

# **ARMED DRONES: TRANSPARENCY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW**

**by**

**JEANIQUE ANDREA PRETORIUS**

**STUDENT NUMBER: 10262882**

**Submitted in accordance with the requirements for the degree  
Magister Legum in International Law with Specialization in International  
Human Rights and Humanitarian Law in Military Operations  
in the Faculty of Law  
at the University of Pretoria**

**SUPERVISOR: Professor CH Heyns**

**October 2014**

## Summary

This dissertation does not challenge the legality of armed drones as weapons in themselves as it has been widely accepted that armed drones may well prove an appropriate and proportionate tool in a number of legitimate civilian and military operations. However, the use of force by States, via armed drones specifically, is the subject of ever-growing controversy and international media scrutiny. Therefore, although the legality of armed drones is not at stake, their use is.

Issues have been raised concerning *jus ad bello* and *jus in bello*. Regarding *jus ad bello*, experts have argued that the current armed drone strikes are being conducted on the territory of another State without that State's consent, without the requisite UN security council authorisation and does not amount to a legitimate use of self-defence and thus amounts to a violation of State sovereignty. *Jus in bello* relates to the protection of people in times of armed conflict. The troubling absence of transparency and accountability in relation to States' lethal force policies involving armed drones are just two of the issues which fall under the broader regime of *jus in bello*.

Another important issue which has been raised concerning armed drone strikes is which legal regime applies. In this regard, it is submitted that States are broadening the definitions of self-defence and non-international armed conflicts to suit their own narrow and short-term interests in order to apply international humanitarian law (IHL), which provides less stringent rules for when life may be taken, in situations where the higher standards provided in international human rights law (IHRL) should apply. This may eventually degrade the security of civilians globally as more and more States acquire armed drone technology, they may claim for themselves these expanded rights, and the world may become a stage in which armed drones are used to "police" situations in other States.

Concerning IHL, concerns have been raised that armed drone strikes may not always be complying with the principles of distinction, proportionality and precaution. However, since armed drones are not illegal weapons in themselves, the legality of each strike must be assessed on a case by case basis. In terms of accountability, civilian casualties must be determined and should be disclosed and there exists an

obligation to investigate and punish those responsible in respect of cases of alleged war crimes. Although an issue facing accountability for violations of IHL using drone strikes is that they are currently only being conducted in non-international armed conflicts (NIACs), in terms of which the rules are very limited, it will be shown that many of the rules pertaining to international armed conflicts (IACs) have been extended to apply to NIACs in terms of customary international law.

In terms of IHRL, which applies in times of peace and continues to apply in times of armed conflict, the right to life entails that no one may be arbitrarily deprived of life. Concerns have been raised by NGOs and legal experts alike that the current drone programmes may violate the right to life of those who are targeted. Regarding accountability under IHRL the modern concept of human rights is based on the fundamental principle that those responsible for violations must be held accountable and a failure to investigate and punish those responsible for violations of human rights constitutes a violation of that right in itself.

The controversy surrounding the use of armed drones has revealed a degree of public anguish worldwide about this method of targeted killing, which is perceived as being shrouded in secrecy and lacking not only transparency and accountability, but perhaps lacking a legitimate legal basis. This dissertation examines the mechanisms available under international law for holding those responsible for violations of IHRL and IHL involving the use of armed drones accountable. An important aspect of transparency and accountability is investigations into alleged violations and therefore the interplay between IHL and IHRL, specifically regarding the investigation of violations will also be examined to determine which standard is applicable to armed drone strikes.

# Table of Contents

|  |    |
|--|----|
| Chapter 1: Introduction .....  | 1  |
| What is a drone? .....   | 2  |
| Relevant concerns raised regarding the use of drones .....                           | 2  |
| Self-defence and drone strikes under jus ad bellum and jus in bello .....            | 4  |
| Legality in terms of IHL and IHRL .....  | 9  |
| Determining the existence of an armed conflict .....                                 | 10 |
| Accountability under IHL.....  | 13 |
| Accountability under IHRL .....  | 14 |
| Conclusion.....  | 15 |
| Chapter 2: The Conduct of Hostilities and its applicability to armed drones .....    | 16 |
| Drones as weapons used for targeted killings .....                                   | 16 |
| The Principle of Distinction and armed drones .....                                  | 19 |
| The Principle of Proportionality and armed drones .....                              | 25 |
| The Principle of Precaution and armed drones .....                                   | 26 |
| Conclusion.....  | 27 |
| Chapter 3: Transparency and Accountability under International Humanitarian Law..... | 29 |
| Transparency.....  | 29 |
| Accountability .....   | 30 |
| Penal sanctions under the Geneva Conventions .....                                   | 32 |
| Additional Protocol I .....  | 34 |
| The relationship between grave breaches and war crimes .....                         | 40 |
| Customary International Humanitarian Law and the obligation to investigate .....     | 46 |
| Issues facing accountability under IHL.....  | 48 |
| The interpretation of the obligation to investigate under IHL .....                  | 50 |
| Drone strikes not conducted by the armed forces of a State.....                      | 51 |

|   |    |
|---|----|
| Conclusion.....   | 52 |
| Chapter 4: International Human Rights Law.....  | 54 |
| Introduction .....  | 54 |
| Transparency.....   | 55 |
| Accountability .....  | 58 |
| Investigations.....   | 60 |
| Conclusion.....   | 65 |
| Chapter 5: The interplay between Human Rights and Humanitarian Law regarding investigations ...   | 66 |
| Introduction .....  | 66 |
| The interplay regarding investigations .....  | 68 |
| Using IHRL instruments to inform IHL.....   | 69 |
| Conclusion.....   | 72 |
| Chapter 6: Complicating accountability: the use of force in foreign territory and the applicability of human rights norms to extraterritorial actions by States ..... | 73 |
| The use of force .....  | 73 |
| The exception of self-defence.....  | 73 |
| Accountability and the extraterritorial use of force in the territory of another State .....  | 73 |
| The extraterritorial application of human rights treaties.....  | 75 |
| Conclusion.....   | 80 |
| Chapter 7: Conclusion.....  | 82 |
| Bibliography .....  | 84 |

## Chapter 1: Introduction

The use of armed drones by States for targeted killings is not a particularly new issue in international law and has been occurring for more than a decade.<sup>1</sup> It has been widely accepted that armed drones are not illegal weapons in themselves, and that they offer significant strategic advantages to States such as their high precision in targeting and the fact that they pose a very low risk to the person operating the drone.<sup>2</sup> Therefore, this dissertation does not challenge the legality of the use of armed drones as weapons and it is submitted that in times of armed conflict, armed drones may well prove an appropriate and proportionate tool in a number of legitimate military operations.<sup>3</sup> Although the legality of armed drones as weapons is thus not at stake, their use is.

The practice of States' employing armed drones to use inter-state force is the subject of ever-growing controversy and international media scrutiny, partially due to the troubling absence of transparency in relation to the States' lethal force policies.<sup>4</sup> This controversy has revealed a degree of public angst worldwide about this method of targeted killing, which is perceived as being shrouded in secrecy and lacking both transparency and accountability.<sup>5</sup> Human rights organisations such as Amnesty International and Human Rights Watch have been among the harshest critics of States deploying armed drones and carrying out targeted killings for numerous

---

<sup>1</sup> David, SR (2002) '*Fatal Choices: Israel's Policy of Targeted Killing*' The Begin-Sadat Center for Strategic Studies Bar-Ilan University Mideast Security And Policy Studies No. 51 page 8.

<sup>2</sup> United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. Report to the General Assembly. (13 September 2013) A/68/382 page 4. Available at [http://justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-HeynsReportDrones.pdf?utm\\_source=Press+mailing+list&utm\\_campaign=6de0426c902013\\_10\\_17\\_Heyns\\_drones\\_report\\_UN&utm\\_medium=email&utm\\_term=0\\_022da08134-6de0426c90-286021377](http://justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-HeynsReportDrones.pdf?utm_source=Press+mailing+list&utm_campaign=6de0426c902013_10_17_Heyns_drones_report_UN&utm_medium=email&utm_term=0_022da08134-6de0426c90-286021377) (accessed 19 October).

<sup>3</sup> Karock, U (2013) '*Quick Policy Insight Drones: Engaging in debate and accountability*' Policy Department, Directorate-General for External Policies DG EXPO/B/PolDep/Note/2013\_144 PE 491.497 page 2.

<sup>4</sup> Amnesty International Publications (2013) '*USA: The Devil In The (Still Undisclosed) Detail Department Of Justice 'White Paper' On Use Of Lethal Force Against U.S. Citizens Made Public*' Published By Amnesty International, International Secretariat, United Kingdom page 6.

<sup>5</sup> Troszczyńska-Van Genderen, W & Bellelli, J (2013) '*Creating Accountability: Recent Developments In The US Policy On Drones*' EU Policy Department, Directorate-General For External Policies page 4.

reasons relating to issues concerning the use of inter-state force, the applicable legal regime, the level of secrecy as well as the lack of transparency and accountability of the operations. These organisations have urged States to be transparent in these operations, so that they can be held accountable.<sup>6</sup>

### *What is a drone?*

A drone, which is often referred to as an Unmanned Aerial Vehicle, Unmanned Air System or remotely piloted aircraft, can be defined as “an unmanned aerial vehicle that does not carry a human operator [but] flies autonomously or is piloted remotely and can carry a lethal or non-lethal payload.”<sup>7</sup> Therefore, it is clear that drones can have a merely reconnaissance function, which is less controversial, but can also be armed and used to deploy deadly force. Although drones may look similar to conventional aircraft in appearance, the difference lies in that they are unmanned and the operator controls it remotely to deploy lethal force whilst seated thousands of miles away. This is partly what makes the use of drones for targeted killings so controversial as there is a risk of the operator developing a ‘PlayStation’ mentality to killing.<sup>8</sup>

### *Relevant concerns raised regarding the use of drones*

Discussions regarding the use of drones at the United Nations have involved all relevant structures, including the General Assembly (UNGA) and the Human Rights Council.<sup>9</sup> UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, has stressed that the lack of appropriate transparency and accountability concerning the deployment of drones undermines the rule of law and may threaten international security.<sup>10</sup> He furthermore stresses that accountability for violations of international human rights law (IHRL) or international humanitarian law

---

<sup>6</sup> Troszczyńska-Van Genderen note 5 page 6.

<sup>7</sup> U.S Department of Defence *Dictionary of military and associated terms* (2001) page 579.

<sup>8</sup> UN Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on Targeted Killings*, Human Rights Council, UN Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> page 25 (accessed 19 October 2014).

<sup>9</sup> Troszczyńska-Van Genderen note 5 page 6.

<sup>10</sup> Heyns note 2 page 21.

(IHL) is not a matter of choice or policy but rather a duty under both domestic and international law, and this duty must be upheld.<sup>11</sup>

As the United Nations Secretary- General has indicated, respect for the rule of law implies that:

“all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with IHRL [and IHRL] norms and standards. It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>12</sup>

There can, however, be no legal and political accountability unless the public have information regarding drone strikes as such information is necessary for effective oversight and enforcement.<sup>13</sup> The first step towards securing human rights in this context is, therefore, transparency about the use of drones. The four principal elements of transparency which would enable the international community to evaluate the legality of the relevant programs include: knowledge of the precise legal basis justifying the killings, knowledge as to which agency has operational responsibility in specific contexts, the identity of those responsible for authorizing killings and the processes they must adhere to, and the criteria used in determining who will be targeted<sup>14</sup> In addition, a degree of transparency in relation to the impact of armed drone strikes on civilians is essential.<sup>15</sup>

However, the concerns on the subject of armed drones run deeper than accountability and transparency as they have also been raised regarding *jus ad bellum* and *jus in bello*. *Jus ad bellum* (the right to make war or the just war theory)

---

<sup>11</sup> Heyns note 2 page 21.

<sup>12</sup> UNSC Report of the Secretary General (23 August 2004) “*The rule of law and transitional justice in conflict and post-conflict societies*” S/2004/616, para.6.

<sup>13</sup> Heyns note 2 page 21.

<sup>14</sup> Alston,P (2011) ‘*The CIA and Targeted Killings Beyond Borders*’ New York University School Of Law Public Law & Legal Theory Research Paper Series Working Paper No. 11 page 50-57.

<sup>15</sup> Alston note 14 page 57.



relates to the use inter-state force. Ben Emmerson, UN Special Rapporteur on Counter Terrorism and Human Rights, has examined the issue of drones and pointed out that the current drone campaigns in some instances involves the use of force on the territory of another State without its consent, without the requisite UNSC authorisation and without complying with the requirements for the legitimate use of self-defence and is, therefore, a violation of the principle of sovereignty under international law.<sup>16</sup>

*Jus in bello*, on the other hand, relates to the protection of people in times of armed conflict. Regarding *jus in bello* specifically, concerns have been raised regarding the applicable legal standards to apply, as it is unclear whether an armed conflict exists in the context of the current drone strikes. The troubling lack of accountability and transparency are a concern that forms part of the broader regime of *jus in bello*, and is explained in more detail below.<sup>17</sup>

### *Self-defence and drone strikes under jus ad bellum and jus in bello*

*Jus ad bellum* governs the legality of recourse to military force, including through drone strikes, by one State against another and against armed non-state actors in another State without the latter State's consent.<sup>18</sup> This is relevant as armed drones are being used by the US against alleged terrorists in other countries, such as Pakistan.

Regarding the use of force, the starting point is Article 2(4) of the UN Charter which provides that States "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state".<sup>19</sup> In the *Legality of the threat or use of Nuclear Weapons* advisory opinion, the ICJ stated

---

<sup>16</sup> Statement by Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights concerning the launch of an inquiry into the civilian impact, and human rights implications of the use of drones and other forms of targeted killings for the purpose of counter-terrorism and counter-insurgency, [http://www.foreignpolicy.com/files/fp\\_uploaded\\_documents/130124\\_SRCTBenEmmersonQCStatement.pdf](http://www.foreignpolicy.com/files/fp_uploaded_documents/130124_SRCTBenEmmersonQCStatement.pdf) (accessed on 2 May 2014).

<sup>17</sup> Troszczyńska-Van Genderen note 6 page 6.

<sup>18</sup> Casey-Maslen, S (2012). 'Pandora's box? Drone strikes under *jus ad bellum*, *jus in bello*, and international human rights law' International Review of the Red Cross Volume 94 Number 886 597-625 page 601. Lubell Noam (2011) 'Extraterritorial Use of Force against Non-State Actors' Oxford Monographs in International Law, page 8.

<sup>19</sup> United Nations, *Charter of the United Nations*, 24 October 1945 (the Charter).

that a threat of force is a “signaled intention to use force if certain events occur.”<sup>20</sup> However, the use of force is permitted in a situation where a State exercises its inherent right of self-defence and where it had received the requisite consent or an authorization from the UN Security Council (Article 43). There is another, unwritten rule which is not contained in the UN Charter or any other international law instrument, which is that the use of force may be used upon invitation by the other State, but only the State’s highest governmental authorities have the power to give consent to use force.

### **The exception of self-defense**

Article 51 of the UN Charter deals with when a State may act in self-defence. Although the Charter does not define what amounts to an actual use of force, military or armed force falls within the scope of the definition as Article 51 uses the term “armed attack.” The *Nicaragua* case confirmed the customary law status of the prohibition of the use of force but also stated that it does not affect the inherent right of States to individual or collective self-defence if an armed attack occurs as stipulated in Article 51 of the Charter.<sup>21</sup>

There is a strong argument that even one drone strike constitutes an armed attack and potentially aggression.<sup>22</sup> The UN General Assembly Resolution 3314 (XXIX) provided that an act of aggression included the: “Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State”.<sup>23</sup> There is also case law supporting this argument. In 1988, a single Palestine Liberation Organization military strategist was killed in his home in Tunis by Israeli commandos, and this was condemned by the UN Security Council as ‘aggression’ in blatant violation of the UN Charter.<sup>24</sup>

---

<sup>20</sup>*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (8 July 1996) (1996) I.C.J. Reports 246 para 78.

<sup>21</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; Merits(1986)ICJ Reports para 176.

<sup>22</sup> See Casey-Maslen note 18 page 602-605.

<sup>23</sup> UN General Assembly Resolution 3314 (XXIX) of 14 December 1974, Annex, Art. 3(b).

<sup>24</sup> UN Security Council Resolution 611 (1988), adopted on 25 April 1988 by fourteen votes with one abstention (USA).

Therefore, if a single drone strike does constitute an 'armed attack', and if the requisite authorization from the UN Security Council or invitation by the other State has not been obtained, the State launching the drone will need to justify its action by reference to its inherent right of self-defence. The situation is controversial when self-defence is claimed not against another State but against an armed non-state actor located in another State. Article 51 of the UN Charter does not specify that the use of force or the threat of the use of force has to originate from a State actor, but it appears that prior 9/11 the prevailing view excluded non-state actors as originators of such attacks.<sup>25</sup> For example, the UN Resolution on the Definition of Aggression referred to an "an attack by the armed forces of a State on land, sea or air forces, or marine and air fleets of another State" which shows that the concept of armed attack is not exclusively linked to the territory of the attacked State and that a State can be the object of an armed attack occurring outside its territory, but by another State.<sup>26</sup>

However, this view ignored the rising role of non-state actors in modern armed conflict and a new view arose which was confirmed in the *Nicaragua* case, namely that State's right to self-defence did include self-defence against non-state actors and that the degree of violence should solely reflect on the scale and gravity of the attack or threat and less on formalities, and this was also confirmed in the *Oil Platforms* case.<sup>27</sup> Supporting this argument is the UN Security Council's recognition that the magnitude and severity of the attacks of 9/11 by the organised armed group Al-Qaeda which allowed the USA to exercise its legitimate right to individual or collective self-defence in its two post 9/11 UN SC Resolutions 1368 and 1373.<sup>28</sup> Further support for this argument can be found in NATO's invocation of the North Atlantic Treaty's Article 5 collective self-defence provision in the wake of the 9/11

---

<sup>25</sup> Bachmann, S (2013) 'Targeted Killings: Contemporary Challenges, Risks and Opportunities' *Journal of Conflict & Security Law*, Vol. 18 No. 2, 259–288 p281. See also Schmitt, Michael 'Drone Attacks under the *Jus Ad Bellum* and *Jus in Bello*: Clearing the "Fog of Law" ' (2010) 13 *Ybk IHL* 311 at 317.

<sup>26</sup> UN General Assembly Resolution 3314 (XXIX) *Definition of aggression* (1974) Art 3(d).

<sup>27</sup> Bachmann note 25 page 281. See also *Nicaragua v. United States of America* note 21 para 191-195. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment (2003) ICJ. Reports, page 161, paras. 51 and 62.

<sup>28</sup> UN Security Council Resolution 1368 (12 September 2001); UN Security Council Resolution 1373 (28 September 2001).

Attacks.<sup>29</sup> However, in the *Wall* case, the ICJ seemed to go back to the traditional view that self-defence may only be used against State actors as the Court requested that Israel had to prove that a State sponsor was behind the terror attacks as a prerequisite for its argument of acting in self-defence when building the wall.<sup>30</sup>

Although the position above does remain contentious, it is arguable that a State that uses armed drones in an inter-state operation against non-state actors, which has not been consented to by the other State may claim it was acting in self-defence, and before an armed attack has occurred, it may claim it was acting in anticipatory self-defence. However, the concept of anticipatory self-defence and, in particular, whether the necessary requirements for it are complied with in the context of the current drone programmes in particular, is controversial.

In order to amount to the lawful use of self-defence, whether anticipatory or not, the *Caroline* test, which states that the “necessity of self-defence was instant, overwhelming, leaving no choice of means, and no moment of deliberation and ...the necessity of self-defence, must be limited by that necessity, and kept clearly within it,” must be complied with.<sup>31</sup> Therefore, the requirements of necessity and proportionality must both be met for self-defence to be lawful.<sup>32</sup> Regarding the principle of necessity, it has been interpreted to mean “the State attacked (or threatened with imminent attack if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force”.<sup>33</sup> The principle of proportionality is a more difficult concept to define. It has been stated that:

“The requirement of proportionality of the action taken in self defence ...concerns the relationship between that action and its purpose, namely...that of halting and

---

<sup>29</sup> Press Release, North Atlantic Council, 12 Sept. 2001, available at <http://www.nato.int/docu/pr/2001/p01-124e.htm> (accessed 19 October 2014)

<sup>30</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Reports 136 at 226.

<sup>31</sup> *The Caroline incident* of 1837 29 B.F.S.P. 1137 – 1138. Webster, Daniel. 'Letter to Henry Stephen Fox', in Shewmaker, K.E (ed.). *The Papers of Daniel Webster: Diplomatic Papers, vol. 1. 1841-1843* (1983) 62. Dartmouth College Press.

<sup>32</sup> This constitutes a customary law rule see *Nuclear Weapons* note 20 para. 41.

<sup>33</sup> Casey-Maslen note 18 page 604. See also UN Doc. A/CN.4/318/Add.5-7 'Addendum – Eighth report on State responsibility by Mr Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (part 1)', Extract from the Yearbook of the International Law Commission 1980, Vol. II(1), para. 120.

repelling the attack...It would be mistaken, however, to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered...Its lawfulness cannot be measured except by its capacity for achieving the desired result. In fact, the requirements of the 'necessity' and 'proportionality' of the action taken in self-defence can simply be described as two sides of the same coin."<sup>34</sup>

Regarding drone strikes, experts have questioned whether drone strikes carried out recently can be justified as a response to the terrorist attacks in 2001 and have concluded that that "some states seem to want to invent new laws to justify new practices".<sup>35</sup> Regarding anticipatory self-defence, there is little publicly available evidence to support a claim that each of the US targeted killings in northwest Pakistan meets the standards to justify anticipatory self-defence.<sup>36</sup>

A troubling tendency which has arisen in recent years is the advocacy of a "robust" form of self-defence in which once the use of force in self-defence doctrine is invoked, no other legal frameworks or limiting principles, such as IHL or IHRL, would apply to targeted killings.<sup>37</sup> Therefore, in terms of this view, once it is justified to use force in self-defence, for example by conducting a drone strike, IHL and IHRL law would not be applicable to that use of force. Alston has stated that "This approach reflects an unlawful and disturbing tendency in recent times to permit violations of IHL based on whether the broader cause in which the right to use force is invoked is "just" and impermissibly conflates *jus ad bellum* and *jus ad bello*."<sup>38</sup>

*Jus ad bellum* relates to a possible violation of state sovereignty, if one of the three defences as discussed above is not present. *Jus in bello*, on the other hand, relates to the protection of people in times of armed conflict. The distinction can also be

---

<sup>34</sup> Casey-Maslen note 18 page 604. Ago note 33 para 121.

<sup>35</sup> Living under Drones (2012) Legal analysis available at [http://www.livingunderdrones.org/report-legality/#\\_ftn18](http://www.livingunderdrones.org/report-legality/#_ftn18) (accessed 19 October 2014).

<sup>36</sup> Becker, J & Shane, S 'Secret 'Kill List' Proves a Test of Obama's Principles and Will' N.Y. Times (May 29, 2012) <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-alqaeda.html?pagewanted=all> (accessed 19 October 2014).

<sup>37</sup> Alston note 8 page 14.

<sup>38</sup> Alston note 8 page 14.

phrased in another way: the question of whether the use of force is legal or whether there is a right to go to war, is a question that usually arises at the start of an armed conflict and relates to *jus ad bellum*, while the law applicable to the conduct during that armed conflict applies throughout it- this is *jus in bello*.<sup>39</sup>

In this sense, there are two distinct levels of responsibility in the event that a targeted killing for which self-defence is invoked is found to be unlawful. The first relates to *jus ad bellum* and is the violation of the limitations of the use of inter-state force without a legitimate defence- this would result in State and individual criminal responsibility for aggression.<sup>40</sup> The second level concerns *jus in bello* and regards liability for the unlawful killing itself. If it violates IHL, it may constitute a war crime and the Articles on State Responsibility make abundantly clear that States may not invoke self-defence as justification for their violations of IHL.<sup>41</sup>

Therefore, it can be concluded that even if the legitimate use of inter-state force is offered as justification for a targeted killing using a drone strike, it does not dispose of the further question of whether the killing of the particular targeted individual or individuals is lawful as the legality of each specific killing depends on whether it meets the requirements of the legal regime applicable.

### *Legality in terms of IHL and IHRL*

Due to the fact that armed drones are not illegal weapons in themselves, the legality of armed drones for targeted killings must be assessed on a case by case basis, both under IHRL and IHL. The first question that must be answered in assessing the legality of a drone strike, and which is the subject of much contention, is which legal regime applies. As discussed in Chapter 4 below, IHRL applies during times of peace and continues to apply during armed conflict; it thus applies at all times. However, during an armed conflict, the right to life is interpreted with reference to IHL. Regarding armed drones, States such as the US have invoked the existence of an armed conflict against alleged terrorists who they claim qualify as “organised

---

<sup>39</sup> Alston note 8 page 14.

<sup>40</sup> Alston note 8 page 14.

<sup>41</sup> Alston note 8 page 14. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, 166-167.



armed groups” or are directly participating in hostilities to justify their use of lethal force under IHL, as IHL has more permissive rules for killing than IHRL does.<sup>42</sup> IHL also has fewer due process safeguards and allows States to expand executive power both as a matter of domestic law and in terms of public support, which appeals to States.<sup>43</sup> Although this appeal is clear, if States extend the ambit of IHL to situations that are essentially matters of law enforcement that must be dealt with under the framework of IHRL, they are exenterating key and necessary distinctions between international law frameworks that restricts States’ ability to kill arbitrarily.<sup>44</sup>

### *Determining the existence of an armed conflict*

IHL differentiates between armed conflicts of an international character (IAC) and armed conflicts of a non-international character (NIAC). An IAC exists whenever there is “resort to armed force between two or more States.”<sup>45</sup> If a conflict reaches the threshold of an IAC, the 1907 Hague regulations as well as the four Geneva Conventions and Additional Protocol I apply, which contain provisions relation to accountability for violations of IHL.<sup>46</sup> However, what must be borne in mind regarding the treaties and conventions discussed in this dissertation is that they only apply to State Parties who have signed and ratified them. They do not apply to States that are not parties. Although most of the conflicts they are engaged in today are NIACs, a concern is that the USA is not a State Party to AP I and thus the additional rules provided therein only apply to their conduct in as far as the rules have attained customary law status.

---

<sup>42</sup> Alston note 8 page 16.

<sup>43</sup> Alston note 8 page 16.

<sup>44</sup> Alston note 8 page 16.

<sup>45</sup> International Committee of the Red Cross Opinion Paper March 2008 available at [http://www w. icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf](http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf) (accessed 18 July 2014) page 5.

<sup>46</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, Art. 3, Oct. 18, 1907, 36 Stat. 2277, 207 Consol. T.S. 277. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I) (Geneva, 12 August 1949, 75 UNTS 31) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces (Geneva II) (Geneva, 12 August 1949, 75 UNTS 85); Geneva Convention relative to the Treatment of Prisoners of War (Geneva III) (Geneva, 12 August 1949, 75 UNTS 135); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV) (Geneva, 12 August 1949, 75 UNTS 287). International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (AP I), 8 June 1977, 1125 UNTS 609I.

If an armed conflict is a NIAC, only Common Article 3 of the four Geneva Conventions, which provides the minimum threshold of protection for civilians in non-international armed conflicts, as well as Additional Protocol II<sup>47</sup> apply to determine the conditions for the use of lethal force, and if these are not met, the accountability mechanisms available for violations of IHL. Once again, a concern is that the USA, which has been involved in armed drone strikes since 2001, is not a State Party to AP II. Furthermore, NIACs are difficult to define. The starting point is Common Article 3 to the four Geneva Conventions which provides no definition of armed conflict, but simply states its applicability to armed conflicts “not of international character”. It applies to “each Party to the conflict” thereby implying that there must be at least two parties, but it does not define what kind of Parties they may be.<sup>48</sup> Therefore, other IHL instruments must be examined in order to attain clarity on this.

Additional Protocol II offers a narrow definition of armed conflict. The definition in Article 1 provides that an armed conflict must take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory. From this definition it is clear that it excludes conflicts between two organised armed groups. However, a broader definition was provided by the International Criminal Tribunal for Yugoslavia (ICTY) in its judgement in *Prosecutor v Tadic* where it stated that, “an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”<sup>49</sup> Thus according to the *Tadic* case, the application of Common Article 3 does not require the involvement of a State actor and armed violence between organised armed groups is enough for the threshold for armed conflict to be met.

---

<sup>47</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (AP II), 8 June 1977, 1125 UNTS 609

<sup>48</sup> Breau, S, Aronsson, M & Joyce, R (2011) ‘*Discussion Paper 2: Drone Attacks, International Law, And The Recording Of Civilian Casualties Of Armed Conflict*’ Oxford Research Group.

<sup>49</sup> *Prosecutor v. Tadic* [Appeal on Jurisdiction] ICTY Case No. IT-94-I-AR72 (2 Oct. 1995) 35 I.L.M. 32, 54 para. 70.



Two issues arise from the definitions provided above. The first issue regards who the parties to a NIAC are whereas the second issue pertains to the threshold of violence required for the existence of a NIAC.

### **Who are the parties to a NIAC?**

Identifying the parties to a NIAC is important for the meaningful application of IHL as the non-state armed group needs to be identifiable so that States can comply with their obligation to distinguish between lawful targets and civilians.<sup>50</sup> From the definitions discussed above, experts have surmised criteria which can be used to indicate the existence of an organised armed group. These factors include that there must be a sufficient level of organization of the group such that the armed forces of a State are able to identify an adversary and use regular military force against the group.<sup>51</sup> The second factor is the capability of the group to apply the Geneva Conventions, which means the existence of an adequate command structure and separation of military and political command.<sup>52</sup> The third factor is the engagement of the group in collective, armed action against the government.<sup>53</sup> Fourthly, the admission of the conflict against the group to the agenda of the UN Security would indicate the existence of an organised armed group.<sup>54</sup>

Kleffner has addressed this issue and has found that there are factors which are constitutive of an organised armed group and other factors which are merely indicative. The constitutive criteria include that the armed group must have an organised command structure and disciplinary rule within the group and must have the ability to plan military operations, control troop movements and logistics.<sup>55</sup> Other constitutive criteria are the ability to get arms and train members and the ability to use unified military strategies and use military tactics.<sup>56</sup> Criteria which are mainly

---

<sup>50</sup> Alston note 8 page 17.

<sup>51</sup> Alston note 8 page 17.

<sup>52</sup> Alston note 8 page 17.

<sup>53</sup> Alston note 8 page 17

<sup>54</sup> Alston note 8 page 17.

<sup>55</sup> Professor Kleffner (Swedish National Defence College) '*Organised armed groups*' lecture given to the LLM International Law: Human Rights and Humanitarian Law in Military Operations class at the University of Pretoria on 12 May 2014 (notes on file with the author). See also ICRC Commentary - Material field of application. Available at <https://www.icrc.org/applic/ihl/ihl.nsf/0/15781c741ba1d4dc12563cd00439e89?OpenDocument>.

<sup>56</sup> Kleffner note 55.

indicative of an organised armed group include the existence of headquarters, territorial control and the ability to speak with one voice.<sup>57</sup>

### **What is the required threshold of violence?**

The second issue is what level of violence and intensity must be met for a NIAC to exist. In this regard, experts have stated that the threshold of violence required for the existence of a non-international armed conflict is higher than that required for the existence of an IAC.<sup>58</sup> From the relevant IHL instruments, it becomes clear that the violence must be “Beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”<sup>59</sup> and must be “protracted armed violence” among organised armed groups or between an organised armed group and a State.<sup>60</sup> Furthermore, if the incident is isolated, the incident itself should be of a high degree of intensity, with a high level of organization on the part of the organised armed group.<sup>61</sup>

### *Accountability under IHL*

In IACs, only enemy combatants may be targeted.<sup>62</sup> As a general rule, civilians may not be targeted unless they are direct participants in hostilities, in which case they become belligerents and may be targeted.<sup>63</sup> Civilian casualties must be determined and should be disclosed and, furthermore, there exists an obligation to investigate and punish those responsible in respect of cases of alleged war crimes.<sup>64</sup> Currently, drones are only being used in NIACS. In terms of NIACs, only those directly participating in hostilities may be targeted.<sup>65</sup> However, the concept of direct participation in hostilities is controversial and will be discussed in detail in Chapter 2

---

<sup>57</sup> Kleffner note 55.

<sup>58</sup> Alston note 8 page 17.

<sup>59</sup> AP II Art 1.

<sup>60</sup> *Tadic* note 49 para 70.

<sup>61</sup> Alston note 8 page 18. IACHR, *Juan Carlos Abella v. Argentina* (1997). Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271 para. 151

<sup>62</sup> AP I Art 48 AP II Art 13. This is discussed in detail in Chapter 2. See also. Kretzmer, D (2005) ‘*Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*’ The European Journal of International Law Vol. 16 no.2 page 1.

<sup>63</sup> AP I Art 51(3).

<sup>64</sup> Geneva Convention I Art. 49; Geneva Convention II Art. 50; Geneva Convention III Art. 129; Geneva Convention IV Art. 146; AP I Art. 85, UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998., Art. 8 (2) (a).

<sup>65</sup> AP II Art 13(3).

below. Regarding accountability, the mechanisms in IHL instruments that apply to NIACs are far less comprehensive than those that apply to NIACs, however, certain rules pertaining to accountability and transparency in IACs have been extended to apply to NIACs in terms of customary international law. Furthermore, experts have submitted that when there are reasons to query whether violations of IHL may have occurred in armed conflict as a result of a drone strike, the principle of accountability demands a preliminary investigation at the very least.<sup>66</sup>

### *Accountability under IHRL*

In contrast to IHL, IHRL was traditionally interpreted to apply in times of peace.<sup>67</sup> However, as discussed in detail in Chapter 5 below, IHRL applies at all times, including during armed conflicts.<sup>68</sup> Under IHRL, the law enforcement model applies and the threshold is that everyone has the right to life as a non-derogable right. Under IHRL a state killing is legal only if it is required to protect life and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life.<sup>69</sup> Therefore, outside the context of armed conflict, law enforcement officials are required to be trained in, to plan for, and to take, less-than-lethal measures – including restraint, capture, and the graduated use of force – and it is only if these measures are not possible that a law enforcement killing will be legal.<sup>70</sup>

Regarding accountability under IHRL, the modern concept of human rights is based on the fundamental principle that those responsible for violations must be held accountable and a failure to investigate and punish those responsible for violations of human rights constitutes a violation of that right in itself.<sup>71</sup> Under IHRL, the criteria for targeting and the authority that approves such killings must be known and drone operations must be placed in institutions that are able to disclose to the public the methods and findings of their intelligence, criteria used in selection of targets and

---

<sup>66</sup> Heyns note 2 page 22.

<sup>67</sup> Dennis, MJ. (2005) '*Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*' *The American Journal of International Law*, Vol. 99, No. 1 pp. 119-141 page 119.

<sup>68</sup> Although this is the widely accepted view, the extraterritorial application of human rights instruments in the territory of other States is still not accepted by certain States, for example the USA.

<sup>69</sup> Alston note 14 page 16.

<sup>70</sup> Alston note 8 page 22.

<sup>71</sup> Heyns note 2 page 20.

precautions incorporated in such criteria.<sup>72</sup> This is all part of the concept of transparency. Furthermore, it has been stated by experts that victims of drone strikes are no different to any other human rights victims and thus they have a right to have access to information relating to allegations of human rights violations as well as their investigation.<sup>73</sup>

### *Conclusion*

Essentially, the circumstances surrounding targeted killings using armed drones are often kept secret by States so their legality can escape public scrutiny. This cloudiness concerns not only the circumstances of each individual strike, but also the broader issue of which legal regime is the correct regime to apply. States are broadening the definition of terms such as self-defence, the use of force and NIACs to suit their own narrow and short-term interests to justify that drone strikes are occurring in armed conflicts and are legitimate military operations, where the right to life is interpreted in terms of IHL, when in actual fact an armed conflict may not exist to start off with, in which case the law enforcement model and thus IHRL applies. This lack of transparency makes it difficult to assess the legality of the strikes. In turn, if the legality of a drone strike cannot be assessed, it becomes extremely difficult to hold those responsible for IHL and IHRL violations accountable under international law. In this dissertation the available mechanisms which can be used to increase transparency and accountability for armed drone strikes under international law are assessed.

---

<sup>72</sup> Heyns note 2 page 21.

<sup>73</sup> Heyns note 2 page 21.

## Chapter 2: The Conduct of Hostilities and its applicability to armed drones

If an armed conflict as described above exists, IHL will apply. The question which now arises is which IHL rules could feasibly commonly be violated with a drone strike. The answer to this question can be found in various IHL instruments including the Geneva Conventions, AP I as well as customary law, which make it clear that in any armed conflict, the right of the parties involved to choose means and methods of warfare is not unlimited.<sup>74</sup> The reasons why armed drones are not illegal weapons will briefly be explained before the principles of distinction, proportionality and precaution in relation to armed drones will be discussed.

### *Drones as weapons used for targeted killings*

It has already been stated above that drones are not unlawful as weapons in themselves and this brief discussion illustrates why this is so. The point of departure in terms of IHL is that diminishing the cruelty between combatants and protecting those *hors de combat* and the civilian population necessitates the prohibition of certain means of warfare.<sup>75</sup> There are several provisions of IHL which seek to limit the means of warfare employed by parties to an armed conflict. Although, there is no exhaustive list of weapons which are prohibited or restricted, various other conventions and declarations do regulate the use of specific weapons.<sup>76</sup>

---

<sup>74</sup> ICRC Unit for Relations with Armed and Security Forces (2002) '*The Law of Armed Conflict. Lesson 1: Basic Knowledge*' page 13.

<sup>75</sup> Sassòli, M (2014) '*Reading materials suggested by Marco Sassòli*' Professor of International Law and Director of the Department of public international law and international organization at the University of Geneva, in view of his course to be given in the framework of the LL.M. course on International Humanitarian and Human Rights Law in Military Operations at the Faculty of Law of the University of Pretoria, on 23 April 2014 page 14.

<sup>76</sup> See for example Declaration II concerning Asphyxiating Gases, 29 July 1899; Declaration III concerning Expanding Bullets, 29 July 1899; Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva 17 June 1925; - Convention on Prohibitions of Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva 10 October 1980; Protocol I on Non-Detectable Fragments, Geneva 10 October 1980; Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices, Geneva 10 October 1980; Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva 10 October 1980; Protocol IV on Blinding Laser Weapons, 13 October 1995; Protocol V on Explosive Remnants of War, 28 November 2003. By virtue of the customary rule that civilians must not be made

AP I recognises that it is much easier to prohibit a weapon's use prior to its incorporation in a State's arsenal, and it places constraints on the development of new weapons as well as weapons or tactics that are of a nature to cause unnecessary suffering or superfluous injury are prohibited.<sup>77</sup>

The purpose of this principle is to prohibit weapons which cause more suffering or injury than is necessary to put the enemy combatants out of action.<sup>78</sup> In practice, the application of this basic rule is always a compromise between military necessity and humanity, as the principle of "superfluous injury or unnecessary suffering" has been interpreted as referring to harm that would not be justified by military necessity, either because of the lack of even the slightest necessity or because necessity is considerably outweighed by the suffering caused.<sup>79</sup> Although it has been submitted that this standard seems too vague to be effective, it has led to efforts to prohibit and restrict certain conventional weapons and weapons of mass destruction.<sup>80</sup>

Regarding the use and development of new weapons, Article 36 of AP I requires State Parties to assess whether the use of any new weapon or of any new method of warfare that they develop, plan to acquire or plan to deploy in operations is compatible with international law as a measure of precaution. Article 36 does not specify the practical modalities of this assessment and they are therefore left to the parties to decide. However, it is submitted that the legal review should cover the weapons themselves as well as the ways in which they might be used.<sup>81</sup> In particular, attention should be paid to the potential effect of the considered weapon on both civilians (prohibition of indiscriminate effect) and combatants (prohibition of unnecessary suffering).<sup>82</sup>

---

the object of attack, weapons that are by nature indiscriminate are also prohibited in non-international armed conflicts.

<sup>77</sup> AP I Art 35 and 36.

<sup>78</sup> ICRC Unit for Relations with Armed and Security Forces note 74 page 14.

<sup>79</sup> Sassoli note 75 page 14.

<sup>80</sup> Sassoli note 75 page 14.

<sup>81</sup> Sassoli note 75 page 16.

<sup>82</sup> Sassoli note 75 page 16.

With reference to drones, the appearance of new weapons' technologies often gives rise to questions of legitimacy, and drones are no exception.<sup>83</sup> It has been stated in this regard that:

“The exponential rise in the use of drone technology in a variety of military and non-military contexts represents a real challenge to the framework of established international law and it is both right as a matter of principle, and inevitable as a matter of political reality, that the international community should now be focusing attention on the standards applicable to this technological development, particularly its deployment in counterterrorism and counter-insurgency initiatives, and attempt to reach a consensus on the legality of its use, and the standards and safeguards which should apply to it.”<sup>84</sup>

The debate over the legitimacy of the use of armed drones as weapons for targeted killings is taking place in both public and official domains around the world.<sup>85</sup> There are two key features to this debate relevant to IHL rules: who is controlling the weapon system and are the drone strikes proportionate acts that provide military effectiveness given the circumstances they are being used in.<sup>86</sup> The principle of proportionality will be discussed in detail below. However, the question of who controls the armed drones during their missions is attracting a great deal of attention world-wide.<sup>87</sup> The Central Intelligence Agency's (CIA) use of armed drones to conduct strikes is the most challenging factor in this matter. It has been reported that between 2004 and 2013, CIA drone attacks in Pakistan killed up to 3,461 people and up to 891 of them were allegedly civilians.<sup>88</sup> This has led to intense criticism by the public, state officials, NGO's and UN Representatives alike and will be discussed in more detail in Chapter 3 below. However, what is clear is that the concerns raised are not about the legality of armed drones themselves, but rather about how and by

---

<sup>83</sup> Kennedy, G (2013) '*Drones: Legitimacy and Anti-Americanism*' Parameters 42(4)/43(1) Winter-Spring 2013 pg 25.

<sup>84</sup> Ben Emmerson, as quoted in Chris Cole, "Will UN Drone Inquiry Get to the Heart of the Matter?" *Drone Wars UK*, January 25, 2013, <https://dronewarsuk.wordpress.com> (accessed 19 October 2014).

<sup>85</sup> Kennedy note 83 page 26, O'Connell, ME, "*Lawful Use of Combat Drones*" Congress of the United States, House of Representatives, Subcommittee on National Security and Foreign Affairs, Hearing: Rise of the Drones II, Examining the Legality of Unmanned Targeting, April 28 2010.

<sup>86</sup> Kennedy note 83 page 26.

<sup>87</sup> Kennedy note 83 page 26.

<sup>88</sup> Kennedy note 83 page 26.



whom they are being used as although they are legal, they can be used in ways which violate IHL.

### *The Principle of Distinction and armed drones*

First and foremost, combatants and civilians, or the civilian population as such, must always be distinguished in both IACs as well as NIACs.<sup>89</sup> A combatant in an IAC can be defined as any member of the armed forces, but it does not include medical and religious personnel.<sup>90</sup> The armed forces of a State consist of all the organised units and personnel that are under the command responsible for the conduct of its subordinates and are subject to an internal disciplinary system that enforces compliance with IHL.<sup>91</sup> Combatants may be attacked at any time and any place unless they are *hors de combat*.<sup>92</sup> Combatants that are *hors de combat* are enemy combatants who are captured, who surrender or who are out of action and incapable of defending themselves and such people must be treated as POWs, must be protected and must not be made the object of attack.<sup>93</sup> However, wounded soldiers who carry on fighting are not protected.

IHL defines the term “attack” broadly as an act of violence against the adversary, whether in offence or defence.<sup>94</sup> The term covers a range of situations, from the case of a single soldier opening fire to an artillery bombardment or major offensive as well as counterattacks, raids and fighting patrols and all types of defensive operations.<sup>95</sup> The protection of civilians applies to both enemy civilians and one's own civilians. Although civilians are protected from attack in terms of IHL, they lose this protection during any period in which they take a direct part in hostilities.<sup>96</sup>

---

<sup>89</sup> AP I Art 48. AP II Art. 13 (2) and (3).

<sup>90</sup> GC III Art 4

<sup>91</sup> AP I Art 1.

<sup>92</sup> AP I Art 1.

<sup>93</sup> AP I Art 41. ICRC Unit for Relations with Armed and Security Forces (2002) ‘*Law of Armed Conflict Lesson 3 -The Conduct of Operations Part A*’ page 4.

<sup>94</sup> AP I Art 49.

<sup>95</sup> ICRC Unit for Relations with Armed and Security Forces note 93 page 4.

<sup>96</sup> AP I Art 51.



## The Principle of Distinction in NIACs and Direct Participation in Hostilities

Common Article 3, as discussed above, applies to non-international armed conflicts. It forbids all murder and requires the humane treatment of non-militants.<sup>97</sup> These would include persons who are not members of armed groups and they enjoy protection from direct attack unless and for such time that they directly participate in hostilities.<sup>98</sup> The principle of distinction is part of customary international law,<sup>99</sup> and only permits targeting of persons who commit specific acts likely to influence military action.<sup>100</sup> However, the question still remains as to who may be targeted in NIACs, in other words, who members of organised armed groups are and when they may actually be targeted.

NGOs have taken an extremely narrow interpretation of this concept which limits who may be targeted to those directly participating in hostilities, whereas US officials have taken an extremely broad interpretation by stating that: “individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law”.<sup>101</sup> Although this issue is too complex to address fully, the view supported in this dissertation is the one put forward by the ICRC Interpretive Guidance which states that:

*“[T]he decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “continuous combat function”). [...] Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its*

---

<sup>97</sup> Geneva Convention I- IV Art 3(1).

<sup>98</sup> AP II Art 13 (3).

<sup>99</sup> *Nuclear Weapons*, note 20 para 226– 27.

<sup>100</sup> Orr, AC (2011) ‘*Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*’ Cornell International Law Journal Vol. 44 729 page 749.

<sup>101</sup> See Human Rights Watch (2013) ‘*Between a Drone and Al-Qaeda*’ page 86 Amnesty International (2013) “*Will I be next? US Drone Strikes in Pakistan*” page 45-46 and Speech by Harold Koh, Legal Adviser U.S. Department of State Annual Meeting of the American Society of International Law Washington, DC (March 25, 2010) available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (accessed 1 October 2014.)

*behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.*<sup>102</sup>

However, individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL and remain civilians assuming support functions.<sup>103</sup>

Another factor that complicates the matter is that there is a lot of controversy surrounding what conduct constitutes direct participation. The ICRC describes the concept of direct participation by civilians who might not be members of an organised armed group. Each specific act by such a civilian must meet three cumulative requirements to constitute direct participation in hostilities:

- “1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
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).”<sup>104</sup>

However, the ICRC has said that civilians enjoy a presumption of non-militant status.<sup>105</sup> This means that commanders may not target persons whose militant status is ambiguous. While this is not an issue where combatants who are, for example, wearing distinctive clothing, it does create a problem regarding organised armed

---

<sup>102</sup> Melzer, N (2009) ‘*ICRC Interpretive guidance on the notion of Direct participation in hostilities under international humanitarian law*’ ICRC 71-72 (Hereafter *ICRC Guidance*).

<sup>103</sup> Iverson, J (2013) ‘*The Drone Reports: Can Members of Armed Groups Be Targeted?*’ available at <http://opiniojuris.org/2013/11/06/drone-reports-can-members-armed-groups-targeted/> (accessed 19 October 2014).

<sup>104</sup> *ICRC Guidance* note 102 page 16.

<sup>105</sup> Orr note 100 page 749.

groups whose members wear no uniforms, do not travel in marked vehicles or otherwise identify themselves in such a way as to facilitate distinction.<sup>106</sup>

This means that drone operators must rely on informants on the ground to determine the status of a given target and the number of civilian casualties is indicative of the unreliability of this intelligence.<sup>107</sup> Moreover, if an armed group uses human shields, this further undermines efforts to distinguish between militants and civilians, and could complicate the legality of drone strikes.<sup>108</sup>

### **The “capture rather than kill” principle**

Despite the fact that IHL does not expressly regulate the degree and type of force that may be used against legitimate targets, it does envisage the use of less-than-lethal measures in armed conflict, as the “right of belligerents to adopt means of injuring the enemy is not unlimited”<sup>109</sup> and States must not inflict “harm greater than that unavoidable to achieve legitimate military objectives.”<sup>110</sup> Although these principles have not been controversial, the ICRC Guidance did create controversy in this regard by recognising that “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her opportunity to surrender where there manifestly is no necessity for the use of lethal force.”<sup>111</sup>

Although some critics have interpreted this statement as requiring the use of a law enforcement paradigm in the context of armed conflict, the guidance makes clear that it merely states the uncontroversial IHL requirement that the kind and amount of force used in a military operation should be limited to what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.<sup>112</sup> Experts have concluded that given that IHL does not create an unrestrained right to kill, the idea that the better approach would be for State forces to minimize the use of lethal force to the extent feasible would be especially true in the following circumstances: in the context of targeted killings of civilians who directly participate in hostilities; when

---

<sup>106</sup> Orr note 100 page 749.

<sup>107</sup> Orr note 100 page 749.

<sup>108</sup> Orr note 100 page 749.

<sup>109</sup> AP I, Art. 35(1)

<sup>110</sup> *Nuclear Weapons*, note 20 para. 78.

<sup>111</sup> *ICRC Guidance* note 102 para 82.

<sup>112</sup> Alston note 8 page 23. *ICRC Guidance* note 102 page 77.

a State has control over the area in which a military operation is taking place, when armed forces operate against selected individuals in situations comparable to peacetime policing and in the context of non-international armed conflict, in which rules are less clear.<sup>113</sup> This does create issues as it is arguable that drones are being used in such situations. However, regarding the use of armed drones the concept of first employing less-than-lethal means would in many instances not be possible as the State often has no means of capturing the target due to their nature as well as the areas and circumstances in which the operations are conducted.<sup>114</sup>

Therefore, even if it is accepted that there is a duty to capture rather than kill under IHL, it will seldom be able to be applied to the use of force with armed drones, which leads to further questions of their legitimacy. For example, due to the lack of information surrounding the strikes the international community has no way of knowing whether the target had in fact surrendered but was nevertheless targeted as he could not be captured.<sup>115</sup> Nevertheless, this debate has not been resolved and is still the subject of controversy, and it has been submitted that States have already decided that it is necessary and proportionate to target combatants on the basis of their status alone, regardless of whether there is the option to capture them.<sup>116</sup> However, the ICRC approach has been applied in some recent State practice on drone attacks and at least one State has confirmed that in its policy on the use of drones, it will not use lethal force when it is feasible to capture a terror suspect, thus confirming that the concept has not yet been clarified and it may develop further.<sup>117</sup>

---

<sup>113</sup> Alston note 8 page 23.

<sup>114</sup> Alston note 8 page 24.

<sup>115</sup> In terms of AP I Art 41 (b), enemy combatants who have surrendered may not be targeted.

<sup>116</sup> Supra Heyns note 2 page 17. Sassoli, M Professor of International Law and Director of the Department of public international law and international organization at the University of Geneva, Lecture given as part of the LLM. course on International Humanitarian and Human Rights Law in Military Operations at the Faculty of Law of the University of Pretoria, on 23 April 2014.

<sup>117</sup> Heyns note 2 page 17. See also *Decision of the German Federal Prosecutor* of 20 June 2013 and the United States, Office of the President, “*Fact sheet: U.S. policy standards and procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities*”, 23 May 2013.

The second part of the principle of distinction is that military objectives and civilian objects must be distinguished as only military objectives may be attacked.<sup>118</sup> Civilian objects must not be made the object of attack unless they have become military objectives.<sup>119</sup> The question then arises as to what constitutes a military objective. Military objectives are defined as those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances prevailing at the time, offer a definite military advantage.<sup>120</sup>

As a consequence of the principle of distinction, indiscriminate attacks are prohibited in IHL.<sup>121</sup> Indiscriminate attacks are attacks which are not directed at a specific military objective; attacks that employ a method or means of combat which cannot be directed at a specific military objective and attacks that employ a method or means of combat the effects of which cannot be limited as required by the law of armed conflict.<sup>122</sup>

In the *Nuclear Weapons* case, the ICJ held that “weapons that are incapable of distinguishing between civilian and military targets” are prohibited.<sup>123</sup> However, the court declined to hold that nuclear weapons are per se incapable of distinction.<sup>124</sup> Therefore, drones cannot be said to be incapable of adhering to the principle of distinction, and the unfortunate deaths of civilians do not render the strikes unlawful.<sup>125</sup> In general, drones are capable of achieving this distinction to the extent that their targeting decisions rely on intelligence sources that are, themselves, able to accurately distinguish.<sup>126</sup>

---

<sup>118</sup> AP I Art 52(1).

<sup>119</sup> AP I Art 52(1).

<sup>120</sup> AP I Art 52(2).

<sup>121</sup> AP I Art 51 (4). This applies equally in non-international armed conflicts. See Henckaerts, J-M and Doswald-Beck, L (2005) *Customary International Humanitarian Law Volume I: Rules* ICRC rule 12 (ICRC *Customary International Humanitarian Law Study*).

<sup>122</sup> AP I Art 51 (4).

<sup>123</sup> *Nuclear Weapons* note 20 para 78.

<sup>124</sup> *Nuclear Weapons* note 20 para 95.

<sup>125</sup> Orr note 100 page 748.

<sup>126</sup> Orr note 100 page 748.

### *The Principle of Proportionality and armed drones*

The second important IHL rule regarding the conduct of hostilities is the principle of proportionality. In terms of IHL, civilian casualties are not forbidden. However, when military objectives are attacked, civilians and civilian objects must be spared incidental or collateral damage to the maximum extent possible and incidental damage must not be excessive in relation to the direct and concrete military advantage that is anticipated from the operation.<sup>127</sup> Although AP II does not contain an explicit reference to the principle of proportionality in attack, it has been argued that it is inherent in the principle of humanity which was explicitly made applicable to the Protocol in its preamble, and thus the principle of proportionality cannot be ignored in the application of the AP II.<sup>128</sup>

This rule ultimately means that when an operation is planned or carried out, disproportionate attacks are prohibited even with regard to combatants and military objectives. The likely effect that the attack will have on civilians and their property must be considered and if it is apparent that the harm that might be caused to them in attacking a military objective with a particular weapon would be disproportionate in relation to the military advantage anticipated, then either a different weapon which would not cause disproportionate harm to civilians or their property should be used, or the attack should not be carried out altogether.<sup>129</sup>

The proportionality aspect of the drone strikes which have occurred so far is difficult to assess due to the details of the strikes being kept secret and due to the inaccessibility of the regions where drone strikes occur. However, certain facts do remain relevant: Firstly, an obvious problem with drone strikes is their dependence on potentially unreliable intelligence, as a local informant may provide intentionally misleading information for a number of self-serving purposes.<sup>130</sup> However, IHL does have safeguards to prevent this such as that those targeting must ensure that armed

---

<sup>127</sup> AP I Art 51(5)(b).

<sup>128</sup> ICRC *Customary International Humanitarian Law Study* note 121 Rule 14.

<sup>129</sup> ICRC Unit for Relations with Armed and Security Forces note 93 page 3.

<sup>130</sup> Orr note 100 page 735.

forces do have access to reliable information to support the targeting decision,<sup>131</sup> which includes an appropriate command and control structure,<sup>132</sup> as well as safeguards against faulty or unverifiable evidence.<sup>133</sup> Furthermore, when an error is apparent, those conducting a targeted killing must be able to abort or suspend the attack.<sup>134</sup>

It can be argued that armed drones offer an advantage in that they show their operators an extremely clear picture of their target, which enables them to adhere to the principle of proportionality.<sup>135</sup> However, it the flip side of the coin is that removing the drone operator from the risk of danger eliminates a natural check on commanders' decisions to attack, making the decision to use deadly force easier thus allowing the principle of proportionality to be violated more easily.<sup>136</sup> If statistics are considered, it has been reported that the USA's drone program in Pakistan has killed more than 2400 people, at least 273 of them reportedly civilians.<sup>137</sup> However, reported civilian casualties have fallen sharply since 2010, and there were no confirmed reports of civilian casualties in 2013, which suggests that the attacks have not been disproportionate.<sup>138</sup>

### *The Principle of Precaution and armed drones*

The duty of each party to the conflict to take all feasible precautions to protect the civilian population and civilian objects under its control against the effects of attacks

---

<sup>131</sup>Alston note 15 page 21. International Humanitarian Law Research Initiative, Harvard University Program On Humanitarian Policy And Conflict Research (2009) '*Manual And Commentary On International Law Applicable To Air And Missile Warfare*' C.12.(A) and G.32(a) Available at <http://www.ihlresearch.org/Amw/Manual>.

<sup>132</sup> *Manual and Commentary on International Law Applicable To Air and Missile Warfare* note 131 G 32.

<sup>133</sup> *Manual and Commentary on International Law Applicable To Air and Missile Warfare* note 131 G 32 (a)-(c), G 39.

<sup>134</sup> *Manual and Commentary on International Law Applicable To Air and Missile Warfare* note 131 G 35.

<sup>135</sup> Mayer, J '*The Predator War*', The New Yorker, Oct. 26, 2009 page 1. Available at <http://www.newyorker.com/magazine/2009/10/26/the-predator-war> accessed on 2 October 2014.

<sup>136</sup>Orr note 100 page 735.

<sup>137</sup> Serle, J (2014) '*Drone Warfare: More than 2400 dead as Obama's drone campaign marks five years*' The Bureau of Investigative Journalism January 23 2014 available at <http://www.thebureauinvestigates.com/2014/01/23/more-than-2400-dead-as-obamas-drone-campaign-marks-five-years/> (accessed on 16 July 2014).

<sup>138</sup> Serle note 137.



is set forth in Article 57 of AP I, which provides a list of precautions which must be taken by States with respect to attacks. The Article provides that Parties must do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and must take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and minimizing the incidental loss of civilian life, injury to civilians and damage to civilian objects. Furthermore, Article 57 provides that an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection; or that the attack may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.

Although AP II does not explicitly require precautions against the effects of attack, Article 13(1) requires that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations” and it would be difficult to comply with this requirement without taking precautions against the effects of attack. Furthermore, the ICRC submits that it is a rule of customary international law applicable to both IACs as well as NIACs that the parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.<sup>139</sup>

Regarding armed drones specifically, it is submitted that the surveillance capabilities of armed drones combined with the removal of the risk for pilots as well as intelligence, surveillance and reconnaissance staff, offers States the opportunity to take effective precautionary measures before employing lethal force.<sup>140</sup>

### *Conclusion*

Chapter I of this dissertation focussed on the issues surrounding the legal regime applicable to the current drone programmes. In this chapter, it was accepted that there are situations in which IHL will apply to drone strikes, and in such situations, there are a number of provisions in IHL instruments which could possibly be violated by the current drone programmes such as the principle of distinction, the principle of

---

<sup>139</sup> ICRC *Customary International Humanitarian Law Study* note 121 rule 22.

<sup>140</sup> Rosen, F (2013) ‘*Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility*’ *Journal of Conflict & Security Law* page 1, 16.



proportionality and the principle of precaution. This raises questions of how those responsible for such violations can be held accountable under international law.

## Chapter 3: Transparency and Accountability under International Humanitarian Law

It has now been ascertained that there are certain provisions of IHL which could, and possibly are, being violated with drone strikes. The question which now arises is what mechanisms are available to increase transparency and accountability for alleged violations of IHL. The answer to this question can be found in various IHL instruments.

### *Transparency*

In terms of IHL, the starting point is Common Article 1 of the four Geneva Conventions which provides that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” The obligation to respect requires States to implement the Conventions within their legal systems, and to ensure that the standards outlined in the Conventions are respected by all State organs as well as by all private individuals within their jurisdiction.<sup>141</sup> The obligation “to ensure respect” has been interpreted more expansively as requiring States to “do everything in their power to induce transgressor States to abide by the Conventions,” and this includes that governments must specifically disclose the measures that they have put in place to ensure respect for their obligations.<sup>142</sup> Therefore, it is clear that a degree of transparency is required to ensure that these obligations are fulfilled. It has been stated that the lack of transparency weakens incentives to fulfil obligations such as to accurately assess civilian losses which in turn, weakens victim identification procedures required for compensation for non-combatant death or injury.<sup>143</sup>

Furthermore, the principle of the right to the truth for relatives of missing persons, including victims of enforced disappearances, is explicitly codified in IHL under Article 32 of AP I. The ICRC concluded that the right to truth is a norm of customary

---

<sup>141</sup> Alston note 15 page 20.

<sup>142</sup> Alston note 15 page 20. See also Focarelli, C (2010) ‘*Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*’ 21 EUR. J. INT’L L.125, 127.

<sup>143</sup> Alley, R (2013) ‘*The Drone Debate: Sudden Bullet or Slow Boomerang?*’ The Centre for Strategic Studies: New Zealand page 27.

international law applicable in both IACs and NIACs, according to which “each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.<sup>144</sup> The right to the truth regarding serious violations of IHL was reaffirmed in the *UN Study on the Right to the Truth*, which clearly sets out the nature, material scope and the content of the right to the truth as well as who is entitled to it and what mechanisms are available to enforce the right.<sup>145</sup>

## **Accountability**

### **The obligation to account for military casualties**

In terms of IHL, there are extensive obligations to account for military casualties in armed conflict. Critically, there is an obligation to record civilian casualties as Geneva Convention I provides that “Parties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.”<sup>146</sup> Article 16 of Geneva Convention IV also provides that as far as military considerations allow, each Party to the conflict shall facilitate steps taken to search for the dead. Article 33 of AP I includes the obligation to search for parties that have been reported missing by the adverse party as soon as circumstances permit and at the latest at the end of active hostilities. Article 33 also provides that the parties shall record the information with respect to persons that have died in detention and to the fullest extent possible, record information of persons that have died as a result of hostilities or occupation.

However, these provisions are not applicable in NIACs and AP II contains a far more limited provision in this regard. Article 8 of AP II provides that whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their

---

<sup>144</sup> *Customary International Humanitarian Law Study* note 121 Rule 117 page. 421.

<sup>145</sup> E/CN.4/2006/91 ‘*Study on the right to the truth*’ Report of the Office of the United Nations High Commissioner for Human Rights 8 February 2006. See Chapter 4 below for a detailed discussion of this study.

<sup>146</sup> Geneva Convention I Art 16.

adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

Therefore, we must turn to customary international humanitarian law. The *ICRC Customary International Humanitarian Law Study* in Chapter 35 ‘The Dead’ and Chapter 36 ‘The Missing’ argues for the customary status of the essence of the extensive treaty provisions in AP I and argues that all the provisions will apply to NIACs.<sup>147</sup> This study importantly also clarifies the scope of the obligation.<sup>148</sup> One of the most important rules is Rule 112, which provides that whenever circumstances permit, each party to the conflict must take all possible measures to search for, collect and evacuate the dead without adverse distinction.<sup>149</sup>

Drone strikes are not usually part of an uninterrupted battle and once concluded, parties can take all possible measures to search for, collect and evacuate the dead, which could include permitting humanitarian organisations or the civilian populations to assume this task.<sup>150</sup> However, questions have been raised as to whether this is actually done.

## **Responsibility in terms of IHL**

### ***The 1907 Hague Regulations***

Before World War I, the relevant IHL treaty regarding responsibility was the 1907 Hague Regulations which provided in Article 3 that:

“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”<sup>151</sup>

This article makes it clear that the primary international remedy for violations was merely pecuniary in nature and certainly did not envisage individual claims. Although the article does not expressly provide that an investigation into alleged violations

---

<sup>147</sup> *Customary International Humanitarian Law Study* note 121 Chapters 35 and 36.

<sup>148</sup> Oxford Research Group note 48 pg 17.

<sup>149</sup> *Customary International Humanitarian Law Study* note 121 pg 406.

<sup>150</sup> Oxford research group note 48 page 18.

<sup>151</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, Art. 3, Oct. 18, 1907, 36 Stat. 2277, 207 Consol. T.S. 277.

must be undertaken, an investigation must clearly be made before a State party can be held liable for compensation for such a violation.<sup>152</sup>

### ***The Geneva Conventions of 1949***

The four Geneva Conventions were adopted in response to the grave atrocities against civilians that were committed in World War II. They are seen as the core of IHL and specifically protect people who are not taking part in the hostilities, such as civilians and medical personnel, as well as those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war. The Geneva Conventions contain stringent rules, which are nearly identical in each of the four Conventions, to deal with so-called "grave breaches" of the Conventions.<sup>153</sup>

Articles 51, 52, 131 and 148 of the Geneva Conventions respectively provide that no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of grave breaches. Experts have opined that this article does not envisage actions by individuals against the State in whose service the author of the breach was and thus only a State can bring a claim against another State so it has no influence whatsoever on the capacity of neutral person individually to claim damages incurred as a result of violations of IHL.<sup>154</sup>

### ***Penal sanctions under the Geneva Conventions***

Upon examination of the Geneva Conventions, it becomes clear that although the texts do not envisage individual claims, they do envisage individual accountability for grave breaches. The relevant provisions provides as follows:

“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the

---

<sup>152</sup> Professor Hampson (University of Essex) ‘*Investigations of alleged violations and reparations for violations*’ lecture given to the LLM International Law: Human Rights and Humanitarian Law in Military Operations at the University of Pretoria on 21 May 2014 (notes on file with author).

<sup>153</sup> Geneva Convention I Art 49, Geneva Convention II Art 50, Geneva Convention III Art 129, Geneva Convention Relative IV Art 146.

<sup>154</sup> Hampson note 152.

following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.”<sup>155</sup>

The provisions of the Geneva Conventions clearly introduce individual responsibility for grave breaches of IHL. States Parties to the Conventions are under a three-fold obligation. Firstly, they are obligated to enact the domestic legislation necessary to prosecute potential offenders; secondly, to search for those accused of violating the Conventions; and lastly, to either prosecute such individuals or turn them over to another State for trial (*aut dedere aut punire*).<sup>156</sup> The obligation on States to investigate alleged breaches of IHL flows from the fact that States are obliged to prosecute or turn the individuals over for trial as this cannot be done without an investigation.

### **Grave breaches**

The question now arises as to what constitutes a grave breach as referenced in the conventions. These are specified in the four Geneva Conventions in Articles 50, 51, 130 and 147 respectively, as including wilful killing; torture or inhuman treatment; biological experiments; wilfully causing great suffering; causing serious injury to body or health; extensive destruction and appropriation of property which is not justified by military necessity and carried out unlawfully and wantonly. There are also grave breaches which are only specified in Articles 130 and 147 respectively of Geneva Convention III and IV which include compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power; and wilfully depriving a prisoner of war or a protected person of the rights or fair and regular trial prescribed

---

<sup>155</sup>Geneva Conventions I-IV Art 49, 50, 129 and Art.146 respectively.

<sup>156</sup>Schmitt, MN (2011) “*Investigating violations of International Law in Armed Conflict*” Harvard National Security Journal Vol 2 31 page 37.

in the Conventions. Finally, there are grave breaches which are specified only in Article 147 of Geneva Convention IV which include unlawful deportation or transfer; unlawful confinement of a protected person; and the taking of hostages. It is clear that the use of armed drones to commit targeted killings could, in certain situations, constitute a grave breach, if it does not comply with IHL rules.

### ***Suppression of breaches other than grave breaches***

It has sometimes been misconstrued that there is no mechanism to enforce breaches other than grave breaches, and thus that there is no mechanism available to enforce Common Article 3, which provides the minimum standard of protection to civilians and those participating in NIACs, and includes the prohibition of violence to life and murder.<sup>157</sup> However, the inclusion of the words “all acts” in the wording of Article 49, 50, 129 and 146 respectively shows that this is incorrect and that States do in fact have an obligation to suppress such breaches as it provides that:

“Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.”

This is important for the purposes of this dissertation as armed drones are currently only being used for targeted killings in NIACs, and it is clear from this provision that States cannot tolerate breaches of IHL in NIACs and are, in fact, obligated to take measures and suppress any breaches that occur from the use of armed drones. It is submitted that these measures could easily include the investigation of an alleged violation as it may be necessary to investigate the violation before it can be suppressed.

### ***Additional Protocol I***

In the two decades that followed the adoption of the Geneva Conventions, the world witnessed an increase in the number of NIACs and wars of national liberation.<sup>158</sup> In response to this, a Diplomatic Conference was convened between 1974 and 1977 to further develop the law that had been set forth in 1949. Two Protocols Additional to

---

<sup>157</sup> Hampson note 152. See also Schmitt note 156 page 47.

<sup>158</sup> ICRC (2010) ‘*The Geneva Conventions of 1949 and their Protocols*’ 29-10-2010 overview available at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> last updated 16-6-2014. (Accessed on 7 July 2014).

the four 1949 Geneva Conventions were adopted in 1977. The Protocols strengthen the protection of victims of IACs (AP I) and NIACs (AP II) and also place limits on the way wars are fought.

What is important to note about AP I and AP II is that they do not supplant the Conventions, but rather supplement them for the State Parties to the two instruments.<sup>159</sup> While AP II makes no reference to a duty to investigate alleged war crimes, AP I does build on the duty to investigate and prosecute set forth in the Geneva Conventions, which it expressly references.<sup>160</sup>

### **State Responsibility under AP I**

AP I's provision regarding responsibility is contained in Article 91 and is almost identical to Article 3 of the Hague Convention of 1907. It provides as follows:

“A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

The ICRC Commentary on this article provides that the obligation applies to all Parties to the conflict, but only if violations have been committed, and that no distinction is made between the victor and the vanquished, nor between a Party which is presumed to have resorted to force unlawfully and a Party which is believed only to have exercised its right of self-defence.<sup>161</sup>

Regarding who may be compensated, the ICRC Commentary states that those entitled to compensation will normally be Parties to the conflict or their nationals, (which envisages that individuals may bring claims), though in exceptional cases they may also be neutral countries, where there is a violation of the rules on neutrality or of unlawful conduct with respect to neutral nationals in the territory of a Party to the conflict.<sup>162</sup> It furthermore states that apart from exceptional cases, persons with a foreign nationality who have been wronged by the unlawful conduct of

---

<sup>159</sup> ICRC note 158.

<sup>160</sup> AP I Arts. 85, 87–89.

<sup>161</sup> ICRC (1987) *Commentary on Additional Protocol I* no 3461 available at <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=73D05A98B6CEB566C12563CD0051E1A0> (accessed on 11 July 2014) No. 3652.

<sup>162</sup> ICRC *Commentary on AP I* note 161 no 3656.



a Party to the conflict should address themselves to their own government, which will submit their complaints to the Party that committed the violation.<sup>163</sup>

Regarding responsibility, the ICRC states that the general international law rules regarding responsibility apply and the conduct of any organ of the State, whether military or civilian, constitutes an act of State, provided that it acted in its official capacity, regardless of its position, whether superior or subordinate.<sup>164</sup> Thus the same applies to any member of the armed forces, without prejudice to the personal responsibility which he may incur, since a member of the armed forces is an agent of the State or of the Party to the conflict to which he belongs.<sup>165</sup> Such responsibility even continues to exist when he has exceeded his competence or contravened his instructions and can be imputed not only for acts committed by a person or persons who form part of the armed forces, but also for possible omissions.<sup>166</sup>

Regarding responsibility and reparation under customary international humanitarian law, the *Customary International Humanitarian Law Study* provides that a State is responsible for violations of international humanitarian law attributable to it and must make full reparation for the loss or injury caused, and this is a rule in non-international and international armed conflicts according to State Practice.<sup>167</sup>

### **The investigation of violations under AP I**

As stated above, AP I builds on the obligation to investigate breaches of IHL. Articles 85-89 deal with the obligation of States to investigate and prosecute those responsible for grave breaches. Article 89 of AP I provides a list of grave breaches and states that the provisions of the Geneva Conventions which relate to the repression of breaches and grave breaches apply, and further provides that the grave breaches listed shall be considered war crimes. The drafting of this article has been described as modest as it merely makes the provisions of the Geneva Conventions relating to the repression of breaches applicable to breaches of the

---

<sup>163</sup> *ICRC Commentary on AP I* note 161 no 3657.

<sup>164</sup> *ICRC Commentary on AP I* note 161 no 3660.

<sup>165</sup> *ICRC Commentary on AP I* note 161 no 3660.

<sup>166</sup> *ICRC Commentary on AP I* note 161 no 3660.

<sup>167</sup> *Customary International Humanitarian Law Study* note 121 Rule 149-150.

Protocol.<sup>168</sup> Article 89 essentially makes it clear that the system of repression provided for in the Geneva Conventions is not to be replaced, but reinforced and developed by Articles 85-91, so that it will apply to the repression of breaches of both the Protocol and the Conventions.<sup>169</sup>

***The investigation of breaches by military commanders***

Article 87 of AP I provides that military commanders must prevent and suppress breaches of the Geneva Conventions and of AP I committed by members of the armed forces under their command and other persons under their control, and to report any breaches to competent authorities. This article affirms that members of the armed forces can be submitted to a regime of internal discipline and that the principal duty of a military commander is to exercise command.<sup>170</sup>

In accordance with this article, the disciplinary system must ensure compliance with all the rules of international law applicable in armed conflict.<sup>171</sup> AP I thus recognises that military commanders are not without the means ensure such compliance. This is because they are on the spot and able to exercise control over the troops and the weapons they use and are in a position that enables them to establish the facts, which would be the necessary starting point for any action to suppress or punish a breach.<sup>172</sup> Paragraph 3 of the article requires that any commander "where appropriate", will "initiate disciplinary or penal action against violators". It flows logically from these words that the commander must investigate the suspected breach; however, it does not provide what form the investigation should take.

The following points can be gleaned from Article 87 regarding the nature of the responsibility of the commander to investigate an alleged violation: firstly, the article contemplates a system of military self-policing that complements the duty of States to investigate and prosecute thus the military can also take action in response to possible breaches.<sup>173</sup> It flows from this that if the military fully examines incidents and

---

<sup>168</sup> ICRC *Commentary on AP I* note 161 no 3461.

<sup>169</sup> ICRC *Commentary on AP I* note 161 no 3567.

<sup>170</sup> ICRC *Commentary on AP I* note 161 no 3549

<sup>171</sup> ICRC *Commentary on AP I* note 161 no 3559.

<sup>172</sup> ICRC *Commentary on AP I* note 161 no 3560.

<sup>173</sup> Schmitt note 156 page 43.

appropriately punishes those responsible for violations; the State's obligations have been met.<sup>174</sup> It is also clear from Article 87 that commanders may investigate possible violations which occur within their own units or which are committed by others who are under their control at the relevant time.<sup>175</sup> The final point that can be gleaned from Article 87 is that the emphasis on the criticality of command as a mechanism for handling possible violations suggests that methods of investigations that might undermine command functions and effectiveness are inappropriate.<sup>176</sup> For example, it would be unreasonable to impose a requirement upon a subordinate commander to report a possible violation to a superior commander if that commander may have been involved in the incident himself and in such a case other means of bringing the matter to the attention of appropriate authorities of taking action should be taken.

Furthermore, commanders can be held criminally responsible if they fail to take reasonable measures to prevent, repress or report war crimes committed by their subordinates which they had reason to know were going to be committed, or failed to punish those responsible for the crime if they had already been committed.<sup>177</sup> The ICRC submits that this is a rule of customary international law applicable in both IACs as well as NIACs, thus if a commander is aware that a drone strike may be targeting a civilian and he fails to prevent the strike, he may be held criminally responsible.<sup>178</sup>

### **Mutual assistance of States in criminal matters**

Article 88 of AP I deals with the mutual assistance of States in criminal matters and provides that Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Geneva Conventions or of the AP I and shall co-operate in the matter of extradition, at the request of the State in whose territory the alleged offence occurred, when the circumstances permit.

---

<sup>174</sup> Schmitt note 156 page 43.

<sup>175</sup> Schmitt note 156 page 43.

<sup>176</sup> Schmitt note 156 page 43.

<sup>177</sup> AP I Art 86 (1).

<sup>178</sup> *Customary International Humanitarian Law Study* note 121 Rule 153.

The aim of this article is clearly to increase accountability for violations of AP I. It has been submitted that there is a general acceptance of the principle that States must make every effort to cooperate with each other, to the extent possible, in order to facilitate the investigation and trial of suspected war criminals and no distinction has been made by States between war crimes committed in IACs and war crimes committed in NIACs, and thus this provision can be applied to the use of armed drones if they violate IHL.<sup>179</sup>

### **The International Humanitarian Fact-Finding Commission**

An interesting investigative tool established by AP I is the International Humanitarian Fact-Finding Commission (IHFFC) which was established in 1991 and is a considerable step forward in supporting impartial investigations into alleged breaches of IHL as it creates a special tool for the implementation of API.<sup>180</sup> Article 90 of AP I deals with the establishment of the IHFFC and states that it shall be comprised of fifteen independent members and that it is competent to investigate any incident alleged to be a grave breach or serious violation of the rules of IHL within States which have recognised the competence of the Commission.<sup>181</sup> It also provides that the Commission shall submit a report on the findings of fact with appropriate recommendations.<sup>182</sup>

The main functions of the IHFFC are fact-finding and conciliation in IACs.<sup>183</sup> This includes the investigation of all activities alleged to constitute a grave breach or other serious violation of the Geneva Conventions and AP I.<sup>184</sup> It also includes other investigations at the request of one party to a conflict and at the agreement of the other party.<sup>185</sup> The last mentioned function makes it clear that even States that are not party to AP I can request the help of the IHFFC.<sup>186</sup> Furthermore, the operation of Article 90 is not limited to IACs, as if all parties to a NIAC agree then the

---

<sup>179</sup> *Customary International Humanitarian Law Study* note 121 rule 161.

<sup>180</sup> Fleck, D (Ed) (2013) *The Handbook of International Humanitarian law* 688.

<sup>181</sup> AP I Art 90.

<sup>182</sup> AP I Art 90(5).

<sup>183</sup> Fleck note 180 page 688.

<sup>184</sup> Fleck note 180 page 688.

<sup>185</sup> Fleck note 180 page 688.

<sup>186</sup> Fleck note 180 page 688.

Commission shall accept to make enquiries into alleged violations of international law in a NIAC as well.<sup>187</sup>

Regarding transparency, the IHFFC does not publicly communicate the results of the fact finding, unless all the parties to the conflict request it to do so.<sup>188</sup> However, although this provision decreases the degree of transparency that the international community so desperately seeks, it has been submitted that this provision may actually strengthen the initiative of States to take necessary measures within their own responsibility, without any pressure from the international community.<sup>189</sup> Another argument that strengthens this contention is that other fact finding activities, for example those conducted by the UN, are by nature publically available, therefore, States have an interest in using the IHFFC rather than any other fact-finding mechanism.<sup>190</sup> However, in practice the IHFFC has been criticised and described as a “dead letter” as firstly, it has never actually been used, and secondly, as a general rule it is only applicable in IACs.<sup>191</sup>

### *The relationship between grave breaches and war crimes*

From the discussions of the accountability mechanisms available under IHL, the question arises as to what the difference is between grave breaches and war crimes, as both envisage individual accountability. Although grave breaches and war crimes were originally of a fundamentally different nature, the passage of time has blurred the distinction between them.<sup>192</sup>

One of the obvious differences between a war crime and a grave breach is that a crime can generally be defined as an act or omission that the law makes punishable; whereas a ‘breach’ in contrast can be defined as merely constituting an act or omission that is contrary to a legal obligation. Therefore, all crimes stem from breaches of the law, but not all breaches amount to crimes.<sup>193</sup> From the definitions

---

<sup>187</sup> Fleck note 180 page 689.

<sup>188</sup> AP I Art 90.

<sup>189</sup> Fleck note 180 page 689.

<sup>190</sup> Fleck note 181 page 689.

<sup>191</sup> Hampson note 152.

<sup>192</sup> Oberg, MD (2009) ‘*The absorption of grave breaches into war crimes law*’ International Review of the Red Cross vol 91 no 873 page 163.

<sup>193</sup> Öberg note 192 page 163.

above it is clear that a crime necessarily entails consequences in criminal law, whereas a breach may have legal consequences inside or outside criminal law.<sup>194</sup>

In terms of international law, this difference applies to war crimes and grave breaches.<sup>195</sup> War crimes, on the one hand, are acts and omissions that violate IHL and are criminalized in international criminal law.<sup>196</sup> Efforts to prosecute some of the people responsible for crimes committed during World War I and World War II led to war crimes becoming highly prominent in international law.<sup>197</sup> The Charter of the Nuremberg International Military Tribunal gave the Tribunal jurisdiction to try people who had committed the following acts in the interests of the European Axis countries:

‘(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.’<sup>198</sup>

In contrast, the four Geneva Conventions did not provide for any international criminal liability for grave breaches. Instead, grave breaches constituted a category of violations of the Conventions which were considered serious enough to warrant States to enact domestic penal legislation, search for suspects, and judge them or hand them over to another State for trial.<sup>199</sup>

In order to understand the original distinction between grave breaches and war crimes, it is necessary to keep in mind two very important points: firstly, international law and domestic law are two separate bodies of law and secondly, regardless of

---

<sup>194</sup> Öberg note 192 page 163.

<sup>195</sup> Öberg note 192 page 164.

<sup>196</sup> Cottier, M (2008) *Article 8: War crimes –introduction/general remarks*, in Triffterer, Otto (ed), *Commentary on the ‘Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, p. 283; Werle, Gerhard (2005) *‘Principles of International Criminal Law’* T.M.C. Asser Press, The Hague pp. 269, 280.

<sup>197</sup> Öberg note 192 page 164.

<sup>198</sup> Article 6(b) of the Charter of the Nuremberg International Military Tribunal of 8 August 1945.

<sup>199</sup> As discussed above. See also Öberg note 192 page 163.

whether a grave breach or a war crime is committed, a rule of international law is breached.<sup>200</sup> However, the difference lies in that whereas grave breaches are violations of certain primary rules of IHL with penal consequences in domestic law, war crimes consist of secondary rules of international criminal law that attach criminal sanctions to breaches of primary rules of IHL.<sup>201</sup> In simpler terms, grave breaches should necessarily entail criminal consequences in domestic law and war crimes entail criminal consequences in international law.

At the preparatory meetings for the Rome Conference on the International Criminal Court (ICC), several State representatives suggested war crimes provisions that would combine grave breaches and war crimes.<sup>202</sup> However, as the grave breaches provisions of the Geneva Conventions were easily identified and widely accepted, they were dealt with separately.<sup>203</sup> The ICC Statute, adopted in 1998, listed grave breaches as a category of war crimes under Article 8(2)(a) and listed other serious violations of the laws and customs of war as a category of war crimes in Article 8(2)(b).<sup>204</sup> Article 8(2)(a) confirms that grave breaches had become subsumed under war crimes.<sup>205</sup> What also becomes clear when considering the provisions of Article 8(2)(a) and Article 8(2)(b), is that there is large degree of overlap between the two, and it has been submitted that this is due to the origins of the two provisions.<sup>206</sup> The fact that the ICC Statute provided the ICC with jurisdiction over a long list of war crimes drawn from customary law and has also included grave breaches in this list illustrates how the concept of grave breaches has appeared in instruments of international criminal law and has blurred the distinction between war crimes and grave breaches.<sup>207</sup>

---

<sup>200</sup> Öberg note 192 page 166.

<sup>201</sup> Öberg note 192 page 167.

<sup>202</sup> Öberg note 192 page 167. See also '*Preparatory Committee on Establishment of International Criminal Court discusses inclusion of war crimes in list of "core crimes"*', Press Release L/2764, 26 March 1996. See also '*Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*', A/50/22, 6 September 1995, para 73 referred to by Öberg.

<sup>203</sup> Öberg note 192 page 167.

<sup>204</sup> Rome Statute of the ICC note 64.

<sup>205</sup> Öberg note 192 page 169.

<sup>206</sup> Öberg note 192 page 169.

<sup>207</sup> Öberg note 192 page 169.



It is clear from the discussion above that there are two kinds of grave breaches. Firstly, there are the original grave breaches contained in the Geneva Conventions which can also be referred to as ‘procedural’ grave breach provisions which are jurisdictional and procedural in nature and which govern how domestic legislative and law enforcement bodies should ensure that justice is done for certain breaches of IHL.<sup>208</sup> Then there are the new, substantive grave breaches which define behaviour that is considered to be criminal in international law and constitute a category of war crimes.<sup>209</sup>

### **The investigation of grave breaches and war crimes in terms of International Criminal law and customary international law**

For the purposes of this dissertation, it is important to examine the respective rules on the investigation and adjudication of grave breaches and war crimes. The position regarding grave breaches has already been discussed above. In contrast to the IHL obligation, there is a conspicuous absence in the ICC Statute of any provision obliging States Parties to enact domestic war crimes legislation corresponding to Article 8(2) of the Statute. However, if a State wishes to maintain jurisdiction over ‘its’ cases, it must avoid being deemed unwilling or unable genuinely to carry out the investigation or prosecution.<sup>210</sup> In order to do so, it must incorporate the war crimes jurisdictional provisions of Article 8(2) in its own domestic legislation and make sure that it is able to effectively investigate and prosecute on this basis.<sup>211</sup> Therefore, States party to the ICC Statute have a strong incentive to effectively investigate and prosecute.<sup>212</sup>

In terms of customary international law the ICRC has submitted that “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the

---

<sup>208</sup> Öberg note 192 page 169.

<sup>209</sup> Öberg note 192 page 169.

<sup>210</sup> Rome Statute of the ICC note 64 Arts 17 and 18.

<sup>211</sup> Öberg note 192 page 179.

<sup>212</sup> Öberg note 192 page 180. Öberg referring to Robinson, Darryl, ‘*The Rome Statute and its impact on national law*’, in Cassese, Antonio; Gaeta, Paola and Jones, John(eds), ‘*The Rome Statute of the International Criminal Court*,’ Oxford University Press, New York pp. 1860–1866.



suspects.”<sup>213</sup> Customary law therefore requires a criminal investigation into war crimes.<sup>214</sup> However, the obligation is potentially limited to active nationality and territorial jurisdiction unless the State’s law gives its courts’ jurisdiction on other bases too.<sup>215</sup> By contrast, the procedural grave breaches regime extends the obligation to search to any State Party, if and when the suspect is on its territory, therefore, it is clear that grave breaches carry a broader obligation in this regard than war crimes.<sup>216</sup>

### **The adjudication of grave breaches and war crimes in terms of International Criminal law and customary international law**

As states above, Common Article 49/50/129/146 of the four Geneva Conventions provides that State Parties “shall bring [persons alleged to have committed, or to have ordered to be committed, grave breaches], regardless of their nationality, before its own courts”. It may also, in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.<sup>217</sup> This system requires States Parties to incorporate universal jurisdiction over grave breaches in their domestic law.<sup>218</sup>

Regarding the adjudication of war crimes, in terms of contemporary customary international law if a State has jurisdiction over a war crimes suspect, it must prosecute him or her, and, furthermore, “States have the right to vest universal jurisdiction in their national courts over war crimes.”<sup>219</sup> Thus from the perspective of domestic criminal jurisdiction, grave breaches carry mandatory universal jurisdiction, while other war crimes carry permissive universal jurisdiction.<sup>220</sup> This is a significant difference in theory, as a State must prosecute or hand over a person accused of a grave breach, while the State would be legally entitled under international law not to

---

<sup>213</sup> *Customary International Humanitarian Law Study* note 121 Rule 158 page 607.

<sup>214</sup> Öberg note 192 page 180.

<sup>215</sup> Öberg note 192 page 180.

<sup>216</sup> Öberg note 192 page 180; See also *Customary International Humanitarian Law Study* note 121 page 593.

<sup>217</sup> AP I Art 3.

<sup>218</sup> *Tadic* note 49 paras 79-80.

<sup>219</sup> *Customary International Humanitarian Law Study* note 121, Rule 157 and 158 p. 604.

<sup>220</sup> Öberg note 192 page 181.

assert jurisdiction over war crime suspects other than on the basis of territoriality or active nationality.<sup>221</sup> In practice, however, States have often failed to give themselves the necessary bases for jurisdiction over procedural grave breaches and where an international court has jurisdiction; this difference between grave breaches and war crimes disappears.<sup>222</sup> What must be borne in mind regarding the discussion above is that although the USA is a State Party to the four Geneva Conventions, it is not a State Party to the ICC Statute and thus only the provisions contained in the Geneva Convention and the rules regarding war crimes which have been accepted to have attained customary law status, apply to their conduct using armed drones.

### **Concluding remarks on grave breaches**

From the discussion of the term ‘grave breaches’ in relation to the text of the Geneva Conventions in IHL, international criminal law and in relation to customary international law, the following interpretive factors have been put forward by experts: Firstly, there is no limitation as to the source of an allegation; it can presumably be levelled by State authorities, private individuals, non-governmental organizations, other States, or intergovernmental organizations.<sup>223</sup>

It is also clear from the text that not every allegation requires an investigation; only those sufficiently credible to reasonably merit one do. There is, therefore, a threshold of certainty below which the obligations do not apply. This is suggested by the lack of a requirement to prosecute or extradite absent a *prima facie* case. Once again, although the Article does not refer to an investigation and refers solely to prosecution, it is logical that this requires an investigation.<sup>224</sup>

Furthermore, the requirement to investigate possible war crimes and prosecute those responsible extends to the actions of individuals who order the commission of an offense. The principle of “command responsibility,” contained in Article 28 of the ICC Statute, provides situations in which a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the

---

<sup>221</sup> Öberg note 192 page 181.

<sup>222</sup> Öberg note 192 page 181.

<sup>223</sup> Schmitt note 194 page 39.

<sup>224</sup> Schmitt note 194 page 39.

jurisdiction of the Court committed by forces under his or her effective command and control, entails that such individuals are treated as perpetrators of the resulting crime, not merely accomplices.<sup>225</sup> Therefore, setting a policy of committing war crimes, such as directing forces to target the enemy civilian population with an armed drone strike, would necessitate investigation and potentially prosecution.<sup>226</sup>

### *Customary International Humanitarian Law and the obligation to investigate*

As was discussed briefly above, the ICRC In its *Customary International Humanitarian Law Study* asserts that the principles set forth in the 1949 Geneva Conventions and AP I regarding investigations and prosecutions enjoy the status of customary law. Rule 158 provides as follows:

“States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”<sup>227</sup>

It has been submitted that although the rule is less detailed than the treaty text, it does capture the principles that the treaty articles express and unquestionably reflects a customary norm.<sup>228</sup>

Furthermore, organs of the United Nations have repeatedly cited the obligation of States to investigate and prosecute war criminals. The General Assembly called on Member States and non-member States alike to take steps to apprehend war criminals and return them to the States where the offences in question were committed during its first session in 1946.<sup>229</sup> It has also urged States to investigate IHL violations and prosecute war criminals on several occasions.<sup>230</sup>

---

<sup>225</sup> Rome Statute of the ICC Art 38. See also *Customary International Humanitarian Law Study* note 121 Rule 153.

<sup>226</sup> Schmitt note 156 page 39. This applies in international as well as non-international armed conflicts according to *Customary International Humanitarian Law Study* note 121 Rule 152-153.

<sup>227</sup> *Customary International Humanitarian Law Study* note 121 rule 158.

<sup>228</sup> Schmitt note 156 page 44.

<sup>229</sup> G.A. Res. 3(I), U.N. Doc. A/RES/3(I) (Feb. 13, 1946). Schmitt page 45.

<sup>230</sup> Ibid. Schmitt refers to G.A. Res. 2338 (XXII), A/RES/2338(XXII) (Dec. 18, 1967); G.A. Res. 2391 (XXIII), A/RES/2391(XXIII) (Nov. 26, 1968); G.A. Res. 2583 (XXIV), A/RES/2583(XXIV) (Dec. 15, 1969); G.A. Res. 2712, A/RES/2712(XXV) (XXV)(Dec. 15, 1970); G.A. Res. 2840 (XXVI), A/RES/2840(XXVI) (Dec. 18, 1971); G.A. Res. 3074 (XXVIII), A/RES/3074(XXVIII) (Dec. 3, 1973).

### **The customary law obligation to investigate in NIACs**

Although it is clear from the discussion above that the obligation to investigate is a customary international law norm in IACs, the question arises as to whether or not it is a customary law norm in NIACs. This is a difficult matter to ascertain and at first glance, it would seem that it cannot amount to a customary law norm for the following reasons: Firstly, AP II itself contains no reference to investigations or prosecution and the ICRC's *Commentary on the Customary International Law Study* is very sparse when justifying the extension of the norm to non-international armed conflicts.<sup>231</sup> The fact that AP II contains no reference to investigations or prosecutions is very strange as AP I explicitly cross-references the related articles in the 1949 Conventions, and further develops the obligation to investigate in the context of the commander's responsibilities.<sup>232</sup> Secondly, Common Article 3 of the Geneva Conventions, which as mentioned above, is the only provision in the Conventions drafted specifically for conflicts "not of an international character," also does not include such an obligation.<sup>233</sup>

However, arguments can be made which support that the customary law obligation to investigate and prosecute does extend to non-international armed conflicts. The following arguments are submitted: Firstly, as discussed above, the third paragraph of the Geneva Conventions' articles on investigation and prosecution refers to "the suppression of *all* acts contrary to the provisions of the present Convention other than grave breaches." The duty to suppress therefore applies to all provisions of the Conventions and thus encompasses Common Article 3 violations, and this could easily require an investigation to ascertain whether a violation has occurred.<sup>234</sup>

Secondly, the ICC Statute makes no distinction between categories of armed conflict in its preamble where it asserts that war crimes and other offenses must not go unpunished.<sup>235</sup> It also does not make such a distinction in its article on command responsibility in which it mentions the situation in which a commander has failed to

---

<sup>231</sup> *Customary International Humanitarian Law Study* note 121 at 609–610. Schmitt note 156 page 40.

<sup>232</sup> Schmitt note 156 page 47.

<sup>233</sup> Schmitt note 156 page 47.

<sup>234</sup> Hampson note 152.

<sup>235</sup> Rome Statute of the ICC note 64 preamble. See also Schmitt note 156 page 47.

submit the matter to the competent authorities for investigation and prosecution.<sup>236</sup> Thirdly, the jurisprudence of international tribunals arguably supports the extension of the obligation to investigate and prosecute to non-international armed conflicts.<sup>237</sup> In the *Tadic* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, after examining the rules regarding the conduct of hostilities during IACs, argued that some of these rules now applied equally in NIACs as a matter of customary IHL.<sup>238</sup> However, it must be noted that the Court found that only a number of rules and principles governing IACs have gradually been extended to apply to NIACs; and that this extension is by no means a full transplant of those rules to internal conflicts; rather, the general essence of those rules has become applicable to internal conflicts.<sup>239</sup>

In light of these arguments, despite the uncertainty, it seems defensible to claim that the requirement to investigate and prosecute war crimes exists in both IACs as well as NIACs in terms of Customary International Humanitarian Law and that the obligation is equally robust in both types of conflict.

### *Issues facing accountability under IHL*

Although it is clear that there are accountability mechanisms available under IHL, there has also been a significant weakness in the practice of States with respect to the carrying out of the duty to prosecute or extradite and for States to cooperate with each other in the investigation, prosecution, and adjudication of those charged with such crimes and the punishment of those who are convicted of such crimes.<sup>240</sup>

However, in 1971 the United Nations General Assembly adopted the Resolution on War Criminals, affirming that a State's refusal "to cooperate in the arrest, extradition, trial, and punishment" of persons accused or convicted of war crimes and crimes against humanity is "contrary to the United Nations Charter and to generally

---

<sup>236</sup> Rome statute of the ICC note 64 Art 28. See also Schmitt note 156 page 47.

<sup>237</sup> Schmitt note 156 page 48.

<sup>238</sup> *Tadic* note 49 at 70.

<sup>239</sup> *Tadic* note 49 at 126.

<sup>240</sup> Bassiouni, MC (1996) 'Searching For Peace And Achieving Justice: The Need For Accountability' Law And Contemporary Problems Vol. 59: No. 4 page 15.

recognized norms of international law,”<sup>241</sup> and in 1973 a resolution was adopted by the United Nations General Assembly entitled *Principles of International Cooperation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*.<sup>242</sup>

Furthermore, the duty to prosecute or to extradite could not be effective if statutes of limitations applied.<sup>243</sup> Thus in 1968 the United Nations adopted a *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*,<sup>244</sup> and, in 1974, the Council of Europe adopted a *European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European)*.<sup>245</sup> However, States were reluctant to ratify these Conventions, which indicated a lack of support of proposition that no time prescriptions should apply to these crimes, thus making their prosecution more difficult.

Then, in 2005, the General Assembly adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* which provides that statutes of limitations shall not apply to serious violations of international humanitarian law which constitute crimes under international law and that domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.<sup>246</sup> Furthermore, the ICC Statute also places a a general obligation on States to cooperate under Article

---

<sup>241</sup> UN General Assembly Resolution. 2840 (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971).

<sup>242</sup> UN General Assembly Resolution 3074 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030 (1973).

<sup>243</sup> Bassiouni note 240 Page 9-28 page 16.

<sup>244</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature at* New York, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/RES/2391 (1968), 754 U.N.T.S. 73, 8 I.L.M. 68, *entered into force* Nov. 1970.

<sup>245</sup> See European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European), *opened for signature at* Strasbourg, Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540, *not yet entered into force*.

<sup>246</sup> UN General Assembly Resolution 60/147, Annex, ¶ 3, A/RES/60/147 (Dec. 16, 2005) paragraph 6 and 7.

86, and Article 29 provides that the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

A further issue that impedes accountability for violations of IHL using armed drones is that the USA has not ratified AP I, AP II or the ICC Statute, thus although the provisions contained in these instruments do build on those provided for in the Geneva Conventions, they only apply to the USA in as far as they have attained customary law status.

### *The interpretation of the obligation to investigate under IHL*

In contrast to IHRL, which will be discussed in Chapter 4 below, the interpretation of the obligation to investigate under IHL is quite sparse and thus it is not clear precisely what the investigations should entail. The General Assembly provided some clarity in this regard by adopting the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. Importantly, this document provides that “the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to . . . investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.”<sup>247</sup>

The Goldstone Report, mandated by the United Nations regarding the Gaza Conflict, derived four universal principles of investigations from the work of human rights courts and bodies as being: independence, effectiveness, promptness, and impartiality.<sup>248</sup> These four principles have clearly permeated IHL, which can be seen, for example, in that Human Rights organisations such as Human Rights Watch have suggested that the standard for investigations of war crimes is that they be “prompt, thorough, and impartial and that the ensuing prosecutions also be independent.”<sup>249</sup>

---

<sup>247</sup> UN General Assembly Resolution 60/147, Annex, 3, A/RES/60/147 (Dec. 16, 2005) paragraph 3.

<sup>248</sup> *Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict* 1620, UN Doc A/HRC/12/48 (Sept 15 2009).

<sup>249</sup> Human Rights Watch (2010) ‘*Turning A Blind Eye: Impunity for Laws-of-War Violations during the Gaza War*’ page 7.



Human Rights Courts have also interpreted the obligation to investigate violations which have arisen in times of conflict, but they have interpreted it in the light of IHRL instruments and will be discussed in Chapter 4 below.<sup>250</sup> However, what can be said regarding the substantive form that an investigation should take in times of armed conflict is that it will vary on a case-by-case basis depending on the circumstances, nature and intensity of the conflict and, in general, will be less robust than the obligation during times of peace.

### *Drone strikes not conducted by the armed forces of a State*

There have been reports that drone strikes have been conducted by the CIA, which does not form part of the armed forces of the USA. If such strikes were to occur outside of armed conflict, such strikes by the CIA would constitute extrajudicial executions if that they do not comply with IHRL.<sup>251</sup> If that is the case, they would have to be investigated and prosecuted both by the US and the State in which the wrongful killing occurred.<sup>252</sup>

However, if such killings occur within the context of armed conflict, then the intelligence agents would constitute civilians directly participating in hostilities and would themselves, be legitimate targets. This has several ramifications regarding accountability. Firstly, unlike members of the armed forces who generally enjoy immunity from prosecution if they comply with IHL requirements, intelligence personnel do not have immunity from prosecution under domestic law for their conduct.<sup>253</sup> Experts have commented in this regard that:

“This means that CIA personnel could be prosecuted for murder under the domestic law of any country in which they conduct targeted drone killings, and could also be prosecuted for violations of applicable US law.”<sup>254</sup>

---

<sup>250</sup> See the discussions of *McKerr v. United Kingdom*, (2001) European Court of Human Rights, *Ergi v Turkey*, European Court of Human Rights (Application no. 40/1993/435/514) 28 July 1998 and *Isayeva and Others v. Russia*, (Application no. 57950/00) European Court of Human Rights 24 February 2005.

<sup>251</sup> See Chapter 4 below. See also Alston note 8 page 22.

<sup>252</sup> Alston note 8 page 22.

<sup>253</sup> Alston note 8 page 22.

<sup>254</sup> Alston note 8 page 22.

As explained above, if a targeted killing violates IHL then the one who physically “pulls the trigger”, as well as those who authorized it, can be prosecuted for war crimes regardless of whether the armed forces or members of Intelligence Personnel conducted it.<sup>255</sup> Furthermore, intelligence agents do not generally operate within a framework which places appropriate emphasis upon ensuring compliance with IHL and this renders violations more likely and causes a higher risk of prosecution both for war crimes and for violations of the laws of the State in which any killing occurs.<sup>256</sup> Finally, it is submitted that to the extent that a State uses intelligence agents for drone strikes to shield its operations from the transparency and accountability requirements under IHL and IHRL, it could also incur State responsibility for violating those requirements.<sup>257</sup>

### *Conclusion*

The clear conclusion that can be drawn regarding transparency and armed drones in terms of IHL is that the transparency requirement entails that governments must specifically disclose the measures that they have put in place to ensure respect for their obligations. Although experts and NGOs have put forward suggestions as to what degree of transparency would satisfy the international community, the question remains whether this deficit of transparency is inevitable given the circumstances surrounding armed conflicts. This includes not only factors such as the need for certain aspects of military operations to remain classified for security reasons, but also other factors such as the remote areas that the strikes often occur and the resources available at the time.

Regarding accountability, States are obligated to investigate alleged unlawful targeted killings and either to identify and prosecute perpetrators, or to extradite them to another State that has made out a *prima facie* case for the unlawfulness of a targeted killing and this is true in both IACs as well as NIACs.<sup>258</sup> Despite the transparency requirement and the obligation to investigate, there is a clear deficit of accountability concerning these operations.

---

<sup>255</sup> Alston note 8 page 22.

<sup>256</sup> Alston note 8 page 22.

<sup>257</sup> Alston note 8 page 22.

<sup>258</sup> Alston note 15 page 22.

Furthermore, despite the obligation to investigate alleged breaches of IHL being cited numerous times in international law instruments and UN documents, there seems to be little concrete guidance regarding what form these investigations should take apart from the fact that they should be effective, prompt, thorough and impartial and it is left to States to interpret the meaning of these words. States have thus far been able to insulate their “targeted” use of deadly force with armed drones from international scrutiny to avoid meaningful transparency or accountability in times of armed conflict, and it is time for the international community not only to demand meaningful transparency and accountability concerning these operations but to provide more concrete guidelines on how the investigations into alleged violations should be conducted, in order to be effective.

## Chapter 4: International Human Rights Law

### *Introduction*

The accountability mechanisms available for possible breaches of IHL by armed drone strikes have been comprehensively discussed. However, as discussed in Chapter I, the situations in which the current armed drone programmes are being conducted may not constitute an armed conflict, in which case IHRL applies. The right against the arbitrary deprivation of life, which has been described as a general principle of international law, a rule of customary international law as well as *jus cogens* norm, is often considered the “supreme right”.<sup>259</sup> However, it is also a right which could be violated by an armed drone when used for targeted killings. It has been submitted that IHRL is based on the fundamental principle that those responsible for violations must be held accountable and that a failure to investigate and punish those responsible for violations of the right to life in itself actually constitutes a violation of that right.<sup>260</sup>

Under international law, the right against the arbitrary deprivation of life is incorporated in Article 3 of Universal Declaration of Human Rights.<sup>261</sup> The right to life is also protected in various human rights treaties such as in Article 6 of the International Covenant on Civil and Political Rights (ICCPR); Article 2 of The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Article 4 of the American Convention on Human Rights as well as in Article 4 of the African Charter on Human and Peoples’ Rights.<sup>262</sup> Regarding International Criminal Law, unlawful killing is universally

---

<sup>259</sup> Heyns note 2 page 7 referring to Human Rights Committee, general comment No. 6 (1982), on the right to life and Human Rights Committee, general comment No. 24 (1994), on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights, para. 10.

<sup>260</sup> Heyns note 2 page 20.

<sup>261</sup> Heyns note 2 page 20.

<sup>262</sup> Heyns note 2 page 7.

criminalized and in some cases, violations of the right to life are considered to be war crimes or crimes against humanity.<sup>263</sup>

It can generally be said that in terms of IHRL standards, the intentional, premeditated killing of an individual would be unlawful unless it is the only way to protect against an imminent threat to life.<sup>264</sup> This raises issues because it is unlikely that drones are being used for targeted killings at the exact moment when the target is threatening someone's life, and certainly the targeted person is not threatening the life of the drone operator as he is seated thousands of miles away. Furthermore, drones enable a State to perform targeted killings in the territory of another State, over which it does not exercise effective control and also without having the individual in custody, which raises more questions such as whether States can be held accountable for their actions outside their own territories.<sup>265</sup>

### *Transparency*

There can be no accountability for violations of IHRL without public access to the information surrounding drone strikes, which means that there must be transparency regarding drone programmes before there can be accountability for violations of IHRL.<sup>266</sup> The current drone programmes have been heavily criticised due to the absence of an official record regarding the persons killed being released to the public, yet the situation is complex as the nature of the operations often makes it difficult for transparency to be achieved as the need for State security needs to be weighed up against the right that the public has to information.<sup>267</sup> However, experts have warned about the dangers of a continued lack of transparency surrounding drone strikes. That fact that States are preventing the public from scrutinising drone strikes could present a serious risk of leaving everyone less secure if other States around the world, as they acquire the new technology, claim for themselves the

---

<sup>263</sup> See also Heyns note 2 page 7 referring to International Tribunal for the Former Yugoslavia, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, case No. IT-95-13/1-A. See also Chapter 3 on War Crimes above.

<sup>264</sup> Heyns note 2 page 8.

<sup>265</sup> Heyns note 2 page 9.

<sup>266</sup> Heyns note 2 page 21.

<sup>267</sup> Heyns note 2 page 21.

same expanded rights to target their enemies without meaningful transparency or accountability.<sup>268</sup>

Although statistics have been released by anti-terrorism experts, NGO's, and reporters alike, the statistics are shockingly inconsistent which leads to the conclusion that although the exact number of people that have been killed in drone strikes is unknown, the number of civilian deaths have been significant.<sup>269</sup> For this reason, experts and NGO's alike have called for a greater degree of transparency regarding drone strikes, in order to assess their legality.

The following has been suggested in this regard: Firstly, there must be transparency as to the legal basis for the activities that agencies and States are involved in, both in terms of domestic law as well as in international law.<sup>270</sup> Secondly, there must be greater transparency as to the appropriate legal authority and operational responsibility to ensure that operations are being conducted in compliance with the domestic law of a given State.<sup>271</sup> Thirdly, there must be transparency as to who has the authority to approve killings using armed drones and lastly, there needs to be transparency as to the impact of armed drone strikes, which means that more information must be made publicly available in relation to civilian casualties resulting from drone strikes.<sup>272</sup>

### **The right to know the truth**

The *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* reaffirms that there is an inalienable right to know the truth regarding gross human rights violations and serious crimes under the international law.<sup>273</sup> Principle 1 states that it is an obligation of the State "to ensure the inalienable right to know the truth about violations". Principle 2 declares that "every people has the inalienable right to know the truth about past events

---

<sup>268</sup> See Heyns, CH., & Knuckey, S. (2013) 'The long-term international law implications of targeted killing practices' Harvard International Law Journal Online / Vol. 54 page 103.

<sup>269</sup> Alston note 15 page 36 - 37.

<sup>270</sup> Alston note 15 page 51.

<sup>271</sup> Alston note 15 page 51.

<sup>272</sup> Alston note 15 page 54-58.

<sup>273</sup> E/CN.4/2005/102/Add.1. See also the *Study on the Right to the Truth* note 145.

concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes”. Principle 4 articulates that “irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate”.

The right to the truth is also closely linked to the rule of law and the principles of transparency, accountability and good governance in a democratic society.<sup>274</sup> Furthermore, although the right to the truth is an autonomous right, it is closely linked to other rights such as inter alia the right to an effective remedy and the right to an effective investigation.<sup>275</sup> Regarding transparency and the right to know the truth, it has been stated that:

“In cases of gross human rights violations - such as torture, extrajudicial executions and enforced disappearance - serious violations of humanitarian law and other crimes under international law, victims and their relatives are entitled to the truth. The right to the truth also has a societal dimension: society has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, so that such events do not reoccur in the future.

The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance, missing persons, children abducted or during the captivity of a mother subjected to enforced disappearance, secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim.”<sup>276</sup>

What must always be borne in mind regarding transparency is that victims of drone strikes are no different from any other human rights victims and thus have a right to have access to information relating to allegations of human rights violations and their

---

<sup>274</sup> The *Study on the Right to the Truth* note 145 para 56.

<sup>275</sup> The *Study on the Right to the Truth* note 145 para 57.

<sup>276</sup> The *Study on the Right to the Truth* note 145 para 58-59.



investigation.<sup>277</sup> Human rights bodies such as the Human Rights Council has emphasized the need under international human rights law for transparency and have highlighted victims' right to know the truth about the perpetrators, their accomplices as well as their motives.<sup>278</sup>

### *Accountability*

The process of accountability can provide victims with a sense of justice.<sup>279</sup> In contrast, the legal or political protection of offenders from prosecution following the commission of IHRL violations gives confidence to those who would contemplate perpetrating them and conveys to victims and society that their feelings of powerlessness and helplessness are genuine.<sup>280</sup> Under IHRL, there is a right to a remedy for violations.<sup>281</sup> This right is found in numerous international instruments, in particular Article 8 of the Universal Declaration of Human Rights,<sup>282</sup> Article 2 of the International Covenant on Civil and Political Rights,<sup>283</sup> Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>284</sup> and Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>285</sup> The United Nations in its *Basic Principles and Guidelines* provides clarity on what this right entails and provides that:

---

<sup>277</sup> Heyns note 2 page 21.

<sup>278</sup> Heyns note 2 page 21.

<sup>279</sup> Kritz, NJ (1996) 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' *Law and Contemporary Problems*, Vol. 59, No. 4, Accountability for International Crimes and Serious Violations of Fundamental Human Rights (Autumn), pp. 127-152 page 129.

<sup>280</sup> Kritz note 279 page 149. Heyns note 268 page 130.

<sup>281</sup> United Nations A/RES/60/147 Resolution adopted by the General Assembly on 16 December 2005 [on the report of the Third Committee (A/60/509/Add.1)] 60/147. 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'. (Hereafter Basic Principles). The Basic Principles apply equally to IHL.

<sup>282</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

<sup>283</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 (ICCPR).

<sup>284</sup> UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965 (ICERD).

<sup>285</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984 (CAT).

“to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation;

and

(d) Provide effective remedies to victims, including reparation.”<sup>286</sup>

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* defines victims as persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of IHRL, or serious violations of IHL.<sup>287</sup> The term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Furthermore, a person is considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted.

In addition, the *Basic Principles* provides that taking account of individual circumstances, victims of gross violations of IHRL, as appropriate and proportional to the gravity of the violation and the circumstances of each case, should be provided with full and effective reparation which includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition and that such reparation

---

<sup>286</sup> *Basic Principles* note 281 para 3.

<sup>287</sup> *Basic Principles* note 281 para 8.

should be prompt, adequate and effective.<sup>288</sup> The *Basic Principles* also obliges States to enforce domestic judgements for reparations against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations.<sup>289</sup> In order to do so, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.<sup>290</sup> What must also be noted is that although the *Basic Principles* is discussed more comprehensively in this dissertation under the chapter regarding IHRL, it also provides for the right to a remedy of victims of serious violations of IHL, thus all the provisions provided therein apply equally to serious violations of IHL.

In helping societies and victims deal with IHRL abuses, various tribunals have been set up in the past to deal with claims of victims of mass IHRL violations and there are also various courts such as the European Court of Human Rights and the International Court of Justice which can deal with such claims. However, before those responsible can be held accountable for violations of IHRL, there must first be an investigation to determine whether or not a violation has taken place. Investigations are thus at the heart of accountability in IHRL.

### *Investigations*

Regarding investigations for violations of the right to not be arbitrarily deprived of life, the starting point is the ICCPR which protects the right to life under Article 6 which provides that:

- “1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final

---

<sup>288</sup> *Basic Principles* note 281 para 18.

<sup>289</sup> *Basic Principles* note 281 para 17.

<sup>290</sup> *Basic Principles* note 281 para 17.

judgement rendered by a competent court...”

The ICCPR, furthermore, requires States to “adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”<sup>291</sup> In this regard, the Human Rights Committee has stated that “a failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”<sup>292</sup>

### **Instruments that interpret the obligation to investigate**

Other bodies concerned with implementing the requirement to investigate in the IHRL context have added significantly to the form that investigations should take, especially those where the allegations involve the use of force.<sup>293</sup> The United Nations *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* requires governments and law enforcement agencies to “ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances” and to send a detailed report “promptly to the competent authorities responsible for administrative review and judicial control, whenever a death or serious injury results.”<sup>294</sup> Those affected by the alleged violation must enjoy access to an independent process, including a judicial process, and, in the event of their death, the right applies to their dependents.<sup>295</sup>

The *UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* also call for the “thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports

---

<sup>291</sup> ICCPR Art. 2.2. The right to life is set forth in Article 6.1.

<sup>292</sup> U.N. Human Rights Comm., General Comment No. 31, *Nature of the General Obligation Imposed on States Parties to the Covenant*, page 15, U.N. Doc. CCPR/C/21/Re.1/Add.13 (May 26, 2004).

<sup>293</sup> Schmitt note 156 page 50. See also Watkin, K (2004) *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1.

<sup>294</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 22, U.N. Doc. A/CONF.144/28/Rev.1.84 23.

<sup>295</sup> Schmitt note 156 page 50.

suggest unnatural death.”<sup>296</sup> The *Principles* set out guidelines on the collection of evidence, autopsies, calling witnesses, disposal of the body, and the availability of budgetary and technical resources.<sup>297</sup>

The UN *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* recognises that although most countries have a system for investigating the cause of death in cases with unusual or suspicious circumstances, in some countries, however, these procedures have broken down or have been abused, particularly where the death may have been caused by the police, the army or other government agents and in these cases, a thorough and independent investigation is rarely done.<sup>298</sup> Evidence that could be used to prosecute the offender is ignored or covered up, and those involved in the executions go unpunished.<sup>299</sup> *The Manual* put forward a detailed Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions (the “Minnesota Protocol”) to address the need for developing uniform standards which should guide all investigations of alleged extra-legal, arbitrary and summary executions.<sup>300</sup> *The Manual* includes detailed guidelines regarding, inter alia, the procedure of enquiry, the processing of crime scenes, the processing of evidence, the selection of investigators and the protection of witnesses.<sup>301</sup> Importantly, *the Manual* also provides a Model Autopsy Protocol<sup>302</sup> as well as a Model Protocol for Disinterment and Analysis of Skeletal Remains.<sup>303</sup>

---

<sup>296</sup> *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, E.S.C. Res. 1989/65, 9, U.N. Doc. E/1989/89 (May 24, 1989).

<sup>297</sup> *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* note 296 9-17.

<sup>298</sup> *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* U.N. Doc. E/ST/CSDHA/12 (1991) page 9-17.

<sup>299</sup> *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* note 298 9-17.

<sup>300</sup> *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* note 298 296 16.

<sup>301</sup> *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* note 298 page 16-27.

<sup>302</sup> *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* note 298 page 27-39.

<sup>303</sup> *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* note 298 page 39-46.

The *Draft Guidelines of the Committee of Ministers on Eradicating Impunity for Serious Human Rights' Violations* provides that States should establish mechanisms to ensure the integrity and accountability of their agents and should provide information to the public concerning violations of human rights and the authorities' response to these violations.<sup>304</sup> The guidelines also reaffirm that combating impunity requires that there be an effective investigation in cases of serious human rights violations and that his duty has an absolute character.<sup>305</sup> It furthermore provides that the obligation to protect the right to life requires that there should be an effective investigation when individuals have been killed, whether by State agents or private persons, and in all cases of suspicious death.<sup>306</sup>

### **How international courts have applied provisions dealing with investigations**

The question is now how the international courts have applied the IHRL provisions dealing with investigations. The European Court of Human Rights has been very active in applying the European Convention on the Protection of Human Rights and Fundamental Freedoms for the parties, which protects the right to life in Article 2.<sup>307</sup> An example which illustrates this is the case of *McKerr v. United Kingdom*, which arose from the issues in Northern Ireland.<sup>308</sup> In addressing the duty to investigate violations of the right to life the Court held that “the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.<sup>309</sup>

---

<sup>304</sup> Directorate General of Human Rights and Rule of Law Council of Europe (2011) ‘*Eradicating impunity for serious human rights violations: Guidelines and reference texts*’ page 9.

<sup>305</sup> *Eradicating impunity for serious human rights violations: Guidelines and reference texts*’ note 304 page 10.

<sup>306</sup> *Eradicating impunity for serious human rights violations: Guidelines and reference texts*’note 304 page 10.

<sup>307</sup> European Convention on the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>308</sup> *McKerr v. United Kingdom*, (2001)(Application no. 28883/95) European Court of Human Rights.

<sup>309</sup> *Mckerr* note 308 para 111.

What is furthermore important about the *Mckerr* decision is that it set out requirements for investigation. Firstly, the Court stated that governmental authorities must take “whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.”<sup>310</sup> Secondly, and importantly for the principle of transparency, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.<sup>311</sup> The Court noted, however, that the degree of public scrutiny required may vary from case to case but that the next of kin must be involved in the process at a minimum.<sup>312</sup> Thirdly, the Court found that the investigation must independent as well as prompt in order to be adequate.<sup>313</sup>

Another case which dealt with the obligation to investigate under IHRL is the case of *Ergi v Turkey*, which concerned clashes between Turkey and Kurdish rebels.<sup>314</sup> Regarding the obligation to investigate, the Court held that “[n]either the prevalence of violent armed clashes nor the high incidence of fatalities could displace the obligation under Article 2 to ensure that an effective, independent investigation was conducted into the deaths arising out of clashes with security forces, particularly in cases such as the present where the circumstances were in many respects unclear.”<sup>315</sup>

The final case for discussion is the case of *Isayeva v Russia*, which is a case involving Russia’s conflict in Chechnya.<sup>316</sup> In this case the Court noted that although the precise form of the investigation required varies according to circumstances at hand, “it may generally be regarded as necessary for the persons responsible for

---

<sup>310</sup> *Mckerr* note 308 para 113.

<sup>311</sup> *Mckerr* note 308 para 115.

<sup>312</sup> *Mckerr* note 308 para 115.

<sup>313</sup> *Mckerr* note 308 para 112 and 114.

<sup>314</sup> *Ergi v Turkey*, European Court of Human Rights (Application no. 40/1993/435/514) 28 July 1998.

<sup>315</sup> *Ergi* note 314 para 85.

<sup>316</sup> *Isayeva and Others v. Russia* (2005) European Court of Human Rights 128.



and carrying out the investigation to be independent from those implicated in the events.”<sup>317</sup>

A major challenge regarding investigations of IHRL violations involving the use of armed drones, which are not undertaken by international bodies, is that it will be the police who will be investigating a victim’s complaint about a death at hands of armed forces; and there is a completely natural instinct to close ranks in these situations.<sup>318</sup> Therefore, there is an interrelationship between a failure to investigate and the right to a remedy.<sup>319</sup> Another challenge is that States have argued that the obligation to investigate flows directly from treaty provisions and thus does not have to be complied with if a State is not party to that treaty, but this approach is incorrect as the duty to investigate killings exists in customary international law independent of treaty obligations.<sup>320</sup> This is due to the fact that the right to life has been accepted as part of customary international law, and a duty to investigate is assumed to be a central part of that norm.<sup>321</sup>

### *Conclusion*

In conclusion, IHRL places a particular emphasis on the obligation of States to investigate, prosecute and punish any alleged violation of the norms banning extrajudicial executions, including those by armed drones.<sup>322</sup> However, the obligation to investigate violations of the right to life is faced with many practical challenges, and first and foremost, can only be met if States accept the need for a certain degree of transparency, which in turn makes it possible to satisfy the obligation to ensure accountability in IHRL.<sup>323</sup>

---

<sup>317</sup> *Isayeva* note 316 para 210-211.

<sup>318</sup> Hampson note 152.

<sup>319</sup> Hampson note 152.

<sup>320</sup> Alston *supra* note 15 page 22.

<sup>321</sup> See *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* note 296 principle 9 and Alston note 14 page 23.

<sup>322</sup> Alston note 14 page 23.

<sup>323</sup> Alston note 14 page 23.

## Chapter 5: The interplay between Human Rights and Humanitarian Law regarding investigations

### *Introduction*

Although IHL and IHRL share similarities regarding their respective objects and objectives, they provide for diverging standards of protection of individuals.<sup>324</sup> IHRL acknowledges that States enjoy disproportionate power over individuals and thus seeks to safeguard them from the abuse of that power by imposing limits on its abuse by providing them with rights.<sup>325</sup> The relationship between the State and the individuals over whom it exercises control is the core of IHRL. In stark contrast, IHL is premised on a delicate balance between two competing State interests; namely being able to effectively use force when involved in an armed conflict and the protection of those for whom the State is responsible.<sup>326</sup> The rules of IHL thus represent a compromise negotiated by States over how best to accommodate these interests.<sup>327</sup> It is accepted that IHRL applies even in situations of armed conflict. However, the question is how it applies, as due to their divergent purposes and differing standards of protection, IHRL and IHL cannot simply be superimposed together in situations of armed conflict.

### **Interpretive principles**

The ICJ has made use of the *lex specialis derogate generali* principle to construe the interplay between the IHL and IHRL in situations of armed conflict.<sup>328</sup> In the *Nuclear Weapons* case, it was held that while the ICCPR does apply during armed conflict, the determination of when a killing is arbitrary and thus in violation of Article 6 is determined in terms of the *lex specialis* of IHL.<sup>329</sup> The relationship between IHL and IHRL was further developed in the *Legal Consequences of the Construction of a*

---

<sup>324</sup> D'aspremont, J (2011) 'Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation under The Guise of Conflict of Norms-Resolution' in Fitzmaurice, Malgosia & Merkouris, Panos (Eds), 'The European Convention On Human Rights And The Uk Human Rights Act' page 1.

<sup>325</sup> Schmitt note 156 page 51.

<sup>326</sup> Schmitt note 156 page 51.

<sup>327</sup> Schmitt note 156 page 51.

<sup>328</sup> D'aspremont note 324 page 4.

<sup>329</sup> *Nuclear Weapons* case note 20 para 25.

*Wall in the Occupied Palestinian Territory* advisory opinion, which also applied the principle of *lex specialis* and specifically highlighted three possibilities as to the interplay between the two bodies of law as follows: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”<sup>330</sup>

What can be seen from these cases is that the cohabitation of IHL and IHRL reaches the very core of armed conflict and that the key to determining the adequacy of a human rights investigation into a breach of a human rights norm during armed conflict is the principle of *lex specialis*.<sup>331</sup> Essentially, the *lex specialis derogat generali* principle will allow the rule considered more “special” to trump the rule considered more “general” in a situation where the *lex specialis* directly conflicts with the *lex generalis*.<sup>332</sup> However, the *lex generalis* does not cease to exist as the application of the principle only allows the *lex specialis* to prevail over the *lex generalis* to the extent of the *lex specialis*, thus the *lex generalis* continues to apply as far as it does not contradict the *lex specialis*.<sup>333</sup>

The purported duty under IHRL to capture, rather than kill, enemy combatants and civilians directly participating in hostilities can be used as an example to illustrate how the principle applies when the *lex specialis* directly conflicts with the *lex generalis*.<sup>334</sup> As discussed above, in terms of IHRL no one may be arbitrarily deprived of life, whereas in terms of IHL enemy combatants and directly participating civilians constitute lawful targets under IHL and it is lawful to kill them even when capture is feasible (this position is accepted for the purposes of this example although this concept has been the subject of debate, as discussed in Chapter 2 above). In such a case, the *lex specialis* IHL norm applies and thus displaces the *lex generalis* IHRL standard.

---

<sup>330</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* note 30 para 105- 106.

<sup>331</sup> Hampson, F (2008) ‘*The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*’ 90 Int. Rev. Red Cross page 549.

<sup>332</sup> D’aspremont, note 324 page 18.

<sup>333</sup> D’aspremont note 324 page 18.

<sup>334</sup> HCJ 769/02, *Public Comm. Against Torture in Israel v. Israel* (Targeted Killings Case) [2006] IsrSC 57(6) 285, 40.

### *The interplay regarding investigations*

However, the situation regarding investigations is different as investigations are required in both IHRL and IHL which raises the second possible application of the *lex specialis* principle which is the interpretation of the *lex generalis* by reference to the *lex specialis* or interpreting IHRL in the light of IHL, which will result in the “humanitarianisation” of IHRL.<sup>335</sup> Applying the principle in the context of investigations, the nature and scope of the IHL requirement to investigate will shape the comparable obligation in IHRL.<sup>336</sup>

From a practical viewpoint, this interpretation is logical as the manner in which investigations must be conducted in armed conflict varies according to the circumstances.<sup>337</sup> A State’s ability to conduct investigations must be analysed on a case by case basis considering the intensity of the conflict, but in general, it can be said that it is far less robust than in peace time for many reasons such as that evidence may have been destroyed during the hostilities, civilian witnesses may have become refugees or internally displaced persons, military witnesses may be deployed elsewhere or be engaged in combat, territory where the offense occurred may be inaccessible and forensic and other investigative tools may be unavailable.<sup>338</sup> Furthermore, the military forces, which in some situations could be the sole governmental authority in the area, have a mission to accomplish in times of armed conflict other than conducting investigations and thus human rights measures appropriate in times of peace such as the duty to conduct autopsies, involve family members, or maintain strict chains of custody, would not fit the realities of conducting an investigation during an armed conflict where the only viable standard is often one of reasonableness in the circumstances.<sup>339</sup>

---

<sup>335</sup> Jean d’ Aspermont (University of Manchester) ‘HRL and IHL-Overlap, Convergence and Conflict (theoretical perspectives)’ lecture given to the LLM International Law: Human Rights and Humanitarian Law in Military Operations students at the University of Pretoria on 19 February 2014 (notes on file with the author).

<sup>336</sup> Schmitt note 156 page 54.

<sup>337</sup> Schmitt note 156 page 54.

<sup>338</sup> Schmitt note 156 page 54.

<sup>339</sup> See the IHRL standards of investigations as described in IHRL documents cited in notes 296, 298 and 304. Schmitt note 156 page 54.

Therefore, it is inappropriate to use IHRL standards for investigations of violations of IHL during hostilities as IHL was developed by States with the specific context of armed conflict in mind. It is for this reason that in general, it is more practical to apply IHL investigatory standards to determine whether the IHRL investigatory requirements have been met in situations of armed conflict. However, the IHRL instruments which provide more substantive guidelines on what form the investigations should take can still be of use in interpreting the obligation to investigate in IHL, especially in modern day conflicts where the intensity of violence is often not extremely high.

### *Using IHRL instruments to inform IHL issues*

There is a trend in international law to find the answers to IHL issues in IHRL instruments.<sup>340</sup> One of the ways in which IHRL instruments may be used to inform IHL issues is that it is human rights bodies which seem to be more active in substantiating how the obligation to investigate must be interpreted, whereas there has been very little written as to what the obligation entails substantively in IHL.

This trend is evident from documents such as the *Draft Guidelines of the Committee of Ministers on Eradicating Impunity for Serious Human Rights' Violations*,<sup>341</sup> the *UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*<sup>342</sup> and the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* which have all been drafted by bodies with a human rights focus.<sup>343</sup> Although the *Basic Principles on the Right to a Remedy* does directly address how violations of both IHL and IHRL must be investigated, this document was developed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities under the auspices of its parent body the United Nations Commission on Human Rights, and not an IHL body.<sup>344</sup>

---

<sup>340</sup> Hampson note 152.

<sup>341</sup> *Draft Guidelines* note 304.

<sup>342</sup> *UN Manual* note 298.

<sup>343</sup> *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* note 296.

<sup>344</sup> Van Boven, T (2010) *The United Nations Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Gross Violations Of International Human Rights Law And*

This trend is also evident from the Goldstone Report, which was mandated by the United Nations regarding the Gaza Conflict, and which derived four universal principles of investigations from the work of human rights courts and bodies as being: independence, effectiveness, promptness, and impartiality, which have since permeated IHL.<sup>345</sup> It must be noted that this was a human rights body deriving principles from other IHRL bodies and IHRL jurisprudence, to be applied in situations where IHL is applicable.

This phenomenon is perhaps due to the fact that IHL only applies during armed conflict, and thus can only be breached when there is such a conflict, whereas IHRL applies at all times and thus IHRL can be violated at any time, thus requiring more substantive rules regarding transparency and investigations. This could also be due to the fact that a State's ability to conduct investigations in armed conflict in general is far less robust than in peace time and, therefore, perhaps it has not seemed as necessary to determine strict guidelines regarding what precise form these investigations must take as a State's ability to conduct investigations must be analysed on a case by case basis considering the intensity of the conflict.

However, given the modern day prevalence of situations in which the lines between which legal regime is applicable -IHL or IHRL- is becoming increasingly blurred, such as the situations in which armed drones are currently being used, it is submitted that it is important to establish firm and clear guidelines regarding the substantive content of the obligation to investigate breaches of IHL. This is further supported by the essential nature that an effective investigation plays in holding those responsible for violations of IHL accountable.

Another way that human rights instruments are being turned to for answers to IHL issues concerns accountability. Human rights courts are being used as gateways for victims of IHL abuses to claim reparations, perhaps due to the fact that there is no

---

*Serious Violations Of International Humanitarian Law*' UN Audiovisual Library of International Law page 1. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* note 281.

<sup>345</sup> *The Goldstone Report* note 248.

permanent IHL court and that the IHRL courts are already well established.<sup>346</sup> This can be seen in the case of *Cyprus v Turkey*, in which Cyprus brought an inter-state claim against Turkey in which it alleged that Turkey had been responsible for human rights violations relating to Article 2 (right to life), Article 3 (prohibition of torture), and Article 5 (right to liberty and security) of the European Convention on Human Rights arising out of the situation in northern Cyprus when Turkey carried out military operations there in July and August 1974.<sup>347</sup>

The Court in this case noted that the most important principle of international law relating to the violation by a State of a treaty obligation was that the breach of an engagement involved an obligation to make reparation in an adequate form, and that the “just satisfaction rule,” whereby the Court can afford just satisfaction to the injured party if the internal law of the other party only allows partial reparation to be made, did apply to inter-State cases.<sup>348</sup> However, the Court reiterated that according to the very nature of the Convention, it was the individual and not the State who was directly or indirectly harmed and primarily “injured” by a violation of one or several Convention rights thus if just satisfaction was afforded in an inter-State case, it always had to be done for the benefit of individual victims.<sup>349</sup>

The Court noted that the Cypriot Government had submitted just satisfaction claims in respect of violations committed against two precise and objectively identifiable groups of people, namely 1,456 missing persons and the enclaved Greek-Cypriot residents of the Karpas peninsula thus just satisfaction was not being sought with a view to compensating the Cypriot State for a violation of its rights but for the benefit

---

<sup>346</sup> Hampson note 152. See also *Ergi v Turkey*, European Court of Human Rights (Application no. 40/1993/435/514) 28 July 1998 and *Isayeva and Others v. Russia*, 2005 European Court of Human Rights 128 as discussed above. Both cases arose from NIACs but human rights instruments were turned to and interpreted by the courts.

<sup>347</sup> *Cyprus v. Turkey* ECHR (application no. 25781/94) 12 May 2014. See also Lott, A (2014) “*Cyprus v. Turkey: Just Satisfaction and Acts of Aggression*” ASIL Insights volume 18 issue 18. Available at <http://www.asil.org/insights/volume/18/issue/18/cyprus-v-turkey-just-satisfaction-and-acts-aggression>. Accessed 25 September 2014.

<sup>348</sup> ECHR 131 (2014) 12.05.2014 Press Release issued by the Registrar of the Court “*Grand Chamber judgment on the question of just satisfaction in the Cyprus v. Turkey case.*” page 3. European Convention of Human Rights Art 41.

<sup>349</sup> Press Release note 343 page 3.



of individual victims.<sup>350</sup> Insofar as these individuals were concerned, the Court considered that the Cypriot Government was entitled to make a claim and that granting just satisfaction in the case would be justified.<sup>351</sup>

Therefore, it is clear that in terms of this case, if an individual suffers human rights violations, committed by the armed forces of another State during an armed conflict, a State may obtain a substantial monetary award for the violation of the individual's rights on behalf of the victim using human rights mechanisms.

### *Conclusion*

Regarding armed drones, it is clear from the discussion above that although they are not unlawful as weapons in themselves, they can easily be used in such a way as to violate various principles of IHL and IHRL in times of armed conflict. This gives rise to the duty in IHRL and IHL to investigate the violations in order to hold offenders accountable. As it can generally be said that there is no inconsistency between the broad principles applicable in IHRL and IHL regarding investigations, it is up to States to translate these general principles into practices applicable to situations where the legality of a drone strike in an armed conflict is questioned, and seeing as IHRL bodies have been more active in determining these substantive standards, it is these documents which should be turned to as a starting point.<sup>352</sup>

---

<sup>350</sup> *Press Release* note 343 page 3.

<sup>351</sup> *Press Release* note 343 page 3.

<sup>352</sup> Schmitt note 156 page 56.

## **Chapter 6: Complicating accountability: the use of force in foreign territory and the applicability of human rights norms to extraterritorial actions by States**

Two questions may arise from the drone strikes that have been documented so far such as the US drone strikes against alleged members of the Taliban and Al-Qaeda in Pakistan. Firstly, can a State exercise its right to self-defence against a non-state actor and secondly, if affirmative, does this right to self-defence also allow for the extraterritorial use of force on the territory of another sovereign State?

### **The use of force**

The use of force has been discussed in Chapter I of this dissertation and it was concluded that it is only permitted in a situation where the United Nations Security Council has authorized it to maintain or restore international peace and security (Article 43) or where a State exercises its inherent right of self-defence (Article 51). There is another, unwritten, exception to the general prohibition of the use of force, which is an intervention upon invitation.

### **The exception of self-defence**

The exception of self-defence was discussed at length in Chapter I, and it was concluded that it is arguable that a State that uses armed drones in an inter-state operation against non-state actors, which has not been consented to by the other State may claim it was acting in self-defence, and before an armed attack has occurred, it may claim it was acting in anticipatory self-defence. However, this position does remain contentious and is discussed further below.

### ***Accountability and the extraterritorial use of force in the territory of another State***

The question of whether a State has a right to cross territorial borders in pursuing their right to self-defence against non-state armed groups and conduct drone strikes in the territory of another sovereign State raises questions of sovereignty. In this regard it has been submitted that:

“A targeted killing conducted by one State in the territory of a second State does not violate the second State’s sovereignty if either (a) the second State consents, or (b) the first, targeting, State has a right under international law to use force in self-defence under Article 51 of the UN Charter, because (i) the second State is responsible for an armed attack against the first State, or (ii) the second State is unwilling or unable to stop armed attacks against the first State launched from its territory. International law permits the use of lethal force in self-defence in response to an “armed attack” as long as that force is necessary and proportionate.”<sup>353</sup>

Regarding consent, although it is accepted that a State may consent to the use of force on its territory by another State, it does not absolve either of the concerned States from their obligations to abide by IHRL and IHL with respect to the use of lethal force against a specific person.<sup>354</sup> Therefore, in terms of IHRL, the consenting State’s responsibility to protect those on its territory from the arbitrary deprivation of the right to life is not extinguished and applies at all times so the consenting State may only lawfully authorise a killing by the targeting State to the extent that the killing is carried out in accordance with the applicable IHL or IHRL rules.<sup>355</sup>

It has been submitted that at a minimum, the consenting State is obliged to require the targeting State to verifiably demonstrate that the person against whom lethal force is to be used can be lawfully targeted and that the targeting State will comply with the applicable law.<sup>356</sup> Regarding accountability it has been submitted that:

“After any targeted killing, the consenting State should ensure that it was legal. In case of doubt, the consenting State must investigate the killing and, upon a finding of wrongdoing, seek prosecution of the offenders and compensation for the victims.”<sup>357</sup>

In the absence of consent, States may also invoke the right to self-defence as justification for the extraterritorial use of force involving targeted killings under Article 51 of the Charter.<sup>358</sup> However, even if it is accepted that under Article 51 of the Charter and customary international law, a State may invoke self-defence to justify

---

<sup>353</sup> Alston note 8 page 11-12.

<sup>354</sup> Alston note 8 page 12.

<sup>355</sup> Alston note 8 page 12, UN General Assembly, Resolution on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, A/Res/51/191, 10 Mar. 2005, para. 1.

<sup>356</sup> Alston note 8 page 12. See also E/CN.4/2005/7, at para. 41.

<sup>357</sup> Alston note 8 page 12.

<sup>358</sup> Alston note 8 page 13.

its use of force to target individuals of a non-state armed group in another State's territory when an armed attack occurs or is imminent, the State claiming to be acting in self-defence must still satisfy the requirements of necessity and proportionality in its actions and controversy still arises in the context of the use of force of States in the territory of other States, such as by the US through their drone programme against alleged terrorists in other countries, for example Pakistan.<sup>359</sup>

If the US drone strikes do not comply with the requirements of self-defence, this has ramifications for accountability as violations of the limitations on the right to self-defence results in State and individual criminal responsibility for aggression and there is also liability for the unlawful killing itself because if it violates IHL, it may constitute a war crime.<sup>360</sup>

All States Members of the United Nations have an obligation to submit reports of measures adopted by States in the exercise of self-defence to the Security Council and it could be argued that the rationale for this reporting requirement is to contribute towards the protection of the legal rights of sovereignty by the international community.<sup>361</sup> However, it can also be seen as imposing an obligation of transparency and justification to the international community and although a failure to submit such a report will not render unlawful an otherwise lawful action taken in self-defence, it may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.<sup>362</sup>

### *The extraterritorial application of human rights treaties*

As drones are being used by one State in the territory of another State, and in some situations possibly unlawfully (not acting with UNSC authorisation, in self-defence, or with the consent of the other State) the question of how States can be held accountable for their actions outside their own territories is raised.<sup>363</sup>

The possibility of the extraterritorial application of human rights treaties such as the ICCPR, had not been seriously considered by the international community until the

---

<sup>359</sup> Heyns note 2 page 14.

<sup>360</sup> Alston note 8 page 14.

<sup>361</sup> Heyns note 2 page 20.

<sup>362</sup> Heyns note 2 page 20.

<sup>363</sup> Heyns note 2 page 24.

1990s, largely due to the fact that culturally, the rights of others were to a significant extent beyond contemplation and the process of human rights acculturation took time.<sup>364</sup> Despite the modern view that human rights treaties can apply extraterritorially, certain States, such as the USA, are still of the view that the ICCPR cannot apply extraterritorially. The USA has based its arguments on the following: Firstly, the existence of a default presumption against extraterritorial application; secondly, the ordinary meaning of “within its territory” coupled with a conjunctive ‘and’ “subject to its jurisdiction” in the jurisdiction clause of the ICCPR; and lastly, the “clear understanding” to that effect from the preparatory work.<sup>365</sup>

However, as stated above, the right to life is a general principle of international law and a customary norm thus States are bound to ensure the realization of the right to life when they use force irrespective of whether it is inside or outside their borders.<sup>366</sup> Although the applicability of such treaties is normally limited to individuals under the jurisdiction of a State party, which would usually mean that persons finding themselves within the territory of a State are presumed to be within its territorial jurisdiction, there is another recognised type of jurisdiction known as personal jurisdiction, which is established when the State has physical power, authority or control over individuals.<sup>367</sup> The majority view is now that States are bound by those treaties to which they are a party, and the fact that human rights treaty obligations can apply to the conduct of a State outside its territory has been confirmed by international courts on various occasions.<sup>368</sup>

In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, the ICJ stated in this regard that:

“While the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the [ICCPR], it would seem natural that, even when such is the case, States parties to the Covenant

---

<sup>364</sup> Milanovic, M (2013) ‘*Foreign Surveillance and Human Rights, Part 2: Interpreting the ICCPR*’ EIJL Talk! November 26 2013. Available at <http://www.eijltalk.org/foreign-surveillance-and-human-rights-part-2-interpreting-the-iccpr/> (accessed 10 October 2014)

<sup>365</sup> Milanovic note 364. ICCPR Art 2(1). See also the United Nations Human Rights Committee, Fifty-third session CCPR/C/SR.1405 25 April 1995, para 20.

<sup>366</sup> Heyns note 2 page 24.

<sup>367</sup> Heyns note 2 page 10.

<sup>368</sup> Heyns note 2 page 24.

should be bound to comply with its provisions...[The *travaux préparatoires* of the ICCPR] show that, in adopting the wording chosen, the drafters of the [ICCPR] did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”<sup>369</sup>

In the *Al-Jedda* case, the European Court of Human Rights found that the internment of the applicant, who was detained at a British detention facility in Iraq, was attributable to the United Kingdom and that during his internment the applicant fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the Convention.<sup>370</sup> In the *Al-Skeini* case, the court similarly held that the United Kingdom assumed the exercise of some of the public powers normally to be exercised by a sovereign government in Iraq and stated as follows:

“In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.”<sup>371</sup>

In the *Loizidou v Turkey* case the European Court of Human Rights recognised the complexity of the situation surrounding jurisdiction and stated as follows:

“The extraterritorial legal effect of human rights standards is particularly difficult to assess. While there can be no doubt that States have to refrain from interfering with human rights irrespective of the place of their actions, to ensure human rights beyond their boundaries are mostly beyond their capabilities. It is noteworthy, in this connection, that the International Covenant on Civil and Political Rights limits the

---

<sup>369</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* note 30 para 109.

<sup>370</sup> *Al-Jedda V. The United Kingdom* European Court Of Human Rights (Application No. 27021/08) Judgment 7 July 2011.

<sup>371</sup> *Al-Skeini And Others v. The United Kingdom* ECHR (Application No. 55721/07) Judgment 7 July 2011.

commitments of States to individuals within their territory and subject to their jurisdiction (Article 2 para. 1).<sup>372</sup>

However, the Court went on to state that there are exceptions to this rule:

“Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”<sup>373</sup>

In the *Ilaşcu* case, the court stated as follows:

“Moreover, the Court...has also acknowledged that the concept of “jurisdiction” within the meaning of Article 1 of the Convention is not necessarily restricted to the national territory of the High Contracting Parties. The Court has accepted that in exceptional circumstances the acts of Contracting States performed outside their territory, or which produce effects there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.”<sup>374</sup>

In the *Coard* case, the Inter-American Commission of Human Rights examined complaints about the applicants’ detention and treatment by United States’ forces in the first days of the military operation in Grenada and commented as follows:

“While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination – ‘without distinction as to race, nationality, creed or sex’. ... Given that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons

---

<sup>372</sup> *Case Of Loizidou v. Turkey* (Preliminary Objections) European Court Of Human Rights (Application No. 15318/89) Judgment 23 March 1995 page 37-38.

<sup>373</sup> *Loizidou V. Turkey* note 372 page 38.

<sup>374</sup> *Case Of Ilaşcu And Others v Moldova And Russia* (Application No. 48787/99) Judgment 8 July 2004 page 72.



within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control."<sup>375</sup>

It is clear from the above cases that States exercise territorial jurisdiction beyond their own borders where they exercise effective control over such territory, whereas personal jurisdiction is established when the State has physical power, authority or control over individuals.<sup>376</sup> However, the situation regarding armed drones is interesting as they allow States to perform targeted killings without exercising effective control over territory and without having the individual in custody therefore without any territorial or personal jurisdiction.<sup>377</sup> From this, the question arises as to whether targeting by armed drones can result in violations of the right to life under the applicable Human Rights treaties.

In the *Alejandro* case, the Government of Cuba had shot down two planes carrying four civilians flying on a routine humanitarian mission to rescue rafters in the Florida straits. As the four rescue workers flew their unarmed airplanes which had been registered in the United States in broad daylight over international waters, the Cuban Air Force attacked them with air-to-air MiG missiles without provocation or warning, killing all four individuals.<sup>378</sup> The court found that the actions by the Cuban military aircraft in international airspace violated the right to life of the passengers and thus it seems the question can be positively answered.

However, if the *Banković* case is examined, it would appear that this question must be answered in the negative. In the *Banković* decision, the Grand Chamber of the Court found that the bombing of buildings in Belgrade resulting in the death of sixteen civilians was an extraterritorial act outside the "jurisdiction" of the High

---

<sup>375</sup> *Coard et al. v. the United States*, Report No. 109/99, case No. 10.951, 29 September 1999, paras 37, 39, 41 and 43.

<sup>376</sup> Heyns note 2 page 10.

<sup>377</sup> Heyns note 2 page 10.

<sup>378</sup> *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republic of Cuba*, case 11.589, Report No. 86/99, 29 September 1999.

Contracting Parties to the Convention responsible for such bombing and the complaint of the relatives of the deceased was deemed inadmissible.

Regarding the extraterritorial application of the Convention, the Court stated as follows:

“The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.”<sup>379</sup>

The Court thus stressed that it needed to be satisfied that exceptional circumstances exist which could amount to the extraterritorial exercise of jurisdiction by a Contracting State.<sup>380</sup> However, this decision has been criticised by experts and has been described as incomprehensible in subsequent decisions.<sup>381</sup>

### *Conclusion*

Therefore, although the position is unclear, it has been submitted that where a State targets individuals abroad with lethal force, for example using armed drones, it intends to exercise control over the individuals concerned which results in those actions being governed by the State’s IHRL treaty obligations as the victims of such drone strikes have arguably been brought within the jurisdiction of the operating State.<sup>382</sup>

However, it must be borne in mind that the fact that a State has human rights obligations with regard to conduct outside its territory does not mean that those obligations are the same as those that arise within its territory.<sup>383</sup> Although the control of territory means that a State has obligations, to respect and fulfil the human rights of those on the territory, if State agents merely have control over an individual

---

<sup>379</sup> *Banković and Others v. Belgium and Others* (dec.) [GC] European Court of Human Rights (application no. 52207/99) 12 December 2001.

<sup>380</sup> *Bancovic* note 379 para 74.

<sup>381</sup> *Bancovic* note 379 para 74.

<sup>382</sup> Heyns note 2 page 11.

<sup>383</sup> Heyns note 2 page 11.

in territory over which it does not have control, it has been submitted that the State is obliged to respect the rights of those individuals at a minimum.<sup>384</sup>

It has been submitted that it would be nonsensical to interpret human rights treaties to allow a State party to perpetrate violations of the treaty on the territory of another State, which it could not perpetrate on its own territory.<sup>385</sup> If this line of reasoning is applied to the right to life, which forms part of general international law and customary international law, any positive action by a State must be carried out in compliance with its IHRL obligations regardless of whether such action is taken on its own territory or that of another State.<sup>386</sup> Therefore, a State employing the use of armed drones to conduct targeted killings on another State's territory must comply with its IHRL obligations at all times, and if it fails to do so, such a State must be held accountable.

---

<sup>384</sup> Heyns note 2 page 11.

<sup>385</sup> Heyns note 2 page 11.

<sup>386</sup> Heyns note 2 page 11.

## Chapter 7: Conclusion

Two key points are clear from the discussions regarding transparency and accountability under international law above in the context of armed drone strikes. The first is that there is an abundance of rules applicable, both under IHL as well as IHRL. However, there is a trend in international law to find the answers to IHL issues in IHRL instruments. This tendency is no different as far as accountability is concerned. The second, more pertinent issue is that States are not being transparent and consistent regarding which legal regime applies to instances in which armed drones are used. This is an extremely troubling tendency as States cannot be allowed to expand the definition of core international law concepts such as self-defence, the use of force, and NIACs to suit their own narrow and short term interests as this creates uncertainty and allows those violating international law to escape accountability.

What is also clear regarding armed drone strikes is that there has been a lack of meaningful accountability. This is fundamentally due to the cloudiness surrounding the applicable legal framework. It is impossible to hold anyone accountable for IHL or IHRL violations if it remains unclear which regime is applicable to each specific strike. This is further compounded by the lack of meaningful transparency surrounding the strikes. The lack of transparency can be partially justified in the sense that it can be attributed to the remote and inaccessible areas that the drone strikes often occur in. However, drone technology allows for a clear picture of each specific strike to be recorded and the lack of transparency is arguably mainly attributable to the fact that the circumstances surrounding targeted killings using armed drones are often kept secret by States for so-called “security” reasons, which prevents the strikes from being scrutinised by the public. This lack of transparency and accountability concerning the use of armed drones particularly, has raised concerns globally, not only in society and amongst legal experts and NGOs, but within the UN framework as well.

This lack of transparency could cause a global snowball effect- as more and more States acquire technology such as armed drones, they may also claim for

themselves the same expanded rights to target their enemies without meaningful transparency which in turn results in a lack of accountability. It is, therefore, submitted that States' policies regarding targeting individuals using armed drones should not only serve their own narrow and short-term interests- as this could potentially result in a global stage on which armed drones can be used to "police" situations in other States, leaving everyone less secure- but should uphold the rule of law and ensure compliance with international law, which includes affording the protections guaranteed by IHL and IHRL.

Word Count: 29 724

## Bibliography

### Books

Cottier, M (2008) 'Article 8: War crimes –introduction/general remarks', in Triffterer, Otto (ed), *Commentary on the 'Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*.

D'aspremont, J (2011) 'Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation Under The Guise of Conflict of Norms-Resolution' in Fitzmaurice, Malgosia & Merkouris, Panos (Eds), 'The European Convention On Human Rights And The Uk Human Rights Act'.

Fleck ,D (Ed) (2013) 'The Handbook of International Humanitarian law' page  
Henckaerts, J-M and Doswald-Beck, L (2005) 'Customary International Humanitarian Law Volume I: Rules. ICRC Cambridge University Press, Cambridge.

ICRC (1987) 'Commentary on Additional Protocol I' Dordrecht, Geneva.

Melzer, Nils (2009)'Interpretive guidance on the notion of Direct participation in hostilities under international humanitarian law' ICRC.

Robinson, D, 'The Rome Statute and its impact on national law', in Cassese, Antonio; Gaeta,Paola and Jones, John(eds), 'The Rome Statute of the International Criminal Court,' Oxford University Press, New York.

U.S Department of Defence *Dictionary of military and associated terms* (2001).

Webster, D 'Letter to Henry Stephen Fox', in K.E Shewmaker (ed.). *The Papers of Daniel Webster: Diplomatic Papers, vol. 1. 1841-1843* (1983) 62. Dartmouth College Press.

Werle, G (2005) '*Principles of International Criminal Law*' T.M.C. Asser Press, The Hague.

### **Journal articles**

Alley, R (2013) "*The Drone Debate: Sudden Bullet or Slow Boomerang?*" The Centre for Strategic Studies: New Zealand.

Alston,P (2011) '*The CIA and Targeted Killings Beyond Borders*' New York University School Of Law Public Law & Legal Theory Research Paper Series Working Paper No. 11-64.

Bachmann, S (2013) '*Targeted Killings: Contemporary Challenges, Risks and Opportunities*' Journal of Conflict & Security Law, Vol. 18 No. 2, 259–288.

Bassiouni, MC (1996) '*Searching For Peace And Achieving Justice: The Need For Accountability*' Law And Contemporary Problems Vol. 59: No. 4 Page 9-28.

Breau,S Aronsson,M & Joyce,R (2011) '*Discussion Paper 2: Drone Attacks, International Law,and The Recording Of Civilian Casualties Of Armed Conflict*' Oxford Research Group.

Casey-Maslen,S (2012).'*Pandora's box? Drone strikes under jus ad bellum, jus in bello, and international human rights law*' International Review of the Red Cross Volume 94 Number 886 597-625 p 601. Lubell Noam (2011), 'Extraterritorial Use of Force against Non-State Actors,' Oxford Monographs in International Law.

David, S R (2002) '*Fatal Choices: Israel's Policy of Targeted Killing*' The Begin-Sadat Center for Strategic Studies Bar-Ilan University Mideast Security And Policy Studies No. 51.



Dennis, MJ (2005) '*Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*' The American Journal of International Law, Vol. 99, No. 1 pp. 119-141.

Focarelli, C (2010) '*Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*' 21 European Journal of International Law 125.

Hampson, F (2008). '*The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body*' 90 Int. Rev. Red Cross 549

Heyns, CH., & Knuckey, S. (2013) '*The long-term international law implications of targeted killing practices*' Harvard International Law Journal Online / Vol. 54.

Karock, U (2013) '*Quick Policy Insight Drones: Engaging in debate and accountability*' Policy Department, Directorate-General for External Policies DG EXPO/B/PolDep/Note/2013\_144 PE 491.497.

Kennedy, G (2013) '*Drones: Legitimacy and Anti-Americanism*' Parameters 42(4)/43(1) Winter-Spring 2013.

Kretzmer, D (2005) '*Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*' The European Journal of International Law Vol. 16 no.2.

Kritz, NJ (1996) '*Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*' Law and Contemporary Problems,' Vol. 59, No. 4, Accountability for International Crimes and Serious Violations of Fundamental Human Rights (Autumn) .

Lott, A (2014) "*Cyprus v. Turkey: Just Satisfaction and Acts of Aggression*" ASIL Insights volume 18 issue 18.

Milanovic, M (2013) '*Foreign Surveillance and Human Rights, Part 2: Interpreting the ICCPR*' EIJL Talk! November 26 2013. Available at <http://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-2-interpreting-the-iccpr/>.

Oberg, M. D (2009) '*The absorption of grave breaches into war crimes law*' International Review of the Red Cross vol 91 no 873.

Orr, AC '*Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*' Cornell International Law Journal Vol. 44 729-752.

Rosen, F (2013) '*Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility*' Journal of Conflict & Security Law.

Sassòli, M (2006) '*Transnational Armed Groups And International Humanitarian Law*' Program On Humanitarian Policy And Conflict Research Harvard University Occasional Paper Series No.6.

Sassòli, M (2014) '*Reading materials suggested by Marco Sassòli*' Professor of International Law and Director of the Department of public international law and international organization at the University of Geneva, in view of his course to be given in the framework of the LL.M. course on International Humanitarian and Human Rights Law in Military Operations at the Faculty of Law of the University of Pretoria, on 23 April 2014.

Schmitt, MN (2010) '*Drone Attacks under the Jus Ad Bellum and Jus in Bello: Clearing the "Fog of Law"*' 13 Ybk IHL 311.

Schmitt, MN (2011) '*Investigating violations of International Law in Armed Conflict*' Harvard National Security Journal Vol 2 31.

Troszczynska-Van Genderen, W & Bellelli, J (2013) '*Creating Accountability: Recent Developments In The US Policy On Drones*' EU Policy Department, Directorate-General For External Policies.

Van Boven, T (2010) '*The United Nations Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Gross Violations Of International Human Rights Law And Serious Violations Of International Humanitarian Law*' UN Audiovisual Library of International Law.

Watkin, K (2004) '*Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*', 98 American Journal of International Law 1.

### **NGO and governmental reports, press releases and statements**

'Addendum – Eighth report on State responsibility by Mr Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (part 1)', Extract from the Yearbook of the International Law Commission 1980, Vol. II(1), UN Doc. A/CN.4/318/Add.5-7.

Amnesty International (2013) '*USA: The Devil In The (Still Undisclosed) Detail Department Of Justice 'White Paper' On Use Of Lethal Force Against U.S. Citizens Made Public*' Published By Amnesty International, International Secretariat, United Kingdom.

Amnesty International (2013) '*Will I be next? USA Drone Strikes in Pakistan*' Published By Amnesty International, International Secretariat, United Kingdom.

Directorate General of Human Rights and Rule of Law Council of Europe (2011) '*Eradicating impunity for serious human rights violations: Guidelines and reference texts*'.

ECHR 131 (2014) 12.05.2014 Press Release issued by the Registrar of the Court “*Grand Chamber judgment on the question of just satisfaction in the Cyprus v. Turkey case.*” .

Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 22, U.N. Doc. A/CONF.144/28/Rev.1.84 23.

Human Rights Watch (2013) ‘*Between a Drone and Al-Qaeda*’ ISBN: 978-1-62313-0701.

Human Rights Watch (2010) ‘*Turning A Blind Eye: Impunity for Laws-of-War Violations during the Gaza War*’ ISBN: 1-56432-598-9.

ICRC *Opinion Paper* March 2008 accessed at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> on 18 July 2014.

ICRC (2011) “*International humanitarian law and the challenges of contemporary armed conflicts*”, document 31IC/11/5.1.2.

International Humanitarian Law Research Initiative, Harvard University Program On Humanitarian Policy And Conflict Research (2009) ‘*Manual And Commentary On International Law Applicable To Air And Missile Warfare*’

O’Connell, ME “*Lawful Use of Combat Drones*” Congress of the United States, House of Representatives, Subcommittee on National Security and Foreign Affairs, Hearing: Rise of the Drones II, Examining the Legality of Unmanned Targeting, April 28, 2010.

*Preparatory Committee on Establishment of International Criminal Court discusses inclusion of war crimes in list of “core crimes”*, Press Release L/2764, 26 March 1996.

Press Release, North Atlantic Council, 12 Sept. 2001, available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

Statement by Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights concerning the launch of an inquiry into the civilian impact, and human rights implications of the use of drones and other forms of targeted killings for the purpose of counter-terrorism and counter-insurgency, '[http://www.foreignpolicy.com/files/fp\\_uploaded\\_documents/130124\\_SRCTBenEmmersonQCStatement.pdf](http://www.foreignpolicy.com/files/fp_uploaded_documents/130124_SRCTBenEmmersonQCStatement.pdf) accessed on 2 May 2014.

The United States, Office of the President, “Fact sheet: U.S. policy standards and procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities”, 23 May 2013.

## **Cases**

*Al-Jedda V. The United Kingdom* European Court Of Human Rights (Application No. 27021/08) Judgment 7 July 2011.

*Al-Skeini And Others v. The United Kingdom* European Court of Human Rights (Application No. 55721/07) Judgment 7 July 2011.

*Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republic of Cuba*, case 11.589, Report No. 86/99, 29 September 1999.

*Banković and Others v. Belgium and Others* (dec.) [GC] European Court of Human Rights (application no. 52207/99) 12 December 2001.

*Caroline Incident*, 29 B.F.S.P. 1137 – 1138

*Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*; Merits, International Court of Justice (1986) ICJ Reports.

*Cyprus v. Turkey* (application no. 25781/94) European Court of Human Rights 12 May 2014.

Decision of the German Federal Prosecutor of 20 June 2013.

*Ergi v Turkey*, European Court of Human Rights (Application no. 40/1993/435/514) 28 July 1998.

*Ilaşcu And Others v Moldova And Russia* European Court of Human Rights (Application No. 48787/99) Judgment 8 July 2004.

*Isayeva and Others v. Russia*, (Application no. 57950/00) European Court of Human Rights 24 February 2005.

*Juan Carlos Abella v. Argentina* (1997). IACHR Report No. 55/97, OEA/Ser.L.V./II.95, doc. 7 rev. 271

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136.

*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (1996) I.C.J. Reports.

*Loizidou v. Turkey* (Preliminary Objections) European Court Of Human Rights (Application No. 15318/89) Judgment 23 March 1995.

*McKerr v. United Kingdom*, (Application no. 28883/95) European Court of Human Rights 4 May 2001.

*Oil Platforms (Islamic Republic of Iran v. United States of America)* (2003) Judgment, I.C.J. Reports.

*Prosecutor v. Mile Mrkšić and Veselin Šjivančanin*, International Tribunal for the Former Yugoslavia case No. IT-95-13/1-A.

*Public Comm. Against Torture in Israel v. Israel* (Targeted Killings Case) HCJ 769/02 [2006] IsrSC 57(6).

*The Prosecutor v. Dusko Tadić*, ICTY Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995.

## **Conventions**

Convention on Prohibitions of Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 10 October 1980.

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, opened for signature at New York, Nov. 26.

Declaration II concerning Asphyxiating Gases, 29 July 1899.

Declaration III concerning Expanding Bullets, 29 July 1899.

European Convention on the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221.



European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European), *opened for signature at* Strasbourg, Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540.

Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva 17 June 1925.

Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 207 Consol. T.S. 277.

ICRC *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85

ICRC *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

ICRC *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

ICRC *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001.

Protocol I to the Convention on Certain Conventional Weapons on Non-Detectable Fragments, Geneva 10 October 1980.

Protocol II to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices, Geneva 10 October 1980.

Protocol III to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva 10 October 1980.

Protocol IV to the Convention on Certain Conventional Weapons on Blinding Laser Weapons, 13 October 1995.

Protocol V to the Convention on Certain Conventional Weapons on Explosive Remnants of War, 28 November 2003.

UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984.

UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

### **UN Resolutions**

UN GA. Res. 2338 (XXII), A/RES/2338(XXII) (Dec. 18, 1967).

UN GA Res. 2391 (XXIII), A/RES/2391(XXIII) (Nov. 26, 1968).

UN GA Res. 2583 (XXIV), A/RES/2583(XXIV) (Dec. 15, 1969).

UN GA Res. 2712, A/RES/2712(XXV) (XXV)(Dec. 15, 1970).

UN GA Res. 2840 (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971).

UN GA Res. 2840 (XXVI), A/RES/2840(XXVI) (Dec. 18, 1971).

UN GA Res. 3(I), U.N. Doc. A/RES/3(I) (Feb. 13, 1946).

UN GA Res 3314 (XXIX) *Definition of aggression* (1974).

UN GA Res. 3074 (XXVIII), A/RES/3074(XXVIII) (Dec. 3, 1973).

UN GA Res. 60/147, Annex, ¶ 3, A/RES/60/147 (Dec. 16, 2005).

UN GA Res A/Res/51/191 (10 Mar 2005).

UN SC Res 1368 (12 September 2001).

UNSC Res 1373 (28 September 2001).

UNSC Res 611 (25 April 1988).

## **UN Reports**

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, A/68/382.

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, A/HRC/14/24/Add.6.

UNSC Report of the Secretary General “*The rule of law and transitional justice in conflict and post-conflict societies*” S/2004/616.

Directorate General of Human Rights and Rule of Law Council of Europe (2011) ‘*Eradicating impunity for serious human rights violations: Guidelines and reference texts*’ page 9.

E/CN.4/2006/91 ‘*Study on the right to the truth*’ Report of the Office of the United Nations High Commissioner for Human Rights 8 February 2006.

*Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 22, U.N. Doc. A/CONF.144/28/Rev.1.84 23.

Human Rights Committee, general comment No. 6 (1982), on the right to life

Human Rights Committee, general comment No. 24 (1994), on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights.

*Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict* 1620, UN Doc A/HRC/12/48 (Sept 15 2009).

*Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, E.S.C. Res. 1989/65, 9, U.N. Doc. E/1989/89 (May 24, 1989).

U.N. Human Rights Comm., General Comment No. 31, *Nature of the General Obligation Imposed on States Parties to the Covenant*, page 15, U.N. Doc. CCPR/C/21/Re.1/Add.13 (May 26, 2004).

UN Report of the Third Committee (A/60/509/Add.1)] 60/147. ‘*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross*

*Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. (Hereafter Basic Principles).

United Nations Human Rights Committee, Fifty-third session CCPR/C/SR.1405  
25 April 1995.

*United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* U.N. Doc. E/ST/CSDHA/12 (1991)

## **Lectures**

Jean d' Aspermont (University of Manchester) '*HRL and IHL-Overlap, Convergence and Conflict (theoretical perspectives)*' lecture given to the LLM International Law: Human Rights and Humanitarian Law in Military Operations students at the University of Pretoria on 19 February 2014.

Professor Hampson (University of Essex) '*Investigations of alleged violations and reparations for violations*' lecture given to the LLM International Law: Human Rights and Humanitarian Law in Military Operations at the University of Pretoria on 21 May 2014.

Professor Kleffner (Swedish National Defence College) '*Organised armed groups*' lecture given to the LLM International Law: Human Rights and Humanitarian Law in Military Operations class at the University of Pretoria on 12 May 2014.

Professor M Sassoli, Professor of International Law and Director of the Department of public international law and international organization at the University of Geneva, Lecture given as part of the LLM. course on International Humanitarian and Human Rights Law in Military Operations at the Faculty of Law of the University of Pretoria, on 23 April 2014.

## Websites

Becker, J & Shane, 'Secret 'Kill List' Proves a Test of Obama's Principles and Will' ,N.Y. Times (May 29, 2012),<http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>. (accessed 19 October 2014).

Ben Emmerson, as quoted in Chris Cole, "Will UN Drone Inquiry Get to the Heart of the Matter?" *Drone Wars UK*, January 25, 2013, <https://dronewarsuk.wordpress.com> (accessed 19 October 2014).

ICRC (2010) 'The Geneva Conventions of 1949 and their Protocols' 29-10-2010 overview available at <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> last updated 16-6-2014. (Accessed on 7 July 2014.)

Iverson, J (2013) 'The Drone Reports: Can Members of Armed Groups Be Targeted?' available at <http://opiniojuris.org/2013/11/06/drone-reports-can-members-armed-groups-targeted/> (accessed 19 October 2014).

Living under Drones (2012) Legal analysis available at [http://www.livingunderdrones.org/report-legality/#\\_ftn18](http://www.livingunderdrones.org/report-legality/#_ftn18) (accessed 19 October 2014)

Mayer, J, 'The Predator War', The New Yorker, Oct. 26, 2009 Available at <http://www.newyorker.com/magazine/2009/10/26/the-predator-war> accessed on 2 October 2014.

Serle, J (2014) 'Drone Warfare: More than 2400 dead as Obama's drone campaign marks five years' The Bureau of Investigative Journalism January 23 2014 available at <http://www.thebureauinvestigates.com/2014/01/23/more-than-2400-dead-as-obamas-drone-campaign-marks-five-years/> accessed on 16 July 2014 (Accessed 19 October 2014)

Statement by Ben Emmerson, UN Special Rapporteur on Counter-Terrorism and Human Rights concerning the launch of an inquiry into the civilian impact, and human rights implications of the use of drones and other forms of targeted killings for the purpose of counter-terrorism and counter-insurgency,'[http://www.foreignpolicy.com/files/fp\\_uploaded\\_documents/130124\\_SRCTBenEmmersonQCStatement.pdf](http://www.foreignpolicy.com/files/fp_uploaded_documents/130124_SRCTBenEmmersonQCStatement.pdf) (accessed on 2 May 2014).