LETHAL USE OF ARMED DRONES AND THE ‘WAR ON TERROR’
Legality under International Law

ANGELIKI KONTODIMOS
ANR: 138094

Department of European and International Public Law
Faculty of Law
Tilburg University
The Netherlands

January, 2017
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LIST OF ABBREVIATIONS

ACHR: American Convention on Human Rights
ACHRP: African Charter on Human and Peoples’ Rights
AP I: Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts
AP II: Additional Protocol II to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts
AUMF: Authorization to Use Military Force
CIA: Central Intelligence Agency (of the United States)
GC: Geneva Conventions
GWOT: Global War on Terror
HIG: Hezb-e-Islami
DoD: Department of Defense (of the United States)
ECHR: European Convention on Human Rights
ECTHR: European Court of Human Rights
IAC: International Armed Conflict
ICC: International Criminal Court
ICCPR: International Covenant on Civil and Political Rights
ICJ: International Court of Justice
ICRC: International Committee of the Red Cross
ICTY: International Criminal Tribunal for the Former Yugoslavia
IHL: International Humanitarian Law
IHRL: International Human Rights Law
IJU: Islamic Jihadi Union
ILC: International Law Commission
IMU: Islamic Movement of Uzbekistan
LOAC: Law of Armed Conflict
NIAC: Non-International Armed Conflict
OEF: Operation Enduring Freedom
UAV: Unmanned Aerial Vehicle
UDHR: Universal Declaration of Human Rights
UN: United Nations
UNGA: United Nations General Assembly
UNSC: United Nations Security Council
I. INTRODUCTION

Armed drones have in recent years received a lot of attention by the media, humanitarian organizations1 as well as political scientists2 and international lawyers.3 Most of the debate surrounding drones has focused on the lack of transparency from the part of states operating them, the civilian collateral damage that has resulted from drone strikes targeting single individuals, their use by non-state actors such as the CIA, as well as their association with the ‘war on terror’. While some of the abovementioned issues, such as the lack of transparency, are irrelevant from a legal perspective, the all increasing use of armed drones under the auspices of the extremely controversial, from both a political and legal viewpoint, ‘war on terror’ raises some significant issues for the Law of Armed conflict (LOAC) and International Human Rights Law (IHRL).

In February 2001, the US air force launched for the first time a Hellfire missile from a Predator drone in the desert of Nevada.4 Seven months after the first test flight of an armed drone, the United States witnessed for the first time in its history a large scale attack on its soil that killed almost 3,000 civilians5. Following the 9/11 attacks, for which the terrorist group Al Qaeda claimed

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responsibility, President G. W. Bush declared a ‘global war on terror’ (GWOT)\(^6\)\(^7\) and it is estimated that in the course of this ‘war’ over 900 missiles have been launched by armed unmanned aerial vehicles (UAVs) in the territories of, \textit{inter alia}, Afghanistan, Iraq, Pakistan, Yemen and Somalia.\(^8\)

Not long after declaring a ‘war on terror’, G. W. Bush designated the territory of Afghanistan as a combat zone in a war to which the United States was a party.\(^9\) The war in Afghanistan was followed by an extremely controversial war in Iraq\(^10\) and in the course of both these wars, the United States has extensively used armed drones to target and kill individuals designated by the US government as ‘terrorists’.\(^11\) This practice raises the question of whether armed drones are lawful weapons under International Humanitarian Law (IHL) and if so whether the practice of targeting individuals that often do not fit the definition of a combatant under IHL is lawful.

Perhaps more complex issues are raised by the use of lethal force by means of armed drones outside the battlefields of these two countries where there is little doubt that an international armed conflict is taking place. As mentioned above, under the auspices of the ‘war on terror’, individuals have been targeted and killed by missiles launched by drones in the territories of not only Iraq and Afghanistan, but also Yemen, Pakistan and Somalia.\(^12\) Whether the territories of Yemen, Pakistan and Somalia are battlefields of an international armed conflict to which the United States is a party, however, is subject to debate.\(^13\) This practice leads us to question not only the legality of the targeted use of lethal force by means of armed drones within the battlefield, but also the very

\(^6\) The present thesis will not attempt to contribute to the debate of defining ‘terrorism’. The term ‘war on terror’ will be used to describe any and all US military operations undertaken following the 9/11 attacks and directed against a person or persons designated by the US government as a terrorist, irrespective of his or her geographical location and irrespective of whether his or her status as a ‘terrorist’ can be debated.


\(^11\) See “Get the data: Drone wars”, supra note 8

\(^12\) Ibid

definition of ‘armed conflict’ under international law as well as the boundaries of the applicability of International Humanitarian law.

I.1 Research Questions and Methodology
The present thesis will examine the legality of the lethal use of armed drones against previously designated targets within the context of the ‘war on terror’. More specifically, it will attempt to answer the following questions:

- To what extent is the use of armed drones compatible with international humanitarian law?
- To what extent is the ‘war on terror’ an ‘armed conflict’ to which International Humanitarian Law applies?
- To what extent is the use of lethal force by means of armed drones lawful under international humanitarian law and under international human rights law?

The present thesis will be limited to a library based study. In order to examine the aforementioned questions, relevant academic literature and legal instruments will be scrutinized and subsequently applied to the practice of the United States as a means to illustrate their application in practice.

Answering the first question will require an examination of IHL treaties pertaining to the law of weaponry and their travaux preparatoires. Taking into account that drones are not explicitly mentioned in any of the aforementioned treaties, their compatibility with IHL will be determined on the basis of the application, by analogy, of general principles entrenched in said treaties as well as documents prepared by states, scholars and the ICRC for the purposes of weapons reviews.

In order to answer the second research question, I will set out a number of criteria that could define the boundaries of the field of application of IHL. These criteria will be divided into three categories, namely criteria ratione personae, rationae loci and ratione temporis. The definition of the criteria belonging into each category will be determined on the basis of an examination of state practice and jurisprudence following the second world war and the entry into force of the UN Charter. After having established these criteria, they will be applied to the ‘war on terror’ in order to determine whether whether it is appropriate to qualify this ‘war’ as an armed conflict to which IHL would be applicable.

In order to answer the third and final question, I will scrutinize treaties, case-law and any documents indicative of state practice and opinio juris of states and pertaining to the jus ad bellum,
the field of application of IHL and International Human Rights Law, the status of individuals in
the course of an armed conflict and the rules of targeting, as well as the right to life and permissible
derogations from said right. The principles derived from the relevant sources will then be applied
to the practice of the United States under the auspices of the ‘war on terror’ in order to illustrate
the (il)legality of the use of lethal force by means of armed drones within different legal
frameworks.

I.2 Existing literature

While the law of weaponry is an area of IHL that has not been significantly scrutinized by
international lawyers, certain weapons including most notably, unmanned, autonomous and
automated weapons systems have recently become the subject of much literature. The all
increasing use of armed drones in particular has been the subject of much research from the part
of international lawyers and international relations scholars. While a number of authors have
examined the significance of the use of drones and other ‘advanced’ weapons technologies for the
very nature of conflicts and the relevance of the laws of war, most of the debate on the legality
of the use of drones has been linked with the legality of the ‘war on terror’ declared by the United
States.

The implications of the use of drones within the context of the ‘war on terror’ for
international law have been discussed by many scholars in recent years. In *Drone Warfare*, for
instance, John Kaag and Sarah Kreps extensively address the legal but also the political and ethical
implications of the use of armed drones by setting out, *inter alia*, the distinctive features of drones
used by the US military and discussing the implications that the increasing use of armed drones
can have for the very definition of war. While several authors have suggested that remotely piloted

14 See, *inter alia*, Isabelle Daoust, Robin Coupland and Rikke Ishoey ‘New wars, new weapons? The obligation of
States to assess the legality of means and methods of warfare’ (2002), 84:846 International Review of the Red Cross
345; Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict*, (Asser Press,
Springer 2014); Darren M. Stewart, ‘New technology and the law of armed conflict’ (2011) 87 International Law
Studies 271; Tyler D Evans, ‘At war with the Robots: Autonomous Weapon Systems and the Martens Clause’ (2013)
41:3 Hofstra Law Review 697

15 See supra note 2

16 See, for instance, Frederic Megret, *supra note 2*

17 See Laurie, R. Blank, ‘After “Top Gun”: How Drone Strikes Impact the Law of War’ (2012) 33 University of
Pennsylvania Journal of International Law 675; Michael J. Boyle, *supra note 2*; Milena Sterio, *supra note 3*; Medea
Benjamin, *supra note 2*

18 John Kaag and Sarah Kreps, *Drone Warfare*, (John Willey and Sons, 2014)
and autonomous weapons systems will change the way wars are fought and a revision of the laws of war is necessary to take into account this new phenomenon, others insist that drones in particular do not present any particular challenge from a legal perspective.

In ‘The Legal and ethical implications of drone warfare’\textsuperscript{19}, for instance, Michael J. Boyle dismisses the argument of some authors that drone technologies are a technological innovation that require a revision of the laws of war and argues instead that legal and ethical challenges only stem from the recent use of armed drones by the US government and its policy of targeted killings. In the same vein, Stephanie Carvin, in “Getting drones wrong”\textsuperscript{20}, highlights false assumptions made by scholars and other commentators and introduces what she believes to be an adequate framework for future research on drones.

The use of lethal force, either by means of armed drones or other means, against previously targeted individuals usually associated with a terrorist group has also been the subject of much discussion amongst international lawyers. In his book, \textit{Targeted Killing in International Law}\textsuperscript{21}, Nils Melzer has undertaken the most extensive, to date, analysis of the lawfulness of targeted killings. Melzer, as most authors, distinguishes between targeted killings as law enforcement and targeted killings as part of hostilities. He argues that both IHL and IHRL in their current state are more than adequate to address the lawfulness of targeted killings that there is no need for a new legal framework. Melzer’s position has been supported by most international lawyers, including most notably former special rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston\textsuperscript{22}.

Other authors have, however, argued that a new legal framework is necessary to account for these challenges. In “Targeted Killings of Suspected Terrorists: Extra-Judicial Executions of Legitimate Means of Defense”, for instance, Kretzmer has made the same distinction between law-enforcement and armed conflict and examined the circumstances under which targeted killings would be lawful in each situation.\textsuperscript{23} In contrast to Melzer, however, Kretzmer argues that international law in its current state is not adequate to deal with this ‘new phenomenon’ of

\textsuperscript{19} Michael J. Boyle, \textit{supra note} 2
\textsuperscript{20} Stephanie Carvin, \textit{supra note} 2
\textsuperscript{21} Nils Melzer, \textit{Targeted Killing in International Law} (OUP 2008)
transnational terrorism and a new legal framework combining IHL and IHRL and taking into account the challenges posed by modern terrorism should be devised.

The controversy surrounding the legality of ‘the war on terror’ has also led scholars to discuss the changes that such wars have brought to the very definition of the notion of armed conflict and the challenges in determining legal framework applicable to such situations. In his book *Transnational Conflicts and International Law*[^24], Constantin von der Groeben (2014) discusses whether recent arm clashes between states and non-state actors can qualify as armed conflicts that would trigger the applicability of IHL and proposes an approach that would combine IHL and IHRL and be applicable to this particular type of transnational conflicts. While von der Groeben does not discuss exclusively the ‘war on terror’, a significant part of the book is dedicated to this war. Other authors, such as Paulus and Vashakmadze in “Asymmetrical war and the notion of armed conflict – a tentative conceptualization”[^25] have refrained from proposing new approaches and have instead attempted to clarify the scope of the application of IHL by discussing a number of criteria that could be used to qualify a situation as an armed conflict.[^25]

I.3 Contribution

Most scholars generally agree that the use of lethal force by means of armed drones[^26] would generally be unlawful under IHRL and lawful under IHL, provided that a number of conditions are satisfied.[^27] Most of the research has, thus, focused on identifying the conditions that would


[^26]: In recent years, a large number of lawyers and political scientists have addressed the issue of the lethal use of armed drones against specified individuals, usually thought to be associated with a terrorist group. The term most commonly used to describe this phenomenon is ‘targeted killing’. The terms ‘selective targeting’, ‘named killing’ and even ‘state sponsored assassination’ have all been used by scholars to describe the same phenomenon. In the present thesis I will avoid using the term ‘assassination’ as assassinations have been illegal under international law and most domestic systems for many years and would, as such, predetermine the legality of the phenomenon discussed. Similarly, the term targeted killings has on occasion been a term to describe the legal undertaking of this exercise, and as such will also be avoided and replaced with ‘lethal use of armed drones’ or ‘use of lethal force by means of armed drones’. However, the aforementioned terms should be understood as what Nils Melzer, the most cited author on the legality of this practice under international law, has defined as targeted killings, namely the “use of lethal force by a subject of international law that is directed against an individually selected person who is not in custody and that is intentional (rather than negligent or reckless), premeditated (meaning that the death of the targeted person [is] the actual aim of the operation, as opposed to deprivations of life which, although intentional and premeditated, remain the incidental result of an operation pursuing other aims’ (Nils Melzer, *supra note 21*, at 3-4)

render the use of lethal force lawful under these two separate legal frameworks without paying particular attention to the circumstances that would trigger the applicability of each legal framework. An examination of current practice within the context of the ‘war on terror’, however, reveals that the lethal use of armed drones is often unlawful not because the state using the drones is not applying legal rules but rather because it applies rules of IHL when rules of IHRL are in reality applicable.

In the absence of clear and objective criteria that would help us qualify a situation as an armed conflict to which IHL is applicable, the determination of the applicable legal framework and by extension the legality of the lethal use of armed drones, is left entirely to the discretion of states. Taking into account that IHL is a legal framework allowing for numerous derogations from IHRL and drafted with the purpose of being applicable under only exceptional circumstances, it is necessary that an effort to is made to clearly define its scope by excluding the application of any subjective criteria leaving considerable room for interpretation. This thesis will, thus, attempt to provide some clarification with regards to the definition of the scope of application of IHL and argue that the primary focus of scholars and states discussing such practices should be on the establishment of a set of objective criteria defining the territorial, temporal and personal application of IHL.

I.4 Structure

The present thesis will be divided into two parts. The first part will be dedicated to the legal framework applicable to the use of armed drones and the use of lethal force by a state both within and outside an armed conflict. The second part will consider the practice of the United States with regards to the lethal use of drones and examine said practice against the principles laid out in the first part.

After briefly discussing some technical features of armed drones, Chapter 1 will set out the legal framework governing the use of weapons in international and non-international armed conflicts and assess the extent to which drones are compatible with the rules and principles previously set out. Chapter 2 will turn to the *jus ad bellum* and examine the circumstances under which the use of force as part of counterterrorism policy would be lawful under Article 51 UN Charter. Before examining the legality of the targeted use of drones under International Humanitarian Law, Chapter 3 will touch upon the difficulties of defining ‘armed conflict’ under
international law and the boundaries of the applicability of International Humanitarian Law. Finally, Chapter 5 will address the question of the legality of the use of lethal force by means of armed drones outside of the battlefield, from the perspective of International Human Rights Law and by paying particular attention to the right to life and permissible derogations from said right.

Part II will then turn to state practice, and more particularly to the practice of the United States in the context of the ‘war on terror’. In order to illustrate the challenges that the lack of a set of criteria delimiting the applicability of IHL presents, this thesis will draw a comparison between US drone strikes in the territory of Afghanistan, a country with which the United States is officially at war, and Yemen, where US drone strikes were launched under solely the auspices of the ‘global war on terror’. The first chapter will address the question of whether the ‘war on terror’ is actually an armed conflict by examining whether IHL could in fact be applied to this conflict on the basis of the criteria pertaining to the field of application of IHL set out in Part II. The second chapter will then discuss the legality of the U.S. drone policy in the territories of Yemen and Afghanistan.
II. LEGAL FRAMEWORK

Part II of the present thesis will set out the legal framework governing the lethal use of drones within and outside the context of an armed conflict. Chapter 1 will discuss the rules pertaining to the means and methods of warfare and the extent to which armed drones are compatible with IHL. Chapter 2 will then discuss the *jus ad bellum* by paying particular attention to the legality of the use of force in the context of the ‘war on terror’. Before turning to the legality of the lethal use of armed drones in an armed conflict in Chapter 4, Chapter 3 will touch upon the boundaries of the applicability of IHL and attempt to identify a number of criteria that would serve to define said boundaries. Finally, Chapter 5 will discuss the legality of the targeted lethal use of armed drones under International Human Rights Law, both within and outside the context of an armed conflict.

II.1. DRONE WARFARE

While most of the debate surrounding drones has focused on the controversial ‘war on terror’, the use of drones by non-state actors, such as intelligence services, as well as on the legal framework against which the use of drones should be examined, the present chapter will only address the use of drones in the course of an armed conflict and the extent to which the use of drones is compatible with the rules of the Law of Armed Conflict (LOAC). The aforementioned issues will then be discussed in subsequent chapters.

II.1.1. History and distinctive features

The present section will briefly discuss the history and technical features of drones, including distinctive features that can set them apart from other weapons currently used in international and non-international armed conflicts around the globe.

Unmanned Aerial Vehicles have been used by the militaries of various countries for many years with their origins dating back to the Second World War.\(^2\) In the course of the 20th century the functions of UAVs, however, were only limited to surveillance, search and rescue missions as

As mentioned above, the first armed UAV was tested by the US military in February 2001 and used for the first time in battle following the September 11 attacks at the World Trade Center. Ever since then, the defense departments of numerous states have acquired various types of drones and small sized surveillance drones have also become popularized for civilian consumption. While many states use surveillance drones, their use as a means to intentionally kill a predetermined target has, for the most part, been limited to the policies of the United States and Israel, and to a lesser extent to those of the UK, Australia and Germany.

UAVs are defined by the United States Department of Defense (DoD) as “powered, aerial vehicles that [do] not carry a human operator, [use] aerodynamic forces to provide vehicle lift, can fly autonomously, or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload.” The aforementioned definition covers both armed and non-armed drones, that are capable of performing intelligence, surveillance, reconnaissance and strike missions. While non-armed drones have had a significant impact on changing the way that wars are fought nowadays, the present thesis will consider the impact of drones as weapons that can target and kill individuals and will, thus, primarily discuss drones that carry lethal payloads.

As many commentators tend to equate armed drones with autonomous weapons systems and discuss the morality of using weapons that lack a human element, it is important to clarify first that armed drones are not autonomous. While some surveillance drones, such as the RQ4 Global

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30 See Matt J. Martin and Charles W. Sasser, supra note 4, at 20
36 Ibid
Hawk, are autonomous, drones that carry lethal payloads are always remotely piloted. In fact, only some functions, such as navigation, take-off and landing are automated functions in armed drones while most others are performed, albeit remotely, manually by humans. Most importantly, there is no autonomy or automation as far as targeting decisions are concerned.

The US military currently possesses over 20 different types of drones. While there are considerable differences in the capabilities of each drone, an analysis of the characteristics of each of these weapons systems is beyond the scope of this thesis. Instead, the focus will be on three main technical features, shared by all drones, that have generated a lot of discussion among scholars, the media, and humanitarian organizations and are believed to impact in some way the extent to which the weapon is capable of adhering to the laws of war.

A first characteristic of drones is that they are extremely long-range weapons. While this is a feature of drones that has generated a lot of discussion, it is important to note that this is not a feature that no other weapon possesses. Many weapons have the same long-range capabilities as drones, including most notably jet fighters and missiles. Moreover, while drones are extremely long range weapons, they are not as long range as some seem to suggest. Many commentators have suggested that militaries possessing armed drones have the capacity to employ lethal force from anywhere in the world. However, while a pilot may be located in Nevada, over 12,000 km away from a target in, for instance, Pakistan, the drone itself will usually be transported and take off from a location closer to the target, instead of flying a distance of over 12,000 km. While the fact that there is a significant distance between the individual operating the weapon and its target, however, is true and has led commentators to suggest that the fact that the operator is not subjected to physical danger might result in an increase of armed conflicts, this is irrelevant from a legal

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38 Jeremiah Getler, supra note 35 at 26; M. J. Boyle supra note 2, at 106
39 Laurie R. Blank, supra note 17, at 677; M. J. Boyle, supra note 2, at 106
40 Ibid
41 For a discussion on autonomous targeting decisions and the law see William Boothby, ‘Some legal challenges posed by remote attack’ (2012) 94 International Review of the Red Cross 579
42 See Jeremy Bender, “This chart shows the massive size and scope of America’s drone fleet” (Business Insider UK, 23 June 2016) http://uk.businessinsider.com/chart-of-us-drone-fleet-2016-3?r=US&IR=T, date accessed: 2/10/2016
44 See ibid; Frederic Megret, supra note 2, at 1293. In fact, manned air vehicles or jet fighters share a great deal of identical characteristics with drones and have many similar capabilities.
45 See Ibid
perspective. For present purposes it suffices to say that the fact that operators are not physically located in the battlefield and, thus, not in any personal physical danger might impact the way in which they make targeting decisions.

A second characteristic of drones is their enhanced capacity for precision targeting. The fact that drones are high precision weapons can allow commanders to more easily distinguish between combatants and civilians and, thus, for a minimum of collateral damage. However, it is important to note, that as is the case with their long-range capabilities the capacity of drones for precision targeting seems to be exaggerated by some commentators. While drones are in fact high precision weapons, they often carry payloads that exhume considerable amounts of force. Consequently, even though a drone might strike within a very close range to its target, its impact will inevitably not be limited to the body of the individual targeted.

Finally, a characteristic of drones that sets them apart from other similar weapons concerns their surveillance capabilities. Drones are capable of hovering over a place for an extended period of time to collect intelligence and assess targets. The surveillance drone, Global Hawk, for instance has a flight time of 30 hours. Moreover, the fact that drones are piloted by individuals that are not physically present in the battlefield minimizes the risk associated with collecting intelligence. The fact that drones can collect significantly more surveillance data than any human ever could which in turn allows commanders and operators to make informed targeting decisions cannot be doubted.

46 See Jelena Pejic, supra note 43, at 3-4
48 This characteristic of drones will be further discussed in section II.1.2.3 “The principle of distinction”
49 Hellfire missiles, one of the most common payloads that US drones are carrying, for instance, have a blast radius of 20 meters (See Brian Anderson, “The Forensics of a Lethal Drone Attack”, (Motherboard, 13 March 2014) http://motherboard.vice.com/read/the-forensics-of-a-lethal-drone-attack, date accessed: 03/10/2016)
50 J. Pejic, supra note 43, at 4
53 J. Pejic, supra note 43, at 4
II.1.2. Compatibility with International Humanitarian Law

II.1.2.1 IHL Basic Principles

International humanitarian law (IHL) or the Law of Armed Conflict (LOAC) regulates the conduct of states or any other actors taking direct part in hostilities in the course of an international (IAC) or non-international armed conflict (NIAC). The entire body of IHL is based on the principles of distinction and proportionality, through the prohibition of indiscriminate attacks, precaution in attacks and the protection of protected persons.

IHL is often divided into The Hague Law on the one hand and the Geneva law on the other. While both bodies of law have in recent years been merged to form the unique body of IHL, many authors still make this distinction. The Hague Law is concerned with methods and means of warfare while the Geneva Law is concerned with the protection of civilians in an armed conflict. The present Chapter will consider the law of weaponry in times of an armed conflict which forms an integral part of said Hague Law while what is known as the Geneva Law will be discussed in a subsequent chapter.

II.1.2.2 Law of weaponry

The origins of the law of weaponry can be traced back to 1868 and the adoption of the St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes (hereinafter, St. Petersburg Declaration). In addition to prohibiting the use of explosive bullets, the St Petersburg Declaration introduced for the first time the fundamental principles of IHL. The Preamble to the Declaration reads: “the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy; [and] this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable […]”. Following the adoption of the St. Petersburg Declaration, a number of treaties restricting the use of certain weapons and ammunitions in times

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54 The name derives from the fact that at the time treaties concerned with means and methods of warfare had been signed in The Hague while treaties concerned with the protection of civilians such as the Geneva Convention had been signed in Geneva. This is, however, not the case anymore as certain conventions concerned with means and methods of warfare, such as the Certain Conventional Weapons Convention, have been negotiated and adopted in Geneva.

55 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. (adopted 29 November 1868, entered into force 11 December 1868) (hereinafter St. Petersburg Declaration)

56 St. Petersburg Declaration, Preamble
of war have been adopted, including _inter alia_ the 1899\(^57\) and 1907 Hague Conventions\(^58\), the 1925 Geneva Gas protocol\(^59\), the 1980 Convention on certain conventional weapons\(^60\) and its five protocols and the 1997 Ottawa Convention on Anti-personnel mines.\(^61\)

Armed UAVs are not mentioned in any LOAC treaty and are, thus, not prohibited as such. This is not to say, however, that every weapon or ammunition not explicitly mentioned in a treaty is necessarily lawful. All weapons and ammunitions and the way in which said weapons and ammunitions are used are subject to the basic principles of IHL.\(^62\) It is, thus, necessary to examine whether drones by nature of their inherent characteristics are capable of adhering to the basic principles of LOAC, namely the principle of distinction between combatants and civilians\(^63\) and the prohibition of unnecessary suffering or superfluous injury\(^64\), applicable to all weapons without exception.

II.1.2.3. _The principle of distinction_

In order for the use of a weapon to be permitted under LOAC said weapon needs to be by nature discriminatory. Pursuant to Article 48 of the _First Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims in International Armed Conflicts (hereinafter AP I)_,”in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly

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\(^{57}\) See Convention (II) with Respect to the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) (hereinafter 1899 Hague Convention III), Article 23

\(^{58}\) Convention (IV) respecting the Laws and Customs of War on Land (adopted on 18 October 1907, entered into force on 26 January 1910) (hereinafter 1907 Hague Convention IV)

\(^{59}\) Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted on 17 June 1925 and entered into force on 8 February 1928) (hereinafter Geneva Gas Protocol)

\(^{60}\) Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (adopted on 10 October 1980, entered into force on 2 December 1983) (hereinafter CCW)


\(^{62}\) Article 22 of the 1907 Hague Convention IV reads: “‘The right of belligerents to adopt means of injuring the enemy is not unlimited’

\(^{63}\) This principle is reflected in the entirety of both additional Protocols to the 1949 Geneva Conventions (Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted on 8 June 1977, entered into force on 7 December 1978) (hereinafter AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted on 8 June 1977, entered into force on 7 December 1978) (hereinafter AP II) )

\(^{64}\) This principle was first articulated in the Preamble of the St Petersburg Declaration
shall direct their operations only against military objectives”. The specific prohibition of indiscriminate attacks is codified in Article 51 of the same protocol which also defines indiscriminate attacks in paragraph 4.

When considering the technical characteristics of drones, including their surveillance and high precision capabilities, it is easy to conclude that drones are not only perfectly capable of adhering to the principle of distinction but are also capable of enhancing adherence to said principle. The fact that they are capable of adhering to this principle, however, does not necessarily mean that they are not also capable of being used indiscriminately and thus in a manner incompatible with the principle of distinction. Several authors, including the former Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions Philip Alston, have discussed the issues with designating a weapon as inherently discriminate or indiscriminate. In fact, all weapons can be used in a manner so as to be indiscriminate. Drones, for instance, that are, as mentioned above, highly precise targeting systems can carry payloads such as nuclear missiles or chemical agents that are likely to have indiscriminate effects. Similarly, as the ICJ has previously observed, an atomic bomb, a weapon that is generally prohibited precisely because of its indiscriminate nature, might be capable of being used in a way, so as not to produce any effects for civilians. It is, thus, difficult, if not impossible, to say that a weapon is by nature indiscriminate. Weapons that have, thus far, been prohibited because of their discriminatory nature have been prohibited primarily because their use is most of the time indiscriminate rather than because they are incapable of being indiscriminate. What is relevant here, thus, is not whether drones are inherently discriminate or indiscriminate but whether drones are primarily being used in a discriminatory manner.

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65 AP I, Article 48
66 AP I, Article 51
67 See Frederic Megret, supra note 2, at 1293-40
68 See, inter alia, Philip Alston, Study on Targeted Killings, supra note 12; Laurie R. Blank, supra note 17, at 683-4; Stephanie Carvin, supra note 2, at 133-4
69 Ibid
70 See Ibid
71 See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J Reports 1996, p.226, (hereinafter ICJ, Nuclear Weapons) para 95
72 See Frederic Megret, supra note 2, at 1240
Many commentators have criticized drone strikes by the United States because they have resulted in the death of civilians.\textsuperscript{74} According to some estimates, out of the approximately 5,300 individuals killed in US drone strikes, over 560 were civilians.\textsuperscript{75} While this number might seem striking to some, it does not in reality support, on its own, an argument suggesting that drones or their predominant use are indiscriminate. It is important to note in this regard, that IHL, does not prohibit the killing of civilians. Instead, it prohibits the targeting of civilians.\textsuperscript{76} A strike targeting combatants that unintentionally results in civilian collateral damage would not, thus, be illegal solely because it produced civilian casualties.\textsuperscript{77} However, pursuant to Article 51 (5) AP I which prohibits indiscriminate attacks, “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” is to be considered indiscriminate.\textsuperscript{78} In order, thus, to determine whether any of the strikes that produced civilian casualties was indiscriminate it is necessary to examine whether said strike was expected to produce collateral damage and if so whether that damage was excessive in relation to the anticipated military advantage. While a number of these strikes might, if examined against the aforementioned criteria, be determined to be unlawful, this does not necessarily lend support to the argument that the weapon itself is or should be unlawful.

While, as illustrated above, drones are capable of being indiscriminate and many drone strikes have produced a number of civilian casualties, collateral damage has more often been the result of a targeting mistake rather than of the design of the weapon itself. Although it is impossible to determine whether a drone strike is discriminate without examining it in relation to the anticipated military advantage, when compared to the use of most similar weapons such as jet fighters and long range missiles, that are considered discriminate and are permitted under IHL, drones seem perfectly capable of adhering to the principle of distinction.

\textsuperscript{75} “Get the data: Drone wars”, \textit{supra} note 8
\textsuperscript{76} AP I, Arts 48 and 51
\textsuperscript{77} See Judith Gardam, “Necessity and Proportionality in \textit{Jus ad bellum} and \textit{jus in bello}” in Laurence Boisson de Chazournes and Philippe Sands (eds), \textit{International Law, the International Court of Justice and Nuclear Weapons} (CUP 1999), at 283
\textsuperscript{78} AP I, Article 51(5) (b)
II.1.2.4. Prohibition of unnecessary suffering or superfluous injury

The use of certain ammunitions and weapons is prohibited by IHL not only because they are incapable of being discriminate but also because they are likely to produce unnecessary suffering or superfluous injury. This prohibition is codified in Article 23(e) of the Annex to the 1907 Hague Convention IV and is based on the principle that the ultimate aim of each contending side in a war would be to render the enemy hors combat so as to gain a military advantage and not necessarily to kill him or her or inflict irreparable damage.79

It is generally accepted that in order to determine whether a weapon can be used in accordance with this prohibition, the weapon or ammunition needs to be examined against three criteria: “the intensity of the pain”, “the degree of permanent disability”, and “the likelihood of death” that it produces.80 As weapons can carry many types of ammunition, treaty law, for the most part prohibits the use of ammunitions rather than weapons. While some weapons systems are actually prohibited altogether because they are deemed to be violating this principle, drones are not capable of producing any physical effects on their own, i.e. without launching ammunition. It suffices to say therefore that drones themselves are compatible with this prohibition so long as they do not carry any ammunition that could cause unnecessary suffering.

It is interesting to note, however, that, according to the ICRC’s as well as many international lawyers’ interpretation of the principle, suffering, does not only refer to physical suffering, but also psychological suffering.81 A number of studies on the use of drones in the battlefield have concluded that drones hovering over a place inhabited by civilians over extensive periods of time can have a negative psychological impact, for instance by inducing stress, on the population.82 It could, thus, be argued that drones, even non-armed ones, are causing unnecessary psychological suffering to the civilian population. However, it would be very hard to argue that a drone produces negative psychological effects that a state of war and the constant presence of any other weapon do not already produce. Moreover, and while most provisions of IHL are concerned with the protection of civilians in the course of an armed conflict, the prohibition of unnecessary

79 1907 Hague Convention IV, Annex Article 23(e)
81 Ibid
82 See International Human Rights and Conflict Resolution Clinic (Stanford Law School) and Global Justice Clinic (NYU School of Law), Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan (2012) at 73-99
suffering is a principle meant to protect combatants and not civilians. It is finally, important to
note, that the principle does not refer to simply suffering or injury, but to unnecessary suffering or
superfluous injury. This implies that the injury should be excessive when examined against the
military advantage sought. While making such a determination would require us to examine
separately every single occasion a drone has flown over a battlefield, which is an impossible
exercise, it is generally safe to assume that the intelligence expected to be gathered by a
surveillance drone over a period of 30 hours would present a considerable military advantage that
would render the psychological injury that combatants might endure because of the presence of
the drone, among a variety of other weapons constantly present in a war zone, non-excessive.

To the author’s knowledge, no weapon has been, to this date, designated or even discussed
as being prone to cause unnecessary suffering without any physical suffering being considered, as
designating any weapon as likely to cause unnecessary suffering when solely taking into account
psychological suffering would open the door for the prohibition of virtually every weapon.

Concluding remarks

It follows from the above that rather than being incompatible with the laws of war, drones
have instead the capacity to even strengthen compliance with the basic principles of IHL.83 Despite
the ongoing debate about the innovative character of drones and the all changing nature of the way
we fight wars, from the perspective of the law of weaponry, drones are not an innovation.84 In fact,
as illustrated above, most, if not all, technical characteristics of drones are shared with two other
weapons, namely jet fighters and missiles, that have been used for years and continue being used
without generating much objection with regards to their compatibility with the basic principles of
IHL.

This is not to say, however, that states and the ICRC should not advocate for the regulation
of armed drones. As with every weapon, drones should be subject to a weapons review. Moreover,
starting a discussion about the relationship between international law and unmanned weapons
system could be the first step towards starting a discussion between international law and

83 See generally, Ian Henderson and Bryan Cavanagh, “Unmanned Aerial Vehicles: Do They Pose Legal
Challenges?”, in Hitoshi Nasu and Robert McLaughlin, supra note 14 at 203–204.
84 See generally, M. J. Boyle, supra note 2; Stephanie Carvin, supra note 2; Rosa Brooks, “What’s Not Wrong with
Drones?”, (Foreign Policy, September 5, 2012) http://foreignpolicy.com/2012/09/05/whats-not-wrong-with-drones/
, date accessed: 5/10/2016
autonomous weapons systems. While, as has been mentioned above no drones carrying lethal payloads currently used are completely autonomous, the fact that autonomous surveillance drones do exist suggests that armed drones capable of making autonomous targeting decisions might sooner than later become a reality.

Furthermore, while drones as such might not present any new challenges to the basic principles of the laws of war\textsuperscript{85}, counter-terrorism policies and the all increasing use of lethal force by means of armed drones to target specific individuals both within as well as outside of the context of armed conflicts does pose a number of challenges to both IHL and International Human Rights Law.\textsuperscript{86} The following sections will discuss these challenges.

**II.2. JUS AD BELLUM**

The present Chapter will set out the general rules governing the use of force under international law by focusing on a number of issues that come up in literature discussing ‘the war on terror’.

**II.2.1. Prohibition on the Use of Force**

Pursuant to Article 2(4) of the UN Charter, “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”.\textsuperscript{87} This prohibition is considered by most international lawyers and the ICJ as not only a norm of customary international law but also a \textit{jus cogens} norm, that can only be modified by another norm of the same nature.\textsuperscript{88}

There is a broad agreement among international lawyers that the term ‘force’ only covers armed force and no other forms of force, such as, for instance, economic sanctions.\textsuperscript{89} This is also

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\textsuperscript{85} See W. Boothby, supra note 41, at 593
\textsuperscript{86} M. J. Boyle, supra note 2, at 108
\textsuperscript{87} UNITED NATIONS, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (hereinafter UN Charter), Article 2(4)
\textsuperscript{89} See inter alia Yoram Dinstein, \textit{War, aggression and self-defense} (CUP 2011) at 88; T.J Farer, ‘Political and economic coercion in contemporary international law’ (1985) 79 American Journal of International Law 405 at 413
evident by the fact that the proposal of Brazil to include economic coercion in the scope of Article 2(4) was rejected during the negotiations that led to the adoption of the UN Charter.Whether all forms of armed force, such as, for instance, minimal uses of force would constitute a violation of Article 2(4) is not, however, subject to the same consensus. Back in 2009, the International Fact Finding Mission on the Conflict in Georgia concluded in its report that “[t]he prohibition of the use of force covers all physical force which surpasses a minimum threshold of intensity […] Only very small incidents lie below this threshold, for instance the targeted killing of single individuals, forcible abductions of individual persons, or the interception of a single aircraft.” A number of authors support this view, suggesting that minimal uses of force do not fall within the scope of Article 2(4). Despite the fact that many drone strikes might unwillingly produce more than a single death, it is often only a single individual that is being targeted. On the basis of the conclusion of the Fact Finding Mission and of the aforementioned authors, thus, a drone strike targeting one single individual would not constitute use of force for the purposes of Article 2(4).

However, this view is not entirely supported by state practice. Irrespective of whether some ‘uses of force’ might fall below the threshold of Article 2(4), it would be very hard to argue that the lethal use of an armed drone would fall below this threshold. Even though it might only be a single individual that is targeted, the amount of force exerted by a single hellfire missile could hardly be characterized as minimal. It would, thus, be hard to argue that the lethal use of armed drones do not in fact constitute use of force for the purposes of Article 2(4). This is not to say however that every drone strike would be a violation of the jus ad bellum. The prohibition to use force entrenched in Article 2(4) of the UN Charter is not absolute. In fact, the UN Charter contains

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91 See Tom Ruys, ‘The meaning of “force” and the boundaries of the jus ad bellum: are “minimal” uses of force excluded from UN Charter Article 2(4)?’ (2014) 108 The American Journal of International Law 159
92 emphasis added
95 See Tom Ruys, supra note 91
96 One of the supporters of the gravity threshold, Mary Ellen Oconnell even has suggested that the use of drones does not fall below said threshold (See Mary Ellen O’Connel “The True Meaning of Force” (4 August 2014, AJIL Unbound) https://www.asil.org/blogs/true-meaning-force, date accessed: 05/08/2016
two important exceptions to the prohibition on the use of force.\textsuperscript{97} These exceptions are the use of force as self-defense\textsuperscript{98} and the use of force with prior Security council authorization.\textsuperscript{99}

Before turning to the use of force as self-defense it is pertinent to address another element of Article 2(4), namely the fact that the prohibition of the use of force applies to force used “against the territorial integrity or political independence of any State”.\textsuperscript{100} This provision quite clearly implies that a drone strike launched against a non-state actor with the consent of the territorial state would not violate Article 2(4) as it would not violate “the territorial integrity of political independence” of the territorial state.\textsuperscript{101} Uses of force with host-state consent, thus, do not need to fall under the exceptions provided under Articles 42 and 51 of the UN Charter in order to be lawful under the \textit{jus ad bellum}.

\subsection*{II.2.2. Use of Force as Self-defense}

The most important, for present purposes, exception to the prohibition provided in Article 2(4) is provided for in Article 51 UN Charter. Pursuant to Article 51,

\textit{“Nothing in the Present Charter shall impair the inherent right of individual or collective self-defense 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. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”}.\textsuperscript{102}

As established by the ICJ in \textit{Nicaragua v USA}, the right of self-defense constitutes customary international law\textsuperscript{103} a conclusion that can also be drawn by the inclusion of the term ‘inherent’ when referring to the right of self-defense.\textsuperscript{104} Furthermore it is widely accepted that in order for

\begin{itemize}
\item \textsuperscript{97} See UN Charter, Articles 42 and 51
\item \textsuperscript{98} UN Charter, Article 51
\item \textsuperscript{99} UN Charter Article 42
\item \textsuperscript{100} UN Charter Article 2(4)
\item \textsuperscript{101} While such uses of force would not be contrary to Article 2(4) and thus not contrary to the \textit{jus ad bellum}, not all such uses of force would necessarily be lawful under other bodies of law. The lawfulness of such attacks will be further discussed in the section on IHRL.
\item \textsuperscript{102} UN Charter, Article 51
\item \textsuperscript{103} ICJ Nicaragua, para 176
\item \textsuperscript{104} See Helen Duffy, \textit{The ‘War on Terror’ and the Framework of International Law} (CUP 2015) at 150
\end{itemize}
self-defense to be legal, two additional criteria, namely ‘proportionality’ and ‘necessity’ should be satisfied.\textsuperscript{105}

\section*{II.2.2.1. Necessity and proportionality}

In \textit{Nuclear Weapons}, the ICJ sustained that “the submission of the exercise of the right of self-defense to the conditions of necessity and proportionality is a rule of customary international law”\textsuperscript{106}. The fact that self-defense should be necessary and proportional to the initial attack has not been, to the author’s knowledge, disputed by any scholars or states. This is not to say, however, that there is an agreement on precisely when self-defense is necessary and proportional as both ‘proportionality’ and ‘necessity’ are terms that leave considerable room for interpretation.

Necessity is to be understood as taking any action necessary to avert the continuation or repetition of the attack. When an armed attack continues at the time that the state invokes its right to self-defense, there is little to no doubt that self-defense satisfies the necessity condition.\textsuperscript{107} Cases where the attack has stopped occurring are, however, more complex. While in theory it is easy to conclude that whether the use of force in self-defense is necessary will be dependent on whether there is an imminent threat of a repetition of the attack, determining the existence of said threat is quite difficult and can only be determined on a case by case basis. Moreover, necessity also implies that the use of force as self-defense will only be necessary if there are no other means available for the state to defend itself. In the case of an attack by a non-state actor, the threshold for necessity will arguably be lower as alternative means, such as diplomacy, will not be available.\textsuperscript{108}

It is generally accepted that in order for the condition of necessity to be satisfied the invocation of the right to self-defense would have to be immediate.\textsuperscript{109} Immediacy implies that the counter-attack that will be launched in self-defense will be immediate following the conclusion of the attack. In fact, pursuant to the Caroline standard, there is ‘no moment of deliberation’ for the attacked to invoke their right to self-defense.\textsuperscript{110} However, as any use of force by a state requires planning and pursuant to Article 51 the state that invokes its right to self-defense is under an

\textsuperscript{105} ICJ Nicaragua
\textsuperscript{106} ICJ, Nuclear Weapons para 41
\textsuperscript{107} See Noam Lubell, \textit{Extraterritorial Use of Force Against Non-State Actors} (OUP, 2010) at 45
\textsuperscript{108} Ibid
\textsuperscript{109} See Yoram Dinstein, \textit{supra note 89} at 209
\textsuperscript{110} Letter dated 6 August 1842 from Mr. Webster to Lord Ashburton, Department of State, Washington, available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2
obligation to inform the UNSC, the term immediacy should be understood as meaning within a reasonable delay, that takes into account the time needed in order for the necessary preparations to be made.\textsuperscript{111} Rather logically, it is generally accepted that self-defense would satisfy the condition of immediacy if exercised between the time following the occurrence of the attack and the decision of the Security Council to take action.\textsuperscript{112} As far as proportionality is concerned, some authors have suggested that proportionality should be understood as force proportional to the armed attack that triggered the exercise of the right with regards to the intensity, location and duration of the use of force.\textsuperscript{113} However, and while this approach might yield an appropriate result, it would be more logical to deduce that the aim of Article 51 is to prevent the continuation or repetition of the attack rather than to punish the perpetrators of the original attack.\textsuperscript{114} Instead of adopting the aforementioned approach of examining proportionality in relation to the initial attack, which is arguably punitive in character, adopting an approach that would examine proportionality in relation to the goal sought, namely discontinuing an ongoing attack or preventing its repetition would seem more appropriate.

\textit{II.2.2.2. Pre-emptive/ anticipatory self-defense}

The right to self-defense in international law finds its origins in the Caroline incident of 1837 and the subsequent formulation of the Caroline doctrine.\textsuperscript{115} The Caroline test was formulated by Daniel Webster who sustained that self-defense must be against a threat that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation”.\textsuperscript{116} The Caroline doctrine leaves considerable room for preemption and following the adoption of Article 51, which as mentioned above refers to an ‘inherent right of self-defense’, a number of scholars and states

\textsuperscript{111} Tom Ruys “International Law on the Use of Force” in Jan Wouters, Philip De Mann and Nele Verlinden, Armed Conflicts and the Law (Intersentia, 2015) at 125; Noam Lubell, \textit{supra note 107}, at 44
\textsuperscript{112} See T Franck, ‘Editorial Comments: Terrorism and the Right of Self-Defense’ (2001) 95 American Journal of International Law 839 at 841
\textsuperscript{113} See Tom Ruys, \textit{supra note 111}, at 126
\textsuperscript{114} For a discussion on the implications of measuring proportionality against the initial attack versus the implication of measuring proportionality in relation to the threat see Lubell, \textit{supra note 107}, at 64-68
\textsuperscript{116} Letter dated 6 August 1842 from Mr. Webster to Lord Ashburton, Department of State, Washington, available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2
have argued that said article permits the exercise of self-defense preemptively, thus reflecting state practice at the time of its drafting.\textsuperscript{117}

While it would be hard to argue that the events of 9/11, for instance, if performed by a state\textsuperscript{118}, would not amount to an ‘armed attack’ for the purposes of Article 51, the actions taken by the United States in response, which continue to this date, 15 years following the initial attack, have arguably exceeded by far the permissible actions that would satisfy the requirements of necessity and proportionality, if the use of force was solely in response to these events. However, the United States has argued that, on the basis of the Caroline test, all operations launched within the context of the ‘war on terror’ have been in response to a possible future attack and therefore do not violate the codification of the Caroline doctrine in Article 51.\textsuperscript{119} However, and while Article 51 might have been inspired by the Caroline test, arguing that its scope is not significantly narrower would require one to interpret said Article by paying little to no attention to the actual wording of the provision. Article 51 clearly states that “if an armed attack occurs” the right to self-defense can be exercised and as such leaves absolutely no room for preemption. The \textit{travaux préparatoires} of the UN Charter support this interpretation as US delegation itself clearly stated that the inclusion of the words “if an armed attack occurs” in Article 51 “was intentional and sound. We did not want exercised the right of self-defense before an armed attack had occurred”.\textsuperscript{120} This view has also been unequivocally supported by two of the most prominent international lawyers, Sir Ian Brownlie and Derek Bowett, further suggesting that pre-emption is not only contrary to the wording of Article 51 but would also be contrary to the prohibition of force as provided for in Article 2(4).\textsuperscript{121}


\textsuperscript{118} the possibility of a non-state actor to undertake an ‘armed attack’ for the purposes of Article 51 will be further discussed below


\textsuperscript{120} Minutes of 48\textsuperscript{th} meeting of US Delegation, SF (20 May 1945) as cited in T Franck, \textit{supra note 112}, at 50

\textsuperscript{121} See Ian Brownlie, \textit{International Law and the Use of Force by States} (OUP, 1963) at 278; Derek Bowett, \textit{Self-Defense in International Law} (Manchester University Press, 1958) at 191. It is also important to note here that the Caroline Doctrine and the customary international law that was subsequently developed on the basis of said doctrine predates the prohibition to the use of force as proclaimed in Article 2(4).
II.2.2.3 Against non-state actors

Another question that has been debated by lawyers in the last decades, and especially since the declaration of ‘the war on terror’ by the United States, is whether an ‘armed attack’ for the purposes of Article 51 could be attributable to a non-state actor.

While Article 51 does not restrict the ‘rationae personae’ origin of the attack in any way, in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory the ICJ stated that the scope of Article 51 was limited to armed attacks by state actors. However, although the actions of Israel preceding this Opinion have been condemned by most states, this has not been the case for the actions of the United States in Afghanistan following the events of 9/11. State practice following this attack, thus, seems to support the argument that the scope of Article 51 is wider than the interpretation of the ICJ in the Wall. While the ‘war on terror’ has been the subject of much controversy, the self-defense claim of the United States in Afghanistan following the 9/11 attacks was left virtually unchallenged by other states. However, it is important to note here that the political climate in the aftermath of these attacks and the expression of solidarity from the part of third states might have played an important role in the decision not to challenge this claim. That being said, and while the law on this matter is far from settled, the position that Article 51 also covers attacks originating from non-state actors seems to be prevailing.

Concluding remarks

The fact that the United States chose to respond to the 9/11 attacks through the use of force against Al-Qaeda affiliates in Afghanistan does not seem to create much legal controversy. This is not the case, however, neither for the use of force in the territories of other countries where Al-Qaeda affiliates were thought to be located, nor for the way force was used both in Afghanistan and the other countries. The following chapter will discuss the applicable legal framework to the use of force during an armed conflict, while the following section will discuss the specific practice of the United States.

123 See ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory opinion. ICJ Reports 2004, p.136 (hereinafter ICJ, The Wall), para 194
124 See Lubell, supra note 107, at 33
125 See generally T. Ruys, ‘Armed Attack’ and Article 51 of the UN Charter, (CUP, 2010), at 419-511
II.3. **JUS IN BELLO**

II.3.1 THE APPLICABILITY OF IHL

II.3.1.1. Defining ‘armed conflict’

In order to determine whether IHL is applicable in any given situation, it is first necessary to define the term ‘armed conflict’. IHL distinguishes between two types of armed conflicts, namely international armed conflicts and non-international armed conflicts.\(^\text{126}\) While the terms are not defined in any IHL treaty, the ICTY in *Tadic* has provided some clarity with regards to their meaning. According to the ICTY ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state’\(^\text{127}\). This test has been endorsed by the International Committee of the Red Cross (ICRC)\(^\text{128}\) and is widely accepted in International Criminal Law as evident by the inclusion of Article 8(2)(f) in the Rome Statute for the International Criminal Court (hereinafter Rome Statute of the ICC)\(^\text{129}\).

While the contribution of the ICTY in attempts to define the term ‘armed conflict’ cannot be disregarded, several terms included in this definition require further interpretation. Moreover, the ‘definition’ provided by the ICTY only clarifies what is meant by international and non-international armed conflicts and provides little to no guidance for situations that cannot be classified as neither international nor non-international armed conflicts. Nonetheless, such hybrid

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\(^{126}\) See AP I and AP II

\(^{127}\) *Prosecutor v. Dusko Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ICTY, 2 October 1995 (hereinafter ICTY, *Tadic*) para 70


\(^{129}\) Article 8(2)(f) of the Rome Statute of the ICC reads: “Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.” (Rome Statute of the International Criminal Court, circulated as as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, entered into force 1 July 2002) (hereinafter Rome Statute of the ICC)
conflicts or ‘transnational conflicts’, as they have been termed, are becoming all the more common nowadays.\(^\text{130}\)

**II.3.1.2 Field of application**

Taking as a starting point the definition of armed conflicts provided by the *Tadic* case let us now turn to examining the applicability of IHL by paying particular attention to transnational armed conflicts. The present chapter will attempt to determine in which situations IHL applies by attempting to answer to three principal questions. First, who is bound by the legal rules (field of application *ratione personae*), second, when do the rules apply (field of application *ratione temporis*) and third where do the rules apply (field of application *ratione loci*).

**Field of application *ratione personae***

Article 2 of AP I states that the Protocol applies to “all persons affected by an armed conflict”.\(^\text{131}\) While AP I extends its protection to all individuals affected by a conflict and is, as evident by the aforementioned provision, applicable to all persons affected by the conflict, it does not create any obligations for protected persons. Instead, as is the case with most bodies of international law, IHL treaties only create obligations for states parties to the conflict or, in the case of non-international armed conflicts for the non-state actor party to said conflict.

All combatants that are bound by the obligations, or rather prohibitions, provided for in IHL treaties are acting on behalf of a party to the conflict. Individuals not associated with any of the parties do not, for the most part, have any obligations of conduct or rights under IHL. Individuals, for instance, who are not associated with the armed forces of a state or a hierarchically organized group do not have the right to participate in hostilities under IHL and are, thus, not bound by any prohibition of conduct that presupposes their participation in hostilities.

The existence of an armed conflict whether international, non-international or transnational presupposes the involvement of two or more actors.\(^\text{132}\) In this respect, it would be very hard to argue that the ‘war on terror’ can satisfy the *ratione personae* requirement for the existence of an armed conflict. While the question of whether a terrorist organization could qualify as an actor to

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\(^{130}\) The term ‘transnational conflict’ will be used to describe conflicts involving a state and non-state actors outside of the territory of that state.

\(^{131}\) AP I, Article 2

\(^{132}\) See Lubell, *supra note 107*, at 113
whom IHL would be applicable in virtue of it being a party to a conflict is subject to debate\textsuperscript{133},
the fact that ‘terror’ or ‘terrorism’ is not an actor, and as such could not be characterized as a party
to a conflict cannot be doubted.\textsuperscript{134}

\textit{Field of application Ratione temporis}

Before the start of the Second World War it was commonly believed that in order for a
legal war to start a state needed to formally issue a declaration of war.\textsuperscript{135} While declarations might
not have always been very common in practice\textsuperscript{136}, from a legal perspective this requirement
facilitated the determination of the temporal applicability of IHL. However, ever since the Second
World War, declarations of war have become not only very uncommon but also legally
irrelevant.\textsuperscript{137} The temporal application of the laws of war is, thus, considerably more complicated
to determine.

According to the ICTY in \textit{Tadic} an ‘armed conflict exists whenever there is resort to armed
force between states […] International Humanitarian Law applies from the initiation of such armed
conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is
reached; or, in the case of internal conflicts, a peaceful settlement is achieved’.\textsuperscript{138} While the Court
provided sufficient guidance with regards to the moment that IHL would cease being applicable,
this is not the case with regards to the moment that IHL would start being applicable. There is
disagreement among scholars on how the Court’s conclusion should be interpreted. The statement
of the Court can be understood as meaning that the temporal application of IHL begins the moment

\textsuperscript{133} On the personal applicability of IHL to Armed groups see generally Marco Sassoli “The Role of Human Rights
and International Humanitarian Law in New Types of Armed Conflicts” in Orna Ben-Naftali, \textit{International
Humanitarian Law and International Human Rights Law} (OUP, 2011) at 56-59
\textsuperscript{134} See generally Rosa E. Brooks ‘War Everywhere: Right, National Security Law and the Law of Armed Conflict in
International Humanitarian Law: Challenges from the “War on Terror”’ (2003) 27 The Fletcher Forum of World
Affairs 55; Miles P. Fischer, ‘Applicability of the Geneva Conventions to “Armed Conflict” in the War on Terror’
\textsuperscript{135} Article 1 of the 1907 Hague Convention III relative to the Opening of Hostilities, for instance, reads: “The
contracting powers recognize that hostilities between themselves must not commence without previous and explicit
warning, in the form of either a declaration of war, giving reasons, or an ultimatum with conditional declarat
ion of war” (Convention (III) relative to the Opening of Hostilities, (adopted 18 October, entered into force on 26 January
1910) (hereinafter 1907 Hague Convention III)
\textsuperscript{136} See generally Stephen Neff, \textit{supra note 115}
\textsuperscript{137} See Christopher Greenwood, ‘The concept of war in modern international law’, (1987) 36 International and
Comparative Law Quarterly 283; Dieter Fleck (eds), The Handbook of International Humanitarian Law, (OUP 2008)
para. 203; ICRC, \textit{supra note 128}, stating “no formal declaration of war or recognition of the situation is required”
\textsuperscript{138} ICTY, \textit{Tadic}, para 70
that there is resort to force by one state to the territory of another. If we accept this interpretation, we can argue that IHL is applicable to the initial attack by one state and that a counter-attack by the targeted state is not necessary to trigger the applicability of IHL. Some authors, however, argue that there needs to be a level of ‘sustained hostilities’ for a situation to escalate to an armed conflict.\textsuperscript{139} The ICRC has rejected this position stating that an international armed conflict exists ‘when [there is] recourse to armed force […] regardless of the reasons or the intensity of this confrontation’\textsuperscript{140} The fact that the Court specified that protracted violence is necessary for a NIAC to exist but it did not introduce any such requirements for IACs seems to support this view.

However, regardless of whether we accept that a certain level of intensity in hostilities is necessary for an armed conflict to exist, the view that IHL is applicable to the initial attack that triggered its applicability cannot be easily supported for several reasons. First, in defining an international armed conflict, the ICTY referred to ‘resort to armed force between states’ rather than resort to armed force by a State against another state. It is, thus, more logical to interpret the Court’s statement as meaning that the armed conflict would begin with the counter-attack rather than with the initial attack.\textsuperscript{141} Second, the presumption that IHL is applicable to the initial attack would be in itself contrary to the \textit{jus ad bellum} and the fact that the \textit{jus ad bellum} and the \textit{jus in bello} are two separate legal frameworks. As has been discussed above, the UN Charter contains a prohibition on the use of force.\textsuperscript{142} The use of force is, however, not only permitted under IHL but it is also a prerequisite to its applicability. An initial resort to armed force can, thus, only be subject to the \textit{jus ad bellum} and not the \textit{jus in bello}.

The rules discussed above are applicable to international armed conflicts while for non-international conflicts the ICTY has stated that protracted violence is necessary for a situation to escalate to an armed conflict. While there is disagreement on which set of rules would be applicable to transnational conflicts, it is clear that in both IACs and NIACs, the applicability of IHL would begin after an initial attack and would, thus, not be applicable to said attack.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{139} See \textit{inter alia} Mary Ellen O’Connel, ‘When is a War not a War? The Myth of the Global War on Terror’ (2006) 12 ILSA Journal of International and Comparative Law 535
\item \textsuperscript{140} See ICRC, \textit{supra note 128}
\item \textsuperscript{141} See Mary Ellen O’Connel, \textit{supra note 139}, suggesting that “Wars[…] do not begin with an attack. They begin with a counter-attack”
\item \textsuperscript{142} UN Charter, Article 2(4)
\end{itemize}
\end{footnotesize}
Field of application ratione loci

The applicability of IHL is also limited territorially. In an IAC the territorial application of the laws of war will be limited to the entire territories of the state parties to the armed conflict and to the high seas. While some commentators have contested the applicability of IHL to the entire territory of the state parties to the conflict and have instead argued that IHL is only applicable to combat zones, the ICTY has concluded that “there is no necessary correlation between the area where the actual fighting takes place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring parties, or in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there.”

It follows that the territorial application of the laws of war in a NIAC and in a transnational armed conflict will be limited to the territory of the state or states parties to the conflict and the territory under the control of the non-state party as well as to the high seas. The mere presence of a militant to a territory not controlled by the non-state party could not extend the applicability of IHL to said territory in the same way that the mere presence of a member of the armed forces of a participating state to an IAC in the territory of a neutral state would not extend the applicability of IHL to that territory.

II.3.2 The Use of Lethal Force Under IHL

Basic Principles

As discussed in a previous chapter, IHL regulates the conduct of hostilities and the methods and means of warfare. After having previously discussed the means and methods of warfare, we now turn to the conduct of hostilities. The main sources of IHL on the conduct of hostilities, or ‘Geneva Law’ are the Geneva Conventions and their Additional Protocols. It is important to mention here, that while there are differences on the rules that are applicable to international armed

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143 See Yoram Dinstein, supra note 89, at 19
conflicts and to non-international armed conflicts, most of the provisions of AP I have now achieved customary status and are applicable to both IACs and NIACs.\textsuperscript{145}

\textit{II.3.2.1 Rules on targeting}

Pursuant to Article 51(2) of AP I and Article 13(2) of AP II, force can only be directed at military objectives.\textsuperscript{146} Persons taking direct part in hostilities, excluding persons \textit{hors de combat}, are the only persons that can be lawfully targeted under IHL.\textsuperscript{147} IHL obliges states not only not to direct attacks at civilians or civilian objects but also, as previously mentioned, prohibits attacks that do not discriminate between civilians and combatants.\textsuperscript{148} A drone strike that is directed against a civilian will be automatically unlawful, while the lawfulness of a drone strike that despite being directed at a combatant resulted in civilian casualties will be dependent on whether sufficient precautionary measures were taken by the individual performing the strike.\textsuperscript{149}

When using force, members of armed forces are, thus, under an obligation to take precautionary measures to ensure that there will be no civilian collateral damage and if this is impossible, that said damage will not be excessive in relation to the anticipated military advantage.\textsuperscript{150} The use of the word anticipated when referring to the military advantage clearly indicates that any examination of whether the damage caused by any given attack was excessive shall not take into consideration any facts that became known following the attack.\textsuperscript{151} Instead, it should be limited to the information that was available to the commander authorizing said attack before making the targeting decision.\textsuperscript{152} The surveillance capacities of drones enable commanders to gather significant information about their targets before making a targeting decision, thus

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\textsuperscript{146} AP I, Article 51(2) reads: “The civilian population as such, as well as individual civilians, shall not be the object of attack. [...]”. The provision is reiterated \textit{verbatim} in AP, Article 13(2)
\textsuperscript{147} Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted on 27 July 1920) (hereinafter Geneva Convention I)
\textsuperscript{148} AP I, Article 48
\textsuperscript{149} Pursuant to Article 57(1) of AP I, “In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”
\textsuperscript{150} AP I Art. 51(5)
\textsuperscript{152} See Laurie R. Blank, \textit{supra note 17}, at 696
\end{flushleft}
improving adherence to the obligation to take precautionary measures.\textsuperscript{153} It is important to note here, that whether the commander made use of said information is irrelevant so long as the information was available to him or her.\textsuperscript{154} Consequently, the threshold of adequacy of the precautionary measures will be higher when drones are being used which would make a targeting mistake harder to justify.\textsuperscript{155}

While the rules on targeting as provided for in IHL do not present any significant challenges, determining whether an individual can be considered a civilian for the purposes of IHL and, therefore, an illegitimate target, has, most particularly in recent years, proven to be a complex exercise.\textsuperscript{156}

\textit{II.3.2.2 Status of individuals}

While one of the most important principles of IHL is the distinction between civilian and military objectives, civilians are not positively defined in any IHL treaty. According to Article 50 of AP I, any person that does not fit the definition of a combatant is to be considered a civilian.\textsuperscript{157} For the purposes of IHL, a combatant in an international armed conflict is any person that is a party of the armed forces of a state.\textsuperscript{158} Members of the armed forces of a state are easily identifiable as they typically wear a distinguishable sign and carry their arms openly.\textsuperscript{159} This is not the case, however, in non-international or transnational armed conflicts. In such conflicts, at least one of the parties is not a state and combatants are, therefore, not members of the armed forces of any state. While AP II does not define the term ‘armed forces’, Article 43 of AP I does not in fact refer exclusively to the armed forces of a state. In fact, it also recognizes as armed forces “all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not

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\textsuperscript{153} \textit{Ibid} at 697
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\textsuperscript{154} In the words of the ICTY, what is relevant is “whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack” (Prosecutor v. Galić, Case No. IT9829T, 5 December 2003, para 58).
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\textsuperscript{155} See Jack M. Bead, ‘Law and the War in the Virtual Era’ (2009) 103 American Journal of International Law 409 at 441
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\textsuperscript{157} AP I, Article 50
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\textsuperscript{158} See AP I, Article 43 and Convention (III) relative to the Treatment of Prisoners of War (adopted on 12 August 1949, entered into force on 21 October 1950) (hereinafter GC III) Art. 4(a)
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\textsuperscript{159} See M. J. Boyle, \textit{supra note} 2, at 112; Laurie R. Blank, \textit{supra note} 17, at 691-2
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recognized by an adverse Party [...]”.\textsuperscript{160} It is, thus, generally accepted in doctrine and state practice that members of hierarchically organized armed groups are combatants for the purposes of IHL and as such can be lawfully targeted.\textsuperscript{161}

Accepting, however, that members of organized armed groups have the status of combatants under IHL does not help us identify these members. In order to remedy this situation, AP I has included Article 51, paragraph 3 which stipulates that, “civilians benefit from protection unless and for such a time as they take direct part in hostilities”\textsuperscript{162}.\textsuperscript{163} It is important to note, however, that this provision has not completely remedied the situation. In fact, this provision has been described by many as a ‘revolving door’ as it only allows for persons not belonging to the armed forces of a state to be targeted only when they take direct part in hostilities. Essentially, this means that the moment a person stops taking direct part in hostilities they are no longer a lawful target even if they participated a second ago and will participate again a second later.

\textit{Concluding remarks}

Irrespective of whether the all changing nature of conflicts and the increasing participation of militant groups that are not associated with the official armed forces of a state or with a hierarchically organized armed group in conflicts might require the adoption of new rules with regards to targeting and the status of individuals, for the time being, persons that do not fit the definition of a combatant under IHL and/or do not take direct part in hostilities cannot be lawfully targeted.

\textsuperscript{160} AP I, Article 43
\textsuperscript{161} See generally Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, (ICRC 2008)
\textsuperscript{162} The ICRC has provided more guidance with regards to what precisely constitutes ‘direct participation’. According to the ICRC ‘the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)” (Ibid, at 16)
\textsuperscript{163} AP I, Article 51 para 3. According to The Israeli Supreme Court “A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian. He is subject to the risk of attack like those to which a combatant, e.g. those granted to a prisoner of war. True, his status is that of a civilian and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack” (Israeli Supreme Court, Targeted Killings Case, 57(6) para 31)
The capabilities of drones can provide a significant advantage in this regard. In contrast to armed forces in the ground who might only have partial information on the status of the individual and might make a justifiably rush targeting decision in order to defend themselves, drone operators have the luxury of both not being present in the battlefield and, thus, of not being in direct physical danger and of having access to considerable intelligence that can allow them to more pertinently distinguish between combatants and civilians.\textsuperscript{164} The use of drones can, thus, improve adherence to the principles applicable to the use of lethal force in the course of an armed conflict. At the same time, however, the fact that drones do have these capabilities is likely to raise the threshold of what is acceptable in terms of precautionary measures and targeting mistakes.

**II.4. INTERNATIONAL HUMAN RIGHTS LAW**

**II.3.1 Applicability of IHRL**

While there is wide agreement among scholars and international bodies on the fact that the applicability of international human rights law does not have any temporal or territorial limitations, some authors have argued that while IHRL always applies, in situations of armed conflicts, IHL, because of its \textit{lex specialis} nature, supersedes IHRL.\textsuperscript{165} However, despite the arguments of these authors, the ICJ has clearly stated in \textit{the Wall} that IHRL can remain applicable in situations where IHL also applies\textsuperscript{166} and most authors now agree that both bodies of law can remain applicable in times of an armed conflict. This is also made clear by the fact that IHRL treaties contain specific derogations in cases of public emergency.\textsuperscript{167} These derogations would seem rather redundant if IHRL automatically ceased to apply in situations of armed conflicts.

It follows from the foregoing that IHRL is always applicable irrespective of whether an armed conflict exists or not. This is not to say, however, that IHL never supersedes IHRL. In fact, in situations of armed conflicts members of the armed forces of a state or of a non-state

\textsuperscript{164} See Laurie, R. Blank, supra note 17, at 693; Michael N. Schmitt, ‘Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the ‘Fog of Law’ (2010) 13 Yearbook of International Humanitarian Law 311

\textsuperscript{165} See, for instance, M. Dennis, ‘ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of human rights treaties extraterritorially in times of armed conflict and military occupation,’ (2005) 99 American Journal of International Law 119

\textsuperscript{166} The Court stated that “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law” (ICJ, \textit{The Wall} para 106)

\textsuperscript{167} See, for instance, Article 4 of the International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) (hereinafter: ICCPR)
hierarchically organized group can legally perform acts that are clearly prohibited by IHRL, precisely because of the *lex specialis* nature of IHL. However, any other persons present in the battlefield in the course of an armed conflict will continue to benefit not only from the protection afforded to civilians under IHL but also from the protection afforded to them under IHRL.

II.3.2. The Right to Life

Pursuant to Article 3 of the Universal Declaration of Human Rights (hereinafter UDHR), ‘everyone has the right to life, liberty and security of person’.\(^{168}\) While the UDHR is not legally binding, the right ‘not to be *arbitrarily*\(^{169}\) deprived of life’ is also proclaimed in, *inter alia*, Article 6 of the International Covenant on Civil and Political Rights (ICCPR)\(^{170}\), Article 4 of the American Convention on Human Rights (ACHR)\(^{171}\) and Article 4 of the African Charter on Human and Peoples’ Rights (ACHRP\(^{172}\)). Further, most scholars and practitioners agree that the right to life is a customary norm of *jus cogens* nature and is, as such applicable to all states.\(^{173}\)

The use of lethal force by any means would *prima facie* be a violation of the right to life as guaranteed by the Universal Declaration of Human Rights. However, and while the ICCPR clearly indicates that the right to life is a non-derogable right,\(^{174}\) attention must be paid to the wording of the provision. Article 6 ICCPR does not simply refer to a right not to be deprived of life but rather to a right not to be arbitrarily deprived of life.

While the ICCPR does not elaborate any further on what would constitute a non-arbitrary deprivation of life, the European Convention on Human Rights (ECHR), which only states that ‘no one shall be deprived of his life’ in Article 2(1), lists three situations where deprivation of life would not be in violation of this provision, provided that the “use of force [that resulted in the deprivation of life] is no more than absolutely necessary”.\(^{175}\) These three situations, namely “(a)[…] defense of any person from unlawful violence; (b) […] a lawful arrest […]; (c) […] action

\(^{168}\) The Universal Declaration of Human Rights (adopted on 10 December 1948), (hereinafter UDHR), Article 3

\(^{169}\) emphasis added

\(^{170}\) ICCPR, Article 6

\(^{171}\) American Convention on Human Rights (adopted on 22 November 1969) (hereinafter ACHR), Article 4


\(^{174}\) ICCPR Article 4(2) reads “no derogation from articles 6, […] may be made under this provision”

\(^{175}\) Council of Europe, European Convention on Human Rights (entered into force on 21 September 1970) (hereinafter ECHR), Article 2(1)
lawfully taken for the purpose of quelling a riot or insurrection”, are arguably three situations where deprivation of life would not be arbitrary for the purposes of the ICCPR. Principle 9 of the UN Basic Principles on the Use of Force and Firearms provide further guidance by allowing the use of lethal force only “in self-defense of defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life […] and only when less extreme means are unavoidable in order to protect life”. It is obvious from the abovementioned instruments that the deprivation of one’s life needs to adhere to both the principles of necessity and proportionality. This was also confirmed in the Guerreo v Colombia case where the Human Rights Committee determined that law enforcement arbitrarily deprived suspected terrorists of their right to life when they used deadly force before attempting to capture them.

It follows from the foregoing that the use of lethal force by means of armed drones against any individual outside of the context of an armed conflict and against individuals not taking direct part in hostilities within the context of an armed conflict would not be arbitrary and thus a violation of Article 6 ICCPR only if it was necessary for the goal of preventing the deprivation of the life of oneself or others and only if it was proportional to the harm sought to be avoided. It would be impossible to assess what would be required for the use of lethal force to be proportional and necessary without separately examining the facts of a situation that led to said use of force. By way of example, however, taking the life of a terrorist suspect who is on the late stages of preparing a terrorist attack that would kill a large number of civilians would be permissible under international law provided that it was the only way to ensure that the attack on the civilians would not take place. However, using lethal force against that same person in the early stages of preparation of the terrorist attack where there was sufficient time to attempt arresting the person or preventing him or her from carrying out the attack through other means would violate Article 6 ICCPR as it would arguably not be necessary. Similarly, using an armed drone against a person who is on the verge of taking the life of a single other person through the means of a handgun for instance, would arguably be disproportional and thus contrary to Article 6 of the ICCPR.

176 Ibid, Article 2
177 See UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted on 7 September 1990), Principle 9
178 See generally Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) supra note 173
III. LETHAL USE OF DRONES IN ‘THE WAR ON TERROR’

After having set out the conditions that would need to be satisfied in order for the lethal use of a drone to be lawful under the *jus ad bellum*, IHL and IHRL respectively, the present section will examine the legality of drone strikes performed by the United States in the context of the ‘war on terror’. Before making this assessment, we will consider the question of whether ‘the war on terror’ is an armed conflict to which IHL would apply.

III.1. IS THE ‘WAR ON TERROR’ AN ARMED CONFLICT?

Despite the criticism surrounding the practices of the US within the context of the GWOT and more particularly the lethal use of drones, the United States has unequivocally supported that all the operations of its armed forces have been compliant with the Laws of War.\textsuperscript{180} Before assessing whether this criticism is, as is the view of the country, unfounded, it is necessary to determine whether this body of law is actually applicable to this ‘war on terror’. In order to do so it is necessary to assess whether the ‘war on terror’ can qualify as an armed conflict that would triggering the applicability of IHL.

The United States has repeatedly claimed that the country is in an armed conflict with ‘Al-Qaeda, the Taliban, and associated forces in response to the 9/11 attacks’.\textsuperscript{181} In the view of the US, as expressed by a former Counsel to the US President Alberto Gonzales, “as a practical matter, this state of war is not in dispute […] by the United Nations Security Council, which passed a resolution in response to the September 11\textsuperscript{th} attacks recognizing the right of states to act in self-defense […]”\textsuperscript{182} In the country’s view, thus, the only body of law that operations need to comply with is IHL, applicable to all armed conflicts.

However, and contrary to what was expressed in the abovementioned statement, this state of war is in dispute by scholars, the media as well as state members of the United Nations. While


the right of self-defense of the United States for the 9/11 attacks was in fact recognized, as has been discussed above, the right of self-defense is a right under the *jus ad bellum*, a body of law separate from the *jus in bello*. By recognizing said right, thus, the United Nations and third states did not in any way recognize the applicability of international humanitarian law to this ‘war’ nor the existence of this armed conflict.

As has been discussed above, the ICTY in *Tadic* defined an armed conflict as is ‘a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state’. On the basis of this definition, the GWOT cannot qualify as an ‘armed conflict’, as the existence of an armed conflict presupposes the existence of two or more actors which are either states or organized armed groups. As terror could not be qualified as an actor, it is impossible to claim, for legal purposes, that the United States is in an armed conflict with terror.

However, it is important to note that even though the US government has on several occasions used the terminology ‘war on terror’, what this war encompasses is a ‘war with Al-Qaeda, the Taliban, and its associated forces’. On the basis of the *Tadic* definition of armed conflict alone, a war between the Taliban and the United States or a war between Al-Qaeda and the United States could qualify as an armed conflict. Taking into account the fact that in 2001, the Taliban represented the government and had control over 90% of Afghanistan and its armed forces, it can be deduced that the Taliban were in fact, at the time, organs or agents of the state of Afghanistan. Even though from 2001 onwards, the Taliban started gradually losing their control over most of the Afghan territory there is little doubt that there was ‘a resort to armed force’ between the states of Afghanistan and the United States and that hostilities had not come to a general ending at the very least until 2014.

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183 See sections *Ius ad Bellum* and IHL above
184 ICTY, *Tadic* para 70
185 See Lubell, supra note 107, at 113
186 Ibid
187 It is interesting to note that in contrast to the Bush administration, the Obama administration has for the most part avoided using the terms ‘war on terror’, calling it instead ‘a war against Al-Qaeda, the Taliban and its associated forces’. These terms are, however, being used interchangeably.
189 See Ibid
190 See Applicable legal framework: Afghanistan below
With regards to the existence of an armed conflict between the United States and Al-Qaeda, while presumably the ICTY had in mind non-international armed conflicts when it talked about protracted violence between governmental authorities and organized armed groups, it is not clear whether the phrase ‘within a state’ applies to both ‘protracted violence between governmental authorities and organized armed groups’ and ‘between such groups’ or exclusively to ‘between such groups’. Interpreting the ICTY’s definition in a manner in which the phrase ‘within a state’ would only apply to the preceding ‘between such groups’ it can be concluded that governmental authorities of any state can be in an armed conflict with an organized armed group when there is protracted violence between them and this, irrespective of whether said violence is taking place within the state. Considering that at the time, Al-Qaeda fractions in some regions were highly organized armed groups, as evident by the success of the 9/11 attacks, and that there was in fact, at the time, protracted armed violence between some fractions of the group and the United States\textsuperscript{191}, it could be argued that this conflict qualifies as an armed conflict for the purposes of the abovementioned definition.

However, it is important to note here that terrorist organizations, including most notably Al Qaeda, are usually networks composed of numerous fractions located in different regions or even countries that albeit sharing some common beliefs and purposes are often not connected in any substantial way with each other. While, thus, some fractions of Al Qaeda might have the characteristics of an organized armed group as envisaged by the ICTY in Tadic, it would be hard to argue that the entire Al Qaeda network and most importantly ‘its associated forces’ could qualify as a hierarchically organized group that could be a party to a conflict. Moreover, at the national level the legal basis of this ‘war’ is the Authorization to Use Military Force (AUMF) adopted on 14 September 2001 and giving authorization to the US to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”.\textsuperscript{192} The US government under Obama has used the AUMF as the basis for military operations targeting groups thought to be successors of Al Qaeda, many


\textsuperscript{192} See M. J Boyle supra note 2 at 113
of which did not exist in 2001. These groups, however, arguably do not belong in the same hierarchically organized structure as the fraction of Al Qaeda responsible for the 9/11 attacks.

It follows from the foregoing that the ‘war on terror’ or the ‘war against the Taliban, Al-Qaeda and its associated forces’ cannot qualify as an armed conflict for the purposes of IHL. The question of whether the acts of the state in the context of this ‘war’ are compliant with IHL is therefore irrelevant, since IHL is not actually applicable. This is not to say, however, that IHL applies to none of the situations where force was used by the United States under the auspices of the ‘war on terror’. In fact, since September 2001 the United States has been involved in a number of wars which despite being fought under the larger umbrella of the ‘war on terror’ is hard to deny that they in fact qualify as armed conflicts to which IHL would be applicable.

The following section will discuss the legality of the use of armed drones from the part of the United States in the territories of two states, namely Afghanistan and Yemen. After having determined that albeit the ‘war on terror’ in its entirety not being an armed conflict for the purposes of IHL several conflicts having occurred under this umbrella can in fact qualify as such, the applicability of IHL to each of the two situations will be examined separately.

III.2. US DRONE STRIKES

III.2.1. Applicable legal framework: Afghanistan vs Yemen

Afghanistan

Following the September 11 attacks at the World Trade Center, the United States and its Allies launched the Operation Enduring Freedom (OEF) on October 7, 2001. While the end of Operation Enduring Freedom and the gradual withdrawal of US troops from the territory of Afghanistan was announced by President Obama on May 2014, there is little doubt that at the very least from October 2001 to May 2014 there was a resort to armed force between states, which would qualify as an armed conflict as defined by the ICTY in Tadic. Taking into account

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193 See *Ibid* at 108
196 It is important to note here that although the withdrawal of US troops was announced in 2014, a small number of US troops are still in Afghanistan.
that both state and non-state actors have been involved in the US-Afghanistan war, it can be said that this was a transnational armed conflict. On the basis of the criteria set out above and referring to the field of application of IHL, IHL would bind the parties to the conflict both state and non-state and would be applicable in the high seas, the territories of non-neutral state parties to the conflict, namely Afghanistan, the US, the UK, Canada, Australia, and Germany as well as the territories controlled by non-state actors party to the conflict, namely the Taliban after 2001, Al-Qaeda, the Hezb-e-Islami Gulbuddin (HIG), the Islamic Jihad Union (IJU) and the Islamic Movement of Uzbekistan (IMU).\(^{197}\)

IHL would, thus, not be applicable to drone strikes performed in the territories of neutral states, save for territories that despite being under the *de jure* jurisdiction of a state are *de facto* controlled by one of the abovementioned non-state groups.\(^{198}\) It is important to note here that while there is irrefutable evidence that the abovementioned states were in fact non-neutral in this conflict, it has been suggested that other states, such as Pakistan, despite claiming to be neutral, were in fact supporting armed groups in Afghanistan.\(^{199}\) While an investigation of the exact extent of participation of Pakistan to the conflict is outside the scope of this thesis, it suffices to say that if in fact Pakistan provided any material or operational assistance to the non-state groups or allowed said groups to operate from its territory, it can no longer be considered as neutral state and the territorial application of IHL is extended to its territory.\(^{200}\)

There is little doubt that IHL would be applicable to the lethal use of armed drones in the territory of Afghanistan. This is not to say, however, that the legality of all drone strikes in the territory of Afghanistan should be examined against IHL. As has been determined above, the applicability of IHL to any given situation does not automatically suspend the applicability of IHRL to that same situation. In fact, many of the rights of civilians under IHRL continue to be applicable even in the course of an armed conflict.\(^{201}\) It follows from the foregoing that while

\(^{197}\) See Kenneth Katzman, *supra* note 194, at 2
\(^{198}\) See Yoram Dinstein, *supra* note 89
\(^{200}\) In fact, the laws of neutrality prohibit neutral states from allowing a belligerent to occupy part of the territory and from providing material support to the belligerents (See Lassa Francis Lawrence Oppenheim, *International Law: A Treatise* (edited by Hersch Lauterpacht) (Longmans, Green, 1944) para 326 at 559
\(^{201}\) This is not the case for all rights conferred upon them by IHRL as derogations from many of said rights are permitted in the event of a public emergency, something that an armed conflict undoubtedly is.
strikes against combatants or any other persons not defined as such and which are taking direct part in hostilities will be subject to IHL, this will not be the case for other individuals irrespective of the fact that they are present in the battlefield.

**Yemen**

The first reported lethal use of an armed drone by the United States in the territory of Yemen took place in 2010.\(^{202}\) Prior to this drone strike there had been no resort to armed force between the United States and Yemen. In fact, since 2001 the two states had been cooperating in matters of security and defense.\(^{203}\) It would be, thus, very hard to argue that an IAC between Yemen and the United States or a transnational conflict in which these two states were involved existed at the time. Moreover, and while since 2015 it is considered that a non-international armed conflict is taking place in the territory of Yemen, internal disturbances prior to 2015 arguably did not amount to an armed conflict and definitely not to an armed conflict to which the United States was a party.\(^{204}\)

As has been mentioned above, the United States government has repeatedly insisted on the fact that IHL is applicable to all military operations launched under the auspices of the GWOT and denied the IHRL is applicable to drone strikes\(^{205}\). However, as has been determined above, the GWOT is not an armed conflict for the purposes of international law and IHL is not applicable to each and every use of force under its auspices, including most notably the use of force in the territory of Yemen and this, irrespective of the status of the individual targeted. The legality of drone strikes in Yemen will, therefore, have to be examined against the rules governing the use of lethal force under IHRL, applicable at all times, and not against IHL.


III.2.2. Legality

III.2.2.1. *Ius ad bellum*\(^{206}\)

As has been mentioned above the first reported drone strike in the territory of Yemen was launched in 2010, ten years later than the ‘armed attack’ to which the US was responding.\(^{207}\) It follows that the criterion of immediacy, necessary for a use of force to be permissible under Article 51 of the UN Charter is, undoubtedly, not satisfied.\(^{208}\) However, the President of Yemen, Abed Rabbo Mansour Hadi publicly declared in 2012 that every American strike in the territory of Yemen has been personally approved by him.\(^{209}\) It follows that since the US had the consent of the government of Yemen, the strikes do not violate Article 2(4) of the UN Charter as they do not interfere with the “territorial integrity or political independence” of the territorial state. Nonetheless, the fact that these drone strikes do not violate the *jus ad bellum* does not necessarily mean that they are lawful. In fact, since no one, including the territorial state in which an individual is located, has the right to arbitrarily deprive said individual from his or her right to life, the consent of the territorial state to a strike would simply imply that the act would not constitute an act of aggression without in any way being determinative of the lawfulness or unlawfulness of the use of lethal force as such.\(^{210}\)

III.2.2.2. IHL

As has been discussed above, the determinative criterion of the compatibility of a drone strike with the rules on targeting set out in IHL is the status of the targeted individual under IHL.\(^{211}\) IHL distinguishes between three types of legitimate targets, namely members of the armed forces

\(^{206}\) As this paper is concerned solely with the legality of the lethal use of drone strikes and not with the legality of the general use of force of the United States under the auspices of the war on terror, having determined that at the time of the first drone strike in the territory of Afghanistan an armed conflict was already taking place, the legality of the use of force in Afghanistan under the *jus ad bellum* will not be discussed.

\(^{207}\) See Khaled Abdullah, *supra* note 202

\(^{208}\) See Section *jus ad bellum* above


\(^{210}\) this will be discussed further below

\(^{211}\) See section “Status of individuals” above
of a state,\textsuperscript{212} members of hierarchically organized armed groups\textsuperscript{213} and individuals that despite not belonging in any of these two categories are taking direct part in hostilities.\textsuperscript{214}

Any drone strike by the US military in the territory of Afghanistan and targeting one of these three types of targets will, thus, always be lawful provided that it does not cause unnecessary suffering\textsuperscript{215} and has been launched after all the necessary precautionary measures prescribed by IHL have been taken.\textsuperscript{216} While it is accepted that persons belonging in all three of these categories would always be legitimate targets, however, it has proven extremely difficult to identify such targets and to distinguish them from civilians.

Even though the US government has only released minimal information with regards to the process of identifying targets, it is widely believed that the majority of US drone strikes are so called ‘signature strikes’ rather than ‘personality’ or ‘identity strikes’.\textsuperscript{217} While several authors have commented on the issues associated with ‘signature strikes’ by comparing them to the seemingly preferred ‘personality strikes’, it is important to note that nothing in IHL indicates that the identity of the target is in any way indicative of whether said target is legitimate or not. Instead, it will be the status of the individual, which does not necessarily derive from the identity of the person but rather from his or her conduct, that will determine whether he or she is a legitimate target. Targeting an individual who is either participating actively in hostilities or is behaving in a way indicative of the fact that he is a member of a hierarchically organized armed group party to the NIAC would be lawful irrespective of whether his identity is known. Conversely, targeting a civilian on the basis of his identity and the knowledge that said civilian has previously participated in hostilities would not be lawful if he or she is not currently participating in hostilities.

It follows that in certain occasions so called ‘signature strikes’ might be more compatible with the rules set out in IHL than so called ‘personality strikes’. This is not to say, however, that signature strikes cannot be problematic. In fact, the US has been performing drone strikes on the basis of signatures such as the mere presence of an individual in an area controlled by groups designated as ‘terrorist’\textsuperscript{218}. In the absence of additional evidence verifying that said individual is

\textsuperscript{212} AP I, Article 43; GC III, Article 4(a)
\textsuperscript{213} AP I, Article 43
\textsuperscript{214} AP I, Article 51(3)
\textsuperscript{215} 1907 Hague Convention IV, Annex Article 23(c)
\textsuperscript{216} AP I, Article 51(5)
\textsuperscript{217} See \textit{inter alia} Kevin Jon Heller, “’One Hell of a Killing Machine’: Signature Strikes under International law’ (2013) 11 Journal of International Criminal Justice 89; M. J. Boyle, \textit{supra note 2};
\textsuperscript{218} Ibid
in fact associated with the group or is currently taking part in hostilities, authorizing a strike against him or her would violate the IHL principle according to which in cases of doubts with regards to the status of an individual, it is to be presumed that said individual is a civilian.\textsuperscript{219}

Considering the plurality of armed groups the members of which were taking direct part in hostilities in the course of this war we can conclude that it is very likely that many, if not most lethal, uses of drones by the US military in the territory of Afghanistan were in fact directed against legitimate targets and it is, thus, very likely that they were compatible with the rules of IHL. However, there are two fundamental issues with the very policy of the U.S. in Afghanistan which make it highly unlikely that all of these strikes were in conformity with said rules. First, the (limited) available evidence on US drone strikes seem to indicate that the process of identifying targets is subject to rules considerably more flexible than the rules actually prescribed by IHL. In the case that the US has in fact targeted individuals on the basis of signatures such as simple presence in an area controlled by terrorists, it is clear that a strike would be contrary to the obligation to presume that an individual is a civilian unless clear evidence indicate otherwise and, thus, unlawful.\textsuperscript{220}

Second, the insistence of the US government on the fact that all drone strikes are compatible with the laws of war implies that their entire policy is based on the wrongful assumption that LOAC is applicable to all drone strikes. However, as has been discussed throughout this thesis, LOAC is only applicable in the territories under the jurisdiction or control of the parties to an armed conflict and only in relation to individuals taking part in hostilities either momentarily or continuously through their membership to the armed forces of a state or to a hierarchically organized armed group. While all other individuals may be lawfully targeted under certain limited circumstances, the rules that will be applicable to the use of lethal force against them are not prescribed by IHL but by IHRL.\textsuperscript{221} It follows, that if lethal force adhering solely to the less strict rules on the use of force provided for in IHL treaties has been used against any such individuals, which is very likely to be the case, then said use of force has been unlawful.

\textsuperscript{219} AP I, Article 50
\textsuperscript{220} Ibid
\textsuperscript{221} See generally Nils Melzer, supra note 21
III.2.2.3. IHRL

As has been determined above, no armed conflict to which the United States is a party is taking place in the territory of Yemen and IHL is, therefore, not applicable to any strike in this territory. While in the case of Afghanistan discussed above, IHRL will only be applicable in relation to individuals who cannot be qualified as legitimate targets under IHL, in the case of Yemen, IHRL applies in relation to all persons irrespective of whether they are associated with a hostile group or with the armed forces of the state.

While it is impossible to consider the compatibility of all or even most lethal uses of drones in the territory of Yemen owing to the lack of relevant data, information on several drone strikes in Yemen have been made public. The majority of reported strikes have targeted and killed individuals believed to be associated with Al-Qaeda. While it is impossible to claim with certainty that the individuals in question were not, at the time of their death, at the late stages of the preparation of an attack that would possibly kill civilians, it is highly unlikely that this was the case for the majority of them. The very fact that many of the reported strikes were launched at night indicate that even if this was in fact the case, it is highly unlikely that the operators of the drones had knowledge of this fact, owing to the lack of visibility. Moreover, many of the strikes have targeted buildings where Al-Qaeda operatives were believed to be hiding or areas believed to have been used as training camps by the group, where it is doubtful that every single individual present, and eventually killed, was at the time involved in the preparation of an attack. While such strikes would possibly be lawful if performed in Afghanistan, where IHL was applicable, this is not the case for Yemen.

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222 It is important to note that this information does not originate from any official sources but rather from the press and is as such not entirely corroborated.


225 Ibid.

226 While it is possible that all individuals present had previously participated in an unlawful attack or were being trained to participate in such an attack, this is irrelevant from the perspective of IHRL so long as they were not at the time threatening the life of another person.
In contrast to IHL, IHRL does not permit the use of lethal force against an individual by reason of his association with an armed group, nor does it allow for any collateral damage when lethal force is used. Instead, lethal force can only be used when the life of another person is threatened and said force should be necessary proportional and only be used after all available non-lethal options have been exhausted.²²⁷ In the cases described above, however, it is questionable whether the life of any other person was imminently threatened, implying that the strikes were not legally justified. This is not to say, however, that all drone strikes in the territory of Yemen are unlawful. In the absence of public information, it is in fact impossible to make such a determination. What is relevant, here, however, is that regardless of the arguments put forward by the US government, irrespective of the status of the target under IHL, the lethal use of armed drones needs to comply with necessity and proportionality as prescribed in IHRL and not IHL and lethal force should always be of last resort.

Concluding remarks

An examination of the drone policy of the United States in Afghanistan and Yemen reveals that most drone strikes in the territory of Afghanistan are likely to have been lawful while most drone strikes in the territory of Yemen are likely to have been unlawful. Many commentators have reached similar conclusions and have criticized the US government for its unwillingness to respect the applicable rules.²²⁸ The very fact that most drone strikes in Afghanistan are likely to have been lawful, however, indicates that the issue with the U.S. drone policy is not that the state is not willing to apply the rules, but that the state is applying rules that are not actually applicable. While it would be rather naïve to argue that the U.S. is applying rules of IHL in situations where IHL is not applicable solely because of confusion with regards to the applicable legal framework and not because it is convenient, the lack of theorization and by consequence clarity on the scope of application of IHL have undoubtedly contributed to the state’s ability to apply rules more beneficial to its interests while at the same time avoiding objections and criticism from the part of other states.

It is important to note here that owing to the lack of publicly available information on said policy, the conclusions on the legality of US strikes have been drawn on the basis of a number of

²²⁷ See Philip Alston, Study on Targeted Killings, supra note 12, at 14
²²⁸ See, for instance, M.J. Boyle, supra note 2; J. Pejic, supra note 43
assumptions, many of which might in reality be inaccurate. The lack of publicly available information pertaining to each strike is in fact a considerable obstacle in the attempt to assess the legality of the strikes. While as has been mentioned in the introduction the lack of transparency is a political and not a legal problem, it is impossible to ensure compliance with the rule of law in the absence of factual information. It is, thus, suggested that the international community takes steps to implement legal review of such practices not only by national bodies which undoubtedly have conflicting interests but also by international bodies.
IV. GENERAL CONCLUSIONS

The present thesis has assessed the legality of the lethal use of armed drones within the context of ‘the war on terror’. More particularly, it has examined the extent to which the use of armed drones is compatible with IHL, the extent to which the ‘war on terror’ is an armed conflict to which IHL applies, and the extent to which the use of lethal force by means of armed drones is lawful under IHL and under IHRL.

After having set out the principal technical characteristics common to all armed drones and assessed these characteristics against the rules of the law of weaponry in IHL, it has determined that from a purely legal perspective drones are not an innovation and do not present any new challenges for IHL. In fact, when compared to other existing and widely considered lawful weapons, armed drones do not only seem perfectly capable of adhering to the rules of IHL but also capable of enhancing adherence to said rules. The lawfulness of the lethal use of these weapons has been examined under three separate legal frameworks, namely the *jus ad bellum*, IHL and IHRL. This assessment has concluded that while lethal uses of drones as all uses of force would be *prima facie* unlawful under the *jus ad bellum*, this would not be the case when a strike is performed in self-defense in accordance with Article 51 of the UN Charter or when the territorial state gives its consent to the strike. It has further determined that in order for the lethal use of drones to be lawful under IHL, the strike should be compatible with the rules of targeting, namely distinction, proportionality and precaution in attacks and can only be lawful under IHRL when it is absolutely necessary to prevent another attack and is proportional to said attack.

Before applying the rules set out to the US drone policy within the context of the GWOT, the qualification of this ‘war’ as an armed conflict to which IHL would be applicable has been addressed. After considering the temporal, territorial and personal field of application of IHL, the present thesis has concluded that IHL is not applicable to all drone strikes performed under the auspices of this ‘war’. In fact, even though several armed conflicts to which the U.S. and one or more armed groups designated as terrorists have actually taken place since 2001, the ‘war on terror’ as such, does not qualify as an armed conflict for the purposes of IHL. A distinction needs to be made, thus, between the applicable legal framework in territories such as Afghanistan where an armed conflict has indeed taken place and the applicable legal framework in territories such as Yemen where despite the presence of armed groups, an armed conflict to which the U.S is a party
has not taken place. IHL would only be applicable to the first case while in the second case, strikes will need to be compatible with the rules of IHRL, applicable at all times.

The separate examination of the legality of drone strikes in the territories of these two states has revealed that the fact that many of these strikes have most probably been unlawful, most likely results from the difficulties associated with determining which legal framework is applicable to each situation rather than from the lack of clarity with regards to the conditions that need to be satisfied for the use of lethal force to be lawful. Legal research thus far has, however, for the most part considered the difficulties associated with identifying the applicable legal framework as only a secondary issue, focusing instead on the set of conditions applicable to each legal framework. However, while IHL is in fact not applicable to all drone strikes under the auspices of ‘the war on terror’, a great majority of said strikes seems to be in accordance with the rules prescribed by IHL. Their unlawfulness, thus, does not derive from the lack of respect of legal rules from the parts of the states using lethal force but rather from the lack of respect of the legal rules that are actually applicable.

While this thesis has insisted on the fact that the field of application of IHL is considerably narrower than what seems to be believed by the United States, it should be acknowledged that in the absence of much needed legal clarification in this regard, it would not be easy to blame states, and eventually hold them responsible, for interpreting the law in the way which is the most in line with their interests. In recent years, the rise of ‘terrorism’ and transnational conflicts, and most particularly ‘the war on terror’, have significantly blurred the lines between law enforcement and military action, highlighting a need for more legal research and clarity on the boundaries of the applicability of IHL. The insistence of the U.S. on the applicability of IHL on ‘the war on terror’ and the lack of clear objections from the part of other states risks normalizing the practice of states choosing at their discretion when to apply rules allowing for acts violating basic human rights to be performed lawfully.

Determining, however, under which circumstances a state can derogate from IHRL cannot be left at its own discretion. With the rise of terrorism and the all growing presence of terrorist cells in European countries, it is in the best interest of not only scholars and currently affected states in the Middle East and Africa, but also in the best interest of the very allies of the United States to attempt to clarify and delimit the field of application of IHL. The applicability of IHL and the lawfulness of military action should remain limited to territories where an armed conflict
is taking place and the determination of the existence of said conflict should be based on objective criteria leaving no room for discretion and which are subject to strict control by international bodies. If we are to abandon any attempts to establish such objective criteria and to accept that the determination of the field of application of a body of law meant to be applied only to exceptional circumstance can be left at the discretion of states, then the very existence of human rights and International Human Rights Law will be rendered obsolete.
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