNNPolitics.com, 18 May 2009

<sup>260</sup> Royal Air Force, *Reaper*, (2014), <http://www.raf.mod.uk/equipment/reaper.cfm> 20 October 2014.

<sup>261</sup> Zenko, *Reforming U.S. Drone Strike Policies*, pp.14-15.

Despite the secrecy, what we do know creates significant cause for concern. Firstly, current US justification cannot easily be reconciled with the *jus ad bellum*. Targeting all terrorist groups, even those with little in common with al-Qaeda, under the AUMF is *extremely* problematic, as is the apparent re-definition of what constitutes an imminent armed attack and the invocation of pre-emptive self-defence. Unless the *jus ad bellum* is subject to radical overhaul and evolution, to account for more immediate and devastating weaponry, it is likely current US policy breaches this area of international law – specifically the practice of pre-emptive self-defence where a specific threat cannot be identified.<sup>262</sup> However, with host-state consent this is merely incidental.<sup>263</sup> Secondly, the US insistence that *all* strikes are governed by IHL is simply incorrect. A situation of armed conflict must either be established between the specific targeted group and the US, or the US must be participating in an armed conflict at the behest of one of the parties for IHL to apply. A strike in an area where one of these criteria does not exist, or where a sufficient nexus cannot be established, would otherwise be governed by IHRL. Thirdly, serious questions remain as to whether many strikes even comply with IHL. The principle of proportionality appears to be all but ignored in some cases, and while the technology *should* allow for increased distinction, targeting decisions seem to render the advantages offered all but redundant when it comes to avoiding civilian casualties. Fourthly, and finally, although technically possible legally to conduct a lethal strike under IHRL, the extremely narrow permissible circumstances mean many attacks carried out would almost certainly breach international human rights norms.

The criticism has perhaps been heeded in America. In the President's recent State of the Union address he remarked, 'America must move off a permanent war footing' and that he had 'imposed prudent limits on the use of drones'.<sup>264</sup> However, no elaboration was offered as to whether this would apply to the programme as a whole, or just to activity in Afghanistan and Pakistan to coincide with the decreasing US presence within Afghanistan.<sup>265</sup> The programme's future is as murky as its legal footing. Although with such an extensive fleet and no apparent

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<sup>262</sup> Lubell, *Extraterritorial Use of Force*, p.56.

<sup>263</sup> Milanovic, 'More on Drones', para.27.

<sup>264</sup> The White House: Office of the Press Secretary, *President Barack Obama's State of the Union Address*, (2014), para.69, <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> 20 October 2014.

<sup>265</sup> Countdown to Drawdown, *10 Facts About US Withdrawal from Afghanistan*, (2013), <http://countdowntodrawdown.org/facts.php> 20 October 2014.

halt to the threat of terrorism one would expect 'more continuity than change'<sup>266</sup> from the superpower.

Despite the many advantages using a drone *should* have over many military alternatives – not just for the operator, but the civilians on the ground too – the secrecy and lack of transparency, the rigid and unacknowledged policy, and at times truly unacceptable targeting decisions undermine the quite brilliant technology. Thanks to these reasons for most a Predator drone conjures up a sinister, even evil, image of an indiscriminate and bloodthirsty robot intent on killing all in its path. Ironically it is the human policy behind the killer which is responsible for this. Whilst the legality of strikes is very much determined on a case-by-case basis and, despite the fact drone strikes may well be 'the only game in town', the game may, at times, be an unlawful one.

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<sup>266</sup> Bellinger, J, 'More Continuity Than Change', *The New York Times*, 14 February 2010.