U.S. Drone Strikes and International Law: Jus ad bellum, International Human Rights Law and International Humanitarian Law Issues.

Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Master of Laws by Research (LLM by Research) by Stephen Thomas Lewis LL.B (Hons.).

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-Dedication-

Sarah, I dedicate this thesis to you, with all my love. To have you in my life is one of my greatest joys. Your encouragement and constant support have helped me stay the course during this project, and I thank you for that. Semper tuum. Stephen x

-Special Thanks-

To my supervisor, Dr Chris Henderson, for his wise guidance, constructive comments, and constant encouragement.

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Abstract

"[I]n all of our operations involving the use of force, including those in the armed conflict with Al-Qaeda, the Taliban, and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law…[I]t is the considered view of this Administration…that US targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."

- *Harold Koh, US State Department Legal Adviser.*[1]

"My concern is that these drones, these Predators, are being operated in a framework which may well violate international humanitarian law and international human rights law."

- *Philip Alston, United Nations Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions.*[2]

The use of Unmanned Aerial Vehicles (UAVs), commonly referred to as "drones", in lethal targeting operations, is one of the most topical and controversial issues in international law.[3] The writer's interest in this area, the relationship between technological developments in warfare and settled principles of international law, developed from his attendance at a lecture given by Professor Harold Koh at Queen's University in Belfast back in May 2013. Professor Koh's now seminal speech to the American Society of International Law in 2010, while serving as Legal Adviser to the US Department of State, set out the US Government's position on the legality of drone strikes under international law.

In recent years, the United States has increasingly utilised drone technology to target and kill enemy operatives in its counter-terrorism operations – against Al-Qaeda and

[1] Harold Koh, former Legal Adviser, US Department of State, Keynote Address at the American Society of International Law Annual Meeting: The Obama Administration and International Law, 25/03/10, available at http://www.state.gov/s/l/releases/remarks/139119.html, hereinafter referred to as Koh, ASIL Speech.

[2] *US Warned on Deadly Drone Attacks*, BBC News, 28/10/09, available at http://www.news.bbc.co.uk/2/hi/8329412.stm.

[3] The terms 'Unmanned Aerial Vehicle', 'UAV' and 'armed drone' are used interchangeably in this work.

Taliban forces in Afghanistan and North West Pakistan, and against militants affiliated with Al-Qaeda in Somalia and Yemen. UAVs have taken on an ever more prominent role in the US's current military and counter-terrorism operations, given their relative low cost, greater accuracy and precision, reduced blast radius, advanced surveillance capabilities, and greater flight time than conventional manned aircraft. The recent proliferation of armed UAV technology, and its deployment in situations of asymmetrical conflict for the purpose of conducting targeted killing operations, has fuelled a public and academic debate, centrally focused on issues regarding the compatibility of such technology and current targeting practices with established norms of international law. The term "targeted killing" does not yet have an agreed definition under international law, although Murphy and Radsen have formulated the following useful definition:

> *extra-judicial, premeditated killing by a state of a specifically identified person not in its custody.*[4]

Targeted killings by means of unmanned drone strikes have proven to be a successful counter-terrorism strategy, not only in terms of locating, targeting and eliminating enemy operatives, but also, and perhaps more importantly, given public discontent at long-standing military deployments in Iraq and Afghanistan, in avoiding many of the challenges that flow from the use of traditional military forces, such as public hostility to the deployment of traditional ground forces, the detention of enemy forces, as well as security threats to military personnel from insurgent attacks.

In the context of the US drone program, three discrete areas of international law are of particular relevance:

1. the *jus ad bellum*, which sets out the narrow circumstances in which a state can lawfully resort to the use of armed force;
2. international human rights law, the corpus of which is of universal application, particularly in situations of armed violence falling below the threshold of an armed conflict;

[4] A.J. Radsen and R.W. Murphy, 'Due Process and Targeted Killing of Terrorists', [2009] at 405, available at http://repository.law.ttu.edu/bitstream/handle/10601/1325/DueProcessandTargetedKilling31CardozoLR405.pdf?sequence=1.

3. the *jus in bello*, international humanitarian law, which regulates the conduct of hostilities in situations of armed conflict.

What follows in this work is an analysis of the legality of US drone strikes in key target states through the prism of each of the three aforementioned paradigms. What shall become clear is that, while the use of armed drones *per se* may not violate international law as an unlawful means and method of warfare, the broad interpretation of the *jus ad bellum* favoured by the United States in the years since the 9/11 attacks, in particular those rules relating to the resort to force by a victim state in self-defence in response to an armed attack, as well as current US targeting practices, in particular the controversial use of Signature Drone Strike Protocol (SDSP), have been the subject of rigorous academic debate, and for the most part have proven difficult to reconcile with established principles of international law. This debate remains far from settled, and in consequence the entire US drone program, shrouded in a veil of secrecy, remains of dubious legality, particularly when examined through the prisms of international human rights law and international humanitarian law.

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Introduction

"America's actions are legal. We were attacked on 9/11…this is a just war- a war waged proportionally, in last resort, and in self-defence."

- Barack Obama, 23rd May 2013, Speech at the National Defence University, Washington D.C.[1]

The face of warfare changes with the evolution of technology. Regrettably, the legal frameworks regulating the resort to the use of force and the conduct of hostilities, the *jus ad bellum* and *jus in bello*, usually fail to keep pace with developments in technology. Therefore, the appearance of UAV technology hardly presents a new challenge in the history of warfare. That is not to say, however, that the use of armed UAVs in lethal targeting operations in contemporary conflicts does not present complex issues of law that need to be addressed with some degree of finality. It is not surprising, then, that the United Nations has made repeated calls for the United States to set out the legal justifications for its drone programs.[2] The program itself has proven so controversial because, although it is an 'open secret', its existence has neither firmly been acknowledged nor squarely denied. Precise information related to the program is scarce, and what is in the public domain is largely based on rumour, leaks and informal statements. The US drone program has become as much a symbol of President Obama's counter-terrorism strategy as Guantanamo Bay was of his predecessor's. Nevertheless, we do know of the existence of three subprograms: the first undertaken by the US military; the second undertaken by Joint Special Operations Command; the third, most controversially, undertaken by the CIA. The targeting operations carried out by the CIA have been the subject of much academic literature, much of which focuses on the status of civilian CIA operators as unlawful

[1] Available at http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-presidential-national-defense-university, (accessed 19th November 2014).

[2] See 'US Warned on Deadly Drone Attacks', *BBC News*, 28th October 2009, available at http://news.bbc.co.uk/2/hi/8329412.stm, (accessed 19th November 2014). More recently, Ben Emmerson QC, UN Special Rapporteur, in his March 2014 report to the UN Human Rights Council, invited the US in particular to make representations in respect of the various legal issues identified therein regarding the use of armed drones in current operations. See Report of Ben Emmerson QC, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, presented to the UN Human Rights Council, 11th March 2014, Ref: A/HRC/25/29.

combatants engaging in strikes that violate settled norms of international law. It is not proposed to discuss this topic further in this work, save to say that the Obama Administration has given assurances that it is taking measures to relieve the CIA of its role in lethal drone strikes in Pakistan, Yemen and Somalia, no doubt in response to concerns as to the legality of such a role. Despite Secretary of State John Kerry's assurances that these measures would be in place by the end of 2014, it would appear that the CIA's involvement has continued into 2015. This has led to criticism and discontent in Congress, with high-profile members such as Senator John McCain, calling for an immediate end to CIA involvement, particularly in the wake of a disastrous strike undertaken by the CIA on an Al-Qaeda compound in Pakistan in January 2015, which resulted in the death of two hostages, one of whom was a US citizen.[3]

Notably, there is a paucity of substantive law regulating aerial warfare, and none specific to targeting operations conducted by UAVs, and so the law that regulates the use of armed UAVs is the existing legal framework regulating air and missile warfare. Following the end of the First World War in November 1918, the International Committee of the Red Cross (ICRC) recognised the need to settle the law relating to aerial warfare, and thus established a Commission of Jurists consisting of experts from the US, UK, France, Italy, Japan and the Netherlands. The Commission formulated the Hague Rules of Aerial Warfare 1923. Regrettably, these rules were not formalised by means of treaty, which is unfortunate as it clouds in uncertainty the legal force of the rules. Nevertheless, the rules are an instructive expression of established legal norms and a credible attempt to codify the law relating to aerial warfare, and this writer would certainly be persuaded by any argument that the rules constitute customary international law.

With the emergence of UAV technology in the first decade of this century, there came an evident need to bring greater certainty to the law, and so in 2009 the Program on Humanitarian Policy and Conflict Research at Harvard University published the Manual on International Law Applicable to Air and Missile Warfare.[4] The AMW

[3] See David Lerman, 'McCain Renews Push to End CIA Control of Drone Strikes', *Bloomberg News*, 26th April 2015, available at http://www.bloomberg.com/news/articles/2015-04-26/mccain-renews-push-to-end-CIA-control-of-drone-strikes, (accessed 1st May 2015).

[4] HPCR Manual on International Law Applicable to Air and Missile Warfare, available at http://www.ihlresearch.org/amw/HPCR%20Manual.pdf. Hereinafter referred to as the 'AMW Manual'.

Manual consists of 175 rules, reflecting treaty provisions and customary international law relevant to aerial warfare, and is certainly a persuasive, albeit inconclusive, statement of the law. The panel of experts that drafted the AMW Manual recognised the emerging technology and therefore the rules address the laws applicable to UAVs. However, the main legal issues surrounding the use of UAVs in lethal targeting operations fall outside the scope of the AMW Manual.[5] Interestingly, the AMW Manual seems to equate armed drones with manned aircraft for the purposes of lethal targeting operations, requiring the same level of precautions to be taken before an attack is initiated.[6] Further, it also states that civilians controlling and operating armed UAVs are directly participating in hostilities.[7] This equivalence in the legal positions of manned and unmanned aircraft has been broadly accepted by commentators, in particular O'Connell, Glazier and Lewis.[8] Lewis takes the view, echoing the submissions of Vogel, that despite the technological sophistications of UAVs, from a legal perspective there is nothing unique about their use as a weapons platform that requires the formulation of a new legal framework to regulate their use in situations of armed violence.[9] A missile fired from an armed drone is no different to a missile fired from a manned aircraft. Therefore, the use of armed drones is governed by the *jus ad bellum*, international human rights law, and, where the intensity and organisation of violence meets the threshold of armed conflict, is governed, as with any other attack, by international humanitarian law. It seems, therefore, that few problems are posed in consequence of this legal equivalence, with commentators such as Alston and O'Connell seemingly more concerned with the issue of *how* and *where* armed drones may be legally employed.[10]

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[5] *Ibid*, r.1 (dd)-(ee), 6 (2009).
[6] *Ibid*, r.39.
[7] *Ibid*, r.29 (vi).
[8] See *Rise of the Drones II: Examining the Legality of Unmanned Targeting*, House of Representatives Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, (Congressional Research Service, Nimble Books LLC, 28th April 2010) (hereinafter referred to as *Drones II*): prepared statement of David Glazier, warning that, "CIA personnel are civilians, not combatants, and do not enjoy the legal right to participate in hostilities" (at 20); prepared statement of Professor Mary Ellen O'Connell, arguing that unmanned drones are "battlefield weapons", and as such should not be used outside of "combat zones" (at 44-46); prepared statement of Michael W. Lewis, opining that "[I]n circumstances where a strike by a helicopter or an F-16 would be legal, the use of a drone would be equally legitimate."
[9] *Ibid*. See also Ryan Vogel, 'Drone Warfare and the Law of Armed Conflict', (2010-2011) 39 Denv. J. Int'l L & Pol'y 101.
[10] See for example Al-Aulaqi –v- Obama 727 F.Supp 2d 1,9 (D.D.C. 2010), describing the Plaintiff's contention that because Anwar Al-Aulaqi was located in Yemen, he was, "outside the context of armed conflict". See also O'Connell, 'Combatants and the Combat Zone', 43 U. Rich. Rev. 845, 860-864 (2009), describing a geographically limited zone of conflict in which the corpus of international

It is not proposed to give over a large portion of this work to a technical exposition of the various models of UAVs currently deployed in the US's counter-terrorism operations across the globe, and the writer would refer the reader to P.W. Singer's *Wired for War: The Robotics Revolution and Conflict in the 21st Century*.[11] For the purposes of this work, what is clear is that UAVs have taken a central position in current targeting operations. Vogel notes that UAV technology languished for years in Research and Development and virtual obscurity,[12] before becoming, in the words of Leon Panetta, the former Director of the CIA, "the only game in town" in the fight against Al-Qaeda.[13] Even in the early years of the conflict in Afghanistan and the 2003 invasion of Iraq, the US military rarely utilised UAV technology. In 2001, the US possessed only 10 'Predator' drone aircraft, which at that time were used mostly in reconnaissance missions. By 2007, the fleet numbered more than 180 aircraft. As this work is concerned with the use of armed drones for lethal targeting operations, there are two models of drone aircraft of particular relevance. The first model is the 'Predator', the most widely recognised drone aircraft. At approximately 27ft in length, it has a flight time of 24 hours, at a maximum altitude of 26,000ft. The 'Global Hawk' is the larger model, at approximately 40ft in length. It has a flight time of 35 hours, at a maximum altitude of 65,000ft. Both aircraft are armed with laser-guided Hellfire missiles, capable of precision targeting, and are capable of high-altitude surveillance. The tactical advantages of drones are therefore obvious, and the US has placed increasing reliance on them in order to reach high-value targets in remote territory and to support combat and counter-terrorism operations. Compared to the deployment of conventional military forces, the use of armed drones presents additional advantages to those already enunciated. Obviously, there is the minimisation of risk to military

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humanitarian law applies. See also *Drones II,* supra n.8, testimony of O'Connell, arguing that international humanitarian law does not apply to drone strikes carried out in Pakistan, as Afghanistan is the only legitimate zone of active hostilities. See also letter from Kenneth Roth, Executive Director of Human Rights Watch, to President Obama, dated 7th September 2010, urging the rejection of the notion of the "global battlefield", available at http://www.hrw.org/en/news/2010/12/07/letter-obama-targeted-killings. See also Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum, Study on Targeted Killings, para.86, UN Doc. A/HRC/14/24/Add.6 (28th May 2010), stating that there "are very few situations" when the legal standards for use of UAVs could be met when a state deployed them "[o]utside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict".

[11] See P.W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, (Penguin, 2009).

[12] See Vogel, supra n.9, at 104.

[13] 'US Air Strikes in Pakistan Called "Very Effective"', *CNN News*, 18th May 2009, available at http://www.cnn.com/2009/Politics/05/18/cia.pakistan.airstrikes/, (accessed 28th November 2014).

personnel as targeting operations can be conducted at a distance from the target. This "risk-less warfare" is a fundamentally novel form of conflict, which has disrupted the mutuality of warfare, from which the law of armed conflict proceeded. Drones are significantly less expensive than conventional military hardware such as ground forces and manned aircraft. Further, the ability to track the movement of targets over a period of time, together with precision targeting capabilities, minimises the risk to civilians and civilian objects. Lastly, the use of drones avoids the difficulties and controversies associated with the deployment of military personnel, such as the detention of belligerents and the threat of insurgency. As much as the driving force behind the deployment of UAVs was to minimise the risk to human life in gathering intelligence and targeting operations, the proliferation of UAVs has as much to do with the relatively low cost of UAV aircraft compared to that of manned aircraft at a time when national defence budgets are under considerable pressure. For example, a single F-22 'Raptor' aircraft costs approximately $170 million, whereas a 'Predator' drone costs approximately $6 million. Compared to manned aircraft, UAVs are an ideal surveillance and striking weapon, particularly in counter-terrorism and counter-insurgency operations, where targets are usually individuals. Although criticism of drone targeting practices has been directed at the perceived indiscriminate nature of those practices, which has resulted in disproportionate civilian casualties, according to Lewis, the reality of UAV strikes is that they provide greater opportunity for disproportionate attacks to be halted prior to weapons deployment, and allow for a much higher degree of confidence that a target has been properly identified, thereby meeting the requirements of the principles of distinction and military necessity.[14] Furthermore, a UAV's on-board sensors allow key personnel to make a determination on the proportionality of an attack before any weapon is fired. Although Vogel has likened the sanitary environment of the drone control room as reducing war almost to the playing of a video game, he submits that this leads, for the most part, to sounder determinations on the issue of proportionality.[15]

Chapters 2 and 3 of this work shall consider the *jus ad bellum* issues relevant to the US drone programs operating in Afghanistan, Pakistan, Somalia, Yemen, and against

[14] Michael W. Lewis, 'Drones and the Boundaries of the Battlefield', (2011-2012) 47 Tex. Int'l L. J. 293, at 299.
[15] See Vogel, supra n.9, at 106.

the self-styled 'Islamic State' in Iraq and Syria. Chapter 2 will set out the general framework of the *jus ad bellum*. This corpus of law has been the subject of much academic debate since the 9/11 attacks and the commencement of the US 'war on terror', and there are complex and competing arguments as to the proper boundaries regulating a victim state's resort to the use of force, particularly with respect to a state's right to resort to the use of force in self-defence against an armed group operating transnationally. Chapter 2 shall examine this debate and set out the contemporary framework of the *jus ad bellum*. Chapter 3 shall examine the legality under the *jus ad bellum* rules of the US's resort to the use of force in each of the key target states.

Article 2(4) of the UN Charter sets forth the prohibition of the use of force. The *jus ad bellum* forms that body of exceptions to this prohibition, setting out the limited circumstances when a state's resort to force would be lawful in international law. The primary exception relied upon by both the Bush and Obama Administrations in a vigorous defence of the use of drones in lethal targeting operations is that of self-defence. Both Administrations have argued that the US is engaged in a just war of self-defence against Al-Qaeda, the Taliban and associated forces, and that drone strikes form a legal (that is, a necessary and proportionate) and continued response to the armed attack perpetrated on 11th September 2001 and to the current threat posed to the US by these groups. Therefore, this work shall consider whether current US targeting practices are compliant with the right to self-defence enshrined in Article 51 of the UN Charter. Only if such is the case will the initial resort to force be lawful. At the outset one can spot an immediate obstacle in attempting to justify the use of lethal force in self-defence as a continued response to an attack that occurred nearly fourteen years ago, that is the appearance of remoteness. With the passage of time, it becomes more difficult to justify defensive force. Having regard to the fundamental challenges that large-scale acts of terrorism perpetrated by Al-Qaeda and affiliated groups have posed to the traditional orientation of the *jus ad bellum* as between states, particularly since the 9/11 attacks, this work shall consider the issue of whether the US can use drone strikes in lawful self-defence against a non-state actor (such as Al-Qaeda) which is acting independently of any state. Further, it must be considered whether the US's inherent right to self-defence is confined to situations in which an armed attack has already occurred, or whether there exists a right to act in anticipatory

self-defence against a non-state actor on the territory of another state, where there is judged to be an imminent threat of attack, and whether there even exists in international law a broader right to resort to the use of force in pre-emptive self-defence. It therefore bears consideration whether the continued threat posed by militant groups, particularly in Afghanistan, Pakistan and the Middle East, justifies the use of armed drones in pre-emptive strikes against those suspected of planning attacks against US interests. Related to this issue are the settled principles of international law on state sovereignty and territorial integrity, which particularly come to the fore in those instances when the US conducts drone strikes over the territory of states in which there exists no situation of violence amounting to armed conflict. Such strikes clearly involve *prima facie* violations of those states' sovereignty and territorial integrity. Of particular relevance here are the strikes conducted in the tribal areas of Pakistan. There have been numerous reports of US violations of Pakistan's sovereignty in apparent self-defence under Article 51 of the UN Charter. Scholarly debate and disagreement on the legality of the US drone program is grounded in the differing interpretations of the scope of Article 51, a debate which has yet to be settled with any degree of finality. There exists jurisprudence of the International Court of Justice (ICJ) holding that states cannot invoke Article 51 against non-state actors, because attacks carried out by non-state actors cannot be attributed to a recognised state as defined in that Article. Armed attacks must be by or on behalf of a state, a position based on the two guiding principles of necessity and proportionality. Indeed, in Armed Activities on the Territory of the Congo (Democratic Republic of Congo – v- Uganda),[16] the ICJ rejected past proposals to extend the scope of Article 51 to permit states to resort to the use of force in pre-emptive self-defence against non-state actors. However, the US position has found some judicial support. Judge Rosalyn Higgins, for example, has stated that Article 51 is unambiguous in its meaning:

There is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is only available when an armed attack is [perpetrated] by a state.[17]

[16] [2005] ICJ 168.
[17] *Ibid*, at 174.

This may mark the beginnings of a shift in judicial thinking on the scope of Article 51, questioning and possibly ultimately rejecting a state actor requirement, due in part to the evolution of weaponry and the realities of contemporary conflict.
It is therefore imperative that an international consensus is reached on the following outstanding issues, which Emmerson usefully sets out in his final report:

i. Does a state's inherent right to national self-defence as enshrined in Article 51 of the UN Charter entitle a state to engage in lethal targeting operations on the territory of another state against a non-state armed group, should that group pose a direct and immediate threat of attack, even when that group has no operational connection to the host state? If so, under what circumstances does such a right exist? Does such a right exist even when the host state refuses consent to the targeting operations? What if the host state is judged to be unable or unwilling to deal with the threat posed by the armed group? What are the criteria for establishing "unwillingness" and "inability"?
ii. Is a state's inherent right to self-defence confined to situations in which an armed attack has already occurred, or is a state entitled to carry out strikes in pre-emptive self-defence against a non-state armed group on the territory of another state, without the consent of the host state, where it judges there to be a risk of imminent attack? How is "imminence" to be defined?[18]

Chapters 4 and 5 of this work shall offer a critical analysis of the legality of US drone strikes in key target states through the lenses of international human rights law and international humanitarian law (in those instances where the latter *lex specialis* is applicable). The inter-relationship between international human rights law and international humanitarian law shall be examined through the prism of US drone strikes in these states. Chapter 4 shall consider whether US targeted killing operations by means of armed drone strikes against suspected terrorists, are compliant with the corpus of international human rights law. The international human rights law paradigm is of universal application to all situations of armed violence, whether or not there exists a situation of armed conflict. It is primarily for this reason that the writer proposes to first consider the *lex generalis* of international human rights law. As

[18] See Report of Ben Emmerson QC, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, presented to the UN Human Rights Council, 11th March 2014, Ref: A/HRC/25/29, at 70.

Alston submits, armed conflict is the exceptional rather than the norm, and only in exceptional circumstances will a situation of armed violence rise to the level of an armed conflict, engaging the *lex specialis* of international humanitarian law.[19] In most situations of armed violence, therefore, no armed conflict exists to which the *lex specialis* applies, and so the conduct of hostilities falls to be regulated solely by international human rights law. The standards of international human rights law, set forth in both numerous agreements between states and in the corpus of customary international law, have as their primary objective the protection of human life and dignity. The Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966 form the basis of human rights protection within international law. Central to this legal paradigm is the prohibition against arbitrary deprivation of life by a state. With regard to lethal drone strikes, therefore, such acts can only be lawful if they are necessary, proportionate to the threat posed, and undertaken in order to protect human life. Targeted killings deemed to be intentional and with the sole objective of execution can never be permissible.[20] This then leaves the issue of whether international human rights law is violated by US targeting practices, the sole purpose of which is the elimination of suspected terrorists. The US has consistently argued that international human rights law is not of extraterritorial application, in the face of jurisprudence and state practice to the contrary, even in situations of non-international armed conflict. The UN Human Rights Council clearly set out the extraterritorial scope of international human rights law prior to the US ratification of the ICCPR in 1992, and at the time of ratification the US entered no reservations specifically denying such extraterritorial application. The international human rights law paradigm has an intolerance for collateral damage, that is, the deaths of non-combatants, and it shall be evidenced that there are legitimate concerns that US drone strikes fail to satisfy the principles of necessity and proportionality, and thus appear to violate fundamental norms of human rights law that insist that individuals cannot be arbitrarily deprived of life, so raising concerns as to the legality of such strikes under international human rights law.

As UAVs become a permanent fixture in modern warfare, their use has come under increased scrutiny from international lawyers, with vocal critics challenging on a number of grounds the legality of using UAVs to target and kill enemy belligerents in

[19] See Alston Report, supra n.10, at para.9.
[20] See *Ibid*, at para.32.

the purported transnational conflict in which the US is presently engaged. There clearly exists a diversity of juristic and academic opinion on this particular issue, and this is borne out in the existing literature. Whilst some commentators, such as Koh, take the view that current targeting practices do not violate international human rights law and international humanitarian law, other commentators, such as Professor Mary Ellen O'Connell and Professor Philip Alston, take the opposite view, challenging on several grounds the legality of current targeting practices. O'Connell, in particular, argues that current targeting practices outside zones of active hostilities (the only legitimate zone of active hostilities, in her opinion, being Afghanistan) operate in violation of established norms of the corpus of international human rights law, amounting to arbitrary, extra-judicial killings that are wholly disproportionate to any legitimate right of the US to act in self-defence.

Chapter 5 of this work shall consider the extent of the applicability of international humanitarian law to US drone strikes in key target states, and whether US targeting practices violate the settled principles of the *jus in bello*. Only when a situation of armed violence meets the legal threshold of an armed conflict will the *lex specialis* of international humanitarian law apply alongside international human rights law. International humanitarian law will only be engaged if the tests of intensity and organisation, set down in Tadic, are satisfied.[21] While the US has applied a standard of "unable or unwilling" in the context of lethal drone strikes conducted in self-defence, it has also claimed to be in a situation of almost continual armed conflict with Al-Qaeda and its affiliated forces, therefore taking a legal position that, in accordance with international law, and the Authorisation for the Use of Military Force 2001, it has the authority to undertake such strikes without any requirement to undertake any pre or post-facto analysis of whether each targeted strike constitutes lawful self-defence. In fusing the right to resort to force in self-defence with international humanitarian law governing the conduct of hostilities, the US seems to have misconstrued the relationship between the *jus ad bellum* and the *jus in bello*. If one concedes that the US *is* in a state of armed conflict with Al-Qaeda and affiliated groups, then drone strikes conducted in zones of active hostilities must be examined through the prism of international humanitarian law. First, it must be considered whether the conflict is of an international or non-international character. The

[21] Prosecutor –v- Dusko Tadic, ICTY, Case IT-94-1-A.

judgement of the US Supreme Court in Hamdan –v- Rumsfeld points to the latter characterisation, although the Court's judgement is rather ambiguous, based more on the absence of a conflict as between two state parties than on the reality of a conflict between a state and a transnational terrorist network.[22] If a situation of non-international armed conflict exists, what then are the temporal and geographical limits of the battlefield? If lethal targeting operations are, as the US asserts, a continued response to the attacks perpetrated on 11th September 2001, there may indeed be merit in O'Connell's submissions that Afghanistan is the only legitimate zone of active hostilities and the application of international humanitarian law is limited thereto, with the framework of international human rights law applying to strikes beyond its borders. Irrespective of any claim by the US that it is engaged in a new form of 'transnational' conflict, where it is entitled to target the enemy where it is found, it must be considered whether the extraterritorial nature of US drone strikes, particularly outside zones of active hostilities, meet the intensity threshold to engage international humanitarian law, and if not, whether the body of international human rights law provides an adequate regulatory framework.

Although technically two discrete areas of law operating in parallel, the US drone program has brought to the fore questions of the interconnection and interoperation of international human rights law and international humanitarian law. It is far from simple to argue anything other than the US drone program being of questionable legality. Even if one accepts the existence of an armed conflict extending beyond Afghanistan, and the application of the *jus in bello* to strikes occurring outside Afghanistan, and the broad compliance with the *jus ad bellum* notwithstanding, this work will highlight the challenges and failures to ensure that such strikes comply with the fundamental principles of international humanitarian law, as well as falling far below the standards set by international human rights law so as to amount, in some instances, to arbitrary killing.

Koh, in his ASIL speech in 2010, set out the official legal position of the Obama Administration, mirroring that taken in the Guantanamo Bay habeas corpus litigation, that the US considers itself to be engaged in "several armed conflicts" – one in

[22] [2006] 548 US 557.

Afghanistan and the other against Al-Qaeda, the Taliban and affiliated forces both "in Afghanistan and elsewhere", in response to the 9/11 attacks, and may use force consistent with its right to self-defence under international law, with no need for a separate legal justification under the *jus ad bellum* for those military operations related to the conflict.[23] Koh's speech can certainly be viewed as an attempt by the Obama Administration to banish the "global war on terror" rhetoric of its immediate predecessor. However, it is more than a simple shift in rhetoric. The US never intended to fight *any* form of terrorism *anywhere* in the world, and so we have Koh's expression of the Obama Administration's position as being engaged in a global war against *specific terrorists* – Al-Qaeda, the Taliban and affiliated forces, including those who offer substantial support. Similarly, John O. Brennan, the current Director of the CIA, in a speech on 16th September 2011, whilst serving as US Homeland Security Advisor, submitted that, due to the presence of a situation of armed conflict, the US takes the legal position that, in accordance with international law, it has the authority required to strike against targets without any requirement for a separate self-defence analysis each time.[24] As Vogel rightly submits, Obama has taken his predecessor's posture of fighting those groups contemplated in the Authorisation for the Use of Military Force (AUMF) 2001, in a wartime framework, anywhere in the world, and applying the law of armed conflict to any belligerents encountered in that fight, subject to "considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses".[25] This position, and the US policy of extraterritorial operations against suspected terrorists, whether by drones or by other means, especially those outside the 'hot' battlefield of Afghanistan, have proven to be highly controversial. Obama's policy has drawn support from several key players, with Harold Koh, former CIA Director and US Secretary of Defence Robert Gates, and his immediate successor Leon Panetta, broadly defending the policy of targeted strikes against those groups contemplated in the AUMF 2001, but mostly side-stepping the weightier, and more controversial, issues presented by drone warfare. Under pressure from the UN and other

[23] See Koh, ASIL Speech, 'The Obama Administration and International Law', available at http://www.state.gov/s/l/releases/remarks/139119.htm.
[24] Available at http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices/>, (accessed 22nd November 2014).
[25] See Vogel, supra n.9, at 102. See also C.A. Bradley and J.L. Goldsmith, 'Congressional Authorisation and the War on Terrorism', (2005) Harv. L. Rev. 2047.

organisations to offer legal justifications for its targeted killing program, Harold Koh's speech at the 2010 Annual Meeting of the American Society of International Law set out the, "considered view of the Obama Administration", stating that, "great care is taken to adhere to [the principles of distinction and proportionality]…in both planning and execution" of lethal targeting operations, asserting that such operations, "comply with all applicable law, including the laws of war".[26] It is submitted that the positions taken by Koh and Brennan must be rejected outright, for they appear to be based on an obvious conflation of the *jus ad bellum* and the *jus in bello*. The US must justify each breach of another state's territorial sovereignty under the relevant rules of the *jus ad bellum*. The purported existence of a situation of armed conflict, 'global' or otherwise, does not diminish this requirement.

The attacks of 11th September 2001 ushered in a change in how the US viewed matters touching on international peace and security. The problem of terrorism, domestic and international, became more than a law enforcement problem. In its "global war on terror", the Bush Administration used drone strikes against targets in Afghanistan, Pakistan, Somalia and Yemen, with the frequency of strikes increasing markedly in Barack Obama's first term, before steadily declining. At the time of writing, the Taliban has been subdued, although by no means defeated, remaining an active force in Afghanistan, aided by militants in the tribal areas bordering north-west Pakistan. Indeed, the Durand Line has been porous to the flow of militants between the two countries. The Pashtun tribal heartland straddles the border between Afghanistan and Pakistan, and the intermingling of cultures and allegiances has allowed militants to flourish in the region. The political reality in Pakistan is that the civilian government maintains only limited control over large areas of its territory, as well as limited control over its military and intelligence services. Al-Qaeda and the Taliban have taken advantage of this reality in recent years, and the Pakistani authorities have proven largely unwilling or unable to counter the threat posed by these groups. President Obama has made it clear that the US will act in accordance with its duty to protect its citizens from attack, arguing that the US may undertake drone strikes over foreign soil when a host state proves unwilling or unable to deal

[26] See Koh, supra n.23.

with the threat posed by terrorists operating within its territory.[27] Therefore, in his May 2013 speech at the National Defense University in Washington D.C., President Obama offered strong legal and political justifications for the use of armed drones and presidential policy guidance was issued tightening the criteria for their use, although no promise was made to cease the use of armed drones altogether, and indeed soon thereafter a CIA drone strike over Pakistan on 1st November 2013 killed the leader of the Pakistan Taliban, Hakimullah Mehsud. Despite the repeated assertions of the Obama Administration that it has the right to resort to armed drone strikes outside zones of active hostilities, further to its inherent right of self-defence, effectively creating a new legal paradigm authorising the use of force, opinion in the international community has largely been stacked against the US in how it has conducted its drone program, with accusations that the US has acted with impunity, violating the sovereignty of Pakistan, Yemen and Somalia, in flagrant breach of international law. Some commentators, such as Anderson, are obvious proponents of such a paradigm, what Anderson refers to as "naked self-defence", in that the *jus ad bellum* not only authorises the resort to force in the form of a policy of targeted killings as a self-defence towards ends of national security, but also as that use of force is occurring outside a situation of armed conflict, international humanitarian law does not apply.[28] Thus, US drone operations outside zones of active hostilities need only satisfy the *jus ad bellum*. This concept seems to have garnered support in the current US Administration, with Koh stating that, "[B]ut a state that is engaged in an armed conflict *or* in legitimate self-defence is not required to provide targets with legal process before the state may use lethal force".[29] However, O'Connell vehemently denies the existence of any such paradigm justifying the use of lethal force, taking issue in particular with arguments made by the Bush and Obama Administrations that because the attacks on 11th September 2001 were preceded and followed by other attacks, the US may target and kill Al-Qaeda members and their affiliates wherever they are found.[30] O'Connell submits that the theatre of conflict is confined to

[27] See James Joyner, *Obama Orders Pakistan Drone Strikes*, NEW ATLANTICIST, 24th January 2009, available at http://www.acus.org/new_antlanticist/obama-orders-pakistan-drone-attacks, (accessed 21st November 2014).
[28] See Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in *Legislating the War on Terror: An Agenda for Reform*, 346-400 (Benjamin Wittes, Brookings Institution Press 2009).
[29] See Koh, supra n.23. Emphasis added.
[30] See *Drones II*, supra n.8, prepared testimony of Professor Mary Ellen O'Connell.

Afghanistan, for the only recent attack on the US that could justify the use of retaliatory force in self-defence occurred on 11th September 2001. Therefore, O'Connell submits, there is no basis in international law for drone strikes anywhere outside Afghanistan and strikes outside this theatre of conflict violate international human rights law. It is respectfully agreed with O'Connell that the notion of "naked self-defence" advanced by Anderson must be rejected, as it was in the Alston Report.[31] The purpose of the *jus ad bellum* is limited to regulating *when* a state can breach the territorial sovereignty of another state, and not *how* and against *whom*, the force is used. To the extent that a state uses lethal force in the territory of another state, it must find authority in the relevant principles of international human rights law and, where applicable, international humanitarian law.

Thus, there are a number of outstanding issues on which there is no clear consensus among states and international lawyers, and where current state practice and interpretations of international law challenge established norms of those legal frameworks which have served to regulate the resort to and the use of force for the best part of a century. Any uncertainty in the interpretation and application of international law governing the use of lethal force by UAVs is to be discouraged, for it risks creating a dangerous divergence in state practice, particularly given the number of states now in possession of UAV technology. As Emmerson rightly submits, this runs contrary to the obligation set out in paragraph 6(s) of General Assembly Resolution 68/178, which urges states to ensure that any measures taken or means employed in counter-terrorism operations, including the use of armed drones, are compliant with obligations under international law, including the UN Charter, international human rights law and international humanitarian law, in particular the principles of distinction and proportionality.[32]

The Obama Administration has stated publicly that:

> *[t]he rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed*

[31] See Alston Report, supra n.10.
[32] See Emmerson Report, supra n.2, at 23 and 70.

> *conflict – such as pilotless aircraft or so-called smart bombs – so long as they are employed in conformity with applicable laws of war.*[33]

Notwithstanding the repeated assertions of the US that it is committed to ensuring that lethal targeting operations comply with international law, the ongoing failure of the US to put in place mechanisms for effective oversight and transparency casts a shadow of doubt over some of the legal justifications proffered in defence of its drone program. Indeed, in the current circumstances, it is difficult, though not impossible (as the following two chapters of this work will show), to give credence to the US's invocation of the right to resort to force in self-defence, and quite easy to understand the hostility that exists among the international community to current targeting practices, particularly those involving blatant violations of the sovereignty of other states by a nation viewed by some as acting with impunity and in flagrant breach of international law. It is the apparent difficulty in reconciling current targeting practices with the fundamental principles of international law, especially those of international human rights law, that has led many scholars to criticise the US drone program as the most effective "extrajudicial execution" program since the Vietnam War. This is certainly a severe criticism, but as this work will show, it is one that has a degree of validity given the less than credible legal justifications advanced by the US.

President Obama, whilst acknowledging the tragic reality that drone strikes have resulted in the deaths of non-combatants, has vigorously defended the use of armed drones in a just war of self-defence against a transnational terrorist network. The Obama Administration has, nevertheless, accepted that increased oversight of drone strikes outside areas of active hostilities is necessary to address the criticisms made against US targeting practices. Addressing the National Defence University in Washington D.C. on 23rd May 2013, President Obama made reference to newly effected "presidential policy guidance", which imposed more stringent conditions on targeted drone strikes, particularly when capture is a viable alternative, as well as setting out plans to transfer responsibility for undertaking lethal targeting operations

[33] See Koh, supra n.23.

from the CIA to the US military by the end of 2014.[34] The guidance itself remains classified, however it has been disclosed in outline.

There is still much information to which commentators are not privy. The ongoing failure of the Obama Administration to disclose that which is not vital to maintaining national security casts a cloud over the legal justifications proffered in support of the US drone program. If the US wishes to make a credible invocation of its right to use force in lawful self-defence, one which can gain support from the wider international community of states, and if it wishes to show that it is abiding by the settled norms of international law relating to the resort to force and the conduct of hostilities against Al-Qaeda and affiliated forces, then it must offer greater transparency and mechanisms of accountability, particularly when drone strikes involve blatant encroachments on the territorial sovereignty of a state where no situation of armed conflict exists and where the US is arguing that such strikes are justified in self-defence when that state is unable or unwilling to counter the threat posed.

[34] See B. Obama, 23rd May 2013, supra n.1.

2

The US Drone Program and the jus ad bellum – Part One

2.1 Background

The following two chapters of this work examine the *jus ad bellum*, and consider whether the US drone programs operating in Afghanistan, Pakistan, Yemen, Somalia, and against the self-styled 'Islamic State' in Iraq and Syria, comply with the legal framework that serves to regulate the resort to the use of force by states. One could devote an entire thesis to an examination of the current status of those legal principles that make up the *jus ad bellum*, however this writer proposes to confine his discussion to those principles of direct relevance to targeted killings undertaken by US drones on the territories of the aforesaid states. Of particular relevance, and central to the Obama Administration's pronouncements on the legality of US drone strikes, is the right of self-defence. As President Obama stated in his May 2013 speech at the National Defense University in Washington D.C.:

America's actions are legal. We were attacked on 9/11…this is a just war- a war waged proportionally, in last resort, and in self-defence.[1]

The following two chapters seek to explore the *jus ad bellum* issues raised by the use of armed drones by the United States against suspected terrorists around the world. When does international law permit a state to violate the territorial sovereignty of another state in order to conduct targeted killing operations? This chapter examines the current status of those legal principles of the *jus ad bellum* which are of primary relevance to the US drone program, considering whether, and if so, how, those principles have undergone substantive change in the years following the attacks of 9/11. The following chapter will then examine the controversial issue of whether US drone strikes in Afghanistan, Pakistan, Yemen, Somalia, and against the self-styled 'Islamic State' In Iraq and Syria, comply with the requirements of the *jus ad bellum*.

[1] See B. Obama, 'Remarks by the President at the National Defense University on 23rd May 2013, available at http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university, (accessed 21st February 2015).

Targeted killings using armed drones as a weapons delivery platform have become a recognisable feature of the Obama Administration's strategy to counter the terrorist threat posed by Al-Qaeda and other islamist groups around the world, including Al-Shabaab in Somalia and Al-Qaeda in the Arabian Peninsula (AQAP) in Yemen.[2] According to unofficial estimates, by February 2015, US armed drones had conducted 413 strikes in Pakistan, 90-109 strikes in Yemen, and 8-12 strikes in Somalia.[3] Whilst it is accepted that drone strikes have been in decline, certainly since their peak in the first year of the Obama presidency in 2009, it must be acknowledged that the US will not cease the use of armed drones completely. Indeed, in his May 2013 speech at the National Defense University, President Obama set out a strong legal and political defence of the US drone program, whilst at the same time announcing newly-effected presidential policy guidance setting out the criteria to be satisfied before a drone strike could be authorised.[4]

The United States has consistently made the argument that, as a matter of international law, it is in a situation of armed conflict with Al-Qaeda, the Taliban and associated forces, in response to the 9/11 attacks, and therefore is entitled to use force consistent with its inherent right to self-defence.[5] In US domestic law, the Obama Administration continues to place its reliance on the Authorisation for the Use of Military Force (AUMF), passed by Congress on 14th September 2001, which authorises the use of armed force against those responsible for perpetrating the 9/11 attacks, granting the President authority to use all, "necessary and appropriate force",

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[2] For an interesting overview, see Sascha-Dominik Bachmann, 'Targeted Killings: Contemporary Challenges, Risks and Opportunities' (2013) 18 JCSL 1.

[3] The Bureau of Investigative Journalism provides an invaluable resource tracking the publicly available information on US drone strikes and providing updates on their website – http://www.thebureauinvestigates.com/category/projects/drones/, (accessed 21st February 2015).

[4] Supra, n.1. On 2 July 2013, a US drone strike killed at least 16 people in a remote area of North West Pakistan. See S. Masood and I. Mehsud, 'US Drone Strike in Pakistan kills at least 16', *New York Times*, (New York, 3 July 2013), available at http://www.nytimes.com/2013/07/04/world/asia/drone-attack-pakistan.html?hp&_r=O&gwh=3DEEDD180CEA003D4C30E583ACFE8E3C, (accessed 22nd February 2015). Further, according to officials in Yemen, between 27 July and 8 August 2013, 34 suspected militants were killed by US drone strikes in that country – see Associated Press, '12 in Yemen Die in Strikes by U.S. Drones', *New York Times*, (New York, 8 August 2013), available at http://www.nytimes.com/2013/08/09/world/mideast/12-in-yemen-die-in-strikes-by-us-drones.html, (accessed 22nd February 2015). Further, on 1 November 2013, drone strikes carried out by the CIA killed Hakimullah Mehsud, leader of the Pakistani Tabilan – see Declan Walsh, 'Drone Strikes are Said to Kill Taliban Chief', *New York Times*, (New York, 1 November 2013), available at http://www.nytimes.com/2013/11/02/world/asia/drone-strike-hits-compound-used-by-pakistani-taliban-leader.html?ref=hakimullahmehsud&r=0, (accessed 22nd February 2015).

[5] See Koh, ASIL Speech, Washington D.C., 25 March 2010, available at http://www.state.gov/s/l/releases/remarks/139119.htm.

against those whom he determined, "planned, authorised, committed or aided", the 9/11 attacks, and those who harboured those persons or groups.[6]

The position taken by the Obama Administration in respect of extraterritorial targeted strikes against suspected terrorists using drones has raised a number of controversial legal issues, particularly in relation to those strikes carried out far from the 'hot' battlefield of Afghanistan. As stated previously in this work, much of the controversy has centred on issues under international human rights law (IHRL) and international humanitarian law (IHL), such as which legal framework is applicable to a particular targeted killing operation, whether a situation of armed conflict exists as between the US and those groups and individuals targeted, as well as the issue of who is a legitimate target.[7] Certainly, the recent reports of UN Special Rapporteurs, Christof Heyns and Ben Emmerson QC, focus primarily on the IHRL and IHL issues related to the US targeted killing program.[8] These same issues were also discussed in detail in a recent report to the European Parliament, as well as in two recent studies by Human Rights Watch and Amnesty International.[9]

Henrikson submits that comparatively little attention has been paid to the separate issues arising under the *jus ad bellum*, and the issue of whether or not the US can legally violate the sovereignty and territorial integrity of the aforementioned states in conducting targeted drone strikes against suspected terrorists.[10] This may well be a well-founded submission on the part of the learned commentator, with the notable exception of the US drone program operating in Pakistan, which has been the focus of comment by scholars such as O'Connell, Murphy and Paust.[11]

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[6] See AUMF, 2001, Pub L 107-140.

[7] See R.J. Vogel, 'Drone Warfare and the Law of Armed Conflict', (2010) 39 Denv. J Int'l L & Poly 101. See also L.R. Blank and B.R. Farley, 'Characterising U.S. Operations in Pakistan: Is the United States Engaged in an Armed Conflict?' (2011) 34 Fordham Int'l L J 151.

[8] See Report of C. Heyns, 'Extrajudicial, summary or arbitrary executions', A/68/382 (13th September 2013), and also Report of B. Emmerson, 'Promotion and protection of human rights and fundamental freedoms while countering terrorism', A/68/389 (18th September 2013).

[9] See N. Melzer, 'Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare', European Parliament Directorate General for External Policies, Policy Department Study (Brussels, 2013); Human Rights Watch, '"Between a Drone and Al-Qaeda", The Civilian Cost of US Targeted Killing in Yemen' (October 2013); Amnesty International, '"Will I Be Next?", US Drone Strikes in Pakistan', (October 2013).

[10] See Anders Henriksen, '*Jus ad bellum* and American Targeted Use of Force to Fight Terrorism Around the World', Journal of Conflict & Security Law (2014), Vol.19 No.2, 211, at 215.

[11] See Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009', Legal Studies Research Paper No.09-43, Notre Dame Law School, 2010; S.D. Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan', in M.N. Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (International Law Studies Vol.85,

The Obama Administration's repeated assertions that it is engaged in an armed conflict with Al-Qaeda, the Taliban and associated forces, has led some commentators to submit that the existence of a situation of armed conflict eliminates the requirement for a separate *jus ad bellum* analysis for those targeted killings related to that armed conflict. John O'Brennan, currently serving as Director of the CIA, in a speech on 16th September 2011, whilst serving as Assistant to the President for Homeland Security and Counter-terrorism, stated that, "the United States is at war with Al-Qaeda", and so, "takes the legal position that – in accordance with international law – we have the authority to take action against Al-Qaeda and its associated forces without doing a separate self-defence analysis each time."[12] This matter was touched on briefly in the introductory chapter to this work, and it has been respectfully submitted that O'Brennan's position must be incorrect, based as it is on an erroneous conflation of the *jus ad bellum* and the *jus in bello*, and a failure to acknowledge the distinction which exists between these two discrete bodies of international law, which apply independently of each other. An earlier point must be reiterated – the existence of a situation of armed conflict, 'global' or otherwise, does not negate the requirement for compliance with the *jus ad bellum*. Put simply, on each occasion when a use of force by the United States (this includes force applied by means of armed drone strikes) violates the territorial sovereignty of another state, that breach must be justified under the *jus ad bellum* in order to be considered lawful. Clearly, it is the overriding purpose of the *jus ad bellum* to regulate *when* a state can lawfully resort to the use of armed force, and not *how*, and against *whom*, that force is used. It is for that reason too that Kenneth Anderson's pronouncements on a doctrine of 'naked self-defence' must be rejected outright. Anderson has advanced the view that US drone operations in Pakistan need only satisfy the *jus ad bellum*, submitting that there is legal authority in international law for a policy of, "targeted killing, as a self-defence toward ends of vital national security that do not necessarily fall within the strict terms of armed conflict in the sense meant by…international treaties on the conduct of armed

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Naval War College Press, 2009) 109; Jordan J. Paust, 'Self-Defence Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan', (2010) J. Transnat'l L & Poly 237.

[12] See 'John Brennan Speech on Obama Administration Anti-Terrorism Policies and Practices', 16th September 2011, available at http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices, (accessed 22nd February 2015).

conflict."[13] It is respectfully submitted that Anderson's view, too, is based on an erroneous conflation of the *jus ad bellum* and the *jus in bello*, or at least a misunderstanding of their proper inter-relationship. Anderson's view is not reflective of either state practice or jurisprudence of the ICJ. As the ICJ noted in its Advisory Opinion on the legality of the threat or use of nuclear weapons, a, "use of force that is proportionate under the law of self-defence", (*jus ad bellum*), must, "in order to be lawful, also meet the requirements of the law applicable in armed conflict", (*jus in bello)*.[14] Therefore, to the extent that a state resorts to the use of lethal force in a situation of armed conflict, the requirements of the *jus ad bellum* and *jus in bello* must both be satisfied. Anderson's 'naked self-defence' is a third paradigm that simply has no proper place in international law.

A useful starting point for any assessment of the legality of the US drone program under the *jus ad bellum* is the UN General Assembly's 1970 Declaration on Friendly Relations, which states:

No state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law. No state may use, or encourage the use of, economic, political or any other type of measures to coerce another state in order to obtain from it advantage of any kind.[15]

The principle underlying this Declaration is the prohibition on breaches of territorial sovereignty.
Article 2(4) of the UN Charter declares that:

[13] See K. Anderson, 'Targeted Killing in U.S. Counter-terrorism Strategy and Law', (Brookings, 11/05/09) s.3.
[14] Legality of the Threat or Use of Nuclear Weapons Advisory Opinion [1996] ICJ Rep. 226, at para.74. Hereinafter referred to as *Nuclear Weapons*.
[15] UN Doc A/RES/2625 (XXV). See also GA Res. 2131 A/6014.

[a]ll 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.

As Shaw rightly submits, this general prohibition on the use of force is regarded as a principle of customary international law, binding upon all Member States, and the reference in Article 2(4) to "force" rather than "war" is intentional, and beneficial, in that the prohibition expressed therein therefore covers situations in which the level of violence falls below the threshold of an armed conflict.[16]

However, the general prohibition on the use of force is not absolute, and there exist specific exceptions, most importantly in relation to the right to use force in self-defence and collective action authorised by the UN Security Council under Chapter VII of the UN Charter.

There has been much academic debate as to the exact scope of the prohibition on the use of force contained in Article 2(4), and as to the precise scope of the exceptions thereto. Higgins, for example, is one commentator who has suggested that the specific wording of Article 2(4) implies that the prohibition on the use of force covers only force directed at the territorial integrity and political independence of a state.[17] On this basis, Travalio submits that the use of force for the purposes of combating terrorism falls outside the Article 2(4) prohibition.[18] With respect, Travalio's interpretation must be rejected. The weight of scholarship is rightly in favour of a reading of Article 2(4) as a 'catch-all' prohibition that covers the use of force in countering terrorism. Most academics have rejected Travalio's interpretation,[19] and this prevailing view is certainly supported on a reading of the travaux préparatoires of the UN Charter and the jurisprudence of the ICJ, such as in the Corfu Channel Case, where the Court rejected an attempt by the UK to adopt a restrictive interpretation of the prohibition set down in Article 2(4), stating that:

[16] See Malcolm Shaw, *International Law*, (7th edn, Cambridge, 2014), at 814.
[17] See R. Higgins, *Problems and Process, International Law and How We Use It*, (OUP, 1994), 245ff.
[18] See G. Travalio, 'Terrorism, International Law, and the Use of Military Force', (2008) 18 Wisconsin Int'l L J 145, at 166.
[19] See, for example, Yoram Dinstein, *War, Aggression and Self-Defence*, (5th edition, Cambridge University Press, 2011), at 90; see also J. Crawford (ed), *Brownlie's Principles of Public International Law* (8th edn, OUP, 2012), at 747.

The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[20]

It therefore seems that, although international law posits a general prohibition on the use of force by a state on the territory of another state, for the purpose of this work there exist three clear instances in which a state may nevertheless be entitled to use force and conduct targeted killing operations against suspected terrorists on the territory of another state:

I. Use of force with the consent of the host state;
II. Authorisation by the UN Security Council under Chapter VII of the UN Charter;
III. Use of force in self-defence.

2.2 The use of force with the consent of the host state

Article 20 of the International Law Commission's articles on state responsibility provides that, "valid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent."[21] So, although the use of force by the attacking state constitutes a *prima facie* violation of Article 2(4), that use of force will be lawful if the host state gives a valid consent. This valid consent would bar any claim by the host state that its territorial sovereignty has been violated.[22] Such valid consent may be given in advance or contemporaneously.[23]

The issue of consent is a controversial one, and an examination of the academic literature reveals no consensus with regard to its role in situations involving the use of

[20] Corfu Channel Case (UK -v- Albania) (Merits) [1949] ICJ Rep. 4, at para.35. Hereinafter referred to as *Corfu Channel*.
[21] See GA Res. 56/83 (12/12/01).
[22] See Emmerson, supra n.8, at 14.
[23] See 'Commentary to Draft Articles on Responsibility of States for Internationally Wrongful Acts', (2001) 2 ILC Ybk 73.

force. O'Connell, for example, rejects the notion of consent as a valid basis for the use of force in those instances where the use of force would have been unlawful if it had been the host state acting, submitting that:

If a government seeks assistance from another state…the party providing assistance may only use that level of force that the government itself has the right to use. Those commenting on the right of the United States to use attack drones in Pakistan often overlook this important set of legal principles governing internal armed conflict. For much of the period that the United States has used drones on the territory of Pakistan, there has been no armed conflict.[24]

Most scholars, however, take an opposing view to that held by O'Connell. Deeks, for instance, submits that:

International law today does not clearly prohibit states from using consent as a partial or complete rationale for their forcible actions in another state's territory, even when that consent purports to authorise an activity that the host state could not legally undertake.[25]

Therefore, the widely accepted view is that the host state's valid consent will render the attacking state's use of force lawful under the *jus ad bellum*, to the extent that that use of force is conducted within the confines of that consent.
All of this raises the question of what constitutes a 'valid' consent, and who is authorised to consent on behalf of the host state. As Emmerson rightly submits, domestic law of the host state may dictate those with authority to consent to the use of force, but international law otherwise presumes that, when a legitimate government exercises effective control over the territory of the state, it is the proper consenting authority.[26] Obviously, consent to violate the territorial sovereignty of the host state can only be given by those who have been vested with the authority to provide such a consent.

[24] See O'Connell, supra n.11, at 16.
[25] See A.S. Deeks, 'Consent to the Use of Force and International Law Supremacy', (2013) 54 Harv. Int'l L J 1, at 26-27.
[26] See Emmerson, supra n.8, at 14-15.

2.3 Authorisation by the UN Security Council

The resort to the use of force by a state on the territory of another state is lawful if it is based on an authorisation from the UN Security Council. Under Article 24 of the UN Charter, UN member states have conferred upon the Security Council primary responsibility for the, "maintenance of international peace and security", and have invested the Security Council with certain powers to enable it to discharge this responsibility. Chapter VII of the UN Charter vests power in the Security Council to authorise member states to take such, "action by air, sea or land forces as may be necessary to maintain or restore international peace and security."[27] One recent example of UN Security Council authorisation for collective enforcement action under Chapter VII is UNSC Resolution 1973 of 17th March 2011, which established a no-fly zone over Libya and authorised the use of, "all necessary means…to protect civilians and civilian populated areas under threat of attack," in that country.[28] Therefore, force falling within the scope of that authorisation would be lawful under the *jus ad bellum*, and would not violate the general prohibition contained in Article 2(4) of the UN Charter.

2.4 The Right to Self-Defence

The third and final relevant exception to the general prohibition on the use of force by a state is the right to resort to force in lawful self-defence. The classic definition of the right of a state to act in self-defence in customary international law comes from The Caroline Case.[29] It is not proposed to detail at length the facts of this case, which are well-recited in the extant literature on self-defence under the *jus ad bellum*. In correspondence with the British Government following the incident involving *The Caroline*, the US Secretary of State, Daniel Webster, set out what he considered to be the elements of self-defence in international law. There had to exist, Webster posited, "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." Such elements had to exist before self-defence could

[27] Article 42 of the UN Charter.
[28] See UNSC Res.1973 (17/03/11).
[29] 29 BFSP, p.1137, and 30 BFSP, p.195. See also R.Y. Jennings, 'The Caroline and McLeod Cases', 32 AJIL, 1938, at 82.

become a legitimate justification for resorting to force, which could neither be unreasonable nor excessive, "since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[30] The British accepted these basic elements of the right to self-defence in 1837, and they now form part of customary international law.

The inherent right of a state to resort to force in self-defence was further expressed in Article 51 of the UN Charter, which provides:

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

The customary law right of self-defence exists in parallel to, and alongside, Article 51 of the UN Charter, and has not been superseded by it. This co-existence is clearly rooted in the very nature of sovereignty. The State, as the supreme authority under international law, must be empowered by international law to respond to threats against its nationals and its territorial integrity. As Newton rightly submits, it is, "modern consensus that the sovereign right of self-defence did not originate in Article 51 of the United Nations Charter and is not restricted to responses enumerated therein."[31]

That there exists such a right of self-defence under the *jus ad bellum* is without doubt, however the scope of such a right has been the subject of much controversy and

[30] *Ibid.*

[31] See Michael Newton, 'Flying into the Future: Drone Warfare and the Changing Face of Humanitarian Law', 39 Denver J. Int'l Law & Pol'y (2011) 601, at 604. Indeed, in the Nicaragua case, the ICJ clearly established that the right of self-defence existed as an inherent right under customary international law as well as under Article 51 of the UN Charter. See Military and Paramilitary Activities In and Against Nicaragua (Nicaragua -v- USA) (Merits) [1986] ICJ Rep. 14, pp.14, 94.

extensive debate amongst commentators, in particular with regard to the use of force in countering terrorism.[32]

Most, but not all, scholars agree that, for a state to make a legitimate claim that it is entitled to resort to the use of force further to its inherent right to self-defence, it must demonstrate that it has been subjected to an armed attack. In this respect, the onus of proof rests on the victim state. The ICJ stated clearly in Armed Activities on the Territory of the Congo (Democratic Republic of the Congo -v- Uganda) (Judgement) that:

Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a state to protect perceived security interests beyond these parameters.[33]

The degree of threat or use of armed violence required to constitute an 'armed attack' is an issue that divides commentators. A minority of scholars hold the opinion that a state may respond in self-defence to *any* threat, even those not rising to the level of an armed attack.[34] These scholars argue that a state should not be required to withhold a response of self-defence until the threat escalates to the level of an armed attack.[35] To require such would create a gap in the law where a state could not respond to serious threats against its nationals or territorial sovereignty, which would render to right to self-defence entirely meaningless. Schwebel further opines that the language of Article 51 lacks condition. Its articulation that a state has a right to self-defence *if* an armed attack occurs could be an indication that the framers of the UN Charter did not intend to limit the right to self-defence "if and only if" an armed attack occurs. However, the majority of scholarship holds the view that a state must be the victim of an armed attack in order to lawfully resort to force in self-defence.

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[32] See, for example, J. Kammerhofer, 'Uncertainties of the Law on Self-Defence in the United Nations Charter', (2004) 35 NYIL 143. See also C.J. Tams, 'The Use of Force against Terrorists', (2009) 20 EJIL 359.
[33] [2005] ICJ Rep. 168, at para.148. Hereinafter referred to as *Armed Activities*.
[34] See Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (1961). See also Stephen M. Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, in *Justice in International Law: Selected Writings of Judge Stephen M. Schwebel* (1994).
[35] See Nicaragua, supra n.31, at para.173 (dissenting opinion of Judge Schwebel).

Prior to the 9/11 attacks, it was open to question whether an attack perpetrated by a terrorist group could constitute an 'armed attack' for the purposes of engaging Article 51 of the UN Charter. Prior to the 9/11 attacks, state practice and the weight of academic opinion weighed against the concept in international law of a right to self-defence against non-state actors. Indeed, few openly supported the existence of such a right in the absence of some element of state complicity in the activities of the non-state actor. As Murphy rightly submits, "prior assertions that terrorist acts constituted an "armed attack" justifying a robust exercise of self-defence have not met widespread acceptance by the global community."[36] However, this position has changed markedly in consequence of the 9/11 attacks. The day following the attacks, the UN Security Council recognised the United States' right to self-defence in this instance.[37] Further, NATO's North Atlantic Council stated that the attacks should be viewed as an action covered by the Treaty of Washington, which states that an armed attack against one or more of the members of the alliance shall be considered an attack against them all, if it was determined that the attacks emanated from a foreign state.[38] This apparent shift in position, which may be political as much as an intentional broadening of the scope of the right to self-defence, is recognised by an evolving state practice with regard to countering international terrorism. Gray and Lubell take the view that, from the international response to the 9/11 attacks, there could, under certain circumstances, be a right of self-defence against non-state actors who perpetrate acts of terrorism, even where there is little or no state complicity in those acts.[39] The difficulty, however, lies in properly delineating the scope of such a right. Certainly, Article 51 does not expressly specify that an armed attack must be perpetrated by a state, but in the event of an attack by a non-state actor with no state complicity in that attack, the question of what constitutes a permissible response in self-defence becomes more problematic. In part, this difficulty is due to the fact that an 'attack' must be of a sufficient intensity to constitute an 'armed attack'. According to the ICJ in Nicaragua, only the, "most grave forms of the use of force" constitute an

[36] See S.D. Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', (2002) 43 Harv. Int'l L.J. 41, at 46.
[37] UNSC Res. 1368 (12/09/01). See also UNSC Res. 1373 (28/09/01).
[38] North Atlantic Treaty Organisation, Statement by the North Atlantic Council (12/09/01), available at http://www.nato.int/docu/pr/2001/p01-124e.htm, accessed 27 February 2015.
[39] See C. Gray, *International Law and the Use of Force*, (3rd edn, OUP, 2008), at 199-202. See also N. Lubell, *Extraterritorial Use of Force Against Non-State Actors*, (OUP, 2010), at 31-36.

armed attack.[40] The Court also opined that an armed attack must reach a certain significant scale of violence above, "mere frontier incidents."[41] In line with the Nicaragua judgment, O'Connell submits that sporadic rocket fire, or small armed groups crossing a border, would not rise to the level of an armed attack.[42] Dinstein, however, argues that smaller scale attacks constitute armed attacks triggering a state's right to self-defence, provided that the scale and effects are not *de minimis*.[43] In line with this thinking, Judge Jennings opined that it would be dangerous to unnecessarily restrict the right to self-defence, as it would limit a state's ability to lawfully respond to a threat to its sovereignty.[44]Certainly, the response of the international community recognising that the 9/11 attacks were of sufficient gravity to trigger the United States' right to self-defence, offers little by way of assistance in this regard. Although recognising the threat posed by terrorism to international peace and security, the 9/11 attacks are the only specific instance where the UN Security Council has specifically recognised a right of self-defence in response to a specific terrorist attack.

This minimum threshold requirement in Article 51 has been the subject of much dispute, with claims from some states, in particular, Israel, that there exists an 'accumulation of events' doctrine, whereby a series of small-scale, sporadic terrorist attacks, designed to achieve an objective that could not be achieved by a single concentrated attack, could be weighted cumulatively in determining whether the threshold requirement has been satisfied. O'Connell submits that the sporadic nature of terrorist acts is precisely the reason why states should be required to respond to acts of terrorism using law enforcement methods within the human rights framework, as opposed to military force.[45] A string of terrorist attacks, O'Connell argues, must be evaluated on a case-by-case basis, and cannot accumulate to constitute an armed attack.[46] However, there is a contention that the accumulation of attacks is justified when there exists a coordinated campaign of violence. Israel has been a staunch advocate of this doctrine in relation to its operations against Hezbollah militants launching attacks against Israel from Lebanon.[47] The ICJ has referred to the doctrine

[40] See Nicaragua, supra n.35, at para.191.
[41] *Ibid*, at para.195.
[42] See Professor Mary Ellen O'Connell, 'Remarks: The Resort to Drones under International Law' 39 Denver J. Int'l Law & Pol'y (2011) 585, at 597.
[43] See Y. Dinstein, supra n.19, at 195.
[44] See Nicaragua, supra n.35, at 543-544.
[45] See O'Connell, supra n.42, at 593.
[46] *Ibid*.
[47] See Y. Ronen, 'Israel, Hezbollah and the Second Lebanon War', (2006) 9 YIHL 362, at 372.

in passing, with several judicial remarks seemingly endorsing the doctrine, at least implicitly. In Nicaragua, the ICJ stated:

Very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or ***collectively*** *(emphasis added) to an 'armed attack' by Nicaragua on either or both states.*[48]

Later, in Islamic Republic of Iran -v- USA (Judgment), the ICJ opined:

…the question is whether that attack, either in itself or ***in combination with the rest of the "series of…attacks"*** *(emphasis added) cited by the United States can be categorised as an "armed attack" on the United States justifying self-defence.*[49]

Finally, in Armed Activities, the Court stated:

The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as ***cumulative in character*** *(emphasis added) they still remained non-attributable to the Democratic Republic of the Congo*.[50]

Notwithstanding these passing judicial comments, implicitly endorsing the 'accumulation of events' doctrine, until recently the doctrine was controversial. However, in the years following 9/11, it is submitted that legal opinion seems to have shifted to such an extent that the doctrine finds considerable support amongst commentators, particularly in relation to attacks by irregular armed bands and terrorist groups. Dinstein, for example, submits that if, "continuous pin-prick assaults form a distinctive pattern, a cogent argument can be made for appraising them in their totality as an armed attack."[51] This certainly seems to be reflected in recent state practice, with Tams rightly pointing to an increasing willingness amongst states to accept the doctrine.[52]

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[48] See Nicaragua, supra n.35, at para.191.
[49] [2003] ICJ Rep. 161, at para. 64. Hereinafter referred to as *Oil Platforms*.
[50] Armed Activities, supra n.33, at para.146.
[51] See Y. Dinstein, supra n.19, at 230-231.
[52] See C.J. Tams, supra n.32.

2.5 A Right of Self-Defence Against Non-State Actors?

The previous discussion raises the issue of attribution of an armed attack, in particular the question of whether the *jus ad bellum* recognises a right of self-defence against non-state actors, such as terrorist organisations. It is not yet a settled point as to whether a victim state must be able to attribute that attack to a state actor in order to lawfully resort to force in self-defence, or whether a state may respond to an armed attack perpetrated by a non-state actor. Under what circumstances can the actions of a non-state actor be attributable to a host state for the purposes of Article 51 of the UN Charter? How close must the connection be between the non-state actor and the host state for the host state to be fixed with legal responsibility for the actions of the non-state actor? Article 8 of the International Law Commission's articles on state responsibility offers some helpful initial guidance, providing that the conduct of a:

person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.[53]

O'Connell submits that, on the basis of the ICJ's decisions in Nicaragua, Oil Platforms and The Wall, attribution of an armed attack to a state actor is an absolute requirement for self-defence, and that without it a victim state must use law enforcement methods within the human rights framework.[54]
A reading of the jurisprudence suggests that the threshold for attribution to the host state is rather high. The ICJ in Nicaragua, in setting down a test of 'effective control', concluded that US participation in the financing, organisation, training, supplying and equipping of the Contras, and in the selection of targets, did not suffice for the purpose of attributing to the US the acts perpetrated by the Contras. The ICJ noted that for, "this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that [the United States had] effective control of military and paramilitary operations in the course of which the alleged violations were committed."[55] Whilst in Tadic,[56] the Appeals Chamber of the International Criminal

[53] See G.A. Res. 56/83 (12/12/01).
[54] See O'Connell, supra n.42, at 590-591.
[55] See Nicaragua, supra n.31, at para.115.

Tribunal for the Former Yugoslavia[57] questioned the rationale behind this high threshold, opting instead for a less onerous test of "overall control",[58] the ICJ nevertheless reaffirmed the higher threshold in both the Armed Activities[59] and the Genocide[60] cases. In the latter case, the ICJ was clearly explicit in stating that "effective control" is required in respect of, "each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the person or group of persons having committed the violations".[61] The Court therefore utterly rejected the notion that the test for attribution was a variable one that was dependant on the nature of the act perpetrated in the absence of a clear *lex specialis*.[62] Regardless of the test applied, the attribution requirement predicates a lawful use of force in self-defence upon the occurrence of an armed attack attributable to a state actor. Violent acts perpetrated unilaterally by a non-state actor would not be sufficient to trigger the right of self-defence.

As it stands, therefore, a host state is responsible for the actions of a non-state actor only if it exercises effective control over the non-state actor in the course of their operations. However, other scholars such as Dinstein maintain that attribution is not required and that a state possesses a right to use force in self-defence against a non-state actor, even when the actions of the non-state actor cannot be attributed to a host state.[63] In other words, there is a free-standing right of self-defence against a non-state actor. A non-state actor can perpetrate an "armed attack" for the purposes of triggering a state's right to resort to force in self-defence under Article 51 of the UN Charter. This issue came to the fore following the 9/11 attacks, with the US arguing that the attacks triggered its right to use force against the Al-Qaeda terrorist network based in Afghanistan. The notion of a right to self-defence against non-state actors has been controversial. In The Wall, Judge Kooijmans noted, in his Separate Opinion in the ICJ's Advisory Opinion, "for more than 50 years…it has been the generally

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[56] Prosecutor -v- Dusko Tadic (Judgment), ICTY-94-1 (15/07/99). Hereinafter referred to as *Tadic*.
[57] Hereinafter referred to as the ICTY.
[58] See Tadic, supra n.56, at paras.117 and 137.
[59] See Armed Activities, supra n.33, at para.160.
[60] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina -v- Serbia and Montenegro), [2007] ICJ Rep. 43.
[61] *Ibid*, at para.400.
[62] *Ibid*, at para. 401.
[63] See Dinstein, supra n.19, at 206, 216.

accepted interpretation", that an armed attack must come from another state.[64] Judge Kooijmans' dictum is certainly reflective of the pre-9/11 prevailing interpretation of Article 51 that the armed attack must be perpetrated by the territorial state *itself* before it could be the legitimate target of force in self-defence directed at the perpetrators of the attack. However, as with the 'accumulation of events' doctrine discussed above, the 9/11 attacks seem to have heralded a shift in legal opinion on this issue. The response of the UN Security Council to the 9/11 attacks, which recognised the right of the United States to act in self-defence, did not itself set down state attribution as a condition precedent.[65] Despite a few persistent objectors, notably Professor O'Connell, who staunchly advocates the traditional view,[66] for most scholars, the response of the international community in the aftermath of the 9/11 attacks indicates that, subject to certain conditions, there does exist, in the words of Gray, a, "right to self-defence against non-state actors for terrorist attacks."[67] Therefore, as Lubell rightly submits, there is plentiful evidence, reflected in state practice since 9/11 in relation to the interpretation of Article 51 of the UN Charter, to support the view that a non-state actor can be responsible for an armed attack that engages a victim state's right to self-defence.[68] It is of note that the report of Christof Heyns reflects this position, although Heyns points to an emerging view amongst commentators that the threshold of violence necessary to justify the use of force in self-defence ought to be set higher where the initial armed attack is perpetrated by a non-state actor. [69] Certainly, there is nothing in the wording of Article 51 referring to the nature of the party responsible for the armed attack, only the nature of the party entitled to resort to force in self-defence – there is no mention or qualification as to the nature of the perpetrator of the armed attack. However, although the weight of scholarly opinion may have shifted in favour of recognising the emergence of a right of self-defence against a non-state actor, to date this has yet to be reflected in the jurisprudence of the ICJ, with the Court thus far sceptical of the existence of such a right. In both The Wall and Armed Activities, the majority of the Court maintained the traditional

[64] See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), [2004] ICJ Rep. 136, Separate Opinion of Judge Kooijmans, at para.35. Hereinafter referred to as *The Wall*.
[65] UNSC Res. 1368 (12/09/01) and UNSC 1373 (28/09/01).
[66] See O'Connell, supra n.11.
[67] See Gray, supra n.39, at 199.
[68] See Lubell, supra n.39, at 31.
[69] See Heyns, supra n.8, at 19.

interpretation of Article 51 that excluded a right of self-defence against non-state actors.[70] In both cases, the reasoning of the majority met with strong dissenting opinions.[71] Judge Higgins opined that there was nothing in the wording of Article 51 to prohibit the use of force in self-defence where the armed attack was perpetrated by a non-state actor – the wording does not limit armed attacks to those attributable to an attacking state (such an apparent limitation being understood in light of the Nicaragua decision, with which the learned Judge expresses her own reservations).[72] Similarly, Judges Kooijmans and Buergenthal, in The Wall, expressed deep dissatisfaction at the apparent reluctance of the ICJ to depart from Nicaragua and accept that armed attacks by non-state actors could engage the victim state's right to resort to force in self-defence.[73] It seems, therefore, that the jurisprudence of the ICJ and academic scholarship on the issue are out of step with one another. Whilst there is an absence of judicial affirmation of such a right of self-defence against non-state actors, the weight of scholarship seems to have determined that such a right does exist, turning its focus to *how* such a right can be exercised lawfully. When, therefore, does the *jus ad bellum* permit a victim state to defend itself against terrorism?

2.6 A Right of Anticipatory Self-Defence?

As stated, a victim state's right to use force in self-defence under Article 51 of the UN Charter is triggered when an armed attack "occurs". Notwithstanding this express and clear wording of Article 51, it is submitted that there are limited circumstances when a state may resort to force in *anticipatory* self-defence against an expected, *imminent*, armed attack.[74] This view was expressed by the UN Secretary-General's High-Level Panel on *Threats, Challenges and Change*, in 2004:

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[70] See remarks of the Court in The Wall, supra n.64, at para.139: "Article 51 thus recognises the existence of an inherent right of self-defence in the case of armed attack by one state against another state". See also Armed Activities, supra n.33, at para.146ff, where the Court had to rule on the legality of Ugandan use of force in the DRC. In rejecting the compatibility of that use of force with the right to self-defence, the Court listed a number of reasons, *inter alia*, that the relevant acts, which according to Uganda triggered its right to self-defence, could not be directly attributed to DRC.

[71] See The Wall, supra n.64, Separate Opinion of Judge Kooijmans, at para.35, and Separate Opinion of Judge Higgins, at para.32. See also Declaration of Judge Buergenthal, at para.6. See also Armed Activities, supra n.33, Separate Opinion of Judge Kooijmans, at para.29, and Separate Opinion of Judge Simma, at para.8.

[72] See Higgins, *Ibid*.

[73] See Kooijmans and Buergenthal, supra n.71.

[74] See Dinstein, supra n.19, at 200. See also Higgins, supra n.17, at 242.

…a threatened state, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.[75]

David Bethlehem offers some helpful guidance on the assessment of whether an armed attack is to be regarded as 'imminent', opining that same is to be assessed by reference to all relevant circumstances, including: (a) the nature and immediacy of the threat; (b) the possibility of an attack; (c) whether the anticipated attack is part of a continuous and concentrated armed activity; (d) the probable scale of the attack and the injury, harm, loss or damage likely to result therefrom in the absence of action taken to mitigate the effects of same; and (e) the likelihood that there will be other opportunities to undertake effective action in self-defence that may reasonably be expected to cause less serious collateral damage to civilians and civilian objects. So long as there is a reasonable and objective basis for concluding that an armed attack is imminent, a lack of specific evidence or knowledge of when and where an attack will take place, or the precise nature of that attack, will not be fatal to a conclusion that the armed attack is imminent and thus will not preclude a legitimate claim of self-defence.[76]

While the original formulation of the right to self-defence in Caroline clearly envisaged the possibility that a state may be required to use force in *anticipation* of an armed attack, it is submitted that the Caroline formula does not recognise the wider notion of *pre-emptive*, self-defence against future attacks that are neither specific nor imminent. However, Article 51 of the UN Charter is not a carbon copy of the original Caroline formula. Indeed, by seeming to permit force in self-defence only when an armed attack occurs, Article 51 seems to be more restrictive than the original formulation, by, *prima facie*, excluding the possibility of self-defence against future attacks, irrespective of their degree of imminence. This apparent exclusion of the possibility of legitimate anticipatory self-defence certainly finds a basis in the travaux préparatoires of the UN Charter, which indicates that the drafters did not wish the

[75] Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', A/59/565 (02/12/04), at 188.
[76] See Bethlehem, 'Principles of International Law on the Use of Force by States in Self-Defence', The Royal Institute of International Affairs, Chatham House, London, October 2005, at 21.

right of self-defence to be engaged before the occurrence of an armed attack.[77] Furthermore, Brownlie submits that, "it can only be concluded that the view that Article 51 does not permit anticipatory action is correct, and that arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence."[78] However, support for such a view is not absolute, with Bowett submitting that such a restriction is, "both unnecessary and inconsistent with Article 2(4), which forbids not only force but the threat of force, and, furthermore, it is a restriction which bears no relation to the realities of a situation which may arise before an actual attack and call for self-defence immediately if it is to be of any avail at all."[79]
Is it therefore possible to reconcile a notion of anticipatory self-defence with Article 51 of the Charter? One possibility lies in the wording of Article 51 itself, which speaks of the "inherent" right of a state to resort to force in self-defence. The wording itself does not preclude a pre-existing anticipatory component of this inherent right. This possibility finds favour with Higgins, who states that it, "is also contended that the continued validity of this pre-Charter law on anticipatory self-defence is consistent with the reference in Article 51 to the right of self-defence being "inherent"."[80] A further possibility is that, while the use of force in self-defence against an attack that has not yet occurred may be proscribed by law, it may be tolerated by the international community in certain, limited circumstances. Gray submits that there is state practice in support of a general acceptance, or at least a quiet tolerance, of the use of force in anticipatory self-defence, provided that the strict necessity and immediacy requirements of the Caroline formula are not deviated from.[81]

Jennings and Watts state:

The better view is probably that while anticipatory action in self-defence is normally unlawful, it is not necessarily unlawful in all circumstances, the matter depending on

[77] See Governor Stassen (US team), *Minutes of the 48th meeting of the US delegation*, San Francisco 20th May 1945, 1 Foreign Relations of the United States of America (1945) 813, at 818.
[78] See I. Brownlie, *International Law and the Use of Force by States*, (OUP, 1963), at 278.
[79] See D. Bowett, *Self-Defence in International Law*, (Manchester University Press, 1958), at 191-192.
[80] See Higgins, 'The Attitude of Western States Towards Legal Aspects of the Use of Force', in A. Cassesse (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff: Dordreht, 1986), at 442.
[81] See Gray, supra n.39, at 130.

the facts of the situation, including, in particular, the seriousness of the threat and the degree to which pre-emptive action is really necessary and is the only way of avoiding that serious threat. The requirements of necessity and proportionality are probably even more pressing in relation to anticipatory self-defence than they are in most other circumstances.[82]

It is not impossible to arrive at an altogether similar conclusion when considering the issue of anticipatory self-defence against a non-state actor, such as a terrorist group. The Caroline case itself dealt with the issue of self-defence against a non-state actor, and the formula set out therein is still regarded as legitimising a limited notion of anticipatory self-defence. It is, therefore, arguable that there exists in international law a limited right of anticipatory self-defence against a non-state actor.
Therefore, if one accepts that, in certain limited circumstances, a state may be left with little option but to resort to force in anticipatory self-defence against another state, the same must be true when there is a necessity to use force in the face of a direct and imminent attack from a non-state actor, particularly if that attack may be on a large scale. The reality of the threat posed by non-state actors such as Al-Qaeda, Boko Haram, Al-Shabaab, *et al*, certainly lends itself favourably to recognising the existence of such a right. That being said, this reality should not translate into recognition of a broader right of *pre-emptive* self-defence, which would permit a state to resort to force on a pre-emptive basis, with no requirement of prior knowledge of a specific imminent attack.

2.7 A new doctrine of pre-emptive self-defence?

Terrorists have demonstrated that they can conduct devastating surprise attacks. Allowing opponents to strike first – particularly in an era of proliferation is unacceptable. Therefore, the United States must defeat the most dangerous challenges early and at a safe distance, before they are allowed to mature.[83]

[82] Jennings and Watts (eds), *Oppenheim's International law*, Ninth Edn, Vol.1, (Longmann: London, 1992), at 421-422.
[83] 'The National Defence Strategy of the United States of America', US Department of Defence, March 2005, at 9.

The response of the Bush Administration following the 9/11 attacks was to claim the existence of a new doctrine of *pre-emptive* self-defence, whereby the US would be able to act against emerging threats before they could fully form.[84] Under this so-called 'Bush-doctrine', the emergence of a new threat from international terrorism, as well as the dangers posed by rogue states such as Iran and North Korea, in particular with regard to the risk of acquisition of weapons of mass destruction, created the need to adapt the concept of 'imminent threat' to meet the capabilities and the objectives of these rogue states and transnational terrorist networks. One major concern that was raised, quite legitimately, was that terrorist targets in particular are usually civilians and civilian objects. Given that such targets are not as easily identifiable or defended as military targets, and the possibility of mass civilian casualties resulting from an attack, the US stressed the importance of taking preventive action.[85] The 2004 UN Panel on *Threats, Challenges and Change* shared the concerns of the US regarding those emerging threats, advocating a more proactive approach in countering them, including, "taking more decisive action earlier than…in the past."[86] However, in contrast to the unilateral approach being advocated by the US, the Panel stressed the importance of adopting a multilateral approach through the UN Security Council.[87] Therefore, does the threat posed by non-state actors in particular justify expanding the scope of the existing, but narrow, right of anticipatory self-defence, so as to allow for a wider right of pre-emptive self-defence, with no requirement of knowledge of a specific, imminent attack? It is submitted that the US' attempts to expand the scope of the temporal aspect of Article 51 so as to allow for pre-emptive self-defence must be rejected outright. Whilst the law as a living construct cannot exist in a vacuum, there is nothing in the travaux préparatoires to suggest that the drafters ever countenanced a notion of legitimate pre-emptive self-defence in the absence of any imminence requirement, and no such notion can be read into the wording of Article 51. The US position has found little support amongst the international community, with even their closest ally, the UK, declining to accept the assertion of a right to pre-emptive self-defence.[88] The principal concern, even amongst those who recognise a limited right of anticipatory self-defence, is that a right of pre-emptive self-defence may be used as a

[84] See National Security Strategy of the United States, September 2002.
[85] *Ibid.*
[86] 'A More Secure World: Our Shared Responsibility', supra n.75, at 194.
[87] *Ibid*.
[88] See Tams, supra n.32, at 389. See also statement of Lord Goldsmith, Attorney-General, dated 21st April 2004, cited in Bethlehem, supra n.76, at 771-772.

cover for unlawful and unprovoked aggression. Therefore, it is submitted, the boundaries of the doctrine set out in the Caroline formula requiring *imminence* and *no other means to counter the threat*, other than force in self-defence, should not be redrawn in such a way as to allow for force in pre-emptive self-defence. The need to establish the imminence of a threat becomes greater when contemplating force in anticipatory self-defence, and the link between the above requirements of the Caroline formula is a sound reason to confine lawful self-defence to knowledge of a specific, imminent attack. Permitting self-defence outside the Caroline formula runs the risk that states may claim pre-emptive action against vague future threats, disregarding the fundamental prohibition on the use or threat of force contained in Article 2(4) of the UN Charter.

Of course, the concept of imminence must take account of all the circumstances prevailing at the time, including the nature of the threat, and the capabilities of the actors in delivering that threat. This position certainly finds support in *Threats, Challenges and Change*, which discusses self-defence in the context of terrorist attacks, stating that:

a threatened state, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate. The problem arises when the threat in question is not imminent but still claimed to be real.[89]

Higgins, whilst accepting that allowance for a limited form of anticipatory self-defence against a specific, imminent attack has considerable support, leaves us with the following warning:

Even so far as conventional military action is concerned, there must be circumstances (notwithstanding the wording of Article 2(4)), which allow a state to take pre-emptive action in self-defence, without waiting to be struck first. But it is equally important that this possibility is not abused, and is not used as a pretext for unprovoked aggression. The test in The Caroline helps strike that balance: for the state

[89] 'A More Secure World: Our Shared Responsibility', supra n.75, at 188.

considering an anticipatory use of self-defence, the necessity must be instant, overwhelming, and leaving no choice of means, and no moment for deliberation.[90]

2.8 Location of the Use of Force in Self-Defence

The issue of *where* a victim state can lawfully use force in self-defence is one that has divided scholars. On the one hand, O'Connell points out that, while there have been concerns about US drone strikes in Afghanistan against Al-Qaeda and the Taliban, the real concern is whether strikes outside the "hot battlefield" of Afghanistan are lawful.[91] O'Connell submits that without attribution of the armed attack to the host state, such use of force would not be a legitimate exercise of self-defence.[92]
O'Connell's argument, however, does not sit well with Paust, who contends that a state's right to territorial integrity is not an absolute, and that under certain circumstances a victim state may exercise its right to self-defence against a non-state actor in the territory of the host state, even when the activities of the non-state actor cannot be attributed to that host state.[93]
O'Connell's arguments against the legality of targeting terrorists outside the traditional boundaries of the battlefield clearly rely on the foundational principle of territorial integrity codified in Article 2(4) of the UN Charter. This concept, coupled with the requirement of attribution to a state actor, form, according to O'Connell, the asserted rule that under the law of self-defence, the territorial integrity of the host state prevails unless the armed attack that engaged the victim state's right to self-defence can be attributed to the host state.[94] Only then may the victim state lawfully use force in self-defence against the non-state actor in the territory of the host state. Where the attribution requirement is not met, O'Connell submits, the victim state must rely on law enforcement methods within the human rights paradigm.[95]
In contrast, Paust asserts that the territorial integrity of the host state may be superseded by the victim state's right to self-defence, provided that the use of force is

[90] See Higgins, supra n.80, at 442.
[91] See O'Connell, supra n.42, at 592.
[92] *Ibid*, at 590-591, 594.
[93] See Jordan J. Paust, 'Permissible Self-Defence Targeting and the Death of bin Laden', 39 Denver J. Int'l Law & Pol'y (2011) 569, at 572-573.
[94] See O'Connell, supra n.42, at 594.
[95] *Ibid*.

confined within the limitations of that right.[96] Paust's arguments are clearly premised upon the notion that a victim state may target individuals directly participating in an armed attack, regardless of where they are located, in particular where the host state is failing to comply with international obligations to deny safe haven to terrorists.[97] Therefore, if one takes Paust's thinking to its logical conclusion, the United States would be permitted to target Al-Qaeda members operating from Yemen, despite the fact that no armed attack can be attributed to the Yemeni state. However, such targeting must be strictly limited to suspected terrorists and not to the Yemeni state.

2.9 Self-Defence – The Requirements of Necessity and Proportionality

It is a settled principle of international law, confirmed by ICJ jurisprudence in Nicaragua, Nuclear Weapons, Oil Platforms and Armed Activities, that in order to be compliant with the *jus ad bellum*, force used in self-defence must satisfy the requirements of necessity and proportionality.[98]

The criterion of necessity requires a state to ascertain if an alternative, more peaceful, means of redress is available during or immediately subsequent to an armed attack, before resort to force in self-defence. Further, there is a requirement of 'immediacy' embedded within the necessity criterion, which requires that the response of the victim state occurs either while the armed attack is still in progress, or soon thereafter. However, it is accepted that this immediacy requirement should be interpreted flexibly, taking account of all the circumstances. For example, it may take some time for a state to determine that it has been the victim of an armed attack, to determine the identity of the perpetrator, to explore the possibility of a peaceful resolution, and to prepare for an armed response to repel the attack.

With respect to the use of force against non-state actors located and conducting operations in and from the territory of a host state, it would appear that, since the 9/11 attacks, two consequences flow from this necessity criterion. First, in respect of non-

[96] See Paust, supra n.93, at 573.
[97] See UNSC Res. 1373, UN Doc. S/RES/1373 (28th September 2001), which confirms that a host state's failure to prevent its territory from being used as a safe haven triggers the right to self-defence against non-state actors located and operating within the territory of the host state.
[98] See Nicaragua, supra n.31, at para.14; Nuclear Weapons, supra n.14, at para.41; Oil Platforms, supra n.49, at paras.76-77; Armed Activities, supra n.33, at para.147.

state actors, the use of force by the victim state in self-defence on the territory of the host state is based on the *inability* or *unwillingness* of the host state to counter the threat posed by the non-state actor. Therefore, if the host state is able and willing to deal with the threat, it would be open to question whether it is necessary for the victim state to resort to force, and should it proceed to do so, it is doubtful that such force would constitute lawful self-defence. This issue is of particular relevance with respect to US drone strikes in Pakistan in recent years, and it is proposed to discuss this issue further in the next chapter of this work. In the meanwhile, it is worth noting the comments of Deeks in relation to this test:

If the territorial state is willing and able, the victim state may not use force in the territorial state, and the territorial state is expected to take the appropriate steps against the non-state group. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use that level of force that is necessary (and proportional) to suppress the threat that the non-state group poses.[99]

Both Heyns and Emmerson cite the test with approval in their respective reports.[100] Similarly, Daniel Bethlehem submits that a state can resort to the use of force on the territory of another state in the absence of consent, "in circumstances in which there is a reasonable and objective basis for concluding," that the host state is, "colluding with the non-state actor or is otherwise unwilling to effectively restrain the activities of the non-state actor such as to leave the state that has a necessity to act in self-defence with no other reasonably available effective means to address an imminent or actual armed attack."[101] As Bethlehem rightly submits, this too would apply when the host state is unable to restrain the threat posed by the non-state actor.

However, this writer believes that it is important, at this stage, to note a significant caveat with respect to this 'unwilling or unable' test. While the test forms a significant part of the US government's legal position, certainly in respect of US drone strikes carried out in the tribal areas of Pakistan, Goodman rightly notes that the test remains

[99] See A.S. Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defence', (2012) 52 Virginia J Int'l L, 483-549, at 487-488.
[100] See Heyns, supra n.8, at 19-20. See Emmerson, supra n.8, at 16.
[101] See Bethlehem, supra n.76, at 776.

controversial under international law.[102] Indeed, as Henderson notes, leading proponents of the test, such as Deeks, readily admit that the test is not well defined and its position in the *jus ad bellum* unclear.[103] The basic test itself may not (as yet) have even attained the status of customary international law.[104] The extensive research undertaken by Deeks in relation to the test, for example, "found no cases in which states clearly assert that they follow the test out of a sense of legal obligation."[105] State practice being virtually non-existent, thus far, only the United States has actively supported the existence of the test as forming part of a state's inherent right to resort to force in self-defence, using the test as part of its justification for drone strikes in Pakistan, Somalia, Yemen, and against ISIS in Iraq and Syria, further to its right to self-defence in the context of an armed conflict against Al-Qaeda, the Taliban and associated forces.

For the purposes of this work, this writer will assume, for the sake of argument, that the 'unable or unwilling' test is now an established, or at least emerging, rule of customary international law, forming part of a state's inherent right of self-defence under the *jus ad bellum*. However, it is accepted, as things presently stand, international law offers little guidance as to the practical application of the 'unable or unwilling' test, but it would seem that prior to resorting to the use of force against a non-state actor in the territory of another state, the victim state should request that the host state, in so far as is practicable in all the circumstances, take all necessary measures to counter the threat posed, and afford the host state reasonable time to do so.[106]

The second consequence of the necessity criterion is that the victim state must limit any use of force to the non-state actor responsible for the armed attack, and not direct any force to the host state itself, unless and until it intervenes on the side of the non-state actor. This preserves the key distinction between self-defence *on the territory of*

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[102] See Ryan Goodman, 'International Law on Airstrikes against ISIS in Syria', *Just Security*, 28th August 2014, available at http://justsecurity.org/14414/international-law-airstrikes-isis-syria/, (accessed 25th April 2015).

[103] See C. Henderson, 'Editorial Comment: The Use of Force and Islamic State', (2014) Journal on the Use of Force and International Law Vol.1 No.2, 209-222, at 215*ff*.

[104] See Ryan Goodman, 'International Law – and the Unable or Unwilling Test – for US Military Operations in Syria', *Just Security*, 12th September 2014, available at http://justsecurity.org/14903/international-law-unwilling-unable-test-military-operations-syria/, (accessed 25th September 2015).

[105] See Deeks, supra n.99, at 503.

[106] *Ibid*, at 525.

the host state, with the victim state exercising its right of self-defence against the non-state actor, and self-defence *against the host state itself*.

The principle of proportionality is a fundamental requirement of lawful self-defence, ensuring that a fair and reasonable balance is struck between the initial armed attack and the force used by the victim state in self-defence in response to that attack. In the context of self-defence and the *jus ad bellum*, the principle of proportionality serves to gauge the legality of force used in self-defence by the victim state, either in relation to the preceding armed attack, or in relation to a imminent threat of attack and the measures necessary to counter that threat.
Going back to the Caroline formula, the victim state must show that it, "did nothing unreasonable or excessive; since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it".[107] However, it is respectfully submitted that the Caroline formula does not preclude a victim state from resorting to a level of force greater than that used in the initial armed attack. As Ago rightly submits, "the action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered."[108] Nor, as Lubell rightly submits, does the principle preclude a victim state from responding to an armed attack by exercising force in self-defence against a non-state actor on the territory of more than one state, where the non-state actor's activities are transnational in nature.[109]

Despite the fundamental nature of the proportionality principle in international law, in practice proportionality assessments are notoriously difficult to make, particularly in instances of alleged self-defence. This is due in no small part to a lack of consensus among the international community as to the proper purpose underlying the right to use force in self-defence. What belies this lack of consensus is a more substantial disagreement as to the purpose of the collective security framework contained in Chapter VII of the UN Charter. The traditional interpretation of Article 51 holds that the purpose of the right to self-defence is limited to allowing the victim state to use force to halt and repel the armed attack for the time necessary before the UN Security Council becomes seised of the situation and acts in accordance with Article 51 by

[107] See Jennings, supra n.29, at 89.
[108] See R. Ago, 'Addendum to Eighth Report on State Responsibility', (1980) 2 ILC Ybk 13, at para.121.
[109] See N. Lubell, supra n.39, at 66.

taking the measures necessary to restore and maintain international peace and security, and therefore any force beyond this must be authorised by the Security Council. Heyns certainly seems to support this traditional interpretation.[110] However, some commentators take the view that the purpose of the right of self-defence is not limited in such a way as held by the traditional interpretation of Article 51. For example, David Kretzmer submits that the principle of proportionality is not a 'one size fits all' principle, and that the legitimate aim of the resort to force in self-defence may differ, depending on the nature and scale of the armed attack, the identity of the perpetrators and any preceding relationship between the perpetrators and the victim state.[111] This would certainly seem to allow for proportionate force for the purpose of preventing or deterring further armed attacks. Ruys, like Kretzmer, argues persuasively for a flexible approach to determining proportionality with regard to large scale armed attacks or in the event of a series of successive armed attacks, submitting that, "the more an attack or a series of attacks threaten the existence of a state, the greater the need to tackle the source of the attacks itself."[112] Further, on consideration of recent state practice on self-defence against terrorism, Tams notes that the international community seems to have largely abandoned the traditional understanding of the right to self-defence as a protective means of halting and repelling armed attacks.[113]

It is respectfully submitted that this contemporary and flexible approach to the assessment of proportionality has much to commend it, given the nature of the ongoing threat posed by transnational terrorist networks such as Al-Qaeda – the fact that their activities and capabilities are more difficult to ascertain, and that they operate in splinter cells across international borders – which makes it difficult to gauge the extent of the threat which needs to be countered by force, and by which proportionality is to be measured.

Tams points to the widespread criticism that existed amongst the international community of armed responses to completed terrorist attacks prior to the events of

[110] See Heyns, supra n.8, at 18-19.
[111] See D. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in the Jus ad Bellum', (2013) EJIL 235, at 239, 240 and 267.
[112] See T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, (Cambridge University Press, 2010), at 117.
[113] See Tams, supra n.32, at 370-371.

9/11.[114] Such criticism was based on a number of factors, in particular that, since the response of the victim state would follow once the armed attack had been completed, the force employed by the victim state may be construed as punitive rather than aimed at preventing an actual terrorist threat against the state, and thus resemble an armed reprisal, illegal under the *jus ad bellum*. Other factors included the pre-emptive nature of such a response in order to protect against an unspecified future attack, and the reluctance of states to recognise a legitimate right to pre-emptive self-defence, as well as concerns that any response would be disproportionate to the initial armed attack. However, the overwhelming support for the US claim in the aftermath of the 9/11 attacks that it is entitled to use force in self-defence in response to those attacks may be indicative of a growing willingness to accept a delayed response on the part of the victim state in the exercise of its right to necessary and proportionate self-defence against specific terrorist attacks, but also that not all armed responses following specific terrorist attacks will necessarily be considered unnecessary and/or disproportionate. What is important, however, is that this flexible approach preserves the clear distinction between legitimate self-defence and unlawful reprisals, so that it can be reconciled with the existing legal framework in the *jus ad bellum*. The risk of what Tams refers to as, "turning a temporal right into an open-ended licence to use force", must be avoided.[115]

2.10 Concluding Comments

What this chapter has highlighted is that the right of a state to use force in self-defence in response to an armed attack as enshrined in customary international law and Article 51 of the UN Charter, has undergone substantial changes in the years following the 9/11 attacks. There are few who would now dispute that acts of terrorism can trigger a state's right to act in lawful self-defence, and it may even be that a state can justifiably accumulate the effects of individual terrorist attacks perpetrated by the same group in order to determine what can be a very difficult to question, that is whether those acts of terrorism are, cumulatively, of sufficient gravity to constitute an armed attack and thus engage a state's inherent right to resort to force in self-defence. That the international community has accepted, following the 9/11

[114] *Ibid.*
[115] *Ibid*, at 389.

attacks, that an armed attack may be perpetrated by a non-state actor, is another significant development. As regards the use of force in self-defence against a non-state actor on the territory of another state, such a right is conditioned on the inability or unwillingness of the host state to counter the threat posed. This chapter has illustrated that proportionality assessments in respect of force in self-defence against terrorist acts have proven difficult to make. Traditionally, armed responses to specific terrorist attacks have found little support amongst commentators and the international community. However, in the years following the 9/11 attacks, there has been a growing acceptance that such responses fall within the right to self-defence, although admittedly this blurs the line between lawful self-defence and unlawful reprisals.

The next chapter of this work shall use the preceding examination of the contemporary *jus ad bellum* in order to determine whether the US drone programs, in undertaking extraterritorial targeted killings against suspected terrorists in Afghanistan, Pakistan, Somalia, Yemen, and against the 'Islamic State' in Iraq and Syria, comply with that legal framework.

3

The US Drone Program and the jus ad bellum – Part Two

3.1 Background

As stated in the previous chapter of this work, the United States has conducted hundreds of targeted killing operations using armed drones against suspected terrorists in Afghanistan, Pakistan, Somalia and Yemen. Since August 2014, the United States has conducted aerial bombardments against the self-styled 'Islamic State' in Iraq and Syria, including by means of targeted drone strikes. On the basis of the examination of the present state of the *jus ad bellum* in the previous chapter, this chapter seeks to provide an analysis of whether armed drone strikes carried out by the United States on the territories of the aforementioned countries are compliant with the principles of the *jus ad bellum*.

The United States has consistently maintained a position that it is engaged in an armed conflict with Al-Qaeda, the Taliban and associated forces, and that those targeted by means of armed drone strikes are lawful targets in that armed conflict.[1] However, as previously submitted, the existence or otherwise of any situation of armed conflict, which would trigger the application of international humanitarian law, does not obviate the requirement for compliance with the *jus ad bellum* in respect of US drone strikes carried out in furtherance of that conflict. Put simply, in any instance where the United States launches an armed drone strike in the territory of a state with which it is not engaged in a conflict, it must justify that use of force, and the resultant breach of that state's territorial sovereignty, under the principles of the *jus ad bellum*. Given the porous nature of the Afghanistan-Pakistan border along the Durand Line, and the fact that US counter-terrorist operations against Al-Qaeda and Taliban militants straddle both countries, it is proposed to consider together US drone strikes in Afghanistan and the Federally Administered Tribal Area (FATA) of Pakistan. For reasons that shall become apparent, the *jus ad bellum* considerations related to US drone strikes against 'Islamic State' shall be examined separately as they apply in

[1] See Koh, ASIL Speech, 25th March 2010, 'The Obama Administration and International Law', available at http://www.state.gov/s/l/releases/remarks/139119.htm.

respect of Iraq and Syria, such are the differing justifications proffered by the United States in respect of its operations against 'Islamic State' in both Iraq and Syria.

3.2 US Drone Strikes in Afghanistan and Pakistan

US drone strikes in Afghanistan and Pakistan have been aimed primarily at members of Al-Qaeda and the Taliban located in Afghanistan, remnants of Al-Qaeda and associated islamist militant groups which crossed into north-west Pakistan in October 2001 with the commencement of *Operation Enduring Freedom*, remnants of the Afghan Taliban regime located in Pakistan, and members of the Pakistan Taliban who oppose ISAF forces in Afghanistan as well the civilian government of Pakistan. These groups have found sanctuary in the tribal regions of north-west Pakistan near the border with Afghanistan, in areas where the Pakistani government has found it difficult to exercise jurisdiction. It seems highly probable that there has been a measure of co-operation between these groups, which share similar aims and objectives, in particular an extreme islamist, anti-western agenda.

It is important to keep in mind that the United States is not, and never has been, in a situation of armed conflict with the state of Pakistan, that Pakistan has often consented to US drone strikes in its territory, and that Pakistan's security and intelligence agencies have not always co-operated with US efforts to target and kill Al-Qaeda and Taliban militants, and indeed have been suspected of colluding with these groups, creating a measure of mistrust between Washington and Islamabad. The inability of the Pakistani government to effectively administer the FATA region, and the lawlessness that exists there, has enabled the Taliban and Al-Qaeda to flourish in that region, to train, plan and co-ordinate attacks against international forces in Afghanistan and US interests around the world, as well as civilian and military targets in Pakistan.[2]

As to whether the US drone program operates with the consent of the Pakistani government, it is unclear whether a universal consent was ever granted with respect to all targeted killing operations. Certainly, there have been instances when the Pakistani government has criticised and condemned US drone strikes as a clear violation of

[2] See S.D. Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan', in M.N. Schmitt (ed), *The War in Afghanistan: A Legal Analysis*, (International Law Studies Vol.85, Naval War College Press, 2009), at 111-113.

Pakistani sovereignty.[3] These instances have usually followed drone strikes that have resulted in the loss of civilian lives and damage to civilian objects. It is of note that the Chief of Staff of the Pakistani military has denied the existence of any agreement between the United States and Pakistan whereby US drone strikes are permitted over Pakistani territory.[4]

In his interim report to the UN General Assembly, UN Special Rapporteur Ben Emmerson QC stated that, whilst there was, "strong evidence to suggest", that up until June 2008 US drone strikes in the FATA region of Pakistan were conducted, "with the active consent and approval of senior members of the Pakistani military and intelligence service, and with at least the acquiescence and, in some instances, the active approval of senior government figures."[5]

On 12th April 2012, the Pakistani Parliament adopted legislation revising the terms of co-operation with the United States, NATO and ISAF, and called for an immediate cessation of US drone strikes inside Pakistani territory. This legislation provided that neither the government nor the military nor the intelligence services could lawfully enter into verbally-binding agreements on matters touching the security of the state, and nullified those agreements already in existence. Any and all such future agreements would be subject to Parliamentary scrutiny and oversight.

Effectively, this was an express revocation of consent by Pakistan to US targeted killings using armed drones in its territory. The current civilian government in Islamabad, which took office in May 2013, has adopted a similar position, taking the view that drone strikes in its territory are counterproductive, in violation of international law, in violation of Pakistan's sovereignty and territorial integrity, and called for an immediate cessation of such strikes.[6] This express revocation of consent by the government of Pakistan is significant, for under international law it is the legitimate consenting authority, responsible for the conduct of the state's international relations and for the expression of the will of the state in the conduct of its foreign affairs. It is, however, claimed that the Pakistani government has, in secret, given the

[3] See S. Shane, 'Effective Yet Controversial: Drones are Here to Stay', *International Herald Tribune* (03/12/09) 3, (accessed 23rd March 2015).
[4] See J.Perlez, 'Pakistan's Military Chief Criticises U.S. over Raid', *New York Times*, (New York, 10/09/08), available at http://www.nytimes.com/2008/09/11/world/asia/11pstan.html, (accessed 23rd March 2015).
[5] See Ben Emmerson QC, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', A/68/389, 18th September 2013, at 15.
[6] *Ibid*.

United States a tacit consent to the continuance of armed drone strikes in its territory, in spite of US Secretary of State, John Kerry, indicating a clearly defined timetable for the cessation of such strikes in 2014.[7] Under the terms of the alleged agreement, reached between US President George W. Bush and Pakistan President Musharaff in the aftermath of the 9/11 attacks, Pakistan would publicly decry such strikes as illegal violations of its sovereignty, but would privately consent.[8] Documents leaked by the 'Wikileaks' website indicate that Pakistan has privately endorsed and consented to US drone strikes in its territory, a position confirmed by former President Musharaff in an interview with CNN in April 2013.[9] Official protestations notwithstanding, it seems likely that US drone strikes in Pakistan are carried out with the consent of the Pakistani government, the hesitancy in publicly endorsing the strikes having no affect on the binding nature of the consent under international law. On the basis of this consent, one is led to the inevitable conclusion that the strikes are compliant with the *jus ad bellum*.

Given the consent of the Pakistan government to the drone strikes, the question of whether the strikes accord with the US's inherent right to resort to force in self-defence, is rather academic. Nevertheless, given the rather tenuous nature of the consent, the issue is worth a consideration, especially since relations between the United States and Pakistan have been somewhat strained in recent years, amid US concerns that Pakistan is continuously failing to honour its international counter-terrorism obligations.[10] Further, it would always be open to the Pakistan government, and any future government, to revoke the consent or to place conditions on that consent that would be unacceptable to the United States.

In this regard, the United States has consistently maintained a position that US drone strikes in Pakistan are in furtherance of its right to self-defence. Both President Obama in his May 2013 speech, and Koh in his ASIL speech, base this right to self-defence on the 9/11 attacks, arguing that that right, triggered by the armed attack on

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[7] See http://www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones.html, (accessed 23rd March 2015).

[8] See K.A. Kronstadt, 'Pakistan-U.S. Relations', CRS Report for Congress R41832 (24/05/12), at 22-23.

[9] See N. Robertson and G. Bothlho, 'Ex-Pakistani Leader Admits Secret Deal with U.S. on Drone Strikes', CNN (12/04/13), available at http://edition.cnn.com/2013/04/11/world/asia/pakistan-musharaff-drones/index.html, (accessed 8th April 2015).

[10] See, for example, UNSC Res.748: "every state has the duty to refrain from…acquiescing in activities within its territory directed towards the commission of such [hostile acts towards other states], when such acts involve a threat or use of force." S.C. Res.748, UN Doc. S/RES/508 (31/03/92).

that day, has not yet been extinguished.[11] As discussed in the previous chapter, there was universal agreement amongst the international community that the 9/11 attacks constituted an armed attack that engaged the US's inherent right to self-defence under Article 51 of the UN Charter, permitting the US to resort to the use of force in self-defence against those who perpetrated the attacks of that day. However, at the time of writing, the 9/11 attacks were over thirteen and a half years ago, and a pertinent issue relating to the US drone program as it operates presently for the purposes of targeted killings of suspected terrorists in states such as Pakistan, is the extent to which the 9/11 attacks can still serve as a legal justification for the resort to force in self-defence. The issue here, it is submitted, is one of remoteness. One could make a valid argument that too much time has passed since the 9/11 attacks for those attacks to form a legitimate basis for the use of force in self-defence. Whether the 9/11 attacks continue to do so or not, of course, depends much on whether this resort to force by the United States is proportionate. It was noted in the previous chapter to this work that any assessment of proportionality must first consider and identify the legitimate aim of the use of force before any determination of whether the force used is necessary in order to achieve that aim. Regrettably, there is no international consensus as to the proper legitimate aim of self-defence, with some states in favour of a limited 'halt and repel' right to self-defence, and other states, including the US, in favour of a broader right, including the right to resort to force in anticipation of a specific, imminent threat. Unsurprisingly, then, there is a divergence of opinion on the issue of whether the 9/11 attacks can still serve as a legitimate justification for the exercise of the right to self-defence. In his recent report, UN Special Rapporteur Christof Heyns adopted the traditional, limited approach to the right to self-defence, submitting that action, "taken lawfully in self-defence, such as the use of drones to target individuals in another state's territory, must serve the purpose of halting and repelling an armed attack and must be both necessary and proportionate to that end."[12]

It is respectfully submitted that it is becoming ever more difficult, with the passing of time, to ground any claim of self-defence on the armed attacks of 9/11. Of course, the United States still faces a direct threat from global islamist terrorism, but compared to

[11] See Koh, supra n.1. See also Obama, Speech delivered at National Defense University, Washington D.C, 23rd May 2013, available at http://www.huffingtonpost.com/2013/05/23/obama-drone-speech-transcript_n_3327332.html?view=print&comm_ref=false.

[12] See Report of Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, presented to the UN General Assembly, dated 13 September 2013, Ref: A/68/389, at 18.

2001, Al-Qaeda is a pale comparison of itself, due to years of US military and CIA action against it. It is a much more loosely organised network, and it is doubtful that it could ever again mount an attack on the same scale of 9/11, capable only of causing marginal harm to US interests. This appears true since the killing of Osama bin Laden in May 2011 by US special forces in Abbottabad, Pakistan. President Obama, in his May 2013 speech at the National Defence University in Washington D.C., stated that, "the core of Al-Qaeda in Afghanistan and Pakistan…is on the path to defeat."[13]
The US Department of State opined in 2011 that Al-Qaeda's:

…organisational strength is difficult to determine precisely in the aftermath of extensive counter-terrorism efforts since 9/11. The death or arrest of mid- and senior-level Al-Qaeda operatives – including Osama bin Laden – have disrupted communication, financial, facilitation nodes, and a number of terrorist plots. Additionally, supporters and associates worldwide who are 'inspired' by the group's ideology may be operating without direction from Al-Qaeda's central leadership; it is impossible to estimate their numbers.[14]

According to counter-terrorism experts, such as Coll, regional 'franchises' present much more of a threat to US interests than the Al-Qaeda of old – groups such as Al-Shabaab, AQAP and Boko Haram.[15] To this, it is supposed, could be added the self-styled 'Islamic State', which seemed to take the world by surprise in the summer of 2014. A breakaway group of Al-Qaeda, IS has taken advantage of the political situation in Syria and Iraq, capturing large swathes of territory, proclaiming an Islamic Caliphate based on a brutal and barbaric interpretation of Sharia Law. In recent months, IS has accepted pledges of allegiance from Boko Haram in Nigeria, and has also forged links with jihadists in Egypt, Libya, Algeria, Yemen and Saudi Arabia.[16] It seems that Al-Qaeda and Islamic State are engaged in a battle for dominance in the global jihadist movement, and as the Al-Qaeda of old poses less and

[13] See Obama, supra n.11.
[14] See US Department of State, 'Country Reports on Terrorism 2011', (Office of the Coordinator for Counter-terrorism, July 2012), at 254ff.
[15] See S. Coll, 'Name Calling', *The New Yorker*, (New York, 04/03/13), available at http://www.newyorker.com/talk/comment/2013/03/04/130304taco_talk_coll.html, (accessed 8th April 2015).
[16] BBC News, 'Islamic State 'accepts' Boko Haram's allegiance pledge', (BBC News, London, 13/03/15), available at http://www.bbc.co.uk/news/world-africa-31862992, (accessed 8th April 2015).

less of a threat to the United States, one is drawn to the conclusion that the US can no longer base its justification for the resort to the use of force in self-defence on the armed attacks perpetrated by Al-Qaeda on 9/11. As Heyns rightly submits, the US right to self-defence against Al-Qaeda was triggered by the armed attacks perpetrated on 9/11, and it cannot be said to have been triggered by the dispersed threats from islamic terrorism coming from multiple territories.[17]

However, this apparent decline in the 'old' Al-Qaeda, marked by the destruction of its command structure, does not preclude a US reliance on the right to self-defence against terrorism as a justification for drone strikes in Pakistani territory. The US has continued to base its right to self-defence on the 9/11 attacks, without explicit reference to any of the new, emerging threats from regional islamist groups as giving rise to a new, separate right to self-defence.

During the course of ground operations in Afghanistan, ISAF forces came under sustained attacks emanating from the mountainous border regions along the Durand Line. In the Pashtun tribal areas of north-west Pakistan, Al-Qaeda and Taliban operatives could take refuge, plan and coordinate attacks. It could, therefore, be argued that the US has indeed been the subject of an armed attack emanating from groups located in Pakistani territory. The accumulation of the effects of the individual attacks would, it is submitted, certainly be grave enough to cross the threshold so as to constitute an armed attack and thereby engage Article 51 of the UN Charter. On this basis, then, it is submitted that the US is entitled to resort to all necessary and proportionate force in Pakistani territory, including by use of armed drone strikes, pursuant to its right to self-defence, in order to halt and repel armed attacks emanating from Pakistani territory. Of course, as was stated in the previous chapter, this right to self-defence would be based on the inability or unwillingness of Pakistan to prevent attacks on US and ISAF forces in Afghanistan from being launched from its territory and to counter the threat posed by islamist militants belonging to Al-Qaeda and the Taliban. As regards inability, it has been discussed how the Pakistani government has found it difficult to effectively administer the FATA region of north-west Pakistan and exercise its jurisdiction there, and so it would be reasonable to assume that the government would be unable to effectively halt the attacks emanating from the FATA

[17] See Heyns, supra n.12, at 14.

region. This being the case, it is submitted that the US would be able to resort to defensive force in the region by means of armed drone strikes.

As to the unwillingness of the Pakistani authorities to halt attacks emanating from its territory, this is a more controversial and complex issue. Consider the US special ops mission that targeted and killed Osama bin Laden in May 2011. Bin Laden, in contrast to those targets situated in remote tribal areas of Pakistan along the border with Afghanistan, was tracked to a compound in the city of Abbottabad, a city clearly under the administration and governance of the central authorities. Whether or not this operation was conducted with the consent of the government based in Islamabad is not within the realm of public knowledge, but in the absence of such a consent, the operation would only be lawful under the *jus ad bellum* if the US could demonstrate an unwillingness on the part of the Pakistani authorities to capture or kill bin Laden if presented with the opportunity.

In counter-terrorist operations against islamist groups in Pakistan, it has been difficult to ascertain the level of full co-operation between the United States and Pakistan, especially in countering the threat posed by those groups which launch attacks into Afghanistan. It is no secret that there is a degree of mistrust and suspicion between Washington and Islamabad. Pakistan has been criticised publicly by US officials on numerous occasions for saying much but doing little to crack down on suspected terrorists operating from within Pakistan, and the US has been reluctant to make full disclosure of intelligence to the Pakistani authorities due to concerns that elements within the military and intelligence services are sympathetic to the islamist militant groups, prompting concerns that intelligence may be leaked and targets forewarned about operations aimed against them.[18] Indeed, a 2012 Congressional Research Service Report similarly stated the widespread belief amongst US officials that elements within the Pakistani intelligence services have sheltered militants, thereby facilitating the continued insurgency in Afghanistan.[19] On this basis, one may conclude that Pakistan has demonstrated an unwillingness to crack down on suspected terrorists using the FATA region as a safe-haven from which to launch attacks against US/ISAF forces in Afghanistan, thus giving rise to a right to resort to necessary and proportionate force in self-defence against those terrorists based in north-west

[18] See C. Whitlock, 'In Hunt for Bin Laden, a New Approach', *Washington Post* (10/09/08), available at http://articles.washingtonpost.com/2008-09-10/world/36805025_1_al-qaeda-senior-pakistani-security>, (accessed 24th March 2015).

[19] See Kronstadt, supra n.8, at 23.

Pakistan. Therefore, it is submitted, to the extent that they are necessary and proportionate, US drone strikes in Pakistan are *jus ad bellum* compliant.
At this stage, it would be appropriate to mention that the US/NATO military presence in Afghanistan is presently being scaled down ahead of a complete withdrawal of forces. Security responsibilities have largely been transferred to the Afghan military. This itself raises the issue of whether there exists a separate, *Afghan*, right to self-defence, triggered by armed attacks emanating from militants located in the border regions of Pakistan. It is respectfully submitted that the accumulation of the effects of attacks launched into Afghanistan would surpass the threshold of an armed attack, and would thus trigger the Article 51 right to self-defence. Under the principles of collective self-defence, the Afghan government can, and indeed has, requested US assistance in exercising its right of self-defence against those militants planning and co-ordinating attacks from Pakistan. It is understood that the US has conducted numerous drone strikes against targets in Pakistan at the request of the Afghan government, and on the basis of the jurisprudence of the ICJ on collective self-defence, it is submitted that such strikes would comply with the *jus ad bellum*.[20]
Professor Philip Alston has stated:

A targeted killing conducted by one state in the territory of a second state does not violate the sovereignty of the second state [where] …the first, targeting state, has a right under international law to use force in self-defence under Article 51 of the UN Charter, [and] the second state is unwilling or unable to stop armed attacks against the first state launched from its territory.[21]

Targeted killings by means of armed drone strikes against Al-Qaeda and associated forces in Afghanistan and Pakistan, it is submitted, are the very kind of self-defence measures identified by Alston, and therefore do not violate the principles of the *jus ad bellum*. [22]

[20] See Nicaragua [1986] ICJ Rep. 14, at para.199; Oil Platforms [2003] ICJ Rep. 161, at para.51; Armed Activities [2005] ICJ Rep. 168, at para.128.
[21] See Report of Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, Human Rights Council, UN Doc. A/HRC/14/24/Add.6 (28/05/10), at para.29.
[22] *Ibid*, at Part II B.

3.3 US Drone Strikes in Pakistan – Acts of Aggression?

On a related note, for many of the same reasons that US drone strikes in Pakistan are in broad compliance with the *jus ad bellum*, such strikes would not, *prima facie*, constitute acts of aggression that would engage state responsibility for such acts. The International Criminal Court has recently defined aggression as the, "use of armed force by one state against another state without the justification of self-defence or authorisation by the Security Council."[23] This definition essentially restates the General Assembly's widely accepted articulation of the crime of aggression in Resolution 3314. [24]

Article 39 of the UN Charter empowers the Security Council to determine the existence of any act of aggression. It is of note that the ICJ has never formally determined the existence of any such act. In Armed Activities, the Court declined to adjudicate on the specific allegation of aggression made by the Democratic Republic of the Congo, despite holding that Uganda was guilty of a, "grave violation", of Article 2(4) of the UN Charter.[25]

Thus, insofar as US drone strikes against suspected terrorists in Pakistan can be founded on a claim of legitimate self-defence, such strikes do not constitute acts of aggression on the part of the United States against the state of Pakistan. Any argument to the contrary would certainly be undermined by reference to the drafting history of G.A. Resolution 3314, which identifies acts of aggression depending on, *inter alia*, their consequences and gravity, along with other relevant circumstances.[26] There is no exhaustive list of these "other relevant circumstances" contained in the text of Resolution 3314, but one can safely assume that the phrase can be understood as making a state's intention relevant to the determination of whether the use of armed force by that state amounts to an act of aggression. In the case of US drone strikes in Pakistan in particular, the narrow intention of the US to act in self-defence would, it is submitted, further undermine any argument that the strikes constitute acts of aggression, as defined in Resolution 3314, by the US against the state of Pakistan.

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[23] International Criminal Court, Assembly of States Parties, The Crime of Aggression, Annex I, Art.8, ICC Doc. RC/Res.6 (advance version, 28th June 2010).
[24] See G.A. Res.3314 (XXIX), Supp. No.31, UN Doc. A/9631 (14/12/74).
[25] See Armed Activities, supra n.20, at 180, para.23.
[26] See G.A. Resolution 3314, supra n.24.

3.4 US Drone Strikes in Yemen

In his June 2012 letter to the United States Congress, President Obama acknowledged that the US was conducting targeted drone strikes in Yemen against suspected terrorists belonging mainly to Al-Qaeda in the Arabian Peninsula (AQAP).[27] In that letter, President Obama stated:

…[t]he US military has…been working closely with the Yemeni government to operationally dismantle and ultimately eliminate the terrorist threat posed by Al-Qaeda in the Arabian Peninsula (AQAP), the most active and dangerous affiliate of Al-Qaeda today. Our joint efforts have resulted in direct action against a limited number of AQAP operatives and senior leaders in that country who posed a terrorist threat to the United States and our interests.[28]

The US holds AQAP responsible for several noteworthy actual and attempted terrorist attacks, including the October 2000 bombing of the US warship, *USS Cole*, in the port city of Aden, the September 2008 attack on the US embassy in Sana'a, the December 2009 attempt to detonate a bomb on a passenger flight bound for the US city of Detroit, and the October 2010 attempt to detonate explosives hidden in printer cartridges onboard a cargo flight bound for the US city of Chicago. The US claims that Anwar al-Awlaki, a US citizen, played a prominent role in the 2009 and 2010 plots. Al-Awlaki was killed in a US drone strike in September 2011, in what has become one of the most controversial strikes conducted by the United States, being a lethal strike against one of its own citizens, denounced by some commentators, particularly the American Civil Liberties Union (ACLU), as an unconstitutional, extra-judicial execution of a US citizen with no regard to his Fifth Amendment right to due process, but defended by the US Administration as the lawful use of lethal force against an enemy operative in the context of an armed conflict.[29]

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[27] Hereinafter referred to in this work as AQAP. See the White House, 'Presidential Letter – 2012 War Powers Resolution, 6-month Report' (15/06/12), available at http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report, (accessed 12th April 2015).
[28] *Ibid*.
[29] See Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qaeda or An Associated Force', Draft 8th November 2011, available at http://fas.org/irp/eprint/doj-lethal.pdf, (accessed 12th April 2015).

In the summer of 2013, it is reported, the CIA intercepted a conversation between Ayman Al-Zawahiri, who succeeded Osama bin Laden as leader of the Al-Qaeda network, and Nasser Al-Wuhayshi, leader of AQAP, which allegedly revealed one of the most serious plots against the US since the 9/11 attacks. This alleged threat led to a temporary lockdown of approximately 25 US diplomatic missions across the Middle East.[30]

As to whether the US drone program operates in Yemen in compliance with the *jus ad bellum*, although there have been occasions when the Yemeni government has expressed anger and dissatisfaction with strikes conducted in its territory, the evidence points to a broad consent to those strikes and an active participation in the identification and locating of targets. There are accounts of the former President of Yemen, Ali Abdullah Saleh, giving the US a free pass to conduct counter-terrorist operations in Yemen, including by use of armed drone strikes against suspected AQAP targets.[31] Similarly, the current Yemeni President, Abdu Rabbu Mansour Hadi, has signalled his consent to the continuation of US targeted killings in Yemeni territory.[32]

If one considers UN Special Rapporteur Ben Emmerson's interim report of September 2013, it appears that the Yemeni government has indicated that the US routinely seeks prior consent, on a case-by-case basis, for lethal drone strikes in Yemeni territory. Where consent is withheld, a drone strike will not proceed.[33] On this basis, then, one is led to the conclusion that US drone strikes in Yemen are based on a valid consent, freely given by the Yemeni government, and are thus in compliance with the UN Charter and the *jus ad bellum*.

The first half of 2015 has witnessed a marked deterioration in the political situation in Yemen. The country is becoming increasingly unstable as internal conflicts continue. Shia Houthi rebels have seized control of large swathes of territory since taking control of the capital, Sana'a, in January 2015. President Hadi has fled to Saudi Arabia, and has accused the regional Shia power, Iran, of supporting the Houthi

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[30] See R.F. Worth and E. Schmitt, 'Caustic Light on White House's Reaction to a Terrorist Threat', *New York Times*, (New York, 07/08/13), available at http://www.nytimes.com/2013/08/08/world/caustic-light-on-response-to-a-threat-of-terrorism.html?pagewanted=all>, (accessed 12th April 2015).

[31] See S. Shane, 'Yemen Sets Terms of a War on Al-Qaeda', *New York Times*, (New York, 04/12/10), available at http://www.nytimes.com/2010/12/04/world/middleeast/04wikileaks-yemen.html, (accessed 13th April 2015).

[32] See R.F. Worth and E. Schmitt, supra n.30.

[33] See Emmerson, supra n.5, at 15.

rebels, and in recent months, air strikes against the rebels have been launched by Saudi Arabia, with the approval of the United States. The objective of these strikes, according to Saudi Arabia, is to protect the legitimate Yemeni government situated in Aden, Yemen's second city.[34]

There thus emerges a clouded and complex situation in Yemen at present, fluid and volatile. US drone strikes in Yemen have been remarkably successful in countering the threat posed by AQAP, regarded by the US as the most dangerous branch of the Al-Qaeda network, and which opposes both the Houthi rebels and the Sunni President. To further muddy the waters, a Yemeni affiliate of the self-styled 'Islamic State' has recently emerged, which, if unchecked, could eclipse AQAP. With the main political and military focus currently on stalling the rapid progress made by the Houthi, AQAP has taken advantage of the opportunity to recover from the effects of successful US drone strikes against them. This writer rather suspects that the US would not be willing to allow AQAP to completely recover its former position, and that US drone strikes against AQAP targets will continue alongside Saudi-led strikes against the Houthi. Indeed, the US drone strike which killed AQAP leader Nasser al-Wuhayshi in the Hadhramaut region would certainly indicate the US's clear intention to continue targeting AQAP in Yemen.

The consent of the legitimate Yemeni government to US drone strikes in its territory renders academic the question of whether the strikes can (also) be justified as the lawful use of force in self-defence. In reality, the issue of a right to self-defence may not arise unless and until Yemen revokes its consent to the US drone strikes or the US acts beyond the limitations of that consent. However, given the current fluidity and volatility of the political situation in Yemen, the issue of whether the drone strikes are compliant with the *jus ad bellum* as the lawful exercise of force in self-defence, is certainly worth consideration.

If it is the case that AQAP in Yemen are indeed responsible for the various attacks and terrorist plots against the US and its interests from 2008-2010, as outlined earlier in this chapter, one could argue that the US has therefore been the target of an armed attack emanating from AQAP in Yemen. It is respectfully submitted that the cumulative effect of recent attacks against US interests in Yemen is sufficient to cross the threshold so as to constitute an armed attack against the United States, thereby

[34] See 'Yemen FM urges swift end to air strikes on Houthis', *BBC News* 27/03/15, available at http://www.bbc.co.uk/news/world-middle-east-32082616.html, (accessed 27th March 2015).

engaging the US's inherent right to self-defence under Article 51 of the UN Charter. As grave as the attack on the *USS Cole* was in October 2000, resulting in the deaths of 17 US Navy personnel, and while that attack, in and of itself, may well have been sufficiently grave at that time to constitute an armed attack triggering the US's right to self-defence, for the purposes of this analysis, one finds it difficult to accept that the attack on the *USS Cole* forms part of the series of attacks attributable to AQAP which would engage the US's right to self-defence. After the attack on the *USS Cole*, it was 8 years before the next attack attributable to AQAP, and so the attack on the *USS Cole* would be too remote to form part of the same series of attacks. To claim otherwise would be to disregard the temporal element underlying Article 51 of the UN Charter and the right to self-defence.

Notwithstanding that the activities of AQAP from 2008-2010 may constitute an armed attack on the US, it is a matter of debate as to whether the US right of self-defence against AQAP still subsists. As submitted, US drone strikes against AQAP in Yemen have been lauded by the US as remarkably successful in diminishing the threat posed by AQAP, and so the issue is just how much of a threat is still posed by AQAP. The use of force by the US by means of armed drone strikes against AQAP targets must, at all times, be necessary and proportionate in order to comply with the *jus ad bellum*, and continued strikes will only be lawful if the US is able to demonstrate a continued and active threat posed by AQAP to US and US interests. The 2013 planned attacks on US interests in the Middle East, which necessitated the temporary shutdown of US diplomatic posts in the region, would certainly indicate that the threat from AQAP is still real and significant, however few details on the specific nature of the threat are in the public domain. On the basis that the threat has not been fully eradicated, one could make the argument that the right to self-defence still exists, and as such, US drone strikes against AQAP targets in Yemen are broadly compliant with the *jus ad bellum*.

On a final point, it is worth noting that US drone strikes in Yemen have been concentrated in areas of the country where the government finds it difficult to exercise effective control.[35] Therefore, given the apparent inability of the legitimate Yemeni government to counter the threat posed by AQAP in those areas, it is respectfully

[35] See New America Foundation – http://yemendrones.newamerica.net, and also Report of Human Rights Watch, "Between a Drone and Al-Qaeda" – The Civilian Cost of US Targeted Killings in Yemen, October 2013.

submitted that the US drone strikes would constitute a necessary and proportionate response to the threat posed, and thus the lawful exercise of a right to self-defence conditioned on the inability of the Yemeni government to halt the activities of AQAP.

3.5 US Drone Strikes in Somalia

The United States has engaged in an extensive counter-terrorism program in Somalia. The first reported drone strike in Yemen occurred on 23rd June 2011, and in his June 2012 letter to Congress, President Obama acknowledged the existence of such operations:

In Somalia, the United States …has worked to counter the terrorist threat posed by Al-Qaeda and Al-Qaeda-associated elements of Al-Shabaab. In a limited number of cases, the United States…has taken direct action in Somalia against members of Al-Qaeda, including those who are also members of Al-Shabaab, who are engaged in efforts to carry out terrorist attacks against the United States and our interests.[36]

US drone strikes in Somalia have focused primarily on targets associated with Al-Shabaab, the armed wing of 'The Islamic Courts', which seized control of large areas of Somalia in 2006. It is widely believed that leading members of Al-Shabaab have trained and fought in Afghanistan, merging with the Al-Qaeda network in early 2012.[37]

The Somali government has confirmed that US drone strikes in its territory are co-ordinated with its military and intelligence agencies.[38] Therefore, on the basis of this consent, it must be submitted that US drone strikes in Somalia comply with the UN Charter and the *jus ad bellum*.

As to whether there exists alongside this consent a free-standing right to resort to force in self-defence, it must be noted that, with the exception of an attack in Uganda

[36] See the White House, 'Presidential Letter – 2012 War Powers Resolution, 6-month Report' (15/06/12), supra n.27.
[37] See National Counter-terrorism Centre, 'Counter-terrorism 2013 Calendar – Al-Shabaab', available at http://www.nctc.gov/site/groups/al_shabaab.html, (accessed 15th April 2015).
[38] See G. Jaffe and K. DeYoung, 'U.S. drone targets two leaders of Somali group allied with Al-Qaeda, officials say', *Washington Post*, (Washington, 29/06/11), available at http://articles.washingtonpost.com/2011-06-29/national/35234554_1_qaeda-somalia-strike-drone-strike, (accessed 15th April 2015).

back in July 2010, which killed more than 70 people, until recently, Al-Shabaab did not appear to be conducting operations outside Somalia, pursuing a domestic agenda rather than a regional and anti-Western one. This all changed, however, on 21st September 2013, when Al-Shabaab militants stormed a shopping centre in Nairobi, Kenya. More than 60 people were killed, including French, British and Canadian citizens. Several US citizens were injured.[39] The response of the US to this horrific attack was to announce that it considered Al-Shabaab to constitute a direct to the US and its interests.[40]

The question to be considered can thus be framed as follows – can the United States claim a right of self-defence against Al-Shabaab arising under international law, that would justify targeted drone strikes against Al-Shabaab militants in Somalia?

The September 2013 attack in Nairobi may well constitute an armed attack on Kenya by Al-Shabaab. This writer's own background research on that attack found no evidence to indicate that Al-Shabaab was intentionally targeting US or other western citizens, and so it is difficult to see how this attack could trigger a US right to self-defence in response to this particular attack that could justify the use of force by the US against Al-Shabaab targets in Somalia. The United States has consistently maintained that international law permits the use of force in self-defence in order to protect a state's nationals abroad, however such a right is controversial, and is not universally accepted. Indeed, it has attracted few adherents amongst the international community, namely the US, the UK, Israel and Belgium.[41] Furthermore, there is little evidence in the public domain to indicate that Al-Shabaab is actively targeting US interests in Somalia or the wider region, and this paucity of evidence somewhat precludes a definitive legal conclusion on the self-defence point. Of course, the United States may be in possession of classified intelligence indicating the presence of such a threat to its interests, but on the basis of what is known publicly, it is submitted that the US would find it difficult to sustain an argument that drone strikes against Al-Shabaab militants in Somalia can be justified as the lawful exercise of anticipatory self-defence against a specific, imminent threat from Al-Shabaab to US interests in Somalia or the wider region.

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[39] See N. Kulish and J. Gettleman, 'U.S. Sees Direct Threat in Attack at Kenya Mall', *New York Times*, (New York, 25/09/13), available at http://www.nytimes.com/2013/09/26/world/africa/us-sees-direct-threat-in-attack-at-kenya-mall?pagewanted=all>, (accessed 15th April 2015).

[40] *Ibid*.

[41] For a comprehensive discussion on this point, see Christine Gray, *International Law and the Use of Force*, (3rd edn, OUP, 2008), at 156-160.

On 2nd April 2015, Al-Shabaab launched a deadly attack on Garissa University College in north-eastern Kenya, killing 150 hostages. This attack, together with the 2013 attack in Nairobi, may well engage Kenya's right to self-defence against Al-Shabaab, and of course it would then be open to the Kenyan government to request US assistance in the exercise of that right. However, there is at present no evidence to suggest that any such request has been made.

It is worth recalling that Somalia has, for many years, been regarded as a 'failed state', with no effective central government exercising jurisdiction over the entirety of its national territory. This being the case, it may be that, on application of the 'unable or unwilling' test, US drone strikes against Al-Shabaab targets in Somalia could be based on a right to resort to force in necessary and proportionate self-defence, provided of course that the United States can demonstrate that it has been the subject of an armed attack emanating from Somali territory, or that it is acting in anticipation of a specific, imminent threat from Al-Shabaab. Unfortunately, however, the lack of clear evidence in the public domain prevents any definitive legal conclusion in this regard.

3.6 US Drone Strikes against the self-styled 'Islamic State'

The self-styled Islamic State of Iraq and the Levant[42] came to the world's attention almost by complete surprise in the summer of 2014. On 29th June 2014, the group proclaimed an Islamic caliphate in the territories of Iraq and Syria under its control, approximately one-third of the territorial land-mass of both states, straddling the international border between both Iraq and Syria.

The territorial losses incurred by the Iraqi government following the IS offensive in the early months of 2014, which seized the cities of Mosul, Tikrit and Ramadi, as well as gains made by IS in Syria, where it is conducting hostilities against forces loyal to President Assad and against other opposition groups, brought IS to global attention. It was the potential humanitarian catastrophe that unfolded in northern Iraq in August 2014, when IS attacks forced members of the Yazidi and Christian minorities to

[42] Also known as 'Islamic State', 'IS', 'ISIL', 'Islamic State in Iraq and Syria', 'ISIS', or 'Da'ish' in Arabic. The writer wishes to make clear that the use of 'Islamic State' in this work in no way expresses or implies the writer's recognition of the statehood of the territories under the control of that group, or of support for the group's aspirations and claims of statehood. Indeed, for the purposes of this work, Islamic State shall be regarded, as is the prevailing opinion, as a non-state actor, a terrorist organisation.

retreat to the relative safety of Mount Sinjar, coupled with the significant threat posed by IS to the very existence of the Iraqi government, which prompted the renewal of US military action in Iraq on 8th August 2014.[43] The US-led aerial bombardment that commenced on that day had as its principal objectives the supporting of Iraqi military operations against IS positions, by means of air strikes and the provision of air support (including targeted drone strikes against IS militants and military objects), and the humanitarian objective of protecting the Yazidi, Christian and Kurdish peshmerga populations from atrocities at the hands of IS militants. The efforts of the US in seeking to protect these groups were, at the time, broadly welcomed by the international community.[44] Indeed, the US-led aerial campaign has been viewed as a balanced intermediate measure, given the recent US withdrawal of ground forces from Iraq, and the understandable hesitancy of the Obama Administration, and the American people, to get drawn into another ground conflict in the Middle East. Notwithstanding the fact that the geo-political borders between Iraq and Syria have effectively been erased by IS in consequence of its operations, for the purposes of the application of international law, IS has not been recognised a new state. Iraq and Syria remain as two separate and sovereign nations, and therefore the *jus ad bellum* implications in respect of US-led strikes in both countries shall be considered separately.

Iraq

The commencement of US air strikes against IS in Iraq on 8th August 2014 drew broad support from the international community, and at first glance, the strikes appear to be uncontroversial from a *jus ad bellum* perspective. The strikes were commenced at the express invitation, and by the consent of, the legitimate Iraqi government in Baghdad and the Kurdish leaders in the north of the country. It has been discussed previously in this work that the limited exceptions to the general prohibition of the threat or use of force contained within Article 2(4) of the UN Charter – self-defence and authorisation by the UN Security Council – essentially bar a claim by the state in

[43] See Martin Chulov, Julian Borger and Dan Roberts, 'US Forces Bomb ISIS Militant Positions in Northern Iraq', *The Guardian* 9th August 2014, available at http://www.theguardian.com/world/2014/aug/09/us-iraq-air-strikes-isis-irbil, (accessed 28th April 2015).
[44] *Ibid*.

which the use of force occurs that its sovereignty has been violated.[45] An invitation to use force, or the provision of consent to such use of force on the territory of a state, by the legitimate government of that state, on the other hand, means that no such violation of sovereignty occurred in the first place.

Whilst it is accepted that IS has had some notable successes in Iraq, and that it has captured large swathes of territory, this does not cast any doubt over the legitimacy of the Iraqi government or its entitlement to request assistance from the US and its coalition partners in response to the IS threat.[46]

Therefore, in terms of US air strikes against IS targets operating within Iraq, including strikes carried out by means of armed drones, it is submitted that these are broadly compliant with the *jus ad bellum*.

Syria

The legal issues become significantly more complex when considering whether US air strikes against IS in Syria comply with the requirements of the *jus ad bellum*. While the US readily came to the assistance of the Iraqi government in response to the latter's request for assistance against the IS threat, there was an evident hesitancy, not only by the US but also its coalition partners, in regards to military action in Syria. The Prime Minister of Australia, Tony Abbott, notably stated that:

The legalities of operating inside Syria [whether against IS and/or forces loyal to the Assad regime] …are quite different from the legalities of operating inside Iraq at the request of, and in support of, the Iraqi government.[47]

US-led air strikes in Syria against IS targets commenced on 23rd September 2014, in spite of the concerns raised by several allied states, such as Australia, France and the Netherlands as to the legality of such strikes in the absence of UN Security Council authorisation or without the invitation or consent of the Assad government in Damascus.

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[45] See Responsibility of States for Internationally Wrongful Acts (2001), Article 21.
[46] See UN Doc. SC/11571, 19th September 2014.
[47] See Prime Minister of Australia, 'Interview with Fran Kelly', *ABC Radio National*, 16th September 2014, available at http://www.pm.gov.au/media/2014-09-16/interview-fran-kelly-abc-radio-national, (accessed 30th April 2015).

As to consent, it should be noted that the Assad government has made it clear that US-led strikes against IS constitute an act of aggression against Syria unless the strikes are coordinated with the Syrian authorities, a position supported by Syria's principal allies, Iran and Russia.[48] However, several key players in the coalition, including the US and the UK, have posited that Assad's regime has forfeited its legitimacy by the commission of war crimes against the Syrian people in the course of the civil war which has raged on since 2011, and therefore that the consent of the Syrian government is not required.[49] To date, the coalition states have ruled out seeking the consent of the Assad government, which is unsurprising given the scale of fierce condemnation of the Assad regime's conduct during the civil war. Seeking the consent of the Assad regime or coordinating the air campaign against IS with Assad's forces might give the appearance that the US and its coalition partners continues to recognise Assad's regime as the legitimate government of Syria. It is submitted, however, that this position ignores the political reality that, despite the events of 2014 and the loss of a significant amount of territory to IS, the Assad regime remains the government of Syria, and therefore for the purposes of international law, remains the proper consenting authority for the use of force in its territory by another state, entitled to invite (or to refrain from inviting) such use of force. Indeed, while many states, including the US, have recognised the Syrian National Coalition (SNC) as the 'legitimate representative' of the Syrian people, it is important to note that those states have not extended this to recognising the SNC as the legitimate government of Syria.[50]

Irrespective of one's view on the legitimacy of the Assad government, the legal reality is that, in the absence of its consent or invitation to the use of force against IS militants in its territory, the general prohibition contained in Article 2(4) of the UN

[48] See Ian Black, 'ISIS Air Strikes: Obama's Plan Condemned by Syria, Russia and Iran', *The Guardian,* 12th September 2014, available at http://www.theguardian.com/world/2014/sept/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan, (accessed 2nd May 2015).

[49] See Mark Leftly and Chris Stevenson, 'Islamic State: Legal Justifications for Air Strikes on Syria Not Even "Wafer Thin", Says Expert', *The Independent*, 14th September 2014, available at http://www.theindependent.co.uk/news/uk/politics/islamic-state-legal-justification-for-air-strikes-on-syria-not-even-waferthin-says-expert-9731645.html, (accessed 2nd May 2015).

[50] 'US Recognises Syria Opposition Coalition, says Obama', *BBC News*, 12th December 2012, available at http://www.bbc.co.uk/news/world-middle-east-20690148, (accessed 2nd May 2015).

Charter remains engaged, meaning that a legal justification must be found in order for the US-led strikes in Syria to be compliant with the *jus ad bellum*.[51]

Given the absence of consent from the Syrian government, and the continued absence of any authorisation by the UN Security Council under Chapter VII of the UN Charter for the use of force against IS in Syria, it would appear that the only justifications left open to the US-led coalition are self-defence and humanitarian intervention.[52]

As to self-defence, it has been submitted previously in this work that, for the purposes of engaging a state's right of inherent self-defence under Article 51 of the UN Charter, the weight of scholarship since the 9/11 attacks has come down in support of the position that an 'armed attack' can be perpetrated by a non-state actor.[53] This raises the issue of whether any of the actions of IS (either taken individually or cumulatively) constitute an armed attack, or the imminent threat of an attack, against the US or any other state.

It is of note that Iraq has not formally claimed to be the victim of an armed attack, and the US-led coalition has not claimed to be acting on the basis of collective self-defence in support of Iraq. In correspondence to the UN Secretary-General, the US Ambassador to the UN, Samantha Power, stated that:

[T]he Government of Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.[54]

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[51] It is worth noting, however, that although the US did not seek the consent of the Assad regime, or seek to coordinate its air attacks against IS with Assad's forces, it did inform the Assad government before the commencement of the aerial campaign in September 2014. See Jessica Winch and Joel Gunter, 'US Launches Air Strikes Against ISIL in Syria – Live', *The Telegraph*, 23rd September 2014, available at http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11114991/US-launches-air-strikes-against-isil-in-syria-live.html, (accessed 2nd May 2015). Furthermore, despite vocal protests decrying the strikes as an illegal violation of its territorial sovereignty, Syria has not lodged any formal protest, although this could be for a variety of reasons, including the desire of the Assad regime to see IS weakened by any means.

[52] Despite the protracted stalemate in the UN Security Council in respect of the situation in Syria since the beginning of that country's civil war in 2011, the UN Security Council did, significantly, adopt Resolution 2178 (2014), which, although adopted under Chapter VII of the UN Charter, merely obligated states to take measures to prevent the movement and recruitment of foreign fighters seeking to join Islamic State.

[53] See Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', (2006) 55 Int'l and Comp. Law Quarterly 963, at 969.

[54] Letter dated 23rd September 2014 from the Permanent Representative of the United States to the United Nations, UN Doc. S/2014/695, dated 23rd September 2014.

This correspondence is clearly the closest the US has come to an express invocation of the right of collective self-defence. It is respectfully submitted that there is no difficulty in recognising that the actions of IS in and against Iraq constitute an armed attack, and if, as is believed to be the case, these attacks are being directed from IS in Syria, the right of collective self-defence is thereby engaged. This is so even on a strict application of Nicaragua, which would attach to the notion of 'armed attack' requirements of 'gravity' and 'scale and effects' for the purposes of Article 51 of the UN Charter.[55] On such an application of Nicaragua, such intervention in Syria against IS would only be lawful if IS was acting as an agent of, or was under the effective control of the Syrian government. However, IS is as hostile to the forces of the Assad regime as it is to forces opposing the Assad regime.
In her correspondence to the UN Secretary-General, Samantha Power stated that:

States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the state where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat.[56]

The writer has already discussed the uncertain status of the "unable or unwilling" test under international law, but if one accepts, purely for the sake of argument, that the test has assumed, or is at least assuming, the status of customary international law, it is respectfully submitted that, on the basis of facts within public knowledge, it is unclear whether the test is satisfied in this instance. It is simply not clear whether the Assad regime is either unable or unwilling to prevent the use of Syrian territory by IS. Facts on the ground would certainly seem to support the assertion that the regime is unable to do so – having lost large swathes of territory to IS over the past year or so, it might simply be argued that if Assad was able to prevent IS from operating within Syria, he would have done so by now. Therefore, by extension, one could argue that US-led strikes to defeat IS in Iraq can be extended into that territory which is no

[55] See Nicaragua [1986] ICJ Rep. 14, at para.195.
[56] See supra n.54.

longer under the effective control of the Assad government. Michael Lewis argues strongly in favour of the test being satisfied, stating that:

Syria is unable to prevent its territory from being used by ISIS to plan, prepare and execute attacks against targets in Iraq…. Whether they are willing to cooperate with the US strikes against ISIS is irrelevant.[57]

Notwithstanding the Assad regime's apparent inability to counter the IS threat, the willingness to do so cannot be in dispute, and this is what complicates the situation. Although the Assad government has signalled its willingness to cooperate with US-led air strikes against IS targets in Syria, the US has to date refused to coordinate its military activities with Assad's regime.[58] This raises doubts as to whether US-led strikes against IS in Syria can legitimately be founded on the right of self-defence. These same questions regarding the ability and willingness of the Syrian government to counter the threat posed by IS operating within Syria, in the context of collective self-defence on behalf of Iraq, may also arise in the context of a right of the United States to resort to force against IS in Syria in furtherance of a right of individual self-defence. It should be noted that such a right was not invoked by Samantha Power in her letter to the UN Secretary-General, either in response to an armed attack by IS or in response to a specific, imminent threat to the US and its interests (including US nationals located in Iraq). Rather, Ms Power stated that:

ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the UN Charter.[59]

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[57] See Michael Lewis, 'What Does the "Unable or Unwilling" Standard Mean in the Context of Syria?', *Just Security*, 12th September 2014, available at http://justsecurity.org/14903/unwilling-unable-standard-context-syria/, (accessed 3rd May 2015).
[58] See Ryan Goodman, 'International Law on Air-strikes against ISIS in Syria', *Just Security*, 28th August 2014, available at http://justsecurity.org/14414/international-law-air-strikes-isis-syria/, (accessed 3rd May 2015).
[59] See supra n.54.

Whether such a right exists ultimately comes down to whether the US is at risk of an attack by IS. On the face of it, IS did not initially set out with any intentions to attack the US, being more focused on its principal objective of consolidating its territory in Iraq and Syria and establishing an Islamic caliphate, rather than planning and executing attacks against the US and its allies. However, although the US did not refer to the threat of a specific, imminent attack, given the brutal practices and ideology of IS, there is an understandable fear that IS may ultimately perpetrate an attack on US soil, and the US has pointed to the extreme ideology pursued by IS and its brutal methods to highlight the obvious threat posed by IS, both to the US itself and its coalition partners, thus giving rise to a right to respond in self-defence. In this respect, therefore, the US is clearly placing reliance on the doctrine of pre-emptive self-defence, although not referring specifically to that doctrine. As was discussed in the previous chapter, the broader right of pre-emptive self-defence permits the use of force in the absence of a specific, imminent attack, but in response to a threat of a more remote future attack. As previously submitted, there is little international support for such a broad right of pre-emptive self-defence. The strongest advocate of the doctrine is the US, and although President Obama has avoided the terminology used by his predecessor in relation to pre-emptive self-defence, he has consistently maintained the right of the United States to resort to the use of force when deemed 'necessary'.[60]

The evidence points, therefore, to the lack of a specific, imminent threat to the United States and its interests emanating from IS in Syria, making it difficult to base its resort to the use of force against IS in Syria on the right of self-defence. This raises the issue of whether the US can base its resort to force on the protection of US nationals in Iraq. It should be noted that there is no established rule that attacks on individual nationals abroad constitute an armed attack against a state for the purposes of engaging its inherent right of self-defence under Article 51 of the UN Charter, and certainly the US Ambassador did not expressly place reliance on any such rule in her letter to the UN Secretary-General.[61]

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[60] See C. Henderson, 'The 2010 National Security Strategy of the United States and the Obama Doctrine of "Necessary Force"', (2010) 15 Journal of Conflict and Security Law 403, at 413-421.
[61] See Jennifer Daskal, Ashley Deeks, and Ryan Goodman, 'Strikes in Syria: The International Law Framework', *Just Security*, 24th September 2014, available at http://justsecurity.org/15479/strikes-syria-international-law-framework-daskal-deeks-goodman/, (accessed 3rd May 2015).

It is therefore clear that US involvement in Iraq against IS was at the invitation and by the consent of the Iraqi government, in response to the humanitarian crisis created by IS. The US has not proffered any justification of humanitarian intervention for the strikes against IS in Syria, which makes the discussion somewhat academic, particularly given the clarity of the legal justifications relied upon by the United States.

While the *jus ad bellum* considerations in respect of US-led strikes, including by means of targeted drone strikes, against IS in Iraq, are relatively straightforward it has been shown that the *jus ad bellum* issues are more complex in relation to US-led strikes against IS in Syria. The legal issues are very much fused with the political situation prevailing in Syria in the context of an ongoing civil war. Essentially, the determination of whether the strikes against IS in Syria are compliant with the *jus ad bellum* hinges on considerations of necessity and proportionality, and on balance, it is respectfully submitted that in its collective self-defence of Iraq against the IS threat, these requirements are broadly satisfied. As to any argument that the aim has shifted from defending Iraq (and the US and its interests) to eradicating IS, raising uncertainty as to the proportionality of US action, it is respectfully submitted that, whatever the debate, the reality is that the former can only be achieved by the latter. As to necessity, this writer would not be persuaded by any argument that the threat posed by IS could be diminished solely by non-lethal alternatives, such as economic sanctions or diplomacy. IS is an extremist terrorist organisation. Its very nature and the brutality of its practices thereby necessitate an armed response to the threat it poses.

3.7 Concluding Comments on US Drone Strikes and the Jus ad Bellum

The question of whether the US drone programs in Afghanistan, Pakistan, Yemen, Somalia, and against the 'Islamic State' in Iraq and Syria, comply with the *jus ad bellum*, is certainly a complicated one. The United States has relied on both the principle of consent and the right to resort to force in self-defence as justifications for armed drone strikes against suspected terrorists in the aforementioned states. The drone programs have been controversial, and the legal bases of both justifications

proffered by the United States have been questioned by commentators, in particular the heavy reliance placed on the principle of consent.

These previous two chapters have illustrated how a valid consent by the host state bars any claim by the host state that the state resorting to force is acting in violation of the *jus ad bellum*, even in those instances where the use of force would have been illegal if carried out by the consenting state itself.

Of course, a valid consent does not in any way justify excessive force or force that contravenes the fundamental principles of international human rights law.

Furthermore, the fact that consent is often shrouded in secrecy, as is the case with Pakistan in particular in relation to US drone strikes in the FATA region, raises the pertinent issue of whether consent should be stated publicly, or perhaps even formalised in writing and deposited with the UN Secretariat (as is the standard practice with bilateral and multilateral treaties) in order to be valid. Such measures would certainly bring a degree of transparency and accountability to the use of force, including current and future drone strikes carried out by the United States.

The debate regarding the scope of the right to self-defence in respect of the use of force by the United States against suspected terrorists has been going on since the 9/11 attacks, and is far from settled. Both the application and the precise threshold for the use of force in self-defence remain uncertain. Nonetheless, it is arguable that extraterritorial strikes using armed drones, absent the consent of the host state, may only be founded on lawful self-defence if the threat or use of force against the victim state amounts to an armed attack. The threat of a sporadic, isolated attack is clearly insufficient to amount to an armed attack for the purposes of engaging the right to resort to force in self-defence.

If these previous two chapters illustrate anything, it is that the *jus ad bellum* is not static. It does not exist in a vacuum. In particular, the right to self-defence has undergone significant changes in the years since 9/11, the most significant of which being the general acceptance that an armed attack perpetrated by a non-state actor may engage Article 51 of the UN Charter. Of equal importance is the increasing acceptance of the 'accumulation of events' doctrine, which, by permitting a victim state to weigh the cumulative effect of a series of relatively small-scale attacks in order to determine if the threshold for engaging Article 51 has been satisfied, introduces a measure of flexibility to the *jus ad bellum*, and reflects the reality of the

threat posed by transnational terrorism, allowing a victim state to act against the threat posed by terrorism in a manner that is compliant with the *jus ad bellum*.

The main problem, highlighted in the present chapter, is the paucity of evidence in the public domain, which often precludes a definitive determination on the legality of US drone strikes under the *jus ad bellum*. The involvement of the CIA, with its 'neither confirm nor deny' policy, in targeted killing operations in Pakistan and Yemen, the lack of information released by the US Administration, and the tendency of the US Administration to pronounce the legality of the US drone program in occasional speeches, such as Koh's ASIL speech in 2010 and Obama's May 2013 speech at the National Defense University, leaves a lacuna which can be filled by idle speculation as to the legal justifications being relied upon by the US in respect of its drone program in general, and specific targeting operations, particularly those occurring outside zones of active hostilities.

This lack of transparency is unfortunate, for it facilitates an accountability vacuum, and opens the United States to criticism that its drone program operates in flagrant breach of settled principles of international law, including those forming the *jus ad bellum*. The only effective remedy for such deficiencies in transparency and accountability, it is respectfully submitted, is for the US to be much more forthcoming (subject of course to considerations of national security) with regard to the legal justifications underpinning the extraterritorial use of force by means of targeted drone strikes. The transfer of responsibility for the US drone program in Pakistan and other states from the CIA to the US military, presently underway, is a welcome step in the right direction. However, greater accountability can only be achieved by the establishing of independent oversight mechanisms, either by the executive, or, preferably, the judiciary. President Obama did indicate in his May 2013 speech that consideration would be given to establishing such mechanisms. It is regrettable that little has been achieved in this regard over two years later.[62]

[62] See Emmerson, supra n.5, at 11-13.

4

The US Drone Program and International Human Rights Law

4.1 Background

The following two chapters consider the legal paradigms regulating the conduct of hostilities – international human rights law (IHRL) and international humanitarian law (IHL). It is important to understand when and how these paradigms operate in the context of extraterritorial drone strikes conducted by the United States. The escalation in the use of armed drone strikes has been justified, politically at least, under the banner of a 'war on terror', and a lawful response in an 'asymmetric conflict'. The primary purpose of the US's drone program is the targeted killing of terrorist suspects. This purpose has led to growing concerns among commentators that the US drone program operates in violation of well-established principles of international human rights law and international humanitarian law, that it amounts to 'extrajudicial killing', and that coercive US targeting practices in its global counter-terrorism operations set a dangerous precedent as more states acquire UAV technology.[1]
Despite the wealth of legal argument, the legality of US drone strikes under both paradigms is far from settled, and remains a live and controversial issue. It shall become clear in the course of this chapter that there is no broad consensus in relation to the issue of whether US drone strikes violate that most fundamental of human rights, the right to life, with its prohibition against arbitrary killing. US policy and targeting practices certainly appear to challenge established norms of international human rights law.
The nature of US drone operations has brought to the fore the issues of how human rights obligations are to be applied in situations of armed conflict, and the extraterritorial application of a state's obligations under international human rights law to measures taken outside the state's sovereign territory. The issue of when, and in what circumstances, a state's obligations under international human rights law can extend to measures of lethal force taken outside its own territory, has divided juristic and academic opinion, though, as shall be seen, there is now a broad acceptance among states (the United States being the notable exception) that, in certain

[1] See G. Blum and P. Heymann, *Laws, Outlaws, and Terrorists*, (MIT Press, Reprint edn. 2013), at 71.

circumstances, human rights obligations can extend extraterritorially, and that lethal force employed by a state outside its own territory can come under purview of international human rights law. This, in turn, has a bearing on the relationship between international human rights law and international humanitarian law, particularly when a state employs lethal force in the context of an armed conflict. This particular issue shall be examined in greater detail in Chapter 5, suffice it to say for now that the applicability and interpretation of certain human rights obligations, particularly in respect of the right to life, are not unaffected by the existence of an armed conflict and the applicability of international humanitarian law.

4.2 The International Human Rights Law (IHRL) Paradigm

The previous two chapters of this work demonstrated how the self-defence paradigm permits a state, when confronted with an actual or imminent armed attack, to resort to the use of necessary and proportionate force under Article 51 of the UN Charter and customary international law. In all situations of armed violence, a state's use of force is regulated by the principles of international human rights law, and, in those situations where the level of violence does not meet the threshold requirements of intensity and organisation required of an armed conflict, a state may only use law enforcement methods to ensure its security.[2] In a situation of armed conflict, which engages the application of international humanitarian law, it is now a well-established principle, affirmed both in the jurisprudence of the ICJ and in numerous General Assembly and Security Council resolutions, that international human rights law continues to apply, complementary to international humanitarian law.[3] Therefore, if a state is not operating within the self-defence or armed conflict paradigms, its use of force must automatically be regulated by the principles of international human rights law. The legality of targeted killings using armed drones is related to the choice of legal framework best suited to tackle the issue of international terrorism. Unfortunately, there is no comprehensive treaty law and no customary *lex specialis* relating to terrorism, and so states have been left to address the problems of

[2] See P. Alston, 'Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', UN Doc. A/HRC/14/24/Add.6 (28th May 2010), available at http://www.unhrc.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4c07635c2, at para.31.

[3] See Nuclear Weapons, ICJ Rep. 8th July 1996, at para.106. See also The Wall [2004] ICJ Rep. 136, at para.104. See also GA Res. 2444 (1968), GA Res. 2675 (1970), UNSC Res. 1019 (1995), and UNSC Res. 1653 (2006).

international terrorism within the existing corpus of international law. Ben Saul rightly recognises the drawbacks of this situation, and his recent monograph is a noble effort to bring together the various norms and principles in the entire corpus of international law that relate in some way to terrorism, including international and regional treaty law, customary international law, UN Security Council practice, and national and international jurisprudence seeking to define terrorism.[4] Saul points to the intense and persistent disagreement amongst states and commentators regarding the definition of terrorism over many years, insufficient evidence of state practice and *opinio juris* supporting a customary international definition or crime of terrorism, the fact that national and international judicial bodies rarely invoke terrorism as an operative legal concept in its own right, whilst at the same time noting the evolution and codification of distinctive prohibitions on terrorism in armed conflict under international humanitarian law.[5] The academic debate rages on as to whether terrorism falls under the purview of international human rights law, or under the self-defence or armed conflict paradigms, and as to which paradigm properly governs the US's various drone programs against Al-Qaeda, the Taliban and associated forces. The human rights and armed conflict paradigms have both been asserted, and sound arguments exist for each applying at certain times and places in the US's current campaign. Some scholars, such as Stein, submit that terrorism is a purely criminal matter, not a military matter coming under the purview of the law of armed conflict, and so the correct paradigm is international human rights law.[6] O'Connell submits that isolated acts of terrorism do not rise to the level of an armed conflict.[7] In O'Connell's opinion, terrorism, generally, is a crime, and because of the usually sporadic nature of terrorist acts, such acts do not rise to the requisite level of violence to constitute an armed attack or an armed conflict.[8] Therefore, O'Connell submits, states do not have a right to act in self-defence or to use military force against terrorists, and instead must rely on law enforcement measures within the international

[4] See Ben Saul, *Defining Terrorism in International Law*, (OUP, 2006).
[5] *Ibid*, at Chapters 4 and 5.
[6] See Y. Stein, *By Any Name Illegal and Immoral*, 17 Ethics and Int'l Rel. (2006); Int'l Commission of Jurists – Assessing Damage, Urging Action 9 (2009), available at http://ejp.icj.org/IMG/EJP-Report.pdf, (accessed 4th June 2015).
[7] See Mary Ellen O'Connell, 'The Choice of Law Against Terrorism', 4 J. Nat'l Security & Pol'y 344 (2010), at 355.
[8] See Mary Ellen O'Connell, 'Remarks: The Resort to Drones under International Law', 39 Denv. J. Int'l Law & Pol'y 585 (2011), at 597.

human rights law paradigm.[9] O'Connell bases her arguments on state practice and *opinio juris* that treat terrorism simply as a criminal activity, pointing to a corpus of state practice evidencing that states regularly employ law enforcement methods against terrorists, for example the UK's use of police surveillance and criminal justice mechanisms in countering the threat posed by the Provisional IRA, and Spain's successful criminal prosecution of the individuals responsible for the Madrid train bombing in March 2004. Further, it is of note that the UN Security Council has used Article 42 of the UN Charter on several occasions to require states to respond to terrorism with law enforcement measures, such as extradition, criminal prosecution, and freezing the assets of terrorist suspects.[10] There does, indeed, exist evidence of states' *opinio juris* that terrorism is a crime that falls outside the purview of international humanitarian law. For example, the UK expressly stated, in its reservations to the Additional Protocols to the Geneva Conventions, its position that, "the term 'armed conflict'…denotes a situation of a kind that is not constituted by the commission of ordinary crimes, including acts of terrorism, whether concerted or in isolation."[11] Similarly, in Tadic, the ICTY opined that, "terrorist activities…are not subject to international humanitarian law."[12]

As Lubell rightly submits, the international human rights law paradigm contains rules relating to the use of force by the state against the individual, in particular the right to life and the prohibition against arbitrary killing.[13] These rules are found in treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR),[14] both of which contain provisions prohibiting the arbitrary deprivation of life. In the context of the US drone program, therefore, the rules of international human rights law are highly relevant in any assessment of the legality of lethal force and targeted killings. A state acting within

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[9] *Ibid*, at 593.
[10] See, for example, S.C. Res. 1044, UN Doc. S/RES/1044 (31st January 1996); S.C. Res. 1373, UN Doc. S/RES/1373 (28th September 2001); S.C. Res.1735, UN Doc. S/RES/1735 (22nd December 2006).
[11] See Reservation of the United Kingdom (02/07/02), Protocol Additional to the Geneva Conventions of 12th August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8th June 1977, 1125 U.N.T.S. 3, available at http://www.icrc.org/ihl.nsf/NORM/OA9EO3FOF2EE757CC1256402003FB6DZ?OpenDocument.
[12] See Prosecutor -v- Tadic, Case No. IT-94-1-T, Appeal, at para.562 (ICTY, 15th July 1999).
[13] See Noam Lubell, *Extraterritorial Use of Force against Non-State Actors*, (OUP, 2010), at 167.
[14] See International Covenant on Civil and Political Rights (16th December 1966) 999 UNTS 171, entry into force 23rd March 1976; Convention for the Protection of Human Rights and Fundamental Freedoms (4th November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3rd September 1953, as amended by Protocols nos. 3,5,8 and 11, which entered into force on 21st September 1970, 20th December 1971, 1st January 1990, and 1 November 1998 respectively.

the international human rights law paradigm must operate within, what Alston terms, the, "law enforcement model."[15] This term in fact refers to the type of force that can be employed, not who may employ the force. Any and all state organs authorised to execute police powers, including military and security forces, may employ force in accordance with the law enforcement model.[16] The model permits non-military tactics, such as arrest, extradition, detention and trial.[17]

In the previous chapters relating to the *jus ad bellum*, it was discussed how the issue of the resort to the use of force became more complicated by virtue of the fact that the initial armed attack was perpetrated by a non-state actor, the Al-Qaeda terrorist network. It is submitted that this presents little difficulty with respect to assessing the legality of armed drone strikes under international human rights law, which is, by definition, designed to regulate the relationship between the state and the individual person.

The legality of targeted killings by means of armed drone strikes under the international human rights law paradigm is, therefore, far from being a settled issue. Some commentators, such as Alston, take the view that such targeted killings are almost always in violation of international human rights law, whereas other commentators, such as Paust and Orr, take the view that US targeting practices comply fully with human rights obligations.[18]

Traditionally, proponents of the US's targeted killing practices have sought to legitimise those practices by pointing to their efficiency and effectiveness in counter-terrorism operations.[19] Returning briefly to Professor Koh's seminal speech before the ASIL in 2010, in respect of the US's targeted killing operations, including those carried out using armed drones, Koh advances the US Administration's legal justifications – the first, that the US is acting in lawful self-defence, and the second, that the US is engaged in an ongoing armed conflict with Al-Qaeda, the Taliban, and

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[15] See P. Alston, supra n.2, at para.31.

[16] *Ibid*, citing Code of Conduct for Law Enforcement Officials, G.A. Res.34/169, Annex, Art.1, UN Doc. A/RES/34/169, 17th December 1979.

[17] See Prosecutor -v- Boskoski, Case No. IT-04-82-T, Judgment, at para.175 (ICTY, 10th July 2008). See also *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcommittee on National Security and Foreign Affairs*, 111th Congress 2 (2010) (written statement of Professor Mary Ellen O'Connell).

[18] See P. Alston, supra n.2. See also Jordan J. Paust, 'Permissible Self-Defence Targeting and the Death of bin Laden', 39 Denv. J. Int'l L & Pol'y 569 (2011); Andrew C. Orr, 'Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law', (2011) 44 Cornell Int'l L.J. 729.

[19] See S. David, 'Israel's policy of Targeted Killing', 17 Ethics & Int'l Aff. 112 (2003).

associated forces.[20] Any reference to the application of human rights law to the US's targeted killing program, in particular the right to life enshrined in Article 6 of the ICCPR, is conspicuous by its absence. This omission is hardly surprising, given the US's long-standing objection to the extraterritorial application of its obligations arising under the ICCPR.[21] Both the Bush and Obama Administrations have obstinately maintained the position that the US's obligations under the ICCPR apply only to acts of the state within its own territory, and that the US can act extraterritorially, including by the use of lethal force, unencumbered by those same obligations. The US position is rather isolated, supported only by Israel, and criticised by the majority of commentators outside the US, ignoring as it does the broad consensus on the universal applicability of international human rights law.[22] Indeed, Koh, in his capacity as Legal Adviser to the US State Department, in two opinions from 2010 that were leaked to the media, opined that the US position in relation to the extraterritorial application of human rights obligations was becoming increasingly untenable, and that the Obama Administration should consider abandoning its position objecting to extraterritorial applicability.[23] It is most unfortunate, then, that the United States has, to date, chosen to maintain the status quo in this respect.

Within a situation of armed conflict, a state may legally employ targeted killing practices, so long as those practices comply with the *jus in bello* principles of necessity, proportionality and distinction. O'Connell submits that targeted killings outside situations of armed conflict (that is, in peacetime), and thus which fall within

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[20] See H. Koh, 'The Obama Administration and International Law', ASIL Speech, 25th March 2010, available at http://www.state.gov/s/l/releases/remarks/139119.htm.

[21] See M. Milanovic, 'Harold Koh's Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties', EJIL: Talk, 7th March 2014, available at http://www.ejiltalk/harold-kohs-legal-opinion-on-us-position-on-the-extraterritorial-application-of-human-rights-treaties/, (accessed 20th July 2015).

[22] This broad consensus is evident in the numerous decisions of the UN Human Rights Committee, including individual cases, its General Comment on the Nature of the General Legal Obligation on States Parties to the Covenant, and in its scrutiny of national situations, which have clearly stated that extraterritorial activity can be subject to the obligations of human rights law. See, for example, Delia Saldias de Lopez -v- Uraguay, Comm. No.52/1979, UN Doc. CCPR/C/OP/1, at para.88 (1984); Lilian Celiberti de Casariego -v- Uraguay, Comm. No.56/1979, UN Doc. CCPR//C/OP/1, at para.92 (1984); Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para.10; Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Israel', UN Doc. CCPR/C/79/Add.93, 18th August 1998. The consensus is also evident in several decisions of the European Court of Human Rights. See, for example, Loizidou -v- Turkey, Preliminary Objections, 310 ECtHR, Series A, at paras.62-64 (1995); Cyprus -v- Turkey, ECtHR, App. No.25781/94, 10th May 2001, at para.77.

[23] See M. Milanovic, supra n.21.

the purview of the human rights paradigm, are unlawful.[24] O'Connell rightly recognises that a state acting within the human rights paradigm must limit the use of lethal force to situations of absolute necessity, where lives are imminently threatened. This principle is recognised in most international and regional human rights instruments, and in the jurisprudence of various judicial organs established under those instruments.[25] Such emergency situations are the only permissible derogation from the prohibition against arbitrary deprivation of life. Furthermore, because killing is not permitted to be the sole objective of any measures taken in derogation from the prohibition, targeted killing is, by its very definition, unlawful under the international human rights law paradigm. O'Connell submits that drones, as a weapons delivery platform, employ military force, and so are, "therefore lawful only in armed conflict hostilities."[26] O'Connell's arguments are clearly based, it is submitted, on US targeting practices to date, where drones have been used to target terrorist suspects posing no apparent imminent threat. By way of example, let us consider the first targeted killing by means of an armed drone strike outside a theatre of armed conflict hostilities, which is believed to have occurred on 3rd November 2002, in Yemen. The target was Qaed Senyn al-Harithi (also known as Abu Ali). Al-Harithi was the suspected mastermind of the attack on the *USS Cole* in October 2000.[27] Al-Harithi and five other suspected Al-Qaeda militants were killed when a drone operated by the CIA launched two Hellfire missiles, destroying the jeep in which the men were travelling, in the northern province of Marib, 160 kilometres east of the capital, Sana'a.[28] In response to the drone strike that killed al-Harithi and his associates, the then UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings, Asma Jahangir, reported that the incident constituted, "a clear case of extrajudicial killing."[29] Given that, on the basis of the facts within public knowledge, al-Harithi posed no imminent threat at the time of the drone strike, there is a sound basis for

[24] See O'Connell, supra n.8, at 599.
[25] See, for example, Article 2(2) of the European Convention on Human Rights. See also the decision of the Inter-American Court of Human Rights in the Las Palmeras Case, Judgment dated 26th November 2002, Series C No.96 (2002).
[26] See O'Connell, supra n.8, at 589.
[27] See N. Melzer, *Targeted Killings in International Law*, Oxford Monographs in International Law, (OUP, 2008), at 3.
[28] See 'US Predator Kills 6 Al-Qaeda Suspects', *ABC News*, 4th November 2002, available at http://abcnews.go.com/WNT/story?id=130027&page=1, (accessed 2nd June 2015).
[29] See UN Commission on Human Rights, Sub-Commission on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, Asma Jahangir, 13th January 2003, UN Doc. E/CN.4/2003/3, at para.19.

arguing that the strike violated the prohibition against arbitrary deprivation of life and was thus unlawful under international human rights law. On the face of it, al-Harithi seems to have been targeted on the basis of his past involvement in planning attacks, in particular the attack on the *USS Cole*. This raises the spectre of whether the drone strike in fact constituted an unlawful reprisal, being an act of retribution for al-Harithi's past misdeeds, although the US would certainly counter any such accusation by pointing out that the targeted killing of al-Harithi prevented the planning and execution of future attacks on US interests, in which al-Harithi would have played a pivotal role.

4.3 The Right to Life in International Human Rights Law

The right to life sits at the apex of rights and freedoms guaranteed under international human rights law, and while its scope has been debated, particularly in relation to extraterritorial counter-terrorism operations involving the use of lethal force, the foundational status of the right has not been seriously challenged.

The inherent right to life of the individual enshrined in Article 6(1) of the ICCPR prohibits the arbitrary deprivation of life. Article 6(1) provides that, "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[30] The use of the word 'inherent' as a descriptor of the right is important, as it indicates the existence of the right independent from its recognition in the Covenant.[31] The right to life is to be found in every major human rights instrument, such is the recognition of its importance.[32] Central to the right to life as expressed in these various instruments is a prohibition, the essence of which, as Lubell rightly submits, is to prohibit extrajudicial executions and arbitrary killings by the state.[33] The prohibition against arbitrary deprivation of life contained within the right to life has attained the status of customary international law, and is therefore an obligation binding upon all states, irrespective of whether or not they are signatories

[30] See ICCPR, Article 6(1), 16th December 1966, 999 U.N.T.S. 171.
[31] See Sarah Joseph, *The International Covenant on Civil and Political Rights*, (Oxford, OUP, 2004), at 154.
[32] See Universal Declaration of Human Rights, Resolution 217 A(III), UN Doc. A/810 91, UN General Assembly, 1948, Article 3; African Charter on Human and Peoples' Rights (26th June 1981) OAU Doc. CAB/LEG/67/3 rev.5; 1520 UNTS 217; 21 ILM 58 (1982), entered into force 21st October 1986, Article 4; American Convention on Human Rights (22nd November 1969) 1144 UNTS 123, entered into force 18th July 1978, Article 4; ECHR, Article 2.
[33] See N. Lubell, supra n.13, at 170.

to any particular human rights instrument, and has arguably attained the status of a *jus cogens* norm of international law.[34] As shall be shown, the right to life does not automatically adjudge all loss of life as a result of state action to be arbitrary and thus in violation of international human rights law, and under this corpus of law, the use of lethal force against an individual can be justified in narrow, specific circumstances, as a measure of last resort, to be used only when strictly unavoidable in order to protect life from an imminent threat. With limited exceptions, therefore, the state may not wantonly attempt to take the life of an individual. There exist three relevant exceptions:

i. The deprivation of life in accordance with a lawfully imposed death penalty, unless the state is party to an instrument forbidding capital punishment, such as the Second Optional Protocol to the ICCPR;[35]
ii. Killings taking place in the context of an armed conflict, and which are lawful under international humanitarian law;[36]
iii. Necessary and proportionate force, where lethal force was not the first option.

As to the first exception, Lubell submits that a targeted killing by one state in the territory of another state would not comply with the requirements of a lawfully imposed death penalty.[37] Lubell's submission is convincing, for while Article 6(2) of the ICCPR contains an exception for death penalties, this exception must be read in conjunction with the procedural requirements of a fair trial, a right enshrined in Article 16 of the ICCPR. Extraterritorial targeted killings may certainly violate any number of these procedural guarantees, such as the imposition of a capital sentence without trial, proceedings *in absentia* where the individual is not afforded the opportunity to mount a defence, and a lack of opportunity to appeal or to seek a pardon. Furthermore, as Lubell rightly submits, the carrying out of an execution in

[34] See N. Melzer, supra n.27, at 184-221. See also UN Human Rights Committee, General Comment No.6 (1982), on the right to life, and General Comment No.24 (1994), on issues relating to reservations made upon ratification or accession to the ICCPR, at para.10.
[35] It should be noted that Article 6(2) of the ICCPR accepts that states party to the ICCPR may have laws permitting the death penalty and that these laws can remain post-ratification, so long as those laws conform to the requirements set out in this, and following, paragraphs. The death penalty is limited to those who have been found guilty of the most serious crimes. See also Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at the abolition of the death penalty, 15th December 1989, UN Doc. A/RES/44/128, entered into force 11th July 1991. For the purposes of this work, it should be noted that the United States is not a state party to the Second Optional Protocol.
[36] See Nuclear Weapons, supra n.3, at para.25.
[37] See N. Lubell, supra n.13, at 172.

such a manner, outside a monitored and controlled environment, may well violate the prohibition against cruel, inhuman or degrading treatment or punishment.[38]
As to the second exception, the operation of same rests very much on the precise circumstances and the interpretation given to the concurrent application of international human rights law and international humanitarian law in the context of an armed conflict, and it is proposed to deal with this issue in Chapter 5.
Under international human rights law, two principles govern the use of lethal force outside a situation of armed conflict – necessity and proportionality.[39] The precise meaning of these terms in the context of the international human rights law paradigm is markedly different to the meanings of these terms under the *jus ad bellum* and international humanitarian law paradigms. Alston submits that, under international human rights law:

[A] state killing is legal only if it is required to protect life (making lethal force proportionate) and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life (making lethal force necessary).[40]

Further, Melzer notes that, under the international human rights law paradigm, the test of proportionality asks not whether the use of lethal force is *necessary* to remove the threat, but whether it is *justified* in view of the nature and scale of the threat posed.[41] The threat to life that the use of lethal force seeks to counter must be imminent. The question of imminence is extremely important in the context of the legality of drone strikes under international human rights law, particularly given the lack of transparency in relation to targeting decisions.[42] There is, of course, the obvious risk that in the absence of an imminence requirement, targeted killings may become a means of exacting retribution for past actions, which could constitute unlawful reprisals. In his report of September 2013, UN Special Rapporteur Christof Heyns challenged the much broader concept of imminence favoured by the United States,

[38] *Ibid*.
[39] See Report of Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, presented to the UN General Assembly, dated 13th September 2013, Ref: A/68/389, at para.33. See also McCann -v- United Kingdom, 21 ECtHR 200 (1997), at paras.203-214.
[40] See P. Alston, supra n.2, at para.32.
[41] See N. Melzer, supra n.27, at pp.3-4.
[42] See P. Alston, supra n.2, at para.20.

apparent in the now infamous leaked Department of Justice White Paper,[43] which effectively dispensed with any requirement that an individual pose an immediate threat before being the target of lethal force, stating that:

The view that mere past involvement in planning attacks is sufficient to render an individual targetable even where there is no evidence of a specific and immediate attack distorts the requirements established in international human rights law.[44]

Given the significant constraints on the intentional use of lethal force under international human rights law, Alston concludes that:

[O]utside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a state's own territory, over which the state has control, would be very unlikely to meet human rights law limitations on the use of lethal force.[45]

Further, outside a state's own territory:

There are very few situations outside the context of armed activities in which the test for anticipatory self-defence…would be met….In addition, drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in state responsibility and individual criminal liability.[46]

Special Rapporteur Ben Emmerson QC has echoed Alston's conclusions. In his report of 18th September 2013, Emmerson concludes that, outside situations of armed conflict, drone strikes will usually violate international human rights law, because

[43] See Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaeda or An Associated Force', available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf, (accessed 29th June 2015).
[44] See Heyns Report, supra n.39, at para.37.
[45] See P. Alston, supra n.2, at para.85.
[46] *Ibid*, at para.86.

only in the most limited of circumstances would it be permissible under that legal paradigm for killing to be the sole or primary objective of an operation.[47]

Therefore, as to the third stated exception, lethal force employed by a state must be *proportionate* to a legitimate aim, and *necessary*, after all less harmful means have been reasonably exhausted. It would have to be demonstrated, therefore, that efforts to arrest or capture were either made and were unsuccessful, or were shown to be unfeasible. Therefore, the actions of the state would have to be proportionate to the legitimate aim of protecting life, and not simply retribution for past acts of terrorism. There must exist sufficient, credible evidence that the individual targeted posed a real, imminent and grave threat. In consequence, unnecessary or disproportionate force may violate international human rights law. The European Court of Human Rights upheld the precepts of necessity and proportionality in the case of McCann -v- United Kingdom, reaffirming the requirements of necessity, proportionality and imminence of threat, which must be present in order for the use of lethal force against terrorist suspects to comply with human rights law.[48] In that case, the Court held that the killing of members of the Provisional IRA by British state agents was a violation of the right to life expressed in Article 2 of the European Convention on Human Rights, because those individuals could have been arrested and detained upon their arrival in Gibraltar, where the operation was conducted.[49] Therefore, it is submitted that the intentional, premeditated killing of an individual would generally violate the prohibition against arbitrary killing, however, where an intentional killing is the only means of protecting life against an imminent threat, it is generally lawful. International human rights law, therefore, can only render lawful lethal force that would otherwise constitute a violation of the right to life where such force is absolutely necessary, where there is evidence to indicate that capture and detention is not a feasible alternative to lethal force, and where the targeted person is about to commit an attack that cannot be repelled by any other means. A state's obligations arising under international human rights law therefore constrains the state from pursuing an unremitting policy of targeted killings.

[47] See Interim Report of Ben Emmerson QC, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, presented to the UN General Assembly, dated 18th September 2013, Ref: A/68/389, at para.60.
[48] See McCann -v- United Kingdom, supra n.39.
[49] *Ibid*, at paras.203-214.

4.4 Application of International Human Rights Law Within and Linked to Armed Conflict

The interrelationship between international human rights law and international humanitarian law will be examined through the prism of US drone strikes in greater detail towards the end of Chapter 5. At this point, it is worth mentioning how international human rights law applies within, and linked to, a situation of armed conflict. It is a well-established principle of international law that human rights obligations continue to apply during an armed conflict (whether international or non-international), as a complement to international humanitarian law.[50] In The Wall, the ICJ affirmed that:

The protection offered by human rights conventions does not cease in cases of armed conflict, save through derogations under Article 4 of the ICCPR.[51]

The UN Human Rights Committee also clarified that:

The ICCPR applies in situations of armed conflict to which the rules of international humanitarian law are applicable. Both spheres of law are complementary, not mutually exclusive.[52]

Therefore, the right to life continues to apply in situations of armed conflict, however, as the ICJ has held in Nuclear Weapons and The Wall, in such situations the prohibition against arbitrary killing must be interpreted according to the applicable targeting rules of international humanitarian law.[53] The applicability of international human rights obligations during situations of armed conflict is confirmed by the presence of derogation provisions in most human rights instruments, which permit states parties to derogate from specific obligations under these treaties in times of war or public emergency.[54] Absent any provision for derogation, human rights obligations

[50] See Nuclear Weapons, supra n.3, at paras.24-25, and The Wall, supra n.3, at para.106.
[51] See The Wall, *ibid*.
[52] See UN Human Rights Committee, General Comment No.31 (2004), supra n.22.
[53] See Nuclear Weapons, supra .3, at paras.24-25, and The Wall, supra n.3, at para.106.
[54] See, for example, Article 5, ICCPR, and Article 15, ECHR.

continue to apply during an armed conflict. This, of course, applies to the right to life, which is usually non-derogable.[55]

Aside from, and in addition to, any determination under the *jus ad bellum* as to the legality of the use of force in the territory of another state, outside a situation of armed conflict, the corpus of international human rights law will be the proper framework for determining the legality of armed drone strikes. Of course, within a situation of armed conflict, non-derogable rights will continue to apply in full, while others may apply subject to any permissible derogation, to the extent strictly required by the exigencies of the situation of armed conflict.[56]

In an oft-cited dictum pertaining to the right to life as expressed in Article 6 of the ICCPR, the ICJ in the Nuclear Weapons Advisory Opinion, opined that:

[t]he protection of the ICCPR does not cease in times of war, save by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. This, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflicts and not deduced from the terms of the Covenant itself.[57]

Several states, in particular the United States and Israel, argued unsuccessfully before the Court that the relevant provisions of the ICCPR were not applicable in a situation of armed conflict. This position has been generally discredited, and there is widespread international consensus as to the coexistence and interrelation of the human rights and armed conflict paradigms in situations of armed violence where the threshold requirements of armed conflict are satisfied. Yet the US obstinately rejects the applicability of international human rights law in situations of armed conflict to

[55] Article 2 ECHR permits derogation, but only within the limits of lawful acts of war.
[56] See UN Human Rights Committee, General Comment 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.1, 31st August 2001.
[57] See Nuclear Weapons, supra n.3, at para.25.

individuals brought under its control and jurisdiction. For example, in its response dated 15th April 2001 to the decision of the Inter-American Commission on Human Rights to order precautionary measures in the Guantanamo Detainees Case, the US Administration submitted that international human rights law was not applicable to the conduct of hostilities or to the capture and detention of enemy combatants, and that these are instead governed by the more specific laws of armed conflict.[58] Furthermore, as noted by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 2004, the US position in respect of both its military operations in Iraq and Afghanistan, and the al-Harithi drone strike in Yemen carried out by the CIA, implies that, where the law of armed conflict applies, it operates to exclude the application of international human rights law.[59] The United States maintains its position that it is engaged in an armed conflict with Al-Qaeda, the Taliban and associated forces, and that the law of armed conflict therefore applies to the exclusion of international human rights law. One can certainly understand the obvious attraction of justifying the use of lethal force, including targeted drone strikes, under the law of armed conflict, which has more permissive rules for the use of lethal force than international human rights law, and which offers the shield of the combatants' privilege to military personnel participating in hostilities.

As stated, however, the US position has been generally discredited, and there is broad consensus on the continued applicability of the relevant corpus of human rights law in situations of armed conflict. Certainly, in the view of this writer, the United States has not advanced any convincing arguments to substantiate its position of 'mutual exclusivity', a position which, it is submitted, stands in clear contradiction to treaty law and state practice. The United States did not enter any specific reservations as to the applicability of Article 6 of the ICCPR in situations of armed conflict at the time of its ratification of the Covenant in 1992, and its position neglects the historical fact that the Universal Declaration of Human Rights (1948), the Geneva Conventions (1949), as well as the various regional human rights instruments, were drafted based on an awareness of the close link between armed conflict and violations of human

[58] See Response of the United States Government of 15th April 2002 to the Inter-American Commission on Human Rights with regard to the Commission's decision to order precautionary measures in the Guantanamo Detainees Case, available at http://www.ccr-ny.org/v2/legal/september_11th/sept11article.asp?ObjID=tltOqaX9CP&Content=134, (accessed 6th June 2015).

[59] See Report of UN Special Rapporteur (Executions) dated 22nd December 2004, UN Doc. E/CN.4/2005/7, at paras.43 and 48.

rights, coming soon after the atrocities committed during the Second World War (1939-1945). Further, it is of note that, as well as rejecting the applicability of human rights law in such cases, the United States initially refused to apply conventional international humanitarian law to counter-terrorism operations undertaken by its military, up until the decision of the United States Supreme Court in Hamdan -v- Rumsfeld in June 2006, where the Court held that Common Article 3 of Geneva Conventions I-IV was applicable to the hostilities between the United States and Al-Qaeda.[60] It is difficult to find any legal merit in the evasive position maintained by the US in relation to the applicability of human rights law in situations of armed conflict, and the US's position appears to lack moral credibility, particularly when the US positions itself in its international relations as a champion of democracy and respect for human rights.

It is, therefore, a generally accepted principle that a situation of armed conflict giving rise to the applicability of international humanitarian law does not entail the suspension of a state's obligations under international human rights law. In situations of armed conflict, the lawfulness of any deprivation of life must be determined first by reference to the *lex specialis* of international humanitarian law. To the extent that the *lex specialis* provides a specific rule covering the situation being considered, that rule takes precedence over the continuously applicable *lex generalis* of international human rights law. This precedence does not exclude the application of the particular rule of human rights law, but merely determines how that rule is to be interpreted. Only where the *lex specialis* of the law of armed conflict does not provide any rule at all, and where no sufficient guidance can be derived by the standard methods of treaty interpretation or by reference to the general principles underlying international humanitarian law, will recourse to the *lex generalis* of international human rights law be appropriate.

[60] See Hamdan -v- Rumsfeld 548 U.S. 557 (2006).

4.5 Applicability of International Human Rights Law to Extraterritorial Actions by States

A key issue in analysing the applicability of international human rights law in the context of the US drone program is that of extraterritoriality. Are states bound by their human rights obligations when acting outside the borders of their own territory? Any assessment of the compliance of US drone strikes in Afghanistan, Pakistan, Yemen and Somalia with international human rights law requires an examination of whether the US's obligations under international human rights law extend to the extraterritorial use of lethal force.

There does exist ICJ jurisprudence in The Wall,[61] Armed Activities,[62] and Georgia -v- Russian Federation,[63] which indicates that states can indeed be bound by international human rights law obligations in respect of activities undertaken on the territory of another state. Similarly, the UN Human Rights Committee has, on various occasions, clearly stated that extraterritorial activity by a state may be subject to that state's obligations under international human rights law.[64]

One argument repeatedly advanced in order to justify targeted killings using drones is based upon a narrow interpretation of international human rights law, for example Article 2(1) of the ICCPR and Article 1 of the ECHR, which would be supportive of the position that states are only obligated to uphold the various rights and freedoms set out in human rights instruments within their own territories and in areas falling under their jurisdiction.

Professor Paust submits that US targeting practices do not violate the arbitrary killing standard of international human rights law.[65] Paust takes the view that extraterritorial targeted killings of suspected terrorists do not violate the, "general human right to freedom from arbitrary deprivation of life," because it, "will only be applicable with respect to those persons who are within the jurisdiction, actual power, or effective control of the state or other entity using a drone."[66] Paust's argument is clearly based

[61] See The Wall, supra n.3.
[62] See Armed Activities, (2005) ICJ Rep.168.
[63] See Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Request for the Indication of Provisional Measures, ICJ, 15th October 2008.
[64] See, for example, Delia Saldias de Lopez –v- Uraguay, supra n.22, at para.88. See also UN Human Rights Committee, General Comment 31, supra n.22, at para.10.
[65] See Jordan J. Paust, supra n.18, at 569-570.
[66] *Ibid*, at 573-574.

on the narrowly held view that a state's international human rights law obligations are not of extraterritorial application.

Andrew C. Orr adopts a similar position to that of Professor Paust. Writing in respect of US drone strikes in the tribal areas of north-west Pakistan, Orr takes the view that such strikes do not violate the right to life as expressed in Article 6(1) of the ICCPR.[67] Orr rightly recognises that a state is permitted to derogate from the prohibition on arbitrary killing in emergency situations, but that this derogation does not extend to punitive or deterrent killing. However, Orr submits that, far from being arbitrary, the targeted drone strikes against Al-Qaeda and Taliban militants in Pakistan aim to disrupt future attacks rather than to punish or deter terrorist activities.[68] Further, Orr submits, it is not at all clear whether the obligations owed by the US under the ICCPR extend to militants operating in Pakistan. The US is clearly obligated under Article 2(1) of the ICCPR to guarantee the rights of persons within its territory and subject to its jurisdiction, however Orr submits that Al-Qaeda and Taliban militants in Pakistan are neither within US territory nor subject to its jurisdiction, and so are not entitled to be afforded by the US the human rights protections of the ICCPR.[69] Properly construed, Orr submits, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, which provides for interpretation, "in good faith in accordance with the ordinary meaning to be given to the terms," the jurisdictional provision of the ICCPR does not obligate the United States to safeguard the right to life of terrorist suspects in Pakistan, and thus drone strikes that eliminate such targeted suspects do not violate the prohibition on arbitrary killing expressed in Article 6(1) of the ICCPR. Orr notes that, beyond refusing to adhere to the principles of international human rights law and international humanitarian law, Al-Qaeda rejects the premises underlying both frameworks.[70] In the words of Sloane:

[T]he common denominator of the war convention – which, absent reciprocity, repudiation, and other inter-state political dynamics, makes it "work", however imperfectly, is a shared normative commitment to reducing superfluous suffering and harm in war. And the main convention by which international humanitarian law accomplishes this is the axiom of non-combatant activity, which modern transnational

[67] See Andrew C. Orr, supra n.18, at 745.
[68] *Ibid*.
[69] *Ibid*, at 746.
[70] *Ibid*.

terrorist networks typified by Al-Qaeda reject. This "new" genre of non-state actor also rejects the secular, aspirationally universal conception of human dignity underlying international human rights law.[71]

Therefore, Orr submits, to insist, as O'Connell does, that existing law enforcement methods within the human rights law paradigm are perfectly capable of countering the threat posed by groups such as Al-Qaeda and other non-state actors, is to ignore the discrepancies between the underlying premises of that paradigm and the methods employed by Al-Qaeda and various affiliated groups in reality.[72]

This narrow interpretation of a state's human right obligations, seemingly favoured by scholars such as Paust and Orr, was certainly evidenced in the judgment of the European Court of Human Rights in Bankovic -v- Belgium and Others, where the Court admonished European states who participated in NATO's aerial bombardment of the Serbian capital, Belgrade, during the Kosovo conflict in 1999, from any liability for loss of lives resulting from NATO air strikes, on the basis that the territory over which the strikes occurred was outside the Court's 'primary territorial' definition of 'jurisdiction'.[73] Essentially, the Court decided against the extraterritorial application of the right to life as expressed in Article 2 of the ECHR, holding that a state party's obligations in respect of that right extended only to the state's own territory within its 'effective control', or territory which it physically occupies. Bankovic is certainly an interesting decision, for it appears to suggest that aerial bombardment does not bring a targeted individual within the jurisdiction of the targeting state. On one reading, the decision of the Court effectively negates the authority or control test and limits the extraterritorial applicability of the right to life expressed in Article 2 of the ECHR to those individuals coming within the effective control of the targeting state.[74] Bankovic has been heavily criticised for seeming to provide states with carte blanche to kill citizens of other states with impunity, as well as for disregarding the notion of varying degrees of 'effective control', including

[71] See Robert Sloane, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War', 34 Yale J. Int'l Law (2010) 47, at 82.
[72] See Orr, supra n.18, at 746.
[73] Bankovic -v- Belgium and Others, Application Number 52207/99, ECtHR (2001), hereinafter referred to as *Bankovic*.
[74] *Ibid*, at paras.59-60.

limited control over another state's airspace, which can give rise to a measure of obligation under international human rights law.

It is, however, important to note that the central issue in Bankovic was that of admissibility, and so the Court's decision should not be taken as overruling previous jurisprudence that makes clear use of the authority or control test, as well as the pronouncements of other international organisations.[75] Further, one must welcome the fact that the European Court of Human Rights has seen the error of its ways and has since narrowed the very broad sweep of its decision in Bankovic in later cases.[76]

It is respectfully submitted that the arguments of Paust and Orr that the United States is not obliged to uphold international human rights law in respect of its extraterritorial operations, cannot be justified from a moral perspective, and go against the widely accepted notion of the universality of international human rights law. Denying the applicability of international human rights law to cases of extraterritorial targeted killing from a distance, as Paust and Orr do, and as Bankovic appears to do, by claiming that the targeted individual is not brought under the authority or control of the targeting state, creates a dangerous incentive for states to evade the applicability of human rights obligations by favouring one method of killing over another. While a state that pursues a policy of capture and detention must adhere to human rights obligations in respect of an individual's detention, a state that pursues a policy of targeted killings might seek to evade scrutiny of its actions.

It is submitted that the appropriate test for the applicability of the right to life expressed in Article 6 of the ICCPR in such circumstances is whether the targeting state exercises authority or control over the targeted individual in such a way that the individual's right to life is essentially in the hands of the targeting state. If state actors, even if targeting from a distance, or even remotely using an armed drone, are able to undertake their missions with the intent to kill the individual, this amounts to a form of authority or control over the life of the individual that engages the human rights law obligations of the targeting state, including the prohibition against arbitrary deprivation of life.

Authority or control should, therefore, correctly be interpreted to include not only situations where the targeted individual is physically in the hands of the targeting

[75] See, for example, Issa and Ors -v- Turkey, Application Number 31821/96, ECtHR (16th November 2004). See also UN Human Rights Committee, General Comment 31, supra n.22.

[76] See, for example, Al-Skeini and Ors -v- The United Kingdom, Application Number 55721/07, ECtHR (Grand Chamber), Judgment 7th July 2011.

state, but also any situation where, irrespective of physical distance, the targeting state has the ability to target and eliminate the individual. It is not so much about physical distance as the key factor in determining authority or control, and thus the extraterritorial applicability of human rights law obligations, but more to do with the power of the targeting state against the individual. In this sense, the state possesses the ultimate coercive power – the power to deprive the individual of his life. Whilst it is accepted that, on a strict interpretation, the ICCPR is limited in scope territorially, binding only upon states parties, requiring states to extend human rights protections to their citizens or persons within their sovereign territory, this writer shares the submissions of Paul Gormley that the obligation on a state not to arbitrarily deprive individuals of the right to life is of an *erga omnes* nature, owed to all states by all states, and is most likely a *jus cogens* norm of international law.[77] Therefore, states are obligated to ensure individuals the right to life regardless of a state's jurisdiction, actual power, or effective control of an individual. Thus, any targeted killing of an individual committed by a state outside the contexts of legitimate self-defence or armed conflict, including by means of armed drone strikes, and where the targeted individual presents no imminent threat, necessarily implicates human rights violations.

Returning to the 2002 drone strike that killed al-Harithi in Yemen, the US Administration justified that strike on the basis that it was part of the US's 'war on terror'.[78] This raises the separate issue of whether the strike was undertaken in the context of an armed conflict. The academic debate on the issue of whether actions taken outside zones of active hostilities (the 'hot battlefields' of Iraq and Afghanistan) in furtherance of this 'war on terror' can be considered part of an armed conflict, thereby engaging international humanitarian law, remains ongoing, and shall be examined in Chapter 5. At this stage, however, it should be noted that there are serious difficulties in accepting without reservation such measures as part of an armed conflict coming under the purview of international humanitarian law, and it is respectfully submitted that the circumstances of this particular strike are such that its

[77] See Paul Gormley, 'The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens', in *The Right to Life in International Law*, (B.G. Ramcharan, ed. 1985), at 120.
[78] See D. Johnston and D. Sanger, 'Threats and Responses: Hunt for Suspects; Fatal Strike in Yemen was Based on Rules Set Out by Bush', New York Times, 6th November 2002, available at http://www.nytimes.com/2002/11/06/world/threats-responses-hunt-forsuspects-fatal-strike-yemen-was-based-rules-set-bush.html, (accessed 2nd July 2015).

legality must be determined under the international human rights law paradigm. For the strike not to have violated the prohibition against arbitrary killing expressed in Article 6 of the ICCPR, it must have been carried out in accordance with the law, it must not have been arbitrary, and must have been necessary and proportionate. It could be argued that the strike against al-Harithi was not arbitrary, in the sense that it was a planned, intentional attack against a specific individual, although whether it was carried out in accordance with the law is questionable. It could well be argued that such targeted killings are in violation of US domestic law, in particular Executive Order 12333 banning assassinations, though the official view seems to be that there was legal authority for this particular strike and that it was undertaken with the consent and cooperation of the Yemeni authorities.[79] The application of US domestic law to the issue creates a legal quagmire that is beyond the scope of this work. However, if the strike was found to be in violation of US domestic law, this would inevitably lead to a finding that it violated the right to life under international human rights law. If, however, it could be concluded that the strike was indeed regulated by law, it falls to be determined whether the force used complied with the principles of necessity and proportionality. From a human rights law perspective, it is submitted that, at first glance, it is difficult to reconcile the lethal force that killed al-Harithi with the underlying principles of international human rights law, and indeed some commentators have labelled the strike as an extrajudicial execution, given its apparent premeditation and lack of consideration given to capture and detention as an alternative to lethal force.[80] The problem, however, is that the US has not indicated whether there was intelligence to suggest that al-Harithi and his five associates presented an imminent threat justifying lethal force as a proportionate response. Of course, one could understand the reluctance on the part of the US Administration to reveal intelligence sources, however the US has not detailed any specific imminent threat that was averted by the strike. Indeed, from the facts within public knowledge, it seems that the principal reason for targeting al-Harithi was, as alluded to previously in this chapter, his involvement in the attack on the *USS Cole*. Whilst it is not disputed that al-Harithi would certainly have continued to play an active role in future Al-Qaeda attacks had he not been targeted, past violent actions cannot justify

[79] *Ibid*.
[80] See M. Sassoli, 'Use and Abuse of the Laws of War in the 'War on Terrorism',' *Law and Inequality: A Journal of Theory and Practice*, 22 (2004), at 212-13. See also H. Duffy, *The 'War on Terror' and the Framework of International Law*, (CUP, Cambridge, 2005), at 342-343.

extrajudicial killing, and international human rights law does not provide for lawful killing based solely on membership of a terrorist organisation unless there is evidence that the person targeted presents an imminent threat.
On this basis, therefore, it is respectfully submitted that the drone strike that killed al-Harithi and the five other men travelling with him violated the right to life and the prohibition against arbitrary deprivation of life as expressed in the ICCPR.

4.6 Concluding Comments

The above analysis, however, does not necessarily mean that all drone strikes automatically violate international human rights law, and it would be ill-judged to cloak the entire US drone program in a blanket of illegality. Certainly, in different, albeit exceptional, circumstances and with additional evidence, such strikes may not violate the right to life. Essentially, the legality of a drone strike under international human rights law can only be determined on a case-by-case basis, having regard to the specific circumstances surrounding the strike, including the identity of the targeted individual and the presence or otherwise of any imminent threat posed by the individual at the time. Ultimately, under international human rights law, the legality of any use of lethal force, including killing by remote weapons, will depend on satisfaction of the aforementioned tests, including those of necessity and proportionality. The problem remains the lack of transparency surrounding the US's targeting practices, in particular the reluctance to detail any specific imminent threat posed by individuals targeted. In spite of the almost universally accepted requirement of imminence, the broad interpretation given to this requirement by the US Administration, as evidenced in the leaked Department of Justice White Paper, effectively dispels any requirement that an individual pose an imminent threat before he can be the object of lethal force.[81] This approach to the imminence requirement, and the perceived willingness of the United States to target individuals on the basis of past involvement in terrorist attacks or simply on the basis of their membership of Al-Qaeda or associated forces, has rightly been criticised by UN Special Rapporteur Christof Heyns.[82]

[81] See Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaeda or An Associated Force', supra n.43.
[82] See Heyns Report, supra n.39, at para.37.

For so long as the United States maintains its position in relation to the extraterritorial applicability of international human rights law, and for so long as the perception remains that the US targets individuals with impunity, and casts its drone programs in almost complete secrecy, then it should expect the shadows of suspicion to linger over drone strikes conducted in Afghanistan, Pakistan, Somalia and Yemen, with many in the international community, scholars, jurists and NGOs, suspecting that such strikes do not fully comply with long established principles of international human rights law.

5

The US Drone Program and International Humanitarian Law

5.1 Background

As Lubell rightly submits, international humanitarian law is that corpus of international law designed to regulate the conduct of hostilities during an armed conflict, and thus the applicability of international humanitarian law to any given situation of armed violence is dependent on that situation satisfying the requisite threshold of an armed conflict.[1]

At first glance, the use of armed drones in a situation of armed conflict may not seem too controversial under the *jus in bello*, given the use of drones as a weapons delivery platform, there being little practical difference between the use of a conventional manned aircraft equipped with bombs and missiles and an unmanned drone equipped with such armaments.[2] Indeed, in his 2010 report, UN Special Rapporteur Philip Alston notes that, although in most circumstances targeted killings violate the right to life, in the exceptional circumstance of a situation of armed conflict, where the international humanitarian law paradigm is applicable, targeted killings may be lawful.[3] Putting aside the separate issues of whether or not the use of armed drones constitutes an act of aggression or lawful self-defence under the *jus ad bellum* rules, should the use of armed drones occur within the context of an armed conflict, the legality of drone strikes would appear to fall to be determined according to international humanitarian law. Therefore, in such instances, drone strikes can only be considered lawful if they comply with, at a minimum, the rules applicable to the conduct of hostilities relating to military necessity, distinction, proportionality, and precautions in attacks (the principle of humanity).

Therefore, this chapter seeks to examine the US drone program through the prism of international humanitarian law. As with the other paradigms discussed previously in this work, there is a lack of clear consensus amongst commentators as to the legality of US drone strikes under international humanitarian law, particularly in relation to

[1] See N. Lubell, *Extraterritorial Use of Force against Non-State Actors*, (OUP, 2010), at 85.
[2] See, for example, John Yoo, 'Assassination or Targeted Killings after 9/11', 56 New York Law School Law Review (2011/12), at 58.
[3] See Report of Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, presented to the UN General Assembly, dated 28th May 2010, Ref: A/HRC/14/24/Add.6, at para.10.

those conducted outside Afghanistan. Indeed, there are some commentators, such as O'Connell, who submit that the battlefield is confined, both geographically and temporally, to the conflict occurring between the United States, the Taliban and Al-Qaeda within Afghanistan, and that international humanitarian law is not applicable to operations occurring outside this 'hot' battlefield. As was submitted in the previous chapter, for O'Connell, the legality of drone strikes conducted away from the 'hot' battlefield falls to be determined under the international human rights law/law enforcement paradigm, with such strikes, for the most part, operating in violation of human rights norms.[4] As stated by Koh in his ASIL speech in March 2010, the United States considers itself to be in an armed conflict with Al-Qaeda, the Taliban and associated forces.[5] This chapter shall therefore examine the nature of this conflict, whether it is in fact an armed conflict, whether it is international or non-international in its scope, as well as its geographical and temporal delineations. The US has asserted that, on the basis of the transnational character of Al-Qaeda and its associated forces, it is engaged in an armed conflict of global reach with those forces, and thus asserts that there are no express geographical or temporal limitations to the battlefield.[6] As shall be discussed, however, there has been much criticism that the US position is at odds with the very nature of the *jus in bello*, that it potentially creates a 'global battlefield', which risks undermining the very purpose of international humanitarian law by facilitating targeted killings in states where no situations of hostilities exist. This writer accepts without reservation that international humanitarian law is applicable to the conduct of hostilities in Afghanistan. However, can the legality of drone strikes carried out by the US in those other key target states, such as Pakistan and Yemen, rightly fall to be determined by international humanitarian law? In other words, do those strikes occur within, and as part of, a situation(s) of armed conflict? What is the nature and scope of such a conflict(s), and who are the parties thereto? It shall then be considered whether US targeting practices in those key target states, in particular what are referred to as "signature strikes", comply with the *jus in bello* principles of distinction and proportionality. This issue has divided scholarship in recent years, with sound arguments having been advanced

[4] See *Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearing Before the Subcommittee on National Security and Foreign Affairs*, 111th Congress 2 (2010) (written statement of Professor Mary Ellen O'Connell).
[5] See H. Koh, 'The Obama Administration and International Law', ASIL Speech, 25th March 2010, http://www.state.gov/s/l/releases/remarks/139119.htm (accessed 6th March 2014).
[6] See Koh, *ibid*.

by both proponents and opponents of US targeting practices. It shall be evidenced that difficulties exist, where international humanitarian law does apply, in squaring US targeting practices with the rules of that paradigm, but that these difficulties are not insurmountable. This chapter shall conclude by considering, through the prism of the US drone program, the complex relationship between international human rights law and international humanitarian law, and the notion of the concurrent applicability of both paradigms in the context of an armed conflict.

It should be stated at this point that space constraints preclude a broad assessment of the compliance of each and every drone strike with the principles of international humanitarian law. As Robert P. Barnidge Jr. rightly submits, international humanitarian law is extremely fact intensive, and its principles, in particular that of proportionality, must be assessed within the context of the particular facts and circumstances unique to each strike, and legal conclusions should not be drawn *in abstracto*.[7] However, such an exacting and individualised assessment for, quite literally, hundreds of drone strikes carried out by the US in recent years is beyond the scope of this thesis, hence the writer's intention to focus analysis on the compliance of the Signature Drone Strike Protocol (SDSP) operating in the key target states with the principles of distinction and proportionality. It is hoped that such an analysis will enable an accurate and faithful assessment of SDSP whilst avoiding abstract conclusions as to the legality of SDSP under international humanitarian law.

5.2 The existence and nature of the current 'conflict'

Notwithstanding the fact that the entire US drone program remains classified, there exist sufficient on-the-ground reports, eye-witness accounts and leaked information to facilitate assessments of the legality of such "signature" strikes – strikes that target individuals solely on their observed pattern of behaviour, or "signature". In spite of President Obama's insistence that such strikes do not cause a, "huge number of civilian casualties",[8] there is sufficient evidence indicating that "signature" strikes do

[7] See Robert P. Barnidge, Jr., 'A Qualified Defence of American Drone Attacks in Northwest Pakistan under International Humanitarian Law', (2012) 30 B.U. Int'l L.J. 409, at 440.

[8] See Chris Woods et al, 'Emerging from the Shadows: US Covert Drone Strikes in 2012', Bureau of Investigative Journalism, 3rd January 2013, available at http://www.thebureauinvestigates.com/2013/01/03/emerging-from-the-shadows-us-covert-drone-strikes-in-2012-2/, (accessed 8th July 2015).

not adequately distinguish between civilians and combatants, resulting in disproportionate civilian casualties.

As stated in the previous chapter, it is now a fairly well-settled point that, in a situation of armed conflict (whether of an international or non-international character), the international human rights law prohibition against arbitrary killing continues to apply, but that the test of whether a deprivation of life is arbitrary must be determined under the applicable *lex specialis* of international humanitarian law.[9] Therefore, in the context of US drone strikes in Afghanistan, Pakistan, and Yemen, it is first important to determine whether there exists a situation of armed conflict, to which international humanitarian law applies, and if so, to delineate the scope of that conflict.

In the aftermath of the 9/11 attacks, the Bush Administration originally suggested that the conflict with Al-Qaeda was of an international character, albeit a new kind of conflict that did not readily fit into any of the traditional categories of conflict recognised under international humanitarian law. It was, "a different kind of war", with, "a different kind of battlefield, where known political boundaries, which previously existed in traditional wars, do not exist in the war on terrorism."[10] This conflict was asserted to exist alongside the further international conflict between the US and the Taliban regime that governed Afghanistan, although the two conflicts were often conflated into, "an armed conflict with Al-Qaeda, the Taliban, and their supporters."[11]

The Obama Administration entered office in January 2009, and appeared at first to promptly abandon the 'war on terror' rhetoric of its predecessor. However, in his national security remarks on 21st May 2009, President Obama stated:

Now let me be clear. We are indeed at war with Al-Qaeda and its affiliates.[12]

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[9] See Nuclear Weapons Advisory Opinion ICJ Rep. 1996, at para.25; The Wall Advisory Opinion ICJ Rep. 2004, at para.106; Armed Activities ICJ Rep. 2005, at paras.216-220.

[10] See Press Gaggle by Ari Fleischer, on board Air Force One, 5th November 2002, available at http://www.whitehouse.gov/news/releases/2002/11/20021105-2.html, (accessed 31st July 2015).

[11] See Submission to the UN Human Rights Committee, 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States of America', UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1, 12th February 2008, at para.12.

[12] See 'Remarks by the President on National Security', *The White House – Office of the Press Secretary*, 21st May 2009, available at http://www.whitehouse.gov/the_press_office/remarks-by-the-president-on-national-security-5-21-09, (accessed 31st July 2015).

In a similar vein to its predecessor, the Obama Administration asserted that it was engaged in, "a novel type of armed conflict."[13] Despite rejecting over time the broad 'war on terror' rhetoric and acknowledging the need to depart from a 'perpetual war' paradigm, the main contention of the Obama Administration is that it is currently engaged in an armed conflict with Al-Qaeda, the Taliban and associated forces, in response to the armed attacks perpetrated on 11th September 2001, and that the laws of armed conflict are thus applicable.[14] Koh is adamant in his argument that US targeted killings, whether conducted in Afghanistan or elsewhere, are occurring within that armed conflict, and that US targeting practices comply with international humanitarian law.[15] As Arnold rightly submits, there is an obvious attraction for the US to characterise the use of lethal force by armed drone strikes as justified under international humanitarian law, for when that paradigm applies, its broader, more permissive rules on targeting supplant the more restrictive rules of international human rights law, as well as providing immunity to state armed forces by means of the combatants' privilege.[16] As well as decreasing the limitations placed by human rights law on states resorting to such lethal force, the operation of international humanitarian law renders irrelevant the issue of "jurisdiction" discussed in the previous chapter in relation to the extraterritorial applicability of international human rights law. International humanitarian law would provide the US with a broader scope for targeting with lethal force. As noted previously, the human rights standard prescribes that lethal force is only permitted to prevent an imminent threat. International humanitarian law, however, is more permissive, permitting the killing of designated "combatants" and the incurring of collateral damage to civilians and civilian objects, within the *jus in bello* framework of necessity, proportionality, distinction and humanity. Alston recognises the inherent risk in allowing states to:

[13] See 'Respondents' memorandum regarding the Government's detention authority relative to detainees held at Guantanamo Bay', Misc. No. 08-442 (TFH), p.1, para.2.
[14] See Koh, supra n.5.
[15] See Koh, *ibid*.
[16] See Graham Arnold, 'Extra-judicial targeted killing', (2013) Int'l Rev. L, Comp. and Tech., 27:3, 319, at 321.

Unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the framework of human rights….[17]

Alston's concern, of course, was that in so doing, states:

Are not only effectively declaring war against a particular group, but eviscerating key and necessary distinctions between international law frameworks that restrict states' ability to kill arbitrarily.[18]

Thus, Alston essentially contends that if states were allowed to abuse the distinctions between the paradigms of self-defence, human rights and armed conflict, this could have disastrous consequences on these frameworks, which operate to constrain the right of states to use lethal force.[19]

As Ben Emmerson QC notes in his report of 18th September 2013, the United States maintains its assertion that it is currently engaged in a non-international armed conflict of global reach with Al-Qaeda and other forces that are transnational in character,[20] and so the US does not recognise any territorial or temporal limitations on the boundaries of the battlefield and thus on the applicability of the targeting rules of international humanitarian law.[21] The obvious flaw in the US position, it is respectfully submitted, is that it runs entirely contrary to the fundamental principles underlying the law of armed conflict that seek to delineate the scope of the conflict territorially and temporally, so as to mitigate the adverse effects of warfare on civilians. The US position, in essence, is that it is engaged in a continuing, potentially perpetual, global armed conflict with Al-Qaeda, the Taliban and associated forces, unlimited both in terms of time and territory. Such an assertion is, as Arnold rightly submits, unsustainable, and has very limited support amongst commentators outside

[17] See P. Alston, supra n.3, at para.48.
[18] See *ibid.*
[19] See *ibid.*
[20] The shift in contemplating the AUMF conflict against Al-Qaeda as being more akin to a non-international armed conflict, albeit one with a global reach, followed the decision of the US Supreme Court in Hamdan -v- Rumsfeld 548 US 557 (2006).
[21] See Interim Report of Ben Emmerson QC, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, presented to the UN General Assembly, dated 18th September 2013, Ref: A/68/389, at para.62.

the US.[22] There may indeed be instances of localised armed conflicts, as can be seen in parts of Afghanistan and Pakistan, between the US and Al-Qaeda or Taliban fighters in particular areas at particular times. However, this does not, and should not, equate to the recognition of a "global battlefield", unlimited geographically and temporally, where the US is free to target the enemy when and where it is found. International humanitarian law simply does not recognise the concept of an undefined armed conflict, still less the concept of a 'perpetual' armed conflict. Armed conflicts must be capable of being brought to a determinative conclusion, by means of negotiation, victory, or surrender, and the concept of a conflict without geographical or temporal delineations goes against the very raison d'être of international humanitarian law.

The Hamdan[23] case highlights extremely well the complexities of modern warfare, and the difficulties in the classification of the AUMF conflict within traditional legal frameworks. It has been submitted previously that the approach to the *nature* of the conflict with Al-Qaeda and its associated forces taken by both the Bush and Obama Administrations has been less than articulate. It appears, however, to have evolved from considering the purported conflict to be of an international character, to considering it to be of a non-international character, albeit one with a global reach.[24] This evolution in approach appears to reflect the decision of the US Supreme Court in Hamdan, where the Court held that Common Article 3 applied to detainees captured pursuant to the 'war on terror', and thus the Obama Administration appeared to rely on the interpretation of the Supreme Court in support of its assertion that the US was engaged in a non-international armed conflict with Al-Qaeda, the Taliban and associated forces. The US Supreme Court, although clearly aware of the transnational character of the conflict in which the US was engaged, interpreted Common Article 3's "not of an international character" language as applicable to any armed conflict that takes place other than between two states.[25] This, according to the Court, was the, "literal meaning", of Common Article 3.[26] The dissenting Justices in the case, Thomas

[22] See G. Arnold, supra n.16, at 321.
[23] See Hamdan, supra n.20.
[24] See J. Pejic, '"Unlawful/Enemy Combatants": Interpretations and Consequences', in M. Schmitt and J. Pejic (eds.), *International Law and Armed Conflict: Exploring the Fault-lines*, (London, 2007), at 341.
[25] See Hamdan, supra n.20, at 628-631.
[26] See *ibid*, at 630.

and Scalia, opined that the Bush Administration's interpretation of Common Article 3 to the contrary was, "reasonable and should be sustained. The conflict with Al-Qaeda is international in character in the sense that it is occurring in various nations around the globe."[27] It can be difficult to find fault with either interpretation proffered, both are, as the dissenting Justices acknowledged, "plausible and reasonable."[28] Thus, according to Hamdan, any conflict that takes place other than between two states is to be characterised as a non-international armed conflict.

It is submitted that the decision in Hamdan was clearly predicated on the absence of an international armed conflict between two or more states, than on a consideration of the principles of non-international armed conflict in the context of a state responding to violence perpetrated by a non-state actor.[29] Its decision that Common Article 3 was applicable has been cited in support of the existence of a non-international armed conflict with Al-Qaeda, though whether the decision actually provides support for this view, as opposed to simply upholding the applicability of minimum protections under international humanitarian law, has itself proven to be a contentious point. Whilst some commentators read the judgment as at least assuming that there exists a global non-international armed conflict against Al-Qaeda, others question whether the Court in fact took any position on the existence or nature of the armed conflict(s) in Afghanistan or beyond.[30] It is unfortunate that the US Supreme Court took no opportunity to consider the decision of the ICTY in Tadic, and in failing to do so, missed a valuable opportunity to interpret existing international jurisprudence in the context of current US counter-terrorism operations and to develop *opinio juris* in this area. In any event, the decision has been relied on by the US Administration as providing judicial approval or *imprimatur* of its position that the US is engaged in a

[27] See *ibid*, at 718.
[28] See *ibid*, at 719.
[29] See generally International Human Rights and Conflict Centre (Stanford Law School) and Global Justice Clinic (NYU School of Law), 'Living Under Drones: Death, Injury, and Trauma to Civilians from U.S. Drone Practices in Pakistan', September 2012, available at http://www.livingunderdrones.org/wp-content/uploads/2013/10/Stanford-NYU-Living-Under-Drones.pdf, (accessed 14th May 2015).
[30] See, for example, Y. Ku and J. Yoo, 'Hamdan -v- Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch', Constitutional Commentary, 23 (2006), at 111: "[T]he Court held that Common Article 3 applied to the US conflict with Al-Qaeda…The Court concluded that the war with Al-Qaeda in Afghanistan…qualifies as a "conflict not of an international character occurring in the territory of one of the High Contracting Parties."" An opposing view was given by E. Shamir-Boner, in 'Revisiting Hamdan -v- Rumsfeld's Analysis of the Laws of Armed Conflict', 21 Emory Int'l Law Review 601 (2007), at 607-608, noting that the Court, "reserved its position on the nature and classification of the conflict."

global non-international armed conflict with Al-Qaeda, the Taliban and other armed groups.

Therefore, the question of whether there exists such a situation of armed conflict(s) with Al-Qaeda, the Taliban and associated forces, depends on the satisfaction of criteria for determining the existence of a non-international armed conflict. Sylvain Vité rightly submits that, as per the decision of the ICTY in Tadic,[31] the threshold for determining the existence of a non-international armed conflict breaks down into two basic elements: (1) the intensity and protraction of the armed violence, and; (2) the degree of organisation of the parties.[32] Both elements must be evaluated on a case-by-case basis, by reference to key indicators.[33] In determining whether a non-international armed conflict exists, the primary focus must be on the actions of the non-state actor, rather than the state actor.[34] A non-state actor needs only a minimal degree of organisation, sufficient to facilitate collective armed activities against the state.[35] The use of a state's military against the non-state actor can, of course, be indicative of the sufficient organisation of that armed group. As to the requirement of intensity and protraction of violence, this condition is satisfied when the situation of armed violence rises above those, "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."[36] Thus, intensity is measured by, *inter alia*, the seriousness of armed attacks, the expanse and duration of armed clashes, involvement of the UN Security Council, the employment of military weapons and tactics, and the number of civilians affected.[37] Additionally, the duration of the conflict must involve, "protracted armed

[31] See Prosecutor -v- Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, 2nd October 1995, at para.70.
[32] See S. Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', 91 Int'l Review of the Red Cross 69 (2009), at 72.
[33] See *ibid.*
[34] See Tadic, supra n.31, at paras.566-567.
[35] See Prosecutor -v- Musema, Case No. ICTR-96-13-A, ICTR, Judgment of 27th January 2000, at para.248: "The expression "armed conflicts" introduces a material criterion: the existence of open hostilities between armed forces which are organised to a greater or lesser degree. Internal disturbances and tensions, characterised by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organised armed groups within the territory of a single state." See also P. Alston, supra n.3, at para.52.
[36] See Additional Protocol II to the Geneva Conventions (AP II), Relating to the Protection of Victims of Non-International Armed Conflicts, 8th June 1977, 1125 U.N.T.S. 609.
[37] See Prosecutor -v- Boskoski and Tarculovski, Case No. IT-04-82-T, ICTY, Judgment of 10th July 2008, at paras.177, and 182-183. See also Tadic, supra n.31, at para.565.

violence."[38] The Second Additional Protocol to the Geneva Conventions (AP II) affirms that isolated acts of violence do not rise to the level of an armed conflict.[39]

Armed attacks by non-state actors, which engage the victim state's right to self-defence, may also rise to the level of violence required to constitute an armed conflict (subject to the satisfaction of the Tadic criteria of intensity and organisation). Thus, it is possible for a state to respond in self-defence to an armed attack, while simultaneously acting within the context of an armed conflict. The distinction is a marked one – in responding in self-defence to an armed attack, the state must ensure that each and every response is necessary and proportionate to the armed attack, whereas a state acting within the context of an armed conflict only has to ensure that each use of force is necessary and proportionate to the overall military objective. A state is therefore less confined when using force within the armed conflict paradigm. It is for this reason that the United States has asserted both its right of self-defence and the existence of an armed conflict as justifications for lethal drone strikes in the key target states.[40] Returning to Koh's ASIL speech in March 2010, unfortunately Koh makes no comment as to whether or not the US regards Al-Qaeda, the Taliban and associated forces to collectively constitute a single organised armed group, or as multiple armed groups. Further, it is unclear from Koh's speech whether the US regards the violence perpetrated by these groups to meet the threshold of armed conflict on an individual or collective basis.

O'Connell maintains that the justifications of self-defence and armed conflict proffered by Koh are, "mutually contradictory", and that the US must *either* be acting in self-defence in response to an ongoing armed attack, *or* be engaged in violence that rises to the level of an armed conflict.[41] This writer is unsure whether he can subscribe to O'Connell's view in this respect. It is not a universally accepted view that the two paradigms are mutually exclusive. Indeed, it is perfectly possible for a state to be acting in self-defence in response to an armed attack by another state, which is simultaneously an armed conflict. It is also perfectly possible for a victim state to

[38] See Tadic, *ibid*, at para.561.
[39] See AP II, supra n.36, at Article 1(2). See also Tadic, *ibid*, at para.562.
[40] See Koh, supra n.5.
[41] See O'Connell, 'Remarks: The Resort to Drones under International Law', 39 Denv. J. Int'l Law and Pol'y 585 (2011), at 592.

respond in self-defence to an armed attack by a non-state actor, with the level of violence rising to a sufficient intensity and protraction so as to evolve into an armed conflict.

As Sassoli notes, the Second Additional Protocol to the Geneva Conventions excludes:

Situations of internal disturbances and tensions…and other acts of a similar nature….Relevant factors that contribute to an armed conflict include: intensity, number of active participants…duration and protracted character of the violence; organisation and discipline of the parties; capacity to respect international humanitarian law; collective, open and co-ordinated character of the hostilities; direct involvement of governmental armed force…and de facto authority by the non-state actor over potential victims.[42]

One of the most novel, and controversial, aspects of the US's assertion that it is engaged in an armed conflict with Al-Qaeda and other armed groups, is the assertion that the conflict is of global reach, unlimited territorially.[43] Thus, the US appears to suggest that international humanitarian law can apply on a global scale to a potentially limitless conflict with no territorial nexus. The conflict is not limited to any specific territory, but 'follows' the members of Al-Qaeda and its associates, thus providing a basis for invocation of international humanitarian law rules on targeting with lethal force anywhere in the world.[44] Lehto describes this as a, "fundamentally new aspect to the arguments," concerning armed conflict with armed non-state actors.[45]
It is respectfully submitted that the repeated assertions of the US Administration that it is engaged in a global non-international armed conflict with Al-Qaeda and its associated forces fail to acknowledge that the aforementioned criteria for such a conflict are premised upon an assumption that the conflict is geographically

[42] See M. Sassoli, 'Transnational Armed Groups and International Humanitarian Law', 6 HPCR Occasional Paper Series 1 (2006), at 6.
[43] See G. Bush, 'State of the Union Address', 29th January 2002.
[44] See K. Anderson, 'Targeted Killing and Drone Warfare: How We Came to Debate Whether there Is a Legal Geography of War', *Hoover Institute Online Volume Essay 'Future Challenges'*, SSRN Working Paper Version, 26th April 2011, at pp.3-15.
[45] See M. Lehto, 'War on Terror – Armed Conflict with Al-Qaeda?', 78(4) Nordic Journal of International Law (2009), at pp.505-506.

delineated. As Emmerson rightly notes, the intensity criterion has traditionally been measured by an analysis of the frequency and severity of armed attacks occurring within a defined area.[46] Delineating the geographical boundaries of a conflict serves the practical purpose of determining whether the targeting rules of international humanitarian law are applicable to a particular operation, otherwise, as Emmerson states, the law would permit attacks in areas that are otherwise free of hostilities.[47]

However, developments in practice have resulted in a flexible approach to the issue of the territorial scope of a non-international armed conflict, whereby it is perfectly acceptable, and well accepted, to make allowance for a "spill over" non-international armed conflict, where an armed conflict occurring within one state "spills" across the territorial borders of a neighbouring state.[48] This is a reasonable and pragmatic approach, reflecting the nature of contemporary conflict and the often transnational nature of the non-state actor's operations. However, it is the assertions of the US that the non-international armed conflict in which it is currently engaged is of global reach, which has drawn international criticism, being described as, "perhaps the most controversial aspect," of contemporary US foreign and counter-terrorism policy.[49] Lehto, for example, states that:

[A]lthough a non-international armed conflict can extend to the territory of several states, the geographical scope of the conflict must be defined.[50]

The widespread criticism of the US position is almost certainly because the very notion of an armed conflict with no territorial limitations does not sit easily with the inherently limited, definable and exceptional nature of armed conflict and international humanitarian law. Only in exceptional circumstances will a situation of armed violence rise to satisfy the threshold of armed conflict and thus engage the application of international humanitarian law.

[46] See B. Emmerson, supra n.21, at para.63.
[47] See Emmerson, *ibid*.
[48] See Emmerson, *ibid*.
[49] See M. Lehto, supra n.45, at pp.505-506.
[50] See *ibid*, at p.508.

Proponents of the US approach suggest that it is necessary to ensure that individuals forming part of an armed conflict, but operating outside a zone of active hostilities, cannot escape the consequences of international humanitarian law. Lewis, for example, expresses concern that individuals should not be, "immune from targeting based purely on geography."[51] Thus, Lewis submits, if individuals are engaged in hostilities from the territory of another state, the law must allow them to be targeted on the same basis as those participating within a zone of active hostilities.[52] This is echoed by Schmitt, who argues that the nature and geography of conflict has changed, and that where a state is engaged in a non-international armed conflict with a non-state actor operating transnationally, there is no traditional battlefield.[53] Schmitt points to the absence of state practice and the paucity of *opinio juris* pointing to the existence of a legal rule confining a non-international armed conflict to a defined geographical area, arguing that the territorial approach is *lex feranda* rather than *lex lata*, what the law should be in future as opposed to what the law is at present.[54]

The majority of commentators, however, take the territorial approach. While acknowledging that a non-international armed conflict can extend beyond the borders of one state, the legal definition of a non-international armed conflict still requires that, for international humanitarian law to be applicable in any state, the threshold of conflict must be met within that particular state.[55] Otherwise, the standards of international humanitarian law may be applied in response to threats and sporadic armed violence, situations properly falling within the purview of the international human rights/law enforcement paradigm.

It is submitted that, at a minimum, there must exist a nexus to a particular locus of an armed conflict where the legal criteria are met, in order for international humanitarian law to apply.[56] If individuals are to be targeted remotely, such as by drone strikes, it

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[51] See M. Lewis, 'The Boundaries of the Battlefield', *Opinio Juris*, 15th May 2011, at para.5, available at http://opiniojuris.org/2011/05/11/the-boundaries-of-the-battlefield, (accessed 4th August 2015).
[52] See Lewis, *ibid*.
[53] See M. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', Harvard National Security Journal, Vol.1 (2010).
[54] See *ibid*.
[55] See N. Schrijver and L. Herik, 'Leiden Policy Recommendations on Counter-Terrorism and International Law', Grotius Centre for International Legal Studies, 1st April 2010, at para.63, available at http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf, (accessed 5th August 2015).
[56] See *ibid*.

must be in accordance with the rules governing legitimate targeting in respect of that conflict.

Even if one accepts the application of international humanitarian law in principle, the geographic locus far from the 'hot' battlefield scenario may, in certain circumstances, call for capture rather than kill where this is feasible.[57] The applicability of international humanitarian law may, therefore, not have the blanket effect in all situations of permitting a state to engage in the use of lethal force anywhere in the world.

The ICRC has noted the lack of consensus on this issue, taking the view that the existence of a non-international armed conflict can only be determined by reference to each situation of violence on a case-by-case basis. The ICRC maintains that international humanitarian law does not permit the targeting of individuals directly participating in hostilities who are located in non-belligerent states, and does not recognise the concept of a "global battlefield".[58] This territorial approach finds support among most international lawyers. Indeed, for the most part, the US position finds support only among US commentators. In this respect, Anderson, in testimony to the US House of Representatives, noted that the US is, "remarkably indifferent to the increasingly vehement and pronounced rejection," of the view that the US can, "simply follow combatants anywhere and attack them."[59]

This writer would subscribe to the orthodox, territorial approach, although it is accepted that the debate as to the proper territorial delineations of the current non-international armed conflict is far from settled, and the law in this area is likely to be debated in the coming years.

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[57] See N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, at p.7.

[58] See ICRC, 'The Use of Armed Drones Must Comply With Laws', 10th May 2013, available at http://www.icrc.org/eng/resources/documents/interview/2013/05/10-drone-weapons-ihl.htm, (accessed 7th July 2014).

[59] See K. Anderson, *Rise of the Drones: Unmanned Systems and the Future of War*, House of Representatives Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, (Congressional Research Service, Nimble Books LLC, 23rd March 2010), at p.5, para.11.

5.3 A Non-International Armed Conflict with Al-Qaeda and Associated Forces?

It must be submitted at the outset that, as regards the existence of any situation of non-international armed conflict with Al-Qaeda, the attacks of 11th September 2001 would certainly have satisfied the intensity threshold,[60] and at the time of the attacks, Al-Qaeda's central command and organisational structures were quite rigid throughout the transnational network. Osama bin Laden's leadership was unquestioned and the hierarchy known and established. More difficult is the issue of whether armed violence by Al-Qaeda and associated forces has continued to satisfy the intensity criterion in the years following 9/11, and in light of developments since then, particularly as a result of US efforts against the network. Do the frequency, scale and nature of Al-Qaeda attacks remain such that they can be considered sufficiently intense so as to amount to an armed conflict, rather than sporadic acts of lethal armed violence? It has been suggested that, in order to continue to satisfy the threshold, it would be necessary to amalgamate all major acts of violence attributed to Al-Qaeda in recent years, such as the Bali bombings in October 2002, the Madrid and London bombings of March and July 2005, and the attacks in Mumbai of July 2011.[61] The problem with this approach, however, is that the governments of the other victim states, unlike that of the US, have utterly rejected the notion of those terrorist attacks as being acts of an armed conflict, instead viewing them as criminal acts of terrorism.[62] Further, it can only be doubted that the various attacks emanated from the same source, so as to constitute violence that might satisfy the intensity threshold. Helen Duffy submits that, in any event, it is the 'organisation' prong of the Tadic criteria that presents the greater obstacle for those proponents of the notion of an

[60] It is important to note that the intensity 'indicators' set out by the ICTY relating to the criterion of protracted violence refer more to the intensity than to the duration of the violence. See Prosecutor -v-Ramush Haradinaj, Case No. ICTY-04-84-T, Judgment, 3rd April 2008, at paras.49 and 60.
[61] See 'Remarks by the President on a New Strategy for Afghanistan and Pakistan', 27th March 2009, available at http://www.whitehouse.gov/the_press_office/remarks-by-the-president-on-a-new-strategy-for-Afghanistan-and-Pakistan/, (accessed 1st August 2015).
[62] See 'Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights: Assessing Damage, Urging Action', International Commission of Jurists, 2009, retrieved from http://ejp.icj.org/IMG/EJP-Report.pdf, (accessed 2nd August 2015).

armed conflict with Al-Qaeda and associated forces.[63] Duffy expresses doubts as to whether Al-Qaeda could possess the characteristics of an 'armed group' as understood by international humanitarian law, such that it could be a party to a non-international armed conflict, pointing to ICTY jurisprudence, which, she argues, makes it clear that an armed conflict can only exist with a non-state actor that has a sufficient level of organisation, to be assessed by reference to 'indicative' factors, including whether the group has a sufficiently identifiable scope and membership, sufficient organisation and structure, and is capable of abiding by international humanitarian law.[64]

It is submitted that, as a result of US military and counter-terrorism operations in the aftermath of 9/11, the capacity and core structures of Al-Qaeda have, admittedly, been depleted, to the extent that it has been viewed not so much as a single organisation with a central command and control structure, but more as a series of loosely connected operational and support cells, which no longer satisfy the 'organisation' prong of Tadic. Al-Qaeda is not the same organisation today that it was prior to and in the immediate aftermath of 9/11.[65] Indeed, as Duffy submits, it is unclear whether the Al-Qaeda of today can reasonably be conceived of as one organisation, or as disparate regional, national, local, or even individual, manifestations of the Al-Qaeda ideology.[66] The matter is further complicated by the repeated assertions of the US that it is also engaged in an armed conflict with Al-Qaeda's 'associates' or 'affiliates'. The proper functioning of international humanitarian law requires the identity of the parties to the armed conflict to be known, yet the US continues to shroud the identity of these 'associates' in secrecy. While it does maintain a list of disparate terrorist groupings, whose affiliates are classified as 'enemy combatants', such as al-Shabaab in Somalia, the potential breadth of those groups that might come under the umbrella of 'associates' raises doubts as to the precise identification of parties to any conflict.[67]

While concerns have been raised about so-called 'lone wolf' attacks, where individuals perpetrate isolated, albeit deadly, terrorist acts inspired by the anti-western ideology of Al-Qaeda, the evidence points to a depletion in the resources available to Al-Qaeda and a decimation of its higher ranks as a direct consequence of US efforts against it, portraying an image of a network that is increasingly decentralised, reliant

[63] See Helen Duffy, *The 'War on Terror' and the Framework of International Law*, Second Edition, (Cambridge, 2014), at 395-399.
[64] See Haradinaj, supra n.60, at para.60. See also Boskoski, supra n.37, at para.194.
[65] See Duffy, supra n.63, at 396.
[66] See *ibid*.
[67] See *ibid*, at 397.

on individual, sporadic and largely uncoordinated attacks, and one that has been largely displaced as leader of the global jihad movement by the so-called Islamic State. Thus, the Al-Qaeda of today bears no characteristics required to constitute an identifiable, organised party to an armed conflict, and so the prevailing view is that there is no longer a situation of armed conflict subsisting between the US and Al-Qaeda and its associates to which international humanitarian law applies. In relation to so-called 'lone wolf' attacks, individual acts of terrorism carried out on the basis of an Al-Qaeda 'franchise' model cannot be attributed to Al-Qaeda for the purposes of constituting a non-state party to a non-international armed conflict. It follows from this that the legality of US actions against Al-Qaeda and its associates falls to be determined by the international human rights law/law enforcement paradigm.[68]

Whether particular armed groups qualify as parties to an armed conflict largely turns on the specific facts. While Al-Qaeda may certainly have played a role in the Afghanistan conflict alongside the Taliban, and may have constituted a party to the non-international armed conflict following the overthrow of the Taliban in March 2002, this status would almost certainly have been lost in consequence of the degradation of its organisational base as a result of US military action against its structure, hierarchy and resources.

Despite the rhetorical shifts, the Obama Administration consistently maintains that it is currently engaged in an armed conflict with Al-Qaeda and associated forces, and maintains the right to wage war on suspected terrorists and terrorist groups. However, this broad approach, which treats individual terrorists and armed groups as parties to an armed conflict, rather than criminals to be dealt with under the international human rights law/law enforcement paradigm, finds little support among other states and the majority of commentators.[69]

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[68] See Eminent Jurists Panel Report, supra n.62, at p.54: "[t]he dominant view seems to be that Al-Qaeda is a loosely connected network rather than a single transnational organisation. However, even if Al-Qaeda were considered to be a cohesive and well-ordered collective that shared common strategies and tactics, it is still difficult to conceive of it as a unitary armed force and, as such, a party to the conflict. The inclusion of indeterminate "associated" groups makes it even more difficult…Both practically and legally, there is no identifiable party to the conflict with which negotiation, defeat or surrender can occur."

[69] See ICRC, 'International Humanitarian Law and Terrorism: Questions and Answers', 1st January 2011, available at http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm, (accessed 2nd August 2015).

5.4 Afghanistan

Afghanistan was the first theatre of armed conflict in the aftermath of the 9/11 attacks, and in contrast to the uncertainty discussed *supra* in relation to the somewhat ambiguous notions of the 'war on terror' or a 'war against terrorists', or even a non-international armed conflict with global reach, it is quite clear that an international armed conflict arose in Afghanistan from 7th October 2001 between the United States and its allies on the one hand, and Afghanistan, as represented by the *de facto* government led by the Taliban, together with its supporters (including elements of Al-Qaeda) on the other.[70] It should be noted that, prior to the military action launched in October 2001, there was a situation of non-international armed conflict in Afghanistan, between the *de facto* government of the Taliban and the Northern Alliance. Thus, by the end of 2001, an international armed conflict existed alongside a non-international armed conflict.

The classification of the conflict(s) becomes more complex over time, and much of this stems from assertions by both the Bush and Obama Administrations of a broader purported conflict with Al-Qaeda and associated forces, and the uncertain relationship of this broader conflict with those occurring in Afghanistan. It is difficult to determine the extent to which the conflicts occurring in Afghanistan at this time had been subsumed by any broader conflict against Al-Qaeda and associated forces.

By 19th June 2002, the Taliban had been removed from power, and a government led by President Hamid Karzai, friendly to the US and its allies, was sworn in. This brought the international armed conflict to an end. From being the once *de facto* government of Afghanistan, the Taliban became a non-state armed group. There continued a situation of various non-international armed conflicts fought between armed groups, including the remnants of the Taliban and elements of Al-Qaeda against the state of Afghanistan and US-led coalition forces mandated under, *inter alia*, UN Security Council Resolution 1386.[71] There is little support among

[70] Questions have arisen as to the relationship between Al-Qaeda and the Taliban in Afghanistan, in particular whether the former fell under the overall control of the latter, or vice versa, or whether they are one and same party to the conflict or not. Francoise Hampson submits that for all intents and purposes there was one international armed conflict at this time. See F. Hampson, 'Afghanistan 2001-2010', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts*, (Oxford, 2012), at p.242.

[71] See A. Cole, 'Legal Issues in Forming the Coalition', in M. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, 85 (2009), US Naval War College International Law Studies, at p.146.

commentators for the view that the continuing involvement of the US and other states in Afghanistan following the overthrow of the Taliban regime in June 2002 meant that the conflict remained international in nature.[72]

As to whether there remains, at the time of writing, a situation of armed conflict(s) in Afghanistan, it is respectfully submitted that, while the international armed conflict may have long since concluded, the criteria for the existence of a non-state armed conflict continue to be satisfied. Al-Qaeda and the Taliban may have been subdued, but they have not been defeated, and still pose a significant, and deadly, threat to security, capable of planning and executing lethal attacks. Whether the criteria continue to be satisfied must be assessed on an ongoing basis, particularly in light of the graduated withdrawal of US and ISAF forces, which commenced in late 2014. At some future point, the intensity prong will no longer be satisfied, and acts of armed violence perpetrated by the Taliban will then fall below the threshold of armed conflict, within the purview of the law enforcement/international human rights law paradigm. However, for the moment, the aforementioned non-international armed conflict between the Afghan government and the Taliban (and elements of Al-Qaeda) continues to subsist, thereby engaging the application of international humanitarian law.[73]

Signature drone strikes currently undertaken by the US in Afghanistan are done so with the consent of the civilian government in Kabul, and are, "ordered by a local commander, overseen by military lawyers."[74] Thus, it is submitted, the legality of such strikes, given that they occur with the consent of the Afghan government, within

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[72] See F. Hampson, supra n.70, at p.242.

[73] See Annyssa Bellal et al, 'International Law and Armed Non-State Actors in Afghanistan', 93 Int'l Rev. of the Red Cross 47 (2011), at 51, available at http://www.icrc.org/eng/assets/files/review/2011/icrc-881-bellal-giacca-casey-maslen.pdf, (accessed 10th March 2015). See also Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaeda or An Associated Force', available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf, which makes repeated references to, "applicable law of war principles," and to the conflict as being, "non-international." That the Taliban in Afghanistan remains a potent threat to the Afghan government, and that there continues to exist a situation of armed conflict, has been evidenced further at the time of writing, as the Taliban have recaptured the strategically important district of Musa Qala in Helmand Province. See D. Moylan, 'Afghan district British soldiers died fighting to liberate falls to Taliban', *The Telegraph*, 26th August 2015, available at http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/11825097/Afghan-district-British-soldiers-died-fighting-to-liberate-falls-to-Taliban.html, (accessed 29th August 2015).

[74] See N. Shachtman, 'Military Stats Reveal Epicentre of U.S. Drone War', WIRED, 9th November 2012, available at http://www.wired.com/dangerroom/2012/11/drones-afghan-air-war/, (accessed 9th July 2015).

a situation of non-international armed conflict, falls to be determined by the applicable rules of international humanitarian law.

5.5 Pakistan

Pakistan has been the principal focus of US drone strikes in recent years. However, it is important to emphasise at the outset that the United States is not, and has never been, in a situation of international armed conflict with the state of Pakistan. However, the uneasy, often strained, relationship between the US and Pakistan was previously discussed in Chapter 3 of this work, and although it was noted therein that there has been some unease at the frequency and intensity of US drone strikes in the tribal regions of north-west Pakistan, there have been instances where certain strikes have been celebrated by Pakistani authorities.[75] The state of lawlessness that existed, and still exists, as a consequence of the inability of the Pakistani government to effectively control and administer the FATA region of Pakistan, enabled it to become a base of operations and a place of sanctuary for Taliban and Al-Qaeda fighters. Despite arguments that the FATA region is, "ungoverned territory", outside the central government's authority and control, the Pakistani government has repeatedly protested that US signature strikes in the region, "compromise the sovereignty of Pakistan."[76] This has not prevented Pakistan's military and intelligence agencies assisting in the execution of these strikes.[77] The intended targets of drone strikes in north-west Pakistan are Al-Qaeda and Taliban fighters and their associates.[78]
The conflict in Pakistan has been characterised as part and parcel of the non-international armed conflict in Afghanistan, a "spill-over" of that conflict.[79] Signature strikes make up a significant proportion of US drone strikes in Pakistan, and the estimates on the number of people killed in Pakistan as a result of drone strikes, 2562-

[75] See Shuja Nawaz, 'Drone Attacks Inside Pakistan: Wayang or Willing Suspension of Disbelief?', 12 Geo. J. Int'l Aff. 79, 80 (2011), available at http://journal.georgetown.edu/wp-content/uploads/Drone-Attacks-Inside-Pakistan-Wayang-or-Willing-Suspension-of-Disbelief.pdf.
[76] See *ibid*, at 84.
[77] See generally Report of Amnesty International, "Will I Be Next?" - US Drone Strikes in Pakistan, October 2013, Ref: ASA 33/013/2013.
[78] See Koh, supra n.5.
[79] See Susan Breau et al, *Discussion Paper 2: Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict*, OXFORD RESEARCH GROUP 1,1 (June 2011), available at http://www.oxfordresearchgroup.org.uk/sites/default/files.ORG%20Drone%20Attacks%20and%20International%20Law%20Report.pdf, (accessed 13th November 2014).

3325 between 2004 and 2012, are staggering.[80] It is worth considering, therefore, whether drone strikes in north-west Pakistan can legally be regarded as 'part and parcel' of the conflict in Afghanistan.[81]

On 31st January 2012, President Obama stated that drone strikes in Pakistan, being undertaken by the CIA, were a, "targeted, focused effort at the people who are on a list of active terrorists," and that the US was not just, "sending in a whole bunch of strikes willy-nilly," but targeting, "Al-Qaeda suspects who are up in very rough terrain along the border between Afghanistan and Pakistan."[82]

As Lubell rightly states, there must exist a clear nexus to an armed conflict with a clearly defined non-state actor.[83] Koh's ASIL speech is clearly indicative of US efforts to establish such a nexus between the activities of Al-Qaeda and the Taliban, in both Afghanistan and Pakistan, with the US Administration distancing itself from the ill-defined 'global war on terror' rhetoric of the Bush Administration, instead speaking in terms of a war on *specific* terrorist groups – Al-Qaeda, the Taliban and associated forces.[84] As Melzer rightly notes:

Whether or not a group is involved in hostilities does not only depend on whether it resorts to organised armed violence temporally and geographically coinciding with a situation of armed conflict, but also on whether such violence is designed to support one of the belligerents against another (belligerent nexus).[85]

Eric Holder, during his tenure as US Attorney-General, addressed the issue of drone strikes in a speech in March 2012, stating that the US's, "legal authority is not confined to the battlefields in Afghanistan," and that there are circumstances in which

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[80] See 'Drone Strikes Kill, Maim and Traumatise Too Many Civilians, U.S. Study Says', CNN News, 25th September 2012, available at http://www.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes/index.html@iref=allsearch, (accessed 9th July 2015). See also 'Living Under Drones', supra n.41.

[81] Where, in contrast, Pakistani or Afghani Taliban members are planning and executing cross-border operations in Afghanistan, or the US is conducting drone strikes in support of the Pakistani government's non-international armed conflict with the Pakistani Taliban (TTP), these are clearly within the context of a specific armed conflict.

[82] See 'Obama discusses U.S. use of drones in online Q&A – video', *The Guardian*, 31st January 2012, available at http://www.theguardian.co.uk/world/video/2012/jan/31/obama-us-drones-video, (accessed 10th July 2015).

[83] See N. Lubell, supra n.1, at 113-114.

[84] See Koh, supra n.5.

[85] See N. Melzer, 'Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', New York Univ. J. Int'l Law and Pol, Vol.42 (2010), at p.841.

the use of lethal force in the territory of another state against senior operational leaders of Al-Qaeda or its associated forces, who are actively engaged in hostilities, would be lawful.[86] Such circumstances would, no doubt, include where it was believed that the individual posed an imminent threat of violent attack against the United States, where capture is not feasible, and where the operation would be conducted in a manner consistent with applicable law of war principles.[87] Regrettably, Mr Holder's statement does not address directly the issue of whether such strikes in north-west Pakistan occur within the context of an armed conflict, either as part of a separate non-international armed conflict or as a spill-over from the conflict in Afghanistan: an oral commitment to conduct operations, including drone strikes, "in a manner consistent with applicable law of war principles,"[88] does not necessarily mean that there exists a situation of armed conflict engaging the application of international humanitarian law.

To the extent that a sufficient nexus exists between the armed conflict in Afghanistan between the US, the Taliban and Al-Qaeda post-9/11, and the acts of a person directly participating in hostilities operating from north-west Pakistan, it can be said that, "the fight follows the fighter."[89] The effect of this "extension" of the theatre of conflict is that international humanitarian law applies both to the immediate area of hostilities (in this instance, Afghanistan), and, "further afield," (in this instance, north-west Pakistan), subject to the requirement of a, "substantial relation."[90] In this sense, therefore, O'Connell would be incorrect in her submission that, "[a]rmed conflict has a territorial aspect. It has territorial limits. It exists where, but only where, fighting by organised armed groups is intense and lasts for a significant period."[91] Further, the ICTY in Kunarac stated that, "there is no necessary correlation between the area where the actual fighting is taking place, and the geographical reach of the laws of

[86] See 'Attorney-General Eric Holder defends killing of American terror suspects', *Daily Telegraph*, 6th March 2012, available at http://www.thetelegraph.co.uk/news/worldnews/al-qaeda/9125038/Attorney-General-Eric-Holder-defends-killing-of-american-terror-suspects.html, (accessed 10th July 2015).
[87] See *ibid.*
[88] See *ibid.*
[89] See G. Blum and P. Heymann, 'Law and Policy of Targeted Killing', 1 Harv. Nat'l Security J. 145 (2010), at 168.
[90] See Prosecutor -v- Kunarac, Case No. IT-96-23 and IT-96-23/1-A, Judgment, ICTY, 12th June 2002, at para.60: "[t]he laws of war may frequently encompass acts which, though they are not committed in the theatre of conflict, are substantially related to it."
[91] See Declaration of Professor Mary Ellen O'Connell, Al-Aulaqi -v- Obama, 8th October 2010, at 7, available at http://www.aclu.org/files/assets/O_Connell_Declaration.100810.pdf.

war."[92] Of course, this understanding must be read in conformity with the Tadic criteria of intensity and organisation.

One could argue that, as an alternative to the notion of the "extension" of the Afghanistan conflict into north-west Pakistan, that US drone strikes in north-west Pakistan have "overlapped" with the separate non-international armed conflict going on between the Pakistani government, the Taliban (both the Afghan and the TTP/Pakistani Taliban) and Al-Qaeda. This "overlap" understanding of armed conflict was clearly recognised by the ICTY in Tadic:

It is indisputable that an armed conflict is international if it takes place between two or more states. In addition, in case of an internal armed conflict breaking out on the territory of a state, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if: (i) another state intervenes in that conflict through its troops; or, alternatively, if (ii) some of the participants in the internal armed conflict act on behalf of that state.[93]

It is worth mentioning in this context that the Pakistani Minister of Foreign Affairs, Hina Rabbani Khar's, condemnation of US drone strikes in Pakistan on 17th March 2011 was phrased in the language of armed conflict, stating that, "[s]uch strikes constitute a matter of serious concern and raise issues regarding respect for human rights and humanitarian law. Irresponsible and unlawful conduct cannot be justified on any grounds."[94] While the Minister's statement was not particularly clear in recognising that the US was engaged in an armed conflict with the Taliban and Al-Qaeda in Pakistan, it certainly contributes to the case for the existence of such a conflict.

It is therefore submitted that the level of armed violence in the tribal regions of Pakistan is of sufficient intensity and organisation to satisfy the Tadic criteria, thereby constituting a non-international armed conflict. Given that the targets of US drone strikes in those regions are members of Al-Qaeda, the Taliban, and those responsible

[92] See Kunarac, supra n.90, at para.57.
[93] See Tadic, supra n.31, at para.84.
[94] See Pakistan Ministry of Foreign Affairs, 'Pakistan Strongly Condemns Drone Attacks', press release n.104/2011 (17th March 2011), available at http://www.mofa.gov.pk/Press_Releases/2011/Mar/Pr_104.htm.

for perpetrating the attacks of 11th September 2001, it is further submitted that there exists a sufficiently clear nexus to regard the conflict in north-west Pakistan as an extension (spill-over) of the conflict in Afghanistan, although it should be noted that this is not the justification advanced by the United States in respect of drone strikes carried out in Pakistan, which is rather unfortunate, as there may well be a basis for the legitimate use of lethal force under international humanitarian law, although only against such individuals participating in operations against the US and its allies in Afghanistan.[95] Thus, it is submitted, while the legality of US drone strikes in the FATA region falls to be determined by the international humanitarian law paradigm, the legality of strikes occurring beyond those regions would fall to be assessed under the rules of the international human rights law/law enforcement paradigm.[96]

5.6 Yemen

The US drone program presently operating in Yemen was discussed previously in Chapter 3. What is clear is that a different scenario arises in relation to Yemen, based on its own unique circumstances and on its greater relative distance from the 'hot' battlefield of Afghanistan. It was the drone strike that killed Anwar al-Aulaqi, a US citizen, on 30th September 2011, that brought the US drone program operating in Yemen to the fore, and the program has been controversial, with reports of the effects of numerous strikes since 2011 bringing that controversy into sharp focus.[97] In considering whether US drone strikes in Yemen occur within a situation of armed conflict and thus within the purview of international humanitarian law, a key question of fact to be assessed on an ongoing basis is whether the intensity prong of the Tadic criteria are met on the basis of armed violence occurring within Yemen itself. It has been suggested that the level of armed violence between Al-Qaeda in the Arabian Peninsula (AQAP) and the Yemeni government has, since 2011 at least, reached the threshold of a non-international armed conflict.[98] The open question that remains is

[95] See N. Lubell, 'Classification of Conflict', in E. Wilmshurst (ed.), *International Law and the Classification of Conflict*, supra n.70, at p.255 on the conflict in Afghanistan, "crossing borders," and noting that, "if the individual or group are continuing to engage in the armed conflict from their new location, then operations taken against them could be considered to be part of the armed conflict.
[96] See N. Lubell, supra n.1, at 225.
[97] See Report of Human Rights Watch, "Between a Drone and Al-Qaeda" – The Civilian Cost of US Targeted Killings in Yemen, October 2013.
[98] See *ibid*.

whether the United States has become a party to this conflict. The US, it appears, has not claimed that this is the case.[99] While the notion of a global non-international armed conflict with Al-Qaeda and associated forces can, and has been, disputed by commentators, as discussed *supra*, on the facts there can be little doubt that AQAP meets the criteria of a party to a non-international armed conflict, given the nature and scale of its activities in Yemen, its level of membership and degree of organisation, and the resources at its disposal.[100]

The Washington Post reported in early 2010 that, "U.S. military teams and intelligence agencies are deeply involved in secret joint operations with Yemeni troops who in the past six weeks have killed scores of people, among them six of fifteen top leaders of a regional Al-Qaeda affiliate, according to senior administration officials."[101] It was also reported that, "American advisers are acting as intermediaries between Yemeni forces and hundreds of US military and intelligence officers…the combined efforts have resulted in more than two dozen ground raids and air-strikes."[102] President Obama approved the use of signature drone strikes in Yemen in 2011, and these strikes are undertaken, with the consent of the Yemeni government, from the US Africa Command based in Djibouti.[103]

It was discussed in Chapter 3 that, as well as being engaged in a conflict against AQAP, the Yemeni government is presently engaged in operations against an insurrection by the Houthi, a Shia militia group, potentially aided by the main regional Shia power, Iran, that has captured large swathes of territory. Saudi Arabia, the main regional Sunni power, has intervened militarily in support of the Yemeni government against the Houthi. AQAP has taken full advantage of the Houthi insurrection, most notably seizing the coastal city of Al Mukalla on 2nd April 2015. Despite the death of its leader, Nasir al-Wuhayshi, in a US drone strike in June 2015, AQAP remains of sufficient organisation and a potent threat to the Yemeni government, that there continues to exist a situation of non-international armed conflict between the two parties. It is respectfully submitted, therefore, that the nature

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[99] See *ibid*, at pp.84-85.
[100] See *ibid.*
[101] See Dana Priest, 'U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Drone Strikes', *The Washington Post*, 27th January 2010, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html, (accessed 11th July 2015).
[102] See *ibid*.
[103] See S. Breau et al, supra n.79.

of the US's intervention in Yemen, undertaking drone strikes on behalf, and with the consent of, the Yemeni government, has been such that its actions have 'overlapped' with the ongoing non-international armed conflict between AQAP and the Yemeni government, and so on the basis of this 'nexus' between that non-international armed conflict and the US drone strikes, the legality of such strikes falls to be determined by international humanitarian law.

5.7 The Fundamentals of International Humanitarian Law

On the basis of the above analysis, it can be submitted, therefore, with a fair degree of certainty that, in those key target states where signature drone strikes are most frequent – Afghanistan, Pakistan, and Yemen, that international humanitarian law is applicable, with equal force, and to all parties. Thus, the legality of signature strikes in those states falls to be determined by the *lex specialis* of international humanitarian law, and the US is under an obligation to ensure that such strikes are carried out in a manner consistent with the rules of that paradigm – necessity, proportionality, distinction, and humanity.

International humanitarian law requires that a state use military force that is *necessary* to achieve the objectives of a military operation, that causes incidental loss of life or civilian casualties *proportionate* to the military objective, and that *distinguishes* between legitimate military targets and civilians.[104] These fundamental principles are codified within the Geneva Conventions and the Additional Protocols thereto, and also, as the ICJ noted in Nuclear Weapons, "constitute intransgressible principles of international customary law."[105] International humanitarian law does not require perfection in the execution of a military attack,[106] nor does it prohibit all civilian casualties. However, these three interrelated and indivisible principles assessed collectively are intended to provide sufficient protection for civilians.
It is, of course, very tempting to conclude that international humanitarian law, while applicable to the aforementioned conflicts, has become somewhat irrelevant, given

[104] See First Additional Protocol to the Geneva Conventions of 12th August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), 8th June 1977, 1125 U.N.T.S. 3, at Art. X, Art.57(1)(iii), and Art.57(1)(i).
[105] See Nuclear Weapons, supra n.9, at para.79.
[106] See First Additional Protocol (AP I), supra n.104, at Art.51.

that the main enemy is an armed non-state actor. However, such a conclusion would be difficult to reconcile with Common Article 3, which anticipated the existence of such groups, and which clearly applies to armed conflicts with such groups, notwithstanding that such groups are not themselves parties to relevant treaties.[107] According to the ICRC:

To what extent Common Article 3 directly addresses armed non-state actors (ANSAs) has been debated. The article states that 'each Party to the conflict shall be bound to apply, as a minimum', its provisions. It has sometimes been claimed that the term 'each Party' does not apply to ANSAs, even though they may meet the criteria for being a Party to the conflict, but only to government armed forces. State practice, international case law, and scholarship, have, however, confirmed that Common Article 3 applies to such ANSAs directly…Suffice to acknowledge that, although the legal reasoning to sustain this conclusion remains unsettled, it has now become uncontroversial, even 'commonplace', that ANSAs are bound by IHL.[108]

Further, a resolution adopted in 1970 by the UN General Assembly speaks of combatants in all armed conflicts, suggesting that attacks on transnational armed groups are still subject to the principle of distinction.[109] The language of Article 51(3) of the First Additional Protocol is succinct: "civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[110] However, some scholars have argued that the rise of armed non-state actors operating transnationally has "discredited" the traditional orientation of international humanitarian law. Wolfrum, for example, has argued that the paradigm is in a period of transition, referring to a "reformulation" of concepts of self-defence that have impacted on the "legitimacy" of the resort to the use of force and the conduct of hostilities.[111] However, the Charter rules were affirmed at the World Summit in 2005, and the justifications proffered by both the Bush and Obama Administrations for the US drone program have been couched in terms of the

[107] See Bellal et al, supra n.73, at 55.
[108] See *ibid*, at 55-56.
[109] See 'Practice Relating to Rule 6. Civilians' Loss of Protection from Attack', ICRC, available at http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule6, (accessed 13th July 2015).
[110] See First Additional Protocol (AP I), supra n.104, Article 51(3).
[111] See William K. Lietzau, 'Old Law, New Wars: Jus ad Bellum in the Age of Terrorism', 8 Max Planck Y.B. of U.N.L. 384 (2004), at 399.

traditional legal frameworks. It is, therefore, difficult to conclude that these frameworks have become irrelevant post-9/11. Given the numerous statements of the Obama Administration referring to a situation of armed conflict with Al-Qaeda, the Taliban and associated forces, it is obvious that the US still regards international humanitarian law as a source of legitimacy for the conduct of armed hostilities.

5.8 The Principle of Humanity/Precautions in Attacks

This principle permeates the entire corpus of contemporary international humanitarian law, with the "Geneva Law" (protection of persons) at its centre, and extending to the "Hague Law" regulating the conduct of hostilities. The principle is grounded in morality, inspired by notions of mercy and compassion in warfare, and has been inserted into the positive law of armed conflicts by express provisions of the Geneva Conventions, notably Common Article 3 and Articles 12, 13 and 27 of Geneva Conventions I-IV. These provisions are reflective of a universal moral rule translated into practical law. The principle has a rich array of content, but at its centre is the requirement of humane treatment in warfare. There are direct links between respect for the principle of humanity and respect for the other customary rules applicable to the conduct of hostilities, notably distinction and proportionality. Most of the rules on this principle are contained within the First Additional Protocol (AP I),[112] but it is generally accepted that these rules now form part of customary international law, binding on all states, and applicable to both international and non-international armed conflicts. There exists an obligation to take, "constant care", in the conduct of military operations, to, "spare the civilian population, civilians, and civilian objects." In this regard, "[a]ll feasible precautions must be taken to avoid, and in any event, to minimise, incidental loss of civilian life, injury to civilians, and damage to civilian objects."[113]

[112] See First Additional Protocol, supra n.104.
[113] See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge University Press (2005), at Rule 15.

Article 57 of the First Additional Protocol provides that those who plan or decide upon an attack shall, "take all feasible precautions in the choice of means and methods of attack."[114]

There are several reasons, therefore, underlying the argument that drone strikes comply with the principle of precautions in attacks. First, the video-feed from a drone can give 'real-time' eyes on the target so that the absence of civilians close to the target can be monitored until the last few seconds before any strike takes place. Second, various tracking mechanisms are used to locate targets, such as thermal imaging, GPS, even paint markers. Third, in certain cases, notably in Afghanistan, nearby ground forces can undertake surveillance of the target prior to a strike. Fourth, other than the thermobaric variant of the Hellfire missile, most weapons fired from armed drones have a smaller blast radius than other conventional munitions used by manned aircraft. While these reasons do not entirely eliminate the risk of civilian casualties, they certainly represent reasonable precautionary measures that can serve to minimise the collateral damage of a drone strike. However, one must be aware of the note of caution sounded by Alston in this regard:

Drones' proponents argue that since drones have greater surveillance capability and afford greater precision than other weapons, they can better prevent collateral civilian casualties and injuries. This may well be true to an extent, but it presents an incomplete picture. The precision, accuracy, and legality of a drone strike depend on the human intelligence upon which the targeting decision is based. [115]

Indeed, as Daniel Byman has argued:

To reduce casualties, superb intelligence is necessary. Operators must know not only where the terrorists are, but also who is with them and who might be within the blast radius. This level of surveillance may often be lacking, and terrorists' deliberate use of children and other civilians as shields make civilian deaths more likely.[116]

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[114] See First Additional Protocol, supra n.104, at Art.57(2)(a)(ii).
[115] See Alston Report, supra n.3, at para.81.
[116] See D. Byman, 'Do targeted killings work?', *Brookings Institution*, 14th July 2009, available at http://www.brookings.edu/opinions/2009/0714_targeted_killings_byman.aspx, (accessed 11th July 2015).

This is not to say, however, that significant failings have not occurred. One drone strike in Afghanistan in February 2010 killed twenty-three Afghan civilians and wounded twelve others.[117] In May 2010, the US military released a report on the deaths, blaming, "inaccurate and unprofessional", reporting by the drone operators, which failed to provide the ground commander with evidence that there were civilians in the vehicle.[118]

The debate as to the quantum of civilian casualties is highly polarised. It was reported in the *New York Times* in May 2012 that the Obama Administration had embraced a method for counting civilian casualties that, "in effect counts all military-age males in strike zones as combatants…unless there is explicit intelligence posthumously proving them innocent."[119] Seen in light of this, therefore, the claim of John O. Brennan that there had not been a single collateral death resulting from a US drone strike in the twelve months to June 2011, is certainly extraordinary.[120]

5.9 The Principle of Distinction

The rule on distinction is, arguably, the most fundamental of all humanitarian law rules, operating by effectively directing the theatre of conflict towards military objectives and away from civilian populations and civilian objects. The purpose of this cardinal rule is simply to limit the scope of the conflict and the potential destruction in consequence thereof, by requiring the parties to the conflict to at all times distinguish between civilians and combatants and between civilian objects and military objectives. Given the realities of the current non-international armed conflicts in Afghanistan, Pakistan and Yemen, the applicable rule on distinction is that which governs the conduct of hostilities in non-international armed conflicts, which states that only lawful military targets, including civilians directly participating in hostilities, may be subject to lethal force, in accordance with Common Article 3, as

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[117] See 'First drone friendly fire deaths', *RT*, 12th April 2011, available at http://rt.com/usa/news/first-drone-friendly-fire/, (accessed 11th July 2015).
[118] See D. Filkins, 'Operators of drones are faulted in Afghan deaths', *New York Times*, 29th May 2010, available at http://www.nytimes.com/2010/05/30/world/asia/30drone.html, (accessed 11th July 2015).
[119] See Jo Becker and Scott Shane, 'Secret "kill list" proves a test of Obama's principles and will', *New York Times*, 29th May 2012, available at http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=18&pagewanted=all, (accessed 12th July 2015).
[120] See D. Walsh, E.Schmitt, and I. Mehsud, 'Drones at issue as US rebuilds ties to Pakistan', New York Times, 18th March 2012, available at http://www.nytimes.com/2012/03/19/world/asia/drones-at-issue-as-pakistan-tries-to-mend-us-ties.html?pagewanted=all, (accessed 12th July 2015).

supplemented by customary international law, and, where applicable, Article 13(3) of the Second Additional Protocol.[121]

The ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* has proven to be highly controversial in several respects. Whilst, naturally, the *Interpretive Guidance* does not prohibit the targeting of a state's armed forces in the course of a non-international armed conflict, controversially it asserts that members of an organised armed group that is a party to the conflict are likewise targetable if they fulfil a 'continuous combat function',[122] (subject to the principle of military necessity).

Alston expressed concern with the ICRC's creation of the 'continuous combat function' category of targetable individual in his 2010 report, stating that:

The creation of the CCF [continuous combat function]category is, de facto, a status determination that is questionable given the specific treaty language that limits direct participation to 'for such time' as opposed to 'all the time'…Creation of the CCF category also raises the risk of erroneous targeting of someone who, for example, may have disengaged from [that] function.[123]

In relation to the identification of such individuals, for both practical and legal purposes, the ICRC observes that:

Under international humanitarian law, the decisive criterion for individual membership of an organised armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities…[This function] distinguishes members of the organised fighting forces of a non-state party from civilians who directly participate in hostilities on a merely spontaneous, erratic,

[121] It should be noted, of course, that the United States is not a State Party to the Second Additional Protocol, although Afghanistan is. Without prejudice to the notion that the rules contained within the Second Additional Protocol form part of customary international law, it could be open to the United States to argue that, even were it to act in strict adherence to the rules of the Second Additional Protocol in respect of drone strikes carried out as part of the conflict in Afghanistan, those rules are not of extraterritorial application, by virtue of Article 1 of the Protocol, and thus would not be applicable to drone strikes carried out in Pakistan.

[122] See N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, at pp.27-28 and pp.30-31.

[123] See Alston Report, supra n.3, at paras.65-66.

or unorganised basis, or who assume exclusively political, administrative, or other non-combat functions.[124]

Direct participation in hostilities, according to the ICRC's *Interpretive Guidance*, arises when a given act fulfils the following criteria: first, 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 or serious injury or destruction to persons or objects protected against direct attack (threshold of harm); second, there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); third, 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).[125] Thus, direct participation may include such acts as capturing, wounding or killing military personnel, or damaging military objects.[126] Alternatively, "indirect" participation would include activities that fail to meet the threshold of harm, but which do contribute to the efforts of the party, but which, "[do] not necessarily lead to a loss of protection against direct attack."[127] Such acts would include the provision of financial, administrative, logistical and political support.[128]

Thus, it would appear that, whilst those with a 'continuous combat function' may be lawfully targeted at any time, those who 'directly participate in hostilities' on a merely spontaneous, erratic, or unorganised basis, may only be lawfully targeted with lethal force while they so participate. Those who assume exclusively political, administrative, or other non-combat functions, may not be lawfully targeted unless and until they directly participate in hostilities, and only for such time as they undertake such acts.[129] Where doubt exists as to an individual's status, that person should be presumed to be a civilian, and thus protected against direct attack, until evidence to the contrary can be adduced.[130]

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[124] See *Interpretive Guidance*, supra n.122, at p.33.
[125] See *ibid*.
[126] See *Direct Participation in Hostilities: Questions and Answers*, supra n.69.
[127] See *ibid*.
[128] See *ibid*.
[129] See *Interpretive Guidance*, supra n.122, at 16.
[130] See *ibid*, at 20.

One issue related to the principle of distinction focuses on the nature of the weapon utilised in an attack. Certain weapons, by their very nature, inherently violate the principle of distinction because of their inability to distinguish between civilians and combatants. In Nuclear Weapons, the ICJ acknowledged that weapons such as landmines, incendiaries, and biological and chemical armaments, inherently violate international humanitarian law, as recognised by conventional and customary international law, as they, by their very nature, are unable to distinguish between civilians and combatants.[131] Based on generous estimates as to the number of civilian casualties resulting from US drone strikes, as compared to the number of suspected terrorists killed, it could be argued that drones equipped with Hellfire missiles are inherently indiscriminate weapons. However, most commentators agree that drones are precise weapons delivery platforms, with technical capabilities permitting constant surveillance, allowing operators to gather substantial data about a targeting area, including the presence of any civilians. Further, laser guidance targeting systems permit greater precision in attack, further minimising the risk of collateral damage.[132] The employment of Hellfire missiles in drone strikes, particularly against high-value targets, may not violate the principle of distinction. The missile has a precise blast radius of ten-fifteen feet, and can be programmed for a delayed detonation, allowing for minimisation of collateral damage to nearby civilians and civilian objects. It is submitted that, on balance, attacks executed using Hellfire missiles launched from armed drones do not inherently violate the principle of distinction. As Drake rightly recognises, the potential misuse of a weapon does not render that weapon unlawful. As Drake notes:

Commentary on Article 36 of AP I confirms this, providing that, "[a] state is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited."[133]

[131] See Nuclear Weapons, supra n.9, at paras.76-77.
[132] See P.W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century*, (Penguin, 2009), at p.222.
[133] See A. Drake, 'Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law – An Overview', 39 Denv. J. Int'l L & Pol'y 629 (2011), at 653.

Therefore, even if the United States was indiscriminately launching Hellfire missiles from drones, that failure to distinguish would not automatically render the missile or the drone unlawful.

A further issue in relation to the principle of distinction relates to the actual execution of an attack. Drone strikes would fall foul of the rule if they were directed specifically against civilians or civilian objects, or launched indiscriminately without distinction between civilians and military targets.[134] Further, once an attack is launched, if a mistake is discovered that has resulted in an error in target identification, then the attack must be immediately aborted.[135] States must adequately and effectively employ mechanisms and processes to distinguish between civilians and combatants, particularly where an attack is launched from a considerable distance and there is no direct view of the target and the surrounding locus.[136]
The requirements of the principle of distinction are, no doubt, the reason why the US has made use of informants on the ground in those key target states, to assist in the identification of legitimate targets prior to the launch of any strike.[137] Such informants often successfully prevent the mistaken targeting of civilians, however, it must be noted that the US remunerates local informants for received intelligence, which perhaps inevitably, has resulted in allegations of suspect reliability. It is therefore critical that the US ensures that procedural safeguards are in place to ensure that the intelligence relied upon as the basis for a drone strike is accurate and verifiable.[138]

Thus, in the context of drone strikes in Afghanistan, Pakistan, and Yemen, the use of lethal force to target those who are engaged in planning, directing, or carrying out an attack, would, *a priori*, be compliant with the principle of distinction. The targeting of others would not be so compliant, unless (and only for such time as) those individuals were directly participating in hostilities. The legality of a drone strike against a suspected terrorist, where the strike was also expected to result in collateral damage in

[134] See AP II, supra n.36, Article 13 and Article 51(2) and (4).
[135] See Alston Report, supra n.3, at para.89.
[136] See Claude Pilloud, *Commentary to the Additional Protocols*, (1987), at Article 57, para.2221
[137] See M. Schmitt, 'Precision Attack and International Humanitarian Law', 87 Int'l Red Cross 445 (2005).
[138] See Bill Weir, 'Our Reporter on Pakistan-Afghan Border: Drones and Diplomatic Efforts', *ABC News*, 12th January 2010, available at http://abcnews.go.com/WN/Afghanistan/abcs-bill-weir-reporting-afghanistan-influence-predator-drones/story?id=9542900, (accessed 12th July 2015).

the form of death or injury to civilians, would depend on a determination according to the rules of proportionality. A failure to make such a distinction during a strike would render the attack unlawful, and may constitute evidence of a violation of international criminal law. In this regard, there have been disturbing claims that the CIA has conducted so-called "double-tap" drone strikes in Pakistan and Yemen, deliberately targeting funerals or those providing assistance to victims of initial drone strikes. According to a report by the Bureau of Investigative Journalism:

A three-month investigation including eyewitness reports has found evidence that at least 50 civilians were killed in follow-up strikes when they had gone to help victims. More than 20 civilians have also been attacked in deliberate strikes on those attending funerals.[139]

Consider, by way of example, the facts surrounding the drone strike carried out by the United States in Pakistan in August 2009 against Baitullah Mehsud. Mehsud was, undoubtedly, a high-profile target, as the primary Taliban leader operating from Pakistan, and so would certainly have been involved in planning and coordinating attacks against US forces across the border in Afghanistan. Mehsud was also implicated in the assassination of former Prime Minister of Pakistan, Benazir Bhutto, in December 2007. After several failed attempts to eliminate Mehsud, the US military tracked him to his father-in-law's house, where, at the time of the strike, he was on the roof with his wife, receiving treatment for kidney disease via an intravenous drip. The Predator drone involved fired two Hellfire missiles, killing Mehsud and eleven others, including his wife and doctor.[140] It is submitted that this particular strike was broadly compliant with the rule on distinction. The strike was not purposefully launched at civilians or civilian objects without a military objective, and if one accepts that Mehsud had a 'continuous combat function' status, he would have been a legitimate target. It is highly probable that prior to launching the strike, the drone operator had conducted surveillance of Mehsud and the surrounding area, and

[139] See C. Woods and C. Lamb, 'Obama terror drones: CIA tactics in Pakistan include targeting rescuers and funerals', *Bureau of Investigative Journalism*, 4th February 2012, available at http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/, (accessed 12th July 2015).
[140] See 'Obituary: Baitullah Mehsud', *BBC News*, 25th August 2009, available at http://news.bbc.co.uk/2/hi/south_asia/7163626.stm.

conducted a proportionality assessment as to any anticipated collateral damage, thereby not targeting indiscriminately.

5.10 Signature Strikes and the Principle of Distinction

The majority of US drone strikes are now based on Signature Drone Strike Protocol (SDSP). The theory behind these signature strikes is that an individual's pattern of behaviour, their "signature", serves as a proxy for determining if that individual has either a 'continuous combat function' (and is therefore a lawful target), or, alternatively, is a civilian 'directly participating in hostilities'. The general rule is that an individual combatant may be targeted with lethal force under international humanitarian law. The difficulty with SDSP, however, is that it does not sit easily with the accepted definitions of 'continuous combat function' or 'directly participating in hostilities'.

Certainly, comments by US officials indicate that drone operators may be instructed to assume that all military-age males in a potential strike zone are combatants unless there is explicit evidence to the contrary.[141] In the leaked DOJ White Paper, the Administration argued for an expanded definition of "imminent" danger,[142] primarily based on its argument that an individual directly participates in hostilities simply by virtue of membership of Al-Qaeda or an associated group, and that defining the scope of 'direct participation' in this manner allows the US to, "avoid broader harm to civilians and civilian objects."[143] Some counter-terrorism officials have insisted that an individual in an area of known terrorist activity is most likely participating in such activities, especially if in close proximity to a senior Al-Qaeda member, and is therefore a legitimate target for a signature strike: "Al-Qaeda is an insular, paranoid organisation – innocent neighbours do not hitchhike rides in the back of trucks headed for the border with guns and bombs."[144]

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[141] See Chris Woods, 'Analysis: Obama Embraced Redefinition of 'Civilian' in Drone Wars', Bureau of Investigative Journalism, 29th May 2012, available at http://www.thebureauinvestigates.com/2012/05/29/analysis-how-obama-changed-definition-of-civilian-in-secret-drone-wars/, (accessed 14th July 2015).
[142] See Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaeda or An Associated Force', supra n.73, at 8.
[143] See R. Vogel, 'Drone Warfare and the Law of Armed Conflict', 39 Denv. J. Int'l L & Pol'y 101 (2011), at 121.
[144] See J. Becker and S. Shane, supra n.119.

It is respectfully submitted that targeting on the basis of such assumptions may violate international humanitarian law. As Melzer rightly notes, even in the context of a 'war on terror', or a war against specific terrorists, individuals do not become legitimate targets simply by membership of a terrorist group or by physical association with, or proximity to, members of such a group.[145] Individuals can only become legitimate targets on the basis of their roles within such groups as determined by their actual activities.[146] Thus, within the context of international humanitarian law, the term 'combatant' must refer only to members participating in armed hostilities, and combatant status cannot be established on the basis of affiliations, family ties, or mere association.[147] There must be an act, and that act must contribute to a continuous role within the armed group. Therefore, the insistence of the Obama Administration that a person in physical proximity to terrorists is more likely than not to be a terrorist too, is not necessarily compliant with the principle of distinction.

There is, regrettably, little information in the public domain as to what types of behaviour are sufficiently suspicious to merit a signature drone strike. However, it can be inferred from the various information leaks and investigative reporting that the "signature" of a potential target is defined very broadly. The difficulty, however, is that in some communities, there may be little significant difference between the day-to-day behaviour of a civilian and that of a terrorist, as perceived by a drone operator. For example, it is a well-accepted fact that in some strike zones, terrorists regularly intermingle with the civilian population, and do not wear uniforms or other distinguishing markers setting them apart from civilians.[148] In consequence of this, drone operators have conflated otherwise normal behaviour with suspicious behaviour on several occasions, targeting people who were carrying weapons, or who were present in a location mistakenly identified as a terrorist compound, or who were travelling in a convoy of vehicles.[149] Individuals have also been targeted for driving a suspicious vehicle, for spending time in and around certain facilities, and for operating certain types of communication equipment.[150]

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[145] See *Interpretive Guidance*, supra n.122, at 44.
[146] See *ibid*.
[147] See *ibid*, at 33.
[148] See 'Living Under Drones: Death, Injury, and Trauma to Civilians from U.S. Drone Practices in Pakistan', supra n.29, at 112.
[149] See *ibid*.
[150] See *ibid*.

The fact that Al-Qaeda and Taliban fighters have adopted the tactic of mingling regularly with the civilian population certainly poses challenges for drone operators and military commanders. However, this tactic is no justification for the adoption of a broad 'pattern-of-life' analysis with a wide scope of activities listed as suspicious "signatures". International humanitarian law requires that militaries engaged in armed conflict must always attempt to distinguish between civilians and combatants.[151] The United States cannot simply circumvent this requirement by adopting a broadly defined Signature Drone Strike Protocol, in which a wide scope of activities are listed as suspicious "signatures", exposing individuals to the possibility of targeting by lethal force. Given the broad scope of suspicious "signatures", as well as the expanded concept of "imminence" favoured by the US Administration, which exposes individuals to lethal force on the basis of membership of Al-Qaeda or associated forces, SDSP stands as a poor proxy for the concepts of 'direct participation' and 'continuous combat function'. Not only does SDSP constitute a *prima facie* violation of the duty placed upon the United States by international humanitarian law to distinguish between civilians and combatants, but also, as shall be evidenced, the mandate to exercise proportionality in the execution of lethal force.

5.11 The Principle of Proportionality

The principal purpose of the rule on proportionality in international humanitarian law is to require a certain type of balancing exercise in the execution of any targeting operation. While in principal a military objective may always be attacked, the rule recognises the reality of situations where the attack on the military objective yields only a limited military advantage, while the expected civilian losses, or damage to civilian objects, appear excessive compared to that advantage. In such situations, the principle of proportionality operates to prohibit the attack as disproportionate. Thus, even if a target is a lawful military objective, the issue of proportionality arises and may either affect the means and methods of warfare, or even effectively prohibit the execution of an attack. According to the First Additional Protocol, violating the rule of proportionality renders the attack indiscriminate.[152] This rule is not expressed in

[151] See ICRC, 'Basic Rules of the Geneva Conventions and Their Additional Protocols' (1988), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0365.pdf, (accessed 14th July 2015).
[152] See AP I, supra n.104, Article 51(5)(b) and Article 57(2)(a)(iii).

either Common Article 3 or the Second Additional Protocol, but it is deemed to be a rule of customary international law, applicable to both international and non-international armed conflicts.

According to Rule 14 of the ICRC's study of customary international humanitarian law:

Launching 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 prohibited.[153]

The key issue, therefore, is in defining what exactly constitutes "excessive". In the commentary to Article 51(5) of the First Additional Protocol, from where the text expressing the rule on proportionality originates, it is stated:

Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem: in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail.[154]

Thus, the principle of proportionality acts as a check on the broader principle of military necessity. The *expected* collateral damage from an attack must not be *excessive* in relation to the anticipated military advantage.[155]
The first step, then, in any assessment of proportionality is a pre-execution consideration of the expected collateral damage, rather than a post-execution evaluation of the outcomes of a military operation.[156]
Civilian casualties are always regrettable, however if the expected level of casualties is not excessive relative to the anticipated military advantage of an attack, those

[153] See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, supra n.113, at Rule 14.
[154] See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva (1987), at paras.1979-1980.
[155] See AP I, supra n.104, Article 51(5)(b), Article 57(2)(a)(iii), and Article 57(2)(b).
[156] See AP I, *ibid*, Article 51(5)(b). See also Joseph Holland, 'Military Objective and Collateral Damage: Their Relationship and Dynamic', 7 Y.B of Int'l Hum. Law 35 (2004), at 50.

casualties would not be disproportionate under this analysis, and the attack would not be unlawful for lack of proportionality. The principle of proportionality is not a counsel for perfection and does not demand a nil rate of civilian casualties. The objective of the rule is to mitigate, rather than eliminate, the effects of warfare, as it is recognised that the latter would be an impossible objective during any armed conflict. The immunity enjoyed by civilians is not an absolute, provided of course that they are not targeted indiscriminately.[157]

The second step in any proportionality assessment relates to evaluating the expected military advantage of an attack. While this assessment must be completed for each and every intended attack, debate has arisen over the scope of the anticipated advantage a state may use to justify an attack. Some scholars, in particular Duffy and Neuman, argue that the specific attack must be weighed against the specific military objective that an individual attack will achieve.[158] An alternative analysis would be to assess the anticipated advantage as a whole, considering the overarching military objective of the entire military campaign. For example, the US could justify the killing of the eleven civilians surrounding Baitullah Mehsud as collateral damage weighed against either the specific objective of eliminating Mehsud or the overarching objective of defeating the Taliban. The analysis proffered by Duffy and Neuman places a greater restriction on the targeting state, as only the military advantage of a specific target can be used to justify collateral damage, while the latter analysis permits the targeting state greater latitude by allowing it to weigh the collateral damage of a specific attack to the military benefit in the context of the objectives of the entire campaign.

The final step in any proportionality assessment is to weight the prospectively determined collateral damage against the military advantage, so as to ensure that the damage will not be *excessive* to the anticipated gain. The term 'excessive' is vague, and unfortunately there exists little by way of state practice or *opinio juris* to readily determine its exact meaning and scope. Proportionality is assessed on a case-by-case

[157] See *ibid*.
[158] See Helen Duffy, *The 'War on Terror' and the Framework of International Law*, (Cambridge University Press, 2005), at 231-235. See also Noam Neuman, 'Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality', 7 Y.B of Int'l Hum. Law 79 (2004), at 96-98.

basis, requiring that, for each intended attack, the targeting state must weigh the value of the target, the location of the attack, the timing of the attack, the number of anticipated civilian casualties, and the amount of damage anticipated to civilian objects.

Returning to the drone strike that killed Baitullah Mehsud, the key issue in any prospective proportionality assessment would have been whether the anticipated collateral damage, including people in the house, other civilians nearby, and the house itself, was excessive relative to the value of targeting and eliminating Mehsud. Obviously, given Mehsud's position as a Taliban leader, the US could have justified a greater number of civilian casualties resulting from the strike.

5.12 Signature Drone Strikes and the Principle of Proportionality

The principle of proportionality as a central component of international humanitarian law has been discussed, and whilst Article 51(5)(b) of the First Additional Protocol has no similar provision in the Second Additional Protocol in respect of non-international armed conflicts, it is generally accepted that the principle forms part of customary international law, binding on all states and applicable to both international and non-international armed conflicts.[159]

The fact that SDSP seems unable to take into account the cultural context in which it operates may have led to disproportionate attacks on civilians in violation of international humanitarian law. The apparent inability of drone operators to contextualise commonplace behaviours and social gatherings within their proper cultural sphere, particularly in homo-social societies like Afghanistan, Pakistan, and Yemen, has, regrettably, resulted in disproportionate civilian deaths.

On one occasion, for example, a signature strike was executed against what was believed to be a heavily armed group acting in a manner consistent with Al-Qaeda militants and including men linked to Al-Qaeda. After executing the strike, the US claimed that it had killed twenty "militants". However, community members and

[159] In the context of the non-international armed conflict in which the US is currently engaged, the status of the principle of proportionality as customary international law remedies the fact that the US is not a State Party to the Additional Protocols. It is noted that the principle is expressly referred to in the Amended Protocol II to the Convention on Certain Conventional Weapons – see 'Rule 14: Proportionality in Attack', ICRC, *Customary International Humanitarian Law*, available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14, (accessed 15th July 2015).

Pakistani officials stated that the missiles had struck a "jirga", a type of meeting held in tribal areas to resolve local disputes. Such meetings require the presence of senior members of the tribal groups, some of whom undoubtedly have connections to the Taliban, in order to have any legitimacy. In the end, it turned out that only four Taliban members were present and killed. The rest of the dead included almost forty civilians.[160]

Vogel highlights the many cultural and contextual obstacles that inform SDSP operating in Pakistan, Afghanistan, and the Middle East, pointing to the practice of terrorists to mingle with civilian populations in order to frustrate attempts by the US to capture or kill them, effectively using civilians and civilian objects as shields, as well as targeting civilian populations themselves and carrying out operations in civilian settings.[161]

Article 50 of the First Additional Protocol makes it expressly clear that the presence of combatants within a civilian area does not automatically render that area a military object, and civilians associating with combatants likewise do not forfeit their civilian status. Vogel's argument, however, is that a civilian object, such as a house, may be used to shelter "belligerents", thus transforming the nature of the object from civilian to military.[162] Of course, international humanitarian law does not recognise the term "belligerents", in much the same way that it does not recognise the term "militants". Both these terms are political rather than legal constructs, with no meaning in international humanitarian law. Only two categories are recognised under this paradigm – "civilians" and "combatants".[163] Thus, if a "civilian" object is used to shelter "combatants", it may lose its civilian status, given that combatants are liable to be targeted with lethal force at any time. The position is less clear where a civilian object is used to shelter "belligerents". That object may indeed retain its civilian status, even if it shelters individuals who may engage in future hostilities.

It is respectfully submitted that, even if the provisions of Article 50 of the First Additional Protocol are set aside, and if the arguments advanced by Vogel are accepted, it must be recognised that Vogel's arguments are not presented with any

[160] See S. Shane, 'Contrasting Reports of Drone Strikes', New York Times, 11th August 2011, available at http://www.nytimes.com/2011/08/12/world/asia/12droneside.html, (accessed 15th July 2015).
[161] See R. Vogel, supra n.143, at 117 and 122.
[162] See *ibid*.
[163] See 'Rule 14: Proportionality in Attack', supra n.127.

recognition or reference to the unique cultural context of the homo-social societies in Afghanistan, Pakistan and the Middle East. Vogel fails to consider that a gathering where "militants" are present among civilians can take place for non-military purposes.

It can only be deeply regretted that a significant number of civilian casualties have resulted from signature drone strikes. Some of these casualties have resulted from misunderstandings and misinterpretations of behaviours, cultures and customs in the various key target states in which the strikes are undertaken. Such casualties could have been avoided, or at least reduced, had drone operators been given a measure of exposure to the cultural and customary norms prevailing in those homo-social societies. On balance, it is submitted, the apparently unpredictable character of SDSP and its inability at times to properly distinguish between civilians and combatants, may lead to disproportionate civilian casualties and thus to violations of the principle of proportionality, given that the general rules of international humanitarian law were developed to protect civilians from the harmful effects of warfare, to mitigate damage and destruction to civilian objects, and to provide care for the casualties of conflict.[164]

Notwithstanding the evident difficulties in reconciling SDSP with the principles of distinction and proportionality, some scholars have advanced arguments in favour of the use of armed drones. Orr, for example, whilst acknowledging that civilian casualties do pose legal challenges to the framework of international humanitarian law, states that:

Targeted killing of Al-Qaeda fighters is permissible under Common Article 3, which applies protections to "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat"…The drones do not attack such persons, instead targeting Al-Qaeda fighters, which is permissible during an armed conflict.[165]

Lewis makes a similar argument stating:

[164] See 'Living Under Drones', supra n.29, at 151.
[165] See Andrew C. Orr, 'Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law', (2011) 44 Cornell Int'l L.J. 729, at 744.

The longer loiter time of drones allows for a much higher level of confidence that the target has been properly identified…Even if the drone is evading fire at the time of weapons release, those making the final decision to carry out the attack are not dealing with the decision-impairing effects of mortal fear. Although the sanitary environment of the drone control room has been criticised for making war too much like a video game, it undoubtedly leads to sounder proportionality determinations.[166]

With respect, the arguments advanced by Orr and Lewis are not entirely solid. Whilst the targeted killing of Al-Qaeda and Taliban members who have a 'continuous combat function' is generally permissible, it has already been discussed that such individuals are not the only ones targeted under current targeting practices. The *Living Under Drones* study undertaken by Stanford Law School and NYU School of Law concluded that the number of "high-level" targets killed relative to the number of total casualties was extremely low. The "militant-to-target" ratio, furthermore, is difficult to verify given that SDSP regards all military-age males in a strike zone to be "militants" liable to be targeted.[167] Statements from eyewitnesses on the ground, as well as from drone operators themselves, all point to SDSP resulting in the unnecessary deaths of civilians.[168] It can, therefore, be difficult to sustain an argument that drones, by virtue of their advanced technical capabilities, are inherently more likely to adhere to the rules of international humanitarian law. Further, the longer loiter time of drones, which, according to Lewis, "allows for a much higher level of confidence that the target has been properly identified",[169] takes no account of the actual criteria for the identification of targets. Lewis's argument would certainly carry more weight if the notion of "signature" sat well with the concepts of 'continuous combat function' and 'direct participation in hostilities', however, as has been submitted, SDSP stands as a poor proxy for the requirement under international humanitarian law to distinguish between civilians and combatants. A Hellfire missile fired from a drone may be able to strike a target with greater accuracy than a missile fired from a conventional manned aircraft, however the target itself may not be a

[166] See Michael Lewis, 'Drones and the Boundaries of the Battlefield', 47 Tex. Int'l L.J. 293 (2012), at 297-298.
[167] See 'Living Under Drones', supra n.29. See also C. Woods and C. Lamb, supra n.139.
[168] See *ibid*.
[169] See M. Lewis, supra n.166, at 297-298.

lawful one.[170] Vogel has submitted that the precision targeting capabilities of drone aircraft, which allows for greater accuracy in targeting, makes drones an ideal weapon for minimising civilian casualties, stating that:

With their ability to surveil for hours or days at a time, and to perform surgical strikes with pinpoint accuracy, drones typically offer a cleaner alternative to other forms of aerial bombardment or missile strikes. P.W. Singer writes that, "[u]nmanned systems seem to offer several ways of reducing the mistakes and unintended costs of war," including by using, "far better sensors and processing power…allow[ing] decisions to be made in a more deliberate manner," and, "remov[ing] the anger and emotion from the humans behind them." "Such exactness", Singer argues, "can lessen the number of mistakes made, as well as the number of civilians inadvertently killed." Senior US officials have consistently stated that, "procedures and practices for identifying lawful targets," in the AUMF conflict, "are extremely robust, and advanced technologies have helped to make our targeting more precise."[171]

However, it is submitted that while there continues to remain a lack of transparency regarding the application of Signature Drone Strike Protocol, together with the apparent deficiencies of SDSP in respect of distinction and proportionality, as well as debate and disagreement as to the true extent of civilian casualties resulting from signature drone strikes in particular, it is difficult to reconcile Vogel's steadfast arguments with respect to the advanced capabilities of drones to precisely and accurately identify and strike targets with the reality of SDSP.

5.13 "Double Tap" Strikes

So-called "double tap" drone strikes, which have become a common feature of US drone strikes carried out in Afghanistan and the tribal regions of Pakistan, have proven to be a highly controversial method of targeted killing. In this method, the drone operator first fires at the intended target, and again at those arriving at the scene

[170] See 'US Drone Strikes More Deadly to Afghan Civilians Than Manned Aircraft', *War in Context*, 3rd July 2013, available at http://www.warincontext.org/2013/07/03/us-drone-strikes-more-deadly-to-afghan-civilians-than-manned-aircraft/, (accessed 16th July 2015).
[171] See R. Vogel, supra n.143, at 102.

to offer aid and assistance, including rescuers and medical personnel.[172] The method has been used with such frequency in both states that at one stage it was reported that, "almost every other", strike in the tribal regions of Pakistan was a "double tap" strike.[173] The adverse effects of such strikes on civilian populations certainly appear to be profound. In addition to killing civilians, such strikes have essentially discouraged rescuers and medical personnel from attending the scenes of drone strikes to offer assistance.[174]

It is submitted that the practice of "double tap" strikes *prima facie* violates the specific international humanitarian law protections in place for the, "sick, wounded…[and] others such as medical and religious personnel, humanitarian workers, and civil defence staff."[175] Indeed, Christof Heyns has gone so far as to label the practice of "double tap" drone strikes as a, "war crime."[176]

5.14 Concluding Comments on Signature Drone Strikes

"Signature" drone strikes against individuals not known and identified as targets individually, but rather on the basis of a "signature" or 'pattern-of-life' analysis, have proven to be highly controversial means of targeted killing.

Under the armed conflict paradigm, the targeting of an individual can only be lawful if that individual is directly participating in hostilities. This 'direct participation' can only be ascribed on the basis of the individual's conduct, and this in turn must be based on reliable and verifiable information. Of course, in a conflict where the enemy wears no identifiable markers and often intermingles with civilian populations, it is undoubtedly more challenging, but all the more important, to make accurate assessments of an individual's role in hostilities, not least given the possible end result

[172] See M. Kelly, 'More Evidence That Drone Strikes Are Targeting Civilian Rescuers in Afghanistan', *Business Insider*, 25th September 2012, available at http://www.businessinsider.com/drone-double-tap-first-responders-2012-9, (accessed 16th July 2015).
[173] See Jerome Taylor, 'Outrage at CIA's Deadly 'Double Tap' Drone Attacks', The Independent, 25th September 2012, available at http://www.independent.co.uk/news/world/americas/outrage-at-cias-deadly-double-tap-drone-attacks-8174771.html, (accessed 16th July 2015).
[174] See *ibid*.
[175] See 'Other Protected Persons: Humanitarian Workers, Journalists, Medical and Religious Personnel', ICRC, 29th October 2010, available at http://www.icrc.org/eng/war-and-law/protected-persons/other-protected-persons/overview-other-protected-persons.htm, (accessed 17th July 2015).
[176] See Report of Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, presented to the UN General Assembly, dated 13th September 2013, Ref: A/68/389, at para.73. See also G. Rona, 'US Targeted Killing Policy Unjustified', *JURIST*, 24th February 2011, available at http://jurist.org/hotline.org/hotline/2012/02-gabor-rona-targeted-killing.php, (accessed 17th July 2015).

of such an assessment – a potentially lethal drone strike. Whilst some commentators have suggested that the use of force in this context depends on an assessment of imminent harm, and that such assessments in a conflict involving a non-state actor require a higher threshold of imminent harm, this point has not been settled, but what clearly is required is an assessment that the particular individual is directly engaged in hostilities. Such individuals may only be lawfully targeted under international humanitarian law for so long as they are directly engaged. Therein lies the difficulty with the Signature Drone Strike Protocol. It has been submitted that "signatures" are not necessarily an accurate method of determining whether an individual has a 'continuous combat function' or is 'directly participating in hostilities' in a manner consistent with the rules of distinction and proportionality. The nature of Signature Drone Strike Protocol may lead to disproportionate civilian casualties. One can certainly understand and empathise with the reported fears and anxieties of local civilian populations, given the unpredictability of SDSP, and SDSP certainly does nothing to garner local support for US operations in those key target states.

What is clear is that, in order to ensure full compliance with international humanitarian law in the application of lethal force, SDSP requires some fine-tuning in order to ensure that civilian casualties are proportionate to legitimate military objectives, and that SDSP effectively and consistently distinguishes between civilians and combatants, particularly taking account of the unique cultural contexts of those key target states.

It is respectfully submitted that there is a paucity of information in the public domain as to the criteria adopted by the United States for determining whether an individual is 'directly participating in hostilities' or has a 'continuous combat function'. Of course, the reluctance of the United States to disclose this criteria may be on legitimate national security grounds, but such a disclosure is key to achieving transparency as to the forms of conduct ("signatures") that may expose an individual to the threat of lethal force, and in ultimately settling the debate as to whether SDSP is compliant with international law. It is not sufficient for the United States to simply state its objections to the ICRC's *Interpretive Guidance* and argue that all members of armed groups are legitimate targets at all times, and it is neither unrealistic nor impractical to require the US to proffer, prior to any drone strike, credible intelligence demonstrating an individual's role within an armed group. In his speech at the National Defence University in Washington D.C. on 23rd May 2013, President Obama

sought to provide reassurance that, in areas outside zones of active hostilities, no strike would be authorised unless there was near-certainty that no civilians would be killed or injured.[177] However, Professor Schmitt has since emphasised that this is not a legal requirement, arguing that, "the degree of requisite certainty would drop in the case of a very high-value target because less certainty would be justified in light of the military advantage likely to accrue from the operation."[178] This may be so, but as Emmerson submits, it remains unclear as to whether such standards are being adopted in respect of drone strikes being carried out within and outside zones of active hostilities.[179] This, together with the US's categorical refusal to reveal the evidence on which specific signature strikes are based, render US targeting practices of dubious legality under international humanitarian law, given the uncertainties that remain as to the nature of those practices and whether they are capable of compliance with the principles of distinction and proportionality.[180] It may be that only a radical reformulation of US targeting practices can ensure parity with the armed conflict paradigm.

5.15 The Relationship between International Humanitarian Law and International Human Rights Law

In the previous chapter, the applicability of international human rights law to extraterritorial drone strikes was discussed, yet, as Lubell submits, the actual use of international human rights law as a regulatory framework is not yet assured, with much depending on whether a particular situation has been classified as part of an armed conflict and on the interpretation of the relationship between international humanitarian law and international human rights law.[181] Even accepting the extraterritorial applicability of international human rights law, in particular Article 6 of the ICCPR, to US drone operations carried out as part of the current AUMF conflict, any determination of whether US drone strikes violate human rights law must take account of other applicable rules, namely those of international

[177] See B. Obama (2013), Speech delivered at National Defense University, Washington D.C, full transcript. http://www.huffingtonpost.com/2013/05/23/obama-drone-speech-transcript_n_3327332.html?view=print&comm_ref=false.
[178] See M. Schmitt, supra n.53.
[179] See B. Emmerson, supra n.21, at para.76.
[180] See K. Heller, 'One Hell of a Killing Machine', 11 J. Int'l Crim Just 8 (2013), at 9.
[181] See N. Lubell, supra n.1, at 236.

humanitarian law, that may supersede or alter the interpretation of the US's obligations under international human rights law.

In the past, there was a vibrant debate surrounding the view that international human rights law was essentially the law of peacetime, and international humanitarian law was the law of war.[182] While there are still some expressions that the human rights paradigm is of limited use during armed conflict,[183] most commentators now accept that international human rights law continues to apply during an armed conflict. Turning to the US drone programs operating in the context of what the Obama Administration refers to as the armed conflict with Al-Qaeda, the Taliban and associated forces, actions taken in that context may or may not, as has been discussed, come within the purview of international humanitarian law, the existence of an armed conflict being dependent on the facts and the interpretation of those facts. If occurring outside the context of an armed conflict, then the conduct of lethal force of course falls to be regulated by international human rights law. However, in a situation of armed conflict, the armed conflict and human rights paradigms apply concurrently. Given the significant differences between the two paradigms, particularly in respect of targeting with lethal force, their concurrent application is a complicated issue.

The previous chapter discussed the principle of *lex specialis derogat legi generali*, which raises an important challenge for the regulation of the conduct of hostilities in an armed conflict. In a situation of armed conflict, is international human rights law supplanted by international humanitarian law in defining the rights and obligations of states and individuals during an armed conflict?

The 1968 International Conference on Human Rights in Teheran was the first formal recognition of the applicability of international human rights law to situations of armed conflict, however the interconnections between human rights law and armed conflict were recognised before 1968, and certainly some human rights instruments concluded prior to 1968 contemplated situations of armed conflict. For example, both the ECHR (1950) and the ICCPR (1966) contain derogation clauses in respect of times of war. Likewise, certain international humanitarian law instruments recognise the applicability of human rights norms, the most obvious being Common Article 3,

[182] See G.I.A.D. Draper, 'The Relationship between the Human Rights Regime and the Law of Armed Conflicts', 1 Israel Yearbook of Human Rights 191 (1971).

[183] See, for example, 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', 99 AJIL 119 (2005).

which according to the ICRC Commentary, reflects, "the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances as being above and outside war itself."[184] More significantly, the Additional Protocols, in particular the Second Additional Protocol, indicated a shift towards the convergence of human rights and humanitarian law norms.
Professor Draper was a leading critic of the attempt to fuse the two paradigms, describing it as:

Insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed….[H]uman rights instruments are neither intended nor adequate to govern an armed conflict….The [human rights] regime in no way purports to regulate the conduct of war…even assuming that both [parties to the armed conflict] were subject to that human rights regime. Hostilities and government-governed relationships are different in kind, origin, purpose, and consequence. Accordingly, the law that relates to them, respectively, has the like differences. Human rights regimes and the humanitarian law of war deal with different and distinct relationships.[185]

Draper's remarks are certainly cautious, and are reflected in the argument proffered by the United States that in addressing particular issues during an armed conflict, international humanitarian law should supplant the application of international human rights law.
Returning to Nuclear Weapons,[186] where the ICJ was faced with the argument that the ICCPR protects human rights only in peacetime, with the United States (along with the UK and the Netherlands) also arguing that the conduct of hostilities during an armed conflict is regulated by international humanitarian law, and that if deaths result from actions that comply with international humanitarian law, the deprivations of life cannot be considered arbitrary. Referring to the negotiating history of Article 6 of the ICCPR, it was submitted on behalf of the UK:

[184] See 'Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field', ICRC, Geneva, 12 August 1949. Commentary - Art. 3, available at https://www.icrc.org/ihl/COM/365-570006?OpenDocument, (accessed 16th July 2015).
[185] See G.I.A.D. Draper, 'Humanitarian Law and Human Rights', Acta Juridica 193 (1979).
[186] See Nuclear Weapons, supra n.9.

The only sensible construction which can be placed on the term "arbitrary" in this context is that it refers to whether or not the deliberate taking of life is unlawful under that part of international law which was specifically designed to regulate the conduct of hostilities, that is the laws of armed conflict.[187]

The oft-quoted dicta of the ICJ, at paragraph 25 of the Advisory Opinion, need not be repeated again from the previous chapter, suffice to say that in that case we see a Court confronted with two legal paradigms, international human rights law and international humanitarian law, both with their own rules regarding deprivation of life by lethal force. In order to reconcile these paradigms, the Court resorted to the principle of *lex specialis derogat lex generali* to opine that the ICCPR's provisions on the right to life must be construed, within a situation of armed conflict, by making a *renvoi* to the rules of international humanitarian law.[188]
Subsequently, the ICJ provided clarification in the form of the following dicta in The Wall:

The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the ICCPR. As regards the relationship between international humanitarian law and international human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of international human rights law; yet others may be matters of both these branches of international law.[189]

Thus, while the ICJ confirmed the non-derogable nature of the right to life, it held in effect that it was appropriate, in situations of armed conflict, to refer to international humanitarian law as *lex specialis*, in order to determine what could be considered an arbitrary deprivation of life. Therefore, in interpreting the precise content of the right to life in the context of an armed conflict, the two paradigms applied concurrently, or within each other. However, from a different perspective, international humanitarian

[187] See Nuclear Weapons – Written Submissions, para.3.101.
[188] See Nuclear Weapons, supra n.9, at para.25.
[189] See The Wall Advisory Opinion, supra n.9, at para.106. See also Armed Activities, supra n.9, at paras.216-220.

law, with its more permissive targeting rules, simply set aside the standard of arbitrariness provided for under the ICCPR.

The jurisprudence of the ICJ in the aforementioned cases draws attention to an important aspect of the operation of the *lex specialis* principle in the context of an armed conflict. Even as the principle operates to justify recourse to the more permissive rules of the armed conflict paradigm, what is being 'set aside' (the *lex generalis* of human rights law) does not vanish altogether. The Court was careful to point out that the *lex generalis* continues to apply during an armed conflict, and that the *lex specialis* affected only one aspect of it, albeit an important aspect of it, namely the assessment of arbitrariness in respect of the deprivation of life by lethal force. There was nothing within the *lex specialis* itself to suggest that the *lex generalis* was abolished in times of armed conflict, and indeed the ICJ clarified its intention in The Wall and Armed Activities, that the *lex specialis* of international humanitarian law should not be used in order to cast aside as a whole the *lex generalis* of human rights law, but rather that the applicable rules for each situation must be determined on a case-by-case basis.[190]

It is respectfully submitted that the *lex specialis* principle has made a significant contribution towards a coherent approach to the complex issue of concurrent applicability. However, it has been remarked that it is too vague and rather oversimplifies the relationship between international humanitarian law and international human rights law during an armed conflict. There exist varying, and often contradictory, interpretations as to the scope and implementation of the *lex specialis* principle. For example, Prud'homme states that:

The vagueness of the lex specialis principle generates serious reservations as to its ability to stand as a sound theoretical model that clarifies the co-existence of the two disciplines.[191]

Although the *lex specialis* principle states that the specific norm prevails over the general one, there is no indication as to how to determine which norm is specific or

[190] See *ibid*.
[191] See N. Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?', 40 Israel Law Review 2356 (2007).

general. Whilst in Nuclear Weapons, it was clear that in terms of the right to life during an armed conflict, the international humanitarian law rule was more specific, this will not be so in relation to other norms, such as economic, social and cultural rights.[192]

Thus, while the approach taken in Nuclear Weapons and The Wall to the use of the *lex specialis* principle as a means of reconciling a conflict between international human rights law and international humanitarian law seems clear and straightforward, problems do arise. The ICJ's approach in both cases fails to clarify *how* the *lex specialis* principle is to be applied, in particular whether it should be used to afford primacy to international humanitarian law over international human rights law in all situations during an armed conflict, or only with regard to specific norms, such as the right to life. The ICJ in Nuclear Weapons seemed to be applying *lex specialis* to the case before it, opining that international humanitarian law displaces international human rights law in the context of a violation of the right to life during an armed conflict. However, the Court gave no clarification as to how *lex specialis* would apply in respect of other rights. In The Wall, the ICJ appeared to deduce that, in a situation of armed conflict, international humanitarian law is always *lex specialis*, displacing international human rights law. The problem with the Court's deduction therein is that is assumes that all rules of international humanitarian law are *lex specialis* to international human rights law as a whole. Thus, in the event of a conflict between the two paradigms, the effective distinguishing of the *lex generalis* rule of international human rights law might create a level of tolerance of serious violations of human rights. This leads on to something of a judicial retreat from the application of the *lex specialis* principle in Armed Activities, where the ICJ did not refer to the *lex specialis* principle as it applied in the previous cases, instead stating that:

Both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.[193]

There is an unresolved issue, raised by Schabas, which presents a marked difference between the human rights and armed conflict paradigms in respect of the nexus

[192] See the range of diverse views expressed by commentators in *Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation*, International Conference Centre, Geneva: The University Centre for International Humanitarian Law, Geneva, September 2005, at 18-20.
[193] See Armed Activities, supra n.9, at para.216.

between the aims and the means, and which is worthy of exposition.[194] Schabas notes that, whilst international humanitarian law is indifferent to the *jus ad bellum*, international human rights law cannot be, since there is an assumption of the right to peace, and because under international human rights law, the legitimacy of the aims is part of the test for determining the legality of the means.[195] Therefore, there may be killings that take place within the context of an armed conflict, and which are lawful under international humanitarian law, but the application of human rights law would require an examination of the circumstances surrounding the use of force and whether legitimate aims are being pursued, as well as *jus ad bellum* considerations as to the legality of the resort to force.[196] This approach, however, carries no favour with Lubell, who submits that it challenges the separation between the *jus ad bellum* and the *jus in bello*, and could undermine adherence to international humanitarian law.[197]

The circumstances of the US drone strike that killed al-Harithi in Yemen, discussed in the previous chapter, provide a useful example of a case exemplifying the need for further analysis of the relationship between international human rights law and international humanitarian law, as well as the search for additional models of interpretation in respect of the concurrent applicability of both paradigms during an armed conflict. This writer has already submitted that this particular strike occurred outside the context of an armed conflict, thereby coming under the purview of international human rights law. Assuming though, for the sake of academic argument, that the strike occurred within the context of an armed conflict, engaging the application of international humanitarian law, and if it was to be concluded that those individuals targeted were lawful targets under international humanitarian law, then the legality of the deprivation of life would fall to be determined by reference to the *lex specialis*, in accordance with the aforementioned ICJ jurisprudence. Therefore, subject to accepting the conditions regarding the applicability of international humanitarian law and the status of those individuals as lawful targets, it could be argued that the al-Harithi drone strike, as well as similar strikes, could have a lawful basis under the *lex specialis*, although such a conclusion obviously rests uneasily with

[194] See W. Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus ad Bellum', 40 Israel Law Review 592 (2007), at 606-613.
[195] See *ibid*.
[196] See *ibid*.
[197] See N. Lubell, supra n.1, at 240.

those, including this writer, who are not entirely convinced of the legality of the strike under international human rights law.

Attempts by scholars, then, to come to a consensus on the complex issue of the concurrent applicability of the human rights and armed conflict paradigms, have ultimately been unsuccessful, and there exists a diversity of views and approaches to the issue.[198] If one adopts an approach to lethal force in any situation of armed conflict that assumes the complete supplanting of international human rights law in favour of international humanitarian law, this would create the risk of states being able to readily claim that individuals are *not* civilians and thus can be lawfully targeted with lethal force.[199] This problem is certainly evident in the context of the current AUMF conflict in which the US is engaged, as well as in the wider context of current US counter-terrorism operations. The US asserts that its actions, included targeted killings using drones, occur within and as part of an armed conflict with Al-Qaeda, the Taliban and associated forces, thereby permitting the invocation of the broader targeting rules of international humanitarian law.[200] As Lubell rightly submits, assertions of the applicability and predominance of international humanitarian law carry a risk of abuse,[201] and one need only refer back to the US's widely-criticised loose interpretation of the targeting rules of international humanitarian law in the current non-international armed conflicts discussed above, in particular SDSP affixing a combatant signature to all military-aged males within a strike zone, and arguing for a broader definition of imminence to bring individuals within the scope of 'direct participation in hostilities' solely on the basis of membership of an armed group without reference to the actual roles played by such individuals within the group.[202]

However, this is not to say that this particular issue can be resolved simply by advocating the use of a human rights approach. Whilst such an approach may be suited to drone strikes such as that which killed al-Harithi in Yemen, and other similar strikes occurring outside zones of active hostilities, reliance solely on the human

[198] See D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 EJIL 171 (2005).
[199] See *ibid*, at 200. See also discussion in *Expert Meeting*, supra n.192, at 34-41.
[200] See Koh, supra n.5.
[201] See N. Lubell, supra n.1, at 243.
[202] See Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaeda or An Associated Force', supra n.73.

rights paradigm would be unrealistic, almost nonsensical, on a "hot" battlefield. Take, for example, a US soldier on the ground in Afghanistan. Constrained by international human rights law, he would only be able to open fire in immediate self-defence of himself or others. Such an approach, it is submitted, does not reflect the reality of armed conflict, and one cannot resolve the complexities of the issue of concurrent applicability by simply dismissing long-established rules of international humanitarian law for regulating the conduct of hostilities during an armed conflict.

As an alternative to the *lex specialis* principle, Kretzmer proposes a 'Mixed Model', in which the availability of alternative options must be taken into account before lethal force against suspected terrorists operating from and within another state can be considered lawful.[203] In the context of targeted killings, this might include the imposition of a legal requirement to capture and detain where this is a feasible option before resorting to lethal force.

At first sight, Kretzmer's alternative seems reasonable enough, appearing to allow the retention of the central elements of human rights law in the context of an armed conflict. The problem, however, is the unclear status of international humanitarian law under Kretzmer's approach. International humanitarian law has never operated in the course of an armed conflict on the basis of a presumption that non-lethal measures, such as capture and detention, must be considered and implemented where feasible, as an alternative to the use of lethal force against a lawful target. It is respectfully submitted that any interpretation of international humanitarian law rules that requires attempts to capture and detain in certain circumstances is unlikely to gain support amongst commentators. Kretzmer's approach in combining the human rights and armed conflict paradigms does not overcome the obstacle that human rights norms would place restrictions on the use of direct lethal force that the rules of international humanitarian law do not prohibit.

Notwithtanding the difficulties presented by Kretzmer's 'Mixed Model', this writer would respectfully agree with Lubell that, until a legal formulation can be agreed upon in respect of the human rights-armed conflict conundrum, it is perfectly acceptance to advance the argument that, as a matter of policy and desirable practice, where circumstances permit, capture and detention should be attempted where

[203] See D. Kretzmer, supra n.198, at 201.

feasible, although this may not always be possible in the heat of battle, such are the realities of war.[204] What is clear is that there exists scope for further development of a coherent approach allowing for a pragmatic and consistent concurrent application of both the human rights and armed conflicts paradigms in an armed conflict.[205]

5.16 Concluding Comments

Looking through the prism of the US drone programs operating in the key target states, extant literature reveals a complex, yet ambiguous, relationship between the human rights and armed conflict paradigms, in part due to a lack of clarity within the corpus of international humanitarian law itself. Where the rules are clearer, such as in relation to the classification of an object under the definition of military objective, there is little problem in relation to the concurrent applicability of the paradigms. Likewise, where there exist parallel rules in the two paradigms, such as in respect of the prohibition of torture, there is little problem in resorting to the more developed corpus of international human rights law in this field to determine if an act constitutes torture. When dealing with the use of lethal force by one combatant against another in the context of an international armed conflict, there seems little difficulty in interpreting the right to life through the *lex specialis* of international humanitarian law.

The situation becomes more difficult when the international humanitarian law rules are unclear. Take, for example, the use of force against a civilian who is 'directly participating in hostilities'. In respect of the issue of concurrent applicability, this example raises the question of whether the human rights paradigm imposes a requirement to consider capture and detention where feasible, as an alternative to lethal force, or whether certain individuals can lawfully be targeted.

The question of the use of lethal force encompasses numerous areas of contention within international humanitarian law itself, such as whether the situation of violence can actually be classified as an armed conflict, the legal status of those participating in hostilities, and the activities (given the lack of clarity as to what behaviours and

[204] See N. Lubell, supra n.1, at 245.

[205] See N. Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate', 40(2) Israel Law Review 648 (2007). See also D. Kretzmer, 'Rethinking the Application of International Humanitarian Law in Non-International Armed Conflicts', 42(1) Israel Law Review 1 (2009).

activities constitute a "signature" under SDSP) and duration of time for which civilians lose their protected status on account of their direct participation in hostilities.[206]

While international humanitarian law and international human rights law have very different origins and certain fundamental differences, they are capable of concurrent application in situations of armed conflict. Concurrent applicability has the potential to enhance the scope of protection afforded to individuals, as one paradigm can influence the application of the other to fill in any lacuna, demonstrated with regard to the right to life. The *lex specialis* principle, espoused by the ICJ to ensure the mutual application of both paradigms during an armed conflict, has its supporters and its detractors, and while the issues surrounding the principle are notoriously complex, it remains the primary method for reconciling the application of both paradigms in situations of armed conflict. Nevertheless, where a conflict of norms results from the application of rules of both paradigms, it may be that policy rather than law dictates what exactly fills the lacuna. Of course, the overriding objective must be to secure the maximum possible protection for non-combatants.

With regard to the US drone programs currently operating, what is of concern is that the debates surrounding the somewhat ambiguous nature of the global conflict with Al-Qaeda and associated forces, discussed earlier in this chapter, and the legal status of members of Al-Qaeda, the Taliban and associated forces (the United States regarding such individuals as 'unlawful combatants', not entitled to the protections afforded by international humanitarian law) have highlighted the risk of a situation being brought about where the US can wilfully disregard its obligations under both paradigms. Such a disdain for the fundamental principles of human rights and humanitarian law must be discouraged and condemned. Further jurisprudence from the ICJ clarifying the issue of concurrent applicability would be of great assistance to legal scholars, as indeed would judicial comment, perhaps in the form of an Advisory Opinion, addressing the legal issues surrounding the US drone programs, and indeed the use of armed drones generally, and other extraterritorial counter-terrorism operations, in particular the applicability of international humanitarian law to such operations undertaken as part of a purported armed conflict with 'global reach'.

[206] See N. Lubell, supra n.1, at 246.

6

Conclusions

Developments in the technology behind Unmanned Aerial Vehicles (UAVs), or as they have come to be known in common parlance, "drones", have been rapid in the past two decades. From languishing in Research and Development (R&D), to their initial use in surveillance and intelligence gathering, the United States has built up a formidable fleet of 'Predator' and 'Reaper' drone aircraft, armed with laser-guided bombs and missiles. These aircraft are at the cutting edge of military technology, capable of flight times in excess of 24 hours without refuelling, equipped with the most advanced surveillance and targeting systems that allow for precision targeting, at a fraction of the cost of a conventional manned combat aircraft. It is, therefore, unsurprising that, in an era of fiscal austerity, with national defence budgets under considerable restraint, states such as the US and the UK are investing heavily in the development and procurement of drone technology as a weapons delivery platform. Aside from the economic reasons for this investment in drone technology, the use of armed drones to date by the US and the UK has avoided the thorny and politically-sensitive issue of committing traditional forces to counter the threat posed by transnational terrorism. Both the US and UK are 'war-weary' as a result of long campaigns in Iraq and Afghanistan following the 9/11 attacks, and the sight of military service personnel killed in combat operations being repatriated has endured in the public conscience. Thus, US and UK operations against the self-styled Islamic State in Iraq and Syria have been restricted to aerial assaults, such is the lack of public and political appetite for committing conventional forces to a ground war against Islamic State. Armed drones have therefore played a prominent role in this 'air war' against Islamic State over the skies of Iraq and Syria.

It has been evidenced that the armed drone, considered as a weapons delivery vehicle, actually has much to commend it, from the perspective of compliance with international law. The tactical military advantage of the swift delivery of lethal force by a precision-guided missile or bomb from the moment of sighting a target, coupled with the ability of drones to loiter and to gather real-time intelligence on a potential target for a significant period of time prior to launching any strike, has the potential to

reduce the risk of collateral damage, both in terms of civilian casualties and damage to civilian objects, by allowing for significant improvement in overall situational awareness. This, it is submitted, is certainly a positive aspect, particularly from the view of ensuring compliance with international humanitarian law principles.[1]
As the ICRC has noted:

Any weapon that makes it possible to carry out more precise attacks, and helps avoid or minimise incidental loss of civilian life, injury to civilians, or damage to civilian objects, should be given preference over weapons that do not.[2]

It has been previously discussed that there is little practical difference between an armament launched from a conventional manned combat aircraft and one deployed from an unmanned drone – the armament is the weapon, the aircraft is the delivery platform.
Even if the armed drone itself, inclusive of the vehicle, could be conceived of as an actual weapon, this writer does not believe that it would fall foul of the requirements of Article 36 of the First Additional Protocol to the Geneva Conventions. There is no evidence to suggest in any way that the nature, design, or technology of the drone results in any design-dependent effects that are of such a nature as to cause superfluous injury or unnecessary suffering, especially when compared to modern conventional combat aircraft. Indeed, quite the opposite may be true, as the standard non-thermobaric variant of the Hellfire missile, the weapon most commonly used with 'Predator' and 'Reaper' drone aircraft, has a smaller blast radius than similar weapons used on conventional combat aircraft. Thus, the drone itself would not be an unlawful weapon, incompatible with international law as a means or method of warfare, assuming of course that the United States, as well as other nations that have acquired UAV technology, have in place effective procedures to ensure compliance with applicable laws, as required in order to guarantee the effective implementation of the prohibition of certain means and methods of warfare. The overriding objective of Article 36 is the prohibition of weapons that are incapable, by virtue of their inherent

[1] See M. Schmitt, 'Precision Attack and International Humanitarian Law', *International Review of the Red Cross*, Vol.87, No.859 (September 2005).
[2] See ICRC, 'The Use of Armed Drones Must Comply With Laws', 10th May 2013, available at http://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm, (accessed 12th August 2015).

nature and characteristics, of compliance with the cardinal principles of international humanitarian law – distinction and proportionality. The armed drone is capable of such compliance, and when used in strict compliance with settled legal principles, has the potential to mitigate the adverse effects of conflict by reducing the risk of disproportionate civilian casualties and damage to civilian objects.

The main legal controversies surrounding the US drone programs presently operating in the key target states – Afghanistan, Pakistan, Somalia, Yemen, and most recently against the self-styled Islamic State in Iraq and Syria, are not so much concerned with the inherent nature or characteristics of the armed drone itself as a weapon or weapons delivery platform, as they are concerned with how, when and where drone strikes are being used as a method of targeted killing in the context of what the United States asserts is a global non-international armed conflict against Al-Qaeda, the Taliban and associated forces.

The United States has grounded its defence of lethal drone strikes in its inherent right to self-defence within a situation of armed conflict, and has repeatedly asserted that its actions comply with all applicable laws, including the law of armed conflict.[3]

However, the legal justifications proffered by the United States have come under sustained scrutiny and criticism from commentators, particularly outside the US. With regard to the broad concept of self-defence favoured by the US, the assertion of a broad concept of "imminence", which would essentially justify the resort to lethal force against an individual solely on the basis of membership of an armed group, irrespective of the degree of actual imminence of any threat of armed attack,[4] that notion has found little support among commentators, with UN Special Rapporteur Christof Heyns challenging any notion that the *jus ad bellum* rules in relation to self-defence can be read in any way that dispenses with the requirement that an individual must pose an imminent threat before he/she can be considered a legitimate target for lethal force in self-defence. Heyns states that:

[3] See H. Koh, 'The Obama Administration and International Law', ASIL Speech, 25th March 2010, http://www.state.gov/s/l/releases/remarks/139119.htm (accessed 6th March 2014). See also B. Obama (2013), Speech delivered at National Defense University, Washington D.C., 23rd May 2013, full transcript. http://www.huffingtonpost.com/2013/05/23/obama-drone-speech-transcript_n_3327332.html?view=print&comm_ref=false.

[4] See Department of Justice White Paper, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaeda or An Associated Force', available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

The view that mere past involvement in planning attacks is sufficient to render an individual targetable even where there is no evidence of a specific and immediate attack distorts the requirements established in international human rights law.[5]

Thus, while the US appears to accept that the resort to lethal force in anticipatory self-defence is subject to an imminence requirement, its broad interpretation of this requirement, which does not include any requirement of a specific, imminent attack, appears to challenge established norms, and has been criticised by the majority of commentators. Likewise, a note of caution must be sounded in relation to the reliance placed by the US on the "unable or unwilling" test, which has been used to justify the resort to force in self-defence against armed groups operating within several states where the US has asserted that the various host states are "unable or unwilling" to counter the threat posed by these armed groups. As has been submitted, most notably by Deeks, it is not yet clear whether this relatively novel principle has assumed a place in the *lex lata* as a rule of customary international law.[6] While the status of the principle within the *jus ad bellum* remains undetermined, it seems to this writer unwise for the United States to place a great deal of reliance on it. Certainly, where any host state refuses to consent to US drone strikes on its territory against suspected members of an armed group operating from and within that territory, the "unable or unwilling" test should not be used as a means of circumventing the established principles of consent, sovereignty and territorial integrity.

In relation to that other justification proffered by the United States, that it is engaged in an ongoing non-international armed conflict of global reach against Al-Qaeda, the Taliban and associated forces, what is of concern to this writer is the continuing refusal of the United States to acknowledge the applicability of international human rights law to its targeted killing operations. The US obstinately argues that international human rights law does not apply in situations of armed conflict, being supplanted by the law of armed conflict, and that international human rights law is not of extraterritorial applicability and so is irrelevant to operations undertaken outside

[5] See Report of Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, presented to the UN General Assembly, dated 13th September 2013, Ref: A/68/389, at para.37.
[6] See A. Deeks, 'Unwilling or unable: toward a normative framework for extraterritorial self-defence', (2012) Va J Int Law 52(3), 483-550.

the United States' own territory. It has been discussed that both arguments do not withstand scrutiny. There is settled jurisprudence of the ICJ in Nuclear Weapons, The Wall, and Armed Activities, that the prohibition against arbitrary deprivation of life contained within Article 6 of the ICCPR and forming part of customary international law continues to apply during a situation of armed conflict, alongside the *lex specialis* of international humanitarian law, and that the test of whether a deprivation of life is arbitrary must be determined by reference to the applicable rules of international humanitarian law.[7] Further, it is now almost universally accepted that a state's obligations under international human rights law apply extraterritorially, and thus the US finds scant support for its assertion to the contrary, sitting as it does at odds with state practice and *opinio juris*. Outside situations of armed conflict, the use of lethal force is lawful under international human rights law only in those circumstances where it is strictly necessary and proportionate, if it is aimed at preventing an immediate threat to life, and if there is no other means of preventing the threat from materialising. As UN Special Rapporteur Ben Emmerson QC rightly submits, only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the sole or primary purpose of an operation.[8] As the principal purpose of a drone strike is the employment of lethal force to kill a targeted individual(s), it follows that drone strikes will rarely comply with established principles of international human rights law in respect of arbitrary deprivation of life outside a situation of armed conflict. This is the prevailing view among commentators, and one shared by this writer. It is lamentable that the US seemingly continues to disregard the applicability of international human rights law to its targeted killing programs. For so long as this remains the case, many commentators and human rights organisations will continue to view drone strikes as being of dubious legality and as a sophisticated means of extra-judicial execution.

The repeated assertion of the United States that it is engaged in a non-international armed conflict of global reach with Al-Qaeda, the Taliban and associated forces, has been a cause of concern for commentators outside the US, and this writer has been

[7] See Nuclear Weapons Advisory Opinion ICJ Rep. 1996, at para.25; The Wall Advisory Opinion ICJ Rep. 2004, at para.106; Armed Activities ICJ Rep. 2005, at paras.216-220.
[8] See Interim Report of Ben Emmerson QC, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, presented to the UN General Assembly, dated 18th September 2013, Ref: A/68/389, at para.60.

struck by the contrasting 'American' and 'European' approaches in relation to the applicability of human rights law and the nature of the purported armed conflict. The US has advanced the argument that it is engaged in an armed conflict with the aforementioned armed groups, that this conflict is directed against those armed groups that perpetrated the 9/11 attacks, that it is a 'novel' form of conflict, and that it is of such a nature, given the transnational nature of the operations of those armed groups, that the 'battlefield' has no geographical or temporal delineations. Essentially, the United States argues that no member of these armed groups is beyond the reach of the targeting rules of the law of armed conflict – that 'the fight follows the fighter'. These arguments, which bring into the realm of possibility the notion of a 'perpetual war' in which the entire globe is a potential 'battlefield', have been seized upon and roundly criticised by the majority of legal opinion, especially that outside the US. The criticisms of the US position are sound, based as they are upon traditional interpretations of international humanitarian law. The US position is clearly at odds with the cardinal principles of international humanitarian law, where this applies, that seek to mitigate the adverse effects of armed conflict, especially on civilians. Although it is accepted that any conflict with the aforementioned groups is better categorised as a non-international armed conflict, international humanitarian law does not recognise the notions of the 'perpetual war' or the 'global battlefield'. Armed conflict must exist within geographical and temporal delineations, and must be capable of being brought to a determinative conclusion.

While situations of non-international armed conflict have been shown to exist at particular times and in particular localities in those key target states where US drone programs presently operate, this does not equate to a situation of global non-international armed conflict. Whether or not a situation of armed conflict exists at a particular time and within a defined geography, can only be determined on the facts known at the time. Although allowance is made for a situation where a non-international armed conflict "spills" across the border of a neighbouring state, the threshold rules for engaging international humanitarian law remain primarily territorial.[9]

Likewise, given the scale of US operations against the Al-Qaeda network in the years following the 9/11 attacks, and the notable successes of these operations, culminating

[9] See Mary Ellen O'Connell, 'Combatants and the Combat Zone', University of Richmond Law Review, Vol.43, No.3 (March 2009).

of course in what has been considered the most successful US counter-terrorism operation, that which located and killed Osama bin Laden in May 2011, it must now be doubted whether the United States can legitimately consider itself to be, at present, in a state of armed conflict with Al-Qaeda, within the purview of international humanitarian law. While the requisite elements of an armed conflict, as per the Tadic criteria, were clearly present at the time of, and in the immediate years after, the 9/11 attacks, as a result of US operations against it, the network has become so irreversibly degraded, in terms of its membership, hierarchy, command and control structure, and resources at its disposal, that it must now be open to question whether Al-Qaeda continues to subsist as a single transnational network, or as a loose collection of individual, local, regional or national cells, inspired by the ideology of Al-Qaeda but operating independently of one another. While the danger of so-called 'lone wolf' attacks has been much discussed in the media, the reality is that Al-Qaeda no longer exists in the some form as it once did, and so it must be doubted that it continues to satisfy the 'organisation' prong of the Tadic criteria, with the consequence being that there is no longer a situation of armed conflict with Al-Qaeda to which international humanitarian law applies. Despite US assertions to the contrary, operations against Al-Qaeda, including armed drone strikes, no longer fall within the purview of international humanitarian law, and the legality of such operations properly falls to be determined by the more restrictive rules of the *lex generalis* of international human rights law and the law enforcement paradigm. Of course, the principal difficulty, aside from the obstinate refusal by the United States to acknowledge the extraterritorial applicability of human rights law to its targeted killing programs, remains in squaring US targeting practices with the essence of the right to life, particularly as expressed in Article 6 of the ICCPR.

Where it is accepted that an armed conflict does exist to which international humanitarian law applies, there remain concerns that US drone targeting practices fall foul of the requirements of the fundamental principles of distinction and proportionality. The US has expressed its chagrin at what it considers to be the unduly restrictive notions of 'continuous combat function' and 'direct participation in hostilities', expressed in the ICRC's Interpretive Guidance,[10] as a means of designating combatant status. However, it has been shown that the US's Signature

[10] See ICRC (2009), 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law', ICRC, Geneva.

Drone Strike Protocol (SDSP) stands as a poor proxy for these notions, and that there are significant difficulties in reconciling US targeting practices, including SDSP, with the principles of distinction and proportionality. The problems with SDSP, as discussed previously, are several, and give rise to strong concerns that drone strikes carried out pursuant to that Protocol violate international humanitarian law. The United States has not disclosed those actions or behaviours that constitute "signatures", though it is believed that the range of actions and behaviours which may lead to a targeted "signature" strike is quite broad, fuelling concerns that common behaviours in homo-social societies, such as Pakistan and Yemen, are being wrongly ascribed "signature" status, perhaps in part due to the lack of cultural awareness on the part of drone operators and military commanders. The legitimate concern, therefore, is that SDSP is too permissive in its scope, inadequately distinguishing between civilians and actual combatants, and resulting in disproportionate civilian casualties relative to any military advantage. In such respects, therefore, SDSP is widely regarded as violating international humanitarian law.

There has long been concern expressed as to the reported large numbers of civilian casualties resulting from US drone strikes,[11] with reliable reports as to the levels of such casualties casting doubt on the various denials of the US Administration, including John O. Brennan's now infamous remark in 2011 that there had not been a single collateral casualty in the year to June 2011.[12] The seemingly incontrovertible evidence of mounting civilian casualties has only served to add to the debate as to whether drones can, and in practice do, comply with the rules on distinction and proportionality. Considerations of the strengths and limitations of armed drones are likely to continue, contributing to an ongoing debate as to the proper role of UAVs generally and within a situation of armed conflict. What is certain is that, in respect of US drone strikes, it is incumbent on the US to demonstrate that it has placed reliance on credible intelligence and that it abides by its obligations under international law, particularly those relating to distinction and proportionality. Rather than publicly demonstrating this, the US continues to hold a veil of secrecy over the entire drone program, in particular official casualty rates, and the secrecy that has surrounded the

[11] See Report of Amnesty International, "Will I Be Next?" - US Drone Strikes in Pakistan, October 2013, Ref: ASA 33/013/2013. See also Report of Human Rights Watch, "Between a Drone and Al-Qaeda" – The Civilian Cost of US Targeted Killings in Yemen, October 2013.

[12] See 'John Brennan Speech on Obama Administration Anti-Terrorism Policies and Practices', 16th September 2011, available at http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices.

deaths of civilians has led to growing international criticism among commentators and human rights NGOs.[13] Whilst this writer does appreciate that there must be a degree of secrecy surrounding military operations, particularly in situations of armed conflict, on grounds of national security, the sheer lack of transparency and accountability that has surrounded the US drone program, particularly where it has been alleged that drone strikes have resulted in civilian deaths, is unacceptable and has been sharply criticised in various Reports of UN Special Rapporteurs, in particular Alston, Heyns and Emmerson.[14] Each Rapporteur has expressed concern that the US places reliance on inaccurate information from paid informants, that positive identification procedures are weak and ineffective, and that there remains a lack of independent post-strike reviews.[15]

Although the US Administration's pledge to remove the CIA from its role in the US drone program, and to transfer operations to the Department of Defence, must be welcomed, given the doubts as to the legality of a civilian intelligence agency that has no military command and control framework undertaking lethal drone strikes, it remains to be seen whether this will ultimately translate into improved oversight and accountability mechanisms. In the absence of clarification by the US Administration of its position on the relevant legal issues, and its continued refusal to declassify to the maximum extent possible all relevant information relating to extraterritorial targeted killing operations, including its own civilian casualty figures as well as information on the methodology used to ascribe combatant status in targeting operations, the transfer of drone operations from the CIA to the military will do little to alleviate concerns as to the legality of US drone strikes. To date, requests and legal actions in pursuit of a degree of declassification of information for those affected by current US

[13] See International Human Rights and Conflict Centre (Stanford Law School) and Global Justice Clinic (NYU School of Law), 'Living Under Drones: Death, Injury, and Trauma to Civilians from U.S. Drone Practices in Pakistan', September 2012, available at http://www.livingunderdrones.org/wp-content/uploads/2013/10/Stanford-NYU-Living-Under-Drones.pdf, (accessed 14th May 2015).
[14] See Report of Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, presented to the UN General Assembly, dated 28th May 2010, Ref: A/HRC/14/24/Add.6; Report of Christof Heyns, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, presented to the UN General Assembly, dated 13th September 2013, Ref: A/68/389; Interim Report of Ben Emmerson QC, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, presented to the UN General Assembly, dated 18th September 2013, Ref: A/68/389; Final Report of Ben Emmerson QC, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, presented to the UN Human Rights Council, dated 11th March 2014, Ref: A/HRC/25/29.
[15] See *ibid*. See also Michael W. Lewis, 'Drones and the Boundaries of the Battlefield', (2011-2012) 47 Tex. Int'l L. J. 293, at para.5.

targeting practices, and ultimately the opportunity to challenge those practices, have been summarily dismissed.[16]

In short, the US drone program remains largely beyond the reach of any effective legal or judicial oversight. One suggestion to remedy this is the establishment of a Congressional Committee to conduct post-strike reviews, although this writer is of the opinion that such reviews could better be undertaken, and the appearance of political impartiality preserved, by an independent tribunal(s) comprised of senior members of the judiciary, assisted by independent counsel and advised by international lawyers and various relevant NGOs. As to the possibility of US targeting practices being the subject of contentious inter-state litigation before the ICJ, this writer does not hold this to be a realistic prospect. Substantive issues aside, the pertinent consideration is that of jurisdiction, and it must be borne in mind that the jurisdiction of the ICJ is fundamentally based on state consent.[17] It is therefore doubtful that the US would consent to being the respondent state in such litigation,[18] and it is highly doubtful that the US would make any declaration accepting the jurisdiction of the ICJ to determine the legality of US drone strikes in any such inter-state litigation.[19] In addition, such litigation would have to be commenced by one or a combination of the key target states, and it is highly unlikely that any of these states would be minded to initiate proceedings against the US, given the evident degree of cooperation between the US and these states in the execution of drone strikes in their territories. It seems more probable, at least to this writer, that any recourse to the ICJ will be at the behest of one of the UN organs, such as the General Assembly, requesting an Advisory Opinion on the legality of US drone strikes. It is unlikely that such a request will emanate from the Security Council, on account of the US's power of veto. Such a request is more likely to come from the General Assembly, on the basis of a simple majority vote and where the US has no power of veto to block such a request. Although such an opinion from the ICJ would certainly lend clarity to the complex legal issues surrounding the US drone programs, the non-binding nature of the opinion may be of limited value in

[16] See Al-Aulaqi -v- Obama, 727 F.Supp. 2d 1 (DDC.2010) (No.10 Civ. 1469), where Al-Aulaqi's family sought information regarding the grounds for putting Al-Aulaqi on a "kill-list", and the legal basis for the asserted authority to use lethal force. The case was summarily dismissed on national security grounds.

[17] See Article 36(1), Statute of the International Court of Justice.

[18] Indeed, the United States withdrew from the compulsory jurisdiction of the ICJ in 1986, following its decision in Nicaragua (1986) ICJ Rep. 14.

[19] See Article 36(2), Statute of the International Court of Justice.

practice, both in terms of achieving justice on behalf of civilian casualties and their families, and in effecting change to US targeting practices using armed drones. Of course, affected parties with sufficient *locus standi* may commence legal proceedings against the United States in US federal courts, with a view to challenging alleged violations of international law, but any such litigation will be problematic owing to sensitive considerations of national security and will stand little prospect of success, as shown in the Al-Aulaqi litigation.[20]

Although the newly-effected presidential policy guidance referred to by President Obama in his May 2013 speech seemed to adopt a more stringent standard for lethal counter-terrorism operations outside zones of active hostilities, indicating that, "before any strike is taken, there must be near certainty that no civilians will be killed or injured,"[21] it is regrettable that this guidance has only been released in outline, and of course does not equate to the imposition of a legal obligation on the part of drone operators to hold fire unless there is an expectation of zero civilian casualties, or that any individual or location should be presumed to be civilian in nature unless there is credible evidence to the contrary.

What was quite surprising to this writer in the course of this project was the length of time taken for the international community, and international lawyers, to react to the initial resort to armed drone strikes post-9/11 and to their rapid rate of increase in the following years. It seems that the concerns of the media, NGOs and commentators were mainly concentrated on Guantanamo Bay, the reported abuses of prisoners carried out by military personnel in Iraq, and on the highly controversial US policy of extraordinary rendition of terrorist suspects. Concerns, of course, shifted over time, as drone strikes took on an ever more prominent role in the so-called 'war on terror'. In the absence of any clear transparency on the part of the Obama Administration in relation to the US drone program, the responses of international organisations become ever more important in reporting when US targeting practices fall foul of international law standards. As Christof Heyns has rightly stated, there is a need for a,

[20] See Al-Aulaqi -v- Obama, supra n.16.
[21] See B. Obama, supra n.3.

"comprehensive overview by the international community," of the means and methods of targeted killings.[22]

There is a legitimate concern that, in the words of Alston:

The United States' assertion of ill-defined license to commit targeted killings against individuals around the globe, without accountability, does grave damage to the international legal frameworks designed to protect the right to life.[23]

The problems of terrorism and assymetrical warfare are very real, but they are neither new nor unique to the US. However, as Heyns rightly makes clear, part of the concern about, "a state killing its opponents in other countries around the world, far from any armed conflict, is the precedent it sets for all states to act in this way."[24]

Given that over fifty states have acquired, or are in the process of acquiring, drone technology, as well as the risk of this technology falling into the hands of armed non-state actors, it is ever more important that there is transparency and accountability in the use of armed drones, so that outstanding legal issues can be definitively settled and that strict adherence to the applicable legal paradigms can be monitored and assured. This would go some way to facilitating consensus among relevant intergovernmental organisations and states, in particular those states using drone technology and those states in whose territory they are used to lethal effect. From such a consensus will come mechanisms for determining the proper application and interpretation of settled legal principles for the use of armed drones, which will be equally applicable to all states. To quote Philip Alston, which in the view of this writer sums up the worst-case scenario in the absence of such adherence to international law in the use of armed drones:

If other states were to claim the broad-based authority that the United States does, to kill people anywhere, at any time, the result would be chaos.[25]

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[22] See Statement by C. Heyns, 20th October 2011, UN Doc. GA/SHC/4016, available at http://www.un.org/news/press/docs/2011/gashc4016.doc.htm, (accessed 19th August 2015).
[23] See P. Alston, 'Statement of UN Special Rapporteur on US Targeted Killings without Due Process', 3rd August 2010, available at http://www.aclu.org/national-security/statement-un-special-rapporteur-us-targeted-killings-without-due-process, (accessed 19th August 2015).
[24] See C. Heyns, supra n.22.
[25] See P. Alston, supra n.23.

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