

# **‘Necessity knows no law’: The resurrection of Kriegsraison through the U.S. targeted killing programme**

## **Abstract**

The doctrine of Kriegsraison, and its argument that ‘necessity knows no law’, is generally considered to have been laid to rest with the creation of the 1949 Geneva Conventions. However, this article asserts that Kriegsraison is resurrected and wholly alive in the United States’ targeted killing programme. The targeted killing programme, now in existence for more than 15 years, remains one of the most problematic aspects of U.S. anti-terror policy and continues to raise numerous legal questions. The article argues that treatment of the various legal frameworks relevant to targeted killing by the U.S. is suffused with Kriegsraison to such an extent that necessity, in its varying iterations, has become the primary guiding principle for U.S. uses of force, and assessments as to their legality. This argument is predicated on an examination of the United States’ expansive interpretation of *jus ad bellum* principles, its a-la-carte approach in recognising the applicability of *jus in bello* rules, and the designation of regions in which it uses force as lying ‘outside the area of active hostilities’. Throughout this assessment, parallels are drawn between the conduct of the United States today and between that of WWI-era Germany, which was characterised by Kriegsraison’s pervasive influence. Finally, the article contends that the use of armed drones as the primary tool for carrying out the targeted killing programme must be scrutinised, as this is vital to understanding the practical implementation of the Kriegsraison doctrine.

## **Introduction**

*‘If the necessity of individuals is recognised as exempting them from punishment for things never so injurious done by them from that necessity, this must be still more the case in war, since so much more is at stake.’<sup>1</sup>*

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<sup>1</sup> Carl Lueder (1885), quoted in Lassa Openheim (ed) *The Collected Papers of John Westlake on Public International Law* (Cambridge University Press 1914), 244.

The U.S. targeted killing programme has now been in existence for more than fifteen years, leading to the deaths of thousands of suspected militants and a much-disputed number of civilians.<sup>2</sup> Much of the commentary on the programme tends to focus on the legality of targeted killing under either of the applicable frameworks of international humanitarian law and international human rights law, and on whether or not the U.S. can be said to be involved in a global non-international armed conflict with Al Qa'eda and associated forces. However, the issue as to whether there is an underlying doctrine of international law guiding U.S. policy in this arena has not been examined. This article aims to address this gap. The author contends that the targeted killing programme and legal positions of the United States relevant to the programme are indicative of the long held to be defunct, and oft-derided, doctrine of *Kriegsraison*.<sup>3</sup> The United States professes to act in accordance with international humanitarian law (which it claims is the only relevant body of law) in each of its targeting decisions, yet many of these decisions leave much to be desired in terms of legality when rigorously assessed under this lens. Though the United States is not explicitly relying on *Kriegsraison* in its treatment of the international law relevant to targeted killing, its consistent appeals to 'necessity' in its legal reasoning bestows a privileged position upon this principle of IHL. As is shown throughout this article, the cumulative effect of this treatment of necessity, demonstrated by the United States in its myriad legal and policy positions on targeting, and the language used to justify these positions, amounts to a revival of *Kriegsraison*.

In the course of the U.S. conflict with Al Qa'eda and associated forces, *Kriegsraison* has been invoked on a few occasions with reference to the Bush administration's use of enhanced interrogation methods.<sup>4</sup> However, this article argues that it is the targeted killing programme which best reflects the insidious, and indeed invidious, nature of *Kriegsraison* and identifies three key areas in which *Kriegsraison* has manifested itself: at the *jus ad bellum* level, in U.S. attempts to expand the right of self-defence; at the *jus in bello* level, in the legal framework applied to the targeting of individuals in regions 'outside the areas of active hostilities'; and,

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<sup>2</sup> Spencer Ackerman, 'Obama claims US drone strikes have killed up to 116 civilians' (*The Guardian*, 01 July 2016) <<https://www.theguardian.com/us-news/2016/jul/01/obama-drones-strikes-civilian-deaths>> accessed 14 April 2017.

<sup>3</sup> Neta C. Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post-9/11 Wars* (Oxford University Press, 2013) 177.

<sup>4</sup> See, for example, G D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2<sup>nd</sup> edn, Cambridge University Press 2016) 616; B R Farley, 'Enhanced interrogation, the Report on Rendition, Detention and Interrogation, and the Return of *Kriegsraison*' (2015) 30 *EILR*; S Horton, 'Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War' (2006) *FILJ* 576.

finally, in the targeted killing programme's use of armed drones. In contrast to much of the legal literature on targeted killing, this paper contends that the choice of weapon for this programme is of some importance, as drones allow for the practical realisation of the *Kriegsraison* doctrine to an extent not previously possible.

A general trend of necessity as defence is coming to the forefront of public international law, write Ohlin and May, 'suggesting that more and more states will argue necessity in the future to escape responsibility from their actions'.<sup>5</sup> This trend is particularly visible in the United States, specifically in the targeted killing programme, which, though never specifically referencing *Kriegsraison*, is suffused with the language of necessity to such an extent that when Solis asks 'is *Kriegsraison* resurrected in America?', his question can be answered in the affirmative.<sup>6</sup> Not only is the targeted killing programme a prime example of *Kriegsraison*, but striking parallels can be drawn between the conduct of Germany in WWI, which was characterised by *Kriegsraison*, and the conduct of the United States today. As Hull has shown, WWI-era Germany was highly cognizant of the importance of international law, much as the United States is today.<sup>7</sup> While much of Germany's conduct was unlawful, it was nevertheless couched in legal language. Germany advocated a theory of law creation that made *opinio juris* a function of state wartime practice, reminiscent of the United States' attempts to have a right of preventive self-defence, and of targeting outside armed conflict scenarios, recognized by the international community.<sup>8</sup> Meanwhile, the United States conflict with Al Qa'eda and associated forces has been accompanied by an expansion in the state's conception of the 'self', and a proclivity to use force in anticipation of threats which have not yet crystallized,<sup>9</sup> in a manner comparable to Germany's proclaimed right to use preventive force in self-defence against an exceedingly broad number of threats to that 'self'.<sup>10</sup> Germany also took advantage of gaps in the law to use new weapons in unforeseen ways, much as the U.S. has done with armed drones.<sup>11</sup>

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<sup>5</sup> Jens David Ohlin and Larry May, *Necessity in International Law* (Oxford University Press 2016), 39.

<sup>6</sup> Gary D. Solis, *The Law of Armed Conflict* (2<sup>nd</sup> ed, Cambridge University Press 2016), 616.

<sup>7</sup> See Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Cornell University Press, 2016).

<sup>8</sup> *Ibid* 64.

<sup>9</sup> See Ian Hurd, 'The Permissive Power of the Ban on War', (2017) 2(1) *EJIS* 1.

<sup>10</sup> Hull (n7) 46.

<sup>11</sup> *Ibid* 267.

The article proceeds as follows: first, it presents a brief account of the *Kriegsraison* doctrine. This is followed by an analysis of the United States' elevation of *jus ad bellum* necessity and its expansion of the concept of "imminence", and the resulting attempts to introduce a right of preventive self-defence to international law. Next, U.S. attempts to establish a right to target individuals under the IHL framework in regions 'outside areas of active hostilities' are discussed, before an examination on the use of drones. Finally, the article concludes by establishing that the United States is wilfully engaging in an à-la-carte application of international law to the targeted killing programme, and that this legal manipulation is a key indicator of the resurrection of *Kriegsraison*.

### **The doctrine of *Kriegsraison***

*Kriegsraison* is a 19<sup>th</sup> Century German doctrine which holds that in war, necessity knows no law.<sup>12</sup> It operates both at the political level of the state and at the military (or operational) level, joining the old doctrine of self-preservation with the unconstrained application of military necessity. At the political level, *Kriegsraison* advocates for the strident invocation of the self-preservation doctrine, providing a State with the excuse for recourse to force for any reason it sees fit. At the operational level, *Kriegsraison* allows for the untrammelled application of the principle of military necessity; any action can be justified once it can be said to be militarily necessary.

Developed during the Bismarckian and Wilhelminian eras, *Kriegsraison* maintains that belligerents may do whatever they feel is necessary to prevail in an armed conflict, as military necessity overrules all law. The doctrine was often expressed as '*kriegsraison geht vor kriegsmanier*': 'the necessities of war take precedence over the rules of war.'<sup>13</sup> *Kriegsraison* is considered as 'the affirmation of *raison d'État* in the context of armed conflict', and is rooted in a natural law approach to necessity.<sup>14</sup> The doctrine was advocated by numerous German commentators who maintained that 'the laws of war lose their binding force in the case of extreme necessity'<sup>15</sup>, perpetuating the views of 'the law of war's fiercest nineteenth-century

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<sup>12</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12<sup>th</sup> August 1949* (International Committee of the Red Cross 1987) para. 1386.

<sup>13</sup> *Ibid.*

<sup>14</sup> Ariel Colonomos, *The Gamble of War: Is It Possible to Justify Preventive War?* (Chris Turner tr, Palgrave Macmillan 2013) 83.

<sup>15</sup> Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press 2005), 64.

critic’, Carl Von Clausewitz.<sup>16</sup> Clausewitz dismissively wrote that international law was ‘almost imperceptible and hardly worth mentioning’, and while it accompanied war, it did so ‘without essentially impairing its power.’<sup>17</sup> This Clausewitzian approach is obvious in the *Kriegsraison* doctrine, which was expounded principally by Professor Carl Lueder, who set out the terms under which *Kriegsraison* was applicable. The first was in the case of extreme necessity, and the second, in retaliation ‘in case of unlawful non-observance of *kriegsmanier* by the enemy.’ Any departure from *Kriegsmanier* was justified, explained Lueder, ‘when circumstances are such that the accomplishment of the war-aim, or the escape from extreme danger, is hindered by sticking to it.’<sup>18</sup>

During both World Wars, Germany invoked the doctrine in defence of a range of unlawful actions.<sup>19</sup> Germany’s political and military conduct during World War I in particular was characterised by *Kriegsraison*, as is evidenced by its consistent references to necessity.<sup>20</sup> On the invasion of Belgium by the Germany Army in 1914, for example, Chancellor von Bethmann Hollweg stated in the Reichstag: ‘Gentlemen, we are now in a state of necessity, and necessity knows no law.’<sup>21</sup> World War II was to prove a turning point for the doctrine. *Kriegsraison* was referenced numerous times in the U.S. Military Tribunals at Nuremberg, notably in *U.S. v List* (the *Hostage* case)<sup>22</sup> and in *U.S. v Von Leeb et al* (the *High Command* case).<sup>23</sup>

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<sup>16</sup> John Fabien Witt, *Lincoln’s Code: The Laws of War in American History* (Simon & Schuster 2012) 184.

<sup>17</sup> Carl von Clausewitz, *On War* (first published 1832, Wordsworth Editions Limited 2013) 35-36. Recent comments from commentators advising that President Trump ‘get himself some Clausewitz’ might want to also consider these other, less savoury, aspects of *On War*. Max Fisher and Amanda Taub, ‘The Interpreter’ (The New York Times, 08 March 2017) <<https://www.inboxdb.com/the-interpreter-the-one-sentence-theory-about-war-that-trump-needs-to-read-645001/>> accessed 14 April 2017.

<sup>18</sup> Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (2nd edn Cambridge University Press 1983) 173.

<sup>19</sup> See, for example, G D Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, (1st edn, Cambridge University Press 2010) 267; World Health Organisation, ‘*Public health response to biological and chemical weapon: WHO guidance. Draft 2003*’ (2nd edn, World Health Organisation 2003); Judgment of the United States Military Tribunal (1948) 8 LRTWC 34.

<sup>20</sup> Hull (2016) 44.

<sup>21</sup> Michael Walzer, *Just and Unjust Wars: a moral argument with historical illustrations* (4th edn, Basic Books 2006) 240. Walzer further writes that ‘here, as in military history generally’, the plea of military necessity ‘means a great deal less than it appears to do’.

<sup>22</sup> Judgment of the United States Military Tribunal (1948) 8 LRTWC 34. The *List* case, commonly known as the *Hostage* case, tried twelve defendants on four counts of committing war crimes and crimes against humanity through being principals in, and accessories to, the murder of thousands of persons from the civilian population of Greece, Yugoslavia, Norway, and Albania between September 1939 and May 1945.

<sup>23</sup> Judgment of the United States Military Tribunal (1949) 11 LRTWC 1

Regarding Germany's justification of unlawful acts as acts of military necessity, the judgment in *List* (commonly known as the *Hostage* case) stated:

It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency do not justify a violation of positive rules.<sup>24</sup>

And later:

Here again the German theory of expediency and military necessity (*Kriegsraison geht vor kriegsmanier*) superseded established rules of international law. As we have previously stated in this opinion, the rules of International Law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation.<sup>25</sup>

The *High Command* case (*U.S. v Von Leeb et al*), was the final of the twelve Nuremberg trials.

Under count one of the indictment – ‘aggressive war’ – the tribunal held that:

‘the doctrine of military necessity has been widely urged. In the various treatises of International Law there has been much discussion on this question. It has been the viewpoint of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war... We content ourselves on this subject with stating that such a view would eliminate humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations.’<sup>26</sup>

Regarding the defendants' plea of military necessity, the Tribunal found:

This theory (of military necessity as an excuse for justification of scorched earth policy during retreat) is nothing more than the reapplication of the well-known German principle ‘*Kriegsraison geht vor kriegsmanier*’ which has been advanced by various German writers and faithfully transmitted into action by the German Armies during the last two world wars. According to this theory, the laws of war lose their binding force

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<sup>24</sup> USMT (n22)

<sup>25</sup> Ibid

<sup>26</sup> USMT (n23)

in case of extreme necessity which was said to arise when the violation of the laws of war offers other means of escape from extreme danger, or the realization of the purpose of war – namely, the overpowering of the enemy. Such a theory is merely a denial of all laws, and a reaffirmation of the philosophy that the end justifies the means.<sup>27</sup>

These judgments, along with the 1949 Geneva Conventions, were said to have ‘put the last nails in the coffin of the doctrine of *Kriegsraison*.’<sup>28</sup> The 1987 Commentary to Additional Protocol I to the Geneva Conventions makes specific reference to *Kriegsraison* in its discussion of Article 35:

...Law is a restraint which cannot be confused with more usages to be applied when convenient. The doctrine of "Kriegsraison" was still applied during the Second World War. It is possibly the uncertainty as to the applicability of the Hague law in conditions which had changed considerably since 1907 that contributed to this to some extent. However, it is probable that the resort to this doctrine was above all based on contempt for the law, the weakening of which may be characteristic and a danger of our age. "Kriegsraison" was condemned at Nuremberg, and this condemnation has been confirmed by legal writings. One can and should consider this theory discredited. It is totally incompatible with the wording of Article 35, paragraph 1, and with the very existence of the Protocol.<sup>29</sup>

*Kriegsraison* is thus considered a defunct legal doctrine and has not been invoked in name by any state since World War II. Essentially, *Kriegsraison* was the unlimited application of military necessity, granting belligerents ‘the right to do whatever is required to prevail in armed conflict; to do whatever they believe is required to win.’<sup>30</sup> Importantly, the belligerent was also the sole judge of this necessity, meaning that the belligerent can ‘violate the law or repudiate it or ignore it whenever that is deemed to be for its military advantage.’<sup>31</sup>

However, *Kriegsraison* also operates at the political level. There has never been a clear-cut distinction in *Kriegsraison* between the principle of military necessity found in international

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<sup>27</sup> USMT (n23).

<sup>28</sup> Scott Horton, ‘*Kriegsraison* or Military Necessity? The Bush Administration’s Wilhelmine Attitude Towards the Conduct of War (2006) 30 *Fordham ILJ* 576, 589.

<sup>29</sup> Sandoz, Swinarsky and Zimmerman (n12) para.1386

<sup>30</sup> Solis (n6) 285.

<sup>31</sup> *Ibid* 286.

humanitarian law and the principle of necessity found in the international law of self-defence. As Colonomos writes, ‘Kriegsraison made no distinction between the violation of *the law of war* and transgressions of *law in war*, and did not indeed concern itself with it very much.’<sup>32</sup> Kriegsraison is primarily concerned with the supremacy of necessity at all levels of war-making. It is a doctrine of both political and military expedience, as was recognised at the tribunals in Nuremberg, as well as ‘a way of speaking in code, or a hyperbolic way of speaking, about probability and risk.’<sup>33</sup> Nor does Kriegsraison justify only whatever is necessary to win a war; it also justifies ‘whatever is necessary to reduce the risks of losing, or simply to reduce losses or the likelihood of losses in the course of war.’<sup>34</sup> Furthermore, it emphasises the exceptional character of conflicts or situations in order to breach, or to bend, the law.

### **Kriegsraison and the jus ad bellum: self-preservation and the expansion of self-defence**

At the state level, Kriegsraison has long manifested itself as the doctrine of self-preservation.<sup>35</sup> Self-preservation serves as the political arm of the Kriegsraison doctrine. The old doctrine of self-preservation allowed for recourse to force for any reason related to the preservation of the security of the State. It can, then, be considered a specific application of the broader concept of necessity – with anything necessary for the State’s security warranting the use of force. Self-preservation was considered a ‘natural’ or ‘inherent’ right, related to the ‘right to security’ in Vattel.<sup>36</sup> In his *Collected Papers*, Westlake describes the doctrine as such:

...when a state employs force in the territory of another state...or when it attempts by threats to restrain the freedom or action of another state within the territory of the latter, or that of the subjects of another state elsewhere than within its own territory... - the state so acting or threatening must find its justification in some other principle (other than its own sovereignty). The principle commonly put forward on such occasion is that of self-preservation, which writers on international law often class among their fundamental, primitive, primary or absolute rights.<sup>37</sup>

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<sup>32</sup> Colonomos (n14) 85.

<sup>33</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4<sup>th</sup> edn, Perseus Books 2006) 144.

<sup>34</sup> *Ibid.*

<sup>35</sup> Jasmine Moussa, ‘Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law’ (2008) 90 (872) *International Review of the Red Cross* 980.

<sup>36</sup> Stanimir A. Alexandrov, *Self-defense against the use of force in international law* (Kluwer Law International 1996) 23.

<sup>37</sup> John Westlake, *The Collected Papers of John Westlake on Public International Law* (Lassa Openheim ed, 1st edn, Cambridge University Press 1914) 121.

For many years, self-defence was held to be synonymous with self-preservation, or as a specific instance of it.<sup>38</sup> Alexandrov notes that during the 19<sup>th</sup> and early 20<sup>th</sup> centuries, self-preservation, self-defence, necessity and necessity of self-defence were used as ‘more or less interchangeable terms.’<sup>39</sup> However, the two concepts are considerably different. Self-preservation represents a particularly broad reading of the right of self-defence, in which a State’s fundamental right to self-preservation supersedes their international obligations and the rights of any other State.<sup>40</sup> If the argument for a right of self-preservation is followed to its conclusion, any conduct deemed necessary by a State to ensure the preservation of its existence is ‘bound to be considered juridically legitimate’, even if ‘undeniably contrary to an international obligation of that State.’<sup>41</sup> Self-preservation can thus ‘cloak with an appearance of legality almost any unwarranted act of violence on the part of a state.’<sup>42</sup>

In the 1837 *Caroline* incident, the British Ambassador to Washington justified British action by invoking ‘the necessity of self-defence and self-preservation’ when destroying the ‘piratical’ steamboat *Caroline*.<sup>43</sup> The *Caroline* incident is widely regarded as being the incident that changed self-defence from being ‘a political excuse to a legal doctrine’,<sup>44</sup> with the U.S. Secretary of State’s formulation of the conditions of self-defence requiring the British Government to show:

- (i) The existence of “...necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation...”
- (ii) “that the local authorities...did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it”.<sup>45</sup>

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<sup>38</sup> Alexandrov (n36) 23.

<sup>39</sup> Alexandrov (n36) 23.

<sup>40</sup> The issue of self-preservation has surfaced more recently, in the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons, in which the Court allowed for the possibility of nuclear weapons use in cases where, ‘in an extreme circumstance of self-defence’, the survival of a state could be said to be at stake. See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 96

<sup>41</sup> Addendum to the eight report on state responsibility by M. Robert Ago, Special Rapporteur (A/CN.4/318/Add.5-7), the internationally wrongful act of the State, source of international responsibility (part 1) 16.

<sup>42</sup> R.Y. Jennings, ‘The Caroline and McLeod Cases’, (1938) 32 Am J Int’l L 82, 91.

<sup>43</sup> Ibid 82.

<sup>44</sup> Ibid

<sup>45</sup> Ibid 89.

Yet Jennings writes that ‘in arguing the *Caroline* case, the fundamental distinction between self-defence and self-preservation was not always appreciated’,<sup>46</sup> as can be seen through examples of earlier state practice against perceived or claimed threats and justified by self-defence.<sup>47</sup> Alexandrov references the United Kingdom’s shelling of Copenhagen and seizing of the Danish fleet after the Peace of Tilsit of 1807. This occurred following Denmark’s refusal to deliver its fleet up to the custody of the U.K. after the British Government demanded they do so, being cognisant of a secret clause of the treaty under which Denmark should, in certain circumstances, declare a war against the U.K. Though this was a case of the use of force for self-preservation, the U.K. justified the shelling and seizure of the fleet as a case of necessity in self-defence, stating that “when a state is unable of itself to prevent a hostile use being made of its territory or resources, it ought to allow proper measures” by the threatened State.<sup>48</sup> The *Virginian* incident in 1873, in which a vessel under the U.S flag was seized by Spain on the high seas in 1873 while attempting to smuggle reinforcements to insurgents, provides another example of justification under self-defence. A number of U.S. and British nationals, who had been both crew members and passengers on the ship, were shot without trial. The U.K. did not protest against the seizure of British subjects on the high seas, but only about their executions, admitting that the latter was an act “under the expectation of instant damage in self-defence”.<sup>49</sup> The *Caroline* incident, however, used the terms self-defence and self-preservation interchangeably. Despite this, in its attempts to define the limits of self-defence and to examine its legal content, self-defence was said to have been “rescued from the Naturalist notions of an absolute primordial right of self-preservation”.<sup>50</sup>

Has self-defence really been ‘rescued’ from self-preservation? It would appear that the answer is no. Indeed, it can be argued that in a perverse manner, the UN Charter itself has been instrumental in the revival of self-preservation and *Kriegsraison*. In creating the UN Charter, those states involved aimed to make unilateral and aggressive uses of force unacceptable. However, it was recognised that states’ had an inherent right of self-defence. Article 51 of the Charter codified this self-defence exception. While the events of 1930s and 1940s had apparently led the international law community to recognise ‘the absurdity of having a prohibition on aggression or first use of force but permitting a state to judge for itself whether

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<sup>46</sup> Ibid 91.

<sup>47</sup> Alexandrov (n36) 20.

<sup>48</sup> Ibid 20.

<sup>49</sup> Ibid 21.

<sup>50</sup> Jennings (n42) 92.

its use of force was in self-defence’, the United States was concerned that the Charter – and the veto power of other future members of the Security Council – might impede its ability to use force in pursuit of its interests.<sup>51</sup> At the behest of the U.S., Article 51, permitting the use of force in self-defence, was added to the Charter. This exception was not present in the Dumbarton Oaks draft of the Charter.<sup>52</sup> Scott explains that the combination of the Article 51 exception on self-defence, along with the makeup and voting system of the Security Council, has meant that the U.S. has retained the capacity to block any decision disputing that its uses of force were not taken in self-defence.<sup>53</sup>

Similarly, while the creation of the UN Charter and the Geneva Conventions were supposed to have nailed the coffin of *Kriegsraison* shut, the doctrine is far from gone and buried.<sup>54</sup> The spectre of *Kriegsraison* continues to haunt the modern international law regime. As Hurd has shown, the codification of the self-defence exception in Article 51 of the Charter has resulted in a redefining of what States consider relevant to their security interests, and an expansion of the ‘self’ in self-defence. Self-defence has become ‘the most popular justification for war, often with all sides in the conflict claiming it as their motivation.’<sup>55</sup> Colonomos notes that international law never disavowed the just war writings; rather, it sought merely ‘to temper *Kriegsraison* and to restrain the Bismarckian sneer’.<sup>56</sup> Instead, Hurd argues, the international legalisation of the self-defence exception has ‘rewritten “just war theory” as “legal war theory”’.<sup>57</sup> Recalling that, in an operational setting, *Kriegsraison* represents the ‘affirmation of *raisons-d’états*’,<sup>58</sup> Article 51 constitutes the legalisation of *raisons-d’états*, providing it with ‘a novel institutional home’.<sup>59</sup> This leads Hurd to comment that Machiavelli’s adage that ‘that war is just which is necessary’ would today be better phrased as ‘that war is legal which is necessary.’<sup>60</sup> Of course, as has previously been mentioned, *Kriegsraison* makes the belligerent the sole judge of that necessity, and thus the sole judge as to whether or not its actions are legal.

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<sup>51</sup> Shirley V. Scott, *International Law, US Power: The United States’ Quest for Legal Security* (Cambridge University Press 2012) 122.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* 123.

<sup>54</sup> Horton (n28) 589.

<sup>55</sup> Hurd (n9) 11.

<sup>56</sup> Colonomos (n14) 84.

<sup>57</sup> Hurd (n9) 17.

<sup>58</sup> Colonomos (n14) 83.

<sup>59</sup> Hurd (n9) 17.

<sup>60</sup> *Ibid.*

This has important consequences for the United States, which remains the sole judge of those actions which it takes in preventive self-defence.

### **The expansion of ‘imminence’ and the expansion of the ‘self’**

Since the publication of the 2002 National Security Strategy by the first administration of President George W. Bush, subsequently known as ‘the Bush doctrine’, the United States has made concerted efforts to create a right of preventive self-defence in international law.<sup>61</sup> Much of this effort has centred around placing a greater emphasis on the importance of the principle of necessity through the broadening of the “imminence” requirement, which the U.S. argues is necessary to respond to the threat it faces from non-state armed groups and the exceptional challenges these groups present.<sup>62</sup> This purported right of preventive self-defence is exceedingly reminiscent of the elevation of necessity and the doctrine of *Kriegsraison* in WWI-Germany.

Hull observes that WWI-era Germany had developed a ‘uniquely robust doctrine of military necessity thought to apply to many levels of action from the tactical (combat), to operational (battle), and at the level of the state itself (war and peace).<sup>63</sup> A convergence of circumstances and policy-making led to the proliferation of dangers which, in the minds’ of Germany’s military and civilian leaders,

‘...easily fulfilled for them the stringent conditions of military necessity enumerated since Grotius. Danger became anticipatory, and vital interest was no longer confined to self-preservation, but expanded to include victory, or even mere military convenience.’<sup>64</sup>

This focus on the use of force to arrest conjectural threats against an expanded ‘self’ for the sake of victory, or even convenience, is symptomatic of *Kriegsraison*. Throughout the course of WWI, Germany invoked a defence of *Notwehr* and *Notstand*. Chancellor Theobald von Bethmann Hollweg invoked *Notwehr* as legal justification for Germany’s violation of Belgian

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<sup>61</sup> See The White House, ‘The National Security Strategy of the United States of America’ (17 September 2002) <<https://www.state.gov/documents/organization/63562.pdf>> accessed 14 April 2017. Although the 2002 NSS repeatedly refers to ‘preemptive’ self-defence, the asserted right is better described as preventive.

<sup>62</sup> White House Press Office, ‘Remarks of John O. Brennan, “Strengthening our Security by Adhering to our Values and Laws”’ (16 September 2011) <<https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>> accessed 14 April 2017.

<sup>63</sup> Hull (n7) 25-26.

<sup>64</sup> *Ibid* 27.

neutrality at the beginning of World War I; *Notwehr* translating as ‘necessary defence’.<sup>65</sup> Thereafter the concept of *Notstand* was cited as Germany’s official defence. *Notstand* was a condition of necessity which pardons a person from ‘having harmed the rights of third parties in the course of defending himself; it does not require a preceding injustice.’<sup>66</sup> As Hull notes, *Notstand* was never a concept in international law and closely resembled the doctrine of self-preservation.<sup>67</sup> *Notstand* required only that there be ‘existential danger’, ‘no other possible means of averting the danger’, and ‘no responsibility for creating the emergency situation on the part of the state claiming it’.<sup>68</sup> This particular construction of ‘existential danger’ came with an elastic interpretation, including not only threats to the existence of a state, but also to its current territory or population, or its state power.<sup>69</sup> Unlike the customary law of self-defence at the time, *Notstand* omitted the requirement that ‘the danger be immediate and real (not the result of assumption or imagination), the response proportionate, and compensation mandatory.’<sup>70</sup>

Today, Hurd argues, we see a similar expansion in understandings of what constitutes the ‘self’ which states claim a right to defend: ‘the self in “self-defence” has grown beyond the territorial borders of the state and now encompasses a range of state interests abroad.’<sup>71</sup> As such, the ‘self’ that states now invoke and defend is conceptual rather than territorial.<sup>72</sup> This expansion tracks the expansion of the ‘self’ visible in Germany during WWI. Similarities are also to be found in Germany’s *Notwehr* and U.S. constructions of ‘imminence’, as is discussed below. These expansive constructions of the ‘self’ and of ‘imminence’ are key elements in U.S. arguments for, and justifications of, its current military conduct.

The United States refers to a number of factors in how it determines the ‘imminence’ of an attack in the 2013 Presidential Policy Guidance, including:

‘the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the

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<sup>65</sup> Ibid 44.

<sup>66</sup> Hull (n7) 44.

<sup>67</sup> Ibid 46.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Hurd (n9) 12.

<sup>72</sup> Ibid.

absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective in self-defense that may be expected to cause less serious collateral injury, loss or damage.’<sup>73</sup>

The U.S. has further stated that it is ‘increasingly recognized by the international community’ that the traditional conception of what constitutes an “imminent attack” must be understood ‘in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.’<sup>74</sup> Yet, to date, only the United Kingdom has expressed an understanding of imminence in a manner akin to the United States.<sup>75</sup> Hakimi notes that, according to the above criteria, “imminence” does not have its ordinary meaning, permitting defensive forces against conjectural attacks.<sup>76</sup>

### **A right of preventive self-defence?**

As Piggott notes, the 2002 National Security Strategy self-consciously set out to change the “imminence test” from one of an ‘instant, overwhelming’ danger to a ‘grave and gathering’ danger. The difference is profound.<sup>77</sup> The Bush doctrine ‘sought not so much to “adapt” the concept of imminent attack to the change circumstances of a post-9/11 world as to replace it altogether’.<sup>78</sup> As such, it represented a ‘genuine innovation’, completely abandoning the traditional condition of imminence.<sup>79</sup> Attempts by the U.S. to transform the concept of imminence continues today. Imminence acquires a unique flexibility for proponents of a right to preventive self-defence, particularly with the introduction of the concept of a ‘continuing

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<sup>73</sup> Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (hereafter 2013 PPG) (22 May 2013) <<https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf>> accessed 14 April 2017.

<sup>74</sup> White House Press Office (n62).

<sup>75</sup> See, for example, J Wright, ‘The Modern Law of Self-Defence’ (EJIL: Talk!, 11 January 2017) <<https://www.ejiltalk.org/the-modern-law-of-self-defence/>>; D Turns, ‘The United Kingdom, Unmanned Aerial Vehicles, and Targeted Killings’ (2017) 21 (3) *ASIL* <<https://www.asil.org/insights/volume/21/issue/3/united-kingdom-unmanned-aerial-vehicles-and-targeted-killings>> both accessed 14 April 2017.

<sup>76</sup> Monica Hakimi, ‘North Korea and the Law on Anticipatory Self-Defense’ (EJIL: Talk!, 28 March 2017) <<https://www.ejiltalk.org/north-korea-and-the-law-on-anticipatory-self-defense/>> accessed 14 April 2017.

<sup>77</sup> Leanne Piggott, ‘The “Bush Doctrine” and the Use of Force in International Law’, in Matthew J. Morgan (ed.), *The Impact of 9/11 and the New Legal Landscape: The Day that Changed Everything?* (Palgrave Macmillan 2009) 246.

<sup>78</sup> *Ibid* 247.

<sup>79</sup> David Rodin, ‘The Problem with Prevention’ in Henry Shue and David Rodin (eds), *Preemption: Military Action and Moral Justification* (Oxford University Press 2007) 161.

imminent threat'.<sup>80</sup> The elasticity bestowed on "imminence" by the U.S has been variously described as '[used] in a way that deprives the word of its ordinary meaning', 'woefully overbroad' and as 'expanding the concept...beyond recognition'.<sup>81</sup>

Yet rather than the U.S. merely offering a new or revised definition of "imminence", Ohlin and May argue that the U.S. has created a new concept in international law which connects necessity to self-defence in a manner akin to that found in domestic legal systems.<sup>82</sup> Ohlin and May specifically reference Germany's penal code, which denotes self-defence as *Notwehr*, and the U.S. Model Penal Code, which in §3.04 on self-defence, uses the phrase 'immediately necessary'.<sup>83</sup> Of course, this connection between necessity and jus ad bellum self-defence was in existence in Germany during WWI, as discussed above.

In effect, the U.S. interpretation of "imminence" establishes a standard of 'immediate necessity', in which 'the relevant time period is the one measured by the concept of necessity, not that measured by imminence'.<sup>84</sup> It elevates necessity to a position of privilege over the principle of proportionality, in which the perceived necessity of an action taken in self-defence outweighs other considerations of its lawfulness, to a degree highly reminiscent of that found in *Kriegsraison*. As Hurd notes, this interpretation of 'imminence' effectively 'substitutes "threat" as the trigger for military response where the Charter text says "armed attack"'.<sup>85</sup> It was noted in the earlier discussion on *Kriegsraison* that, as a doctrine, it justifies whatever is necessary to reduce the risk of losing, or to reduce losses or even the risk of losses in the course of war. As such, *Kriegsraison* is extremely concerned with threats and risk avoidance. It is therefore notable that the U.S. has invoked the avoidance of risk in discussions around imminence, stating that requiring its forces to wait until the 'precise time, place and manner of an attack became clear' would create 'an unacceptably high risk that our efforts would fail, and

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<sup>80</sup> Department of Justice, 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force' (08 November 2011) <<https://fas.org/irp/eprint/doj-lethal.pdf>> accessed 14 April 2017.

<sup>81</sup> Kevin Jon Heller, 'The DOJ White Paper's Confused Approach to Imminence (and Capture)' (*Opinio Juris*, 05 February 2013) <<http://opiniojuris.org/2013/02/05/the-doj-white-papers-confused-approach-to-imminence-and-capture/>>; Glenn Greenwald, 'Chilling legal memo from Obama DOJ justifies assassination of US citizens' (*The Guardian*, 05 February 2013). <<https://www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo>> both accessed 14 April 2017.

<sup>82</sup> Ohlin and May (n5) 57.

<sup>83</sup> *Ibid* 55.

<sup>84</sup> *Ibid* 57.

<sup>85</sup> Hurd (n7) 13.

that Americans would be killed'.<sup>86</sup> Essentially, the U.S. construction of imminence reunites the principles of imminence and necessity, and re-establishes the connection between self-defence and self-preservation.

What legal standing does this alleged right of preventive self-defence have? It is now generally accepted by the international legal community that a right of anticipatory (or pre-emptive) self-defence exists, but the same cannot be said for a right of preventive self-defence.<sup>87</sup> Anticipatory self-defence occurs when a State uses force against an attack that has yet to physically strike its territory, but which is expected imminently. How imminent an attack is, and how the word 'imminent' is defined by the State employing force in self-defence, is central when considering whether a case of anticipatory self-defence is justified. The mere threat of an attack is not enough to resort to force in self-defence.<sup>88</sup> In relation to targeted killing, the 2010 report by Philip Alston, the then-UN Special Rapporteur on extrajudicial, summary or arbitrary executions, supports the more permissive anticipatory approach to self-defence in the case of an imminent attack, stating that the view 'more accurately reflects State practice and the weight of scholarship'.<sup>89</sup> Alston notes that this remains subject to the strictures articulated in *Caroline*.<sup>90</sup> This position supports the broad consensus on the matter, which is that 'if a right to anticipatory self-defence exists, it is limited'.<sup>91</sup> Even with the general consensus that anticipatory self-defence is not unlawful, states have been reluctant to rely on anticipatory self-defence as justification for their actions.<sup>92</sup>

Preventive self-defence reaches further than anticipatory self-defence in its expansive approach. It is defined by Reisman and Armstrong as:

'a claim to entitlement to use unilaterally, without prior international authorisation, high levels of violence to arrest an incipient development that is not yet operational or

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<sup>86</sup> Department of Justice 'Attorney General Eric Holder Speaks at Northwestern University School of Law' (05 March 2012) < <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> > accessed 14 April 2017.

<sup>87</sup> See Hakimi (n76).

<sup>88</sup> It should be noted that in the *Nicaragua* judgment, the Court did not express a view as to the lawfulness of the use of armed force in response to the imminent threat of armed attack, as it was not relevant to the case in question. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (n117) 194.

<sup>89</sup> UNHRC 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston – addendum' (2010) UN Doc EN A/HRC/14/24/Add.6, 45.

<sup>90</sup> *Ibid.*

<sup>91</sup> Helen Duffy, *The "War on Terror" and the Framework of International Law* (1st edn, Cambridge University Press 2005)157.

<sup>92</sup> Christine Gray, 'The US National Security Strategy and the new Bush Doctrine of Pre-Emptive Self-Defence' (2002) 1 CJIL 437, 442.

directly threatening, but that, if permitted to mature, could be seen by the potential pre-emptor as susceptible to neutralisation only at a higher and possibly unacceptable cost to itself.<sup>93</sup>

In other words, it is a ‘military action against a potential adversary in advance of a suspected attack’.<sup>94</sup> It is distinct from anticipatory self-defence in that those contemplating anticipatory self-defence ‘can point to a palpable and imminent threat’.<sup>95</sup> In the case of preventive self-defence, a State believes that a threat exists or that a threat *will* exist and argues that force can be utilised in self-defence against that threat. Any preventive action taken is ‘deliberately future-oriented’, and ‘loses its defensive character’.<sup>96</sup> Preventive self-defence is not only incompatible with accepted interpretations of Article 51 of the UN Charter, it is also not supported by state practice.<sup>97</sup> Alexandrov states that ‘while there may be some uncertainty as to whether use of force against imminent attack may be justified as legitimate self-defence, practice has clearly illustrated that there is no right’ of preventive self-defence,<sup>98</sup> while Alston writes that preventive self-defence is ‘deeply contested and lacks support under international law’.<sup>99</sup>

The scope of a right of preventive self-defence as claimed by the U.S. in the 2002 National Security Strategy is unprecedented in the modern international law regime, but it is entirely familiar if considering the doctrine of *Kriegsraison* and Germany’s application of *Notwehr* and *Notstand*. As Ohlin and May note:

‘if imminence is an additional constraint on defensive force over and above the necessity requirement, then preventive war is illegal, because it would satisfy the necessity requirement but not the imminence requirement. The only way to get around this conclusion is to subordinate the imminence requirement to the necessity requirement and conclude that the former element does not need to be met if the latter element is satisfied.’<sup>100</sup>

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<sup>93</sup> Michael W. Reisman and Andrea Armstrong, ‘The Past and Future of the Claim of Pre-Emptive Self-Defense’ (2006) 100 *AJIL* 526, 526

<sup>94</sup> Tarcisio Gazzini, ‘A Response to Amos Guiora: Pre-Emptive Self-Defence Against Non-State Actors?’ (2008) 13 *JCSL* 25, 29.

<sup>95</sup> Reisman and Armstrong (n92) 526.

<sup>96</sup> Gazzini (n94) 30.

<sup>97</sup> Yoram Dinstein, *War, Aggression and Self-Defence* (4th edn, Cambridge University Press 2005) 183.

<sup>98</sup> Alexandrov (n36) 165.

<sup>99</sup> UNHCR (n89) para.45.

<sup>100</sup> Ohlin and May (n5) 56.

This, of course, is exactly what *Kriegsraison* does, subordinating all other considerations to the necessity requirement, while leaving the belligerent the sole judge of that necessity.

The lack of support from the international community for defensive action against non-imminent threats highlights the anachronism of the U.S. position. Ruys notes that even among those states supporting a broader interpretation of the right of self-defence, ‘support for self-defence against non-imminent threats is virtually non-existent’.<sup>101</sup> Consider, for example, the position of France regarding self-defence against an imminent threat, which is set out in the French Armed Forces law of armed conflict manual. The manual states that an ‘imminent threat’ refers to a:

‘...potential aggression, the accomplishment of which is likely but has not yet been realised. This notion corresponds to the Anglo-Saxon expression of ‘hostile intention’. Such a threat, in French law, does not justify recourse to individual self-defence, except if the realisation of the aggression has begun. This situation is generally provided and regulated for in the rules of engagement and behaviour based on the circumstances’.<sup>102</sup>

Germany, too, along with states such as Lichtenstein, Japan, Singapore, Switzerland and Uganda, has ‘placed great weight on the imminence requirement’.<sup>103</sup> Meanwhile, in response to the High-Level Panel’s Report on Threats, Challenges and Change, China stated that:

‘...In case of self-defence against armed attacks, any use of force must have the authorization of the Security Council. Any “imminent threat” should be carefully judged and handled by the Security Council.’<sup>104</sup>

Furthermore, whilst the Report of the High-Level Panel on Threats, Challenges and Change accepts that there exists a right of self-defence where an attack is imminent, it goes on to ask:

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<sup>101</sup> Tom Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 336.

<sup>102</sup> Ministère de la Défense, ‘Manuel de droit des conflits armés’ (2012) 62, <[http://www.cicde.defense.gouv.fr/IMG/pdf/20130226\\_np\\_cicde\\_manuel-dca.pdf](http://www.cicde.defense.gouv.fr/IMG/pdf/20130226_np_cicde_manuel-dca.pdf)> accessed 14 April 2017. In French, this passage reads: ‘**Menace imminente** (en anglais : imminent threat) Agression potentielle dont l’accomplissement, bien que probable, n’est pas encore réalisé. Cette notion correspond à l’expression anglo-saxonne d’intention hostile. Une telle menace, en droit français, ne justifie pas le recours à la légitime défense individuelle, sauf si elle s’est traduite par un début de réalisation. Cette situation est généralement prévue et réglée par des règles d’engagement et de comportement adoptées en fonction des circonstances.

<sup>103</sup> Ruys (n101) 336.

<sup>104</sup> Ibid 341.

‘Can a State, without going to the Security Council, claim in these circumstances the right to act in anticipatory self-defence, not just pre-emptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)?’<sup>105</sup>

The High-Level Panel’s conclusion is that it cannot. It states that:

‘...the answer must be that, in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.’<sup>106</sup>

This purported right of preventive self-defence promoted by the U.S. has been accompanied by a dangerous blurring of the boundaries between the jus ad bellum and the jus in bello, and attempts to apply jus ad bellum standards and IHL to scenarios in which IHRL is applicable. It is to these issues that our attention now turns.

### **Kriegsraison and the jus in bello: targeting in regions ‘outside areas of active hostilities’**

The subversive impact of Kriegsraison visible in the promotion of a purported right of preventive self-defence is also in evidence in the U.S. blurring of the jus ad bellum with the jus in bello. The U.S. believes that, since 2001, it has been engaged in global, non-international armed conflict (NIAC), with no defined geographical boundaries, against Al Qa’eda and associated forces.<sup>107</sup> The U.S. argues that this NIAC gives it the right to target members of Al Qa’eda and associated forces under the framework of international humanitarian law applicable to NIACs. However, the U.S. also argues that its inherent right of self-defence also grants it permission to target suspected militants. Speaking to the American Society of International Law in 2010, Harold Koh, in his role as then-Legal Advisor at the U.S. Department of State, said that ‘a state that is engaged in armed conflict or in legitimate self-defense is not required

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<sup>105</sup> Report of the Secretary General’s High-Level Panel on Threats, Challenges and Change (2004) UN Doc EN A/59/565, 189.

<sup>106</sup> Ibid 191.

<sup>107</sup> See, for example, Council on Foreign Relations, ‘Legal Adviser Koh’s Speech on the Obama Administration and International Law, March 2010’ (Harold Hongju Koh, 25 March 2010), <<http://www.cfr.org/international-law/legal-adviser-kohs-speech-obama-administration-international-law-march-2010/p22300>>; International Law Studies, ‘International Law, Legal Diplomacy and the Counter-ISIL Campaign’ (Brian J. Egan, 01 April 2016), <<http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1668&context=ils>>; Department of Justice, ‘Memorandum for the Attorney General, Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (Office of the Assistant Attorney General, 16 July 2010), <[https://www.aclu.org/files/assets/2014-06-23\\_barron-memorandum.pdf](https://www.aclu.org/files/assets/2014-06-23_barron-memorandum.pdf)>, accessed 14 April 2017.

to provide targets with legal process before the state may use armed force'.<sup>108</sup> In his 2013 speech at the National Defense University, President Obama again put forward the U.S. position that targeted killing takes place within an armed conflict under the U.S.' inherent right of self-defence, stating:

...America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with Al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war – a war waged proportionally, in last resort, and in self-defense.<sup>109</sup>

The 2013 DOJ White Paper states likewise, arguing that the targeted killing programme is lawful under 'the inherent right to national self-defense recognized in international law.' It further states that the use of force 'against a senior operational leader of al-Qaeda or its associated forces...' would be justified as an act of national self-defense, and that additionally, the U.S. is engaged in a non-international armed conflict with al-Qaeda and its associated forces. Another report, released to the ACLU in 2015 following legal proceedings, holds that:

As a matter of international law, the United States may use lethal force in accordance with the laws of war in order to prosecute its armed conflict with al-Qaeda and associated forces in response to the September 11, 2001 attacks, and the United States may also use force consistent with our inherent right of national self-defense.<sup>110</sup>

This is the 'naked self-defense' theory proposed by Anderson, who argues that 'a targeted killing within an armed conflict does not have to comply with IHL as long as it qualifies as legitimate self-defense', with Anderson's rationale being that 'the proper international legal rationale for targeted killing is self-defense, not that the target is a combatant under IHL'.<sup>111</sup> This view is not tenable. As Alston has noted, the law of armed conflict and the rules governing

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<sup>108</sup> Council on Foreign Relations (n106).

<sup>109</sup> The White House, 'Remarks by the President at the National Defense University' (23 May 2013) <<https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>> accessed 14 April 2017.

<sup>110</sup> ACLU, 'Report on Process for Determining Targets of Lethal or Capture Operations' (06 March 2014) <<https://www.aclu.org/foia-document/report-process-determining-targets-lethal-or-capture-operations>> accessed 10 February 2016

<sup>111</sup> Kenneth Anderson, 'Targeted Killing in U.S. Counterterrorism Strategy and Law', in Benjamin Wittes (ed) *Legislating the War on Terror: An Agenda for Reform* (Brookings Institution Press 2009) 366.

a state's right to self-defence are two sets of rules that are 'radically different'.<sup>112</sup> In his 2010 report, Alston writes that while Koh's statement was 'an important starting point', it fails to address:

some of the most central legal issues including: the scope of the armed conflict in which the US asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms.<sup>113</sup>

The consistent invocation of the right of self-defence by the United States is redolent of *Kriegsraison*, representing as it does a deliberate attempt to confuse the applicable *jus in bello* legal regime with the *jus ad bellum*. In its repeated assertions that targeted killings are lawful under its right of self-defence, without reference to the applicable legal framework which would apply in such instances (except to note that targeted strikes conform to the principles of necessity and proportionality), the U.S. returns necessity and military necessity to their former use as justification for unlawful acts, rather than excuse.<sup>114</sup> As Corn writes, 'the scope of lawful authority to employ force during mission execution will be subtly but unquestionably degraded if *ad bellum* principles are utilized as a substitute for *in bello* regulation.'<sup>115</sup>

This elevation of necessity, and the obfuscation of the dividing lines between the *jus ad bellum* and *jus in bello*, is particularly relevant to the U.S. designation of certain regions within which it carries out targeted killings as 'outside areas of active hostilities'. This term is not a legal term of art; it is a U.S. creation which is to be found solely in the 2013 Presidential Policy Guidance.<sup>116</sup> As Brookman-Byrne has noted, this term does not reflect international law relevant to uses of force or the conduct of hostilities.<sup>117</sup> Furthermore, it is regularly applied to regions 'in which no attempt has been made to demonstrate that armed conflicts are occurring', and in situations that do not reach the required threshold to establish the existence of an armed

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<sup>112</sup> Democracy Now! 'UN Special Rapporteur Philip Alston Responds to US Defense of Drone Attacks' Legality' (01 April 2010) <<http://www.democracynow.org/2010/4/1/drones>>, accessed 14 April 2017.

<sup>113</sup> UNHRC (n89) 3.

<sup>114</sup> Hull (n7) 68.

<sup>115</sup> Geoffrey S. Corn, 'Self-defense Targeting: Blurring the Line between the *Jus ad Bellum* and the *Jus in Bello*', in Kenneth Watkin and Andrew J. Norris (eds) *Non-International Armed Conflict in the Twenty-first Century* (Naval War College 2012) 60.

<sup>116</sup> 2013 PPG (n73).

<sup>117</sup> Max Brookman-Byrne, 'Drone Use "Outside Areas of Active Hostilities": An Examination of the Legal Paradigms Governing US Covert Remote Strikes' (2017) *NILR* 2.

conflict.<sup>118</sup> The application of this term to regions which are not experiencing armed conflict, and therefore to which it is likely that IHRL, and not IHL, should apply is one of the most telling aspects of the political and military expediency of the targeted killing programme.

The existence of a specific Presidential Policy – the 2013 PPG - for those targeted killings which take place in locales identified as ‘outside areas of active hostilities’ was revealed in 2013.<sup>119</sup> According to a 2016 report, the designation ‘area of active hostilities’ applies not only to regions where an armed conflict under international law is taking place, but also takes into account ‘the size and scope of the terrorist threat, the scope and intensity of U.S. counterterrorism operations, and the necessity of protecting any U.S. forces in the relevant location.’<sup>120</sup> Under these criteria, Afghanistan, Iraq, Syria, certain areas of Libya and, as of March 2017, Somalia, are designated ‘areas of active hostilities’. As such, the 2013 PPG does not apply to these regions, but to targeting operations taking place elsewhere. It also does not apply to direct action ‘taken when the United States is acting quickly to defend U.S. or partner forces from attack or outside the counterterrorism context.’<sup>121</sup> The United States maintains that the 2013 PPG affords ‘heightened policy standards and procedures’ to regions which are outside areas of active hostilities.<sup>122</sup> These ‘policy standards’, far from demonstrating a commitment to heightened protections for peoples in those areas, merely reflect the legal standards which the United States is required to apply to regions designated as ‘outside areas of active hostilities’, given that these standards simply reflect the requirements of the international human rights law framework which should be applied to these regions.<sup>123</sup> It is, however, exceedingly unlikely that the U.S. will recognise the human rights standards with which it is required to oblige. Although the U.S. recognises that IHRL is not entirely displaced by IHL during armed conflict, it continues to contest the extraterritorial application of the ICCPR.<sup>124</sup>

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<sup>118</sup> Ibid.

<sup>119</sup> See 2013 PPG (n73).

<sup>120</sup> The White House, ‘Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations (05 December 2016) <<https://fas.org/man/eprint/frameworks.pdf>> accessed 14 April 2017, 25.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid 24.

<sup>123</sup> Adil Ahmad Haque, ‘Targeted Killing Under Trump: Law, Policy, and Legal Risk’ (*Just Security*, 10 February 2017) <<https://www.justsecurity.org/37636/targeted-killing-trump-law-policy-legal-risk/>> accessed 14 April 2017.

<sup>124</sup> The White House (n120) 57, at note 191.

Despite this, the U.S. consistently makes reference to legal norms which appear to have been imported wholesale from law enforcement standards found in international and domestic human rights law, while continuing to maintain that it is involved in a transnational non-international armed conflict to which international humanitarian law applies as *lex specialis*. Yet given the multiplicity of geographical areas and legal scenarios within which the targeted killing programme operates, it is impossible to apply one legal framework to all of the targeted killings carried out under the auspices of the ‘war on terror’. Targeted killings must be assessed on a case-by-case basis to legally analyse and classify them – there is certainly no ‘one size fits all’ approach available.<sup>125</sup> This is true even in cases where a State has lawfully resorted to force under the law of self-defence. Any targeted killing carried out in self-defence must still abide by the relevant regulatory legal framework of international humanitarian law and/or international human rights law, dependant on the context in question.

### **IHRL and the importance of ‘imminence’**

As with jus ad bellum and resort to force, a central question in international human rights law as to the legality or otherwise of an instance of targeted killing rests heavily on ‘imminence’. Yet imminence, like necessity and proportionality, has a very different meaning under IHRL than those terms in the jus ad bellum and in IHL. The traditional view of imminence in international human rights law is that ‘imminence encompasses a person literally in the process of using deadly force’, and as such, imminence ‘requires a visible threat to human life.’<sup>126</sup> This imminence requirement is distinct from the concept of imminence required for the use of force by a State in anticipatory self-defence.<sup>127</sup> The two concepts should not be conflated. Any application of the inter-state use of force definition of imminence, rather than the IHRL concept of imminence, to an operation which requires that human rights standards be applied will be unlawful.

However, as Heller comments, the traditional view of imminence under human rights law is ‘probably too strict outside of the domestic law-enforcement context.’ He believes the best interpretation to be such that the targets of a strike under an international human rights law framework:

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<sup>125</sup> UNHRC (n89) 92.

<sup>126</sup> Kevin Jon Heller, ‘One Hell of a Killing Machine: Signature Strikes and International Law’, (2013) *JICJ* 11, 115.

<sup>127</sup> UNHRC (n89) 45.

‘would have to be planning a specific attack, not simply preparing for unspecified future attacks. The second requirement, however, would be variable: as long as the United States could not feasibly use non-lethal means to neutralize the target, it could strike the target at any temporal stage of the intended attack – planning, preparing, or execution.’<sup>128</sup>

This is also the interpretation of imminence proposed by Alston:

‘the legal framework should take into account the possibility that a threat may be so imminent that a warning and the graduated use of force are too risky or futile (e.g. the suspect is about to use a weapon or blow himself up). At the same time, it must put in place safeguards to ensure that the evidence of imminence is reliable, based on a high degree of certainty, and does not circumvent the requirements of necessity and proportionality.’<sup>129</sup>

The U.S. consistently justifies targeted killings by maintaining that every strike is conducted against an individual who poses an imminent threat.<sup>130</sup> This comes with a number of conditions attached:

‘...the condition that an operational leader present an “imminent” threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.’<sup>131</sup>

As such, a high-level official in a U.S. administration could conclude that:

‘...an individual poses an “imminent threat” of violent attack against the United States. Moreover, where the al-Qa’ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member’s involvement in al-Qa’ida’s continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.’<sup>132</sup>

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<sup>128</sup> Heller (n126) 116.

<sup>129</sup> UNHRC (n89), 93.

<sup>130</sup> Department of Justice (n80).

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

This standard of ‘imminence’ flagrantly flouts the human rights standards around the use of lethal force. The U.S. has introduced the law enforcement terminology of imminence (while wildly distorting that conception of imminence) into what the U.S. argues is an armed conflict scenario - yet this standard has no pertinence to the jus in bello application of IHL. As such, the U.S. stands accused of mangling the law.<sup>133</sup> Rather than this ‘mangling’ of law being accidental or unintended, it reflects a deliberate attempt at obfuscation and deflection. The U.S. has approached the possible relevant regulatory frameworks of the targeted killing programme in an á la carte manner – ‘cherry picked from different legal regimes’, by amalgamating aspects of both international humanitarian law and international human rights law in their policy rhetoric, rather than simply abiding by the relevant rules in each case of targeted killing.<sup>134</sup> The U.S. has purposely confused the applicable legal frameworks. While it maintains that it respects the applicable law, the U.S. has instead decided to acknowledge whichever rules it prefers in any given instance, with little evidence that they actually abide by these rules, regarding them instead as ‘discretionary rather than binding’.<sup>135</sup>

### **Kriegsraison and necessity in IHL and IHRL**

The fact that the U.S. has attempted to conflate human rights norms with the norms of the jus ad bellum, and stated that it will not target an individual ‘if it is feasible to capture the target at the time of the operation’ demonstrates that it is aware that the wider international community believes that it is international human rights law, and not the law of armed conflict, which should apply to many of the drone strikes in the targeted killing programme, even as the U.S. continues to deny international human rights law’s extraterritorial application. This confusion of terms also extends to the principle of necessity.

Much like the term ‘imminence’, the principles of military necessity in IHL and the principle of necessity in IHRL are vastly different. Verdirame writes:

‘Military necessity, one of the cornerstones of the laws of war, has no equivalent in human rights law. It reflects the realist and pragmatic assumptions of the laws of wars, which, while seeking to minimise the consequences of armed conflict, essentially regard war as a social fact and historical reality.’<sup>136</sup>

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<sup>133</sup> Stuart Casey-Maslen, ‘The Use of Armed Drones’, in Stuart Casey-Maslen (ed) *Weapons Under International Human Rights Law* (Cambridge University Press 2014) 390.

<sup>134</sup> Jameel Jaffer, *The Drone Memos: Targeted Killing, Secrecy and the Law* (The New Press 2016) 7.

<sup>135</sup> Ibid.

<sup>136</sup> Guglielmo Verdirame, ‘Human rights in wartime: a framework for analysis’ (2008) *EHRLR* 704.

Far from being a restrictive principle, as some have argued, military necessity provides a licensing function in IHL, allowing all actions ‘designed to pursue the ends of war, and outlawing only those actions that are delinked from the aims of war and are pursued for irrational or emotional reason’, subject to specific rules of IHL.<sup>137</sup> The principle remains ‘incredibly broad’ today, with the ‘truly humane’ aspects of the law stemming from these specific IHL prohibitions.<sup>138</sup> In other words, ‘the principle [of military necessity] does not say that whatever is necessary is permissible, but that everything permissible must be necessary.’<sup>139</sup> The broadly licensing character of military necessity is directly linked to its history, where it was first codified in the *Lieber Code*, written in 1863 by Clausewitz’s fellow Prussian Francis (or Franz) Lieber.<sup>140</sup> Also known as Instructions for the Government of Armies of the United States in the Field or General Order 100, it was issued by President Abraham Lincoln on 24<sup>th</sup> April 1863. In the Code, Lieber wrote:

‘military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.’<sup>141</sup>

Often called a ‘humanitarian milestone’,<sup>142</sup> the Code is more aptly described as ‘tough humanitarianism’.<sup>143</sup> While considered a blueprint for our modern conception of military necessity, the Lieber Code was not particularly constraining. Witt notes that in its most open-ended provision, the Code authorised any measure necessary to secure the ends of war and defend the country, with Lieber writing that ‘to save the country is paramount to all other considerations.’<sup>144</sup> Lieber was, however, concerned at ‘the prospect of *Kriegsraison* emerging as a rule’, or as a ‘rule-swallowing exception’, and his codification of military necessity was directed at its limitation.<sup>145</sup>

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<sup>137</sup> Ohlin and May (n5) 107.

<sup>138</sup> Ibid.

<sup>139</sup> Lackey, quoted in Ohlin and May (n7) 77.

<sup>140</sup> It is also the first codification of the laws of war for soldiers [Solis (n1) 41]. Lieber described it as “short but pregnant and weighty like some stumpy Dutch woman when in the family way with coming twins.”

<sup>141</sup> General Order No. 100, Instructions for the Government of Armies of the United States in the Field (the Lieber Code) 14.

<sup>142</sup> Chris Johnick and Roger Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’ (1994) 35 *HILJ* 49, 65.

<sup>143</sup> Rick Beard, ‘The Lieber Codes’ (*The New York Times*, 24 April 2013)

<<http://opinionator.blogs.nytimes.com/2013/04/24/the-lieber-codes/>> accessed 14 April 2016.

<sup>144</sup> Witt (n16) 4.

<sup>145</sup> Horton (n28) 580.

The strong influence of Clausewitz that we see in *Kriegsraison* is also to be found in the Lieber Code.<sup>146</sup> Lieber himself stated that ‘the more vigorously wars are pursued, the better it is for humanity’. It fails to contradict a ‘rather Clausewitzian view of warfare: the shortest wars are the best’.<sup>147</sup> This, combined with the lack of a restriction on armed forces in measures allowing them to secure the ends of war, demonstrates that the Lieber Code does not in fact ‘run radically counter to *Kriegsraison*.’<sup>148</sup> Given this Clausewitzian connection in both the doctrines of *Kriegsraison* and military necessity, along with each having been in some way informed by the other, it is perhaps not difficult to understand why Colonomos argues that there is no stable foundation for the principle of military necessity when one considers the fluid terrain on which it has been built.<sup>149</sup> Despite this, the wording of military necessity found in the Lieber Code remains the ‘closest international law comes to a generally accepted statement of the doctrine’.<sup>150</sup>

Meanwhile, under IHRL, violence should be used only ‘where strictly necessary to protect against an imminent threat to life’, with ‘necessity’ here meaning that ‘if the measures taken will result in a possible violation of a right, it must be shown that there measures were necessary in order to achieve the legitimate objective...’<sup>151</sup> The concept of necessity in IHRL is, then, far more demanding than the principle of military necessity in IHL, as is apparent in the judgments of the ECtHR in *United Kingdom v. McCann* and *Al-Skeini v. United Kingdom*. In *McCann*, the ECtHR found that the right to life of three Provisional IRA members killed by British forces in Gibraltar had been violated because the use of lethal force should have been avoidable. Instead, the Court found that elements of the operation meant that ‘the use of lethal force was almost unavoidable’ and were not persuaded that the use of force which killed the three individuals in question was ‘no more than absolutely necessary’.<sup>152</sup> In *Al-Skeini*, which concerned the killing of Iraqi citizens by British forces in Iraq, the Court again established that

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<sup>146</sup> Witt writes that Lieber’s hero was ‘not the great philosopher of peace, Immanuel Kant, but the prophet of modern total warfare, Carl von Clausewitz...’, with Lieber ‘aware of the works of his fellow Prussian even before the publication of Clausewitz’s *On War*.’ Witt (n16) 3-4.

<sup>147</sup> Colonomos (n14) 84.

<sup>148</sup> Colonomos (n14) 84.

<sup>149</sup> *Ibid.*

<sup>150</sup> David Turns, ‘Military Necessity’ (*Oxford Bibliographies*, 23 March 2012)

<<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0008.xml>> accessed 14 April 2017.

<sup>151</sup> Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press 2010), 173.

<sup>152</sup> *McCann And Others v UK* Series A no 324

the use of force must be ‘no more than absolutely necessary’, and concluded that this provision implies ‘that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.’<sup>153</sup> As Ohlin and May observe, these cases:

‘show how powerful the human rights notion of necessity really is. Whether a human rights case is explicitly governed by a “least-restrictive-means” test or a test of “absolute necessity”, both involve the strictest scrutiny over the government’s behaviour. In order to justify its actions, the government needs to show that it had no other alternative to secure its legitimate aim; if other, less injurious alternatives existed, the government action or policy violates human rights law.’<sup>154</sup>

The principle of military necessity is decidedly different. It is an unknown entity and a wildly alien concept for international human rights law – how can it be acceptable to take human life due to an often tenuous belief that it will provide an important military advantage? While in human rights law, where the use of force ‘must be absolutely necessary to save the life of another’, in international humanitarian law ‘the action need only be necessary for the accomplishment of the conflict, which includes defeating the enemy as quickly as possible with the fewest risks to one’s own personnel.’<sup>155</sup>

The United States is undoubtedly applying the jus ad bellum principle of necessity and the IHL principle of military necessity to IHRL scenarios, instead of the far more restrictive IHRL necessity principle. The U.S. has specifically affirmed that it believes its targeted strikes conform to the IHL principles of necessity:

‘U.S. targeting practices conform to the principle of necessity, which requires that the use of military force (including all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of armed conflict) be directed at accomplishing a legitimate military purpose. Individuals who are part of enemy forces are generally legitimate military targets, and the United States may use lethal force against enemy forces in the armed conflict in which it is engaged...’<sup>156</sup>

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<sup>153</sup> *Al-Skeini and Others v UK* (2011) 53 EHRR 18

<sup>154</sup> Ohlin and May (n7) 125.

<sup>155</sup> Jens David Ohlin, ‘The Duty to Capture’ (2013) *MLR*. 97, 1316.

<sup>156</sup> The White House (n120) 21.

Of course, as has been established above, the application of the IHL principle of military necessity to an IHRL scenario is unlawful. As such, a consideration of military necessity, rather than IHRL's necessity, in a region considered to be an 'area outside of active hostilities' is erroneous. Though the 2013 PPG professes to offer heightened protections to peoples in the areas to which it applies, individuals are still targeted according to the IHL criteria of military necessity, rather than the concept of necessity in IHRL, which ultimately makes the 2013 PPG meaningless. Furthermore, the uncertainty as to the United States criteria for designating a region as being an 'area outside of active hostilities' is a cause for concern. The apparent ease with which such a designation can be removed means the targeting criteria for such a region can change in a matter of hours; consider, for example, the decision in March 2017 to declare parts of Somalia an 'area of active hostilities', in which the PPG will not apply for at least 180 days.<sup>157</sup> Under the guidelines which are now applicable to the relevant areas of Somalia, status-based targeting is allowed, 'without any reason to think that the individual target poses a particular and specific threat to Americans'.<sup>158</sup>

The U.S. has repeatedly asserted that all targeted strikes 'conform to the principle of necessity, the requirement that the target have definite military value.'<sup>159</sup> However, doubt has been cast as to how much military value these targets actually possess. From the beginning of the first Obama administration to the present day, there have been a reported 616 drone strikes (approximately) in Yemen, Pakistan and Somalia, 74 of which have occurred in the first 74 days of the Trump administration.<sup>160</sup> In total, the Bureau of Investigative Journalism estimates that there have been at least 673 strikes in the three countries named above, with a minimum of 4,534 killed, included some 1008 civilians.<sup>161</sup> If the Bureau's figures are accepted, at least 3,526 combatants have been killed in Yemen, Pakistan and Somalia, all of whom have allegedly been 'high-value targets' representing 'continuous imminent threats' – yet the

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<sup>157</sup> Charlie Savage and Eric Schmitt, 'Trump Eases Combat Rules in Somalia Intended to Protect Civilians' (*The New York Times*, 30 March 2017) <<https://www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html>> accessed 14 April 2017.

<sup>158</sup> Ibid. According to this article, the Trump administration is apparently considering whether to 'scrap the 2013 rules altogether'.

<sup>159</sup> John O. Brennan, 'The Efficacy and Ethics of U.S. Counterterrorism Strategy' (*Wilson Center*, 30 April 2012) <<https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>> accessed 14 April 2017.

<sup>160</sup> Micah Zenko, 'The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama' (*Council on Foreign Relations*, 02 March 2017) <<http://blogs.cfr.org/zenko/2017/03/02/the-not-so-peaceful-transition-of-power/>> accessed 14 April 2017.

<sup>161</sup> The Bureau of Investigative Journalism, 'Drone Warfare' <<https://www.thebureauinvestigates.com/projects/drone-war>> accessed 14 April 2017.

terrorist threat does not seem to have been significantly impacted in any of these countries. In Somalia, for example, the removal of the 2013 PPG to Somalia in March 2017 indicates the opposite, while the quantitative escalation of strikes in Yemen since January 2017 casts doubt on the effectiveness of the targeted killing programme against AQAP to date.<sup>162</sup>

As Chehtman writes, the available empirical data does not make it clear that military necessity supports resorting to drone strikes against extraterritorially based non-state armed groups.<sup>163</sup> According to Chehtman, simple comparisons between the number of drone strikes and the number of terrorist attacks over time (or the number of strikes with the number of victims of terrorist violence) do not suggest that an increase in drone strikes diminishes the number of terrorist attacks, and a similar conclusion follows from studies using regression analysis.<sup>164</sup> He further notes that in the most positive study, which focuses on drone strikes in Pakistan, the effect of drone strikes is found to be ‘rather small’ in reducing the capacity of terrorist groups to undertake attacks, and as such drone strikes should not be relied upon as the primary strategy for defeating these groups.<sup>165</sup> In other studies, drone strikes have been found to have different effects on different groups, with strikes on the Taliban in Afghanistan having a negligible impact, but strikes on groups in Pakistan ‘triggering more violence instead of reducing it.’<sup>166</sup>

Yet another issue arises with the application of the IHL principle of military necessity to situations that should ostensibly be governed by IHRL. The overbroad interpretation of imminence and the privilege it bestows upon the necessity principle at the *jus ad bellum* level has knock-on effects for the principle of proportionality and military necessity at the *jus in bello* level. Amos Guiora (who is in his own words ‘a proponent of targeted killing’) has argued that current U.S. policy, with its broad interpretation of imminence, risks privileging *jus ad bellum* proportionality to the extent that *jus in bello* proportionality is disregarded. He writes:

‘the increasingly flexible notion of imminence and threat have significant effects on the “military advantage gained” (i.e., the value of the target) and therefore on the application of the proportionality principle governing the minimization of civilian harm. If all threats are so imminent and dangerous as to justify the use of lethal force

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<sup>162</sup> Zenko (n160).

<sup>163</sup> Alejandro Chehtman, ‘The ad bellum Challenge of Drones: Recalibrating Permissible Use of Force’ (2017) 28 (1) *EJIL*, 196.

<sup>164</sup> *Ibid* 186.

<sup>165</sup> *Ibid*.

<sup>166</sup> *Ibid* 187.

in self-defense, then the value of taking them out will be great enough to justify significant amounts of civilian harm – essentially meaning that broad understandings of the first concept of proportionality eliminate the need for the second, equally essential, proportionality analysis.<sup>167</sup>

If, as is quite likely, many targeted killings (even those which could be deemed permissible) are not militarily necessary, then once again, they represent the political and military expediency of *Kriegsraison*. As Ohlin and May have commented, it is wrong to assume that military necessity can be employed ‘to explode the restraints of Just War theory and its rules of war.’<sup>168</sup> The military necessity of the targeted killing programme and the real advantage, if any, achieved by it must continue to be interrogated.

### **Drones: why the weapon matters**

Given *Kriegsraison*’s tendency to speak in code and hyperbole about probability and risk, and its interest in justifying whatever is necessary to reduce losses or even the risk of losses in the course of conflict, it would be remiss of this article if it did not briefly interrogate how the U.S. portrays drones in its attempts to ‘sell’ the targeted killing programme. In a number of ways, the drone represents *Kriegsraison*’s platonic ideal of a weapon, and indeed drones allow for the practical implementation of the *Kriegsraison* doctrine to an extent not previously possible. Indeed, Chamayou describes the drone as ‘the weapon of self-preservation’,<sup>169</sup> allowing for the projection of power without the projection of vulnerability.<sup>170</sup>

As stated, drones are the perfect weapon for the *Kriegsraison* doctrine, allowing as they do for the rapid neutralisation of possible threats before that ‘threat’ becomes imminent and giving no cause for concern for one’s own troops. It is interesting to note that parallels can again be drawn in this arena between WWI-era Germany and the U.S. today, particularly when looking at Germany’s employment of the submarine at that time. The submarine was first used between 1904 and 1905, but it was during the First World War that German statesmen, lawyers and military leaders began to push in earnest for the submarine to be accepted by international law. There is no doubt that the manner in which Germany used the submarine to destroy merchant

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<sup>167</sup> Amos Guiora, ‘Targeted Killing: When proportionality gets all out of proportion’ (2012) *CWRJIL* 235, 253.

<sup>168</sup> Ohlin and May (n5) 146.

<sup>169</sup> Grégoire Chamayou, *A Theory of the Drone* (Janet Lloyd tr., The New Press 2015) 84.

<sup>170</sup> *Ibid* 12.

ships and the crew on those ships during the war was illegal and broke with tradition. However, the fact that the submarine was new meant that it was unmentioned in the Declaration of London (DoL) and the Hague Conventions, but, as Hull notes, both the DoL and customary law at the time had major implications for submarine warfare.<sup>171</sup> Germany, however, argued forcefully that the submarine was a new weapon, and that “new means require new forms.”<sup>172</sup> A memorandum by Admiral von Pohl of the Germany Navy to the Chancellor stated that ‘modern technology’ had handed Germany a weapon that ‘would lead to a complete revolution in the conduct of war’.<sup>173</sup> Given that ‘new means require new forms’, he argued, one could not demand of the U-boat that it surface and announce its presence (to remove crews and passengers on neutral merchant ships).<sup>174</sup> Germany argued that submarine warfare (and aerial attacks, which were also novel at the time) ‘is something completely new and thus outside of old international law’.<sup>175</sup> It also stated that belligerents had the right to use the submarine weapon and wanted the rest of the international community to recognise this right, too, arguing that ‘only such firmness... can convince [other nations] of the existing, perfect right to use this form of war conduct...’.<sup>176</sup> Hull writes that the navy was ‘determined to get the submarine and what they took to be its essential manner of warfare recognized by the world as legal, with one Admiral confiding to his diary in September 1916 that it was ‘essential to work with all political means on the USA so that it recognizes the justice and necessity of our unrestricted submarine policy.’<sup>177</sup> Further legal opinions offered by the navy noted the submarine’s unique characteristics of surprise underwater attack, and argued that, this being the submarine’s ‘essence’, actions such as stopping, searching ships papers, and saving the crew could not be required of submarines – the element of surprise at its core making the weapon exceptional. Vice Admiral Reinhard Scheer wrote:

‘The new weapon needs a new law. That is a natural development of law, as it is recognized in every area of human progress. It is not illegal. But the new law naturally produces resistance fed by contrary interests, and overcoming that requires work and energy. It is said that “international law can only be made by those with power.” We have the power, if we defeat England...’<sup>178</sup>

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<sup>171</sup> Hull (n7) 212.

<sup>172</sup> Ibid 221.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid .

<sup>175</sup> Ibid 267.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid 268.

Much like drone use today, ‘the new weapon, law, and world power were thus inextricably tied together.’<sup>179</sup> Germany’s submarine use in World War I was echoed on both sides during World War II, and represented what Hull terms as ‘weapons positivism’, where ‘technological progress completely undermined and displaced written law. The engineer replaced the legislator.’<sup>180</sup> Hull connects this to the legal positivism dominant in Bismarckian Germany, where Carl Lueder (who has already been discussed as the principle proponent of *Kriegsraison*), had written that ‘the formation of the law of war... flows from the nature of war’ and that ‘all warlike measures of violence which are required by the goal of war, must be used unlimitedly and cannot be restricted by a legal commandment.’<sup>181</sup> As such, ‘where Lueder had derived the law (of military necessity) from the alleged nature of war, the Wilhelminians derived it from the nature of weapons.’<sup>182</sup>

The United States’ drone use, and arguments around drones’ legality and the U.S. right to use them, run extremely close to German arguments around the submarine. With the drone, not only has the U.S. introduced a new weapon with which to fight war in a new way, it has attempted to create entirely new legal standards to fit the use of this weapon. Like the submarine and World War I, drones were already in existence and in use for surveillance and reconnaissance purposes prior to the first U.S. drone strike of the targeted killing programme in 2002. It was the U.S., however, who first armed a Predator drone with a hellfire missile in 2001.<sup>183</sup> With the advent of the ‘War on Terror’, the U.S. realised the revolutionary potential of the drone and began to utilise it in an unprecedented manner. The creation and expansion of the targeted killing programme has seen efforts by the U.S. to normalise the weapon, while refusing to support a UNHRC resolution on the use of armed drones.<sup>184</sup> Drones are considered as battlefield weapons, used in the same way as rocket launchers and bomber aircraft, and it is

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<sup>179</sup> Ibid.

<sup>180</sup> Ibid 269.

<sup>181</sup> Hull (n7) 269.

<sup>182</sup> Ibid.

<sup>183</sup> Hugh Gusterson, *Drone: Remote Control Warfare* (M.I.T. Press 2016) 11.

<sup>184</sup> See, for example, C Lynch, ‘Exclusive: U.S. Boycotts U.N. Drone Talks’ (*Foreign Policy*, 19 March 2014) <<http://foreignpolicy.com/2014/03/19/exclusive-u-s-boycotts-u-n-drone-talks/>>; Mission of the United States in Geneva, Switzerland, ‘EOV Resolution on the use of Remotely Piloted Armed Drones in Counter-Terrorism and Military Operations’ (27 March 2014) <<https://geneva.usmission.gov/2014/03/28/eov-on-resolution-on-the-use-of-remotely-piloted-aircraft-or-armed-drones-in-counter-terrorism-and-military-operations/>> accessed 14 April 2017.

argued that U.S. drone use ‘is no different than our launch of these other launch vehicles’.<sup>185</sup> It is telling that while some have argued that armed drones are neither revolutionary nor transformative,<sup>186</sup> drones have nonetheless been described as being ‘the only game in town’;<sup>187</sup> ‘a major step forward’ in humanitarian technology and as having ‘exceptional proficiency, precision.’...<sup>188</sup>

The legality of armed drones under international law is generally uncontested. Yet, despite their ostensible legality, there remains a lack of consensus on how the various rules of international law that regulate the use of lethal force should be applied to drones.<sup>189</sup> The U.S., much like Germany in WWI, has taken advantage of silences in the law to encourage the tacit acceptance of the weapon, if not the way in which it is being used, by the international community. It has done so primarily through its presentation of drones as exceptional weapons, imbued with both the characteristics of humanity and precision, providing a perfect vehicle for Krieger’s manner of ‘speaking in code’ and hyperbole about probability and risk. For targeted killing, the concepts of precision, accuracy and humanity work in concert to reify the idea of the armed drone as an ‘exceptional’ weapon. If the ‘war on terror’ is exceptional in its nature, then an exceptional weapon or weapons system should - or indeed must - be used to fight it. Descriptions of armed drones regularly include the word ‘exceptional’, for example: ‘exceptional proficiency’;<sup>190</sup> ‘exceptional ability to accurately identify and attack targets’;<sup>191</sup> ‘exceptionally precise, exceptionally surgical and exceptionally targeted’.<sup>192</sup> In a discussion on drones and the FATA province of Pakistan, Shah notes that the positing of drones as ‘exceptional technology’ and of FATA as ‘exceptional territory’ has ‘allowed the

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<sup>185</sup> Mary Ellen O’Connell, ‘Drones Under International Law’ (*Washington University*, 08 October 2010) <<http://law.wustl.edu/harris/documents/OConnellFullRemarksNov23.pdf>> accessed 14 April 2017.

<sup>186</sup> Kenneth Anderson, ‘Military Drones: Evolutionary, Not Transformative, Not Revolutionary’ (*Lawfare*, 29 June 2016) <<https://www.lawfareblog.com/military-drones-evolutionary-not-transformative-not-revolutionary>> accessed 14 April 2017.

<sup>187</sup> Jane Mayer, ‘The Predator War’ (*New Yorker*, 26 October 2009) <<http://www.newyorker.com/magazine/2009/10/26/the-predator-war>> accessed 14 April 2017.

<sup>188</sup> Chamayou (n169) 146.

<sup>189</sup> Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta, ‘The International Law Framework Regulating the Use of Armed Drones’, *ICLQ* 65 (2016) 793.

<sup>190</sup> Scott Shane, ‘Election spurred a move to codify U.S. drone policy’ (*The New York Times* 24 November 2012) <[http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?\\_r=0](http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?_r=0)> accessed 14 April 2017.

<sup>191</sup> David True, ‘Disciplining drone strikes: Just War in the context of counterterrorism’ in Peter L. Bergen and Daniel Rothenburg (eds), *Drone Wars: Transforming Conflict, Law, and Policy* (Cambridge University Press 2015) 297.

<sup>192</sup> Conor Friedersdorf, ‘Calling U.S. drone strikes “surgical” is Orwellian propaganda’ (*The Atlantic*, 27 September 2012) <<http://www.theatlantic.com/politics/archive/2012/09/calling-us-drone-strikes-surgical-is-orwellian-propaganda/262920/>> accessed 14 April 2017.

uncomfortable marriage of drones with the region of FATA'.<sup>193</sup> This idea of 'exception' permeates almost every facet of the targeted killing programme and the wider 'war on terror'. The conflict is said to be exceptional in its very nature and the weapons used are exceptional in their technical abilities. The civilians killed are killed in 'tragic' incidents, representing exceptions to the norm, and despite the sheer number of targeted killings carried out, each individual targeted is deemed to present an exceptional threat. Yet the 'exceptional' practice of targeted killing is now routine, and firmly embedded in U.S. military practice.

The majority of scholarship and commentary on the subject accepts that in an armed conflict scenario, drones are legal and subject only to the strictures of IHL. Whether drones can comply with IHRL is another matter. While they are not illegal per se under IHRL, the instances in which it would be lawful to use a drone in a non-conflict situation to which IHRL applies will be extremely rare, given that using a drone-fired missile will likely instantly kill both the target and any other individual in his or her vicinity. Drones also present legal challenges of another kind – they necessitate a rethinking of our conceptions of 'power' and 'control' regarding jurisdiction in international human rights law, and raise the very real possibility that their use relaxes the standards for resort to force in the jus ad bellum, making targeted killing across borders easier than in the past, potentially undermining the role of State sovereignty, and thereby the international security system.<sup>194</sup> There are also concerns that as drones allow for the targeting of individuals without any risk to a State's forces, 'policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively.'<sup>195</sup> Furthermore, Chehtman argues that there is another facet to the effect of drones on jus ad bellum proportionality. It is unlikely, he says, that drones can comply with the principle of proportionality, because their perceived advantages in discrimination are counteracted by the lesser chances of success in achieving the just cause of war.<sup>196</sup> Drones may make resort to force easier, but this force is less likely to succeed in attaining the desired goal.

## **Conclusion**

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<sup>193</sup> Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan: The Legal and Socio-political Aspects* (Routledge 2014) 225.

<sup>194</sup> Heyns et al (n189) 793.

<sup>195</sup> UNHRC (n90) para. 80.

<sup>196</sup> Chehtman (n163) 197.

Although some moves were made toward transparency in the final year of the Obama administration, the targeted killing programme, as is to be expected, remains secretive and opaque. As such, a lack of information means that creating a definitive stance on the legality or otherwise of individual strikes can be difficult. However, it is still possible to holistically assess the legal arguments and practice of the U.S. At the very least, the United States is being disingenuous in its classification of conflicts, and deliberately dishonest in its application and interpretation of imminence and necessity at the *jus ad bellum* level. The United States continues to portray a flagrant disregard for widely accepted norms and rules, even while it pays lip-service to them. Worryingly, it also appears to be operating under the mistaken belief that necessity and military necessity can operate as the sole justifications for military action. The United States has never expressly invoked *Kriegsraison*, but like WWI-era Germany it holds *opinio juris* to be a function of state wartime practice, as is evidenced by its consistent attempts to have the international community accept a non-existent right of preventive self-defence, an overbroad and uniquely flexible conception of ‘imminence’, and the creation of regions to which IHL applies, despite these regions being ‘outside areas of active hostilities’. With this fallacious reasoning, the U.S. ushers in the return of *Kriegsraison*.

We should remain wary of arguments that ‘new means require new forms’, particularly when these ‘new’ forms represent a return to a much-discredited and disgraced doctrine of international law.<sup>197</sup> The United States has consistently argued that the current international law regime requires modification in order to address the threats and challenges faced today. This is not the case. The regimes of international humanitarian law and international human rights law as they currently exist are more than capable of addressing the current terrorist challenges faced by States.<sup>198</sup> Those who argue against their applicability, or who assert that neither body can adequately engage with the issues of drone strikes and transnational terror do so in order to better justify their own contempt for these rules. Heyns et al, in arguing that ‘drones should follow the law, rather than the other way around’, write:

‘The legal framework for maintaining international peace and the protection of the right to life is a coherent and well-established system, reflecting norms that have been developed over the centuries and have withstood the test of time. Even though drones

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<sup>197</sup> Hull (n7) 221.

<sup>198</sup> Heyns et al (n189) 826.

are not illegal weapons, they can easily be abused. The central norms of international law need not and should not be abandoned to meet challenges posed by terrorism and ‘new’ forms of conflict. On the contrary, the fact that drones make targeted killing so much easier should serve as a prompt to ensure a diligent application of these standards, especially in view of the likely expansion in the number of States with access to this technology in the future.’<sup>199</sup>

In noting that ‘the drone campaign is saturated with the language of law’, Jaffer remarks that ‘if this is law, it is law without limits – law without constraint.’<sup>200</sup> And what is this a symbol of, other than *Kriegsraison*? The hyperbole, and the political and military expedience of *Kriegsraison*, are demonstrated in the actions and words of the U.S. in relation to its position on the extraterritoriality of international human rights law. The U.S. continues to actively resist the extraterritorial applicability of IHRL for reasons both policy and law-driven. It is far easier to describe the deaths of civilians in a drone strike as an ‘unfortunate’ or ‘tragic’ accident, or as collateral damage, when that strike takes place in the context of an armed conflict. Such arguments and positions are much less convincing, and harder to sustain, when, away from the battlefield or ‘hot spot’ of fighting, these individuals are imbued again with their right to life and those other rights which accompany it, and the decision to deprive them of their enjoyment of these rights must be convincingly explained and justified.

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<sup>199</sup> Ibid.

<sup>200</sup> Jaffer (n134) 7.