

## **The Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem?**

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## Abstract

The regulation of the employment of combat drones in current conflicts is a central issue of recent discussions in international law. Contrary to misinterpretations in the media, this article claims that the legal framework regarding today's drone systems is settled. The author first provides an assessment of unmanned combat drones as a new technology from the perspective of international humanitarian law. He then proceeds to the vital point of the legality of targeted killings with remotely operated drones. Further, he discusses the preconditions for applicability of humanitarian law and human rights law to such operations. In conclusion, the author holds the view that the legal evaluation of drone killings depends on the execution of each specific strike. Assuming that targeted killings with drones will generally only be legal under the law of armed conflict, States might be further tempted to label their struggle against terrorism as 'war'.

## A. Introduction

In 1996, the U.S. Secretary of Defence assigned the U.S. Air Force for the operational control over the first Predator drone systems. Since then, the presence of unmanned drones in current conflicts has steadily increased. The U.S. fleet of Predator drones has reportedly grown from less than ten in 2001 to 180 in 2007.<sup>1</sup> But it is not only the U.S. which is equipped with this technology. 43 States already possess unmanned flight systems,<sup>2</sup> others also have or are developing armed ones.<sup>3</sup>

Originally, the drones were designed as reconnaissance aircraft.<sup>4</sup> In 2002, the U.S. added AGM-114 Hellfire missiles to its systems,<sup>5</sup> and

<sup>1</sup> P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (2010), 34.

<sup>2</sup> 'The Soldiers Call It War Porn', interview with P. W. Singer, *Spiegel Online International* (3 December 2010) available at [www.spiegel.de/international/world/0,1518,682852,00.html](http://www.spiegel.de/international/world/0,1518,682852,00.html) (last visited 3 January 2012).

<sup>3</sup> P. Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, UN Doc A/HRC/14/24/Add.6, 28 May 2010 [Alston-report], para. 27.

<sup>4</sup> Singer, *supra* note 1, 33.

<sup>5</sup> U.S. Air Force, 'Fact Sheet to MQ-1B Predator' (20 July 2010) available at [www.af.mil/information/factsheets/factsheet.asp?fsID=122](http://www.af.mil/information/factsheets/factsheet.asp?fsID=122) (last visited 3 January 2012).

expanded their purpose. From 2007 to 2011, the number of drones, Predators and now also Reapers, performing combat air patrols at the same time in Afghanistan and Iraq was estimated to increase from 21 to 54.<sup>6</sup> At the end of 2010, the drone assaults in Afghanistan and Pakistan reached their highest level for now, with 58 strikes in 102 days.<sup>7</sup>

The use of combat drones started a controversial discussion in the media and the academic world. This article will focus on the question whether the nature of the problem is legal or political. The perspective taken will be one of international humanitarian law (IHL). It will first provide an assessment of the technology ‘drone’ itself under this framework. Secondly, it will deal with legal issues arising from the engagement of drones in targeted killings, their most prominent field of employment. Thirdly, the circumstances for the application of IHL will be discussed. Following this, concluding remarks will be submitted.

## B. Predator and Reaper – Illegal in Themselves?

“From time to time in the history of international law, various weapons have been thought to be so cruel as to be beyond the pale of human tolerance. I think, cluster bombs and land mines are the most recent examples. It may be - it may be, I am not expressing a view, that unmanned drones that fall on a house full of civilians is a weapon the international community should decide should not be used.”<sup>8</sup>

With these words, often cited by newspapers,<sup>9</sup> the British Lord Bingham brought forward his objections concerning the use of drones in

<sup>6</sup> ‘Attack of the Drones’, *Newsweek Magazine* (18 September 2009) available at <http://www.thedailybeast.com/newsweek/2009/09/18/attack-of-the-drones.html> (last visited 3 January 2012).

<sup>7</sup> S. Ackerman, ‘Unprecedented Drone Assault: 58 Strikes in 102 Days’ (17 December 2010) available at [www.wired.com/dangerroom/2010/12/unprecedented-drone-strikes-hit-pakistan-in-late-2010](http://www.wired.com/dangerroom/2010/12/unprecedented-drone-strikes-hit-pakistan-in-late-2010) (last visited 3 January 2012).

<sup>8</sup> T. Bingham during an interview related to the British Institute of International and Comparative Law’s launch of the Bingham Centre for the Rule of Law (2009) available at [www.biicl.org/binhaminterview](http://www.biicl.org/binhaminterview) (last visited 3 January 2012).

<sup>9</sup> See M. Wardrop, ‘Unmanned drones could be banned, says senior judge’, *The Telegraph* (6 July 2009) available at <http://www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html> (last visited 3 January 2012); R. Verkaik, ‘Top judge: use of drones intolerable’, *The*

modern warfare. Immanently in his remark, Lord Bingham pointed out on an important rule of international law, the so-called ‘Lotus-Principle’. According to the Lotus case of the Permanent Court of International Justice, States may act in any way they wish as long as they do not contravene an explicit prohibition.<sup>10</sup> In the context of armed conflict, prohibitions of military conduct comprise the rules of IHL and especially of specific interdictions or restrictions on the use of certain weapons by multilateral treaties.<sup>11</sup> As long as no treaty exists that bars States from using combat drones, the framework for the recourse to drones is the specifically applicable *ius in bello*.

States are not free in their choice of methods or means of warfare.<sup>12</sup> The first main limitation to that choice is the principle of distinction between combatants, civilians directly participating in the hostilities, and military objectives on the one side, and civilians and civilian objects on the other side.<sup>13</sup> Secondly, IHL prohibits States from employing “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”<sup>14</sup>. In its Nuclear Weapons Opinion, the International Court of Justice (ICJ) found that these limitations were the “cardinal principles”<sup>15</sup> of IHL and binding on all States as

*Independent* (6 July 2009) available at <http://www.independent.co.uk/news/uk/home-news/top-judge-use-of-drones-intolerable-1732756.html> (last visited 3 January 2012).

<sup>10</sup> Judgment No. 9, *The Case of the S.S. Lotus (France v. Turkey)*, PCIJ Series A, No. 10 (1927), para. 46.

<sup>11</sup> Starting with the *St Petersburg Declaration* in 1868, many international treaties on the restriction or prohibition of certain weapons were arranged. The latest is the *Convention on Cluster Munitions*, 30 May 2008, CCM/77, which entered in to force on 1 August 2010.

<sup>12</sup> *Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Annexed to Hague Convention II of 1899 and Hague Convention IV of 1907*, Art. 22; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 23 January 1979, 1125 U.N.T.S. 3 [AP I], Art. 35(1); compare Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (2010), 8, para. 18.

<sup>13</sup> This rule is incorporated e.g. in Art. 48 AP I.

<sup>14</sup> Art. 35(2) AP I.

<sup>15</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 226, 257, para. 78.

“intransgressible”<sup>16</sup> customary law. Consequently, they must be observed in conflicts of any character, international as well as non-international.<sup>17</sup>

Regarding the prohibition to cause superfluous injury or unnecessary suffering, the legal status of unmanned drones needs to be clarified. Lord Bingham’s designation of drones as weapons probably is due to the use of everyday language. The legal classification is not as easy. According to the “Manual on International Law Applicable to Air and Missile Warfare”<sup>18</sup> prepared by the Harvard Program on Humanitarian Policy and Conflict Research, a weapon is a means of warfare that is capable of causing injury or death of persons or the damage or destruction of objects.<sup>19</sup>

Combat drones do not cause this definition’s specific outcome of a weapon’s action themselves. In contrast, the HPCR-Manual adopted the definition of an ‘Unmanned Combat Aerial Vehicle’. This “means an unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target.”<sup>20</sup> Exactly tailored to the capacities of combat drones, this definition outlines that drones are not weapons themselves, but weapons are a possible addition.<sup>21</sup> Consequently, it is not the drone that has to be reviewed in the light of the prohibition, but any weapons it carries.<sup>22</sup> Despite the legality of the weapon, the drone as the platform for the specific weapon does not raise legal issues with respect to superfluous injury and unnecessary suffering.

As drones per se cannot contravene the above discussed prohibition, the principle of distinction is more relevant.<sup>23</sup> The focus is on whether the drone can be directed at a specific military objective.<sup>24</sup> It must possess the ability to launch attacks which distinguish between civilian and military

<sup>16</sup> *Id.*, para. 79.

<sup>17</sup> See also ICRC, J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1 (2005) [Customary Law Study], Rules 11-13, 70-71.

<sup>18</sup> Harvard Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare* (15 May 2009) [HPCR-Manual].

<sup>19</sup> Rule 1, lit. ff) HPCR-Manual.

<sup>20</sup> Rule 1, lit. dd) HPCR-Manual.

<sup>21</sup> Compare R. Frau, ‘Unbemannte Luftfahrzeuge im internationalen bewaffneten Konflikt’, 24 *Journal of International Law of Peace and Armed Conflict* (2011) 2, 60, 62.

<sup>22</sup> For the extent of review regarding the specific missile see W. H. Boothby, *Weapons and the Law of Armed Conflict* (2009), 224-225.

<sup>23</sup> Compare *id.*, 230.

<sup>24</sup> *Id.*, 231.

objectives.<sup>25</sup> Reportedly, the precision of a Predator drone is higher than that of a traditional jet.<sup>26</sup> This is owed to the slower flight-velocity of the system. Drones are capable of circulating above their target for a few hours. Their operators have no need to destroy a target just as they face it, but have the possibility to gain more information about the surroundings.<sup>27</sup> Comparing the use of drones to the use of a fighter jet, the first probably even minimises the danger of indiscriminate attacks.

In any event, unmanned drones, as long as they have the necessary sensors, cameras and laser facilities, are capable of guiding missiles to their targets. Certainly, the drone operator has to assess the situation around the target to ensure that the attack is conducted discriminately.<sup>28</sup> This so-called 'man in the loop' is strictly necessary for such a complex decision.

From a factual perspective, future technologies might render the 'man in the loop' superfluous. From the legal perspective, the development of such new technologies is also governed by treaty law. According to Article 36 AP I, States must determine whether the employment of new means of warfare "would, in some or all circumstances, be prohibited". Considerations must deal with the question of how autonomous drones will obey the principle of distinction.<sup>29</sup> Furthermore, autonomous drone strikes will have to comply with other precautionary requirements as well.<sup>30</sup> These,

<sup>25</sup> Article 51(4) AP I, the notion of which also applies in non-international armed conflicts as a rule of customary international law, compare Customary Law Study, *supra* note 17, Rule 7.

<sup>26</sup> Singer, *supra* note 1, 33.

<sup>27</sup> U.S. Major B. Callahan during an interview, 'It Is Not a Video Game', *Spiegel Online International* (3 December 2010) available at [www.spiegel.de/international/world/0,1518,682842,00.html](http://www.spiegel.de/international/world/0,1518,682842,00.html) (last visited 3 January 2012).

<sup>28</sup> Compare W. H. Boothby, 'The Law Relating to Unmanned Aerial Vehicles, Unmanned Combat Air Vehicles and Intelligence Gathering from the Air', 24 *Journal of International Law of Peace and Armed Conflict* (2011) 2, 81, 83.

<sup>29</sup> For a discussion of the principle of distinction with respect to the employment of autonomous combat drones see M. Wagner, 'Taking Humans Out of the Loop: Implications for International Humanitarian Law', *University of Miami Legal Studies Research Paper* No. 2011-21, 6-7.

<sup>30</sup> For a detailed overview of necessary precautions in the planning of drone assaults see Boothby, *supra* note 28, 83-84.

for instance, include a proportionality assessment,<sup>31</sup> which, at a first glance, seems rather a task for a human being than for artificial intelligence.<sup>32</sup>

Regarding today's drones, the way in which the operator conducts the assaults could, of course, also be indiscriminate. However, remotely operated combat drones are not indiscriminate by nature. The principle of distinction is generally maintained. In consequence, only specific drone strikes could raise legal issues. These issues will then not relate to the employed drone system, but to the conditions of its employment.

### C. The Employment of Combat Drones for Targeted Killings

The most relevant issue with respect to the employment of combat drones are targeted killings. A targeted killing in military operations is the use of lethal force against an individual selected human being who is not in the physical custody of the targeting entity, with the intent, premeditation, and deliberation to kill.<sup>33</sup>

For the purpose of this article, it is important to determine whether targeted killings by combat drones create 'drone-specific' legal problems. That would be the case if the legal issues arising could only arise in the context of drone assaults. Therefore, the legality of such a killing, which depends on the applicable legal framework, will now be assessed.

Under human rights law (HRL), targeted killings are likely never to be lawful, as "it is never permissible for killing to be the *sole objective* of an operation."<sup>34</sup> The main legal basis for this assessment is Art. 6 ICCPR<sup>35</sup>. This provision stipulates that no one shall be arbitrarily deprived of life, and

<sup>31</sup> The implications of the principle of proportionality for autonomous drones are also further discussed by Wagner, *supra* note 29, 8-10.

<sup>32</sup> Conversely, some commentators argue that artificial intelligence will be able to behave more ethically on the battlefield than human soldiers; compare e.g. R. C. Arkin, 'Ethical Robots in Warfare', 28 *IEEE Technology and Society Magazine* (2009) 1, 30, 30. For a discussion of these arguments see J. P. Sullins, 'RoboWarfare: Can Robots Be More Ethical Than Humans on the Battlefield?', 12 *Ethics and Information Technology* (2010) 3, 263.

<sup>33</sup> Compare N. Melzer, 'Targeted Killings in Operational Law Perspective', in T. D. Gill & D. Fleck (eds), *The Handbook of the International Law of Military Operations* (2010), 277-278.

<sup>34</sup> Alston-report, *supra* note 3, para. 33.

<sup>35</sup> *International Covenant on Civil and Political Rights*, 23 March 1976, 999 U.N.T.S. 171.

forbids the use of lethal force without lawful reasons.<sup>36</sup> In contrast, a killing is only legal to prevent a concrete and imminent threat to life, and, additionally, if there is no other, non-lethal means of preventing that threat to life.<sup>37</sup>

For the situation of armed conflict, the ICJ held in the *Nuclear Weapons Opinion* that “whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 ICCPR, can only be decided by reference to the law applicable in armed conflict”<sup>38</sup>. Therefore, it is important to assess who may lawfully be targeted at war.

In case of an international armed conflict, the legitimate human targets of attacks generally are combatants. This group includes all members of the armed forces of a (State) party to that conflict.<sup>39</sup> Additionally, civilians taking a direct part in the hostilities may be lawfully targeted.<sup>40</sup> This rule also applies to non-international armed conflicts,<sup>41</sup> governed by Common Article 3 of the Geneva Conventions<sup>42</sup>, Additional Protocol II<sup>43</sup>, and customary law<sup>44</sup>.

The major aim of U.S. drone strikes today is combating the terrorist network Al-Qaeda. Most of the targets are not members of armed forces, and are therefore not combatants. If IHL applies in those cases, the decisive

<sup>36</sup> Human Rights Committee, *Chongwe v. Zambia*, UN Doc CCPR/C/70/D/821/1998, 9 November 2000, para. 5.2; M. E. O’Connell, ‘The Choice of Law Against Terrorism’, *Notre Dame Law School, Legal Studies Research Paper No. 10-20*, 2010, 4.

<sup>37</sup> *McCann and Others v. United Kingdom*, ECHR (1995), No.18984/91, para. 145; Human Rights Committee, *General Comment No. 6*, UN Doc HRI/GEN/1/Rev.1 at 6 (1994), para. 3; *Concluding Observations of the Human Rights Committee: Israel*, UN Doc CCPR/CO/78/ISR (21 August 2003), para. 15; Alston-report, *supra* note 3, para. 32; N. Melzer, *Targeted Killings in International Law* (2008), 59.

<sup>38</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 15, para. 25.

<sup>39</sup> Art. 43(2) AP I; compare K. Ipsen, ‘Combatants and Non-Combatants’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed. (2008), 84.

<sup>40</sup> Art. 51(3) AP I.

<sup>41</sup> See Common Art. 3 and Art. 13(3) AP II.

<sup>42</sup> *Geneva Conventions I to IV*, 12 August 1949, 75 U.N.T.S. 31, 85, 135, 287 [GCs].

<sup>43</sup> *Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 7 December 1978, 1125 U.N.T.S. 609 [AP II]. The applicability of AP II depends on whether the requirements of the material field of application, laid down in Article. 1, are fulfilled, and whether the respective state is a state party to the protocol.

<sup>44</sup> Customary Law Study, *supra* note 17, Rule 6.



question, regardless of whether the targeted person is a ‘fighter’ in a non-international armed conflict, or a civilian in any form of conflict, is whether each targeted person was directly participating in the hostilities.<sup>45</sup>

The requirements for ‘direct participation in hostilities’ are neither laid down in the Geneva Conventions nor in their Additional Protocols. In 2006, the Israeli Supreme Court had to assess the legality of the Israeli official policy of targeted killings.<sup>46</sup> The Court assumed an international armed conflict. As Israel is not a state party to AP I, Chief Justice Barak focussed on the interpretation of direct participation in the customary rule expressed in Article 51(3) AP I.<sup>47</sup> In conclusion, the Supreme Court adopted a “functional approach”<sup>48</sup> to determine which acts constitute direct participation, asking “whether civilians are performing the *function* of combatants”<sup>49</sup>. Additionally, the Court dealt with the time element of direct participation. Chief Justice Barak pointed out that, on the one hand, civilians who have detached themselves from single or sporadic hostile acts were entitled to protection under IHL.<sup>50</sup> On the other hand, he held the view that permanent members of terrorist groups would lose their protection.<sup>51</sup> According to the Court’s ruling, “customary law has not yet crystallized”<sup>52</sup> with respect to cases in the grey area between these two extreme examples.

Three years later, in 2009, the International Committee of the Red Cross (ICRC) published a study as guidance for the interpretation of direct participation in hostilities.<sup>53</sup> It describes direct participation as a specific act,

<sup>45</sup> The ICRC-study on the notion of direct participation in hostilities rightly suggests the interpretation of “active” or “direct participation” in Common Article 3 GCs, Art. 51(3) AP I, and Art. 13(3) AP II in the same manner with reference to the general use of “*participent directement*” in the authentic French texts; compare ICRC, N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, (2009) [ICRC-study], 43.

<sup>46</sup> Supreme Court of the State of Israel (sitting as the High Court of Justice), *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, HCJ 769/02 (11 December 2005).

<sup>47</sup> See *id.*, para. 29-40.

<sup>48</sup> H. Keller & M. Forowicz, ‘A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court’s Judgment on Targeted Killing’, 21 *Leiden Journal of International Law* (2008) 1, 185, 207.

<sup>49</sup> *Id.*

<sup>50</sup> *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, *supra* note 46, para. 39.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, para. 40.

<sup>53</sup> ICRC-study, *supra* note 45.

defines constitutive elements of its notion, and also elaborates on its time dimension. Accordingly, civilians lose protection against direct attacks as long as they participate in a specific hostile act.<sup>54</sup> In contrast, members of organised armed groups remain direct participants in hostilities for the duration of their membership by virtue of their continuous combat function.<sup>55</sup>

Still, the judgment of the Supreme Court of Israel<sup>56</sup> and the ICRC's study<sup>57</sup> leave room for further clarification, which this article does not seek to provide. Instead, the vital point is whether the remaining ambiguity is an issue that exclusively arises with respect to combat drones. Targeted killings were a phenomenon that occurred regularly throughout history,<sup>58</sup> long before the first U.S. drone strike on Qaed Senyan Al-Harithi was reported in 2002.<sup>59</sup> They can also be conducted by snipers, for instance. The question, as to which persons may be lawful targets at war, is even not only relevant in cases of targeted killings. All questions arising are generally relevant for operations under IHL.

<sup>54</sup> *Id.*, 43-46.

<sup>55</sup> *Id.*, 31-36.

<sup>56</sup> For a discussion of the judgment see O. Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law', 5 *Journal of International Criminal Justice* (2007) 2, 322; K. E. Eichensehr, 'On Target? The Israeli Supreme Court and the Expansion of Targeted Killings', 116 *Yale Law Journal* (2007) 8, 1873; Keller & Forowicz, *supra* note 48; M. Lesh, 'The Public Committee against Torture in Israel v the Government of Israel: The Israeli High Court of Justice Targeted Killing Decision', 8 *Melbourne Journal of International Law* (2007) 2, 373; R. S. Schondorf, 'The Targeted Killings Judgment: A Preliminary Assessment', 5 *Journal of International Criminal Justice* (2007) 2, 301.

<sup>57</sup> For a critical review of the ICRC-study see K. Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance', 42 *New York University Journal of International Law and Politics* (2010) 3, 641; M. N. Schmitt, 'Deconstructing Direct Participation of Hostilities: The Constitutive Elements', *id.*, 697; W. H. Boothby, '“And for such time as”: The Time Dimension to Direct Participation in Hostilities', *id.*, 741; W. H. Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect', *id.*, 769. In return: N. Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', *id.*, 831.

<sup>58</sup> Melzer, *supra* note 37, 1.

<sup>59</sup> J. Mayer, 'The Predator War', *The New Yorker* (26 October 2002) available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer) (last visited 3 January 2012).

Admittedly, the development of combat drones makes a profound interpretation of the notion of direct participation more important than ever before. However, interpreting decisive provisions within a legal framework is what lawyers are there for. Drawing the conclusion that IHL was not capable of providing a legal regulation for targeted killings by combat drones would be without rhyme or reason.

## D. Applicability of International Humanitarian Law to Current Drone Operations

### I. The Requirement of Armed Conflict

Due to the fact that actions of war are prohibited under Article 2(4) of the U.N. Charter, IHL is only the exceptional framework for the mere situation in which armed conflicts nevertheless occur. As noted above, targeted killings, with the sole purpose of eliminating a certain person, can never be lawful under the legal frame of peacetime, HRL. Bearing this in mind, the determination whether an armed conflict is at hand will be crucial for the legality of each specific drone strike.

*Ratione temporis*, the beginning of applicability generally “coincides with the moment at which an [...] armed conflict exists”<sup>60</sup>. *Ratione materiae*, the determination of an international armed conflict does not prompt questions.<sup>61</sup> Common Article 2 GCs requires an armed conflict that arises between two or more States. This is the case if one State uses armed force against another,<sup>62</sup> directly or through attributed action.<sup>63</sup>

The more complicated question is the determination of a non-international armed conflict. Common Article 3 GCs lays down the lowest

<sup>60</sup> J. K. Kleffner, ‘Human Rights and International Humanitarian Law: General Issues’, in Gill & Fleck, *supra* note 33, 64, para. 27.

<sup>61</sup> Compare Alston-report, *supra* note 3, para. 51.

<sup>62</sup> C. Greenwood, ‘Scope of Application of Humanitarian Law’, in Fleck, *supra* note 39, 46, para. 202; for a more detailed definition see Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed. (2005), 15.

<sup>63</sup> According to the jurisprudence of the ICJ, attribution can be established by effective control of a state over non-state entities’ actions; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, 64, para. 115. The International Criminal Tribunal for the former Yugoslavia adopted the lower threshold of overall control in the Tadic case; *Prosecutor v. Tadic*, Judgment, ICTY (Appeals Chamber), IT-94-1-A, 15 July 1999, para. 120.

threshold for such a conflict. It requires an “armed conflict not of an international character”<sup>64</sup>. For States that are party to AP II, Article 1 of this Protocol adds the preconditions that the non-state party to the conflict must have a certain degree of organisational structure, exercise control over a certain territory, and be able to conduct sustained and concerted military operations, as well as to respect IHL. Also, a level of intensity of the conflict beyond internal disturbances is prerequisite.<sup>65</sup>

In its *Tadic* decision, the Appeals Chamber at the International Tribunal for the former Yugoslavia found a “comprehensive definition”<sup>66</sup> of armed conflict and held that “an armed conflict exists whenever there is a resort to force between two States or protracted armed violence between governmental authorities and organised armed groups or between such groups”.<sup>67</sup> There are good arguments for this common definition of armed conflict to prevail in the academic debate.<sup>68</sup>

If it comes to a conflict between a State and a non-state actor, the vital question is what impact the definitional problem has on the application of the obligation to only target direct participants in the hostilities. This rule is also enclosed in the minimum humanitarian standard of Common Article 3 GCs. As shown above, this provision has the lowest threshold for its application. In the *Hamdan* case, the U.S. Supreme Court held that exactly this provision is the one governing the ‘transnational conflict’ against the non-state actor Al-Qaeda.<sup>69</sup> In any case, as the U.S. is not a state party to AP II, only the rules of custom enclosed in this protocol could apply. The mere application of Common Article 3 and customary law alongside one another provides a minimum of protection for those involved in the conflict. However, it is important to note that it also contains the possibility for the armed forces to conduct targeted killings. The alternative, applicability of HRL, would deny this ‘right to kill’. The determination of the existence of an armed conflict should, therefore, more importantly than ever, be made by objective criteria.

<sup>64</sup> Common Article 3 GCs.

<sup>65</sup> Compare Article 1(2) AP II.

<sup>66</sup> A. Paulus & M. Vashakmadze, ‘Asymmetrical War and the Notion of Armed Conflict – a Tentative Conceptualization’, 91 *International Review of the Red Cross* (2009) 873, 95, 99.

<sup>67</sup> *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY (Appeals Chamber), IT-91-1-AR72, 2 October 1995, para. 70.

<sup>68</sup> See Paulus & Vashakmadze, *supra* note 66, 95.

<sup>69</sup> U.S. Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557, 633, 126 Supr. Ct. 2749, 2797 (2006).

For States, the employment of combat drones could be an attractive alternative to traditional warfare or even to police enforcement measures.<sup>70</sup> This political consideration is likely to have an impact on state practice concerning the assumption of armed conflicts. The Bush Doctrine of the ‘global war on terror’ has been criticised often enough. Nevertheless, targeted killings with combat drones are only possible where there is an armed conflict. This could further lower the customary threshold of war.

## II. International Humanitarian Law and the Justification for Drone Killings in Self-Defence

The Obama administration justifies the U.S. drone assaults with the right of self-defence. Accessorily, it holds the view to be in “an armed conflict” with Al-Qaeda, the Taliban and associated forces.<sup>71</sup> It is disputable whether, and in which areas of Afghanistan and Pakistan, international or non-international armed conflicts exist.<sup>72</sup> Contrary to the doctrine of a ‘global war on terror’, the still predominant perception of the *ratione loci* for an armed conflict provides that conflicts centre on a particular ‘theatre of war’.<sup>73</sup>

For drone strikes outside this theatre of war, the applicability of IHL must be questioned again. For instance, such a strike occurred in Yemen on 5 May 2011, aimed at Anwar Al-Awlaki, a U.S. citizen who was suspected to have recruited Islamist militants for terrorist attacks.<sup>74</sup> Ultimately, Al-

<sup>70</sup> F. Boor, ‘Der Drohnenkrieg in Afghanistan und Pakistan’, 24 *Journal of International Law of Peace and Armed Conflict* (2011) 2, 97, 99.

<sup>71</sup> H. Koh, Legal Adviser to the Department of State, ‘The Obama Administration and International Law’, Keynote Address at the Annual Meeting of the American Society of International Law (25 March 2010) available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (last visited 3 January 2012).

<sup>72</sup> For a detailed analysis of the situation in Pakistan see L. R. Blank & B. R. Farley, ‘Characterizing US Operations in Pakistan: Is the United States Engaged in an Armed Conflict?’, 34 *Fordham International Law Journal* (2011) 2, 151.

<sup>73</sup> Greenwood, *supra* note 62, 59, para. 216; Kleffner, *supra* note 60, 65, para. 29; M. E. O’Connell, ‘Combatants and the Combat Zone’, 43 *University of Richmond Law Review* (2009) 3, 845, 863-864.

<sup>74</sup> M. Mazetti, ‘Drone Strike in Yemen Was Aimed at Awlaki’, *The New York Times* (6 May 2011) available at <http://www.nytimes.com/2011/05/07/world/middleeast/07yemen.html> (last visited 3 January 2012). Al-Awlaki also aroused attention as he was the first U.S. citizen on the CIA’s ‘capture or kill list’; see S. Shane, ‘U.S. Approves Targeted Killing of American Cleric’, *The New York Times* (6 April 2010) available at <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>

Awlaki was killed.<sup>75</sup> In another drone strike, his son reportedly died.<sup>76</sup> Regardless of how the situation in Afghanistan and Pakistan is assessed, drone strikes occurring outside these States' territories cannot be seen as part of the existing conflicts.

Some commentators merely focus on the justification of such drone killings in self-defence.<sup>77</sup> This approach forgets about the distinction between *ius ad bellum* and *ius in bello*. The application of IHL in such a 'self-defence operation' depends on the same criteria as in general, even if the operating State is also obliged to comply with the law of inter-state force.<sup>78</sup> It is triggered by any action in self-defence that meets the threshold of armed conflict.<sup>79</sup>

These few drone strikes on the territory of Yemen do not amount to an armed conflict. Neither can the assessment be made that a conflict in Afghanistan or Pakistan spilled over into Yemen's territory.<sup>80</sup> Therefore, the strikes in Yemen, and other strikes alike, fall under the framework of HRL. Consequently, such targeted killings, as far as they do not prevent an imminent and otherwise inevitable danger, are illegal.

(last visited 3 January 2012), and L. Kramm, 'USA geben US-Amerikaner zum Abschuss frei', *Institute for International Law of Peace and Armed Conflict, Ruhr-University Bochum, Bofax* 346D, (7 June 2010) available at [www.rub.de/ifhv/documents/bofaxe/bofaxe2010/346d.pdf](http://www.rub.de/ifhv/documents/bofaxe/bofaxe2010/346d.pdf) (last visited 3 January 2012).

<sup>75</sup> Y. Musharbash, 'The Death of Jihad's English-Language Mouthpiece', *Spiegel Online International* (30 September 2011) available at <http://www.spiegel.de/international/world/0,1518,789427,00.html> (last visited 3 January 2011).

<sup>76</sup> L. Kasinof, 'Strikes Hit Yemen as Violence Escalates in Capital', *The New York Times* (15 October 2011) available at <http://www.nytimes.com/2011/10/16/world/middleeast/yemeni-security-forces-fire-on-protesters-in-sana.html> (last visited 3 January 2012).

<sup>77</sup> Compare the criticism of Blank & Farley, *supra* note 72, 153.

<sup>78</sup> This legality would be given if the state, on which territory the operation is conducted, consents to the use of force, or the targeting state can invoke its right of self-defence against an armed attack by or attributable to the first state.

<sup>79</sup> C. H. B. Garraway, 'International Humanitarian Law in Self-Defence Operations', in Gill & Fleck, *supra* note 33, 213, para. 11.01.

<sup>80</sup> Which could possibly trigger the application of IHL; compare D. Fleck, 'The Law of Non-International Armed Conflicts', in Fleck, *supra* note 39, 605.

## E. Conclusion and Remarks

Unmanned combat drones, as long as they are remotely operated, do not raise legal issues by themselves. Their strikes can be conducted in compliance with the principle of distinction and the prohibition of superfluous injury and unnecessary suffering can generally be maintained. The legal assessment concerning these questions is clear.

Legal concerns may still be raised by each single strike. Targeted killings are of particular importance. Drone killings taking place under the framework of IHL will, in general, not be justifiable. Under the framework of IHL, the essential question is whether the target is a combatant or a person directly participating in the hostilities. The existing ambiguity concerning this term's definition is not a question especially raised by the drone but a general one. Consequently, it is not the drone that raises legal issues. It is the way the strikes are conducted. This leads to the conclusion that IHL is capable of regulating the employment of combat drones.

The question of the application of IHL generates anxiety. Given the fact that targeted killings are more likely to be legal under this framework and drone employment has an element of attraction for States, the assessment 'to be at war', to fight terrorism for example, might have further appeal. This argument is reinforced by the assessment that self-defence actions of a State that do not amount to an armed conflict themselves have to comply with human rights obligations. A further lowering of the customary threshold of armed conflict might be the consequence.

All the aforementioned points indicate that the legal issues regarding remotely operated combat drones are settled. Indeed, some legal terms need to be further defined, but the most significant question will be how States will comply with these legal regulations. Undoubtedly, this is a political issue. To avoid a situation of non-compliance, only Lord Bingham's proposal of a ban on combat drones might be a solution. Such a ban is again a question of politics, not of law, and in the near future probably not achievable due to the attraction of the drone.