

# Extraterritorial targeting by means of armed drones: Some legal implications

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## Abstract

*The use of “drones” has grown exponentially over the past decade, giving rise to a host of legal and other issues. Internationally, it is the utilization of armed drones by States for the extraterritorial targeting of persons that has generated significant debate. This article attempts to outline some aspects of the relevant legal framework, with a focus on the international law applicable to drone strikes in situations of armed conflict. It briefly addresses the jus ad bellum and then centres on the jus in bello, addressing, in turn, questions related to when there is an armed conflict, what the rules on targeting are, who may be targeted and where persons may be targeted.*

**Keywords:** drones, targeting, use of lethal force, conduct of hostilities, direct participation in hostilities, conflict classification, extraterritorial NIAC, international armed conflict, non-international armed conflict, IHL, *jus ad bellum*, geographical scope, non-belligerent state, neutrality.

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The use of “drones”, the colloquial term for an array of remotely piloted airborne vehicles, has grown exponentially over the past decade. Drones are being increasingly relied on in peacetime to perform a range of tasks, including traffic congestion monitoring and police surveillance, to name just two. It may safely be said that this type of drone use is likely to increase with time; it raises thorny privacy protection and other legal issues and is the subject of growing attention,

\* This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

particularly in States in which it is becoming more common.<sup>1</sup> At the international level, it is the use of armed drones by States for the extraterritorial targeting of persons that is generating significant debate.<sup>2</sup> The purpose of this article is to attempt to outline some aspects of the international legal framework applicable to the extraterritorial use of armed drones in situations of armed conflict. Before that, several preliminary observations need to be made. The first relates to the use of terms. In this text, “drone” is shorthand for an armed *remotely piloted aircraft* or *remotely operated weapon system* – i.e., a weapon platform that is at all times under human command and control in the process of identification and attacking of targets, meaning that there is a “person in the loop”. It should be noted that certain other functions of drones, such as take-off, navigation and landing, are often automated, which indicates that these platforms are actually not entirely “remotely piloted”. The term *unmanned combat aerial vehicle* is also in common use.

Second, weapons with autonomy in the “critical functions” of identifying and attacking targets, and therefore in the use of force, are outside the scope of this examination, due to the fact that different legal considerations are involved.<sup>3</sup> Third, an attempt to outline certain aspects of the international legal framework implies adopting a “big picture” rather than a granular approach to the relevant law. Provided below is thus a broad legal reading of the regulation of armed drone use, not a blueprint (if that were even possible) for analyzing specific instances of targeting by drone. Fourth, it must be stressed that the text below is limited primarily to the legal implications of extraterritorial targeting by drones. It does not deal with other possible aspects of armed drone use, of a political, ethical or other nature, that are also the subject of intense debate.

- 1 See, e.g., Conor Friedersdorf, “Local Anti-Drone Activism Begins: ‘If They Fly in Town, We Will Shoot Them Down’”, *The Atlantic*, 30 July 2013, available at: [www.theatlantic.com/politics/archive/2013/07/local-anti-drone-activism-begins-if-they-fly-in-town-we-will-shoot-them-down/278198/](http://www.theatlantic.com/politics/archive/2013/07/local-anti-drone-activism-begins-if-they-fly-in-town-we-will-shoot-them-down/278198/).
- 2 See, e.g., Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Ben Emmerson, UN Doc. A/HRC/25/59, 11 March 2014, available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/25/59](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/25/59). In this context it should be noted that the current focus of international attention has been the extraterritorial targeting of specific individuals by States, even though the day may not be far when States might use armed drones within their borders. Focus has also been directed mainly at the use of drones by State actors, despite the fact that it is likely only a question of time before drones are more widely utilized by organized non-State armed groups and other non-State actors, as well as by private individuals. The Lebanon-based Hezbollah group is reported to have deployed drones laden with explosives. See Micah Zenko, *Reforming US Drone Strike Policies*, Council Special Report No. 65, Council on Foreign Relations, Center for Preventive Action, January 2013, p. 21, available at: [www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736](http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736). More recently, in July 2014, Hamas is reported to have flown an unarmed drone over Israel. See “When Terrorists Have Drones”, Editorial, *BloombergView*, 22 July 2014, available at: [www.bloombergview.com/articles/2014-07-22/when-terrorists-have-drones](http://www.bloombergview.com/articles/2014-07-22/when-terrorists-have-drones).
- 3 For an examination of legal and other issues related to autonomous weapons see ICRC, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects*, Report of Expert Meeting, Geneva, 26–28 March 2014, available at: [www.icrc.org/eng/assets/files/2014/expert-meeting-autonomous-weapons-icrc-report-2014-05-09.pdf](http://www.icrc.org/eng/assets/files/2014/expert-meeting-autonomous-weapons-icrc-report-2014-05-09.pdf); See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, UN Doc A/HRC/23/47, 9 April 2013, para. 38, available at: [www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf).

The article is divided into two parts. The section below is devoted to a brief examination of the lawfulness of drones as such. The subsequent section, which is the greater part of the text, sets out the framework for analysis, including, briefly, the *jus ad bellum*. It then focuses mainly on the *jus in bello* and deals with the classification of armed conflicts, the general principles and rules on targeting, the question of who may be targeted under the international law governing armed conflicts, and the territorial scope of application. The final section provides a few brief concluding remarks.

## The lawfulness of drones as such

One of the first questions asked when the issue of armed drone use came onto the public radar is whether drones are lawful as such. Different concerns were raised, and continue to be expressed. By way of example, it is pointed out that this technology can make it easier for States to decide to use lethal force abroad because of the lower political and financial costs involved. This lack of or lowered political risk is based on the fact that drones are operated by personnel who, being located many kilometres/miles away from the site of an attack, remain out of harm's way themselves. Drones are also known to be significantly less costly to produce, and are thus less costly to potentially "lose" than other types of fixed-wing aircraft.<sup>4</sup> It has been pointed out that, as a result, drone technology may enable the spread of armed conflict throughout the world in ways that a traditional "boots on the ground" military campaign generally cannot.<sup>5</sup> While these and other arguments are undoubtedly compelling and deserve serious consideration, they are outside the realm of the law and relate to the political, policy, moral and other possible implications of armed drone use.

As regards existing law, drones are not a weapon platform specifically prohibited by any international treaty or by customary law. Distance from a potential adversary is not a unique feature of drones when compared to other weapons or weapon systems: the operators of cruise missiles, for example, might also be located hundreds or thousands of kilometres/miles away from an intended target. There is also no particular characteristic of the technology itself to suggest that drones are inherently incapable of being used in a way that would comply with the relevant international norms. While the rules of international humanitarian law (IHL) governing the conduct of hostilities in armed conflict will be outlined further below, a few technical features of drones relevant to such a conclusion are very briefly mentioned here.

Many armed drones in use today have sensors similar to those on manned aircraft, but a major difference is that they are able to loiter over an area for extended

4 Michael J. Boyle, "The Costs and Consequences of Drone Warfare", *International Affairs*, Vol. 89, No. 1, January 2013, p. 22, available at: <http://onlinelibrary.wiley.com/doi/10.1111/1468-2346.12002/abstract>.

5 Stephen Holmes, "What's in it for Obama?", *London Review of Books*, Vol. 35, No. 14, 18 July 2013, pp. 15–18, available at: [www.lrb.co.uk/v35/n14/stephen-holmes/whats-in-it-for-obama](http://www.lrb.co.uk/v35/n14/stephen-holmes/whats-in-it-for-obama).

periods of time to identify possible targets. This provides personnel with increased options regarding the timing of an attack, which could help avoid or minimize incidental harm to civilians and damage to civilian objects. Attacks can also be suspended at very short notice, which is not the case with many types of ordnance fired from other weapon platforms at long ranges (although some munitions and missiles do have on-board deactivation or self-destruct mechanisms). In short, to the extent that drone pilots and operators have an increased ability to determine that their target is indeed a military objective, to take the required precautions in attack and to observe other rules on the conduct of hostilities, it has been argued that drones could actually be the preferred option for certain operations from an IHL standpoint.<sup>6</sup> There are, admittedly, differing views on whether drone operators experience reduced levels of stress in comparison to the crews of manned fighter jets.<sup>7</sup>

It should also be recalled that any and all prohibitions on the utilization of certain types of weapons based on international treaties and customary law apply to drones. For example, it would be a violation of international law to fire prohibited weapons, such as chemical or biological weapons, from a drone. States party to the Cluster Munitions Convention would, similarly, be barred from employing drones to launch cluster munitions. The use of incendiary weapons from a drone would likewise be subject to specific limitations under customary IHL and, for States party to Protocol III to the Convention on Certain Conventional Weapons (CCW), to additional restraints.

The real test of the lawfulness of drone use may thus be said to lie not in the features of the weapon platform itself – provided the targeting and firing process remains under human control – but in the willingness and ability of the persons commanding and operating drones extraterritorially to utilize them within the existing international legal framework. This is the subject of the next section.

## The international legal framework applicable to extraterritorial targeting by means of armed drones

Assessing the lawfulness of extraterritorial targeting by means of drones requires a two-step process.

6 See Ian Henderson and Bryan Cavanagh, “Unmanned Aerial Vehicles: Do They Pose Legal Challenges?”, in Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict*, Springer, Berlin, 2014, pp. 203–204.

7 In this context, an occasionally stated allegation is that there is a risk that abuses are more likely to occur when a person deciding on the use of lethal force is disconnected and at a great distance from a potential adversary (the “PlayStation” mentality). See “Study on Targeted Killings”, Addendum to Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, para. 84, available at: [www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf). There is at present no evidence that this is the case or is more frequent with drones than with other remotely operated weapon platforms.

## The law governing when force may be used

### **The *jus ad bellum***

First, it must be determined whether the resort to force by one State in the territory of another complied with the *jus ad bellum*, the body of international law governing when force may be used. The applicable rules of the *jus ad bellum* are provided for in the United Nations (UN) Charter and customary international law. Under Article 2(4) of the Charter, States must refrain from the threat of use of force against the territorial integrity or political independence of any other State, or in any other manner inconsistent with the purposes of the UN.<sup>8</sup> A use of force will not be deemed contrary to the Article 2(4) prohibition of the Charter where one State (the “host” State) validly consents to the use of force in its territory by another.<sup>9</sup> When consent may be deemed to have been validly granted may be difficult to establish in some cases, not necessarily because of lack of clarity regarding the applicable law, but because the opacity of the factual situation may be such that a careful evaluation to establish validity may be required.<sup>10</sup>

The exercise of self-defence is a well-established basis under both treaty and customary law precluding the unlawfulness of an extraterritorial use of force even without a host State’s consent. Article 51 of the UN Charter preserves the inherent right of States to individual or collective self-defence<sup>11</sup> “if an armed attack occurs” against a member State of the UN. Based on the plain language of the provision, action in individual self-defence by a State may be undertaken in response to an ongoing armed attack and, according to prevailing but not unanimous doctrine, when such an attack is imminent,<sup>12</sup> provided the customary law principles of necessity and proportionality have also been observed. While this statement of the law seems straightforward on its face, each of the elements included has been subject to different interpretations and remains the focus of significant international legal debate. This text does not aim to provide a specific legal reading of the *jus ad bellum*, but only to briefly highlight a few outstanding points of divergence.

8 Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Art. 2(4).

9 International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, UN Doc. A/56/10, November 2001, Art. 20. For a commentary, see James Crawford, *ILC Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002, pp. 163–165.

10 In this context it may be noted, for example, that the issue of whether a particular person or entity within a State had the authority to grant consent in a given case is not a question regulated by international rules on State responsibility but by international law relating to the expression of the will of the State, as well as domestic law. As regards the former, the rules on consent to treaties contained in the Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980), 1155 UNTS 331, are considered to provide relevant guidance. See J. Crawford, above note 9, p. 164, paras 5 and 6.

11 Given that current extraterritorial targeting by means of drones is not being conducted by the relevant States under the rubric of collective self-defence, this basis will not be explored further.

12 See Secretary-General Kofi Annan, *In Larger Freedom*, Report, UN Doc. A/59/2005, 21 March 2005, para. 124 (based on Report of the High Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, para. 188).

One such point is how the criterion of imminence should be understood and where the limits of anticipatory self-defence should be drawn. At one end of the spectrum, there may be said to be a lack of acceptance of the concept of anticipatory self-defence.<sup>13</sup> At the other end, there has been an attempt to extend the imminence criterion to include what has been called “pre-emptive self-defence”<sup>14</sup> – in other words, self-defence that aims to prevent threats that have “not yet crystallized but may materialize”.<sup>15</sup> There are middle-ground views as well.<sup>16</sup>

The International Court of Justice (ICJ) has provided its legal reading of the necessity criterion. According to the Court, “the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any measure of discretion”.<sup>17</sup> Needless to say, evaluating the necessity of a particular action taken in self-defence can only be done on a case-by-case basis, taking into account the facts available at the time and provided all peaceful means of ending or averting the attack have been exhausted or are unavailable.<sup>18</sup>

The proportionality criterion must also be satisfied for a use of force in self-defence to be deemed lawful. This essentially means that the use of force, taken as a whole, must not be excessive in relation to the need to avert the attack or bring it to an end.<sup>19</sup> Once again, the application of the legal standard to specific facts will in many cases be challenging.

Perhaps the greatest disagreement in international law circles centres on the question of whether the right to self-defence may be invoked by a State in response to an armed attack carried out by a non-State actor. (An additional issue is whether the attack must, as a precondition, be large-scale.<sup>20</sup>) It has been pointed out that there are essentially three schools of thought on this.<sup>21</sup> Under one view, the

13 See, e.g., Non-Aligned Movement position expressed in relation to the High Level Panel’s Report in Official Records of the 85th Plenary Meeting of the United Nations General Assembly, 6 April 2005, New York, UN Doc. A/59/PV.85, pp. 14 and 15, available at: <http://www.un.org/ga/59/pv.html>.

14 The White House, *The National Security Strategy of the United States of America*, Washington, DC, September 2002, pp. 6, 15 and 16, available at: [www.state.gov/documents/organization/63562.pdf](http://www.state.gov/documents/organization/63562.pdf).

15 Elizabeth Wilmschurst, *Principles of International Law on the Use of Force by States in Self-Defence*, Working Paper, Chatham House, October 2005 (Chatham House Self-Defence Principles), p. 9, available at: [www.chathamhouse.org/publications/papers/view/108106](http://www.chathamhouse.org/publications/papers/view/108106).

16 See *Ibid.* See also Nico Schrijver and Larissa van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 1 April 2010, paras 27–52, available at: [www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf](http://www.grotiuscentre.org/resources/1/Leiden%20Policy%20Recommendations%201%20April%202010.pdf).

17 International Court of Justice (ICJ), *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, para. 73.

18 See E. Wilmschurst, Chatham House Self-Defence Principles, above note 15, p. 7.

19 See *Ibid.*, p. 10.

20 See, e.g., Daniel Bethlehem, “Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors”, *American Journal of International Law*, Vol. 106, No. 4, 2012, p. 773. See also Elizabeth Wilmschurst and Michael Wood, “Note and Comment: Self-Defense against Nonstate Actors: Reflections on the ‘Bethlehem Principles’”, *American Journal of International Law*, Vol. 107, No. 2, April 2013, p. 390.

21 Ashley S. Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extra-territorial Self-Defense”, *Virginia Journal of International Law*, Vol. 52, No. 3, 2012, p. 492, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1971326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971326).

“armed attack” envisaged in Article 51 of the UN Charter can only emanate from another State.<sup>22</sup> The other view, in support of which the ICJ is usually cited, is that an armed attack may be committed by a non-State actor, but must be attributable to a State for the attack to trigger the right of self-defence.<sup>23</sup> The ICJ’s more recent pronouncement on this issue has, admittedly, cast doubt on what its position might be in the future.<sup>24</sup> The third view, which seems to be gaining traction at least among some States and scholars in the West, is that an armed attack within the meaning of Article 51 of the UN Charter may be committed by a non-State actor, and thus trigger the right of self-defence, even if there is no host State involvement.<sup>25</sup>

The question of how to resolve the conundrum outlined above, in particular as regards non-State actors deemed to be “terrorists”, leads to similarly divergent views. Some scholars, for example, believe that the way to accommodate recent State action within the *jus ad bellum* lies in devising a “special standard of imputability in relations between terrorist groups and host states, [one] arguably most closely resembling international rules against ‘aiding and abetting’ illegal conduct”.<sup>26</sup> Others are of the view that the necessity criterion should be expanded to include two inquiries. An attacked State should examine not only whether the use of force is a necessary response to an armed attack by a non-State actor, but should also evaluate whether the host State is “unwilling or unable” to deal with the non-State actor threat emanating from its territory. If that is the case, the use of force in self-defence would be lawful, provided the other criteria, such as proportionality, are satisfied.<sup>27</sup>

As mentioned above, the purpose of this brief outline was not to take a position on any of the views presented here. Rather, the aim was to indicate the difficulty that is likely to arise in reaching a generally accepted legal reading of the operation of the *jus ad bellum* in a given case at the international level. This is important because, as will be noted below, there is a strand of scholarly thought that adopts an expansive view of the territorial scope of application of the *jus in bello* in non-belligerent States, but believes that the use of lethal force would be constrained by the *jus ad bellum*. It is submitted that this argument should be approached with caution.

Apart from the inherent right of self-defence, force may be used in a State’s territory without its consent based on a legally binding decision to that effect

22 *Ibid.*, p. 492, note 24.

23 See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 194, in which the Court rejected Israel’s claim of self-defence because it did not argue that the relevant attacks were imputable to a State.

24 See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Reports 2005, para. 116, in which the Court noted that it has “no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces”.

25 See A. S. Deeks, above note 21, p. 493, note 26.

26 See Christian J. Tams, “The Use of Force against Terrorists”, *European Journal of International Law*, Vol. 20, No. 2, 2009, p. 385.

27 See A. Deeks, above note 21, p. 495. See also E. Wilmschurst, Chatham House Self-Defence Principles, above note 15; and N. Schrijver and L. van den Herik, above note 16.



adopted by the UN Security Council under Chapter VII of the UN Charter.<sup>28</sup> While the practical implementation of the Security Council's enforcement powers is the subject of much nuanced legal discourse, the basic proposition, which is expressly rooted in the UN Charter, is commonly accepted. A recent study by a group of international law experts that examined the use of drones came to the following conclusion as regards this context:

If a legally binding UN mandate authorises the use of force, armed drones may be deployed to implement the mandate, provided such action accords with the general conditions and objectives of that mandate. It is not necessary for the UN Security Council to give explicit authorisation for the use of armed drones.<sup>29</sup>

### The law governing how force may be used

In addition to the lawfulness of an extraterritorial operation under the *jus ad bellum* (when may force be resorted to), the second step required to determine the international legal framework applicable to extraterritorial targeting by means of drones involves establishing whether the way in which lethal force is used against a particular individual or individuals is likewise lawful (how it may be used). This will depend on whether extraterritorial targeting takes place within an armed conflict or outside of it. In the first scenario, the relevant rules are those of IHL (also known as the law of armed conflict or LOAC), which constitute the *jus in bello* and are the focus of this text. In the second case, outside armed conflict, the rules on the use of force in law enforcement provided for in international human rights law will govern. While complementary, IHL and human rights law differ in the way in which they regulate the use of lethal force because of the different circumstances in which these branches of law were designed to apply: situations of armed conflict and peacetime, respectively. It is beyond the scope of this article to examine the interplay of the two branches of international law.<sup>30</sup> For the sake of completeness, it must be mentioned that self-defence is sometimes posited, particularly in the US, as a separate, stand-alone legal basis regulating how lethal force may be used:

As a matter of international law, the United States is in an armed conflict with al-Qa'ida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may *also* use force consistent with our inherent right of national

<sup>28</sup> See UN Charter, above note 8, Arts 39–43.

<sup>29</sup> Netherlands Advisory Committee on Issues of Public International Law (CAVV), *Advisory Report on Armed Drones*, Advisory Report No. 23, The Hague, July 2013 (Netherlands Advisory Committee Report), pp. 2–3, available at: [http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV\\_advisory\\_report\\_on\\_armed\\_drones\\_\(English\\_translation\\_-\\_final\)\\_2\).pdf](http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_(English_translation_-_final)_2).pdf). The CAVV is an independent body that advises the government, the House of Representatives and the Senate of the Netherlands on international law issues.

<sup>30</sup> It is submitted that, as a general rule, what constitutes an “arbitrary” deprivation of life within the meaning of Article 6 of the International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976), 999 UNTS 171 (ICCPR), is to be determined, in situations of armed conflict, with reference to the rules on the conduct of hostilities provided for in IHL, as the *lex specialis*. See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 25.



self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.<sup>31</sup>

At first blush, it appears that the reference to self-defence above addresses situations in which lethal force is used outside existing armed conflicts, but in which such use of force would not be governed by human rights law.<sup>32</sup> It is submitted that, under current international law, the right to self-defence is a concept of the *jus ad bellum* and not a stand-alone legal regime governing how force may be used. Even if that were accepted for the sake of argument, the specific rules on the use of force under this legal basis remain unclear, as they have not been officially articulated. At second blush, given that the statement above mentions the unable or unwilling standard, it may be that self-defence was also being referred to within the *jus ad bellum* sense. While it would be necessary and useful to better understand the meaning(s) ascribed to self-defence in the US context, this “separate” basis will not be dealt with further in this article.

## The *jus in bello*

Given that the *jus in bello* applies only in armed conflict, the first inquiry that is required in relation to an extraterritorial targeting by drone is whether the use of lethal force took place within such circumstances. This involves (a) application of the relevant IHL rules on the classification of armed conflicts in order to

31 John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, Remarks at the Woodrow Wilson International Center for Scholars, Washington, DC, 30 April 2012, available at: [www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy](http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy) (emphasis added).

32 This concept has been called “naked self-defence”. See Kenneth Anderson, “Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a ‘Legal Geography of War’”, in Peter Berkowitz (ed.), *Future Challenges in National Security and Law*, Hoover Institution, Stanford University, 2011, p. 8, available at: [http://media.hoover.org/sites/default/files/documents/FutureChallenges\\_Anderson.pdf](http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf), stating:

The US government position rejects the frame that legal uses of force are necessarily regulated either as law enforcement under human rights law or as the law of armed conflict – and nothing else. This takes up the brief, but much-noticed, reference by US State Department legal adviser Harold Koh to the customary law of “self-defence” in a speech to the American Society of International Law in March 2010 ... Koh’s 2010 statement was consistent with Sofaer’s address from decades before. It held out the possibility that there might be instances in which the United States would engage in uses of force under self-defence that would not necessarily be part of an armed conflict in a technical legal sense (we might call it “naked” self-defence). It can be defined as resorting to force in self-defence, but in ways in which the means and levels of force used are not part of an armed conflict, as a matter of the technical law of war. Those circumstances include self-defence uses of force against non-State actors, such as individual terrorist targets, which do not (yet) rise to the NIAC threshold.

The reference here is to a speech delivered in 1989 by the then US State Department Legal Adviser Abraham Sofaer, “Terrorism, the Law, and the National Defense”, Sixth Annual Waldemar A. Solf Lecture in International Law, *Military Law Review*, Vol. 126, 1989, p. 89, available at: [www.loc.gov/rr/frd/Military\\_Law/Military\\_Law\\_Review/pdf-files/277079~1.pdf](http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/277079~1.pdf). Anderson recognizes that the concept of naked self-defence is controversial.

determine, based on the facts, if a particular situation of violence qualifies as an armed conflict.<sup>33</sup> Additional questions that have been posed in respect of extraterritorial targeting under the *jus in bello* are (b) what the general principles and rules on targeting are and, as part of them, (c) who may be targeted, and (d) where persons may be targeted. Each will be briefly addressed in turn.

## Classification of armed conflicts

As is well known, IHL distinguishes between two types of armed conflicts: international and non-international. *International armed conflicts* (IAC) are essentially those waged between States.<sup>34</sup> Pursuant to Article 2 common to the four Geneva Conventions, these foundational IHL treaties apply to all cases of declared war, or to “any other armed conflict which may arise” between two or more State parties thereto even if the state of war is not recognized by one of them.<sup>35</sup> As explained by Jean Pictet in his commentaries to the four Conventions:

any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a State of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.<sup>36</sup>

The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a similar general definition of international armed conflict. In the *Tadić* case, the Tribunal stated that “an armed conflict exists whenever there is a resort to armed force between States”.<sup>37</sup> This definition has been adopted by other international bodies since then.

33 For a comprehensive examination of this issue see Elizabeth Wilmschurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012. See also ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Opinion Paper, ICRC, Geneva, 17 March 2008, available at: [www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf](http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf).

34 Pursuant to Additional Protocol I, an armed conflict between a State and a national liberation movement can also be classified as international provided the requisite conditions have been fulfilled. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Arts 1(4), 96(3).

35 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 2; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 2; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 2 (common Article 2). Under IHL, belligerent occupation is considered a type of international armed conflict. The challenges raised in relation to the criteria for determining the existence of an occupation will not be explored further in this article.

36 Jean Pictet (ed.), *Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Commentary*, ICRC, Geneva, 1960, p. 23.

37 International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-I-A, 2 October 1995, para. 70, available at: <http://www.refworld.org/docid/47dfb520.html>.

In the decades since the adoption of the Geneva Conventions, duration or intensity have generally not been considered to be constitutive elements for the existence of an IAC. It should be noted that this approach has recently been called into question by suggestions that hostilities must reach a certain level of intensity to qualify as an armed conflict, the implication being that the fulfilment of an intensity criterion is necessary before an inter-State use of force may be classified as an IAC.<sup>38</sup> Pursuant to this view, a number of isolated or sporadic inter-State uses of armed force that may be described as “incidents”, “border clashes” and others do not qualify as IACs because of the low intensity of violence involved.

While this approach may appear to be appealing, it is submitted that the absence of a requirement of threshold of intensity for the triggering of an IAC should be maintained because it helps to avoid potential legal and political controversies about whether the threshold has been reached based on the specific facts of a given situation. There are also compelling protection reasons not to link the existence of an IAC to a specific threshold of violence. To give but one example: under the Third Geneva Convention, if members of the armed forces of a State in dispute with another are captured by the latter’s armed forces, they are eligible for prisoner of war (POW) status regardless of whether there is full-fledged fighting between the two States. POW status and treatment are well defined under IHL, including the fact that a POW may not be prosecuted by the detaining State for lawful acts of war. It seems fairly evident that captured military personnel would not enjoy equivalent legal protection solely under the domestic law of the detaining State, even when supplemented by international human rights law. The lack of a threshold of intensity for the application of the Geneva Conventions is not due to chance, but may be said to be an element of the entire package of protection offered by these treaties.

According to still another school of thought, which seems to be gaining traction among some scholars,<sup>39</sup> when a State uses force in the territory of a host State – including by means of drones – which is directed not at the latter *per se* but at an organized non-State armed group operating from its territory, such use of force would constitute a non-international armed conflict (NIAC) between the attacking State and the non-State armed group, but not an IAC between the two States themselves. This approach risks standing a well-established IHL precept on its head: that any use of force by one State in the territory of another without the latter’s consent constitutes an international armed conflict. As has been cogently explained:

[T]o attempt to distinguish between force directed at a non-State group and force which has as its overall purpose the intention to influence the

38 See Mary Ellen O’Connell, *Final Report on the Meaning of Armed Conflict in International Law*, Committee on the Use of Force, International Law Association, The Hague, 2010, available at: [www.ila-hq.org/en/committees/index.cfm/cid/1022](http://www.ila-hq.org/en/committees/index.cfm/cid/1022).

39 For a discussion of the various positions, see Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in E. Wilmschurst (ed.), above note 33, p. 72.

government of the State is to condition the application of IHL on the mental state or motive of the attacker. It is to suggest that the very same acts of force directed by one State against the territory of another State would yield different legal results depending on the intention of the intervening State regarding whom it seeks to affect.<sup>40</sup>

It is submitted that while a double classification in that scenario cannot be excluded (an IAC between the two States and a NIAC between the attacking State and the non-State armed group, depending on the circumstances), an elimination of the IAC track would be cause for serious concern.

A further issue that has recently arisen, particularly in relation to extraterritorial targeting by means of armed drones, is whether IHL applies in situations in which there is no “declared war” between States. The seeping of this term into public discourse<sup>41</sup> appears to merit a reminder. One of the most important historical advances achieved by the drafters of the Geneva Conventions is that they delinked their application from any official declaration of “war”. As specified in common Article 2, the treaties also apply to “any other armed conflict which may arise” between two or more States Parties, a determination that is made only on the facts. The application of the law of IAC was divorced from the need for official pronouncements many decades ago precisely in order to avoid cases in which States could deny the protection of this body of rules by means of lack of official recognition.<sup>42</sup> In this context it is important to note that the same approach applies to determining the existence of a NIAC: it is a factual issue that does not depend on a declaration by any or all of the parties to such a conflict. The concept of battlefield, which is not synonymous with that of war or armed conflict, is dealt with further below.

A key distinction between an international and a *non-international armed conflict* is the quality of the parties involved: while an IAC presupposes the use of armed force between two or more States,<sup>43</sup> a NIAC involves hostilities between a State and an organized non-State armed group (the non-State party), or between such groups themselves. In order to classify a situation of violence as a NIAC within the meaning of common Article 3 of the Geneva Conventions (i.e., to distinguish it from internal disturbances and tensions not reaching that level such as riots, isolated and sporadic acts of violence and other acts of a similar

40 *Ibid.*, p. 75.

41 See, e.g., European Parliament Resolution on the Use of Armed Drones, Plenary Sitting, 2014/2567(RSP), 25 February 2014, para. E, available at: [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP/TEXT+MOTION+P7-RC-2014-0201+0+DOC+XML+V0//EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP/TEXT+MOTION+P7-RC-2014-0201+0+DOC+XML+V0//EN).

42 See Christopher Greenwood, “Scope of Application of International Humanitarian Law”, in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 43. “The application of IHL is not dependent on a formal declaration of war.”

43 Except as mentioned in above note 34.

nature),<sup>44</sup> two factual criteria are deemed indispensable. The first is that the parties involved must demonstrate a certain level of organization, and the second is that the violence must reach a certain level of intensity.

Common Article 3 expressly refers to “each Party to the conflict”, thereby implying that a precondition for its application is the existence of at least two “parties”. While it is usually not difficult to establish whether a State party exists, determining whether a non-State armed group may be said to constitute a “party” for the purposes of common Article 3 can be complicated, mainly because of a lack of clarity as to the precise facts. Nevertheless, it is widely recognized that a non-State party to a NIAC means an armed group with a certain level of organization. International jurisprudence has developed indicative factors on the basis of which the “organization” criterion may be assessed.<sup>45</sup> They include the existence of a command structure and disciplinary rules and mechanisms within the armed group, the existence of headquarters, the ability to procure, transport and distribute arms, the group’s ability to plan, coordinate and carry out military operations, including troop movements and logistics, its ability to negotiate and conclude agreements such as ceasefires or peace accords, and so on. Differently stated, even though the level of violence in a given situation may be very high, unless there is an organized armed group on the other side, one cannot speak of a NIAC.

The second criterion commonly used to determine the existence of a common Article 3 armed conflict is the intensity of the violence involved. This is also a factual criterion, the assessment of which depends on an examination of events on the ground. Pursuant to international jurisprudence, indicative factors to consider include the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones.<sup>46</sup> The involvement of the UN Security Council may also be a reflection of the intensity of a conflict. The ICTY has deemed there to be a NIAC in the sense of common Article 3 whenever there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a state”.<sup>47</sup> The

44 Given that NIACs under the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1987) (AP II), have to fulfil certain conditions not found in common Article 3 and that they are far less common, they will not be further discussed here. See AP II, Art. 1(2); GC I, Art. 3; GC II, Art. 3; GC III, Art. 3; and GC IV, Art. 3 (common Article 3). It is generally accepted that the threshold found in Article 1(2) of AP II, which excludes internal disturbances and tensions from the definition of NIAC, also applies to common Article 3. Given that NIACs under AP II have to fulfil certain conditions not found in common Article 3 and that they are far less common, they will not be further discussed here.

45 See Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, in *Collected Courses of the Hague Academy of International Law*, Vol. 163, Martinus Nijhoff, The Hague, 1979, p. 147. For a detailed analysis of this criterion see ICTY, *The Prosecutor v. Fatmir Limaj*, Case No. IT-03-66-T, Judgment, 30 November 2005, paras 94–134.

46 For a detailed analysis of this criterion, see *Limaj*, above note 45, paras 135–170.

47 *Tadić*, above note 37, para. 70.

Tribunal's subsequent decisions have relied on this definition, explaining that the "protracted" requirement is in effect part of the intensity criterion.

NIAC is by far the prevalent type of armed conflict today. When the Geneva Conventions (i.e., common Article 3 thereto) were being drafted, the negotiators essentially had one, "traditional", type of NIAC in mind: that between government armed forces and one or more organized armed groups within the territory of a single State. (The historical backdrop was, among other cases, the Spanish civil war.) Nowadays there is a variety of factual scenarios, with an extraterritorial element, that may also be classified as NIACs.<sup>48</sup> For the purposes of this examination, two types will be mentioned.

The first is a "spillover" NIAC. These are armed conflicts originating within the territory of a State as described above, between government armed forces and one or more organized armed groups, which spill over into the territory of one or more neighbouring States. While common Article 3 does not expressly provide for this scenario, there seems to be increasing acknowledgment by States and scholarly opinion that the applicability of IHL between the parties may be extended to the territory of an adjacent, non-belligerent State (or States) in such a case.<sup>49</sup> By way of reminder, the Statute of the International Criminal Tribunal for Rwanda (ICTR), adopted by the UN Security Council already in 1994, provided that the ICTR's jurisdiction covers serious violations of IHL committed not only in Rwanda but also by Rwandan citizens "in the territory of neighbouring States".<sup>50</sup> Leaving aside other legal issues that may be raised by the incursion of foreign armed forces into a neighbouring territory (violations of sovereignty and the possible reaction of the armed forces of the adjacent State, which could turn the fighting into an IAC between the States), it is submitted that the extension of IHL applicability in this factual scenario is accepted at the international level on a *sui generis*, exceptional basis. As will be discussed further below, prevailing State practice and *opinio juris* do not seem to currently allow for a similar conclusion with respect to the extension of the applicability of IHL between the parties to a NIAC to the territory of a non-adjacent, non-belligerent State.

There is, admittedly, no readily accessible or detailed explanation for the legal reading that has been recognized by States and scholarly opinion with

48 For a possible typology see ICRC, *Report on IHL and the Challenges of Contemporary Armed Conflicts*, Report presented to the 31st International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 28 November–1 December 2011 (2011 ICRC Challenges Report), pp. 9–11, available at: [www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf](http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf).

49 See, e.g., Michael N. Schmitt, "Charting the Legal Geography of Non-International Armed Conflict", *International Law Studies*, Vol. 90, US Naval War College, 2014, p. 11. "In particular, there is growing acceptance of the proposition that IHL applies to 'spillover' conflicts in which government armed forces penetrate the territory of a neighboring State in order to engage organized armed groups operating in border areas ... There is certainly State practice and scholarly support for this interpretation" (footnotes omitted).

50 Statute of the International Criminal Tribunal for Rwanda (ICTR), UN SC Res. 955 Annex, UN Doc. S/RES/955, 8 November 1994, Art. 1.



respect to spillover NIACs.<sup>51</sup> It may be assumed that the contiguity of land surface between States, which can and does facilitate the spread of a NIAC into a neighbouring State, is deemed crucial. The fairly constant occurrence of spillover NIACs in various parts of the world is the likely practical reason. While spillover conflicts such as the one in Rwanda used to be fairly uncommon, this type of NIAC is far more frequent today (e.g., in Colombia and Uganda). Similarly, a spillover of the NIAC in Afghanistan (see below) into certain border regions of Pakistan has been widely reported for several years now.<sup>52</sup>

A second type of NIAC with an extraterritorial aspect is one in which the armed forces of one or more States fight alongside the armed forces of a host State in its territory against one or more organized armed groups. As the armed conflict does not oppose two or more States – i.e., as all the State actors are on the same side – the conflict can only be classified as non-international, regardless of the international component, which can at times be significant.<sup>53</sup> This type of NIAC can come about in different ways. One scenario is where an armed conflict that was initially international in nature is reclassified as non-international because of an evolution in circumstances on the ground. A case in point is the armed conflict in Afghanistan, which is still ongoing as of this writing. While an IAC began in 2001, since June 2002 the foreign contingents, including US and other forces under “Operation Enduring Freedom”, and those making up the International Security Assistance Force (ISAF), have been acting in support of the Afghan government against organized non-State armed groups.<sup>54</sup>

Another scenario is one in which the armed forces of a State, or States, become involved in a NIAC that is already taking place in the territory of a host State between its armed forces and one or more organized armed groups. While international law does not provide specific guidance as to the criteria on the basis of which the intervening State may be deemed to have become a party to an ongoing NIAC, it is submitted that the following elements, cumulatively applied, could be relied on: (1) there is a pre-existing NIAC in the territory of a State; (2) acts of hostilities are carried out in its territory by another State (or States); (3) they are undertaken in support of the host State, and with its consent, against

51 A specific legal and practical issue that is the subject of much debate and on which no majority opinion may currently be discerned is how far into a neighbouring State the applicability of IHL extends in case of a spillover NIAC: does it extend to the entire territory of the adjacent country or only to the area of hostilities between the parties? This question, while important, will not be further explored here.

52 See, *inter alia*, CNN, “Gates Calls Pakistan ‘Most Worrisome’”, 1 March 2009, available at: <http://edition.cnn.com/2009/US/03/01/us.afghanistan/>. “Meanwhile, the war is spilling over into Pakistan, where the Taliban have long had a foothold in the tribal areas along the mountainous border.”

53 A subset of this type of NIAC is one in which UN forces, or forces under the aegis of a regional organization (such as the African Union), are sent to support a host government involved in hostilities against one or more organized armed groups in its territory. See 2011 ICRC Challenges Report, above note 48, p. 10.

54 See Françoise J. Hampson, “Afghanistan 2001–2010”, in E. Wilmshurst, above note 33, p. 251 (citing, *inter alia*, the ICRC’s view). See also *ibid.*, p. 252, where the author submits that the IAC in Afghanistan ended either with the adoption of UN Security Council Resolution 1386 (2001) or with the inauguration of Hamid Karzai as president after the Loya Jirga and the establishment of an Afghan transitional government in June 2002. The latter, ICRC view is adopted here.



one or more non-State armed groups; and (4) they reflect a considered decision taken at the highest decision-making level of the intervening State (or States).<sup>55</sup> There are a number of recent and ongoing examples of this type of NIAC taking place in various parts of the world. A case in point was the 2013 French intervention in Mali on the side of the govt of Mali against a range of organized non-State armed groups.<sup>56</sup> It has been argued that the United States is also involved in this type of non-international armed conflict in Yemen.<sup>57</sup>

An account of types of NIAC would not be complete without a brief mention of the classification of violence currently taking place between the United States and “Al-Qaeda, the Taliban and associated forces”.<sup>58</sup> The US was initially of the view that this was an international armed conflict<sup>59</sup> of global dimensions (“global war on terror” or GWOT), but since the US Supreme Court decision in the 2006 *Hamdan* case it is domestically regarded as being non-international in nature.<sup>60</sup> At the risk of simplifying, the gist of the US’s view, which has remained unchanged since the attacks of 11 September 2001, is that the country is engaged in a single armed conflict with the above-mentioned

55 For a more detailed elaboration of the criteria on the basis of which a State (or States) may be considered to have become a party to a pre-existing NIAC in a host State, see Tristan Ferraro, “The Applicability and Application of IHL to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891, 2013, p. 561.

56 See Agence France-Presse, “Key Dates in French-Led Mali Intervention”, *Global Post*, 1 July 2013, available at: [www.globalpost.com/dispatch/news/afp/130701/key-dates-french-led-mali-intervention](http://www.globalpost.com/dispatch/news/afp/130701/key-dates-french-led-mali-intervention).

57 See Robert Chesney, “The United States as a Party to an AQAP-Specific Armed Conflict in Yemen”, *Lawfare*, 31 January 2012, available at: [www.lawfareblog.com/2012/01/yemen-armed-conflic/](http://www.lawfareblog.com/2012/01/yemen-armed-conflic/). “[T]he U.S. has not merely provided various forms of assistance to the government of Yemen in its fight with AQAP, but also has attacked AQAP targets in Yemen in its own right at least *seventeen* times over the past few years, including a strike yesterday. I think the better view, then, is that we are party to the Yemen NIAC, and that our uses of force there implicate IHL as a result (quite apart from arguments about the existence and geographic scope of conflict elsewhere or with respect to other entities)” (emphasis in original).

58 The domestic legal basis is the Authorization for the Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224, adopted by Congress in S.J. Res. 23 on 14 September 2001 and signed by President George W. Bush on 18 September 2001, available at: [www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm](http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm). For an explication of how the AUMF is being applied, see Stephen W. Preston, General Counsel, Department of Defense, *Prepared Statement on The Legal Framework Under U.S. Law for Current Military Operations*, Committee on Foreign Relations, United States Senate, 21 May 2014, available at: [www.foreign.senate.gov/download/preston-testimony-05-21-14](http://www.foreign.senate.gov/download/preston-testimony-05-21-14).

59 US Supreme Court, *Hamdan v. Rumsfeld*, 548 US 57, 2006, p. 67, available at: <http://www.law.cornell.edu/supct/pdf/05-184P.ZO>. (“[T]he Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being ‘international in scope,’ does not qualify as a ‘conflict not of an international character.’”)

60 See US Department of State, *Report of the United States of America Submitted to the UN High Commissioner for Human Rights In Conjunction with the Universal Periodic Review*, 2010, para. 84, available at: [www.state.gov/documents/organization/146379.pdf](http://www.state.gov/documents/organization/146379.pdf). “Individuals detained in armed conflict must be treated in conformity with all applicable laws, including Common Article 3 of the 1949 Geneva Conventions, which the President and the Supreme Court have recognized as providing ‘minimum’ standards of protection in all non-international armed conflicts, including in the conflict with Al Qaeda.”

groups.<sup>61</sup> At the apex is the “core” of Al-Qaeda, based in the border regions of Afghanistan and Pakistan, with which a range of other groups are associated.<sup>62</sup> The full list remains classified,<sup>63</sup> similar to the criteria on the basis of which a group is added to it. As is well known, this armed conflict has involved the presence of US armed forces on the ground in Afghanistan starting in 2001, but is also being waged – primarily by means of remotely piloted and manned fixed-wing aircraft – outside that country (i.e., in Pakistan, Yemen and Somalia).<sup>64</sup>

It has been stated on various occasions that the International Committee of the Red Cross (ICRC) does not share the view that an armed conflict of global dimensions with the above-mentioned groups has been taking place or is currently ongoing.<sup>65</sup> A single NIAC across space and time would, *inter alia*, require the existence of a “unitary” non-State party opposing one or more States. Based on publicly available facts, and especially at the present time, when the Al-Qaeda core is publicly recognized as having been significantly degraded,<sup>66</sup> this does not seem to be the case. It is likewise doubtful that groups whose affiliation to the Al-Qaeda core is primarily ideological, but whose military operations in

- 61 According to President Obama: “Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces.” See President Barack Obama, *Remarks by the President at the National Defense University*, Office of the Press Secretary, Washington, DC, 23 May 2013, available at: [www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university](http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university). The Taliban is only targeted in Afghanistan: “Beyond the Afghan theater, we only target al Qaeda and its associated forces.” See also, e.g., US Department of Justice, Office of Legal Counsel, *Memorandum for the Attorney-General Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*, 16 July 2010 (released publicly 23 June 2014), p. 24, available at: <http://fas.org/irp/agency/doj/olc/aulaqi.pdf>. “[T]he contemplated DoD operation would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida. That does not affect our conclusion, however, that the combination of facts present here would make the DoD operation in Yemen part of the non-international armed conflict with al-Qaida.”
- 62 In his NDU speech President Obama stated: “Today, the core of al Qaeda in Afghanistan and Pakistan is on the path to defeat. ... Instead, what we’ve seen is the emergence of various al Qaeda affiliates. From Yemen to Iraq, from Somalia to North Africa, the threat today is more diffuse, with Al Qaeda’s affiliates in the Arabian Peninsula – AQAP – the most active in plotting against our homeland.” B. Obama, above note 61.
- 63 See Cora Currier, “Who Are We at War With? That’s Classified”, *ProPublica*, 26 July 2013, available at: [www.propublica.org/article/who-are-we-at-war-with-thats-classified](http://www.propublica.org/article/who-are-we-at-war-with-thats-classified).
- 64 For a succinct overview of Obama administration views, with links to key speeches by administration officials on the issue over the past few years, see Jonathan Masters, *Targeted Killings*, Background, Council on Foreign Relations, Washington, DC, 23 May 2013, available at: [www.cfr.org/counterterrorism/targeted-killings/p9627](http://www.cfr.org/counterterrorism/targeted-killings/p9627).
- 65 See, *inter alia*, 2011 ICRC Challenges Report, above note 48, p. 10.
- 66 See J. Brennan, above note 31. “Al-Qa’ida leaders continue to struggle to communicate with subordinates and affiliates. Under intense pressure in the tribal regions of Pakistan, they have fewer places to train and groom the next generation of operatives. They’re struggling to attract new recruits. Morale is low, with intelligence indicating that some members are giving up and returning home, no doubt aware that this is a fight they will never win. In short, al-Qa’ida is losing, badly.” See also Tim Lister, “How ISIS is Overshadowing al Qaeda”, *CNN*, 30 June 2014, available at: <http://edition.cnn.com/2014/06/30/world/meast/isis-overshadows-al-qaeda/>.

the respective theatres of armed conflict are otherwise autonomously conducted, may be deemed to be “co-belligerents” in one and the same armed conflict.<sup>67</sup>

The ICRC has taken a case-by-case approach to analyzing and legally classifying the various situations of violence that have taken place since the attacks of 11 September 2001 and have been subsumed under the fight against terrorism.<sup>68</sup> Based on the relevant classification criteria, and as outlined above, some situations have been classified as international armed conflicts, violence in other contexts has been deemed to constitute a non-international armed conflict, and while certain acts of terrorism that have taken place in the world (an issue not addressed above) have been assessed as being outside any armed conflict. IHL is applicable only when drone strikes take place within an armed conflict.

## The rules on targeting

This text has thus far referred to IHL rules on “targeting”. It would, in fact, be more legally correct to speak of IHL rules on the conduct of hostilities, which are far broader, and include principles and rules governing both attacks against persons and objects. Provided below are a few background observations and a brief summary of the main IHL principles and rules on the conduct of hostilities, including by means of armed drones. The specific rules on the use of lethal force against persons (who may be targeted) under IHL are dealt with in the next section.

## Background observations

IHL rules on the conduct of hostilities were historically developed for IAC and are nowadays mainly provided for in Additional Protocol I to the Geneva Conventions, in Additional Protocol II (with far less elaboration), and in customary IHL. Common Article 3 is devoted essentially to the protection of persons in enemy hands and contains no rules on the conduct of hostilities. Practice, however, has unquestionably demonstrated that both State and non-State parties conduct hostilities in NIACs meeting the common Article 3 threshold and that limitations on the use of means and methods of warfare are accepted as a matter of law. This was confirmed in the 2005 ICRC Customary Law Study, which identified a number of conduct of hostilities rules applicable regardless of the classification of a conflict.<sup>69</sup> Before outlining the rules themselves, two preliminary remarks are deemed useful.

67 See Charlie Savage, “Debating the Legal Basis for the War on Terror”, *New York Times*, 16 May 2013, available at: [www.nytimes.com/2013/05/17/us/politics/pentagon-official-urges-congress-to-keep-statute-allowing-war-on-terror-intact.html?\\_r=0](http://www.nytimes.com/2013/05/17/us/politics/pentagon-official-urges-congress-to-keep-statute-allowing-war-on-terror-intact.html?_r=0). “Mr. Taylor [Acting General Counsel of the Pentagon] said that as a matter of domestic law, the authorization did grant such authority if groups in those countries had affiliated themselves with the original Al Qaeda and became ‘co-belligerents’ in the conflict.”

68 For an examination of the relationship between armed conflict and terrorism, see Jelena Pejic, “Armed Conflict and Terrorism: There Is a (Big) Difference”, in Ana Maria Salinas de Frias, Katja L. H. Samuel and Nigel D. White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012, pp. 171–204.

69 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

The first is that IHL rules governing the use of force are specific to the reality they govern and cannot be transposed to situations other than armed conflict. This is because the ultimate aim of military operations is to prevail over the enemy's armed forces. Parties to an armed conflict are thus permitted to attack, or at least are not legally barred from attacking, each other's military objectives (which include members of the armed forces and other persons taking a direct part in hostilities – see next section). Violence directed against those targets is not prohibited as a matter of IHL regardless of whether it is inflicted by a State or a non-State party, provided, of course, that other IHL rules such as those prohibiting specific weapons are respected. Acts of violence against civilians and civilian objects are, by contrast, unlawful because one of the main purposes of IHL is to spare civilians and civilian objects from the effects of hostilities. IHL thus regulates both *lawful* and *unlawful* acts of violence and is the only body of international law dealing with the protection of persons that takes such a two-pronged approach. There is, for example, no similar dichotomy in international human rights law, another branch of international law that, *inter alia*, protects persons from State violence.<sup>70</sup>

The second feature not replicated in other bodies of international law is the principle of equality of rights and obligations of belligerents under IHL.<sup>71</sup> Pursuant to the *jus in bello*, each side to an armed conflict has to comply with the same rules. This is because the purpose of IHL is not to determine which party was “right” in resorting to the use of armed force against the other (the purview of the *jus ad bellum*, outlined above), but to ensure the equal protection of persons and objects affected by armed conflict regardless of the lawfulness of the first resort to force. Thus, any party to an armed conflict is equally prohibited from directly attacking civilians or civilian objects, but is not prohibited from attacking the adversary's military objectives under IHL.<sup>72</sup>

### *General principles and rules on the conduct of hostilities*

Distinction is the fundamental IHL principle in the conduct of hostilities, and has two prongs. Under the first, the parties to an armed conflict must distinguish at all times between civilians and combatants, and may direct attacks only against combatants.<sup>73</sup> Civilians are persons who are not members of the armed forces,

70 This is not to say that there cannot be lawful use of force by State agents under human rights law. Such use of force, however, is always undertaken in response to a previously unlawful act by an individual or group of persons. That is not the case with direct participation in hostilities, which is either explicitly allowed, or is not prohibited under IHL. Thus, direct participation in hostilities is not a war crime under IHL.

71 See Marco Sassòli and Lindy Rouillard, “La définition du terrorisme et le droit international humanitaire”, *Revue québécoise de droit international*, Studies in Honour of Katia Boustany, 2007, p. 31. See also the debate between Marco Sassòli and Yuval Shany, “Should the Obligations of States and Armed Groups Under International Humanitarian Law Really Be Equal?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 431.

72 The principle of equality of parties, or “equality of belligerents”, under IHL is not only legally important, but also serves to *de facto* enhance compliance with the norms by all sides involved.

73 AP I, Art. 48; ICRC Customary Law Study, above note 69, Rule 1.

and the civilian population comprises all persons who are civilians. Pursuant to both treaty and customary law, civilians are protected against attack unless and for such time as they take a direct part in hostilities.<sup>74</sup> In case of doubt as to whether a person is a civilian, he or she must be considered to be a civilian.<sup>75</sup>

The second prong of the principle of distinction is that the parties to an armed conflict must at all times distinguish between civilian objects and military objectives and may direct attacks only against military objectives.<sup>76</sup> In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Civilian objects are all objects that are not military objectives. They are protected against attack, unless and for such time as they are military objectives.<sup>77</sup>

The definition of and prohibition of indiscriminate attacks are provided for in both treaty and customary IHL.<sup>78</sup> It is likewise well accepted that the IHL rule of proportionality must be observed in the conduct of hostilities in both IAC and NIAC<sup>79</sup> and that the parties must also adhere to the rules governing precautions in attack or against the effects of attacks.<sup>80</sup> Given a later discussion in this text, it is useful to note here that there are important and often misunderstood differences between the operation of the principle of proportionality under IHL and human rights law, which reflect the differences between what is practically possible in war and in peacetime.

The principle of proportionality in attack prohibits attacks against military objectives that may be expected to cause incidental death, injury to civilians or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. There is no precise mathematical or other formula for assessing the excessiveness of incidental civilian harm against the expected military advantage; in practice, the higher the military value of a legitimate target, the greater the possible justification for higher incidental harm will be. How to strike the right “balance” (for lack of a better word) is one of the most operationally challenging issues in the conduct of hostilities and requires a careful evaluation of the circumstances in each specific case. The crucial difference between the relevant IHL and human rights rules is that the aim of the IHL principle of proportionality is to limit incidental (“collateral”) harm, while nevertheless recognizing that an operation may be carried out even if such harm is likely, provided, as just noted above, that

74 See AP I, Art. 51(3) and AP II, Art. 13(3); ICRC Customary Law Study, above note 69, Rule 6.

75 AP I, Art. 50(1). For an evaluation of the customary law status of this rule, see the ICRC Customary Law Study above note 69, commentary to Rule 6, pp. 23–24. See also *Tallinn Manual on the International Law Applicable to Cyber Warfare*, NATO Cooperative Cyber Defence Centre of Excellence, Cambridge University Press, Cambridge, April 2013, Rule 33, available at: [www.ccdcoe.org/tallinn-manual.html](http://www.ccdcoe.org/tallinn-manual.html).

76 AP I, Art. 48; ICRC Customary Law Study, above note 69, Rule 7.

77 ICRC Customary Law Study, above note 69, Rule 10.

78 AP I, Art. 51(4); ICRC Customary Law Study, above note 69, Rules 11 and 12.

79 AP I, Art. 51(5)(b); ICRC Customary Law Study, above note 69, Rule 14.

80 AP I, Arts 57 and 58; ICRC Customary Law Study, above note 69, Rules 15–24.

it is not excessive in relation to the concrete and direct military advantage anticipated. In contrast, the aim of the principle of proportionality under human rights law is to prevent harm from happening to anyone else except to the person against whom force is being used. Even such a person must be spared lethal force if there is another, non-lethal way of achieving the aim of a law enforcement operation.<sup>81</sup>

The IHL principle of precautions in attack is multifaceted in that it requires the application of a range of steps to ensure that civilians and civilian objects are spared the effects of military operations.<sup>82</sup> It means, *inter alia*, that everything feasible must be done to make sure that the object of attack is indeed a military objective – i.e., to avoid erroneous targeting of civilians or civilian objects. It mandates that all feasible precautions in the choice of means and methods of warfare must be taken in order to avoid or at least minimize possible collateral civilian damage or casualties, and that parties must refrain from an attack which may be expected to cause excessive incidental civilian damage or casualties. In practice, the extent to which precautions are feasible will depend on a variety of factors including, for example, “the availability of intelligence on the target and its surroundings, the level of control exercised over territory, the choice and sophistication of available weapons, the urgency of the attack and the security risks that additional precautionary measures may entail for the attacking forces or the civilian population”.<sup>83</sup> The principle of precautions also requires that an attack be suspended or cancelled if it becomes clear that an intended target is not a military objective, or if the attack may be expected to cause excessive incidental civilian damage or casualties. As mentioned, there are also precautions incumbent on the defending party.<sup>84</sup>

By way of summary, IHL rules on the conduct of hostilities recognize that the use of lethal force against persons is inherent to waging war. This body of rules aims to avoid or limit death and other harm, particularly to civilians, but recognizes that the very nature of armed conflict is such that loss of life, regrettably, cannot be entirely prevented.

81 See Noam Lubell, “Challenges in Applying Human Rights Law to Armed Conflict”, *International Review of the Red Cross*, Vol. 87, No. 860, 2005, p. 745, available at: [www.icrc.org/eng/assets/files/other/irrc\\_860\\_lubell.pdf](http://www.icrc.org/eng/assets/files/other/irrc_860_lubell.pdf). “For example, under human rights law and the rules of law enforcement, when a State agent is using force against an individual, the proportionality principle measures that force in an assessment that includes the effect on the individual himself, leading to a need to use the smallest amount of force necessary and restricting the use of lethal force.”

82 For an excellent overview of the issue, see Jean-Francois Queguiner, “Precautions Under the Law Governing the Conduct of Hostilities”, *International Review of the Red Cross*, Vol. 88, No. 864, 2006, available at: [www.icrc.org/eng/resources/documents/article/review/review-864-p793.htm](http://www.icrc.org/eng/resources/documents/article/review/review-864-p793.htm).

83 Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, Study, European Parliament, Directorate-General for External Policies, Policy Department, May 2013, p. 24, available at: [www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=92953](http://www.europarl.europa.eu/delegations/en/studiesdownload.html?languageDocument=EN&file=92953).

84 AP I, Art. 58; ICRC Customary Law Study, above note 69, Rules 22–24.



## Who may be targeted?

The issue of who may be targeted by means of armed drones has been, and continues to be, the subject of much controversy. Provided below is an overview of IHL rules on the conduct of hostilities that relate specifically to the question against whom lethal force may be used in armed conflict.

There is no doubt that under IHL lethal force may be used against combatants. A combatant is a member of the armed forces of a party to an IAC who has “the right to participate directly in hostilities”.<sup>85</sup> This means that he or she may use force against – i.e., target and kill – other persons taking a direct part in hostilities (and destroy other enemy military objectives). Under IHL, the civilian population and individual civilians enjoy general protection against the dangers arising from military operations, in both IAC and NIAC.<sup>86</sup> To give effect to this principle, IHL specifically provides that the “civilian population as such, as well as individual civilians, shall not be the object of attack”.<sup>87</sup> Civilians remain protected from direct attack, whether in IAC or NIAC, “unless and for such time as they take a direct part in hostilities”.<sup>88</sup>

Who is deemed to be a civilian taking a direct part in hostilities is thus a key practical and legal issue. As noted in an ICRC report, civilians have, throughout history, contributed to the general war effort to a greater or lesser degree, but such activities were typically conducted at some distance from the battlefield.<sup>89</sup> Recent decades have seen this pattern change radically. There has been a continuous shift of military operations away from distinct battlefields and into civilian population centres, as well as an increasing involvement of civilians in activities more closely related to the actual conduct of hostilities. Even more recently, there has been a trend towards the “civilianization” of the armed forces, meaning the involvement of large numbers of private contractors as well as intelligence personnel and other civilian government employees, in armed conflict. Moreover, in a number of contemporary conflicts, military operations have attained an unprecedented level of complexity and have involved a great variety of interlinked human and technical resources, including remotely operated weapons systems such as drones.

The increasingly blurred distinction between civilian and military functions, the intermingling of armed actors with the peaceful civilian population, and the wide variety of activities performed by civilians in contemporary armed

85 AP I, Art. 43(2).

86 AP I, Art. 51(1) and AP II, Art. 13(1).

87 AP I, Art. 51(2) and AP II, Art. 13(2).

88 AP I, Art. 51(3) and AP II, Art. 13(3).

89 ICRC, *Report on IHL and the Challenges of Contemporary Armed Conflicts*, Report presented to the 30th International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 26–30 November 2007, pp. 15–16 (on which part of this section is based), available at: [www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf](http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf). “They included, for example, the production of arms, equipment, food and shelter, as well as economic, administrative and political support. Traditionally, only a small minority of civilians became involved in the actual conduct of military operations.” *Ibid.*, p. 15.



conflicts have caused confusion and uncertainty as to how the principle of distinction should be implemented in the conduct of hostilities. These difficulties are aggravated when armed actors do not distinguish themselves from the civilian population, or when persons act as “farmers by day and fighters by night”. As a result, peaceful civilians are more likely to fall victim to erroneous or unnecessary targeting, while members of the armed forces run an increased risk of being attacked by persons they cannot distinguish from peaceful civilians even though they must have been trained to protect civilians.

The challenges above have emphasized the importance of distinguishing not only between civilians and the armed forces, but also between civilians who do not participate directly in hostilities and those who do. As noted above, under IHL the notion of “direct participation in hostilities” describes individual conduct which, if carried out by civilians, suspends their protection from direct attack. However, despite the serious legal consequences involved, neither the Geneva Conventions nor their Additional Protocols provide a definition of what conduct amounts to direct participation in hostilities.

It was with a view to clarifying the law that in 2009 the ICRC published its Interpretive Guidance, enunciating the organization’s recommendations.<sup>90</sup> The first question addressed in the Interpretive Guidance is who is considered a civilian for the purposes of the principle of distinction, because the answer determines the scope of persons protected against direct attack “unless and for such time as they directly participate in hostilities”. The Guidance distinguishes between (i) members of organized armed forces or groups, the latter defined as persons whose continuous function is to conduct hostilities on behalf of a party to an armed conflict; and (ii) civilians – that is, persons who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic or unorganized basis. It concludes that, for the purposes of the principle of distinction under IHL, only the latter are deemed to be civilians.

This means that, in NIAC, persons who are not members of State armed forces or of organized armed groups are considered civilians and may not be targeted unless and for such time as they are engaged in a specific act of direct participation<sup>91</sup> (see below). Conversely, organized armed groups constitute the armed forces of a non-State party to a NIAC. The decisive criterion for individual

90 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (Interpretive Guidance), available at: [www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm](http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm). For scholarly articles criticizing certain aspects of the Interpretive Guidance, and Nils Melzer’s response to those views, see *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, available at: <http://nyujilp.org/print-edition/>, which is devoted to that topic.

91 Pursuant to the Interpretive Guidance, in IAC all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Members of irregular armed forces (militia, volunteer corps, etc.) whose conduct is attributable to a State party to a conflict are considered part of its armed forces. They are not deemed civilians for the purposes of the conduct of hostilities even if they fail to fulfil the criteria required by IHL for combatant privilege and POW status. Membership in irregular armed forces belonging to a party to the conflict is to be determined based on the same functional criteria that apply to organized armed groups in NIAC.

membership in an organized armed group is whether a person performs a continuous function for the group involving his or her direct participation in hostilities (“continuous combat function” or CCF). As long as this is the case, he or she ceases to be a civilian for the purpose of the conduct of hostilities and loses protection against direct attack. This does not imply *de jure* entitlement to combatant privilege, which in any event does not exist in NIAC. Rather, it distinguishes members of the organized fighting forces of a non-State party from civilians, including those who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis. The concept of CCF has been criticized as being allegedly based on status rather than behaviour as the basis for targeting.<sup>92</sup> It is submitted that this view is misplaced, as the Interpretive Guidance does not – and could not – introduce combatant status into a NIAC. On the contrary, as the very term indicates, membership in an armed group is linked to the CCF that a person carries out.

The second question dealt with in the Interpretive Guidance is what conduct amounts to direct participation in hostilities. Pursuant to the Interpretive Guidance, a specific act must fulfil the following cumulative criteria: (1) it must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (*threshold of harm*); (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (*direct causation*); and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).

Applied in conjunction, the three requirements are believed to permit a workable distinction between activities amounting to direct participation in hostilities and those which, although occurring in the context of an armed conflict, are not part of the hostilities and do not lead to loss of protection from direct attack. In addition, measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, are deemed to constitute an integral part of the act.

The third issue addressed in the Interpretive Guidance is the modalities that govern the loss of protection against direct attack. These include the time during which members of State armed forces or of organized armed groups, as well as individual civilians, may be subject to direct attack, and the rules and principles governing the use of force against them. As regards the latter, the Guidance determines that “the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing

92 See Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, above note 7, para. 65.

circumstances”.<sup>93</sup> This recommendation, in particular, has been criticized as being contrary to IHL, which does not include any explicit restriction on the targeting and killing of persons who are legitimate targets.<sup>94</sup> It has also, wrongly, been interpreted as requiring in all circumstances a “capture rather than kill” obligation in the conduct of hostilities.

With respect to the first critique, the ICRC’s view, as explained in the Interpretive Guidance, is based on the interplay between the principles of military necessity and humanity that underlie the entire normative framework of IHL. Just as importantly, the recommendation is drawn from the interpretation given by relevant States to the interface of those principles as reflected in their military manuals.<sup>95</sup>

The second critique misreads the plain language of the recommendation and of the accompanying commentary. The latter specifically states that “the absence of an unfettered ‘right to kill’ does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances”.<sup>96</sup> The commentary also explains that:

what kind and degree of force can be regarded as necessary in an attack against a particular military target involves a complex assessment based on a wide variety of operational and contextual circumstances. The aim cannot be to replace the judgment of the military commander by inflexible or unrealistic standards; rather, it is to avoid error, arbitrariness, and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation.<sup>97</sup>

The Interpretive Guidance ends with a reminder that civilians who cease direct participation in hostilities and individuals who cease to be members of an organized armed group by disengaging from a continuous combat function regain full civilian protection against direct attack. However, in the absence of combatant privilege they are not exempted from prosecution under the domestic law of the detaining State for acts committed during direct participation or membership. They may also be held individually responsible for war crimes or other crimes under international law.

93 Interpretive Guidance, above note 90, p. 77, Recommendation IX.

94 See W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, p. 799.

95 See, for example, NATO, *Glossary of Terms and Definitions*, AAP-6V, M-5, p. 2; US Department of the Army, *Field Manual 27–10*, 1956, § 3; US Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1–14M/MCWP 5–12-1/COMDTPUB P5800.7A, 2007, § 5.3.1, p. 5–2; French Ministry of Defence, *Manuel de Droit des Conflits Armés*, 2001, pp. 86 ff.; German Federal Ministry of Defence, *Triservice Manual ZDv 15/2: Humanitarian Law in Armed Conflicts*, August 1992, §130; Switzerland, *Swiss Army, Regulations 51.007/IV, Bases légales du comportement à l’engagement*, 2005, § 160. Historically, the modern concept of military necessity has been strongly influenced by the definition provided in *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100, 24 April 1863 (Lieber Code), Art. 14.

96 Interpretive Guidance, above note 90, p. 78.

97 *Ibid.*, p. 80.

It should be noted that the Interpretive Guidance was intended to provide military planners, commanders and their lawyers, as well as others, with legal standards elaborating the concept of direct participation in hostilities. The recommendations formulated are thus of necessity broad and abstract in nature and need to be further “translated” into operational tools in order to be applicable in specific targeting operations on the ground.

Given some of the current controversies surrounding either the law or the reported practice related to the extraterritorial targeting of persons by means of armed drones, a few additional observations may be made. Apart from State armed forces in an IAC, the *only* other persons against whom in the ICRC’s view lethal force may be used by way of direct attack are either members of armed groups in NIAC (defined as those who perform a continuous combat function) or civilians directly participating in hostilities on an individual basis for the duration of the specific act of direct participation. In this context there have been reports in the public domain, and reactions thereto, about the practice of “signature strikes”.<sup>98</sup> These have been described as drone attacks that target “groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t known”.<sup>99</sup> The concept of signature strikes is not a legal term of art and risks creating confusion by suggesting the possible introduction of a new (legal) notion. The way in which this concept is used – i.e., in distinction to “personality” strikes<sup>100</sup> – also erroneously implies that targeting under IHL will only be lawful if the identity of the person targeted is known. This requirement is not an element of the principle of distinction and would for the most part not be possible to fulfil in the reality of armed conflict.

What is required is a determination that a person constitutes a lawful target, either because of a continuous combat function or because he or she is a civilian who is taking a direct part in hostilities, and sufficient evidence of either one or the other. It is not suggested that gathering evidence will in all cases be easy, as IHL does not provide guidance on the quality or quantity of evidence required. It should also be recalled that implementation of the requirement that an attacker do everything feasible to verify that he is not targeting civilians (part of the principle of precautions in attack) can be only based on information available at the time, and not in hindsight. Nevertheless, in case of doubt, as also mentioned above, a person should be presumed not to be targetable.

98 See Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position*, Policy Brief, European Council on Foreign Relations, London, 3 July 2013, p. 5, available at: [http://ecfr.eu/publications/summary/drones\\_and\\_targeted\\_killing\\_defining\\_a\\_european\\_position211](http://ecfr.eu/publications/summary/drones_and_targeted_killing_defining_a_european_position211). See also N. Melzer, above note 83, pp. 34–35.

99 For a comprehensive review of the issue, see Kevin Jon Heller, “‘One Hell of a Killing Machine’: Signature Strikes and International Law”, *Journal of International Criminal Justice*, Vol. 11, No. 1, 2013, p. 1, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2169089](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2169089), citing Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, Houghton Mifflin Harcourt, New York, 2012, p. 41.

100 Those in which the targeting entity has a “high degree of confidence” that it knows the precise identity of the target. See K. Heller, above note 99, p. 2.

There have also been reports of drone strikes against military-aged males. These are strikes that allegedly consider all males of military age in a strike zone as combatants (this term presumably being used in its colloquial sense), because “simple logic indicates that people in an area of known terrorist activity ... are probably up to no good”.<sup>101</sup> The practice is sometimes examined on its own, while in other cases it is considered to be a subset of “signature strikes”.<sup>102</sup> If targeting on this basis has been or is taking place, it would be contrary to the principle of distinction as the vicinity of a person to a particular area, coupled with his age, cannot make him a military objective. If, alternatively, the persons at issue are not considered targets themselves but are not counted as civilians in any proportionality assessment, then that would be an improper application of the rule of proportionality described above.

A question that is sometimes posed relates to the IHL rules that would be applicable to the use of lethal force against drone operators. The fact that a drone is operated from a distance does not change the IHL rules on the conduct of hostilities outlined above. If a drone operator is a member of the regular armed forces of a State involved in an IAC he or she may be targeted by the adversary by virtue of the fact that he or she is a military objective. If in an IAC a drone is operated by a government entity which is not part of the armed forces, the persons involved will lose protection from direct attack to the extent that their activity amounts to a continuous combat function or to individual direct participation in hostilities. The relevant IHL rules outlined above will also govern the use of lethal force by means of armed drones in a NIAC. Thus, direct attacks would not be prohibited under IHL against members of the State’s armed forces operating a drone, or against persons operating a drone as part of a continuous combat function or directly participating in hostilities by operating drones as civilians on a sporadic basis, whether on the State or non-State side. The difference with IAC of course relates to the issue of the legal status of the operators: there is no combatant or POW status in NIAC, which means that persons on the side opposing government forces will remain prosecutable under domestic criminal law upon capture even in the case of drone attacks that may not have been in violation of IHL.<sup>103</sup>

## Where may persons be targeted?

The territorial scope of armed conflict – and therefore of IHL – is probably the most challenging issue that has arisen in the legal and other debates on extraterritorial targeting by means of armed drones. This is in no small measure due to the fact that IHL does not contain an overall explicit provision on its scope of territorial applicability. The individual specific references to “territory”

<sup>101</sup> See *ibid.*, p. 11 and note 52.

<sup>102</sup> For an examination of the practice on its own, see N. Melzer, above note 83, p. 35. For an examination of the practice as a subset of signature strikes, see K. Heller, above note 99, p. 11.

<sup>103</sup> See I. Henderson and B. Cavanagh, above note 6, p. 208.

included in the Geneva Conventions and their Additional Protocols have thus recently given rise to different positions on what has been termed the “legal geography of war”.<sup>104</sup> The questions most often asked are: does IHL apply to the entire territories of the parties to an armed conflict, or is it restricted to the “battlefield” within such territories? Does it apply outside the territories of the parties, i.e., in the territory of neutral or non-belligerent States? It must be stressed that the views offered below are of a “framework” nature only. The reality is so complex, and constantly evolving, that not all possible specific practical cases and the legal questions they generate have been, or can be, addressed at this time.

### *The applicability of IHL in the territories of the parties to an armed conflict*

As regards international armed conflict, it is generally accepted that IHL applies to the entire territory of the States involved in such a conflict, as well as to the high seas and the exclusive economic zones (the “area” or “region” of war).<sup>105</sup> A State’s territory includes not only its land surface but also rivers and landlocked lakes, national maritime waters and territorial waters, and the airspace above these territories.<sup>106</sup> There is no indication either in the Geneva Conventions and the Additional Protocols or in the doctrine and jurisprudence that the scope of applicability of IHL rules is limited to the “battlefield”/“zone of active hostilities” or “zone of combat”, generic terms used to denote the space in which hostilities are taking place.<sup>107</sup> It is also widely agreed that military operations may not be carried out beyond the area/region of war as defined above, meaning that they may not be extended to the territory of neutral States, an issue dealt with briefly below.

It may likewise be argued that IHL applies in the whole territory of the parties involved in a NIAC. While common Article 3 does not deal with the conduct of hostilities, it provides an indication of the scope of its territorial applicability by specifying certain acts as prohibited “at any time and in any place whatsoever”.<sup>108</sup> The *travaux préparatoires* to this article do not suggest that its applicability was meant to be confined to the “battlefield” or the “zone of active hostilities/combat”. The ICTY Appeals Chamber has specifically stated that

104 See K. Anderson, above note 32.

105 See, e.g., C. Greenwood, above note 42, p. 51 (area). See also Yoram Dinstein, *War, Aggression and Self-Defense*, Cambridge University Press, Cambridge, 2011, p. 19.

106 Parts of the national territory of the parties to an IAC, such as demilitarized zones, including hospital and safety zones, as well as neutralized zones and non-defended localities, are subject to a special IHL regime that will not be examined here.

107 For an examination of the notion of “zone of active hostilities”, see Jennifer C. Daskal, “The Geography of the Battlefield: A Framework for Detention and Targeting Outside the ‘Hot’ Conflict Zone”, *University of Pennsylvania Law Review*, Vol. 161, No. 5, 2013, pp. 1165–1234.

108 Common Art. 3(1).

there is no necessary correlation between the area where the actual fighting takes place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the warring parties, or in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there.<sup>109</sup>

For its part, the ICTR has concluded:

Once the conditions for the applicability of Common Article 3 and Additional Protocol II are satisfied, their scope extends throughout the territory of the State where the hostilities are taking place without limitation to the “war front” or to the “narrow geographical context of the actual theatre of combat operations”.<sup>110</sup>

It could be pointed out that the pronouncements of the International Tribunals were intended to establish the territorial reach of IHL primarily for the purposes of enabling jurisdiction over war crimes. While this may be the case, it is nevertheless submitted that their findings are valid as regards the territorial applicability of IHL, including its rules on the use of lethal force, which are the focus here. IHL will apply to specific hostile acts carried out by individuals as part of the conduct of hostilities between the parties to an armed conflict – i.e., to direct participation in hostilities – wherever in the territory of the parties such acts may take place. A different conclusion would mean that hostilities could not spread beyond the “battlefield” or “zone of active hostilities/combat” within the territory of a State. However, in reality they do, in which case IHL is designed to regulate them.

It is important to stress in this context that the applicability of IHL to the territory of the parties to a conflict does not mean that there are no legal constraints, apart from those related to the prohibition of specific means and methods of warfare, on the use of lethal force against persons who may be lawfully targeted under IHL – i.e., members of State armed forces or of organized armed groups, as well as individual civilians taking a direct part in hostilities, *particularly outside the “battlefield” or “zone of active hostilities/combat”*. As explained in the commentary to Recommendation IX of the ICRC’s Interpretive Guidance, referred to above, IHL does not expressly regulate the kind and degree of force permissible against legitimate targets.<sup>111</sup> This does not imply a legal entitlement to use lethal force against such persons in all circumstances without further considerations. Based on the interplay of the principles of military necessity and humanity, the Interpretive Guidance determines that “the kind and degree of force which is permissible against persons not entitled to protection against direct

109 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96–23 & IT-96–23/1-A, Judgment, 12 June 2002, para. 57, available at: [www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf](http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf). It may be noted that the ICTY Appeals Chamber’s view on the geographical scope of application of IHL seems to have evolved from the initial position taken in the 1995 *Tadić* Decision, above note 37, paras. 67–69.

110 ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment, 15 May 2003, para. 367, available at: [www.refworld.org/docid/48abd5a30.html](http://www.refworld.org/docid/48abd5a30.html).

111 Interpretive Guidance, above note 90, p. 78.



attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances”.<sup>112</sup> As has been mentioned, it is recognized that this will involve “a complex assessment” that will depend on a wide range of operational and contextual factors. In some instances, it should lead to the conclusion that means short of lethal force will be sufficient to achieve the aims of a military operation. As already noted, this does not introduce a law enforcement “capture rather than kill” obligation into the framework of IHL, although that could in certain limited circumstances be the practical outcome of the legal analysis called for in Recommendation IX.

It should also be noted that Recommendation IX does not, and cannot, prejudice the application of other branches of international law that may also be relevant in a given situation, an issue which is outside the scope of this examination. Suffice it to note that domestic law, as well as its international and/or regional human rights obligations, will also impact the legal analysis of the lawfulness of a State’s use of lethal force in a NIAC in its territory.<sup>113</sup> By way of example, it has recently been argued that IHL provisions on the protection of persons in enemy hands apply throughout the territory of a State within which a NIAC is taking place, but that the same cannot be said for its rules on the conduct of hostilities.<sup>114</sup> The latter will apply only in the “context of hostilities”,<sup>115</sup> meaning that a State may not use lethal force against a member of an armed group “in a situation in which it is perfectly feasible to employ law enforcement mechanisms”.<sup>116</sup> According to this view “this approach is similar” to that enunciated in Recommendation IX of the Interpretive Guidance.<sup>117</sup> While, as noted above, this may in certain limited circumstances be the case as a matter of practical outcome, it must be recalled that in terms of legal grounding Recommendation IX is based on IHL, while this view rests on a law enforcement paradigm.

In the context of this discussion, the question of IHL applicability to the territories of the parties to a NIAC with an extraterritorial element may be posed (the case in which the armed forces of one or more States fight alongside the armed forces of a host State in its territory against one or more organized armed groups). There is at present little in the way of official pronouncements by States on this specific issue, and the few publicly expressed expert views differ. According to some, “in principle IHL applies only to the territory of the State where the conflict is taking place”.<sup>118</sup> Others have said (with reference to the States members of ISAF in Afghanistan): “Since all such states are party to

<sup>112</sup> *Ibid.*, p. 77, Recommendation IX.

<sup>113</sup> See Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, Report of Expert Meeting, ICRC, Geneva, November 2013, available at: [www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf).

<sup>114</sup> David Kretzmer, Aviad Ben-Yehuda and Meirav Furth, “Thou Shall Not Kill: The Use of Lethal Force in Non-International Armed Conflicts”, *Israel Law Review*, Vol. 47, No. 2, 2014.

<sup>115</sup> *Ibid.*, p. 194.

<sup>116</sup> *Ibid.*, p. 224.

<sup>117</sup> *Ibid.*, p. 222.

<sup>118</sup> See Netherlands Advisory Committee Report, above note 29, p. 3.

Afghanistan's NIAC, IHL applies throughout their territories, even though no conflict related hostilities are taking place there.”<sup>119</sup>

It is submitted that there are cogent legal reasons to believe that IHL applies to the territories of the assisting States in this scenario. It may be argued that third States involved in an extraterritorial NIAC should not be able to shield themselves from the operation of the principle of equality of belligerents under IHL once they have become a party to this type of armed conflict beyond their borders. This would be contrary to the IHL aim of creating, at least in law, a level playing field between the parties, one in which both have the same rights – and, of course, obligations – under this body of norms. Thus, while acts possibly carried out as part of the hostilities by a non-State party on an assisting State's territory will certainly be penalized under domestic law (and probably qualified as “terrorist”), they may under some circumstances be lawful under IHL. This would be the case if an attack by the relevant non-State party were, for example, directed at a military objective in the intervening State's territory. If the attack were directed at civilians or civilian objects, it would be criminal and prosecutable as such under IHL, as well as a war crime. As regards the use of lethal force by a third State on its own territory against the non-State side, it would be governed by the standard outlined in Recommendation IX of the Interpretive Guidance, and also determined by the State's domestic law and its international and/or regional human rights obligations, as mentioned above.

### *The applicability of IHL to the territory of a non-belligerent State*<sup>120</sup>

While IHL is believed to apply in the entire territory of the parties to an armed conflict as just explained, there is also a range of views and significant disagreement among lawyers, scholars and others regarding the applicability of IHL to the territory of a non-belligerent State. The scenario is the following: a person who constitutes a military objective – because he or she is a member of the armed forces of a State, or is a member of a non-State armed group (continuous combat function), or is an individual civilian taking a direct part in hostilities – moves from a State in which there is an ongoing armed conflict into the territory of a non-neighbouring non-belligerent State, and continues his or her activities in relation to the conflict from there. Can such a person be targeted by a third State in the non-belligerent's territory under the rules of IHL?

There are, broadly speaking, two basic positions. Under the first, the answer is yes. A concise presentation of this view is provided below:

From a policy perspective, humanitarian law was never designed to prevent armed conflicts or to confine them territorially but, rather, to regulate them whenever and wherever they occur. From a legal perspective, the prevention and territorial confinement of armed conflicts are not a matter for

<sup>119</sup> M. Schmitt, above note 49, p. 16.

<sup>120</sup> The term “non-belligerent” is used here in the generic sense to signify a State not taking part in an armed conflict, in distinction to the status of neutrality of a State in an IAC, as described below.

humanitarian law, but for the UN Charter and the law of neutrality. Moreover, while the latter frameworks do aim to prevent and confine armed conflicts, they do not prevent or confine the applicability of humanitarian law (as a matter of law) when and where armed hostilities do occur (as a matter of fact). Once the objective criteria for the existence of an armed conflict are met, the applicability of humanitarian law is not territorially delimited but governs the relations between the belligerents irrespective of geographical location... In the absence of express territorial limitations, however, humanitarian law applies wherever belligerent confrontations occur, including international air space, the high seas, cyberspace and, indeed, the territory of third States, whether hostile, cobelligerent, occupied or neutral. What is decisive is not where hostile acts occur but whether, by their nexus to an armed conflict, they actually do represent “acts of war”. Therefore, any drone attack or other use of robotic weapons for reasons related to an armed conflict is necessarily governed by humanitarian law, regardless of territorial considerations. The separate question of whether the extraterritorial use of robotic weapons is lawful depends not only on humanitarian law, but also on other bodies of international law, such as the UN Charter or the law of neutrality, which may restrict or prohibit hostile acts between belligerent parties even when they are permissible under humanitarian law.<sup>121</sup>

The other approach separately addresses situations of international and non-international armed conflict. Pursuant to this view, “in situations of international armed conflict between states, the applicability of international humanitarian law is limited to the territory of the warring states”.<sup>122</sup> It is submitted that there are valid legal and policy reasons for this reading. When it comes to IAC, a close examination of the Geneva Conventions may lead to the conclusion that the vast majority of their provisions were in fact drafted for and intended to apply only to the territory of the States involved in such a conflict. By way of reminder, apart from national territory, which is not limited to the land surface, the area/region of war may include the high seas and exclusive economic zones. The issue of controversy being examined here is the extension of IHL application beyond that space to the territory of non-participating States. The obvious example is the Fourth Geneva Convention, which is essentially structured around the protection of persons either in the territory of a party to the conflict or in occupied territory. Some of its provisions are thus “common to the territories of the parties to the conflict and to occupied territories”,<sup>123</sup> others govern the treatment of “aliens in the territory of a party to the conflict”,<sup>124</sup> and

121 N. Melzer, above note 83, p. 21. For a similar position see Michael N. Schmitt, “Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law”, *Columbia Journal of Transnational Law*, Vol. 52, 2013, p. 99.”

122 Netherlands Advisory Committee Report, above note 29, p. 3.

123 GC IV, Part III, § I, Arts 27–34.

124 GC IV, Part III, § II, Arts 35–46.

still others concern the treatment of persons in “occupied territory”.<sup>125</sup> There are also numerous references to “territory” (a total of seventy-one) or “territories” (a total of fourteen) throughout other parts of the Fourth Geneva Convention related to the internment of protected persons, their death, release and repatriation, the execution of the Convention, etc.

While the Third Geneva Convention has a smaller number of explicit references to “territory” (a total of twenty) or “territories” (a total of three), its operation on the national territory of the State parties to an IAC is likewise clearly intended. Article 4, which *inter alia* defines eligibility for POW status for members of militias and other groups “belonging to a party to the conflict” (that is, in IAC, a State, which by definition consists of a defined territory under public international law), expressly refers to the operation of such groups “in or outside their own territory, even if this territory is occupied”.<sup>126</sup> Given the context, the term “own” territory can only be interpreted to mean the national territory of the State to which they “belong”. Where the Geneva Conventions refer to or have an effect on neutral States, the relevant provisions for the most part also explicitly refer to the “territory” of neutral States.<sup>127</sup>

It could be argued that the essentially “territorial” scope of the Geneva Conventions is simply a result of the fact that they govern the treatment of persons in enemy hands,<sup>128</sup> but that the same conclusion is not necessarily valid with respect to the rules of Additional Protocol I on the conduct of hostilities. Here again, arguments to the contrary may be made.

First, AP I “supplements”<sup>129</sup> the Geneva Conventions: there is nothing to suggest that the Protocol was meant to enlarge the essentially territorial scope of applicability of the Conventions as a matter of law. Second, no particular provision indicates that the Protocol’s rules on the conduct of hostilities were intended to apply “globally” – i.e., outside the territories of the belligerents. The wording of AP I Article 49(2) is, admittedly, unusual in that it specifies that the Protocol’s provisions on “attacks” (defined as acts of violence against the adversary, whether in offence or defence)<sup>130</sup> “apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the

125 GC IV, Part III, § II, Arts 47–78.

126 GC III, Art. 4A(2).

127 Thus, for example, in Article 4B(2), the Third Geneva Convention extends POW treatment to members of the armed forces of a belligerent who have been received by a neutral State (in which case they must be interned in accordance with the 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land). Similarly, the First and Second Geneva Conventions specify, in Articles 4 and 5 respectively, the treatment that neutrals must afford to wounded, sick or shipwrecked members of the armed forces of the belligerents, including medical personnel and chaplains, received or interned in their territory.

128 The essentially territorial scope of application of IHL treaties in IAC does not mean that IHL will cease to operate in favor of individual protected persons who are removed from belligerent territory, as long as they remain in enemy hands.

129 AP I, Art. 1(3).

130 AP I, Art. 49(1).

conflict, but under the control of the adverse party”.<sup>131</sup> A review of the drafting history of this provision<sup>132</sup> and of scholarly commentary<sup>133</sup> clarifies, however, that what the drafters were anxious to ensure were limitations on the behaviour of a party in its own territory. The reference to “whatever territory” was thus not intended to suggest a spatial extension of the scope of application of this rule outside the territories of the parties to the conflict, but on the contrary, to guarantee that a belligerent will apply it in its own.<sup>134</sup> If the Protocol’s rules on the conduct of hostilities were meant to potentially apply without geographic limitation, then the way in which the end of this treaty’s application is formulated would presumably also have been different. However, it reads as follows: “The application of the Conventions and of this Protocol shall cease, in the territory of the Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation.”<sup>135</sup>

The view that IHL application cannot be automatically extended any time a member of the adversary’s armed forces in an IAC moves around the world is further buttressed by the existence of the law of neutrality.<sup>136</sup> Under a geographically “unlimited” reading of IHL rules on targeting, such a person could be attacked based on his or her very status as a combatant, without more. But this is not the case. Due to the operation of the law of neutrality, enemy combatants may be targeted only if the neutral State assists a belligerent or is derelict in preventing members of his armed forces from continued participation in hostilities from its territory, and not just because they may be located there. The law of neutrality is an extension of IHL, and its main goal is precisely to prevent the spread of hostilities to the territory of non-participating States. It does so by means of a range of rules governing the behaviour of both neutral and belligerent States. While an examination of the rules on neutrality is not the focus of this text, a few general principles will be recalled.<sup>137</sup>

131 AP I, Art. 49(2): “The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a party to the conflict but under the control of an adverse party.”

132 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of June 8 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (AP I Commentary), paras 1883–1891.

133 Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2002, p. 240.

134 See AP I Commentary to Art. 49(2) at para. 1891. “Finally this paragraph makes it clear, as implied in paragraph 4, that the provisions of the Protocol relating to attacks and the effects thereof apply to the whole of a population present in the territory of a party to the conflict, even if it is under enemy control – as does Part II of the Fourth Convention” (emphasis added).

135 AP I, Art. 3(b).

136 For an overview of the law of neutrality and arguments in favour of its continued validity, see Wolff Heintschel von Heinegg, “‘Benevolent’ Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality”, in Michael Schmitt and Jelena Pejić (eds), *International Law and Armed Conflict: Exploring the Faultlines*, Martinus Nijhoff, Leiden/Boston, 2007, pp. 543–568.

137 See Peter Hostettler and Olivia Danai, “Neutrality in Land Warfare”, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, §2, General Rules, paras 7–10, available at: <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e347?rskey=UkNyhH&result=1&prd=EPIL>.

Neutrality is the status of States that do not participate in an IAC. Neutral States must abstain from supporting or harming States that are parties to such a conflict, whether by means of direct support to military operations, by hindering the belligerents outside neutral territory, or by providing belligerent States with services not authorized under the law of neutrality. In the same vein, neutral States are obliged to treat the belligerents in an equal manner (the principle of impartiality). The law of neutrality obliges the belligerents to respect the inviolability of the territory of neutral States, which includes the prohibition of any type of military activity in a neutral's territory, as well as such activities in close proximity to neutral territory that may cause damage to persons or property situated on it. Neutral States are obliged to prevent and repel violations of their neutrality by belligerent States.<sup>138</sup> According to some, the decision of a State to remain neutral is unilateral and does not require a declaration, nor is it subject to the agreement of another State.<sup>139</sup>

Thus, in the scenario provided above, the law of neutrality will operate to possibly allow the targeting of a belligerent who continues to directly participate in hostilities from a neutral's territory. But, it is submitted, this will be the result of the application of the specific rules of neutrality and not based on an unfettered "right" of one party to an IAC to target members of the opposing side's armed forces, without more, under IHL rules governing the conduct of hostilities anywhere in the world.

In this context it is worth mentioning that while its essential postulates remain valid, the law of neutrality is widely believed to be in need of update.<sup>140</sup> The bulk of the treaty rules date from the beginning of the last century and the customary law norms likewise leave much to be desired in terms of present-day relevance. The other observation that must be made, in relation to the discussion that follows, is that the law of neutrality does not apply *de jure* in NIACs, which are by definition armed conflicts not between States, but between States and a non-State party or parties.

The hypothetical scenario provided at the beginning of this section – in which a member of a non-State armed group (continuous combat function) or an individual civilian taking a direct part in hostilities in relation to an ongoing NIAC moves into the territory of a non-belligerent State – is probably the one currently being most hotly debated because of the real challenges presented in reality and law. Once again, two basic legal positions may be discerned.

138 For the application of the rules of neutrality to air warfare, see Peter Hostettler and Olivia Danai, "Neutrality in Air Warfare", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford Public International Law, paras 1–23, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e346?rskey=J0TtA8&result=2&prd=EPIL>.

139 P. Hostettler and O. Danai, above note 137, paras 3–4. There are also different views on this, as noted in W. H. von Heinegg, above note 136, p. 556.

140 See Michael Bothe, "The Law of Neutrality", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 487.

Pursuant to the first view, which has been outlined above, as in IAC, there is no territorial limitation to the scope of application of IHL in NIAC. What is decisive is “not where hostile acts occur, but whether, by their nexus to an armed conflict, they actually do represent ‘acts of war’. Therefore, any drone attack ... for reasons related to an armed conflict is necessarily governed by humanitarian law, regardless of territorial considerations.”<sup>141</sup> It is also posited that the norms of other bodies of international law “may restrict or prohibit hostile acts between the belligerent parties even when they are permissible under humanitarian law”.<sup>142</sup> This could be the *jus ad bellum* under the UN Charter, or the rules on State responsibility for internationally wrongful acts.

It is submitted that a different reading of the scenario given is also possible – and should be preferred – based on reasons of law and policy. To begin with, it is evident that common Article 3 contains explicit provisions on its applicability in the “territory” of a State in which such a conflict is taking place.<sup>143</sup> Traditionally, this was understood to cover only the fighting between the relevant government’s armed forces and one or more organized non-State armed groups on its soil. However, as previously outlined, the factual scenarios of NIAC have evolved, and with them the legal interpretation of the spatial scope of applicability of common Article 3. Thus, in addition to the *sui generis* case of a spillover NIAC, there have been and continue to be instances in which the armed forces of one or more States fight alongside the armed forces of a host State in its territory against one or more organized armed groups (an additional example of an extraterritorial NIAC). As has been argued, there are legal reasons to believe that IHL will apply in such a situation also to the territories of the assisting States, because they are parties to the NIAC.

However, it is a different order of legal magnitude to suggest that “territory” may be understood to mean that IHL – and its rules on the conduct of hostilities – will automatically extend to the use of lethal force against a person located outside the territory of the parties involved in an ongoing NIAC, i.e. to the territory of a non-belligerent State. This reading would mean the acceptance of the legal concept of a “global battlefield”, which as has been outlined, does not appear to be supported by the essentially territorial focus of IHL, which appears to limit IHL applicability to the territory of States involved in an armed conflict. A territorially unbounded approach would imply that a member of an armed group or an individual civilian directly participating in hostilities moving around the world would be deemed to automatically “carry” the “original” NIAC with them wherever they go, and based on IHL, would remain targetable within a potentially

141 N. Melzer, above note 83, p. 21.

142 *Ibid.*

143 AP II provides in Article 1(1): “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions ... and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups.” Given the different legal threshold for the applicability of AP II, due to which the hypothetical scenario is outside the purview of the Protocol, this treaty will not be further mentioned here.



geographically unlimited space. With the exception of the United States, State practice and *opinio juris* do not seem to have accepted this legal approach and the great majority of States do not appear to have endorsed the notion of a “global battlefield”.<sup>144</sup> In addition, it is disturbing, as a practical matter, to envisage the potential ramifications of the territorially unlimited applicability of IHL if other States around the world involved in a NIAC were to likewise rely on the concept of a “global battlefield”.

It is posited that it would be more legally and practically sound to consider that a member of an armed group or an individual civilian directly participating in hostilities in a NIAC from the territory of a non-belligerent State should not be deemed targetable by a third State under IHL, but that the threat he or she poses should rather be dealt with under the rules governing the use of force in law enforcement.<sup>145</sup> (See further below for the exception.) The rules governing the use of lethal force in law enforcement under human rights law – which would, of course, also be applicable to possible drone targeting outside situations of armed conflict – would merit a separate examination. Given that such an analysis is outside the scope of this text, only the most basic provisions will be noted. It is important to recall for the purpose of this discussion that human rights law does not prohibit the use of lethal force in law enforcement, but provides that it may be employed only as a last resort, when other means are ineffective or without promise of achieving the intended aim of a law enforcement operation.<sup>146</sup> Lethal force will be allowed if it is necessary to protect persons against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life.<sup>147</sup> The use of lethal force is also subject to the human rights requirement of proportionality, which, as noted above, differs from the principle of proportionality applicable in the conduct of hostilities under IHL.<sup>148</sup> In effect, the application of the relevant rules on the use of force in law enforcement would circumscribe both the circumstances in which lethal force could lawfully be used, as well as the way in which it would have to

144 For example, the European Union and its member States have consistently stressed a human rights (i.e., criminal justice) approach to the fight against terrorism (which includes persons associated with organized non-State armed groups designated as “terrorist”), without mention in EU documents or in joint statements with the US of a “global war on terrorism” or of a “global battlefield”. For the EU approach, see, e.g., EU Council Secretariat, *The European Union and the Fight Against Terrorism*, Factsheet, Brussels, 2 October 2009, available at: [www.consilium.europa.eu/uedocs/cmsUpload/Factsheet-fight%20against%20terrorism%20091002.EN.revised.PDF](http://www.consilium.europa.eu/uedocs/cmsUpload/Factsheet-fight%20against%20terrorism%20091002.EN.revised.PDF). See also *Joint Statement*, EU–US Summit, Brussels, 140326/02, 26 March 2014, para. 13, available at: [www.eeas.europa.eu/statements/docs/2014/140326\\_02\\_en.pdf](http://www.eeas.europa.eu/statements/docs/2014/140326_02_en.pdf). “We cooperate against terrorism in accordance with respect for human rights.”

145 ICCPR, Art. 6; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990 (BPUFF), available at: [www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx). If in this scenario the non-belligerent State did not consent to the use of force in its territory, a separate IAC between the two States will also be deemed to exist as a matter of law.

146 BPUFF, Principle 9.

147 *Ibid.*

148 N. Lubell, above note 81, p. 745.

be planned and carried out. Drone strikes in the territory of a non-belligerent State would thus be legally justifiable only in very exceptional circumstances.

Reliance on the rules governing the use of force in law enforcement in the scenario being examined would also be more appropriate as a matter of policy. A non-belligerent State is by definition one that does not take part in an armed conflict being waged among others. As a result, the rules governing the possible use of lethal force in its territory by a third State pursuing a specific person located there in relation to a territorially removed NIAC should not be those of IHL. The application of law enforcement rules would be more protective of the general population in those circumstances than IHL norms on the conduct of hostilities (designed for the specific reality of armed conflict), as there is no armed conflict in the non-belligerent State. The employment of IHL conduct of hostilities rules could lawfully entail consequences in terms of harm to civilians and civilian objects in the non-belligerent territory – i.e., allow for “collateral damage” – that the utilization of the rules on law enforcement could not.

It may also be pointed out that reliance on other bodies of international law to essentially “counterbalance” the effects of a territorially expansive view of IHL applicability in the territory of a non-belligerent State – on which proponents of the geographically unlimited approach put emphasis – is of little comfort. It has already been mentioned that the law of neutrality will not apply *de jure* to the scenario at hand. As regards the possibly constraining impact of the *jus ad bellum*, it would appear that this body of norms is being increasingly interpreted by some States and experts in ways that are making it easier for third States to use force extraterritorially, particularly against non-State actors. As for the restraining influence of the law on State responsibility, it must be recalled that its role is not the direct prevention of any particular conduct, but to possibly establish that the conduct was unlawful – after the fact.

What has just been said above should not, however, be understood to mean that IHL applicability can never be extended to the territory of a non-belligerent State. For example, it has been pointed out in relation to an ongoing NIAC that:

The applicability of IHL may be extended if the conflict spills over into another state in cases where some or all of the armed forces of one of the warring parties move into the territory of another – usually neighbouring – state and continue hostilities from there. IHL does not apply to the territory of a third state simply because one or more members of the armed forces of a warring party are physically located on the territory of that third state.<sup>149</sup>

Pursuant to another, similar, view: “IHL also governs operations in States not party to the conflict when the intensity and organization criteria are satisfied within that State during a conflict between an organized armed group and another State’s forces.”<sup>150</sup> It is submitted, in keeping with the gist of these opinions, that IHL would begin to apply in the territory of a non-belligerent State if and when the conditions

<sup>149</sup> Netherlands Advisory Committee Report, above note 29, p. 3.

<sup>150</sup> M. Schmitt, above note 49, p. 18.

outlined at the beginning of this text necessary to establish the factual existence of a separate NIAC in such a territory have been fulfilled. In other words, if persons located in a non-belligerent State acquire the requisite level of organization to constitute a non-State armed group as required by IHL, and if the violence between such a group and a third State may be deemed to reach the requisite level of intensity, that situation could be classified as a NIAC and IHL rules on the conduct of hostilities between the parties would come into play. The relationship under IHL of the two States would also need to be determined in this case, based on the rules related to the classification of armed conflicts outlined previously.

The scenarios related to the possible extension of IHL applicability to the territory of a non-belligerent State relied on above are not the only ones that could be envisaged.<sup>151</sup> They have been provided, as already mentioned, to serve as the backdrop for a framework reading of some of the salient points of the law. In this context it may be added that the legal interpretation of any particular scenario will not only be heavily fact-specific, but will inevitably require dealing with a set of very complex facts. The application of other relevant bodies of international law, as well as of domestic law, will make a careful legal assessment in any specific case all the more challenging.

## Closing remarks

The increasing use of drone technology in situations of armed conflict has posed, and is likely to continue to pose, a host of legal and other questions. IHL can only provide answers to the queries to which it was designed to respond, which do not include the political, policy, moral and other implications of the employment of armed drones – issues that undoubtedly also warrant serious consideration.

The *jus in bello* is able to provide guidance on many of the legal queries being raised with a fair degree of certainty, while others remain the subject of heated debate. It has been submitted that drones are a weapon platform that is not prohibited by any specific rule of IHL and that there is likewise nothing inherent to the technology itself that would make operators unable to respect the relevant IHL norms. While the classification of a situation of violence presents factual and legal challenges, once an armed conflict has been determined to exist, IHL rules, including those on the conduct of hostilities, will apply. Drone operators must observe these provisions, under which only military objectives

151 Two specific issues have been flagged in this regard. The first is the legal regime that would be applicable to the possible use of force against bases established by a non-State armed group in the territory of a non-belligerent State for training and logistical purposes in relation to an ongoing NIAC. See M. Schmitt, above note 49, p. 17. It is submitted that the same question should also be posed with respect to the legal regime that would be applicable to the targeting of the military bases of States located in non-belligerent territory from which military operations are conducted in relation to an ongoing NIAC. The second issue is the legal regime that would be applicable to cyber-attacks launched by and against non-State armed groups from and through non-belligerent territory. Both questions will clearly require further examination as State practice evolves.

may be lawfully attacked, and which also require the application of other relevant IHL rules, such as proportionality and precautions in attack. The issue of who may be lawfully targeted in armed conflict remains controversial, but a specific legal reading of how to interpret the notion of direct participation in hostilities has been summarized in this text. The greatest difference in opinions currently centres on the applicability of IHL targeting rules to persons located in the territory of a non-belligerent State, as outlined above. This is an ongoing legal and policy discussion which is likely to continue, and in which positions are likely to evolve as the possible factual scenarios become more fully evident over time.