INVESTIGATING THE RELATIONSHIP BETWEEN TARGETED KILLING, AMERICAN EXCEPTIONALISM, AND *KRIEGSRAISON*: REPERCUSSIONS FOR INTERNATIONAL LAW

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BY

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Abstract

Investigating the Relationship between Targeted Killing, American Exceptionalism and *Kriegsraison*: Repercussions for International Law

Catherine Connolly

For nearly seventeen years, targeted killing has been lauded by the United States as the optimum method of disrupting terrorist activities carried out by al-Qaeda and 'affiliated forces' not only in Afghanistan and Iraq, but outside the immediate zone of hostilities in Pakistan, Somalia, Yemen, Libya, Niger and Syria. While thousands of civilians and suspected militants have been killed in such strikes, their effectiveness in disrupting terrorist activity appears minimal. This thesis investigates the relationship between targeted killing, the doctrine of *Kriegsraison* (which posits that states may use all means considered necessary, however unlawful, to protect the security of the state), and international law. It does so in order to examine how targeted killing and *Kriegsraison* harm international law at the same time as they employ international law as a validating tool. The thesis undertakes a theoretical and doctrinal study of international law using a critical approach, and clarifies the legality of the targeted killing programme and how the political actions and context that influence the United States' legal actions and interpretations have led to the return of *Kriegsraison*. Given *Kriegsraison's* self-judging nature, it is particularly damaging to the international legal order and international relations.

The thesis engages directly with the questions raised by the United States use of armed drones as the main method of carrying out the targeted killing programme. Furthermore, through an assessment of the domestic context that informs the United States' ambivalent relationship with public international law, the thesis contends that the resurrection of *Kriegsraison* is a violent expression of U.S. legal imperialism, and of the United States' long-held belief that it exists in its own, permanent state of exception. Finally, the thesis concludes that *Kriegsraison* itself operates in a state of exception *inside* the liberal order, often through the harnessing of international law rules.

Dedication

Dedicated to my beloved and brave dad, Seán Connolly (1958 – 2005) and my fierce and brilliant friend, Grace McDermott (1990 – 2017).

And for my mam, Jacqui, who continues to teach me all the things that are most worth knowing.

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My heart is moved by all I cannot save:
so much has been destroyed

I have to cast my lot with those
who age after age, perversely,

with no extraordinary power,
reconstitute the world.

(From 'Natural Resources' by Adrienne Rich, 1977)

Introduction

'in principle...states have equal rights...in reality they are unequal in their significance and their power'.[1]

This thesis argues that the United States' targeted killing programme - in which individuals are identified as members of non-state armed groups posing a potentially imminent security threat to the U.S., and then targeted and killed in drone strikes – demonstrates the continuing presence of *Kriegsraison* in international law. According to *Kriegsraison*, an 18th-century doctrine with German origins, if a state decides that a military act is necessary for its security, that act does not have to comply with the rules of international law.[2] The *Kriegsraison* doctrine established the supremacy of state security above all other relevant considerations, including a state's international (and indeed, domestic) legal obligations. In this thesis, I argue that *Kriegsraison*, far from being merely a doctrine concerned with the law of armed conflict, operates at both the level of politics and the level of military action and decision-making. It encourages states to argue that the security and safety of the state is under threat, to the extent that military force must be used to counter this threat. Whether the threat is real or merely perceived is beside the point, and the decision to use force can be taken irrespective of the domestic or international rules surrounding the initial decision to use force, and the secondary decision as to how exactly that force will be used. Despite *Kriegsraison* being the exception that undoes international law protections, arguments that employ the logic of *Kriegsraison* are often framed in legitimising or legal language. As such, in the present moment, *Kriegsraison* operates less as a 'doctrine' in the legal sense, and more as a modality - a pattern of argument and reasoning - which asserts a strategic legalism steeped in the reasoning of the older *Kriegsraison* doctrine. I further contend that the modality of *Kriegsraison* employed by the U.S. is demonstrative of U.S. imperialism, and that this imperialism - both capital and racial – is inherent in U.S. readings of the international law on the use of force and international humanitarian law. That *Kriegsraison* can be employed so readily by the United States is a testament to American exceptionalism; without the considerable power it wields on the international stage, the U.S. could not use *Kriegsraison* with such success, and so widely, in multiple states and against multiple, amorphous enemies. Consider the 'unwilling or unable doctrine' (discussed in Chapter 1), through which the U.S. argues that it can use force in or against states who are

[1] EB Pashukanis, 'International Law', in Beirne & Sharlet (eds) (1980) 178.
[2] See Catherine Connolly, 'Necessity Knows No Law: The Resurrection of Kriegsraison Through the U.S. Targeted Killing Programme' (2017) Journal of Conflict & Security Law 3 (1) 463.

unwilling or unable to deal with terrorist threats emanating from their territory against the United States. As Tzouvala argues:

> 'This sort of argument does away even with formal legal equality amongst states, and only gives the full range of legal rights to powerful states, or to states that follow specific counter-terrorism policies. This way of organising lawful violence closely resembles 19th-century, imperial international law, which, in turn raises the question whether international law ever became truly post-colonial.'[3]

The 'unwilling or unable' argument is a new and unprecedented development in international law. That the U.S. has been able to wield it effectively speaks volumes.

The United States' approach to public international law, in particular its approach to international human rights law and the international law on the use of force, is both highly utilitarian and deeply exceptionalist. While the U.S. views itself both as an exceptional state and as a state who can, when necessary, exempt itself from the international legal system and the rule of law, it tends to do so through the 'creative' interpretation of already existing legal rules, and of course the obvious flouting of others (in particular, the international law on the use of force). U.S. exceptionalism is thus situated not in a sphere outside the international rule of law, but rather in an exceptional space *within* a structurally imperial rule of law system.

The U.S. has consistently asserted that the targeted killing programme complies with international law. It argues that, under the international law on the use of force, targeted killings are carried out in self-defence against an imminent threat to the United States and in pursuit of U.S. objectives in the 'war on terror', according to Article 51 of the Charter of the United Nations. Regarding international humanitarian law, also known as the law of armed conflict, the U.S. contends that the targeted killing programme complies with the relevant rules, that strikes are carried out against individuals who are members of non-state armed groups involved in hostilities against the United States, and that strikes are both militarily necessary and proportionate.[4] It does not consider international human rights law a relevant consideration for

[3] Greek News Agenda, *Ntina Tzouvala on the history of international law and its impact on the Balkans* (2019), http://www.greeknewsagenda.gr/index.php/articles/recent/15-interviews/7014-ntina-tzouvala-on-the-development-of-international-law-and-its-impact-on-the-history-of-the-balkans?fbclid=IwAR2nXYLm88nwch8CqFqh7CZxlGSAgSWhXp2kRjO9jeYed2Mm5w5IZ1IJBss, accessed 01 July 2019

[4] See Department of Justice (2011), Department of Justice White Paper: 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, https://www.documentcloud.org/documents/602342-draft-white-paper.html, accessed 17 December 2018.

the targeted killing programme. The United States has couched its arguments justifying the targeted killing programme in terms of military necessity and self-defence, claiming that the targeted killing programme is necessary to ensure the security, safety, and continued survival of the United States and the American way of life.[5] The Trump administration's 2018 National Strategy for Counterterrorism reiterates that the U.S. is 'a nation at war—and it is a war that the United States will win.'[6]

Domestically, successive U.S. presidents – George W. Bush, Barack Obama, and Donald Trump – have justified uses of force against various terrorist groups in different countries as part of the U.S. 'war on terror', under the 2001 Authorization for the Use of Military Force (2001 AUMF). The 2001 AUMF was passed three days after the al-Qaeda attacks of September 11th 2001 on the United States. In the Senate, the AUMF was passed 98-0, while in the House of Representatives, it was passed by a vote of 420-1. The 2001 AUMF authorized President Bush to:

> '…use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.'[7]

It is from the 2001 AUMF that Presidents Bush, Obama, and Trump have derived their authority to carry out the targeted killing programme. Under the 2001 AUMF, President Obama oversaw its expansion to include Libya in 2012, while the Trump administration has overseen the expansion of the programme to include Niger. Many of the groups targeted by drone strikes in the targeted killing programme were not in existence at the time of the 9/11 attacks in 2001, and are often only loosely affiliated with al-Qaeda, if indeed they are at all. Furthermore, strikes against the Assad regime in Syria by the Trump administration, and U.S. involvement in the Saudi-led coalition in the war in Yemen, have each been justified under the 2001 AUMF. As such, the presidential authority derived from the 2001 AUMF is in question. Such conduct amounts to an expansion in presidential war powers, and inaction from Congress in this regard has led to accusations that Congressional war powers are now irrelevant and dead, or at the

[5] The White House (2018), National Strategy for Counterterrorism of the United States of America https://www.whitehouse.gov/wp-content/uploads/2018/10/NSCT.pdf, accessed 17 December 2018.
[6] Ibid, II.
[7] 115 STAT. 224 PUBLIC LAW 107–40—SEPT. 18, 2001 (2001 AUMF)

very least 'on life support.'[8] While the Senate voted on 13th December 2018 to end U.S. military assistance to the Saudi-led coalition in Yemen, marking the first ever use of the controversial War Powers Resolution of 1973, it remains to be seen whether Congress will vote likewise in 2019, and what the exact repercussions of such a vote for presidential war powers would be.[9] In any case, regardless of whether U.S. military assistance to the Saudi-led coalition is ended, the targeted killing programme in Yemen will continue.

Since the beginning of the targeted killing programme under the administration of President George W. Bush in 2002, an estimated 11,880 people have been killed in drone strikes in Afghanistan, Yemen, Pakistan and Somalia. More have been killed in Iraq, Syria, Niger and Libya. Operated over a distance of some 13,000 kilometres (or 8000 miles), drone strikes kill identified or suspected militants and civilians, while U.S. drone pilots sit safely ensconced in locations such as the Creech air force base in the Nevada desert, in the United States. In government statements and news reports, reports regarding the targeted killing programme tend to focus on drones and the missile strikes they perform. These strikes are described as 'precision strikes', erasing the significant destructive impact of the missiles deployed in drone strikes, such as the 500lb GBU-38 missile and the 100lb AGM-114 Hellfire missile.

Aside from the substantial kinetic impact of the missiles carried by drones, including causing injury and death, and damage to infrastructure and the wider environment, drones also have a detrimental psychological effect on the communities over which they hover. The Reaper drone has an endurance time of over 27 hours, allowing it to loiter for substantial periods of time over a specific area.[10] This loitering capacity has affected community and familial relationships and social cohesion.[11] Communities have described reducing the time they spend socialising, avoiding large family and other gatherings, and feeling afraid to go to mosques.[12] There have been numerous reports of drone strikes on funerals and weddings.[13] In a study by the Alkarama

[8] See, for example, Keith E. Whittington (2018), 'R.I.P. Congressional War Power' (Lawfareblog.com, 20 April 2018) https://www.lawfareblog.com/rip-congressional-war-power, accessed 17 December 2018.
[9] Julie Hirschfeld Davis and Eric Schmitt (2018), 'Senate Votes to End Aid for Yemen Fight Over Khashoggi Killing and Saudis' War Aims' (*The New York Times*, 13 December 2018), https://www.nytimes.com/2018/12/13/us/politics/yemen-saudi-war-pompeo-mattis.html, accessed 17 December 2018.
[10] General Atomics Aeronautical (2015), *MQ-9 Reaper/Predator B: Persistent Multi-Mission ISR*, http://www.ga-asi.com/Websites/gaasi/images/products/aircraft_systems/pdf/MQ9%20Reaper_Predator_B_032515.pdf.
[11] Alaa Hijazi et al (2017), 'Psychological Dimensions of Drone Warfare', *Current Psychology*, available online at: https://link-springer-com.dcu.idm.oclc.org/article/10.1007/s12144-017-9684-7, accessed 17 December 2018.
[12] Ibid.
[13] See, for example, Conor Friedersdorf (2013), 'Drone Attacks at Funerals of People Killed in Drone Strikes' (*The Atlantic*, 24 October 2013) https://www.theatlantic.com/international/archive/2013/10/drone-attacks-at-funerals-of-people-killed-in-drone-strikes/280821/, accessed 17 December 2018; Spencer Ackerman (2013), 'Air strike in Yemen kills 15 wedding guests mistaken for al-Qaida – officials' (*The Guardian*, 12 December 2013)

Foundation, PTSD was found to be prevalent in adults living in an area in Yemen frequented by drones, along with 'constant anxiety' and 'constant fear'.[14] Children, in particular, have suffered psychological ill-effects. Children no longer want to play outside with their friends, and prefer when the sky is grey – because when the sky is blue, the drones can fly.[15] 74% of children in the same Alkarama study reported having feelings of fear 'when they hear sounds that resemble the buzzing of drones.'[16]

In the U.S, the targeted killing programme continues to be largely regarded as unproblematic. In the most recent Pew survey of public opinion on drone strikes, carried out in 2015, 58% of respondents approved. 74% of Republicans approved of drone strikes, while 52% of Democrats and 56% of Independent felt likewise. Only 29% of respondents were concerned about whether drone strikes were being conducted legally.[17] That the targeted killing programme and drone strikes continue to maintain broad support, both among the American public and politicians, has a lot to do with the fact 'that drones are frequently described as precise instruments of warfare, carrying out surgical strikes while reducing risks to American forces.'[18]

The U.S. is now going into its nineteenth continuous year at war. Currently, there is little sign of that war, or its global reach, abating. As of 11th September 2018, U.S. teenagers who were not born when the events of 9/11 occurred are eligible to enlist in the U.S. military.[19] The federal defence budget has risen by 12% in the past two years, and now stands at $695.1 billion dollars - totalling more than the next seven countries (including Russia and China) combined.[20] The U.S. appetite for war, or at the very least preparing for war, appears unsatiated. Relatedly, the U.S. continues to express anxiety about its safety and security – a feature of American

https://www.theguardian.com/world/2013/dec/12/air-strike-yemen-15-wedding-guest-killed-mistaken-al-qaida, accessed 17 December 2018.

[14] Women's International League for Peace & Freedom (2017), *The Humanitarian Impact of Armed Drones*, https://wilpf.org/the-many-humanitarian-impacts-of-armed-drones/, 41.

[15] Karen McVeigh (2013), 'Drone strikes: tears in Congress as Pakistani family tells of mother's death' (*The Guardian*, 29 October 2013) https://www.theguardian.com/world/2013/oct/29/pakistan-family-drone-victim-testimony-congress, accessed 17 December 2018.

[16] Women's International League for Peace & Freedom (n12), 43.

[17] Pew Research Center (2015), 'Public Continues to Back U.S. Drone Attacks' www.people-press.org/2015/05/28/public-continues-to-back-up-drone-attacks, accessed 17 December 2018.

[18] Loren DeJonge Schulman (2018), 'Precision and Civilian Casualties: Policymakers Believe Drones Can Be Precise. That May Not Be Enough.' (*Just Security*, 02 August 2018) https://www.justsecurity.org/59909/precision-civilian-casualties-policymakers-drones-precise-enough, accessed 17 December 2018.

[19] J.D. Simkins (2018), 'A person born on Sept. 11, 2001, can now enlist to fight in the war that day spawned' (*MilitaryTimes.com*, 11 September 2018) https://www.militarytimes.com/news/your-military/2018/09/11/a-person-born-on-sept-11-2001-can-now-enlist-to-fight-in-the-war-that-day-spawned/, accessed 17 December 2018.

[20] Peter G. Peterson Foundation (2018), 'U.S. Defense Spending Compared to Other Countries', https://www.pgpf.org/chart-archive/0053_defense-comparison, accessed 17 December 2018.

national life since before the country's founding. In his November 2018 statement on supporting Saudi Arabia in the face of criticism for the murder of Jamal Khasoggi, President Trump proclaimed that 'the world is a very dangerous place!'[21] In the 2017 National Security Strategy, the administration stated that the U.S. 'faces an extraordinarily dangerous world, filled with a wide range of threats that have intensified in recent years'.[22] Such perceptions of insecurity, combined with the U.S.' long history of war-making and war-fighting, have coalesced to make all actions which are counter to American interests appear as threats to its national security, its domestic safety, and the American way of life. War is, as Adrienne Rich wrote in 1991, the 'absolute failure of imagination'. [23] For decades now, the United States has failed to imagine a different way of life.

In 2018, the U.S. dropped more bombs in Afghanistan than in any year since 2004.[24] The targeted killing programme has been expanded to Niger.[25] Strikes under the targeted killing programme in Somalia have more than doubled since 2016.[26] The Trump administration has expanded the CIA's strike authority in Africa, after the agency had its responsibilities rolled back by the Obama administration.[27] Hellfire missile production (the main missile of choice for drone strikes) is set to increase by 50% in 2019.[28] The Trump administration has relaxed the military's rules of engagement.[29] Such decisions accord with President Trump's promise while on the campaign trail when discussing how he would deal with terrorists: namely, that

[21] The White House, Statement from President Donald J. Trump on Standing with Saudi Arabia (20 November 2018) https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-standing-saudi-arabia/, accessed 26 November 2018.
[22] The White House (2017), National Security Strategy of the United States of America.
[23] Adrienne Rich, *What Is Found There: Notebooks on Poetry and Politics* (W.W. Norton & Company 1991) 16.
[24] Niall McCarthy, 'The US Never Dropped As Many Bombs on Afghanistan As It Did In 2018', (*Forbes.com*, 13 November 2018) https://www.forbes.com/sites/niallmccarthy/2018/11/13/the-u-s-never-dropped-as-many-bombs-on-afghanistan-as-it-did-in-2018-infographic/#31841cbf2fae, accessed 17 December 2018.
[25] Eric Schmitt, 'A Shadowy War's Newest Front: A Drone Base Rising From Sahara Dust' (*The New York Times*, 22 April 2018) https://www.nytimes.com/2018/04/22/us/politics/drone-base-niger.html, accessed 17 December 2018.
[26] Christina Goldbaum, 'A Trumpian War on Terror That Just Keeps Getting Bigger' (*The Atlantic*, 11 September 2018) https://www.theatlantic.com/international/archive/2018/09/drone-somalia-al-shabaab-al-qaeda-terrorist-africa-trump/569680/, accessed 17 December 2018.
[27] Joe Penney et al, 'C.I.A. Drone Mission, Curtailed by Obama, Is Expanded in Africa Under Trump' *(The New York Times*, 09 September 2018) https://www.nytimes.com/2018/09/09/world/africa/cia-drones-africa-military.html, accessed 17 December 2018.
[28] Kris Osborn, 'U.S. Army: We Will Increase Hellfire Missile Production by 50-Percent in 2019' (*The National Interest*, 16 November 2017) https://nationalinterest.org/blog/the-buzz/us-army-we-will-increase-hellfire-missile-production-by-50-23218, 17 December 2018.
[29] Helene Cooper (2017), 'Trump Gives Military New Freedom, But With That Comes Danger' (*The New York Times*, 05 April 2017) https://www.nytimes.com/2017/04/05/us/politics/rules-of-engagement-military-force-mattis.html, accessed 17 December 2018.

he would 'bomb the shit out of 'em'.[30] The number of civilian casualties has risen accordingly. In Yemen, for example, around a third of those killed in U.S. drone strikes in 2018 to date are believed to have been civilians.[31]

The paragraph above illustrates why simply asking which rules of international law are violated by the targeted killing programme does not go far enough in its inquiry. If American military supremacy and unlawful uses of force are to be effectively challenged, we must grasp how the United States' has long held itself out as an arbiter and creator of universal values and standards, and as a protector of rules in the realm of international law and international security, while simultaneously flouting, or essentially ignoring, many of those rules and standards it has played a key part in creating. Consequently, while this thesis attempts to provide clarification on the history and development of the principles of military necessity and self-defence in international law and the history of the *Kriegsraison* doctrine, as well as analysing the legal environment in which the targeted killing programme occurs in order to better understand which legal rules are applicable to the programme, it also endeavours to understand the historical and political origins of the United States' fraught relationship with those bodies of law related to the use of force; namely, the law on the use of force (*jus ad bellum*), and international humanitarian law and international human rights law (*jus in bello*). To do so, two key features of American history are explored: the experience of warfare in the United States since the country was first settled by colonists; and the creation of the U.S. Constitution in 1789, with a specific focus on *The Federalist Papers*.

The thesis also considers what *Kriegsraison* itself tells us about international law on the use of force and international humanitarian and human rights law, and what this tells us about international law and its future. It argues that while international law has the capacity to provide a radical and liberating framework for those opposing the use of armed force, it is imperative that international law's role in countenancing and enabling uses of force, and particularly *imperial* uses of force, is recognised and questioned.

Given the above, this thesis attempts to answer a number of questions. The core question is this: to what extent does US use of targeted killings constitute a manifestation of Kriegsraison? Secondarily, why does international humanitarian law, international human rights law, and the

[30] Jared Keller, 'Trump is making good on his promise to 'bomb the sh*t' out of terrorists' (*Taskandpurpose.com*, 13 September 2017) https://taskandpurpose.com/trump-bomb-shit-afghanistan-isis/, accessed 17 December 2018.
[31] Maggie Michael and Maad Al-Zikry, 'The hidden toll of American drones in Yemen: civilian deaths' (*APNews.com*, 14 November 2018) https://www.apnews.com/9051691c8f8a449e8bb6fd684f100863, accessed 17 December 2018.

international law on the use of force allow for the United States to make, and act on, claims regarding the targeted killing programme which are plainly unlawful, without sanction or censure, and how exactly does the targeted killing programme violate the relevant rules of international humanitarian and human rights law? Finally, how has the history of U.S. war-making and war-fighting influenced its approach to those bodies of international law relevant to war and armed conflict? What can we learn about U.S. interpretations of the relevant law from *The Federalist Papers* and its approach to international law domestically?

The core argument of this thesis is that the U.S. targeted killing programme represents a manifestation of *Kriegsraison* to the fullest extent possible today, and that it can harness the modality of *Kriegsraison* and justify its targeted killing programme under the guise of legality due to the continued imperial character of international law. While the imperialism of early international law is now widely acknowledged, the continued relevance of imperialism to the international law on the use of force, international humanitarian law and international human rights law is less often considered.[32] The role of capital, empire and race in international humanitarian law and international law on the use of force is perhaps less readily apparent than it is in other bodies of law; for example, international economic law. Nonetheless, capital, empire, and race continue to exert a strong and sustained influence on the legal rules and institutions relevant to war and armed conflict. As Knox notes, international law is 'the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world' (cite). Imperialist states – the U.S. chief among them – use international law to articulate their interests, with international law serving to "concretize" economic and political relationships. This thesis clarifies how the international law on the use of force, international humanitarian law and international human rights law lend themselves to manipulation by those same powerful actors.

The language and strategic legalism used in the targeted killing programme is demonstrative of *Kriegsraison*. Through the targeted killing programme, *Kriegsraiso*n manifests as a reading of international law in which the state is always right, in which all kinetic actions are necessary to ensure the security of the state, and in which (as is discussed later) instances of civilian death are explained away as accidents, errors and tragic incidents. That any violence against civilians that comes as a result of the targeted killing programme is explained away as accidental again

[32] Rob Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) London Review of International Law 4 (1), 92.

links us to imperialism. Knox highlights how violence is divorced from imperialism's logic, treated instead as an aberration, 'pathological to capitalism's normal function'. [33]

The thesis contributes to the literature on critical international law and critical security studies in important and original ways The thesis explains how *Kriegsraison* has been used by the United States through its targeted killing programme, filling a gap in the critical international law literature by identifying how the U.S. employs the logic of *Kriegsraison* to directly advance its interests at the operational level in a way that makes use of existing international law. The thesis demonstrates that, far from being resigned to the past with the advent of the post-WWII Geneva Conventions, *Kriegsraison* continues to exist and make itself available to powerful state actors. In discussing the history of U.S. war-making and war-fighting and the continued influence of *The Federalist Papers*, the thesis identifies important connections between American exceptionalism – from the past through to the present day – and the ways in which the U.S. deals in law, domestically and internationally. Further, it highlights the importance of racialised concepts to the international law on the use of force and the international law of war. Regarding critical security studies, the research calls attention to the influence of militarism and national identity on U.S. foreign policy, particularly in terms of the sustained influence of *The Federalist Papers* on this issue. It further elucidates how the U.S. harnesses the role of racialised concepts such as 'civilisation' in employing international law to achieve its foreign and security policy priorities and goals and the importance of international law for U.S security policy framing.

In terms of critical international law, this thesis is situated in the 'Intersectional Marxist Approaches to International Law' (IMAIL) framework articulated by B.S. Chimni and the 'Stretched Marxism' approach put forward by Rob Knox.[34] As such, the thesis directly engages not only with questions of capital, but also with questions of 'civilisation' in international law, the role of race and civilisation in the foundation of the United States, and the racial beliefs of early international lawyers such as Francis Lieber. While numerous scholars have written on critical approaches to international law and on international law as it relates to targeted killing,[35] to date, there has not been a work which focusses specifically on the targeted killing

[33] Knox (n32) 92.

[34] See: B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press, 2018) ; Knox (n32)

[35] See, for example: B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press, 2018); Matthew Stone, Ilan rua Wall and Costas Douzinos (eds.), New Critical Legal Thinking: Law and the Political (Routledge, 2012); Paul O' Connell, 'On The Human Rights Question' (2018) *Human Rights Quarterly* 40 (4); Markus Gunneflo, *Targeted Killing: A Legal and Political History* (Cambridge University Press 2016); Anthony Anghie,

programme as an expression of U.S. imperialism through an international law framework, combining critical legal analysis with a study of the history of U.S. militarism and war-making in U.S. national identity. Similarly, while there is a host of scholarship on targeted killing scholarship in the field of critical security studies,[36] this thesis makes an original contribution to the field by identifying how the United States uses international law to frame and structure its choices in the area of security policy and identifies how the history of war in the United States continues to influence U.S. Security policy.

Methodology

This thesis adopts a critical, Marxist analysis of international law. As Knox notes:

> 'Marxist approaches are committed to grounding the law in its wider material context: understanding the ways in which political-economic relationships—and their attendant conflicts—shape and are manifested within (international) law. As such, any critical analysis of international law should seek to ask what part, if any, international law plays in 'the reproduction of the structural inequalities which characterise capitalist societies'.[37]

A critical approach to international law should thus bring 'to light the hidden forms of domination and exploitation which shape it.'[38] As such, this thesis engages in critical research by examining traditional, doctrinal sources of international law such as treaties, conventions, and jurisprudence, and 'soft law', such as legal memos from the U.S. Department of Justice and the Office of the Legal Counsel, and statements from key figures in the Executive Branch of successive U.S. administrations, including the President George W. Bush administration, the administration of President Barack Obama, and the administration of President Donald Trump, from a critical perspective. It seeks to uncover the ways in which the international law

Imperialism, Sovereignty and the Making of International Law (Cambridge University Press, 2004); Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge University Press, 2004); Roland Otto, *Targeted Killings and International Law* (Springer 2011).

[36] See, for example: Kersten Fisk and Jennifer M. Ramos (eds) *Preventive Force: Drones, Targeted Killing, and the Transformation of Contemporary Warfare* (NYU Press, 2016); Ann Rogers and John Hill, *Unmanned:Drone Warfare and Global Security* (Pluto Press 2014); Bradley Jay Strawser (ed.), *Killing by Remote Control: The Ethics of an Unmanned Military* (Oxford University Press, 2014); David Cortright, Rachel Fairhurst and Kristen Wall (eds.), Drones and the Future of Armed Conflict (University of Chicago Press, 2015); Geoff Martin and Erin Steuter, *Drone Nation: The Political Economy of America's New Way of War* (Lexington Books, 2017)

[37] Knox, Rob, 'Marxist Approaches to International Law', in *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016)

[38] Akbar Rasulov, 'A Marxism for International Law: A New Agenda' (2018), *European Journal of International Law* 29 (2), 638

on the use of force and the international law relevant to war and armed conflict are complicit in reifying existing material structures of imperial domination by the U.S. in the countries in which it carries out the targeted killing programme, and how bodies of law such as international humanitarian law lend themselves to such practices. 'Soft law' sources, including statements and speeches from U.S. presidents, legal advisors, Secretaries of Defense and State etc., provide clarity as to how *Kriegsraison* operates at the political level and, in highlighting U.S. reliance on arguments of military necessity, self-defence and self-preservation in its pursuit of the targeted killing programme, help us to understand U.S. legal interpretations in more depth; as Koskenniemi says, 'authoritative speech migrates between technical disciplines – that… is a large part of how power operates.'[39] Through its examination of the history of warfare in the United States, and *The Federalist Papers*, this thesis also engages in historical research and, in the final chapter, includes an overview of the legitimating rhetoric used by the U.S. to support its various legal positions.

The thesis proceeds as set out below.

Chapter One traces the history of the legal development of the principle of military necessity and the right of self-defence in international law, and provides an in-depth discussion on the history of the *Kriegsraison* doctrine. It presents an overview of the debate surrounding different conceptions of the central purposes of the rules of war: whether the rules of war are supposed to restrain or enable military activity. It also addresses the various arguments in support of, and against, interpreting the right of self-defence, as found in Article 51 of the UN Charter, restrictively. This chapter asserts that the United States relies on claims of military necessity and self-defence in justifying its targeted killing programme, to the extent that the targeted killing programme is representative of *Kriegsraison*.

Chapter Two examines the U.S. targeted killing programme and its effectiveness in achieving the United States' proclaimed aim of eradicating the global terrorist threat against the state's security and safety. Much of the focus on the targeted killing programme in news media and in government statements has been on the method by which targeted killings are executed – namely, with drone strikes. In contrast to much of the literature on targeted killing, this chapter engages directly with the primary arguments put forward by the U.S. government to support

[39] Opinio Juris, Interview with Martti Koskenniemi on International Law and the Rise of the Far-Right (*Opinio Juris*, 10 December 2018), http://opiniojuris.org/2018/12/10/interview-martti-koskenniemi-on-international-law-and-the-rise-of-the-far-right/, accessed 18 December 2018.

the targeted killing programme and it's use of armed drones. Claims of drone strikes' cost-efficiency, 'humanity', and precision are interrogated and exposed as misleading, and often illusory. The chapter then explores the issues of 'accidental' civilian deaths caused by drone strikes, and the diffusion of responsibility that comes with an often complex and convoluted chain of command, before focussing on the importance of adequate and reliable intelligence for drone strike operations. It illuminates how drones have been portrayed as exceptionally precise and exceptionally humane, successfully allowing consecutive presidential administrations to present the targeted killing programme as a unique tool in the 'war on terror'.

Chapter Three situates the targeted killing programme in international law and applies the rules of international humanitarian law (IHL) to the targeted killing programme. It examines the categorisation of conflicts under international law, i.e. international armed conflict (IAC) and non-international armed conflict (NIAC). The chapter argues that if we accept the United States' argument that it is involved in an internationalised NIAC, the targeted killing programme is still extremely legally problematic, particularly given the United States' overbroad interpretations of proportionality and the principle of distinction, and its reliance on the principle of military necessity. Therefore, the chapter considers the rules of IHL relevant to targeting in a NIAC. It surveys the distinctions and differences in the targeting rules applied to civilians directly participating in hostilities and to individuals who are members of non-state organised armed groups, and engages in a detailed appraisal of the legality of personality and signature strikes under the applicable rules.

Given that some targeted killings in the targeted killing programme, for example in Niger and Libya, take place away from 'hot' battlefields or 'outside an area of active hostilities'- a category that does not exist in international law – international human rights law (IHRL) should then apply to such drone strikes. Chapter Four addresses the questions which arise from applying international human rights law to the targeted killing programme. First, it asks whether international human rights law applies extraterritorially – the U.S. maintains that it does not. The chapter then examines how, and to what extent, IHRL applies in armed conflict, and how it interacts with IHL. Finally, the chapter evaluates the targeted killing programme under the relevant rules of IHRL, and finds that the U.S. has purposely confused the legal frameworks applicable to the targeted killing programme.

Chapter Five considers the American approach to security and international law through an examination of the place of war and law in American national identity. The chapter traces

America's experiences of war and insecurity from the 1600s to the present day, with a particular focus on the writings of three of the 'Founding Fathers' in *The Federalist Papers*. *The Federalist Papers*, which remain extremely influential in the American mythos today, provides a valuable insight into the pre-eminence of security concerns in the drafting of the new American constitution in the late 1780s. This chapter emphasises how the militarism of U.S. society throughout its history, accompanied by the militarisation of the state after WWII and the legalism found in American national identity has contributed to a reading of international law in which legal rules are interpreted as serving America's security interests. Further to this, the domestic war powers, and powers of international law interpretation of the Executive Branch of U.S. government are also addressed, and the implications of the 2001 AUMF on same is examined.

The concluding chapter, Chapter Six, asks what the return of *Kriegsraison* itself represents for international law. Employing a critical analysis of international law, the chapter argues that *Kriegsraison* is representative of an imperialism which, though often erased in discussions on international law, exists to allow states to use international law rules to further imperious and predatory conduct. Declaring the legality of the targeted killing programme under a melange of criteria from different bodies of international law has allowed to the U.S. to escape ethical and moral discussions on the targeted killing programme, reducing the conversation to questions of pure legality. Yet legality does not impute ethicality or morality. This raises larger questions for international law. The chapter asks how individuals and communities can resist imperial readings of international law, so that individuals and society can ensure that international law does not accommodate injustice.

Why is this thesis relevant and necessary?

There are several reasons why the study performed in this thesis is important and necessary. It provides a detailed account as to how the targeted killing programme has been justified and clarifies its legality under the relevant rules of international law. Furthermore, in exploring how the United States' historical experiences of war and insecurity directly influences U.S. conduct in the targeted killing programme and in the international law sphere today, the thesis also brings to light how *Kriegsraison* cannot be fully eradicated from international law. First, it elucidates that the development of international humanitarian law, and in particular the principle of military necessity and the rights of self-defence, do not have the purely altruistic

and humanitarian nature often attributed to them. However, it also emphasises that since the creation of the U.N. Charter in 1945, the majority of states in the international system have taken a narrow view of the right of self-defence, and that increasingly, the principle of military necessity is viewed as restrictive rather permissive. This is especially important given ongoing attempts not only by the United States, but by states such as Russia and Israel, to expand the right of self-defence and adopt a lax reading of the principle of military necessity.

Secondly, the fallacies surrounding the targeted killing programme's drone strikes – that they are 'precise', without clarifying what precision means; that they are cost-efficient, without detailing the actual costs involved; and that they are 'humane', without acknowledging the death and destruction they cause – necessitate examination, given that it is those aforementioned arguments, accompanied by claims as to the targeted killing programme's legality, that have given it its legitimacy and allowed the U.S. to expand the programme. It appears increasingly likely that lethal autonomous weapons systems (LAWS) will be employed by states such as the U.S. in the future. It is probable that claims of precision, cost-effectiveness and humanity will accompany the use of LAWS and it is therefore incumbent upon us to interrogate these misleading claims while drones remain under meaningful human control.

Thirdly, the rules applicable to the targeted killing programme remain contentious and must be further explicated. Whether it is international humanitarian law or international human rights law which applies to the targeted killing programme, the U.S. has deliberately conflated aspects of the *jus ad bellum* with the *jus in bello*, taking an à-la-carte approach to international law that serves the interests of the state more than it does the interests of those most affected by armed conflict and terrorism.

Fourth, the history of U.S. war-making and its domestic experiences of conflict, along with the nation's approach to law, directly influences the United States' interpretations of international law today, and the war powers of the president. Furthermore, taking an ahistorical approach to the subject fails to appreciate the specifically American nuances of the *Kriegsraison* doctrine as it appears through the targeted killing programme today.

Finally, imperialism remains embedded in aspects of modern international law, even while that same law is invoked for radical and emancipatory purposes. We must remain alive to these opposing approaches when construing how international law does, or does not, contribute to the furthering of respect for human rights and the mitigating of suffering in times of armed conflict.

Chapter One: Military Necessity, *Kriegsraison* and Self-Defence

The principle of military necessity and the right of self-defence are two of the most pertinent facets of public international law, particularly when examining the issue of targeted killing. Targeted killings have primarily been justified as militarily necessary acts carried out in self-defence due to extreme circumstances in an exceptional time. Therefore, these concepts demand detailed discussion. Due to their being invoked in unprecedented ways, the concepts have also come under increased scrutiny in recent years. International humanitarian law is 'predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian consideration'.[40] If this equilibrium is unsettled, so too is the entirety of international humanitarian law. Similarly, modern international relations are reliant upon the assertion in Article 51 of the UN Charter that states may only use force in self-defence. Should force be used by a state for a reason other than this, or should a state invoke a right to use force in self-defence dishonestly, the principles of sovereign equality and territorial integrity are thrown into doubt. Therefore, respect for each concept is considered as being of the utmost importance for the maintenance of public international law. Unfortunately, this respect does not appear to have been particularly forthcoming in recent history, particularly following the events of September 11th 2001, with many states attempting, and often succeeding, to ignore the law for expediency's sake. This phenomenon has become one of the greatest challenges facing public international law, and it is incumbent upon the international community to examine not just how this is happening, but why, and furthermore to assess how these important concepts came into being.

In response to this, the following section examines the concept of military necessity, its extreme expression in the form of the doctrine of *Kriegsraison*, and the history of its codification. Next, there is a discussion on the (now unaccepted) right of self-preservation, and the development of the modern right of self-defence. This final section also addresses the arguments for and against a restrictive interpretation of self-defence as it is articulated in Article 51 of the UN Charter.

[40] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press 2004) 17.

Military necessity

Military necessity represents one of international humanitarian law's most challenging principles. Invoked for many years to justify a plethora of unlawful acts, it continues to defy definition.

The principle first appeared in codified form in the Lieber Code of 1863 and received greater recognition in the 1868 St. Petersburg Declaration.[41] Although not explicitly named as military necessity, the Declaration states in its preamble that 'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy', which Solis terms 'the core concept of military necessity'.[42]

The principle of military necessity allows for whatever lawful force is necessary to accomplish a legitimate military purpose not otherwise prohibited by international humanitarian law, where the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict.[43] The ICRC states that the purpose of international humanitarian law is to 'strike a balance' between military necessity and humanitarian exigencies.[44]

Military necessity is inextricably linked to the principles of unnecessary suffering and proportionality, and requires an action invoked in its name to provide some kind of military advantage, namely the weakening of enemy forces. Unsurprisingly, given its pliability, there have been many readings and interpretations of military necessity by States, international organisations such as the UN and the ICRC, and NGOs. Some of these interpretations have veered toward the extreme, such as the doctrine of *Kriegsraison*.

[41] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in* War (Cambridge University Press 2010) 43.
[42] Ibid, 50.
[43] International Committee of the Red Cross, 'Military necessity' (*International Committee of the Red Cross*, 2012) https://www.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm accessed 15 May 2015.
[44] Ibid. It is put somewhat more eloquently by David Luban: 'Terrible things happen in wars. The point of the laws of war cannot be to abolish those terrible things. The point can only be to shrink them to what is necessary, where, awful as it is, necessity always means someone else's tears.' David Luban, 'Military Lawyers and the Two Cultures Problem' (2013) 26 Leiden J Int'l L 323.

The doctrine of *Kriegsraison*

The doctrine of *Kriegsraison* (reason of war) holds that in war, necessity knows no law, and is considered as the 'affirmation of raison d'état in the context of armed conflict'.[45] Oppenheim states that it 'dates very far back in the history of warfare', originating 'in those times when warfare was not regulated by laws of war, i.e. generally binding customs and international treaties, but only by usages'.[46]

The principle of military necessity as expressed by *Kriegsraison* has its roots in natural law understandings of necessity found in the just war doctrine. The just war doctrine held that the just side in war was permitted to use whatever degree of force was necessary in the particular circumstances of the case to bring about victory; beyond that, all force became unlawful.[47] Grotius and Vattel represent the most important of these writers in the just war tradition to express the principle of military necessity and linking the *jus in bello* to the *jus ad bellum*.[48]

There is, writes Boed, a 'Grotian understanding of necessity as a right'.[49] This right is closely linked to the doctrine of self-preservation – Boed explains that 'when a threat to self-preservation arose, it was considered justified to take any steps necessary to preserve one's existence, even if such steps would have been unlawful had they been taken in the absence of a threat to self-preservation'.[50] Thus, there existed not only a right to self-preservation, but a right to do whatever was necessary to achieve one's self-preservation.

Whilst Grotius wrote that 'in war things which are necessary to attain the end in view are permissible', he did place limitations on this necessity:

> '…we must not attempt any thing [*sic*] which may prove the destruction of innocents, unless for some extraordinary reasons, and for the safety of many.'[51]

Elsewhere, Grotius also states that 'advantage does not confer the same right as necessity'.[52] This means that 'not everything that is militarily advantageous is militarily necessary', despite

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[45] Ariel Colonomos, *The Gamble of War: Is It Possible to Justify Preventive War?* (Chris Turner tr, Palgrave Macmillan 2013) 83.
[46] Lassa Francis Oppenheim, *International Law: A Treatise* (1st edn, Longmans, Green and Co. 1905) 91.
[47] Stephen C. Neff, *War and the Law of Nations: A General History* (1st edn, Cambridge University Press 2005) 64 .
[48] David Turns, 'Military Necessity' (*Oxford Bibliographies* 2012). Available at: http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0008.xml
[49] Roman Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Hum Rts & Dev LJ 1, 6.
[50] Ibid, 4.
[51] Hugo Grotius, *The Rights of War and Peace*, Book III (first published 1625, Liberty Fund 2005) 1439.
[52] Steven P. Lee, *Ethics and War: An Introduction* (Cambridge University Press 2012) 217.

the fact that there may be protestations to the contrary by military forces. [53] As noted by Boed, while Grotius recognised a right to occupy neutral soil should the exigencies of war make it necessary, he nonetheless placed a number of restrictions on this right, writing that 'nothing short of extreme exigency can give one power a right over what belongs to another no way involved in the war'.[54]

However, it remains clear that 'virtually unmitigated military necessity was the state of the law as Grotius perceived it'.[55] Despite the restrictions, all actions are allowed where there is 'extreme exigency' or 'extraordinary reasons'.

Military necessity as it relates to the just war doctrine is also to be found in Vattel's work:

> '… from the object of a just war: for, when the end is lawful, he who has a right to pursue that end, has, of course, a right to employ all the means which are necessary for its attainment'.[56]

He also writes:

> 'As soon, therefore, as we have declared war, we have a right to do against the enemy whatever we find necessary for the attainment of that end, for the purpose of bringing him to reason, and obtaining justice and security from him.'[57]

Vattel also places limitations on this right, noting that no more than the means necessary should be used in attaining the ends, with whatever is done beyond that being 'reprobated by the law of nature' and 'condemnable at the tribunal of the conscience'.[58]

Despite the positive law developments surrounding military necessity during the 19th century, *Kriegsraison* is rooted in this natural law approach which holds that 'if an end is permissible, the necessary means to that end are also permissible'.[59] The doctrine was advocated by numerous German writers who maintained that 'the laws of war lose their binding force in the case of extreme necessity'. [60] This approach to military necessity represents a continuation of a particularly German view expressed most famously by 'Prussian military genius' and 'the

[53] Ibid.
[54] Boed (n40) 5.
[55] Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (Martinus Nijhoff Publishers 2007) 327.
[56] Emmerich de Vattel, *The Law of Nations,* Book III (first published 1758, Liberty Fund 2008) 542.
[57] Ibid.
[58] Ibid.
[59] Neff (n38) 65.
[60] Ibid.

law of war's fiercest nineteenth-century critic', Carl von Clausewitz, in his book *On War*, published posthumously in 1832.[61] Deeming war 'a mere continuation of policy by other means', Clausewitz writes that:

> Self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law, accompany it (war) without essentially impairing its power. Violence, that is to say, physical force…is therefore the means; the compulsory submission of the enemy to our will is the ultimate object. In order to attain this object fully, the enemy must be disarmed, and disarmament becomes therefore the immediate object of hostilities…[62]

And further that:

> As the use of physical power to the utmost extent by no means excludes the co-operation of the intelligence, it follows that he who uses force unsparingly, without reference to the bloodshed involved, must obtain a superiority if his adversary uses less vigour in its application.[63]

The Clausewitzian approach is obvious in the doctrine of *Kriegsraison*. Although the doctrine had been in existence for many years prior, *Kriegsraison* was exposited principally by Professor Carl Lueder in the book *Handbuch des Völkerrechts: Auf Grundlage europäischer Staatspraxis*, published in Germany in 1886. Lueder, elucidating the doctrine, wrote that in war, in extreme circumstances, states were not obligated to observe the laws of war. The circumstances under which this could be so were:

> 1. In case of extreme necessity, when the object of war can only be achieved by non-observance and would by observance be frustrated;
>
> 2. as retaliation, in case of unlawful non-observance of *Kriegsmanier* by the enemy. Any departure from *Kriegsmanier* is justified when circumstances are such that the accomplishment of the war-aim, or the escape from extreme danger, is hindered by sticking to it. [64]

[61] John Fabien Witt, *Lincoln's Code: The Laws of War in American History* (Simon & Schuster 2012) 184.
[62] Carl von Clausewitz, *On War* (first published 1832, Wordsworth Editions Limited 2013) 35-36.
[63] Ibid, 36.
[64] Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (2nd edn Cambridge University Press 1983) 173.

According to Best, Lueder was 'peculiarly insistent that nothing in international law (or the moral philosophy which some found to be attached to it) obliged you to stick to the rules if your opponent gave you any excuse or pretext for breaking them. Further, *Kriegsraison*:

> 'made no distinction between the violation of the law *of* war and transgression of law *in* war, and did not indeed concern itself with it very much.'[65]

Colonomos argues that this point, namely the differences between the violation of the law of war and of law in war, 'remains in suspense', and is one of the 'ambiguities of the legal idea of military necessity'.[66]

Kriegsraison, then, allows belligerents to do whatever they feel necessary to prevail in armed conflict, as military necessity overrules all law.[67] If applied practically, Solis finds that:

> …if a belligerent deems it necessary for the success of its military operations to violate a rule of international law, the violation is permissible. As the belligerent is *the sole judge of the necessity*, the doctrine is really that the belligerent may violate the law or repudiate it or ignore it whenever that is deemed to be for its military advantage.[68]

Essentially, *Kriegsraison* is the 'unlimited application of military necessity', and emphasises the exceptional character of a conflict or situation in order to breach the law.[69]

The *Kriegsraison* doctrine was invoked by the German Armies during both World Wars I and II as a defence for a range of actions. On the invasion of Belgium by the Germany Army in 1914, Chancellor von Bethmann Hollweg stated in the Reichstag:

> 'Gentlemen, we are now in a state of necessity, and necessity knows no law…He who is menaced as we are and is fighting for his highest possession can only consider how to hack his way through'.[70]

Solis writes that in the course of WWI, *Kriegsraison* was used to justify the killing in the water of survivors by the submarines that had targeted their ship.[71] Similarly, the use of chemical

[65] Colonomos (n36) 85.
[66] Colonomos (n36) 85.
[67] Solis (n32) 267.
[68] Ibid.
[69] Ibid, 266.
[70] 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'.
[71] Solis (n32) 267.

weapons in the course of WWI was also repeatedly qualified by the doctrine of *Kriegsraison* – the World Health Organisation, in their 'Public health response to biological and chemical weapons', for example, makes explicit mention of *Kriegsraison* in their recounting of the events of 22nd April 1915, when Germany released some 180 tonnes of liquid chlorine into the air that is believed to have killed as many as 15,000 soldiers. [72]

During World War II, the doctrine was employed to justify actions including, but not limited to, the compulsory recruitment of labour from occupied territories, the seizure of property and goods, the killing of prisoners of war and scorched earth policies. World War II was to prove a turning point for the doctrine, with *Kriegsraison* being referenced numerous times in a number of cases before the U.S. Military Tribunals at Nuremberg (which occurred after the trial of the major war criminals), notably in *U.S. v List* (the *Hostage* case) and in *U.S. v Von Leeb et al* (the *High Command* case).

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 by the use of troops of the German armed forces under their command of and acting pursuant to their orders issued; participation in a deliberate scheme of terrorism and intimidation, wholly unwarranted and unjustified by military necessity, by the murder, ill-treatment and deportation to slave labour of prisoners of war and members of the civilian populations in territories occupied by the German armed forces; by plundering and pillaging public and private property and wantonly destroying cities, towns, and villages for which there was no military necessity.[73]

Regarding the justification of unlawful acts in military necessity, the judgment 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. [74]

[72] World Health Organisation, '*Public health response to biological and chemical weapon: WHO guidance. Draft 2003'* (2nd edn, World Health Organisation 2003) http://www.who.int/csr/delibepidemics/en/allchapspreliminaries_may03.pdf, accessed 17 December 2018.
[73] *Judgment of the Nuremburg International Military Tribunal* (1948) 8 LRT WC 34.
[74] Ibid.

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.[75]

The *U.S. v Von Leeb et al*, also known as the *High Command* case, was the final of the twelve Nuremberg trials. Fourteen defendants, all of them having been either leading command or staff officers in the German armed forces, were charged with crimes against peace; war crimes; crimes against humanity; and a common plan or conspiracy to commit the crimes charged in the first three counts. Regarding the German's plea of military necessity, the tribunal held that:

> 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 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. [76]

The Nuremburg judgements, along with the 1949 Geneva Conventions, 'put the last nails in the coffin of the doctrine of *Kriegsraison*.'[77] The 1987 Commentary to Additional Protocol I to the Geneva Conventions makes specific reference to *Kriegsraison* in its discussion of Article 35, and states:

> …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.

[75] Ibid.

[76] *Judgment of the Nuremburg International Military Tribunal* (1949) 11 LRTWC 1.

[77] Scott Horton, 'Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude Towards the Conduct of War (2006) 30 Fordham Int'l LJ, 589.

> However, it is probable that the resort to this doctrine was above all based on contempt for the law, the weakening of which is 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.

Kriegsraison is thus seen as a defunct doctrine and has not been invoked by any state, at least by name, for any action since World War II. This is due in no small part to the codification of military necessity, one of the aims of which was said to be the restraint of the doctrine.[78] The untrammelled right of military necessity had, arguably, already begun to fade. Yet, as is demonstrated throughout this thesis, *Kriegsraison* remained available to states with sufficient military power, political power and wealth – notably, the United States. As noted in the introduction, *Kriegraison*, as it is currently manifested, appears less as a doctrine than as a modality, as a form of strategic legalism. Following the creation of the UN Charter, this modality, this logic and reasoning of *Kriegsraison*, could now be accessed by an invocation of self-defence, as laid out in Article 51 of the UN Charter. With the embedding of the WWII Allies' political power in the creation of the UN Security Council, the U.S. (at whose behest Article 51 was added to the Charter, as is discussed at more length in Chapter 5), helped to create a system in which it would be possible to justify almost every instance of the use of armed force, as long as it could be said to be necessary for its self-defence, and in which it would be next to impossible to censure or punish the country for any unlawful uses of force, as per the rules of IHL, within this area.[79] That this use of Article 51 remains available to the United States (and, indeed, the other countries who make up the Security Council's P5) speaks to the embedding of material political-economic relationships in international law. No other country has so successfully, or repeatedly, invoked Article 51 of the Charter as a blanket justification for otherwise unlawful uses of force.[80]

As Sanders argues, 'legal cultures…play a significant role in shaping state conduct… legal cultures underwrite how political actors interpret, enact, and evade legal norms.'[81] The strong

[78] Horton (n68) 589.

[79] Shirley V. Scott, *International Law, US Power: The United States Quest for Legal Security* (Cambridge University Press 2012) 9.

[80] See, for example: Rebecca Sanders, Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror (Oxford University Press, 2018)

[81] Ibid, p.2.

legal culture of the United States, which is discussed in more detail in Chapter 5, is such that its decisions in the arena of armed conflict are imbued with the kind of strategic legalism found in *Kriegsraison*, even if, under even a broad reading of the relevant rules of international law, U.S. conduct in this area is found to be unlawful. That the U.S. can repeatedly engage in such before and still find the framing of *Kriegsraison* amenable to their conduct speaks volumes – not only about U.S. exceptionalism, but about the character of international law itself.

The Lieber Code

As previously stated, military necessity was first codified in the *Lieber Code*, written in 1863 by Clausewitz's fellow Prussian Francis (also known as Franz) Lieber.[82] The 'Lieber Code' was officially known as '*Instructions for the Government of Armies of the United States in the Field or General Order 100*', and was issued by President Abraham Lincoln on 24th 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.'[83]

Often called a 'humanitarian milestone'[84], the Code is more aptly described as 'tough humanitarianism'.[85] 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.' [86] 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. [87]

[82] It is also the first codification of the laws of war for soldiers [Solis (n31) 41]. Lieber described it as "short but pregnant and weighty like some stumpy Dutch woman when in the family way with coming twins."
[83] General Order No. 100, Instructions for the Government of Armies of the United States in the Field (the Lieber Code) 14.
[84] Chris Johnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War'(1994) 35 Harv Int'l LJ 65.
[85] Rick Beard, 'The Lieber Codes' (*The New York Times*, 24 April 2013) <http://opinionator.blogs.nytimes.com/2013/04/24/the-lieber-codes/>, accessed 17 December 2018.
[86] Witt (n52) 4.
[87] Horton (n68) 580.

Despite this, the strong influence of Clausewitz in *Kriegsraison* is also to be found in the Lieber Code.[88] 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'.[89] 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 'run radically counter to *Kriegsraison*.'[90] The Lieber Code itself also contains elements of imperial racism (discussed further in Chapter 6), arguing that the rules of the Code are not applicable to the 'uncivilised' nations or the 'barbarous' races.[91]

In fact, the Lieber Code has been considered by some to have informed the modern formulation of *Kriegsraison*. A similar code was adopted by Prussia in 1870, whose Chancellor Otto von Bismarck had remarked "what leader would allow his country to be destroyed because of international law?"[92] Horton writes that the doctrine of military necessity was an issue of contention in the state, with Prussia, and then Germany, embracing 'an unrestrained Clausewitzian view of the doctrine', exemplified by *Kriegsraison*.[93]

Given the 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 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.[94] This fluidity remains an issue today, as can be seen as the following section investigates how military necessity is interpreted around the globe, not just by States, but by international organisations such as the UN, the ICRC, and NGOs.

[88] 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 (n51) 3-4.
[89] Colonomos (n36) 84.
[90] Ibid.
[91] General Order No. 100, Instructions for the Government of Armies of the United States in the Field (the Lieber Code)
[92] Johnick and Normand (n72) 64.
[93] Horton (n68) 585.
[94] Colonomos (n36) 84.

Law of Armed Conflict or International Humanitarian Law? Contrasting conceptions of the rules of war

The wording of military necessity found in the Lieber Code is the 'closest international law comes to a generally accepted statement of the doctrine'.[95] Disagreement as to the application of the principle, and its limits once applied, abound within the international community. Tension continues to exist between what Luban terms the 'LOAC vision' and the 'IHL vision, with the former beginning with armed conflict and believing that military necessity and the imperatives of war-making should be afforded primary status, and the latter beginning with humanitarianism and assigning human rights and human dignity primary status.[96]

Luban argues that the LOAC 'vision', in 'taking necessity seriously, is 'less restrictive' than the IHL approach.[97] The LOAC vision is that held by military lawyers, who principally work for militaries and government departments, with the humanitarian vision being the one held by lawyers working in NGOs and organisations such as the ICRC. Luban acknowledges that many people will, at some point in their careers, have worked for both military and humanitarian organisations, and also notes that not every military lawyer will agree with the LOAC vision, and vice versa for humanitarian lawyers and the humanitarian vision. However, Luban holds that 'the two visions of the laws of war closely track organisational cultures'. Furthermore, he believes that in the last decade the cleavages between these two visions have become more pronounced, leading to the creation of two teams whose 'goal is to ensure their vision of law prevails'.[98]

For the LOAC vision, 'taking necessity seriously' involves the assumption that the purpose of the laws of war is 'to give full sway to military necessity and protect civilians (only) against military excess'.[99] The LOAC vision prioritises operational aspects of LOAC, and thus places extra weight on the perspectives of 'specially affected' states. [100]

The humanitarian vision, on the other hand, advocates an entirely different approach. This vision sees the core purpose of the laws of war as being the protection of civilians 'to the maximum extent possible, against the violence and indignities of war'. IHL, says Luban, provides a 'civilian's-eye view of war, and gives ground grudgingly to claims of military

[95] Turns (n39).
[96] David Luban,'Military Lawyers and the Two Cultures Problem' (2013) 26 Leiden Journal of International Law 316.
[97] Luban (n83) 316.
[98] Ibid 317.
[99] Ibid 320.
[100] Ibid 321.

necessity'. Thus, although both sets of lawyers for 'the most part read and accept the same body of jurisprudence', and 'admit that war and human dignity belong to the human world', the conclusions they reach are different 'because they assign military necessity and human dignity different logical priority'.[101] The humanitarian vision maximises legal interpretation in the 'restraints and obligations of warriors', as opposed to the LOAC vision which minimises that interpretation. Likewise, the IHL vision minimises interpretation in discretion and deference to the military, where LOAC maximises it.[102]

Where the LOAC vision relies on state practice and, the IHL vision embraces 'a variety of soft-law instruments from multiple sources as evidence of opinion juris', and holds the verbal practice of States (i.e. official state statements) as opposed to practice on the ground as 'law-generative state practice'.[103] This expansiveness in treaty interpretation extends to an expansiveness in the domain of state practice and *opinio juris* that the IHL vision canvasses to identify customary international law. Luban notes that these methods have been 'ratified' by international courts and tribunals, meaning the IHL vision has 'gained a foothold in positive law – it is not simply wish-fulfilment fantasies of humanitarian reformers'.[104]

Reeves and Thurnher, respectively a Major and a Lieutenant Colonel in the U.S. Army, highlight the divide verbalised by Luban. They set out their belief that the law of armed conflict has begun to prioritise humanitarianism over military necessity, to the detriment of the entire international community. Correct in their statement that the law of armed conflict is 'predicated on the existence of a balance between the traditionally recognised principles of military necessity and humanity', with the relationship between these two principles being rather delicate, they go on to assert that 'external influences have begun hindering the ability of states to preserve the appropriate equilibrium'. This is deemed to be a 'troubling trend'. Reeves and Thurnher opine that states are the primary figures in the creation of international law, and must retain the 'flexibility' to 'adjust the law as needed'. [105]

Reeves and Thurnher attempt to support their point by illustrating three case studies in which they believe there is an excess of humanitarianism taking precedence over military necessity:

[101] Ibid 329.
[102] Ibid.
[103] Luban (n83) 323.
[104] Ibid.
[105] Shane R. Reeves and Jeffrey S. Thurnher 'Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity - Humanity Balance' (2013) Harvard National Security Journal. Available at: http://harvardnsj.org/2013/06/are-we-reaching-a-tipping-point-how-contemporary-challenges-are-affecting-the-military-necessity-humanity-balance/.

the ‘capture or kill’ debate, the autonomous weapons debate, and the cyber warfare debate. Those ‘external influences’ becoming a hindrance to states, including the ICRC, NGOs such as Human Rights Watch and ‘many in the media’, are variously portrayed as ‘overreaching’, of having little expertise with which to assess where the balance between humanitarianism and military necessity should lie, and of taking things out of context ‘in rather dramatic ways’. Debates around the three aforementioned issues serve, say Reeves and Thurnher, to ‘act in concert to subvert the principle of military necessity and tip the scale in favour of humanity’.[106]

The language employed by Reeves and Thurnher to describe the ‘threat’ from ‘external influences’ echoes that used by Yoram Dinstein (and cited by Luban in his piece referenced above) in his closing remarks at a 2011 conference on International Law and the Changing Character of War at the U.S. Naval College. In his address, Dinstein referred to the evolving ‘menace’ to the law of armed conflict from ‘the human rights zealots’ and ‘do-goodniks’ (which he terms ‘human rights-niks’) who are said to be attempting ‘a hostile takeover of LOAC’.[107] Reeves and Thurhner conclude by writing that states must not yield their authority to ‘unaccountable ideologues’, and must strive to keep military necessity and humanity in balance.[108]

Military necessity in state practice

The tension in the different visions of military necessity and its place in the law of armed conflict are apparent in the different interpretations of military necessity found in states’ military manuals around the globe and the interpretations of military necessity situated in international treaties.

An example of state practice on military necessity is to be found in the ICRC’s customary law guide, in the section relating to rule 54, ‘attacks against objects indispensable to the survival of the civilian population’. Referencing a number of military manuals, it is notable that in many of the LOAC guides or handbooks (e.g. Canada, Netherlands, Spain, Germany) ‘scorched earth’ policies are permitted in cases of ‘imperative military necessity’, following the wording of article 54. What exactly constitutes ‘imperative military necessity’ is not defined. Other

[106] Ibid.
[107] Yoram Dinstein, ‘Concluding Remarks: LOAC and Attempts to Abuse or Subvert It’ (2011) 87 Int’l L Stud US Naval War Coll, 488.
[108] Reeves and Thurnher (n92).

manuals do not require that the case be imperative – for example, Russia's manual allows for the commander, in exceptional cases and 'proceeding from the principle of military necessity' to define which objects to attack, destroy or put out of commission. Israel's, meanwhile, does not mention military necessity in relation to rule 54 at all. The United States (who have not yet ratified API) allows for scorched earth policies where required by military necessity, without the need for this military necessity to be 'imperative'.[109] The varying interpretations of military necessity demonstrate that the reading of the principle as understood in treaty law and by international tribunals is more restrictive than the understanding of the principle held by militaries themselves.

What, then, are the practical implications of the tension between the two cleavages of the IHL/LOAC 'visions' and the different interpretations of military necessity? Regarding the two different visions of the laws of war, Luban finds that the result is a 'practical indeterminacy in the law', leaving the laws of war susceptible to 'systematically inconsistent interpretations'. This is particularly a problem for military lawyers in the field, who may be left confused as to whether they should veto a tactic or targeting choice that their commander wishes to employ, given that the different visions of the laws of war may provide two different answers.[110] Luban also references the International Criminal Tribunal for Yugoslavia's 2011 *Gotovina* decision, in which the Trial Chamber found that 'a Croatian artillery officer named Rajcic indiscriminately shelled a city by firing at the enemy commander's apartment in a civilian neighbourhood.' General Gotovina, who had ordered the action, was given a 24-year sentence for war crimes.[111] The Trial Chamber stated that they found the risk to be:

> 'Excessive in relation to the anticipated military advantage of firing at the two locations where the HV believed Martic to have been present. This disproportionate attack shows that the HV paid little or no regard to the risk of civilian casualties and injuries and damage to civilian objects when firing artillery at a military target…'[112]

Though Gotovina's conviction was subsequently reversed by the Appellate Chamber, for military commanders, says Luban, the decision of the Trial Chamber was outrageous. In their view, judges should not be able to 'second-guess a field commander's risk-benefit assessment

[109] International Committee of the Red Cross, 'Practice Relating to Rule 54. Attacks against Objects Indispensable to the Survival of the Civilian Population'(Customary IHL Database) <https://www.icrc.org/customary-ihl/eng/docs/v2_cha_chapter17_rule54_sectionc>.
[110] Luban (n83) 321.
[111] Ibid 326.
[112] Ibid.

on such a fact intensive and situation-sensitive decision'.[113] A trial court is seen to be 'badly situated to offer a concrete assessment of comparative military advantage'. This is representative of the wider view held by the LOAC vision, under which external accountability is not trusted and universal jurisdiction is 'particularly deplorable'.[114]

On the IHL side, Luban discusses the 2012 *Haditha* case, in which a U.S. military court acquitted the last suspect in the 2005 killing of unarmed civilians at Haditha, Iraq, of the most serious charges. Luban quotes from a New York Times report on the case:

> The Haditha case also fits another pattern: Many cases involving civilian deaths arise during the chaos of combat or shortly afterward, when fighters' emotions are running high; they can later argue that they feared they were still under attack and shot in self-defense. In those so-called fog-of-war cases, the military and its justice system have repeatedly shown an unwillingness to second-guess the decisions made by fighters who said they believed they were in danger, specialists say.

There is, says Luban, a high acquittal rate in U.S. trials for war crimes committed in combat zones, further observing that NATO has failed to investigate civilian deaths caused by their bombings in Libya, despite a U.N. investigating commission recommending that NATO do so. This aligns with the IHL vision's opinion that 'international law is already too deferential to military commanders', which in turn undermines accountability.

As Schmitt notes, and as indeed Reeves and Thurnher noted, military necessity and humanity 'exist in fragile equipoise' in international humanitarian law.[115] The (sometimes subtle) differences between states also highlight the malleability of the principle. The delicate balance between humanity and necessity becomes increasingly precarious as states enact policies which directly and indirectly contravene treaty and customary law as they attempt to mould the principle to fit the form they desire it to take.

In recent years, we have largely seen this reshaping of the principle of military necessity come from those States who proclaim that they are doing so for reasons of self-defence and the security of their nation. In this light, the following section examines the doctrine of self-preservation and the principle of self-defence.

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[113] Ibid 327.
[114] Ibid.
[115] Michael N. Schmitt, *Essays on Law and War at the Faultlines* (T.M.C. Asser Press 2012) 837.

Self-Preservation and Self-Defence

Just as the doctrine of *Kriegsraison* was invoked to justify the unlimited application of military necessity, the 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 evolved from the Grotian understanding of necessity discussed earlier,[116] and likewise was considered a 'natural' or 'inherent' right[117], related to the 'right to security' in Vattel. Vattel states that 'self-preservation is not only a natural right, but an obligation imposed by nature' and further states that 'it is this right to preserve herself from all injury that is called the right to security'.[118] This 'right to security' states that every nation not only has a right to protect and defend its interest from injury, but indeed a duty to do so on behalf of the life of the nation. Due to this right, in the interest of self-preservation, Fenwick states that 'a state may violate the sovereignty of another state to prevent a threatened evil whether it be proximate or remote'.[119] Vattel also writes that 'a nation has the right…to anticipate designs against itself, though it must be careful not to become itself an unjust aggressor' and also states that 'nature gives men the right to use force when it is needed for the defense and preservation of their rights'.[120] This conception of the doctrine of self-preservation as a right that can be employed to ensure the security of the nation has implications for the current arguments employed by those states advocating for a broader right of self-defence, as will be discussed later.

A further discussion of self-preservation can be found in Westlake's *Collected Papers*, where he describes the doctrine thus:

> ...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

[116] Boed (n40) 6.
[117] Stanimir A. Alexandrov, *Self-defense against the use of force in international law* (Kluwer law International 1996) 23.
[118] De Vattel (n47) 111 & 288.
[119] Charles G. Fenwick, 'The Authority of Vattel' (1914) 8 American Political Science Review 379.
[120] Ibid 379.

> of self-preservation, which writers on international law often class among their fundamental, primitive, primary or absolute rights. [121]

For many years, self-defence was held to be synonymous with self-preservation, or as a specific instance of it.[122] Alexandrov notes that during the 19th and early 20th centuries, statesmen used self-preservation, self-defence, necessity and necessity of self-defence as 'more or less interchangeable terms'.[123] However, the two concepts are considerably different. Self-preservation represents a particularly broad reading of the right of self-defence, in which the States' fundamental right to self-preservation supersedes their international obligations and the rights of any other State. If the argument for a right of self-preservation was followed to its conclusion, any conduct deemed necessary by a State to ensure the preservation of its existence 'was bound to be considered juridically legitimate, even if it was undeniably contrary to an international obligation of that State.'[124] Self-preservation can thus 'cloak with an appearance of legality almost any unwarranted act of violence on the part of a state.'[125]

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*. [126] The *Caroline* incident is widely regarded as being the incident that changed self-defence 'from a political excuse to a legal doctrine', [127] 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".[128]

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[121] John Westlake, *The Collected Papers of John Westlake on Public International Law* (Lassa Openheim ed, 1st edn, Cambridge University Press 1914) 121.
[122] Alexandrov (n104) 23.
[123] Ibid 63.
[124] International Law Commission, 'Addendum - Eighth report on State responsibility by Mr. Robert Ago, Special Rapporteur - the internationally wrongful act of the State, source of international responsibility (part 1) [1980] A/CN.4/318/Add.5-7, 7.
[125] R.Y. Jennings, 'The Caroline and McLeod Cases' (1938) 32 Am J Int'l L 91.
[126] Ibid 82.
[127] Ibid.
[128] Jennings (n112) 82.

Yet Jennings writes that 'in arguing the Caroline case, the fundamental distinction between self-defence and self-preservation was not always appreciated', [129] as can be seen through examples of earlier state practice against perceived or claimed threats and justified by self-defence.[130] Alexandrov references the United Kingdom's shelling of Copenhagen and seizing of the Danish fleet after the Peace of Tilsit of 1807, 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. 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.[131] The Virginius 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". [132]

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, the conception was "rescued from the Naturalist notions of an absolute primordial right of self-preservation". [133]

The doctrine of self-preservation was then, and continues to be, particularly problematic for international law and possibly destructive to the entire legal order, as all duties of states were 'subordinated to the 'right of self-preservation'. [134] As Bowett states, it is doubtful whether self-preservation can have any meaning as a legal concept – its appeal lying in the 'realm of ideology rather than of law'. [135]

[129] Ibid 91.
[130] Alexandrov (n104) 20.
[131] Ibid 20.
[132] Alexandrov (n104) 20.
[133] Jennings (n112) 92.
[134] D. W. Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 10
[135] Ibid.

The issue of self-preservation and what a state may resort to in its name has surfaced more recently. The matter of an existential threat to a state is central in the International Court of Justice's Advisory Opinion of 1996 on the Legality of the Threat or Use of Nuclear Weapons. In considering whether recourse to nuclear weapons would be illegal in all and any circumstances 'owing to their inherent and total incompatibility with the law applicable in armed conflict', and despite the Court's assertion that 'the use of such weapons…seems scarcely reconcilable with respect for such requirements' [*the prohibition of methods and means of warfare which preclude any distinction between civilian and military targets or which would result in unnecessary suffering to combatants*], paragraph 96 states:

> '…the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.'[136]

The issue of an existential threat is raised again in paragraph 97:

> 'Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.'[137]

Dinstein deems the last sentence 'most troublesome'.[138] The Court, to the detriment of the judgment, did not go any deeper into what an 'extreme circumstance' might amount to.[139] These paragraphs thus raise important questions for the relationship between self-preservation, self-defence, proportionality and necessity.

Despite the Court's stance on nuclear weapons as being 'scarcely reconcilable' with two of the most important, and indeed defining, elements of international humanitarian law - the prohibition on unnecessary suffering and the principle of distinction - the judgment still allows for a State to use such weapons in a situation in which its survival is at stake, effectively allowing the State to ignore the principle of proportionality.[140] In this way, the judgment could

[136] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 96.
[137] *Legality of the Threat or Use of Nuclear Weapons* (n123) 97.
[138] Dinstein (n31) 78.
[139] Ibid 79.
[140] Ibid.

be seen as privileging the self-preservation of a state above all else, and possibly allows for the doctrine of *Kriegsraison* to come back into play, albeit in the most extreme of circumstances.[141]

The earlier instances of state practice invoking self-defence, discussed previously, highlight the dangers inherent in an expansive approach to self-defence and self-preservation. This challenge continues apace, with the past fifteen years in particular providing numerous instances of state practice which have abused the special position of the right of self-defence as the sole exception to the prohibition on the use of force enshrined in the UN Charter in Article 2(4).

Indeed, challenges to the interpretation of self-defence in the UN Charter have been voiced since the Charter came into being. Bowett, despite his assertion that the doctrine of self-preservation was more ideological rather than legal, argued that:

> '…it is believed that the right of self-defence, though chiefly relevant as an exception to the prohibition of force and as a reaction to a delictual use of force, cannot be and has not been by state practice confined to this context.' [142]

Bowett held that an armed attack need not have occurred before a state could use force in self-defence and believed that, for states, 'the right to protect their rights by their own action is obvious'.[143]

Despite early challenges to the modern conception of self-defence, it remains distinct from the doctrine of self-preservation. However, the challenges it currently faces risk the doctrine of self-preservation making a return, not only in parlance but also in practice. The following section looks at the principle of self-defence today, and those challenges.

Self-defence

Divorced from the doctrine of self-preservation, today self-defence, whether it be individual or collective, is recognised as an 'inherent right' in Article 51 of the UN Charter and is permitted only 'if an armed attack occurs'. This reading of self-defence is upheld by the International Court of Justice in the *Nicaragua* case.

[141] Solis (n32) 269.
[142] Bowett (n121) 24.
[143] Bowett (n121) 3.

In the *Nicaragua* case (*Nicaragua v USA*) concerning military and paramilitary attacks in and against Nicaragua brought by Nicaragua against the United States, the Court supported a narrow interpretation of the right of self-defence. [144] Although it based its jurisdiction on customary international law, its discussion of a customary right of self-defence codified the law of self-defence as existing under the UN Charter as well as in customary law. [145]

The Court found that the right of individual or collective self-defence was 'already a matter of customary international law'. [146] Regarding the characteristics governing the right of self-defence, the Court held that 'the exercise of this right is subject to the state concerned having been the victim of an armed attack'. [147]

This narrow interpretation of the right of self-defence represents that accepted by the majority of members of the international community. The narrow interpretation has, however, found itself increasingly under attack. Arguments for the continuation of a narrow interpretation of the right of self-defence, and arguments against, are discussed next.

Support for a broad interpretation of the right of self-defence

In the past fifteen years, public international law has come under increasing pressure from those supporting a broad interpretation of the right of self-defence. The support for a less restrictive approach is in evidence in both State rhetoric and State practice.

As discussed earlier, the ICJ's Advisory Opinion on the Threat or Legality of the Use of Nuclear Weapons seems to allude to the doctrine of self-preservation in its judgment that the use of nuclear weapons may be justifiable should the life of a state be at stake. The Advisory Opinion is thus seen by some as contributing to the building of 'a broad construction of the right of self-defence'[148]. The language of an 'extreme circumstance' threatening the life of a State has become a recurring feature of arguments seeking to make the right of self-defence less prohibitive, particularly for those States engaged in conflict with terrorist forces.

[144] Alexandrov (n104) 138.
[145] Ibid 135.
[146] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 193.
[147] Ibid.
[148] Natalino Ronzitti, 'The Expanding Law of Self-Defence' (2006) 11 J Conflict Security Law, 357.

The main debates here lie in whether or not there exists a right to anticipatory self-defence and to pre-emptive self-defence. The right to anticipatory self-defence is examined below, before a discussion on pre-emptive self-defence. It should be noted that this author distinguishes between anticipatory self-defence and pre-emptive self-defence. An action in anticipatory self-defence occurs when a State uses force against an attack that has yet to physically strike their territory but which is expected imminently. An action in pre-emptive self-defence occurs when a State uses force against a threat which has yet to come into palpable existence.

Anticipatory self-defence

Most arguments on the limits of the right of self-defence centre on the wording of Article 51 of the UN Charter, which reads:

> 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.'[149]

On first reading, Article 51 seems straightforward – a State may only resort to force in self-defence if an armed attack has occurred. A 'contextual' reading of the Article does likewise, says Duffy, who notes that unlike other provisions of the Charter, Article 51 'omits any reference to "threat" of attack'.[150] How, then, can a right of anticipatory self-defence be said to exist?

Those in favour of a right of anticipatory self-defence argue that States should be allowed to defend themselves when an attack is imminent – they should not have to be 'sitting ducks', waiting for an attack to happen.[151] Another argument contends that Article 51 of the UN Charter 'failed to abrogate the broader pre-existing customary right of self-defence', and thus a limited right of self-defence in the case of an imminent attack, as articulated in *Caroline*, continues to exist.[152] This position is held, for example, by the United Kingdom, and is

[149] United Nations, Charter of the United Nations (1945) 1 UNTS XVI.
[150] Helen Duffy, *The "War on Terror" and the Framework of International Law* (Cambridge University Press 2005) 153.
[151] Alexandrov (n104) 149.
[152] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 255-256.

illustrated by Lord Goldsmith, then Attorney General, during a House of Lords debate on international self-defence:

> '…it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent. It is clear that the language of Article 51 was not intended to create a new right of self-defence. Article 51 recognises the inherent right of self-defence that states enjoy under international law. That can be traced back to the "Caroline" incident in 1837… It is not a new invention. The charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack.'[153]

This is what Ruys calls the 'pre-existing custom' argument, which is just one of the arguments used by the 'expansionists' or 'counter-restrictionists'. Further arguments state that a right of anticipatory self-defence was implicitly accepted by the Nuremberg and Tokyo Military Tribunals.[154]

Anticipatory self-defence therefore occurs when a State uses force against an attack that has yet to physically strike their 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 threat of an attack is not enough to resort to force in self-defence. 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.[155]

Alexandrov notes that anticipatory self-defence has been allowed 'only in very few restrictive cases: when the attack is underway or is imminent and the use of force in self-defence is necessary to stop it'[156]. Similarly, Dinstein writes that:

[153] HL Deb 21 April 2004, vol 660, cols 370-376 (UK House of Lords debate on International Self-Defence), available at https://api.parliament.uk/historic-hansard/lords/2004/apr/21/international-self-defence.
[154] Ruys (n139) 257.
[155] *Legality of the Threat or Use of Nuclear Weapons* (n123) 194.
[156] Alexandrov (n104) 163.

> 'The right to self-defence can be invoked in response to an armed attack as soon as it becomes evident to the Victim State…that the attack is in the process of being mounted. There is no need to wait for the bombs to fall – or for that matter, for fire to open – if it is morally certain that the armed attack is underway (however incipient the stage of the attack is). The Victim State can lawfully intercept the attack (under Article 51) with a view to blunting its edge.[157]

A proclaimed right to anticipatory self-defence in practice has been rare. An example of such state practice includes the 1967 or Six-Day War Arab-Israeli war, in which Israel claimed a right to act in anticipatory self-defence as Egyptian and Syrian forces had been deployed, they argued, as part of an impending attack.[158] However, as Alexandrov notes, Israel was the only State to examine the concept of anticipatory self-defence, with even those States supporting the Israeli action refraining from any discussion of it. The subsequent resolution adopted by the UN Security Council makes it clear, says Alexandrov, that 'Israel's claim of anticipatory self-defence found little support'.[159] Similarly, Israel claimed to have acted in anticipatory self-defence when it bombed the Osirak nuclear reactor in Iraq in 1981, another action which was condemned by the UN Security Council.[160]

Since that time, the position of the international community has changed somewhat. For example, in relation to targeted killing, the 2010 report by Philip Alston, then-UN Special Rapporteur on extrajudicial, summary or arbitrary executions, supports the more permissive 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'. However, he does write that this remains subject to the strictures articulated in *Caroline*.[161] Alston's position does seem to represent the broad consensus on the matter, which is that 'if a right to anticipatory self-defence exists, it is limited'.[162]

[157] Yoram Dinstein, *War, Aggression and Self-Defence* (4th edn, Cambridge University Press 2005) 187.
[158] Alexandrov (n104) 153.
[159] Ibid 154.
[160] Solis (n32) 183.
[161] UNHRC, Report of the Special Rapporteur, Philip Alston, on extrajudicial, summary or arbitrary executions – addendum (2010) UN Doc EN A/HRC/14/24/Add.6, 15.
[162] Duffy (n137) 157

Preventive self-defence

What, then, is the difference between anticipatory and preventive self-defence? 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 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.'

In other words, it is a 'military action against a potential adversary in advance of a suspected attack'.[163] It is distinct from anticipatory self-defence, in that those contemplating anticipatory self-defence 'can point to a palpable and imminent threat'[164]. In the case of preventive self-defence, a State believes that a threat exists or that a threat will exist and argues that it can use force in self-defence against that threat. Any preventive action taken is 'deliberately future-oriented' and thus 'loses its defensive character'.[165]

Preventive self-defence found itself cast into the spotlight in 2002, having been articulated in the U.S. National Security Strategy of the same year. Also referred to as the 'Bush doctrine', the Strategy proclaimed a policy of preventive self-defence against threats to U.S. national security, 'even if uncertainty remains as to the time and place of the enemy's attack'.[166] Gray describes this message on the use of force as 'stark and revolutionary'.[167]

Again, if we can conclude that, as Piggott writes, 'prior to the Bush doctrine, there was a widely accepted view that it is lawful for a state to resort to force in self-defense to preempt an armed attack that is "imminent,"' what is different in the claims put forward by the U.S.? As stated in the previous section, states have been reluctant to rely on anticipatory self-defence as

[163] Tarcisio Gazzini, 'A Response to Amos Guiora: Pre-Emptive Self-Defence Against Non-State Actors?' (2008) 13 Journal of Conflict & Security Law, 29.
[164] Michael W. Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Pre-Emptive Self-Defense' (2006) 100 Am J Int'l L 526.
[165] Gazzini (n150) 30.
[166] The White House (2002), The National Security Strategy of the United States of America, available online at: https://www.state.gov/documents/organization/63562.pdf. The document referred to this policy as one of 'pre-emptive', rather than 'preventive', self-defence. However, given that the terms 'pre-emptive' and 'anticipatory' tend to be used interchangeably by many authors when referring to anticipatory self-defence, this author refers to the U.S. policy as one of prevention, rather than pre-emption.
[167] Christine Gray, 'The US National Security Strategy and the new Bush Doctrine of Pre-Emptive Self-Defence' (2002) 1 Chinese J Int'l L 437, 437.

justification for their actions.[168] The scope of a right of preventive self-defence as claimed by the U.S. in the 2002 National Security Strategy was therefore unprecedented.

The U.S. continues to hold this position today (though it is articulated with more subtle language). It remains completely incompatible with Article 51 of the UN Charter and is not supported by state practice.[169] 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.'[170] Alston writes that preventive self-defence is 'deeply contested and lacks support under international law'.[171]

Many counterterror operations performed today are founded on a belief in a right to preventive self-defence. Those in favour of a right to preventive self-defence argue that it is necessary for counterterrorism to succeed, as 'self-defence in this environment is enormously complicated'.[172]

State support for anticipatory and preventive self-defence

Ruys writes that 'there can be no doubt that (declared) support of anticipatory self-defence has increased in recent years', noting that following the publication of the 2002 U.S. National Security Strategy, a number of States made statements supporting a right of anticipatory self-defence.[173] For example, following the December 2002 Bali bombing in which eighty Australian tourists were killed, the then-Prime Minister of Australia stated that the country should be 'allowed to strike first at terrorist targets'.[174] Similarly, Russia 'asserted their right to undertake "pre-emptive" strikes against terrorist bases in neighbouring countries.'[175] North Korea, Iran and India also stated their belief in a right to anticipatory action.[176] Japan 'stressed that the Charter allows "pre-emptive strikes" or "pre-emptive attacks" when a nation is faced

[168] Ibid 442.
[169] Dinstein (n144) 183.
[170] Alexandrov (n104) 165.
[171] UNHRC (n148).
[172] Amos N. Guiora, 'Anticipatory Self-Defence and International Law: A Re-Evaluation?' (2008) 13 Journal of Conflict and Security Law 4.
[173] Ruys (n139) 331.
[174] BBC News, 'Australia ready to strike abroad', *BBC News* (London 1 December 2002) <http://news.bbc.co.uk/2/hi/asia-pacific/2532443.stm> accessed 20 May 2015.
[175] Ruys (n139) 330.
[176] Ibid.

with an imminent threat; the German government, in 2004, acknowledged that Article 51 of the Charter also applied to an imminent attack. Likewise, prior to the 2005 World Summit, several states supported the position on Article 51 of the High Level Panel on Threats, Challenges and Change's position in their report 'A more secure world: Our shared responsibility'. The report, in the section entitled 'Article 51 of the Charter of the United Nations and self-defence' states:

> 'The language of this article is restrictive… However, a threatened state, according to long-established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it, and the action is proportionate.'[177]

It is also observed by Ruys that 'several military doctrines and security strategies adopted after 2002 appear to give greater recognition to "preventive deployment" and the like', notably the 2003 European Security Strategy, the French Loi de Programmation, and the Chief of Italian Defence Staff Strategic Concept.[178] The French Loi de Programmation 2003-2008 stated that:

> 'We must be able to identify and prevent threats as soon as possible. Within this framework, possible pre-emptive action is not out of the question, where an explicit and confirmed threat has been recognised.'[179]

It seems clear, then, that a right to anticipatory self-defence is, as Alston and Ruys say, now widely accepted by the wider international community. However, the same cannot be said of a right to preventive self-defence. There is little appetite amongst the international community for an interpretation of Article 51 of the U.N. Charter which allows for the use of force against a non-imminent threat, or for a reworking of the language of Article 51. For example, the 'Concept of the Foreign Policy of the Russian Federation', approved by President Putin in February 2013, states that Russia:

> 'regards Article 51 of the UN Charter as an adequate legal basis not liable to revision for the use of force in self-defense, including in the face of existing threats to peace and

[177] Report of the Secretary General's High-Level Panel on Threats, Challenges and Change (2004) UN Doc EN A/59/565, 188.
[178] Ruys (n139) 331.
[179] Ibid.

> security such as international terrorism and proliferation of weapons of mass destruction.'[180]

Similarly, the Non-Aligned Movement has consistently reiterated their view that Article 51 'is restrictive and should not be re-written or re-interpreted'.[181] These statements echo the sentiments of the majority of States when faced with arguments favouring a right to preventive self-defence.

It does, therefore, seem safe to assert that Ruys is correct when he states:

> 'In light of the available evidence, it can be concluded that there has indeed been a shift in States' opinio juris insofar as support for pre-emptive self-defence, fairly rare and muted prior to 2001, has become more widespread and explicit in recent years. At the same time, it seems a bridge too far to claim that there exists today widespread acceptance of the legality of self-defence against so-called 'imminent' threats.'[182]

Tentative support for a less restrictive interpretation of Article 51 seems to have reached its zenith amongst the international community in the three-four years following the events of September 11th, 2001. However, the approach articulated by the U.S. in the 2002 National Security Strategy has continued apace under the second Bush administration and consecutive Obama administrations. Although the use of the terms 'pre-emption' and 'pre-emptive' has all but disappeared from U.S. rhetoric, the policy remains in existence and is particularly apparent in the construction of a particularly pliant formulation of the concept of imminence.

The term 'imminent', and how it is defined, has become a central feature of any discussion on anticipatory and preventive self-defence. How a State chooses to interpret the meaning of 'imminent' can change an action from being one of anticipatory self-defence to one of preventive self-defence. It is, then, key that the U.S. and wider international position toward this concept be discussed in order for the difference between anticipatory and preventive self-defence to be appreciated fully.

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[180] The Ministry of Foreign Affairs of the Russian Federation, 'Concept of the Foreign Policy of the Russian Federation' (2013) 303-18-02-2013

[181] 16th Summit of Heads of State or Government of the Non-Aligned Movement: Final Document' (2012) NAM 2012/Doc.1/Rev.2

[182] Ruys (n139) 341.

The importance of imminence

The word 'imminent', important for cases of anticipatory self-defence, is even more central in cases of preventive self-defence. A large motivation behind the push from the U.S. (and indeed the U.K.) in the early 2000s for a right to preventive self-defence following 9/11 lay in the claim that Iraq was in possession of WMDs, some of which could be deployed within forty-five minutes – a claim that was later proven to be unsubstantiated.[183] It was argued by the U.S. that Iraq, with the possession of such weapons, presented a 'grave and gathering danger', and that a resort to force against Iraq would thus be lawful. However, no state involved in the invasion of Iraq in 2003 other than the U.S. relied on this justification – the U.K. came the closest, and even then, the then-Prime Minister Tony Blair characterised the threat from Iraq as an immediate one (under the traditional conception of imminence), rather than a developing one.[184] The apparent immediacy of the threat was underlined by the numerous references to the 45 minute claim in the so-called 'September dossier', the British government's assessment of 'Iraq's Weapons of Mass Destruction'. Blair referred to it in his foreword, stating that [Saddam Hussein's] 'military planning allows for some of the WMD to be ready within 45 minutes of an order to use them'.[185] This claim is made another three times in the body of the report.[186] Thus, Piggott concludes:

> '…to the extent that Prime Minister Blair sought to rely on Britain's right of self-defense as its legal justification for resorting to force in Iraq, he did so on the basis of the classical "imminent danger" test of the Caroline case rather than the nebulous "grave and gathering danger" test of the Bush Doctrine.'[187]

As Piggott notes, the Bush doctrine set out in 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, Piggott says, is profound.[188] In this

[183] Tom Happold and agencies, 'Official explodes key WMD claim', *The Guardian* (London, 29 May 2003) <http://www.theguardian.com/politics/2003/may/29/iraq.iraq> accessed 20 May 2015; BBC News, 'Timeline: The 45-minute claim', *BBC News* (London, 13 October 2004) <http://news.bbc.co.uk/2/hi/uk_politics/3466005.stm> accessed 20 May 2015

[184] 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) 250.

[185] 'Iraq's Weapons of Mass Destruction – the Assessment of the British Government' (2002), available at <https://fas.org/nuke/guide/iraq/iraqdossier.pdf> accessed 20 May 2015.

[186] Piggott (n171) 250.

[187] Ibid 250-251.

[188] Piggott (n171) 246.

way, 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'.[189]

The attempt by the U.S. to transform the concept of imminence, despite its failure to do so before the invasion of Iraq, 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 imminent threat'. The U.S. 2015 National Security Strategy illustrates the continuing attempts at redefinition, in the section on combatting terrorism:

> 'When there is a continuing, imminent threat, and when capture or other actions to disrupt the threat are not feasible, we will not hesitate to take decisive action'.

The notion of a threat being both continuing and imminent allows a State to have recourse to force in self-defence at any time it sees fit.

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'.[190] 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'. [191]

[189] Ibid 247.

[190] Ruys (n139) 336.

[191] Ministére de la Défense, 'Manuel de droit des conflit armées'(2010) 45, available at <http://www.defense.gouv.fr/sga/le-sga-en-action/droit-et-defense/droit-des-conflits-armes/droit-des-conflits-armes> accessed 20 May 2015. 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.'

Germany, too, along with states such as Lichtenstein, Japan, Singapore, Switzerland and Uganda, has 'placed great weight on the imminence requirement'.[192] 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.'[193]

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:

> '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)?[194]

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.'[195]

The British position on imminence seems to be somewhat contradictory. Whilst first stating:

> 'International law permits the use of force in self-defence against an imminent attack but *does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote'*[196]

Lord Goldsmith then goes on to state in the next paragraph that:

> 'It must be right that states are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, *even if there is no specific*

[192] Ruys (n139) 336.
[193] Ibid 341.
[194] Report of the Secretary-General's High-Level Panel (n163), 189.
[195] Ibid 191.
[196] HL Deb (n140).

evidence of where such an attack will take place or of the precise nature of the attack.'[197]

So, whilst first stating that pre-emptive strikes should not be permitted against remote threats, Goldsmith then states that such strikes can be permitted even when there is no evidence of an attack.

The position of the United States on the concept of imminence is strikingly different from that of other states, with the elasticity bestowed on the term being both unprecedented and unparalleled. The U.S.' use of the term 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'.[198]

A Department of Justice White Paper, entitled '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', was leaked by NBC news in February 2013. This memo details the legal rationale behind the Obama administration's targeted killing policy, and is a prime example of attempts to redefine the meaning of 'imminent'. The memo first details the three criteria which should be met before the targeting of U.S. citizen is considered lawful. These criteria read as follows:

1. An informed, high-level official of the U.S. government has determined that the targeted individual poses an *imminent* threat of violent attack against the United States;
2. Capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and
3. The operation would be conducted in a manner consistent with the applicable law of war principles.[199]

The memo then goes on to address the concept of imminence by stating:

'…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

[197] HL Deb (n40). Emphasis added.
[198] Kevin Jon Heller, 'The DOJ White Paper's Confused Approach to Imminence (and Capture)' (*Opinio Juris*, 5 February 2013) < http://opiniojuris.org/2013/02/05/the-doj-white-papers-confused-approach-to-imminence-and-capture/> accessed 20 May 2015. Glenn Greenwald, 'Chilling legal memo from Obama DOJ justifies assassination of US citizens' *The Guardian* (New York, 5 February 2015). <http://www.theguardian.com/commentisfree/2013/feb/05/obama-kill-list-doj-memo accessed> 20 May 2015.
[199] U.S. Department of Justice (n2) 8. Emphasis added.

> evidence that a specific attack on U.S. persons and interests will take place in the immediate future. Given the nature of, for example, the terrorist attacks on September 11, in which civilian airliners were hijacked to strike the World Trade Center and the Pentagon, this definition of imminence, which would require the United States to refrain from action until preparations for an attack are concluded, would not allow the United States sufficient time to defend itself…'[200]

The discussion on imminence is concluded with the following:

> 'By its nature, therefore, the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate…Thus, a decision maker determining whether an al-Qa'ida operational leader presents an imminent threat of violent attack against the United States must take into account that certain members of al-Qa'ida (including any potential target of lethal force) are continually plotting attacks against the United States; that al-Qa'ida would engage in such attacks regularly were it able to do so; that the U.S. government may not be aware of all al-Qa'ida plots as they are developing and thus cannot be confident that none is about to occur; and that, in light of these predicates, the nation may have a limited window of opportunity within which to strike in a manner that both has a high likelihood of success and reduces the probability of American casualties.'[201]

What this definition of imminence seems to boil down to is that it is possible to target a U.S. citizen almost any time, in any place, no matter whether an attack on U.S. 'persons or interests' is shortly to occur.

Arguments in favour of preventive self-defence are particularly important for targeted killing. The vast majority of the targeted killings of which we are aware have been carried out by the U.S. in order to pre-empt supposed threats to U.S. national security. The consistent use of this counterterror strategy and the justifications enunciated for it have contributed significantly to a U.S.-led attempt at the expansion of the right of self-defence and a broader reading of the meaning of Article 51.

[200] U.S. Department of Justice (n2) 7.
[201] Ibid 7-8.

Conclusion

What consequences do attempts to expand the right of self-defence and the concept of imminence, and statements regarding the military necessity of illegal actions due to extreme circumstances, hold for international law? Lt. Cdr Burke writes that 'when the omnipotent are tempted to discard law, the lawyer must challenge them as to whether, when such power wanes, the law will again be needed'.[202] Despite protestations from states that their actions are in line with public international law, we are experiencing a backlash against the humanitarianism inherent in international humanitarian law and a return to the time when *Kriegsraison* and self-preservation offered themselves as justifications for sometimes irresponsible, often predatory, almost always unjustified state behaviour.

The attempts to shift the precarious balance between military necessity and humanity to favour the former, and by extension the LOAC/utilitarian 'vision', along with the consistent bid to expand how we define imminence and when a state can have recourse to force, have combined to bring about the reappearance of *Kriegsraison* and self-preservation.

While it is possible for a state to invoke *Kriegsraison* during an otherwise lawful conflict, where a state has justified their recourse to force to ensure the security and preservation of their nation, it is likely that *Kriegsraison* will occur. Both *Kriegsraison* and self-preservation emphasis the exceptional character of a conflict in order to breach the law, and both allow for any necessary means to be used in furtherance of their ultimate objective. Where there is believed to be an existential threat to a state – or where this is used as an excuse to justify the illegal use of force – military necessity will be taken to its most extreme expression, with little regard for international humanitarian law.

It is unsurprising that attempts to shift the balance between military necessity and humanity to favour the former are occurring at the same time as the push to expand a state's right to use force in self-defence. The widely-accepted interpretation of the right of self-defence as found in Article 51 of the U.N. Charter depends largely upon what we construe 'imminent' to mean. As 'imminent' grows to encapsulate even the vaguest of 'threats', so Article 51 will become meaningless. Similarly, as the division between the LOAC and humanitarian views of the law of war expands, with states pushing for the primacy of the former, actions permitted in the name of military necessity will no doubt increase. *Kriegsraison* finds its expression today

[202] Lt Cdr Joseph P. Burke, 'The Battle Over the Law of War: Exploring the Role of Law in Twenty-First Century Conflict, Irish Defence Forces Review 2009 18.

through these overbroad invocations of Article 51, as manifested in the U.S. targeted killing programme. With an action justified as being made in 'self-defence', the U.S. believes that it can then use the maximum level of force it deems appropriate, regardless of the actual magnitude of the threat in question (if, in fact, a threat does exist).

The United States targeted killing programme is currently the prime example of the expansion of 'imminence', of attempts to broaden the right of self-defence, and the granting of undue weight to the principle of military necessity. The second chapter of this thesis discusses the U.S. targeted killing programme, and assesses the predominant arguments put forward in favour of the programme and its accompanying use of armed drones.

Chapter Two: Targeted Killing and the Use of Armed Drones

Targeted killing is a relatively new phrase in the lexicon of international law and is not defined therein, nor can it be located within a specific area of international law. The term came into frequent use following Israel's public disclosure of a policy of 'targeted killings' during the second intifada in the Occupied Palestinian Territories in 2000.[203] The term and the tactic pose a number of problems for international law and the international community. Beginning with a brief explanation of what targeted killing is, this section examines the United States targeted killing programme, its place in the 'war on terror', and its perceived advantages and disadvantages.

Targeted killing is distinct from assassination and extrajudicial executions in that both are by definition illegal, whereas targeted killings are not always contrary to the law.[204] An assassination in peacetime is the 'murder of a private individual or public figure for political purposes', whilst in wartime it is defined as 'the specific targeting of an individual using treacherous means'.[205] Extrajudicial executions are understood to be a term applicable to domestic contexts in which international human rights law is operating as the *lex specialis* and to refer to "the deliberate killing of suspects in lieu of arrest, in circumstances in which they do not pose an immediate threat".'[206] The term 'targeted killing' is neutral: it does not indicate any presumptions regarding the international lawfulness of the tactic, nor does it make restrictions as to means used or the motivation underlying a specific use of the tactic.[207]

Whilst there is no official definition of the term in international law, the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions in his 2010 report defined targeted killing as:

[203] *Judgment of The Supreme Court Sitting as the High Court of Justice [December 11 2005] in The Public Committee against Torture in Israel et al. v. The Government of Israel et al.* HCJ 769/02, para.1; see also BBC News (2004), 'Israel's "targeted killings" (BBC News, 17 April 2004), accessed online at http://news.bbc.co.uk/2/hi/middle_east/3556809.stm, 01 December 2018

[204] UNHRC (n148) 5.

[205] Jason W. Fisher , 'Targeted killing, norms and international law' (2007) 45 (3) Columbia J of Transnational Law, 714

[206] Ibid.

[207] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 4

> …the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them.[208]

And by Melzer as:

> 'the intentional, premeditated and deliberate use of force, by states or their agents, acting under colour of law, or by an organised armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.'[209]

Targeted killings may be carried out during armed conflict and in peacetime, by subjects of international law such as governments or organised armed groups, using a variety of different means and methods, including drones, missiles and sniper fire.[210] The U.S. targeted killing programme is primarily an Unmanned Aerial Vehicle (drone) programme.

The U.S. targeted killing programme is a major component of the 'war on terror'. The programme, initiated in 2002, is seen as an 'essential tactic' in bringing to justice those responsible for the September 11th 2001 attacks, and others who may pose a threat to the security of the U.S.[211] It was at first an exceptional tool used sparingly by the Bush administration. Under the Obama administration, targeted killing became a 'routine instrument of counter-terrorism policy.'[212] The targeted killing programme was for some time regarded as an 'open secret' as it did not officially exist.[213] It was publicly acknowledged a number of times by President Obama, including for the first time by in January 2012 when President Obama admitted that the U.S. had carried out targeting through drone strikes in Pakistan,[214] in May

[208] UNHRC (n148) 3.
[209] Melzer (n194) 1.
[210] UNHRC (n148) 4.
[211] Jonathan Masters, 'Targeted Killings' (*Council on Foreign Relations*, 13 June 2012) http://www.cfr.org/counterterrorism/targeted-killings/p9627.
[212] The New Yorker, 'Drones, due process and presidential power'(*The Political Scene*, 23 July 2012) http://www.newyorker.com/news/news-desk/political-scene-drones-due-process-and-presidential-power.
[213] Karen McVeigh, 'Drone Strikes: Activists Seek to Lift the Lid on Open Secret of Targeted Killings', *The Guardian* (London, 20 June 2012) <http://www.guardian.co.uk/world/2012/jun/20/drone-strikes-targeted-killings-case> accessed 28 June 2015.
[214] AFP, 'Obama Admits US Drone Strikes into Pakistan', *The Express Tribune* (Islamabad, 20 June 2012) <http://tribune.com.pk/story/329760/obama-admits-us-drone-strikes-into-pakistan/> accessed 28 June 2015.

2012 when he publicly acknowledged drone strikes in Somalia and Pakistan in a letter to Congress, [215] and in a major speech at the National Defense University in May 2013.

Despite successive administrations having previously condemned such practice by Israel,[216] the targeted killing programme was expanded under President Obama to the extent that, on his leaving office, it was the United States' favoured method of combating terrorism. Described by former Defense Secretary Leon Panetta, during his time as Director of the CIA, as 'the only game in town',[217] the expansion of the programme has continued under President Trump.[218]

Personality and signature strikes

There are two types of targeted killing – 'personality' strikes and 'signature' strikes. 'Personality' strikes involve identifying a high-value target, placing them on a 'kill list', and vetting him or her closely before striking. During the Obama administration, these lists were given to the president, who made the final decision as to whether a drone strike should go ahead. Under the Trump administration, executive oversight of such strikes is no longer required.[219] The legality of personality strikes under international humanitarian law is discussed in Chapter 3, and under international human rights law in Chapter 4.

Many of the targeted killings carried out by the CIA are not personality strikes, and are not 'targeted' at all, in the sense that 'targeted' would generally be assumed to mean. The majority of drone strikes are what are known as 'signature' strikes. Signature strikes have never required administrative approval.[220] Also referred to as 'crowd kills' or 'terror attack disruption strikes' (TADS), signature strikes are strikes conducted against individuals whose identity is not known but who are targeted 'based on a pattern of activity' – that is, those whose behaviour matches

[215] Adam Entous, 'US Acknowledges Its Drone Strikes', *The Wall Street Journal* (New York, 15 June 2012) <http://online.wsj.com/article/SB10001424052702303410404577468981916011456.html> accessed 28 June 2015

[216] CNN.com, 'Powell: Israel 'Too Aggressive' in Hamas Attack' (CNN.com, 13 June 2012) <http://articles.cnn.com/2001-08-01/us/powell.mideast_1_hamas-attack-state-colin-powell-hamas-office?_s=PM:US> accessed 28 June 2015

[217] Jane Mayer, 'The Predator War' (*The New Yorker*, 16 July 2012) <http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer> accessed 03 July 2015

[218] Daniel J Rosenthal and Loren Dejonge Schulman, 'Trump's Secret War on Terror' (*The Atlantic*, 10 August 2018), accessed online at: < https://www.theatlantic.com/international/archive/2018/08/trump-war-terror-drones/567218/>, 01 December 2018

[219] Ibid.

[220] Jo Becker and Scott Shane, 'Secret 'kill list' proves a test of Obama's principles and will' *The New York Times* (New York, 29 May 2012) <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=0> accessed 03 July 2015

a 'pre-identified "signature" of behaviour that the U.S. links to militant activity'.[221] Whilst what exactly constitutes this type of behaviour remains classified, it is believed to include such behaviour as 'a gathering of men, teenaged to middle-aged, travelling in convoy or carrying weapons'[222] or 'loading a truck with what appears to be bomb-making material or even crossing a border multiple times in a short period.'[223] Such a system is open to much error, particularly in countries such as Yemen, where 'every Yemeni is armed,' making it even harder to distinguish between civilians and those involved in terrorist activity.[224] Apparently, there is a joke in the U.S. State department which says that when the CIA sees 'three guys doing jumping jacks', they decide it is a terrorist training camp.[225]

In practice, this means that signature strikes:

> '…in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.' [226]

Under these criteria, according to Heller, the very first known CIA drone strike was in fact a signature strike.[227] On February 4th 2002, a Predator drone operated by the CIA fired a Hellfire missile, which instantly killed three men standing in Zhawar Kili, an 'abandoned mujahedeen complex' near Khost in Afghanistan's Paktia province.[228] The CIA had apparently believed that the taller of the three men, whom the others were 'acting reverently towards', was Osama bin Laden.[229] It later emerged that all three men were civilians gathering scrap metal, according to local reports.[230]

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[221] Danya Greenfield, 'The Case Against Drone Strikes on People Who Only 'Act' Like Terrorists' (The Atlantic, 19 August 2013), accessed online at https://www.theatlantic.com/international/archive/2013/08/the-case-against-drone-strikes-on-people-who-only-act-like-terrorists/278744/, 01 December 2018.

[222] Spencer Ackerman , 'Inside Obama's drone panopticon: a secret machine with no accountability' (*The Guardian,* 25 April 2015) <http://www.theguardian.com/us-news/2015/apr/25/us-drone-program-secrecy-scrutiny-signature-strikes> accessed 02 July 2015

[223] Michael Boyle, 'The costs and consequences of drone warfare' (2013) 1 Int'l Affairs 8.

[224] Boyle (n210) 8.

[225] Becker and Shane (n207)

[226] Ibid.

[227] Kevin Jon Heller, "'One Hell of a Killing Machine': Signature Strikes and International Law" (2013) 11 J Int'l Criminal Justice 89

[228] Ibid.

[229] Ibid.

[230] John Sifton, 'A brief history of drones' (*The Nation,* 7 February 2012) <http://www.thenation.com/print/article/166124/brief-history-drones> accessed 03 July 2015

Signature strikes are the most practised and most controversial type of drone strike, and their legality under international humanitarian law and international human rights law is discussed at length and in detail in Chapters 3 and 4.

The following section examines the effectiveness of signature strikes in achieving the U.S.' stated counter-terror aims. It also includes an inspection of the arguments in favour and against the use of armed drone technology itself in carrying out the targeted killing programme.

'Killing them faster than they can grow them'[231]

Those in favour of the continuing employment of signature strikes employ a number of assertions about their usefulness. First amongst these is that signature strikes are both a conventional tactic and an effective way of disrupting, and indeed decimating, the al-Qaeda network and the networks of its affiliate forces. Advocates such as Kenneth Anderson assert that, far from the practice being indiscriminate or novel, the means by which a signature strike is undertaken – after an intelligence assessment that takes into account behavioural signatures 'such as organized groups of men carrying weapons, suggesting strongly that they are "hostile forces" - are 'the norm in conventional warfare'.[232] Philip Mudd, states that 'the impact of armed drones during the decade-plus of this intense global counter-terrorism campaign is hard to over-estimate', particularly when one considers their effect on terror groups which have, he says, decayed into 'locally focused threats' or disappeared altogether. Mudd claims that signature strikes have accelerated the decline of terror groups for a number of reasons, primarily because they have:

[231] 'We are killing these sons of bitches faster than they can grow them' – former CIA counterterrorism center chief on the pace of drone strikes against Al-Qaeda in Pakistan. Greg Miller and Julie Tate, 'CIA shifts focus to killing targets' (*The Washington Post*, 2 September 2011) < https://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story_1.html> accessed 21 June 2015

[232] Kenneth Anderson, 'The case for drones' (*Commentary Magazine*, 01 June 2013) <https://www.commentarymagazine.com/article/the-case-for-drones/> accessed 27 June 2015

> '…pulled out… lower-level threads of al Qaeda's apparatus – and that of its global affiliates – rapidly enough that the deaths of top leaders are now more than matched by the destruction of the complex support structure below them.'[233]

He goes on to argue that al-Qaeda and its affiliates are not hierarchical structures in the Western conception, but rather 'conglomerations of militants, operating independently, with rough lines of communication and fuzzy networks that cross continents and groups'. Signature strikes, he argues:

> '…take out whole swaths of these network sub-tiers rapidly – so rapidly that the groups cannot replicate lost players and their hard-won experience. The tempo of the strikes, in other words, adds sand to the gears of terror organizations, destroying their operational capability faster than the groups can recover.' [234]

Likewise, Anderson writes that the U.S. targeted killing strategy has:

> '…worked far better than anyone expected. It is effective, and has rightfully assumed an indispensable place on the list of strategic elements of U.S. counterterrorism-on-offense.'[235]

He then states that the CIA disruption of al-Qaeda in Pakistan is a 'remarkable success' and states that drone warfare has a 'clear utility in disrupting terrorist leadership.'[236] Daniel Byman states that:

> 'drones have done their job remarkably well: by killing key leaders and denying terrorists sanctuaries in Pakistan, Yemen, and, to a lesser degree, Somalia, drones have devastated al-Qaeda and associated anti-American militant groups.'[237]

Byman also writes that drones have hurt terrorist organisations by eliminating operatives who are 'lower down the food chain but who boast special skills' (such as passport forgers, bomb makers, recruiters and fundraisers), have 'undercut terrorists' ability to communicate and to

[233] Philip Mudd, 'Fear Factor' (*Foreign Policy*, 24 May 2013) < foreignpolicy.com/2013/05/24/**fear-factor**/> accessed 27 June 2015
[234] Ibid.
[235] Anderson (n219).
[236] Ibid.
[237] Daniel Byman, 'Why drones work' (2013) 92 (4) Foreign Affairs 32

train new recruits' and have 'turned al-Qaeda's command and training structures into a liability, forcing the group to choose between having no leaders and risking dead leaders'.[238]

The Obama administration itself made these same arguments, most obviously in President Obama's remarks at the National Defense University in 2013, during which, in a passage on drone strikes, he stated:

> '…our actions are effective. Don't take my word for it. In the intelligence gathered at Bin Laden's compound, we found that he wrote, "We could lose the reserves to enemy's air strikes. We cannot fight air strikes with explosives." Other communications from al Qaeda operatives confirm this as well. Dozens of highly skilled al Qaeda commanders, trainers, bomb makers and operatives have been taken off the battlefield. Plots have been disrupted that would have targeted international aviation, U.S. transit systems, European cities and our troops in Afghanistan. Simply put, these strikes have saved lives.'[239]

Mudd does acknowledge that there are problems with signature strikes, but these problems seem to centre around not if a signature strike should be carried out, but when. He writes:

> 'If we strike too soon, we risk alienating a local population and increasing its motivation to target New York. If we strike too late, a nascent group of violent extremists will become operational…'[240]

Here, Mudd seems to believe that there exists a Goldilocks scenario, in which conditions for targeting are 'just right', wherein a strike will avoid any ire from local populations whilst at the same time killing a militant who would have become a leader or imminently carried out an attack. It seems unlikely that such a scenario exists.

Despite the above assertions that drone strikes are effective, there are many who disagree. In January 2013, Michael Boyle, who had been a member of Obama's counter-terrorism group prior to his 2008 election, wrote that drone effectiveness is a 'myth'. He writes that:

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[238] Ibid.

[239] The White House, 'Remarks by the President at the National Defense University' (23 May 2013) <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> accessed 28 June 2015

[240] Mudd (n220)

> 'the position of the American foreign policy establishment on drones – that they are an effective tool which minimizes civilian casualties – is based on a highly selective and partial reading of the evidence'.[241]

Boyle writes that arguments for the effectiveness of drones can be divided into four separate claims, with numbers 2 and 3 being those claims presented above - 'that drones have been successful at killing so-called "high value targets" (HVTs)' and 'that the use of drones puts such pressure on terrorist organisations that it degrades their organisational capacity and ability to strike'.[242] In response to the claim number 2, Boyle argues that 'the actual record of drone strikes suggest that forces under his [President Obama's] command have killed far more lower-ranked operatives associated with other Islamist movements and civilians than HVTs from al-Qaeda', and quotes an estimate from CNN which states that by 2013, only 2% of drone strikes since 2004 had killed high-ranking militants.[243] Regarding the third claim, Boyle writes that 'the evidence that drones inhibit the operation latitude of terrorist groups and push them towards collapse is more ambiguous…' He argues that drone strikes 'may have scattered al-Qaeda militants, but it does not neutralize them'.[244] A 2017 study by Abrahms and Mierau found that leadership decapitation has little effect on the quantity of terrorist attacks, but does lead to a reduction in the *quality* of attack,[245] (with more civilians targeted after leadership decapitation), while Bolland and Lee Ludvigsen argue that drone strikes have failed to reduce AQ's operational capacity.[246] Yet, drone strikes retain their favour with the U.S. government.

The next section investigates the benefits and drawbacks of the technology, and examines why armed drones are used instead of more traditional weapons systems or covert operations teams.

The cost, 'humanity', and precision of armed drones

As important as drone technology is, it must be remembered that drones do not make decisions. Drones are enablers and facilitators. Drones do not make the decisions as to who to strike, where to strike, or when to strike. The armed drones currently used by states are not

[241] Boyle (n210) 4
[242] Ibid.
[243] Ibid 9.
[244] Ibid 11.
[245] Max Abrahms & Jochen Mierau, 'Leadership Matters: The Effects of Targeted Killings on Militant Group Tactics' (2017) *Terrorism and Political Violence* 29 (5), 845.
[246] Thomas Bolland & Jan Andre Lee Ludvigsen, "No boots on the ground": the effectiveness of US drones against Al Qaeda in the Arabian Peninsula (2018) *Defense & Security Analysis* 34 (2) 137.

autonomous. It is at the human level that decisions are made. The role of the drone in targeted killing programmes should not be underestimated or dismissed as unimportant, but nor should it be fetishized. In their examination of drone warfare in the FATA region of Pakistan, Shaw and Akhter note:

> 'The primary relationship evoked in most discussions of drone warfare is between a drone and its battlefield of objectified targets, rather than the relationship between the team of technicians operating the drone as agents of American empire and the unsuspecting bodies surveilled and slaughtered on the ground in neo-colonial Pakistan. In other words, drone warfare is thought of as a relationship between things, rather than between people. And the supernatural element is never far away. As Colonel Theodore Osowski of the US Air Force reveals in his Biblical allegory on drones: "It's kind of like having God overhead. And lightning comes down in the form of a Hellfire".'[247]

A focus on drone technology alone, then, masks and mystifies the human relationship with the object.[248] The human role must be placed front and centre, as must the construction of the drone as an economical, precise and humane weapons platform. Arguments made by the United States around the cost-effectiveness and 'humaneness' of armed drones are largely specious and are each intricately linked with the core justification for armed drone use: precision. This section interrogates such claims in turn.

Show me the money: the cost appeal of armed drones

After a long and costly war in Iraq and with the continuing presence of troops in Afghanistan, there is very little appetite or public support in the U.S. for sending large numbers of troops abroad to combat terrorism, due to the heavy human and monetary costs of such conflicts. The economic effectiveness of armed drones is much lauded by proponents of the targeted killing programme. Drones are considered to be a cheaper and more efficient alternative to manned aircraft. Kaag and Kreps write that 'drone use aligns with new attitudes favoring war at minimal cost. In the words of the Congressional Research Service, drones are "the poor man's air force"'.[249]

[247] Ian Graham Ronald Shaw and Majed Akhter, 'The unbearable humanness of drone warfare in FATA, Pakistan', Antipode (2012) 44 (4) 1502.
[248] Ibid 1501.
[249] John Kaag and Sarah Kreps, *Drone Warfare* (Polity Press 2014) 62.

It is often stated that the unit costs associated with drones tend to be lower than those of modern manned aircraft, and that maintenance is generally more cost-effective.[250] In 2011, for example, the reported cost of a Predator drone was $5 million and the cost of a Reaper drone was $28.4 million, compared to the $150 million price of a Lockheed Martin F-22 fighter.[251] However, to say that the unit costs associated with drones are less than those of other airborne weapons systems is misleading. In order for a Reaper to operate, the ground components must be included. Considering that every Combat Air Patrol (CAP) includes four drones, the average unit procurement cost for a Reaper CAP is substantially more than the unit-cost estimate typically reported. For the fiscal year 2018, the average unit procurement cost for an MQ-9 Reaper CAP was $86.82 million, excluding development and others costs.[252] The Department of Defense's 2014 Select Acquisition Report, which is the most recent report detailing acquisition costs for the MQ-9 Reaper, shows that when costs such as research, development, testing and evaluation, procurement, support, spares and military construction are included, the total cost comes to an estimated $11.8 billion 2008 dollars, equalling $14.5 billion 2018 dollars.[253] The 2014 Select Acquisition Report states an estimated number of 346 Reapers will be produced. This means that the true cost of each Reaper comes to an estimated $32 million dollars, with a CAP of four Reapers costs approximately $128 million dollars - very close to the price of a fighter jet.

Furthermore, 'as the systems have required more sophisticated sensors, costs of UAVs have begun to move toward parity with manned aircraft, making the economic case for drones far from obvious'.[254]

Meanwhile, each Hellfire missile fired from a Reaper drone costs approximately $68,000 apiece (the 2017 Under Secretary of Defense's Comptroller report notes that Hellfire

[250] Ibid.
[251] Medea Benjamin, *Drone Warfare: Killing by Remote Control (*Verso, 2013) 20.
[252] Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer (2017), Programe Acquisition cost by Weapon System – United States Department of Defense Fiscal Year 2018 Budget Request, available online at: https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2018/fy2018_Weapons.pdf, accessed 15 December 2018.
[253] Department of Defense, 'Select Acquisition Report (SAR) MQ-9 Reaper Unmanned Aircraft System' As of FY 2015 President's Budget' <http://www.dod.mil/pubs/foi/Reading_Room/Selected_Acquisition_Reports/14-F-0402_DOC_57_MQ-9ReaperDecember2013SAR.PDF> accessed 11 September 2015
[254] Kaag and Kreps (n236) 62

production 'continues at full-rate production' and that 'the factory will operate at the maximum rate of production' for the coming year),[255] and:

> 'the cost of fuelling, operating and maintaining drones is not fully known…But every hour a drone is up in the air is estimated to cost between $2,000 and $3,500, and the number of flight hours has skyrocketed.'[256]

More personnel are also needed to operate drones than manned aircraft. Approximately 186 people are required to operate every CAP of four drones. One in ten image analysts (or 'screeners') are employed by private firms, rather than by the Pentagon, raising costs even more.[257] The Bureau of Investigative Journalism has identified ten private-sector companies heavily involved in the operation of the U.S.' surveillance and targeting networks.[258] Hundreds of contractors have been hired to analyse the nearly half a million hours of video footage recorded by drones and other aircraft every year, costing the Department of Defense more than $260 million dollars.[259] Procurement costs to cover further operations such as the managing of communications between drones and their bases in the U.S., the maintenance of data collection systems and servicing sensors, and the operation of smaller surveillance drones in Afghanistan, run into billions of dollars.[260] These costs are likely to increase rather than decrease as the U.S. expands its drone flights from 65 a day to 90 a day by 2019, particularly considering that the Pentagon already lacks the requisite manpower to sift through the thousands upon thousands of hours of footage it already has.[261]

Drones are also prone to crashing.[262] In 2009, Air Force officials admitted that 'more than a third of their unmanned Predator spy planes…have crashed, mostly in Iraq and Afghanistan'.[263] Another excerpt from the aforementioned Congressional Budget Office report states that

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[255] Office of the Under Secretary of Defense (n239)
[256] Benjamin (n238) 21
[257] Abigail Fielding-Smith and Crofton Black, 'When you mess up, people die': civilians who are drone pilots' extra eyes' (*The Guardian*, 30 July 2015) <http://www.theguardian.com/us-news/2015/jul/30/when-you-mess-up-people-die-civilians-who-are-drone-pilots-extra-eyes>, accessed 12 October 2015
[258] Ibid.
[259] Crofton Black, 'Expanding contracting: The private sector's role in drone surveillance and targeting', (*Remote Control*, 8 October 2015) <http://remotecontrolproject.org/expanding-contracting-the-private-sectors-role-in-drone-surveillance-and-targeting/> accessed 13 October 2015.
[260] Ibid.
[261] Gordon Lubold, 'Pentagon to sharply expand U.S. drone flights over next four years,' (*The Wall Street Journal*, 16 August 2015) <http://www.wsj.com/articles/pentagon-to-add-drone-flights-1439768451> accessed 13 October 2015.
[262] Benjamin (n238) 22.
[263]Christopher Drew, 'Drones are weapons of choice in fighting Qaeda' (*The New York Times*, 16 March 2009) http://www.nytimes.com/2009/03/17/business/17uav.html?adxnnl=1&pagewanted=all&adxnnlx=1435932021-A0ljoE3gqaRSSopDv/F5BQ accessed 19 June 2015.

'…excessively high losses of aircraft can negate cost advantages by requiring the services to purchase large numbers of replacement aircraft.'[264] As is seen from the evidence presented above, the oft-expounded economic advantages of drones are not quite as straightforward as they are often made out to be. Yet even as the economic cost of drones edge upwards, they will likely remain the weapon of choice in the 'war on terror'. This is because their economic cost is not their primary or only attraction; rather, it is their alleged reduction in the *human* cost of counter-terrorism that makes them so attractive. The force protection and 'humanitarian' aspect of drones, discussed in the next section, 'will most likely outweigh the considerations of drones economic advantages'.[265]

Drones: humane warfare?

Armed drones are regularly presented as the one of the most humane weapons available for combatting terrorism. In his written testimony to the House of Representatives Subcommittee on National Security and Foreign Affairs in 2010, Anderson wrote that 'drones are a major step forward…in humanitarian weapons technology'. Chamayou quotes a U.S. official who considers drones to be 'the most refined, accurate and humane way' to fight a war'.[266] This language needs to be disputed and challenged. To present drones as 'humane' and 'humanitarian' is to mask their inherently destructive nature. To understand why and how armed drones (or indeed any weapons) have come to be described as 'humane' - an association that can certainly be considered as oxymoronic - I first examine why states (particularly in the West) find it appealing, and indeed necessary, to label conflicts and the weapons used to fight them as 'humanitarian' and 'humane'.

As noted by Coker, and Carvin and Williams, modern Western society is increasingly risk-averse. Warfare in the West is now preoccupied with risk management, and the pre-emption of threats both real and imagined. Noting that revolutions in military affairs (RMAs) historically occur to overcome a problem, Carvin and Williams suggest that 'the RMA we are living through is one driven by the problem that, increasingly, Western societies do not want to fight wars (even if politicians do)'.[267] In their assessment, the challenge facing Western militaries

[264] Jeremiah Gertler (2012), U.S. Unmanned Aerial Systems (Congressional Research Service), available online at: https://fas.org/sgp/crs/natsec/R42136.pdf.
[265] Kaag and Kreps (n236) 64.
[266] Grégoire Chamayou, *A Theory of the Drone* (Janet Lloyd tr., The New Press 2015) 135.
[267] Stephanie Carvin and Michael John Williams, *Law, Science, Liberalism and the American Way of Warfare: The Quest for Humanity in Conflict (*Cambridge University Press 2015) 209.

today is social rather than military, with social drivers changing states' approach toward threats and security problems 'to a more disengaged approach centred on risk management where society expects technology, not people, to manage the risks.'[268] Similarly, Coker writes that 'the West is becoming increasingly risk averse and less willing than ever to court the risks war entails.'

It is not a coincidence that the turn toward 'humanitarian' warfare has occurred as populations become more reluctant to go to war. As Owens observes:

> '…the very notion of 'humanitarian' war rests, in part, on the expectation that liberal state war is increasingly (or should be) almost death-free in principle, for both Western soldiers and civilians on the ground.'[269]

As a result of this humanitarian turn, 'the individual is now placed at the centre of the war' - as citizen, as solider, and as the reason for going to war. Targeted killing itself individualises conflict to an unprecedented degree. Subsequently, with populations less willing to go to war, the state has to demonstrate that troops (and to a lesser extent, the civilians of the state in which the conflict occurs) are at little risk of death. This social change has been highly instrumental in the turn toward 'humanitarian' warfare and the labelling of armed drones as 'humane' weapons.

With Western populations unwilling to risk death on behalf of their states, technology has stepped in to fill their combat boots. Ironically, an unexpected result of the Western attempt to create 'humanitarian' warfare has been its subsequent dehumanisation. The social RMA, along with technology, has resulted in the move toward unmanned warfare.[270] Coker, writing before the 'war on terror' and the increasingly widespread use of drones, explains that:

> '…humanity requires distance to be put between the soldiers and pilots and their targets. The style is one of containment and confinement and dissuasion. As battle is "unprudential" it is best avoided not because the outcome is necessarily in doubt but because in all battles the costs of success are unpredictable for the individual solider.'[271]

[268] Ibid 210.
[269] Patricia Owens, 'Accidents Don't Just Happen: The Liberal Politics of High-Technology 'Humanitarian' Warfare', (2003) 32 (3) Millennium J of Int'l Studies 596-597.
[270] Carvin and Williams (n254) 212.
[271] Christopher Coker, *Humane Warfare* (Routledge 2003) 57.

Armed drones are presented as saving American lives due to the fact that they are unmanned, since those operating them and firing the missiles are doing so remotely. President Obama noted of targeted killing that 'there is a remoteness to it that makes it tempting to think that somehow we can, without any mess on our hands, solve vexing security problems.'[272] Chamayou deems this the 'principle of vital self-preservation', in which 'preserving the lives of one's own soldiers is regarded as a quasi-absolute state imperative.'[273]

Chamayou describes the logic behind referring to drones as 'humanitarian' as follows:

> '…the humanitarian imperative is to *save* lives. And the drone does indeed save *our* lives. It is therefore a humanitarian technology. QED.'[274]

The idea of the drone as a 'humane' technology has been embraced by proponents of the targeted killing programme, and 'drones save lives' is one of their repeated refrains. As Kreps and Kaag note, 'if we look at the rhetoric surrounding the development of combat drones, much of it turns on troop protection and the ability to project force without risk.'[275] The 'life saving' aspect of drone strikes is consistently put forward in their support. The life-saving rhetoric tends to have two components: the first, that drones save the lives of American military personnel as there is no need to have 'boots on the ground' in the territory in which the strikes take place, and the second being that drone strikes spare more civilian lives relative to other forms of aerial bombing, such as bombings by F-16s or Tomahawk cruise missiles, due to their 'precision'. Regarding troop protection, former CIA deputy director Michael Morell has written that 'hundreds of lives were saved' due to drone strikes in Yemen.[276] In May 2013, President Obama stated that 'simply put, these strikes have saved lives'.

On the protection of civilian lives when targeting militants, Anderson writes that '[drone warfare] …lends civilians in the path of hostilities vastly greater protection than does any other fighting tool…'.[277] Other authors write that 'drones kill a lower ratio of civilians to combatants

[272] Scott Shane, 'Election spurred a move to codify drone 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> accessed 06 July 2015.
[273] Chamayou (n253) 137.
[274] Ibid.
[275] Kaag and Kreps (n236) 63.
[276] Ken Dilanian, 'Former CIA leader defends drone strikes, torture' (*PBS Newshour*, 04 May 2015) .<http://www.pbs.org/newshour/rundown/former-cia-leader-defends-drone-strikes-torture/> accessed 06 July 2015.
[277] Anderson (n219).

than we've seen in any recent war', and state '…civilian casualties? That's not an argument against drones. It's the best thing about them'.[278]

The drone, then, can be seen as a perfect 'humanitarian' and 'humane' technology, or, as Carvin and Williams describe it, the perfect 'legal-scientific' weapon:

> '…they are precision-guided weapons which may be used to surgically strike at threats while promising to avoid excessive civilian casualties. Further, rather than requiring the deployment of military troops and the necessary infrastructure that accompanies them, and which can cause problems and resentment in host countries, drones require few, if any, boots on the ground. The risk to American soldiers is minimal.'[279]

The rhetoric of drones as 'life-saving' and 'humane' has been consciously and consistently reified since the targeted killing programme became public knowledge. As noted earlier, to deem a weapon 'humane' seems oxymoronic. What does it mean to affix this word to a device? It is necessary, as Chamayou argues, to 'elucidate the twisted logic that makes it possible to claim an instrument of death saves lives.'[280] Seantel Anais, in a discussion on the framing of non-lethal weaponry as 'humane', is worth quoting here at some length. Anais explains:

> 'The term "humane" is a labile signifier of intent and practice. To claim that an object or approach is humane serves as a means of apportioning value to the human and non-human actors captured by such a term. Thus, humanitarianism holds the possibility of physical and political violence just as much as do humanitarian interventions. The "humane" is distinguished by its inverse proportionality to risk, loss of life, destruction of property and bloodshed… To call a weapon humane is to imbue it with compassion and benevolence, to suggest that it involves the least possible infliction of pain. The imputation of humanity to the weapon itself loops around to invest its user with an air of civility.'[281]

At the most basic level, an armed drone has been engineered to do the same thing as any other weapon or weapons platform - to cause harm. As Forge notes, ''it is at the tactical and operational level, at the level of use, that any "humanity" and respect for the laws of war enters

[278] William Saletan 'In defense of drones' (*Slate*, 19 February 2013) <http://www.slate.com/articles/health_and_science/human_nature/2013/02/drones_war_and_civilian_casualties_how_unmanned_aircraft_reduce_collateral.html> accessed 08 July 2015.
[279] Carvin and Williams (n254) 202.
[280] Chamayou (n253) 136.
[281] Seantel Anais, *Disarming Intervention: A Critical History of Non-Lethality* (UBC Press 2015) 21.

into the picture, not at the technical level of weapons characteristics.'[282] Or as Heather Linebaugh, a former member of the U.S. Air Force who worked as an imagery analyst and geo-spatial analyst for the drone programmes in Iraq and Afghanistan, puts it: 'the UAVs in the Middle East are used as a weapon, not as protection'.[283]

It is not humanity, but inhumanity, that is an inherent characteristic of a weapon, whether that weapon is used for a 'humane' reason or not. Describing a weapon as 'humane' serves to make the state using it appear humane in their actions and decisions. While a drone strike might be considered 'humane' for U.S. troops in no danger of being the target of one, it is rather less humane if you are on the receiving end of a drone strike. The number of civilian dead resulting from U.S. drone strikes is either completely misrepresented - as with John O. Brennan's statement that no civilians had been killed in drone strikes in 2011 - or dismissed.[284] This calls to mind a comment by Gulf War Allied Commander Norman Schwartzkopf, who, when questioned in an interview about the number of dead on the Iraqi side, stated that the figure was '50,000 or 100,000 or whatever'.[285] As Coker says, to the Commander the figure didn't really matter, because 'the right side won.'[286] Deaths on the opposing side, whether civilian or otherwise - even in an asymmetrical conflict against al-Qaeda and affiliated forces in which the U.S. is not really fighting against another 'side' per se - don't matter once your own forces are not in harm's way, and you win.

The above arguments on cost-efficiency and humanity are intimately connected with precision, which is the core justification used in support of drone strikes. Chamayou writes:

> 'One can claim that drones save not only "our lives" but "theirs", thanks to increased precision…. Lives are saved. But saved from what? From oneself, from one's own power of death. The violence could have been worse, and since one tried in good faith to limit its deadly effects, one acted morally.'[287]

[282] John Forge, *Designed to Kill: The Case Against Weapons Research (*Springer Research Ethics Forum 2013) 172.
[283] Heather Linebaugh, 'I worked on the US drone program. The public should know what really goes on' (*The Guardian*, 29 December 2013) <http://www.theguardian.com/commentisfree/2013/dec/29/drones-us-military> accessed 05 September 2015.
[284] Scott Shane, 'C.I.A. is disputed on civilian toll in drone strikes' (*The New York Times*, 11 August 2011) <http://www.nytimes.com/2011/08/12/world/asia/12drones.html> accessed 10 July 2015.
[285] Coker (n258) 13.
[286] Ibid.
[287] Chamayou (n253) 137.

The fallacy of 'precision'

The combination of acceptable 'humanitarian' warfare, fought with cost-effective and 'humane' weapons lead Carvin and Williams to conclude that the U.S. (and other Western nations) may in future engage in what Martin Shaw calls 'risk transfer militarism', in which, in a bid to maintain their own security, the U.S. (and perhaps other nations):

> '…wages a perpetual war to prevent the realisation of security risks in the homeland, all the while subjecting foreign populations to the collateral damage of American military strikes with drones.'[288]

Technological precision and normative precision are deliberately conflated in the rhetoric surrounding drone strikes. Put simply, just because a weapon is more technologically precise does not mean the strategy surrounding it is sound, that it is precisely hitting its target, or that the 'right' people are being targeted and killed. Arguments of precision deliberately mask the fact that civilians are still killed in substantial numbers, whether by drone strikes or manned aerial bombing, yet air power, and in particular armed drones, are regularly presented as the optimum method of countering terrorism due to their ability to be precise in their targeting. Claims of precision are central to the representation of drone warfare as ethical and superior.[289] Former Defense Secretary Leon Panetta claimed that drones are 'probably the most precise weapons in the history of warfare.'[290] Byman writes that:

> '…compared with a 500-pound bomb dropped by an F-16, the grenade-like warheads carried by most drones create smaller, more precise blast zones that decrease the risk of unexpected structural damage and casualties.'[291]

In the same May 2013 speech referenced earlier, President Obama stated that 'conventional airpower or missiles are far less precise than drones, and are likely to cause more civilian casualties and more local outrage'.[292] Many of these assertions are misleading.

Zehfuss argues that current 'performance' in military operations should be assessed not in comparison to earlier times or 'dumb' bombs, but 'with respect to what would be possible

[288] Carvin and Williams (n254) 214.
[289] Maja Zehfuss, 'Targeting: precision and the production of ethics' (2011) 17 (3) E J Int'l Relations 559.
[290] Karen Parrish, 'Panetta assesses national security threats' (*U.S. Department of Defense*, 07 September 2011) <http://www.defense.gov/News/NewsArticle.aspx?ID=65268> accessed 05 July 2015.
[291] Byman (n224) 32.
[292] The White House (n226).

given the available technology.'[293] Though armed drones are presented as being the most precise option available when viewed beside 'any other comparable weapons platform', often this is either wrong or like is not being compared with like.[294] An armed drone carrying a 'small smart weapon' such as Lockheed Martin's Shadow Hawk bomb is of course more precise than a ballistic missile fired from an F-16 or more precise than a carpet-bombing attack, but it is disingenuous and misleading to compare it with such systems when they are not the most similar options available today and when such 'small smart weapons' are not the weapons usually used by the drones carrying out strikes. The MQ-9 Reaper drone, the primary drone used for the targeted killing programme can be equipped with a payload of 3,750lbs.[295] It can carry up to 16 AGM-114 Hellfire missiles, but usually carries four Hellfire missiles and two 500lb GBU-38s.[296] The recently retired MQ-1B Predator – the pioneer drone of the targeted killing programme – had a payload of a mere 450lb. Despite the invention of smaller, smarter weapons, drones are being engineered to carry higher payloads and heavier weapons: to become more lethal, rather than less.

What, then, does it mean to call a weapon or weapons platform 'precise'? Precision guided munitions or weapons are variously defined as weapons that can be 'directed against a target using either external guidance or a guidance system of their own';[297] by the U.S. Air Force Weapons School as a weapon that impacts within a three-metre CEP as compared to an accurate weapon which impacts within a ten-metre CEP;[298] and as 'an array of advanced firepower projectiles that use precision guided technology to hit targets more precisely'.[299] Lockheed Martin, the manufacturer of the AGM-114 Hellfire missile, provides a short and telling description of why they consider precision to be important: precision weapons, states their site, have 'long standoff ranges to keep pilots and aircraft out of harm's way', and 'dominate the

[293] Zehfuss (n276) 558.
[294] Anderson (n264).
[295] U.S. Air Force, 'MQ-9 Reaper Fact Sheet' (2015) https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/, accessed 12 December 2018.
[296] U.S. Air Force (n282).
[297] HPCR Manual on International Law Applicable to Air and Missile Warfare, 'precision guided weapons' <http://www.ihlresearch.org/amw/manual/section-a-definitions/aa> accessed 11 September 2015.
[298] Maj. Jack Sine, 'Defining the "precision weapon" in effects-based terms' (2006) (Spring) Air & Space Power Journal <http://www.airpower.maxwell.af.mil/airchronicles/apj/apj06/spr06/sine.html> accessed 11 September 2015.
[299] BAE Systems, 'Precision guided munitions' <http://www.baesystems.com/enhancedarticle/BAES_159223/precision-guided-munitions?_afrLoop=1564444045742000&_afrWindowMode=0&_afrWindowId=null#!%40%40%3F_afrWindowId%3Dnull%26_afrLoop%3D1564444045742000%26_afrWindowMode%3D0%26_adf.ctrl-state%3D1cpx8wjn0f_101> accessed 11 September 2015.

battlefield'.[300] U.S. Air Force Major Jack Sine writes that 'conventional wisdom considers a weapon "precise" if it possesses the capability to guide to a specific aim point'.[301] This does not tell us anything about the effects of the weapon, how wide the blast radius is, or to what point a weapon should be accurate. Sine, writing in 2006, proposed a more holistic understanding of the term 'precision weapon', which would take into account not just a weapon's guidance accuracy, but which would also include:

> '…the context within which the weapon will be employed to include the target, its environment, the desired and undesired effects, and the rules of engagement. A weapon becomes a precision weapon when it provides the means of causing a specific, measurable tactical effect while minimizing undesired effects. Dependent on scenario, this effect must be quantifiable, assessable, and predictable'.[302]

Sine believes such a definition would break 'the direct relationship between guidance accuracy and precision' and raise awareness that 'PGMs and precision weapons are not synonymous'.[303] This definition does not yet appear to be forthcoming. Zehfuss explains that precision weapons are 'inherently imprecise', with the precision claimed for a weapon 'normally achieved only ever other time', even under test conditions.[304] This is because the 'precision of weapon delivery systems is typically expressed in terms of CEP'.[305] CEP, or Circular Error Probable, is 'the distance from the aim point within which 50 percent of the weapons will impact.'[306] The blast radius also has an influence on the precision of the weapon. The blast radius from a Hellfire missile 'can extend anywhere from 15-20 meters', and 'shrapnel may also be projected significant distances from the blast.'[307] Anyone within 40 - 50 metres of the site of a Hellfire missile target has a 10% probability of physical incapacitation.[308] The U.S. military classifies physical incapacitation as a soldier being 'physically unable to function in an assault within a

[300] Lockheed Martin, 'Weapons Systems' https://www.lockheedmartin.com/en-us/capabilities/weapon-systems.html, accessed 12 December 2018.
[301] Sine (n285).
[302] Ibid.
[303] Ibid.
[304] Zehfuss (n276) 543.
[305] Ibid.
[306] Sine (n285).
[307] Stanford Law School and NYU School of Law, '*Living under drones: death, injury and trauma to civilians from U.S. drone practices in Pakistan*' (September 2012) <http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf> accessed 09 July 2015.
[308] Department of Defense, JFIRE Multi-Service tactics, techniques, and procedures for the joint application of firepower FM 3-09.32 MCRP 3-16.6A NTTP 3-09.2 AFTTP(I) 3-2. (2007) <https://info.publicintelligence.net/MTTP-JFIRE.pdf> accessed 11 September 2015.

5-minute period after an attack.'[309] Despite this, we are led to believe that precision weapons and 'precision warfare' means that targets are killed, with little to no resulting collateral damage, and with the weapon finding its target almost every time. This is, quite simply, false.

As stated above, the terms 'precision guided munitions' or 'precise weapon' mean only that the weapon in question is one that is expected, fifty-percent of the time, to hit within three metres of the aim point.[310] Precision has no meaning other than this. 'Precise' and 'precision' do not indicate that the correct person or group has been targeted. The meaning of 'precision' has been deliberately conflated with the idea that because the weapon is precise, it is also killing the 'right' people. Reese posits that precision firepower blurs:

> '…the distinction between the tactical, operational, and strategic levels of war. This blurring encourages thinkers to equate the ability to destroy something with the purpose behind destroying it – to equate the means and ways of strategy with its end'.[311]

In this way, terms like 'targeted' and 'precise' conceal more than they explain.[312] As Van der Linden argues, 'the very fact that drone technology has accurate capabilities in terms of identifying its target and then striking the target does not mean that due care is taken to avoid civilian casualties.'[313] Nor is the identified target always the correct one - as Van der Linden points out, 'precision in finding and hitting the target does not imply that there is precision in the selection of the target.'[314] Despite this, conflicts are increasingly referred to as being some of the most precise ever fought. As of July 2015, the campaign against ISIS in Iraq and Syria, 'Combined Joint Task Force Operation Inherent Resolve', had carried out some 3,800 airstrikes, with more than 875 of these carried out by drones.[315] Lt Gen John Hesterman, the coalition's lead commander, described the campaign as 'the most precise and disciplined in the

[309]Globalsecurity.org, 'Appendix F: Risk Estimate Distances', <http://www.globalsecurity.org/military/library/policy/usmc/mcwp/3-23-1/appf.pdf> accessed 11 September 2015.
[310] Sine (n285).
[311] Lieutenant Colonel Timothy R. Reese, U.S. Army, 'Precision Firepower: Smart bombs, dumb strategy', (2003) Military Review (July-August) 47.
[312] Spencer Ackerman, '41 men targeted but 1,147 people killed: US drones strikes the facts on the ground' (*The Guardian,* 24 November 2014) <http://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147> accessed 09 July 2015.
[313] Harry Van der Linden, 'Drone Warfare and Just War Theory' in Marjorie Cohn (ed.), *Drones and Targeted Killing: Legal, Moral and Geopolitical Issues* (Olive Branch Press 2015)
[314] Ibid.
[315] David Axe, 'Drones take over America's war on ISIS' (*The Daily Beast,* 17 June 2015) <http://www.thedailybeast.com/articles/2015/06/17/the-war-on-isis-is-a-drone-war.html> accessed 12 September 2015.

history of aerial warfare.'[316] At of the beginning of August 2015, approximately 452 civilians, including 100 children, had been killed in only 52 strikes.[317] In Afghanistan, a study by U.S. military advisor Larry Lewis found that between mid-2010 and mid-2011, drone strikes caused ten times more civilian casualties than strikes by manned aircraft.[318]

As Zehfuss notes, 'smart' bombs and PGMs are seen to enable Western militaries to reliably hit ever smaller targets.[319] This has led to a widespread expectation that fighting with such weapons both reduces the extent of destruction and increases the possibility of protecting non-combatants during war.[320] Zehfuss notes that such claims of precision serve to produce Western warfare as ethical, and that claims of precision do not say anything about the ability to identify a target and determine its location.[321] Precise weapons have led Western populations to perceive modern warfare as being akin to 'laser surgery'.[322] With the expectation that war will be precise comes the expectation that there will be fewer civilian casualties. In this way, 'high-technology weapons seem to offer a technical fix for an ethico-political predicament', allowing states to go to war and protect non-combatants at the same time.[323] Zehfuss observes that a reduction in non-combatant deaths through the use of precision weapons is therefore crucial to Western claims about increasingly humane and ethical high-tech warfare.[324] Precision is produced as central to the alleged ethicality of precision bombing, but as Zehfuss points out, non-combatant protection is not the central, or indeed the only, ethical standard in play. If non-combatant immunity was indeed the central concern in modern conflict, we would likely see an increased use of Special Forces. [325] However, force protection tends to take precedence over non-combatant protection, to the extent that most commanders in the theatre of conflict are now 'reluctant to send a convoy down a road without an armed drone watching over it.'[326]

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[316] Alice Ross, 'Civilian deaths claimed in 71 US-led airstrikes on Isis' (*The Guardian*, 3 September 2015) http://www.theguardian.com/world/2015/sep/03/isis-us-led-airstrikes-civilian-deaths-claimed, accessed 04 September 2015.
[317] Alice Ross, 'Hundreds of civilians killed in US-led air strikes on ISIS targets - report' *The Guardian* (London, 03 August 2015) http://www.theguardian.com/world/2015/aug/03/us-led-air-strikes-on-isis-targets-killed-more-than-450-civilians-report, accessed 12 September 2015.
[318] Spencer Ackerman, 'US drone strikes more deadly to Afghan civilians than manned aircraft' *The Guardian* (New York, 02 July 2013) <http://www.theguardian.com/world/2013/jul/02/us-drone-strikes-afghan-civilians> accessed 12 September 2015.
[319] Zehfuss (n276) 543.
[320] Ibid.
[321] Ibid 544.
[322] Ibid 545.
[323] Ibid 547.
[324] Ibid 559.
[325] Ibid 556.
[326] Drew (n250).

Lee observes that 'precision' is also a political choice. In as much as armed drones and other platforms carrying air-to-surface missiles are capable of being very 'precise' at a technical level, when it comes to targeting decisions it is politicians who set the rules of engagement.[327] A devastating example of this can be seen in the procedures surrounding the use of the AC-130 gunship. An AC-130 gunship was responsible for striking, over the course of an hour, a Médicins Sans Frontières (MSF) hospital in the besieged city of Kunduz in Afghanistan on October 3, 2015, the only working trauma hospital in the city.[328] The air strikes killed at least 22 people, including 10 patients (3 of whom were children) and twelve members of staff.[329] Carrying a wide-range of weaponry, including 25-millimetre and 40-millimetre canons, and a 105-millimetre howitzer, the AC-130 is 'supposed to be more accurate than other warplanes'.[330] The risk of physical incapacitation from a 105-mm howitzer stands at 10% if one is within 90 metres of the targeted site.[331] This is almost double the risk estimate distance of a Hellfire missile, and yet the howitzer is still classed as 'precise'. The AC-130 is described by the U.S. Air Force as having 'sophisticated sensor, navigation and fire control systems to provide surgical firepower or area saturation during extended loiter periods, at night and in adverse weather.'[332] Its precision guided lethal weapons are said to 'moderate destructiveness by highly accurate delivery means'.[333] However, the rules of engagement relating to AC-130s are not quite as 'precise'. The crew of an AC-130 do not have to complete a CDE (collateral damage estimation) prior to engaging their weapons. A CDE is 'essentially a flowchart that requires an air controller to figure out where civilians are in proximity to enemy targets, and to ask whether an attack on the enemy using a particular weapon might also harm civilians'.[334] Weapons less than 105 millimetres do not require a CDE, due to 'operational practicality' and because 'the risk of collateral damage from these weapon systems is presented by the distribution of munitions in the target area and not from the explosive effects of the warhead'.[335]

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[327] Peter Lee, Keynote speech at the University of Birmingham workshop on researching drones, 15 September 2015.
[328] David Axe, 'The U.S. gunship that slaughtered doctors and patients in Kunduz' (*The Daily Beast*, 05 October 2015) <http://www.thedailybeast.com/articles/2015/10/05/how-a-u-s-gunship-slaughtered-doctors.html> accessed 06 October 2015.
[329] Médicins San Frontières, 'Kunduz Hospital Airstrike' (*MSF*, 05 October 2015) <http://www.msf.org/topics/kunduz-hospital-airstrike>, accessed 06 October 2015.
[330] Axe (n315).
[331] Department of Defense (n295).
[332] U.S .Air Force, 'AC-130H/U' (30 July 2010) http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104486/ac-130hu.aspx accessed 06 October 2015.
[333] Major Justin L. Bobb, 'Non-lethal weaponry: Applications to AC-130 gunships' (Research Report, Air Command and Staff College, Air University 2002) <http://www.au.af.mil/au/awc/awcgate/acsc/02-018.pdf>, accessed 06 October 2015.
[334] Axe (n315).
[335] Department of Defense, 'Chairman of the Joint Chiefs of Staff Instruction 3160.01' (*Department of Defense*, 13 February 2009) <https://www.aclu.org/files/dronefoia/dod/drone_dod_3160_01.pdf>, accessed 06 October 2015.

Aside from highlighting the political choices informing precision, this incident also demonstrates one of the dangers inherent in 'precision weapons': whilst precision weapons may be more accurate at striking the *correct* target, they will also be more accurate in striking the *wrong* target. Forge discusses this briefly, noting that:

> '…while it is true that if the mission is to strike at a safe house of an enemy insurgent commander that is near a school, a guided munition weapon will be more likely to hit the house than a 'dumb' iron bomb and so collateral damage will be minimised, it is *also* true that if the aim is to hit the school and maximise civilian deaths, a precision weapon will be more likely to succeed.'[336]

When strikes are given the go-ahead, both armed forces and politicians are aware that civilian deaths are a distinct possibility. Strikes are 'okayed' anyway. To then frame any ensuing non-combatant deaths as accidental rather than incidental absolves those in political power of having to take any political responsibility for the action in question. As Zehfuss has highlighted:

> 'if you choose to bomb, even with precision weapons, you always already choose to kill "innocents". Indeterminacy is…built into the system because the "precision" as expressed in CEP… is only expected to be reached every other time. The killing of innocents is a structural possibility; it is not an aberration….'[337]

This is not to dismiss the Kunduz attack and the ensuing civilian deaths as 'incidental', particularly as it is possible that the attack may have constituted a war crime. Rather, the attack on the MSF hospital in Kunduz by a gunship equipped with extremely 'precise' weaponry perfectly exposes both the limits of technological and normative precision, the danger in conflating the two, and the trend toward avoiding responsibility for military actions which kill and/or injure civilians by deeming them 'tragic incidents' or 'accidents', as is discussed in the next section.

The lax attitude towards civilian deaths and the lack of interest in knowing who exactly is targeted or killed in a strike - and particularly in a drone strike - is a symptom of the belief that 'precision' means that every strike hits the correct target, and *only* the correct target, every time. For example, it is notoriously difficult to ascertain the number of civilian non-Western

[336] Forge (n269) 172.
[337] Zehfuss (n276) 557.

deaths arising from drone strikes. The reason that the deaths of the Italian and U.S. hostages, and the killings of militants who were also U.K. and U.S. citizens, have received much more attention politically and from the media is due to the fact that all were Western. If drone strikes were to take place in the West, it is nigh on inconceivable that we would not have a precise count of the civilian dead. Zehfuss draws attention to Butler's work on the difference between the deaths of Westerners and non-Westerners, which appears to be particularly significant in cases such as this.[338] Butler writes 'it is not just that a death is poorly marked, but that it is unmarkable'.[339] Indeed, it has also been mooted that one of the reasons the media continued to pay attention to the Kunduz strike, days after the fact, is because MSF is 'run by western-based physicians and other medical care professionals' who are 'not so easily ignored', particularly because MSF staff can give 'compelling, articulate interviews in English to U.S. media outlets'.[340] Despite the rhetoric of humane drones and other weapons platforms 'saving lives' and non-combatants being increasingly protected due to precision, those that are killed are often disregarded, their lives and deaths being considered as unremarkable and unworthy of grief.

Accidents and responsibility

The diffusion of responsibility, resulting simultaneously from the 'unmanned' capability of drones and the 'hyper manned' aspect of the 186-strong team involved in their operation makes it extremely difficult to pinpoint who, if anyone, could or should be responsible for a wrongful or unlawful act. As noted earlier, U.S. drones are flown in teams of four, with each team known as a 'combat air patrol' (CAP), with each CAP requiring approximately 186 people. This includes the drone pilot and the sensor (camera) operator, both of whom are seated together in an air force base like Creech in Nevada, or Cannon in New Mexico. This is the central 'mission-control element'. The 'launch and recovery' element work from bases in countries such as Saudi Arabia and Afghanistan. This team physically deploys the drones and brings them back to base (much of this work is also outsourced to companies such as Raytheon).[341] There are

[338] Zehfuss (n276) 558.

[339] Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004) 35.

[340] Glenn Greenwald, 'The radically changing story of the U.S. airstrike on Afghan hospital: from mistake to justification' (*The Intercept*, 05 October 2015) https://theintercept.com/2015/10/05/the-radically-changing-story-of-the-u-s-airstrike-on-afghan-hospital-from-mistake-to-justification/, accessed 06 October 2015.

[341] As of September 2018, General Atomics has reported the first automated landing and auto-takeoff of an MQ-9 Reaper drone, increasing the Reaper's autonomy and reducing the number of personnel needed in its operation. See: General

then a substantial number of imagery and intelligence analysts (also known as 'screeners') who watch and analyse the footage coming in from drones on patrol. These analysts are located at a number of different bases around the U.S. Furthermore, there is the flight operations supervisor and the mission intelligence coordinator who are in charge of the pilot and the sensor. They report to a joint air force and space component commander. There are also 'safety' observers and judge advocate generals (JAGs) who are supposed to ensure that any decision to strike or launch a missile, whether it be from an armed drone or another armed platform, complies with the ROE. They are usually situated in a base in Qatar.[342] A fully staffed CAP should include 59 people in the field working on launch and recovery, 45 working on mission control, and 82 analysing the gathered data.[343]

Each individual drone's live feed is watched by three image analysts. One watches the screen consistently, alerting her two partners to possible threats. These two 'screeners' pass alerts to the drone pilot controlling the drone's missiles, or to a team in the field if the drone is unarmed (a helicopter or AC-130 gunship crew, for example) via a computer chat room channel known as mIRC, and take screenshots of the most important images.[344] The screeners observations are seen by both the drone pilot and the sensor operator, and by the mission intelligence coordinator, who ensures that the pilot and sensor operator don't miss any important information in the mIRC.[345] Because there is a slight delay between the pilot and sensor operator receiving the drone's live feed and the analysis crew getting it, according to one screener, 'in a situation where it gets high-paced they'll [the military operators] cut the screener out entirely'.[346] According to this screener, once an observation has been typed into mIRC, it is hard to revise, as it has already influenced the mindset of the drone pilot. Everything the screeners say is 'interpreted in the most hostile way', and according to this image analyst, 'it could be argued that I was responsible, but I'm not the one shooting'.[347] This convoluted decision-making chain highlights how easy it is for the United States to evade responsibility

Atomics (2018), 'USAF Completes First Auto-Land Using MQ-9 BLOCK 5' http://www.ga-asi.com/usaf-completes-first-auto-land-using-mq-9-block-5, accessed 15 December 2018.

[342] Pratap Chatterjee, 'America's drone program is a travesty – and a mystery even to its executors' (*Salon.com*, 14 July 2015) <http://www.salon.com/2015/07/14/americas_drone_program_is_a_travesty_and_a_mystery_even_to_its_executors_partner/> accessed 13 October 2015.

[343] Ibid.

[344] Christopher Drew, 'Military is awash in data from drones' (*The New York Time*, 10 January 2010) http://www.nytimes.com/2010/01/11/business/11drone.html?_r=0, accessed 13 October 2015.

[345] Fielding-Smith and Black (n244).

[346] Ibid.

[347] Ibid.

for strikes in which the wrong people are targeted, or in which there are substantial civilian casualties.

Such a diffusion of responsibility, aside from having repercussions at the political level, also has repercussions for responsibility at the legal level. As Heller notes in his examination of whether unlawful signature strikes could be considered war crimes, 'the real issue in a prosecution of either crime' [a drone strike based on a legally inadequate signature or a legally adequate signature supported by insufficient evidence] 'would be proof of *mens rea*'. Heller then describes how a 'drone operator' could be proven guilty of such a war crime:

> 'For murder, the prosecution would have to prove that the *drone operator* intended to engage in the conduct that caused the victim's death; either intended to cause the victim's death or was at least aware that the victim would die 'in the ordinary course of events'; and was aware that the victim qualified as a civilian. For an intentional attack, the prosecution would have to prove only that the *drone operator* intended to engage in an attack on a population or individual and was aware that the population or individual qualified as civilian.'[348]

As has been shown, the chain of decision-making at the immediate tactical level is quite convoluted (not to mention the chain of decision-making at the political level). Is the 'drone operator' discussed by Heller the drone pilot? Should the mission intelligence coordinator or 'screener' be held to account if the information passed to the drone pilot is inaccurate? The secrecy surrounding how exactly targeting decisions are made make questions such as these difficult to answer.

'Accidental' civilian deaths

Another trend which has arisen from the phenomenon of 'humanitarian' and 'humane' warfare is that those civilian deaths which are acknowledged by the U.S. are regularly referred to as 'accidents'.[349] Owens, writing in 2003, states:

> 'Political and military leaders have sought to ensure that all non-combatants who die in the course of these so-called 'humanitarian wars' are portrayed as doing so 'accidentally'. Because specific non-combatant deaths were not wilfully intended as

[348] Heller (n214) 107.
[349] Owens (n256) 596.

> unique events, they should be classed as 'accidents'; the United States and its allies cannot be held responsible (or even criticised). Alongside the basic laws of war which allow for 'collateral' or unintended damage, and the over-selling of precision technology, such claims are supported by widespread assumptions that the conduct of war for the West is becoming more 'humane'.'[350]

Following the deaths in early 2015 of the American and Italian aid workers who had been held hostage in Pakistan, President Obama called their deaths a 'mistake' and a 'tragic incident',[351] whilst the Italian Prime Minister Matteo Renzi referred to the U.S. strike as a 'tragic and fatal error'.[352] Similarly, media reports in the U.S. and elsewhere widely deemed the incident an 'accident'.[353] For example, CNN's headline on the story stated that 'U.S. drone strike accidentally killed two hostages',[354] the Wall Street Journal wrote that the deaths of Weinstein and Lo Porto were 'inadvertent',[355] and the website of Pakistani newspaper Dawn ran an editorial entitled 'America's drone accident'.[356] This incident received widespread attention due to the fact that the dead civilians were hostages from Western nations. Owens suggests that 'civilian deaths are made permissible, not impermissible, when constructed as "accidents"', and this certainly fits well with the 'war on terror'.[357] Owens observes that:

> 'While the number of "accidents" involving civilian death may increasingly be known and the potential of high-tech warfare to produce disaster may also be recognised, 'accidental' small massacres of civilian populations are…becoming normalised as part of the post-9/11 order of the pre-emptive war.'[358]

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[350] Ibid.

[351] Paul Lewis, Spencer Ackerman and Jon Boone, 'Obama regrets drone strike that killed hostages but hails US transparency' (*The Guardian*, 23 April 2015) http://www.theguardian.com/world/2015/apr/23/us-drone-strike-killed-american-italian-al-qaida, accessed 07 July 2015.

[352] Megan Murphy, Geoff Dyer and James Politi, 'US drone strike on al-Qaeda killed western hostages, says White House' (*The Financial Times*, 23 April 2015) http://www.ft.com/intl/cms/s/0/5b6a1bc8-e9c2-11e4-b863-00144feab7de.html#axzz3mgD3kYyo, accessed 03 August 2015.

[353] See, for example: USA Today, 'Obama: Two hostages accidentally killed in drone strike' (23 April 2015) <http://www.usatoday.com/story/news/politics/2015/04/23/obama-us-hostages-killed-al-qaeda/26232205/>; Politico 'GOP strongly backs drone strikes, despite accident' (23 April 2015) <http://www.politico.com/story/2015/04/drone-strike-hostages-killed-gop-response-117284>, accessed 03 August 2015.

[354] CNN Politics, 'U.S. drone strike accidentally killed 2 hostages' (*CNN.com*, 24 April 2015) http://edition.cnn.com/2015/04/23/politics/white-house-hostages-killed/, accessed 03 August 2015.

[355] The Wall Street Journal, 'Death by drone' (*The Wall Street Journal*, 23 April 2015) <http://www.wsj.com/articles/death-by-drone-1429831349> accessed 03 August 2015

[356] Dawn, 'America's Drone Accident' (26 April 2015) http://www.dawn.com/news/1178209, accessed 03 August 2015.

[357] Owens (n256) 597.

[358] Ibid 606-607.

Portraying civilian deaths as 'accidents' is an integral part of 'humane' warfare:

> The 'humanitarian' rationale for force makes it more difficult to defend violence both logically and politically if great harm is caused to civilians. Bearing this calculation in mind, describing civilian casualties as 'accidents' forms an integral part of justifying war.[359]

In this way, whilst drone strikes have caused a high number of civilian casualties, the description of drones as 'humane' weapons and of civilian deaths as 'accidents' collude to make drone strikes not just more acceptable, but more palatable.

The effect of the consistent treatment of all civilian deaths as 'accidents' is also symptomatic of the 'dehumanisation' of 'humane' warfare which contributes to an evasion of responsibility on the part of a State involved in a wrongful act. Owens writes:

> …in a world of seemingly autonomous machines fighting 'digital-age' war, blaming humans, holding anyone responsible, seems even less plausible…the notion that the machine itself might ultimately be behind any given accident or wrongdoing substantially diminishes the legitimacy of attributing responsibility to anyone. Civilian death and the evasion of responsibility seem further to collide with near autonomous machines.[360]

The importance of intelligence

A strike will not be precise if the intelligence guiding it is not precise. In his 2010 report, special rapporteur Philip Alston wrote that 'the precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based'. Byman has also acknowledged this, writing that:

> 'To reduce casualties, superb intelligence is necessary. Operators must know not only where the terrorists are, but also who is with them and who might be within the blast

[359] Ibid 616.
[360] Owens (n256) 608.

> radius. This level of surveillance may often be lacking, and terrorists' deliberate use of children and other civilians as shields make civilian deaths even more likely.'[361]

Quite often, intelligence fails, leading to less than precise strikes. An analysis of available data by the charity Reprieve, published in 2014, found that even when the U.S is engaging in a personality strike rather than a signature strike, in which they know exactly who they are targeting, they often 'kill vastly more people than their targets.'[362] Reprieve found that attempts to kill 41 specific individuals resulted in the deaths of some 1,147 people as of November 2014, with drone operators often needing to strike multiple times before hitting their target.[363] According to confidential slides obtained by The Intercept, in one five-month period of the targeted killing programme, 90% of those killed in strikes were not the intended targets.[364] Whilst this doesn't mean that all those 'accidentally' killed were civilians, it certainly belies claims of precision.

'Precision' is only as good as the quality of the available intelligence allows it to be. Drones have been heralded as the ideal surveillance and intelligence tool. Their ability to follow targets or hover over an area for prolonged periods of time means hours of video footage and thousands of images can be captured and analysed. Margolis describes drones as 'the ultimate intelligence platform', noting that they have replaced satellites and manned aircraft as the favoured platform for intelligence collection.[365] Drones can collect a number of different kinds of intelligence. Among these are Signals Intelligence (SIGINT), which is the interception and decoding of foreign electronic communications; Measurement and Signature intelligence (MASINT), which is described as a "compendium of techniques rather than an identifiable collection method", including 'the advanced processing and use of data gathered from overhead and airborne IMINT and SIGINT collection systems'; and geospatial intelligence (GEOINT), which is 'information about any object - natural or man-made - that can be observed or referenced to the Earth, and has national security implications', and which is produced with radar imagery or by electro-optical systems.[366] These capabilities, combined with the number of drone patrols now being flown, results in the production of a staggering volume of video

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[361] Daniel Byman, 'Do targeted killings work?', (*Brookings* 14 July 2009) http://www.brookings.edu/research/opinions/2009/07/14-targeted-killings-byman, accessed 04 July 2015.
[362] Ackerman (n299).
[363] Ibid.
[364] Jeremy Scahill, 'The assassination complex' (*The Intercept*, 15 October 2015) < https://theintercept.com/drone-papers/the-assassination-complex/>, accessed 15 October 2015.
[365] Gabriel Margolis, 'The lack of HUMINT: a recurring intelligence problem' (2013) 4 (2) Global Security Studies, 54.
[366] Ibid 55.

footage and images, which must be analysed in extremely short amounts of time. As David Deptula, a retired three-star general who oversaw the air force's ISR expansion in 2006, has said 'we're drowning in data.'[367] For example, Predator and Reaper drones flew 10,499 missions between 2007 and 2008 in Afghanistan and Iraq. They were also conducting 34 surveillance missions a day. These missions amassed about 16,000 hours of video footage each month. Footage of this kind has increased in the past number of years due to the addition of the Increment 2 'wide-area airborne surveillance pods', also known as the 'Gorgon stare', to drones such as the Reaper, which has expanded the quantity of surveillance feeds military commanders can use tenfold, and because the number of drone patrols have nearly doubled.[368] An overreliance on SIGINT and MASINT has led to a number of 'mistakes' and 'tragic incidents' of the kind discussed above. A startling account of one 2011 strike in Afghanistan details how poor-quality visual intelligence and no HUMINT led to the deaths of between 16 and 23 individuals.[369] The Afghan civilians – men, women, and children - were travelling in two vehicles early in the morning, and were mistakenly identified as a threat, after the drone crew decided that the convoy probably carried a high-level Taliban commander.[370] Uncertainty regarding such video footage and other intelligence is not unusual. Personality strikes are carried out using all available forms of intelligence, including HUMINT. The HUMINT is necessary for personality strikes in order to identify the targets, usually a specific person at the top tier leadership of the terrorist organization.[371] However, signature strikes are conducted on the basis of MASINT alone.[372] MASINT is used to determine 'signatures' that suggest involvement in terror plots or militant activity. There is no corroborating HUMINT to confirm identifies or to confirm that targeted individuals are terrorists. A number of classified slides on the targeted killing programme, obtained by The Intercept, show that even in personality strikes:

> '…the US military has become over-reliant on…SIGINT, to identify and ultimately hunt down and kill people. The documents acknowledge that using metadata from phones and computers, as well as communications intercepts, is an inferior method of

[367] Fielding-Smith and Black (n244).
[368] Gordon Lubold, 'Pentagon to sharply expand U.S. drone flights over next four years,' (*The Wall Street Journal*, 16 August 2015) http://www.wsj.com/articles/pentagon-to-add-drone-flights-1439768451, accessed 13 October 2015.
[369] David Cloud (2011), 'Anatomy of an Afghan war tragedy' (*Los Angeles Times*, 10 April 2011), < https://www.latimes.com/world/la-fg-afghanistan-drone-20110410-story.html>, accessed 09 December 2018.
[370] Ibid.
[371] Margolis (n352) 50.
[372] Ibid 55.

> finding and finishing targeted people. They described SIGINT capabilities in these unconventional battlefields as "poor" and "limited." Yet such collection, much of it provided by foreign partners, accounted for more than half the intelligence used to track potential kills in Yemen and Somalia. The ISR study characterized these failings as a technical hindrance to efficient operations, omitting the fact that faulty intelligence has led to the killing of innocent people, including U.S. citizens, in drone strikes.'[373]

The quality of available intelligence also aids in the evasion of responsibility. Lee-Morrison notes that, in the case of the 2011 Afghanistan strike, the footage and the distance 'which made it possible to comprehend an anticipated threat also became the position from which the screeners and drone personnel could be held unaccountable.'[374] The lack of reliable intelligence is extremely worrying and makes claims of 'precision' and 'accuracy' almost laughable. Increased precision and accuracy aren't undesirable per se. However, unqualified claims of precision and accuracy work directly with notions of weapons and weapons platforms as 'humane' to make uses of force more legitimate and justifiable, and to make resort to war both more politically acceptable and politically viable. For targeted killing, the concepts of precision, humanity, and cost-effectiveness work in concert to reify the idea of the armed drone as an 'exceptional' weapon. This is despite serious doubt as to the actual effectiveness of signature strikes and the wider targeted killing programme in combatting the terrorist threat, as discussed at the beginning of this chapter.

Conclusion

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';[375] 'exceptional accuracy';[376] 'exceptional ability to accurately identify and attack targets';[377] 'exceptionally

[373] Scahill (n351).
[374] Lila Lee-Morrison, 'Drone warfare: Visual primacy as a weapon' in Anders Michelsen, Frauke Wiegand and Tore Kristensen (eds.), *Transvisuality: The cultural dimension of visuality. Volume 2: Visual organisations* (Liverpool University Press 2015) 209.
[375] Shane (n271).
[376] Alice Ross, 'Documenting civilian casualties' in Marjorie Cohn (ed.), *Drones and Targeted Killing: Legal, Moral and Geopolitical Issues* (Olive Branch Press 2015).
[377] 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).

precise, exceptionally surgical and exceptionally targeted'.[378] 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 uncomfortable marriage of drones with the region of FATA'.[379] 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. The 'exceptional' practice of targeted killing is now routine, and firmly embedded in U.S. military practice. This chapter demonstrates that the principle justifications presented in favour of the targeted killing programme by the U.S. government and numerous commentators are often misleading, and quite frequently false.

Such widespread use of targeted killing by the U.S., in numerous countries and conflict situations, demands legal analysis. The following chapter therefore presents an examination of the United States' proffered legal justifications for the targeted killing programme and assesses the targeted killing programme under the body of law applicable to armed conflict, namely, the rules of international humanitarian law.

[378] 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 17 September 2015.

[379] Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan: The Legal and Socio-political Aspects* (Routledge 2014) 127.

Chapter Three: Situating the Targeted Killing Programme in International Law, and Targeted Killing Under the Rules of International Humanitarian Law

Targeted killing operates in a fraught, and at times fluid, legal context. Situating targeted killing within a specific body of law presents myriad problems. The United States has issued contradictory statements on what it believes to be the applicable legal regime on numerous occasions. Academic debate on the issue tends to agree that targeted killing is covered either by international humanitarian law in all situations, or by international humanitarian law in some contexts, and by international human rights law in others.

The U.S. itself argues that it is engaged in a non-international armed conflict with al-Qaeda and affiliated forces, thus giving it the right to target individuals, and it further argues that the targeting of individuals is acceptable under its inherent right of self-defence.[380] 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-defence is not required to provide targets with legal process before the state may use armed force'.[381] As Alston noted at the time, the law of armed conflict and the rules governing the right to self-defence of a state are two sets of rules that are 'radically different'.[382] 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.[383]

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:

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[380] Department of Justice (n2).
[381] U.S. Department of State, 'The Obama Administration and International Law' (Harold Koh, 25 March 2010) <http://www.state.gov/s/l/releases/remarks/139119.htm>, accessed 08 February 2016.
[382] 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 08 February 2016.
[383] UNHCR (n148).

> …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.[384]

The most detailed document on the legal position taken by the U.S. available thus far is the Department of Justice's White Paper, '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', leaked by NBC News in 2013. The paper states that the United States is in an armed conflict with al-Qaeda and its associated forces, and that aside from the authority arising from the 2001 AUMF (which is examined in a later chapter discussing the U.S. domestic context for the targeted killing programme), the targeted killing programme is lawful under 'the inherent right to national self-defence recognized in international law'. It further states that the use of force 'against a senior operational leader of al'Qa'ida or its associated forces…' would be justified as an act of national self-defence, and that additionally, the U.S. is engaged in a non-international armed conflict with al-Qaeda and its associated forces. The paper also maintains that 'any such lethal operation by the United States would comply with the four fundamental law-of-war principles governing the use of force…'[385]

Sixteen years after the U.S. first employed targeted killing, the status of the tactic under international humanitarian law (IHL) and international human rights law (IHRL) remains controversial and complex. Given the complicated environments in which targeted killings are performed, and the varying types of situation in which they are allegedly carried out (e.g. international armed conflict, non-international armed conflict), targeted killings often appear to defy categorisation. As discussed, targeted killings have largely been justified in terms of military necessity and self-defence. Yet the fact remains that however justified an act in self-defence or otherwise might be, and however exceptional the threat faced, all targeted killings must comply with the rules of either international humanitarian law (IHL) or international human rights law (IHRL). In ascertaining whether targeted killings are governed by IHL or by IHRL, the legal context in which such operations occur must be discussed.

[384] The White House (n226).
[385] Department of Justice (n2).

While the U.S. maintains that targeted killings in Pakistan, Somalia, Libya, Niger and Yemen take place within the same legal context – that of a non-international armed conflict (NIAC) - this is a dubious claim. This chapter analyses which rules of IHL govern targeted killings, and whether this is the case in the varying jurisdictions in which they take place.

As Solis points out, in order for a targeted killing to be classified as such – and not as a homicide, assassination, or domestic crime – an international or non-international armed conflict must be in progress. Contesting the view that an armed conflict is ongoing means that 'the lawfulness of any targeted killing is necessarily contested as well. It is the predicate armed conflict that raises the right to kill an enemy'.[386] If we are to accept the United States' contention that it is involved in a non-international armed conflict with al-Qaeda and associated forces, then those targeted killings carried out in Yemen, Pakistan, Somalia, and other States are, like targeted killings in Afghanistan, governed by the relevant international humanitarian law rules applicable to a non-international armed conflict. However, if the United States is held not to be involved in a non-international armed conflict (aside from in Afghanistan), and is similarly held not to be in an international armed conflict, then those targeted killings carried out outside the immediate zone of hostilities in Afghanistan are subject to international human rights law.

The United States has consistently argued that those targeted killings which take place outside an armed conflict situation 'do not need to be justified under HRL as long as they represent legitimate acts of self-defense under Article 51 of the UN Charter'.[387] Both Harold Koh, in his position as Legal Adviser at the U.S. Department of State, and John O. Brennan, in his capacity as Assistant to the President for Homeland Security and Counterterrorism, illustrated this position. The former remarked that lethal drone strikes did not qualify as extrajudicial killing as 'a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force', while the latter claimed that 'as a matter of international law, the United States is in an armed conflict with al-Qaeda, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense'.[388]

[386] Gary Solis, 'Targeted killing and the Law of Armed Conflict', *Naval War College Review* Spring 2007 60 (2) 134-135.
[387] Heller (n214) 91.
[388] Ibid.

Yet, if an act is performed in self-defence, this does not preclude that act from having to be justified under either IHL (if the targeted killing is performed within an armed conflict) or IHRL (if the targeted killing is performed outside of an armed conflict situation).[389] While Article 21 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts states that 'the wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations', the commentary to Article 21 maintains that:

> '…this is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations… As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct'.[390]

The consistent invocation of the right of self-defence by the United States represents a deliberate attempt to confuse the applicable legal regime – whether IHL or IHRL – with the *jus ad bellum*. The following section discusses the categorisation of armed conflict and why such categorisation remains important, particularly for the situation in question.

Why is the categorisation of conflict important for targeted killing?

Categorising conflict is often a difficult task. Despite the shrinking gap in the rules applying to international armed conflict and non-international armed conflict, categorisation remains necessary, particularly for cases pertaining to targeted killing. Depending on whether a conflict is of an international or non-international nature, different rules apply to the targeting of individuals. How are we to determine whether international humanitarian law or human rights law applies to U.S. targeted killings? To begin with, we must determine whether an armed conflict exists, and if so, what category of armed conflict we are dealing with. While it is now nearly two decades since the U.S. first employed targeted killing, the status of the tactic under international humanitarian law (IHL) and international human rights law (IHRL) remains controversial and complex. Given the complicated environments in which targeted killings are performed, targeted killing often seems to defy categorisation. As previously discussed,

[389] Heller (n214) 92.

[390] International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, accessed 05 March 2016.

targeted killings have largely been justified in terms of military necessity and self-defence. Yet the fact remains that however justified an act in self-defence or otherwise might be, and however exceptional the threat faced, all targeted killings must comply with the rules of either IHL or IHRL. In order to ascertain whether targeted killings are governed by IHL or by IHRL, the legal context in which they take place must be discussed. While the U.S. maintains that targeted killings in Afghanistan, Pakistan, Somalia and Yemen take place within the same legal context, this is a dubious claim. Similarly, targeted killings performed in Iraq and Syria take place within a different legal setting. This section thus analyses whether it is IHL or IHRL that governs targeted killings in the different jurisdictions in which they are carried out.

The next section addresses the question as to whether the U.S. targeted killing programme takes place within an armed conflict situation. In doing so, it first examines the categories of armed conflict under international humanitarian law, before addressing the U.S. conflict with al-Qaeda and affiliated forces specifically.

International armed conflict and non-international armed conflict

How do we know when international humanitarian law applies? It is not, as might be expected, quite so simple as merely stating 'an armed conflict exists, and therefore international humanitarian law applies.' Solis summarises some of the complexities involved in the classification of armed conflicts:

> 'If two or more Geneva Convention High Contracting Parties are fighting, it may be a common Article 2 interstate conflict, in which all of the 1949 Geneva Conventions and Additional Protocol I apply. Depending on whether they are fighting each other or both are fighting an armed opposition group, it could be a common Article 3 intrastate conflict – a non-international armed conflict in which common Article 3 and, perhaps, Additional Protocol II apply. It may be a non-international armed conflict in which domestic law applies, and the Geneva Conventions and the Protocols do not figure at all. If a nonstate armed opposition group is fighting a High Contracting Party, the situation may be more difficult to unravel. As Yoram Dinstein says, "drawing the line of demarcation between inter-State and intra-State armed conflicts may be a complicated task…"'[391]

[391] Solis (n32) 150.

First, it is necessary to define the term 'armed conflict' – something for which no clear definition exists in the 1949 Geneva Conventions. The International Committee for the Red Cross (ICRC) notes in its opinion paper of 2008 'How is the term "Armed Conflict" defined in International Humanitarian Law?' that international humanitarian law: 'distinguishes two types of armed conflicts:

- International armed conflicts (IACs), opposing two or more States, and
- Non-international armed conflicts, between governmental forces and non-governmental armed groups, or between such groups only. IHL treaty law also establishes a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II.'[392]

As the ICRC paper states, 'no other type of armed conflict exists', though it is 'nevertheless important to underline that a situation can evolve from one type of armed conflict to another, depending on the facts prevailing at a certain moment.'[393] As Darcy observes, an armed conflict may be a factual determination, but the existence of one carries 'significant legal implications', particularly given that different rules apply to the different categories of armed conflict.[394]

The differences between the treaty law applicable to international armed conflicts and non-international armed conflicts are, as Akande says, vast.[395] The Geneva Conventions of 1949, the Hague Conventions which preceded them and API of 1977 all apply to international armed conflicts. The treaty rules applicable to non-international armed conflicts are, on the other hand, severely limited – only Common Article 3 of the Geneva Conventions, in some cases APII of 1977, and Article 8 (2) (c) and (e) of the Rome Statute apply. Common Article 3 merely describes the basic protections of those who do not, or who no longer, take part in hostilities and has no rules regulating the conduct of hostilities. APII has fewer than twenty provisions,

[392] International Committee of the Red Cross, 'How is the term "Armed Conflict" defined in international humanitarian law?' (17 March 2008) https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm, accessed 02 March 2016.
[393] Ibid.
[394] Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge University Press 2014) 83.
[395] Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2010) 166.

and the Rome Statute provisions dealing with non-international armed conflicts somewhat extend the rules relating to the protection of victims of armed conflict and introduce 'modest' rules relating to the conduct of hostilities, 'but fall far short of establishing a regime of international humanitarian law close to that established for international armed conflicts'.[396] Akande points out, however, that the distinction between international armed conflicts and non-international armed conflicts is being eroded 'such that there is now greater, though by no means complete, unity in the law applicable to those two forms of conflict'.[397] This gap is bridged firstly by a number of treaties which apply to all armed conflicts, primarily those concerning the means and methods of warfare, for example the Biological Weapons Convention 1972, the Convention Prohibiting Anti-Personnel Land Mines 1997, and the 2001 amendment which extends the Convention on Conventional Weapons and its protocols to non-international armed conflicts. More important for non-international armed conflicts is the application of customary international law, which is filling many of the gaps left by treaty law, leading to the filling of the 'dichotomy' between international and non-international armed conflicts.[398] Akande draws attention to the position taken on this distinction by the Appeals Chamber of the ICTY in *Tadic*:

> Notwithstanding…limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules…cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[399]

Furthermore, the ICTY held:

> What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.[400]

[396] Ibid 167.
[397] Akande (n382) 168.
[398] Ibid.
[399] Ibid 169.
[400] Ibid 170.

The ICRC's Study of customary international law supported this approach, and found that 'nearly all' the rules identified in the Study applied to both kinds of conflict.[401] The Study stated:

> This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and show the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. In particular, the gaps in the regulations of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts.[402]

While the ICRC's study remains somewhat contentious, Akande writes that there does seem to be an acknowledgement by States that customary international law now provides more elaborate rules for non-international armed conflicts than the rules found in Common Article 3 and APII.[403] However, Akande also points out that the ICC Statute, adopted after the *Tadic* decision, does not include some of the customary rules (e.g. the prohibition of attacks on civilian objects) identified by the ICTY and the ICRC in the Statute's war crimes provisions. The Statute also includes a substantially longer list of war crimes in international than in non-international armed conflicts. In Akande's opinion, while the distinction between the law applicable in international and non-international armed conflicts is certainly blurring, States have not seized opportunities to abolish the distinction when they have had the opportunity to do.[404] Particularly important for this examination of the context in which targeted killings take place is also the fact that two crucial parts of international humanitarian law – the law relating to the status of fighters and the rules relating to detention of combatants and civilians – differ depending on the status of the armed conflicts. The 2016 Commentary to the Geneva Conventions also holds that the distinction between international armed conflict and non-international armed conflict is of 'continuing relevance', noting that:

> '…there are still important elements of humanitarian law governing international armed conflicts that have no counterpart in the law applicable to non-international

[401] International Committee of the Red Cross, Customary IHL: Rules - Introduction https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in, accessed 05 March 2016.
[402] ICRC (n388).
[403] Akande (n382) 171.
[404] Ibid 172.

> armed conflicts, despite the considerable development of conventional and customary international humanitarian law applicable to non-international armed conflicts since 1949'.[405]

In this regard, the 2016 Commentary specifically mentions the lack of prisoner-of-war status in the humanitarian law governing non-international armed conflicts, and the lack of an occupation law regime.[406] Therefore, the categorisation and classification of armed conflicts for the applicability of international humanitarian law remains important.

The following section will first consider the necessary criteria for an international armed conflict to exist, before examining the relevant criteria for a non-international armed conflict.

International Armed Conflict (IAC)

As noted earlier, the term 'armed conflict' is not defined in the 1949 Geneva Conventions, or its subsequent Protocols. According to common Article 2 of the 1949 Geneva Conventions, international armed conflicts are those which oppose 'high contracting parties', i.e. States. An international armed conflict, then, occurs when one or more states have recourse to armed force against another state, 'regardless of the reasons or the intensity of the confrontation.' The 2016 Commentary to the 1949 Geneva Conventions, meanwhile, quite simply states 'any difference between two States and leading to the intervention of members of the armed forces' is an international armed conflict.[407] A 2008 ICRC opinion paper on the subject observes that the existence of an IAC, and thus the possibility of applying IHL, 'depends on what actually happens on the ground. It is based on factual conditions.'[408] Furthermore, the 2016 Commentary to the 1949 Geneva Conventions confirms that:

> 'any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.'[409]

[405] ICRC, Commentary of 2016 to the 1949 Geneva Conventions, <https://www.icrc.org/ihl/full/GCi-commentary>, accessed 24 March 2016.
[406] Ibid.
[407] ICRC (n392)
[408] ICRC (2008), How is the Term "Armed Conflict" Defined in International Humanitarian Law?, https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf, accessed 24 March 2016.
[409] ICRC (n392).

Additional Protocol 1 extends the definition of international armed conflict to further include 'armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation).'[410] Once an armed conflict of an international character is determined to exist, the 1949 Geneva Conventions apply, except for Common Article 3, which explicitly covers non-international armed conflicts.[411]

Perhaps the most important definition of armed conflict, which also discusses the applicability of international humanitarian law to armed conflicts, is that provided by the ICTY Appeals Chamber in the *Tadic* case, since adopted by other international bodies:[412]

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[413]

The 2016 Commentary to the Geneva Conventions states that the *Tadic* definition of armed conflict 'is generally considered the contemporary reference for any interpretation of the notion of armed conflict under humanitarian law'.

Another important definition of armed conflict, and the applicability of international humanitarian law to armed conflicts, is that provided by the ICTY Appeals Chamber in the *Tadic* case, since adopted by other international bodies:[414]

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies

[410] ICRC (n395).
[411] Ibid.
[412] Jelena Pejic, 'Extraterritorial targeting by means of armed drones: Some legal implications' *International Review of the Red Cross* 2014 96 (893) 10.
[413] Darcy (n381) 87.
[414] Pejic (n399) 10.

> from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[415]

Pejic notes that in the decades since the adoption of the Geneva Conventions, the duration or intensity of hostilities had 'generally not been considered to be constitutive elements for the existence of an IAC', though this approach has recently been called into question:

> 'by suggestions that hostilities must reach a certain level of intensity to qualify as an armed conflict, the implication being that the fulfilment of an intensity criterion is necessary before an inter-State use of force may be classified as an IAC. Pursuant to this view, a number of isolated or sporadic inter-State uses of armed force that may be described as "incidents", "border clashes", and others do not qualify as IACs because of the low intensity of violence involved.'[416]

Such 'incidents' are often described as 'armed conflicts short of war'. Solis writes that a 'key indicia' of whether an incident is actually an armed conflict is whether the incident is protracted, i.e. 'the longer an incident continues, the more difficult it is to describe it as merely an incident'.[417] Therefore, 'generally speaking, an armed *incident*, even when between two states, is not sufficient to constitute an armed conflict in the sense of common Article 2.'[418] Akande takes issue with this reading, and writes:

> 'to import an intensity requirement into the definition of international armed conflicts is effectively to assert that no law governs the conduct of military operations below that level of intensity, including the opening phase of hostilities'.[419]

Such a position also seems to contradict the ICTY's finding in *Tadic* that an armed conflict exists '*whenever*' there is a resort to armed force between States, which suggests that the threshold of an international armed conflict is very low, 'except perhaps in cases where the use

[415] Darcy (n381) 87.
[416] Pejic (n399) 77.
[417] Solis (n32) 152.
[418] Ibid.
[419] Akande (n382) 181.

of force is unintended (for example arising out of error)'. This position is further supported by the 2016 Commentary, and is quite different from the position in non-international armed conflicts, where domestic law and international human rights law governs tensions and internal disturbances that 'fall below the intensity of armed conflict'.

The position generally taken is that international humanitarian law applies to an armed conflict even if neither party recognizes a state of war. Rather, what is important today is 'the fact of an armed conflict, rather than the formal status of war'.[420] There are no modern examples of a formal declaration of war.

Non-International Armed Conflict (NIAC)

The majority of conflicts today are non-international armed conflicts, but this does not make non-international armed conflicts any easier to classify or define. As mentioned earlier, the law applying to non-international armed conflicts is limited to Common Article 3 in all cases, and Additional Protocol II and Rome Statute Article 8 (2) (c) (f) in some cases.

Non-international armed conflicts are classified under Common Article 3 of the Geneva Conventions, and Article 1 of Additional Protocol 2. Common Article 3 applies 'in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties', including armed conflicts in which one or more non-governmental armed groups are involved. The 2008 ICRC Opinion Paper notes that NIACs in the meaning of Common Article 3 are distinguished from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, by a 'certain threshold of confrontation'.[421] The hostilities 'must reach a minimum level of intensity', and 'non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces.'[422] Such organised armed forces must be under a certain command structure, and must have the capacity to sustain military operations.

In the meaning of Article 1 of Additional Protocol 2, the definition of NIAC is more restrictive. Here, NIACs are those:

[420] Akande (n382) 177.
[421] ICRC (n395).
[422] Ibid.

> 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.[423]

This more restrictive definition is 'relevant for the application of Protocol 2 only, but does not extend to the law of NIAC in general'.[424] The ICRC's opinion paper also notes that judgments and decisions of the ICTY also shed light on the definition of NIAC, with the ICTY determining that an NIAC exists 'whenever there is …protracted armed violence between governmental authorities and organised armed groups or between such groups within a State', confirming 'that the definition of NIAC in the sense of common article 3 encompasses situations where "several factions [confront] each other without involvement of the government's armed forces.'[425]

Regarding the judicial consideration of the concept of NIACS, Darcy writes that it 'has included attempts to provide a definition, flesh out indicative criteria, and arguably to circumvent the threshold of Additional Protocol II'.[426] He adds that the ICTY Appeal's Chamber's 1995 definition of armed conflict, which held that an NIAC exists where there is 'protracted armed violence between governmental authorities and organized armed groups within a State', was able to 'cut through the uncertainty and debate concerning the meaning of armed conflict that had persisted since the 1949 Geneva Conventions were being negotiated'. Intensity and organisation have, says Darcy, since 'become accepted in the jurisprudence as the main determinants of the existence of a non-international armed conflict covered by common article 3'.[427] Solis also discusses the *Tadic* judgment, which stated:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal….character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry,

[423] Ibid.
[424] Ibid.
[425] ICRC (n395).
[426] Darcy (n381) 104.
[427] Ibid 105.

unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.'[428]

ICTY jurisprudence has also provided 'detailed and useful' guidance on the meaning of intensity and organisation', with the Trial Chamber in *Limaj* explaining that intensity could be assessed 'by looking at the seriousness and number of attacks, the geographical and temporal spread of clashes, the mobilisation of government forces, the distribution of weapons, and whether the conflict is before the United Nations Security Council'.[429] Solis notes that while the law of armed conflict 'has virtually no application in a common Article 3 conflict', with the Parties to a common Article 3 conflict only bound to observe common Article 3, IHL and other elements of the law of armed conflict are making their way into common Article 3 conflicts 'to an ever greater degree'.[430]

Common Article 3 armed conflicts

Common Article 3 applies 'in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties', including armed conflicts in which one or more non-governmental armed groups are involved. The article does not, however, specify precisely when it applies – as Akande says, whether or not an 'armed conflict not of an international character' is taking place is determined by criteria which have been 'fleshed out' by customary international law.[431] The 2016 Commentary to the Geneva Conventions describes non-international armed conflict as a 'situation in which organized Parties confront one another with violence of a certain degree of intensity, which is determined based on the facts'.[432] In the *Tadic* case, the ICTY Appeals Chamber described non-international armed conflicts as a situation of 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State', with the same test being adopted in article 8 (2) (f) of the Rome Statute.[433]

The 2008 ICRC Opinion Paper notes that non-international armed conflicts in the meaning of Common Article 3 are distinguished from less serious forms of violence, such as internal

[428] Solis (n32) 153.
[429] Darcy (n381) 106.
[430] Solis (n32) 154.
[431] Akande (n382) 200.
[432] ICRC (n392).
[433] *Tadic Case* (Judgment) ICTY-94-1 (26 January 2000).

disturbances and tensions, riots or acts of banditry, by a 'certain threshold of confrontation'.[434] This is also indicated by the Rome Statute, which states that non-international armed conflict excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'. The 2016 Commentary to the Geneva Conventions, meanwhile, notes that the qualifications of occurrences listed as 'not being armed conflicts' in Article 1 of Additional Protocol II should also be considered accurate for Common Article 3.[435]

Common Article 3 non-international armed conflicts may be between a State and a non-state group, or a conflict between non-state groups only. In all non-international armed conflicts, 'at least one side must be considered a non-state group and international humanitarian law provides the rules for determining when such a group may be regarded as a party to an armed conflict'.[436] To be considered a party to an armed conflict, the non-state group must be under a certain command structure and must have the capacity to sustain military operations – in other words, they must have a certain level of organisation, or in the words of the Appeals Chamber in *Tadic*, must be an 'organized armed group'.[437] A number of factors determine whether an armed group is sufficiently organised, but as Akande emphasises, these are not minimum factors that must be present, but are indicators of organisation.[438] Such factors include: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords.[439]

The level of violence between an organised armed group and a State, or between organised armed groups, must also reach a certain degree of intensity before it can be considered a non-international armed conflict. In *Tadic*, the Appeals Chamber said that an NIAC exists whenever there is 'protracted armed violence between governmental authorities and organised armed

[434] ICRC (n395).
[435] ICRC (n391).
[436] Akande (n382) 201.
[437] *Tadic* (n420).
[438] Akande (n382) 202.
[439] *Tadic* (n4320).

groups or between such groups within a State' – while 'protracted' is usually taken to relate to the time over which an armed conflict takes place, Akande explains that here, it has come to be accepted that the key requirement is the intensity of the force.[440] The intensity requirement 'indicates that the threshold of violence that is required for the application of international humanitarian law in non-international armed conflicts is higher than the case of international armed conflicts'. The situation with respect to non-international armed conflict is 'more fluid', because the violence often 'pre-dates the establishment of a non-international armed conflict and the application of international humanitarian law'.[441] The ICTY, in *Prosecutor v Ramush Haradinaj et al* (arising out of the conflict in Kosovo between the authorities of the Federal Republic of Yugoslavia and the Kosovo Liberation Army) relied on a range of factors for assessing the criteria of 'intensity' and the 'organization of armed groups'.[442] Regarding intensity, the relevant factors include: the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. Akande also notes that the involvement of the UN Security Council may also reflect the intensity of a conflict.[443] The ICTY Trial Chamber in *Limaj* has also provided 'detailed and useful' guidance on the meaning of intensity and organisation', explaining that intensity could be assessed 'by looking at the seriousness and number of attacks, the geographical and temporal spread of clashes, the mobilisation of government forces, the distribution of weapons, and whether the conflict is before the United Nations Security Council'.[444] According to Akande, these criteria may 'clearly' point in different directions, so a complete assessment of an overall situation has to be made – there is no particular formula that can be applied determining what weight should be given to each of the different factors.[445]

Additional Protocol II

In the meaning of Article 1 of Additional Protocol 2, the definition of NIAC is more restrictive. Here, NIACs are those conflicts:

[440] Akande (n382) 203.
[441] Ibid.
[442] Ibid 204.
[443] Akande (n382) 205.
[444] Darcy (n381) 106.
[445] Akande (n382) 205.

> 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

This more restrictive definition is 'relevant for the application of Protocol II only, but does not extend to the law of NIAC in general'. Addition Protocol II applies only to those armed conflicts which take place on the territory of a party 'between its armed forces and dissident armed forces or other organised armed groups'. There are a number of ways in which the Protocol is more rigorous in its test for non-international armed conflicts than Common Article 3: conflicts taking place between organised armed groups are not covered by APII, and the organised armed group involved in conflict with the State must exercise control over territory. Further, as APII applies only to armed conflicts taking place in the territory of a party between '*its* armed forces' and organised groups, this means that the Protocol is limited in its application to internationalised non-international armed conflicts.

Regarding the judicial consideration of the concept of non-international armed conflict, Darcy writes that it 'has included attempts to provide a definition, flesh out indicative criteria, and arguably to circumvent the threshold of Additional Protocol II'.[446] He adds that the ICTY Appeal's Chamber's 1995 definition of armed conflict, which held that an NIAC exists where there is 'protracted armed violence between governmental authorities and organized armed groups within a State', was able to 'cut through the uncertainty and debate concerning the meaning of armed conflict that had persisted since the 1949 Geneva Conventions were being negotiated'. Intensity and organisation have, says Darcy, since 'become accepted in the jurisprudence as the main determinants of the existence of a non-international armed conflict covered by common article 3'.[447] Solis also discusses the *Tadic* Judgment, which stated:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal….character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry,

[446] Darcy (n381) 104.
[447] Ibid 105.

> unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.'[448]

Solis also notes that while the law of armed conflict 'has virtually no application in a common Article 3 conflict', with the Parties to a common Article 3 conflict only bound to observe common Article 3, IHL and other elements of the law of armed conflict are 'making their way' into common Article 3 conflicts 'to an ever greater degree'.

Categorising the U.S. conflict with al-Qaeda and affiliated forces

It is almost immediately obvious that the United States' fight against al-Qaeda and affiliated forces does not fit neatly into the aforementioned categories of armed conflict. The U.S. is not involved in a conflict with another state, and therefore it would seem reasonable to assume that the conflict cannot be categorised as an international armed conflict. Yet, there are those who argue that in certain situations, this is not the case. Opinion is also divided as to whether the conflict can be categorised as a non-international armed conflict. In the following sections I briefly examine the arguments made for classifying the United States conflict with al-Qaeda and affiliated forces as a non-international armed conflict, before discussing those arguments made in favour of classifying it as an international armed conflict. I then discuss the laws of armed conflict applicable to the targeting of individuals in each scenario.

A non-international armed conflict?

The United States maintains that it is involved in a non-international armed conflict with al-Qaeda and affiliated forces. As previously mentioned, this position is plainly stated in the DOJ White Paper, on page three:

> 'The United States is currently in a non-international armed conflict with al-Qa'ida and its associated forces… Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities.'[449]

The DOJ supports this position with reference to the Supreme Court's judgment in *Hamdan v. Rumsfeld*, in which the Court, discussing Common Article 3, stated that the term 'conflict not

[448] Solis (n32) 153.
[449] Department of Justice (n2).

of an international character' is used 'in contradistinction to a conflict between nations'.[450] The Court further stated that the commentaries to the Geneva Conventions 'make clear "that the scope of application of the Article must be as wide as possible,"' finding that Common Article 3 was applicable to the case in question, and to the U.S. conflict with al-Qaeda and affiliated forces.[451]

More recently, the former U.S. State Department Legal Adviser Brian Egan, in an address to the American Society of International Law, referred to U.S. hostilities with al-Qaeda as 'our non-international armed conflict against al-Qa'ida and its associated forces.'[452] As to the applicable law in this situation, Egan said:

> '…the applicable international legal regime governing our military operations is the law of armed conflict covering NIACs, most importantly Common Article 3 of the 1949 Geneva Conventions and other treaty and customary international law rules governing the conduct of hostilities in non-international armed conflicts.'[453]

Numerous concerns have, however, been raised regarding the classification of the situation with al-Qaeda and affiliated forces as a non-international armed conflict. Chief amongst these concerns are whether al-Qaeda and affiliated forces are organised enough to be considered an 'organised armed group', and whether the level of violence reaches the necessary threshold of intensity.

Regarding the first issue, Lubell notes that 'there are serious concerns about describing al-Qaeda as a distinct and organized armed group, rather than a network of loosely affiliated groups sometimes reduced to little more than similar ideologies'.[454] This issue, he writes, is linked to the second:

> 'The threshold of violence and the identity of the party to the conflict are linked: if numerous incidents round the world classified as terrorism could be attributed to the same entity then one could argue that the threshold for conflict has been crossed; if however these incidents are perpetrated by separate groups with no unified and

[450] Ibid.
[451] Ibid.
[452] U.S. Department of State, 'Remarks by Brian Egan, Legal Adviser to the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign' (01 April 2016) http://www.state.gov/s/l/releases/remarks/255493.htm, accessed 05 April 2016.
[453] U.S. Department of State (n439)
[454] Noam Lubell, 'The War (?) against Al-Qaeda', in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2010) 943.

> organized command and control structure, it becomes difficult to add them all up together as evidence of an existing conflict… There would need to be a connection between the militant groups that fulfils the organizational requirements, such as a unified command and control structure and hierarchy. Even within Pakistan there appears to be a lack of clarity as to whether the targets of the strike can all be said to belong to one organized group, and based on existing reports it appears that the drone strikes are targeting a number of different militant groups.'[455]

Anderson further examines the concerns regarding requirements around the threshold of intensity, noting that:

> …'any particular instance of targeted killing will most often aim at minimum violence to kill a particular individual. It does so using means, such as drones, that do not satisfy those requirements in any single targeted killing operation. Moreover, each of those operations is planned and executed in ways that, if the operation goes as intended, will never reach the level of any of those criteria.'[456]

He goes on to say:

> 'If you believe that individual instances of targeted killing are not already part of an armed conflict under way, then the failure to engage in enough violence through targeted killing means that this act of violence is not, all things equal, protected under the law of armed conflict and that those engaging in it have no combatant's privilege for their acts of violence under international law. If captured (and even if not), they are liable for crimes under the domestic law of the place where the killing takes place, for example. Importantly, too, the targeted killing itself then turns into an extrajudicial killing under international human rights law, among other adverse legal consequences.'[457]

Others dismiss such arguments regarding the failure of the U.S. conflict with al-Qaeda and affiliated forces to reach the necessary level of violence. Notable amongst these is Ohlin, who virulently argues that those who are critical of drone strikes and supportive of the 'hot

[455] Ibid 945.
[456] Kenneth Anderson, 'Targeted Killing and Drone Warfare: How We Came to Debate Whether There is a "Legal Geography of War"', *American University Washington College of Law Research Paper No. 2011-16,* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783> 6.
[457] Ibid.

battlefield' stance 'make factual assertions that undermine the legal foundations of their arguments'. He writes:

> '…it is sometimes asserted that the United States is operating drones in areas where there is no armed conflict because the scope and intensity of fighting is too low. Then the critics decry the number of civilian casualties caused by the strikes, suggesting that thousands of innocent civilians are being killed on a regular basis by the aerial strikes.'[458]

This 'politically powerful' and factual claim, Ohlin argues, 'undermines the legal argument, because it belies the claim that the scope and intensity of fighting is too low.'[459] He then makes a dubious assertion:

> 'the relevant scope of violence is not the fighting performed by the enemy; it is the total amount of fighting in the area. Consequently, the U.S. deployment of drones in the area and the killings that result from them actually support the legal conclusion that the United States is engaged in an armed conflict in that area.'[460]

This is a worrying contention regarding the existence of an armed conflict, in which Ohlin suggests that simply because drones strikes are deployed in an area in countries such as Niger which are not regarded as 'hot battlefields', and because civilian and other casualties result from these strikes, an armed conflict exists.

Targeting in such areas, which are not located in a 'hot battlefield' or an 'area of active hostilities', such as that in Afghanistan - but which the U.S. contends are included in a non-international armed conflict – are, according to the U.S., subject to the criteria set out in the 2013 Presidential Policy Guidance, entitled 'U.S. Policy Standards and Procedures for the Use of Counterterrorism Operations Outside the United States and Areas of Active Hostilities', known as 'the PPG'.[461] This short document seems to support Ohlin's stance regarding the spread of the non-international armed conflict. The document sets out a number of preconditions which should be met before lethal force is used 'outside areas of active

[458] Jens David Ohlin, *The Assault on International Law* (Oxford University Press 2015) 174.
[459] Ibid.
[460] Ohlin (n445) 74.
[461] The White House, U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (23 May 2013) https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf, accessed 20 March 2016.

hostilities' (the PPG will be discussed in more detail in the next section on the rules related to targeting). As Hernández points out, the geographic scope of the PPG is not at all clear:

> 'The principles are said to apply 'outside the United States and areas of active hostilities', but does that include Pakistan, Yemen and Somalia? If not, is the international law of armed conflict exhaustive? It is true that the US Supreme Court maintained in *Hamdan v Rumsfeld* that the war on terror is a non-international armed conflict; even if that is the case, however the PPG seemingly applies *beyond* areas of active hostilities, in some sort of penumbral wider zone where international humanitarian law may not apply.[462]

Echoing the U.S. position, Ohlin dismisses any claims that there are geographical constraints on non-international armed conflict and argues forcefully that the U.S. is involved in a non-international armed conflict in Yemen and in Afghanistan, in Pakistan and Somalia, and anywhere else where militants of al-Qaeda and affiliated forces are located and found to represent an imminent threat.[463]

Ohlin's reasoning for this is twofold: in the first place, he claims that the ICTY, in the *Tadic* case, 'rejected the hot battlefield argument' because:

> 'In arguing that the law of war applied in a much broader area, the court concluded that the "geographical and temporal frame of reference for international armed conflicts is similarly broad…[because Common Article 3 applies] outside the narrow geographical context of the actual theatre of combat operations"'.[464]

In fact, non-international armed conflicts do not, for Ohlin, hold any geographical limitations. Ohlin agrees with the conclusion of the Court in *Hamden v. Rumsfeld* that non-international armed conflicts 'include all armed conflicts that do not fall into the category international armed conflicts, regardless of whether they are geographically limited to government territory'. Ohlin further contests that those supporting a 'restricted geography of armed conflict' do so under a 'mistaken reading' of Common Article 3 of the Geneva Conventions. This 'mistaken'

[462] Gleider I. Hernández, 'Obama's Counter-Terrorism Speech: A Turning Point or More of the Same?' (*EJILTalk*, 27 May 2013) <http://www.ejiltalk.org/obamas-counter-terrorism-speech-a-turning-point-or-more-of-the-same/> accessed 20 March 2016.
[463] Ohlin (n445) 74.
[464] Ibid.

reading assumes that Common Article 3 was 'trying to define non-international armed conflicts'. [465]

While Ohlin accepts the U.S. contention that it is engaged in a non-international armed conflict with al-Qaeda and affiliated forces, he goes so far as to deny that Common Article 3 applies to this conflict at all. Ohlin contends that Common Article 3 was merely an attempt to regulate certain non-international armed conflicts – i.e. internal conflicts which take place 'solely on the territory of a contracting party and to which the Geneva protections then apply'. He maintains that for other non-international armed conflicts, including the armed conflict against al-Qaeda and affiliated forces, 'the customary norms of the law of war apply' only.[466]

Regarding the 'internationalisation' of a non-international armed conflict, Akande argues that in extraterritorial conflicts with non-state armed groups, in the case where the State on whose territory the non-state armed group is operating (the 'territorial State') has consented to the use of force by the foreign state, a non-international armed conflict takes place, as 'the consent of the territorial state has the effect that there are not two opposing states involved in the conflict'.[467] However, in the event that the territorial state has not consented to the foreign State's use of force on its territory, an international armed conflict occurs. This is so because any use of force by the foreign state on the territory of the territorial state without the latter's consent is:

> 'a use of force *against* the territorial state. This is so even if the use of force is not directed against the governmental structures of the territorial state, or the purpose of the use of force is not to coerce the territorial state in any particular way.'[468]

This position is, according to Akande, supported both by state practice and the jurisprudence of international tribunals, in particular by the International Court of Justice in the *Armed Activities* case, specifically in the following paragraph:

> "The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and

[465] Ibid 175.
[466] Ibid.
[467] Akande (n382) 246.
[468] Ibid 247.

> airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war."[469]

Akande further argues that article 2 (4) of the UN Charter prohibits the use of force '*against* the territorial integrity or political independence of other States', and writes that, given that States routinely invoke Article 51 of the UN Charter when using force abroad, 'even against non-state armed groups', this indicates 'an acceptance that article 2 (4) is engaged and that absent Article 51, the use of force would be against the territorial integrity of another State'.[470]

According to Akande, then, any use of force by one state on the territory of another, without the consent of the latter, gives rise to an international armed conflict. He believes that it does not matter whether the territorial state responds forcefully to the foreign state's use of force, because, as Common Article 2 of the Geneva Conventions says, the Conventions apply even if only one of the parties recognises a state of war. As to whether two different categories of armed conflict could, in such a situation, run parallel to each other – i.e. a non-international armed conflict between the foreign state and the non-state group, and an international armed conflict between the foreign state and the territorial state, Akande rejects this possibility, writing:

> '…the important point here is that the conflict with the non-state group will be so bound up with the international armed conflict between the two States that it will be impossible to separate the two conflicts. With respect to the conduct of hostilities and targeting in general, every act of targeting by the foreign State will not only be an attempt to target the non-state group (or members thereof) but will also at one and the same time be a use of armed force against the territorial State because it is a use of force over that State's territory without its consent. This means that every act of targeting or opening fire must comply with the law of international armed conflicts.'[471]

This position is supported by Milanovic, who agrees that a lack of consent from the territorial states 'internationalizes' a conflict.[472] Lubell, however, argues that the two different categories of armed conflict can indeed exist alongside each other, dismissing the importance that Akande

[469] Ibid 248.
[470] Ibid 249.
[471] Akande (n382) 256.
[472] Marko Milanovic, 'What Exactly internationalizes an Internal Armed Conflict?' (*EJILTalk*, 07 May 2010) http://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/, accessed 22 March 2016.

places on the consent of the territorial state to the use of force by the foreign state.[473] Lubell writes that the question of classification of a conflict rests not on the issue of consent, but rather on a 'factual determination of hostilities', and states that the position taken by Akande – that any use of force by a State on the territory of another without the consent of the territorial state results in an international armed conflict – 'unnecessarily mixes the *jus ad bellum* and the *jus in bello*', which can 'lead to problematic results', reiterating that 'the underlying question for classification must be that of identifying the parties to the conflict, rather than consent'.[474] This removes somewhat the issue arising in classification in cases where the existence of the consent of the 'territorial' State is either not known, or where contradictory statements have been communicated, such as in the case of Pakistan.

Given the lack of agreement regarding the classification of the conflict with al-Qaeda and affiliated forces, we must examine the law relating to targeting under the international humanitarian law applicable to non-international armed conflicts.

Targeting in Non-International Armed Conflicts

'Lawful targeting begins with lawful targets'.[475] This simple statement belies the many difficulties in ascertaining who, or what, is a lawful target. Targeting in non-international armed conflicts, already onerous pre-2001, is an increasingly complicated matter. As the United States maintains that it is involved in a non-international armed conflict with al-Qaeda and affiliated forces, I examine targeting rules under the international humanitarian law applying to NIACs, paying particular attention to the International Committee of the Red Cross's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* as well as the U.S. Department of Defense *Law of War Manual*, published in 2015. This examination proceeds in two parts, beginning with a discussion of the 'continuous combat function' criteria set out in the Interpretive Guidance, followed by a review of the rules related to civilian direct participation in hostilities. I then assess the United States' targeted killing programme under these rules.

In a non-international armed conflict, two categories of targetable persons – aside from those in state armed forces - are generally identified: members of organised armed groups, and

[473] Lubell (n439) 936.
[474] Ibid 937.
[475] Adil Ahmad Haque, 'Off Target: Selection, Precaution and Proportionality in the DoD Manual' (2016) International Law Studies 92, 32.

civilians directly participating in hostilities. Yet the U.S. Department of Defense's 'Report on Process for Determining Targets of Lethal or Capture Operations (U)' states the following:

> 'Another operational requirement is near certainty that non-combatants will not be injured or killed. Non-combatants are understood to be individuals who may not be made the object of attack under the law of armed conflict. The term "non-combatant" does not include an individual who is targetable as part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense.'[476]

An individual 'targetable in the exercise of national self-defence' is not a category of persons that exists under international humanitarian law. Under international humanitarian law, two broad categories of individual exist: combatants, and civilians. Civilian cannot be targeted unless they are directly participating in hostilities. As numerous commentators have pointed out, the creation of such category of persons is indicative of the confusion of the '*jus in bello* with the *jus ad bellum*',[477] suggests 'the elongation of the category of "indirect participants" in hostilities',[478] and is 'rather more expansive' than the continuous combat function standard envisioned by the ICRC in its Interpretive Guidance on the Notion of Direct Participation in Hostilities, discussed in the next section.[479] As this criterion has no basis under international humanitarian law, individuals targeted in the course of a non-international armed conflict must be assumed to fall into the category of member of a non-organised armed group, or the category of civilian directly participating in hostilities.

Organised armed groups and Continuous Combat Function (CCF)

The first category, 'members of organised armed groups', can be difficult to clarify in traditional situations of non-international armed conflict. In non-international armed conflict,

[476] U.S. Department of Defense, Report on Process for Determining Targets of Lethal or Capture Operations (U), ACLU v DOJ – DoD 072 (2014) https://www.aclu.org/legal-document/aclu-v-doj-exhibit-52-report-process-second-spurlock-declaration, 15 December 2018.
[477] Hernández (n448).
[478] Gledier I. Hernández, 'Drones and the Law of Armed Conflict', in Philipp Ambach, Frédéric Bostedt, Grant Dawson and Steve Kostas (eds.), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society: Essays in Honour of the Life and Work of Joakim Dungel* (Brill Nijhoff 2015) 64.
[479] Hilary Stauffer, 'The "New" US Policy on Drone Strikes, in Stuart-Casey Maslen (ed.), *The War Report: Armed Conflict in 2013*,(Oxford University Press 2013) 265.

members of organised armed groups are a distinct and separate category from civilians. Article 51 (3) of AP1, dealing with Direct Participation in Hostilities, states:

> 'Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.'[480]

While Article 13 of Additional Protocol II states:

> 'Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.'[481]

Traditionally, members of organised armed groups were often identifiable through the very characteristics that allowed the group to be classified as an organised armed group, as discussed in the previous section on classification of conflicts, in that members of the group may have worn a uniform or other distinctive emblem, and clearly followed orders in a hierarchical manner. Yet ascertaining membership of organised armed groups often still proved difficult. The waters become muddier still in cases concerning non-state armed groups, and particularly the transnational terrorists groups dealt with here. Such non-state armed groups tend not to distinguish themselves from the general population through the wearing of uniforms or emblems. Regarding organisation, and as noted in the previous section, many of these non-state 'organised' armed groups are not at all 'organised' in the sense usually understood, with the groups often 'appearing to be amorphous groups of like-minded individuals rather than a well-organized structure'.[482] As such, membership is often 'informal and fluid' and lacking any external identifying characteristics, making it particularly difficult to distinguish between members of non-state armed groups and the general civilian population.[483] Grant and Huntley deem this issue to be 'one of, if not the most, significant challenges on the modern battlefield'.[484]

Such organisation, or identifiable lack thereof, also poses challenges for purposes of proportionality assessments. How can we identify the relative value of targets in the absence of clear, hierarchical structures? The Obama administration attempted to deal with this issue

[480] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
[481] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[482] Matthew R. Grant and Todd C. Hunter, 'Legal Issues in Special Operations', *U.S. Military Operations: Law, Policy and Practice*, Shane R. Reeve and Rachel E. Van Landingham eds. (Oxford University Press 2016) 598.
[483] Ibid 598.
[484] Ibid 599.

by requiring that all individuals targeted (whether in personality or signature strikes) were high-level militants, posing a continuing, imminent threat to the national security of the United States of America.[485] Under the Trump administration, the continuing, imminent threat requirement has allegedly been rescinded, and strikes can target 'low-level foot soldiers.'[486]

Direct Participation in Hostilities and Membership of Non-State Armed Groups

The character of many existing conflicts today, for example in Yemen, in Libya, and in Syria, has made the question of identifying which individuals are citizens directly participating in hostilities, and which individuals are members of non-state armed groups, increasingly complex. The ICRC's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (hereafter 'the Interpretive Guidance') thus attempts to address many of the issues faced when dealing with direct participation in hostilities and membership in non-state armed groups in the current context. There has been, as will be shown, some disagreement over a number of the finer points in the text, but the Interpretive Guidance remains one of the most important guiding documents on direct participation in hostilities in recent years. As is noted in the title of this document, it is an 'interpretive guidance' only, and as such can be regarded as 'soft law' – it is not a binding interpretation of the relevant rules.

Regarding membership in non-state armed groups, the Interpretive Guidance states:

> 'For the practical purposes of the principle of distinction… membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities'.[487]

[485] Rosenthal and Dejonge Schulman (n205)
[486] Ibid.
[487] Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 33.

The Interpretive Guidance later states categorically that:

> 'In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consists only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function"). [488]

This relatively new term, in fact first introduced in the Interpretive Guidance, is known as the 'continuous combat function' (CCF) standard, a somewhat controversial category in an already controversial document.[489] Such a category does not exist in any treaty or multilateral convention, but is now 'widely considered to be emblematic of an emerging norm of customary international law'.[490] This test separates members of organised armed groups directly participating in hostilities from civilians who directly participate in hostilities on a 'merely spontaneous, sporadic or unorganized basis'.[491]

Of course, a CCF standard comes with its own problems, primarily as to how a 'continuous' combat function should be defined. According to the Interpretive Guidance, continuous combat function 'requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict.' Thus:

> …individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat functions. An individual recruited, trained and equipped by such a group to *continuously and directly participate in hostilities* on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act…'.[492]

The Interpretive Guidance also sets out those individuals who may be associated with, or who 'continuously accompany or support an organized armed group', but who should not be considered members of that group and whose function 'does not involve direct participation in

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[488] Ibid 36.

[489] Michael N. Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) Intl. Law and Politics 42 (3), 698. See also: Michael N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) National Security Journal 1; Elvina Pothelet, 'Are people in Islamic State training camps legitimate targets?' (*Just Security*, 04 March 2016) https://www.justsecurity.org/29728/people-islamic-state-training-camps-legitimate-targets/, accessed

[490] Ohlin (n445) 178

[491] Melzer (n474) 35

[492] Melzer (n474) 35. Emphasis added.

hostilities'. Such individuals include 'recruiters, trainers, financiers and propagandists'. Whilst their activities may 'continuously contribute to the general war effort of a non-State party', they 'remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces'.[493]

How far this 'continuous combat function' can be stretched is a matter of some debate. As noted by Pejic, there has been some criticism of the idea of 'continuous combat function' by those who believe that the category is 'based on status rather than behaviour as the basis for targeting'.[494] Alston, in his role as Special Rapporteur on extrajudicial, summary or arbitrary executions, wrote in his 2010 study on targeted killings that:

> '…the creation of CCF category is, *de facto*, a status determination that is questionable given the specific treaty language that limits direct participation to "for such time as" as opposed to "all the time".'[495]

Alston also believes that the CCF category 'raises the risk of erroneous targeting of someone who, for example, may have disengaged from their function.' As such, 'if States are to accept this category, the onus will be on them to show that the evidentiary basis is strong.'[496] Pejic considers Alston's critique to be misplaced, 'as the Guidance does not – and could not – introduce combatant status into non-international armed conflict.' She writes that, 'on the contrary, as the very term indicates, membership in an armed group is linked to the continuous combat *function* a person carries out.'[497]

Much of the criticism surrounding the continuous combat function criteria revolves around the Interpretive Guidance's statement that those who 'continuously support or accompany' an armed group, including recruiters, trainers and financiers, are not legitimate targets.[498] The United States believes that the CCF standard 'creates a disparity because it does not set the same standard for members of regular armed forces and those of organised armed groups, who

[493] Ibid.
[494] Jelena Pejic, 'Conflict Classification and the Law Applicable to Detention and the Use of Force', in Elizabeth Wilmshurt (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 311.
[495] UNHRC (n148) 21.
[496] Ibid.
[497] Pejic (n481) 311.
[498] See Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) International Law and Politics 42, 641; Dapo Akande, 'Clearing the Fog of War? The ICRC's Interpretive Guidance On Direct Participation in Hostilities' (2010) International and Comparative Law Quarterly, 59.

should not merit greater protections.'[499] Ohlin puts forward a similar argument, using the example of whether an 'al-Qaeda cook' could be targeted under the CCF criteria, noting that:

> 'In one sense, a cook does not intuitively sound like the type of occupation that should be considered as a continuous combat function. However, if the underlying principle is one of symmetry, it should be noted that uniformed cooks in the U.S. Army are subject to lawful attack at any moment in time'.[500]

Here, both the United States and Ohlin wilfully misunderstand the point of the continuous combat function idea. The underlying principle of the continuous combat function standard is not one of symmetry; it is intended to ensure the protection of civilians who directly participate in hostilities on a sporadic basis, rather than on a continuous basis as a member of an organized armed group. The continuous combat function standard should be tightly construed. It is not a military status designation. The disparity between members of regular armed forces and those of organised armed groups must exist because members of organised armed groups can regain their civilian status. As Crawford explains:

> 'The idea of "continuous combat function" was adopted to exclude certain types of participation in a non-international armed conflict from falling within the scope of DPH. The concern raised by the ICRC – and a number of the experts – was the possibility of equating membership in an organized armed group with direct participation, that is to say, membership in an organized armed group, in and of itself, should not *per se* constitute DPH. The result of such an approach might be that an overly broad definition of membership in an armed group could result in vast portions of the population being considered as taking a direct part in hostilities. Concerns were also raised that such an extension of the concept of DPH beyond the commission of hostile acts would blur the distinction in IHL made between "loss of protection based on conduct (civilians) and on status or function (members of armed forces of organised armed groups.'[501]

Schmitt, in a criticism similar to Ohlin's, which harks back to my earlier discussion on the balance between military necessity and humanity, holds that application of the continuous

[499] Hernández (n465) 64.
[500] Ohlin (n445) 170.
[501] Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (Oxford University Press 2015) 74.

combat function 'badly distorts the military necessity – humanitarian balance of IHL.' Schmitt's argument here is similar to Ohlin's example of an al-Qaeda cook:

> 'A requirement of continuous combat function precludes attack on members of an organized armed group even in the fact of absolute certainty as to membership. In contrast, membership alone in a state's military suffices, even when there is absolute certainty that the individual to be attacked performs no functions that would amount to the equivalent of direct participation.' [502]

Despite the similar criticisms put forward by both Ohlin and Schmitt, they each find a different result forthcoming. Ohlin contends that the continuous combat function exception 'constitutes wide support for the U.S. program of targeted killings against al-Qa'ida militants'.[503] Schmitt, however, finds the continuous combat function exception much more restraining, writing that 'it makes no sense to treat an individual who joins a group that has the express purpose of conducting hostilities a civilian than it would to distinguish between lawful combatants'.[504]

The Continuous Combat Function standard in U.S. courts and administrative interpretation

The U.S. courts and administration have not embraced the CCF standard, notes Ohlin, but rather have invoked the concept of 'functional membership' in an attempt to provide further clarification as to who the U.S. may or may not target in relation to non-state armed groups.[505] Functional membership criteria looks to 'whether the individual is part of a chain of command and participates in the giving or taking of orders, thus establishing that he is a functional member of a non-state organization's military wing', which, in application 'allows a court to determine whether someone is a continuous combat fighter in a non-state military organization by determining whether the individual is part of that military organization's chain of command.'[506] The concept of 'functional membership' is somewhat wider than that put forward in the Interpretive Guidance's continuous combat function concept. Two of the U.S. court cases dealing with the detention of suspected Taliban and al-Qaeda members elaborate on this 'functional membership' test. In *Gherebi v. Obama*, the court stated that:

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[502] Michael N. Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) Harvard National Security Journal 1, 23.
[503] Ohlin (n445) 170.
[504] Schmitt (n489) 24.
[505] Ohlin (n445) 170.
[506] Ibid.

> 'The key question is whether an individual "receive[s] and execute[s] orders" from the enemy force's combat apparatus, not whether he is an al-Qaeda fighter. Thus, an al-Qaeda member tasked with housing, feeding or transporting al-Qaeda fighters could be detained as part of the enemy armed forces notwithstanding his lack of involvement in the actual fighting itself, but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, could not be detained assuming such individuals had no independent role in al-Qaeda's chain of command.'

It further stated:

> 'With these non-exclusive limiting principles in mind, the Court agrees with the government that "[i]t is neither possible nor advisable to define the precise nature and degree of 'substantial support', or the precise characteristics of 'associated forces,' that are or would be sufficient to bring persons and organizations" within the government's proposed standard for detention.[507]

In *Hamlily v. Obama,* the Court said:

> 'With respect to the criteria to be used in determining whether someone was "part of" the "Taliban or al Qaida or associated forces"… this Court will, by necessity, employ an approach that is more functional than formal, as there are no settled criteria for determining who is a "part of" an organization such as al Qaeda…The key inquiry, then, is not necessarily whether one self-identifies as a member of the organization (although this could be relevant in some cases), but whether the individual functions or participates within or under the command structure of the organization *i.e.,* whether he receives and executes orders or directions.'[508]

Under the United States 'functional membership' test, then, it seems correct to assert that if an al-Qaeda cook can be detained 'as part of the enemy forces', then he or she could certainly also be targeted.

In 2010, Koh, in his former capacity as Legal Adviser to the U.S. Department of State, commented on the administration's 'functional' membership test, noting that the federal courts had endorsed it. He also, however, stated that the administration disagreed with the International Committee of the Red Cross 'on some of the particulars', before adding that it is

[507] *Gherebi v. Obama,* 609 F. Supp. 2d 43 (D.C. 2009) 69.
[508] *Hamlily v. Obama,* 616 F. Supp. 2d 63 (D.C. 2009) 77.

still ‘consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities’ (i.e. the Interpretive Guidance).[509]

The continuous combat function standard put forward by the Interpretive Guidance is currently the most practical approach to take when ascertaining who is or who is not a member of a non-state organised armed group involved in a non-international armed conflict. While not ideal, it appears to be the most realistic interpretation of membership of non-state armed groups that currently available, with the caveat that, as Alston says, there should be a heavy onus on States accepting the CCF standard to prove that there is a strong evidentiary basis for identifying an individual as having a continuous combat function.

The functional membership test put forward by the U.S., however, is overbroad. As Akande notes, with the Interpretive Guidance’s continuous combat function criteria, the ICRC has ‘taken a narrow view of the scope of direct participation’, akin to that ‘suggested by the text and structure of the provisions which deal with direct participation in hostilities’:

> ‘The text of the relevant provisions speak not of participation in armed conflict but of *participation in hostilities*, something narrower than being involved in the conflict in general. Participation in hostilities suggests participation in military operations. Furthermore, participation must be ‘direct’. So not all participation in military operations means loss of protection from attack.’[510]

The functional membership test ignores this, seemingly assuming that being involved in the conflict in general is akin to participation in hostilities. This raises doubts as to the United States compliance with the principle of distinction – for if anyone within the organisation who ‘receives and executes orders or directions’ is assumed to have functional membership, the logical conclusion is that any member of al-Qaeda or affiliated forces, regardless of their role within their organisation, can be targeted. Indeed, the U.S. maintains that there is ‘no such thing as civilian membership’ of organisations such as al-Qaeda, meaning of course that the U.S. government ‘has not to evaluate when, if ever, any “civilian” members of al-Qaeda may be

[509] U.S. Department of State (n368).
[510] Dapo Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance On Direct Participation in Hostilities’ (2010) *International and Comparative Law Quarterly* 59, 188. Emphasis added.

targeted.'[511] Such claims necessitate an examination of when civilians can be said to be 'directly participating' in hostilities, and thus become lawful targets.

Civilians and Direct Participation in Hostilities

Regarding those civilians who participate directly in hostilities but are not considered to be members of non-state organised armed groups, the Interpretive Guidance sets out the following criteria which a specific act must cumulatively meet in order to qualify as direct participation in hostilities:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). [512]

Akande writes that this narrow view 'is also suggested by the purpose of the rule limiting the targeting of civilians to those who take a direct part in hostilities', arguing that:

> 'There is a distinction to be made between acts of participation in hostilities and acts which generally sustain the war effort. This is a crucial distinction as it may be the case that much activity in a state in armed conflict may go towards sustaining the war effort. To permit anyone who is involved in the war sustaining effort to be a target of lethal weapons is to allow for unrestricted warfare – practically everyone could be a target. This would be a regressive move.'[513]

This of course begs the question as to when direct participation in hostilities begins and ends. According to the Interpretive Guidance, direct participation commences with 'measures

[511] Marty Lederman, 'Are all "members" of ISIL targetable?' (*Just Security*, 09 April 2016) https://www.justsecurity.org/30508/members-isil-targetable/, accessed 12 December 2018.
[512] ICRC (n474) 46.
[513] Akande (n497) 188.

preparatory to execution of a specific act of direct participation in hostilities', and continues with the deployment to and from the location of the execution of that specific act, where these actions 'constitute an integral part of such a specific act or operation.'[514] Preparatory measures includes those measures of a specifically military nature, aiming to carry out a specific hostile act. Preparatory measures aiming to establish the general capacity to carry out unspecified hostile acts do not amount to direct participation in hostilities.[515]

The issue of temporality in direct participation is a fraught one, and has been so for a long time.[516] Schmitt notes that in the 2006 *Targeted Killings Case*, the Israeli government argued that the phrase "for such time" did not reflect customary international law, 'but rather was simply a treaty restriction that limited only states party to the relevant instruments (principally the Additional Protocols).' However, the Israeli Supreme Court 'rejected this contention by correctly noting that the issue was not whether the "for such time" limitation was customary but rather how to interpret it.'[517] Consensus was not reached by the experts involved in the Interpretive Guidance as to the specifics of when direct participation begins and ends. While all were agreed that the "for such time" standard was customary in nature, there was no agreement as to what constitutes 'preparatory measures' or 'deployment'.[518]

The Interpretive Guidance also indirectly addresses the concept of a 'continuing imminent' threat, one of the targeted killing programme's most criticised constructs. It states:

> 'In operational reality, it would be impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurring basis and whether they have the continued intent to do so again. Basing continuous loss of protection on such speculative criteria would inevitably result in erroneous or arbitrary attacks against civilians, thus undermining their protection which is at the heart of IHL'.[519]

The U.S. itself defines 'direct participation' in somewhat broader terms. This is probably best demonstrated in the U.S. Department of Defense' Law of War Manual (hereafter 'the Manual'), published, following decades of work, in 2015. The Manual states that it is lawful to target

[514] ICRC (n474) 65.
[515] Ibid 66.
[516] Schmitt (n489) 34.
[517] Ibid 34-35.
[518] Schmitt (n489) 36.
[519] ICRC (n474) 45.

civilians who 'effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations.'[520] It further asserts that the lawfulness of attacking a civilian may depend on 'whether the [civilian's] act is of comparable or greater value to a party's war effort than acts that are commonly regarded as taking a direct part in hostilities.'[521] As Haque correctly points out, no matter how valuable a civilians contribution to the war effort might be, it 'is not legally equivalent to direct participation in hostilities'.[522] The Manual's stance on this also raises questions regarding the principle of proportionality, which I will discuss further into this section.

The Manual does not adopt the Interpretive Guidance's three-part test for direct participation, but instead 'lays out a range of activities relevant to the DPH determination'.[523] In this range of activities, we find, on the one hand 'actions that are, by their nature and purpose, intended to cause actual harm to the enemy' and on the other hand, actions that constitute 'general support that members of the civilian population provide to their State's war effort'. Santicola notes that the Manual thus differs from the Interpretive Guidance in two important respects. Firstly, and as stated earlier, while the Interpretive Guidance 'limits the DPH evaluation of harm caused by the civilian's actions to the detriment caused to the opponent', the DoD Manual 'calls also for consideration of the benefit provided to the group being supported.'[524] Secondly, while the guidance:

> '…specifically excludes "indirect" support to combat operations from its definition of DPH, the manual leaves room for extension to what may be, arguably, labelled indirect activities insofar as it calls for consideration of "the degree to which the act contributes to a party's military action against the opposing party".'[525]

This overbroad reading propounded in the Manual has since found support amongst numerous commentators. Bracknell, for instance, argues that civilians driving ISIL oil trucks (many of whom, he notes, have been forced or coerced into doing so) which are being moved 'to generate

[520] Haque (n462) 32.
[521] Haque (n462) 32.
[522] Ibid.
[523] Ryan Santicola, 'War-Sustaining Activities and Direct Participation in the DOD Law of War Manual' (*Just Security*, 15 December 2015) https://www.justsecurity.org/28339/war-sustaining-activities-direct-participation-dod-law-war-manual/, accessed 12 December 2018.
[524] Ibid.
[525] Ibid.

economic benefits for ISIL and not to directly enable combat operations' are targetable, because:

> 'While the nexus and causation are slightly more attenuated, they warrant the determination that civilian drivers are directly supporting ISIL combat activity and can, therefore, be targeted…targeting oil tankers transporting fuel to generate revenue is virtually identical to targeting those moving fuel to ISIL on the battlefield.'[526]

This analysis is, says Bracknell, 'consistent with the U.S. view, as expressed in Paragraph 5.9 of the DoD Law of War Manual'.[527] As Santicola has demonstrated, Bracknell's assessment is correct if we agree with the Manual's interpretation. It is incorrect, however, if we agree with the Interpretive Guidance.

Proportionality and distinction

Regardless of the views taken in the above debate, all targeting decisions must also comply with the principles of proportionality and distinction. The principle of proportionality is codified in Articles 51 (5) (b) and 57 of Additional Protocol I to the Geneva Conventions. Article 51 (5) (b) prohibits:

> 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.'[528]

As the ICRC notes, state practice 'establishes proportionality as a norm of customary international law applicable in both international and non-international armed conflict.'[529]

The U.S. Department of Defense Law of War Manual states that 'proportionality may be defined as the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive.'[530] It further explains:

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[526] Butch Bracknell, 'Warnings to Civilians Directly Participating in Hostilities: Legal Imperative or Ethics-based Policy?' (*Lawfare*, 29 November 2015), https://lawfareblog.com/warnings-civilians-directly-participating-hostilities-legal-imperative-or-ethics-based-policy, accessed 12 December 2018.
[527] Ibid.
[528] Protocol Additional to the Geneva Conventions of 12 August 1949 (n466).
[529] ICRC, 'Rule 14. Proportionality in Attack' (*Customary IHL*) https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14, accessed 12 December 2018.
[530] U.S. Department of Defense, *Law of War Manual* (2015) 60.

> 'Proportionality most often refers to the *jus in bello* standard applicable to persons conducting attacks. Proportionality considerations, however, may also be understood to apply to the party subject to attack, which must take feasible precautions to reduce the risk of incidental harm.'[531]

The interpretations of proportionality presented in the Manual are, however, quite worrying. In two separate pieces on the Manual's treatment of the concept, Hathaway and Lederman state that the Manual 'threatens to upend proportionality' and 'threatens to unravel the proportionality rule through the back door', respectively.[532] This is due to two principles in the Manual which the above authors identify and discuss. First, section 5.5.3.2 asserts that 'under customary international law, no legal presumption of civilian status exists for persons or objects'. Secondly, the Manual repeatedly proposes that:

> 'when civilians – or other "protected" persons who cannot themselves be targeted – are in or near lawful military targets, they have in some sense "accepted the risk" of death or further injury due to their proximity to military operations, and that therefore any foreseeable harm to those civilians and other protected persons *need not be taken into account in assessing whether an attack would comply with the principle of proportionality*.'[533]

Furthermore, Lederman notes that section 5.3.1 'goes so far as to suggest that the laws of war impose an affirmative obligation upon such persons to avoid becoming collateral damage', stating:

> 'Civilians also may share in the responsibility to take precautions for their own protection.'[534]

Such an 'assumption of risk' argument is not supported in either international law or state practice. As Hathaway writes:

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[531] Ibid 60-61.

[532] Oona Hathaway, 'The Law of War Manual's Threat to the Principle of Proportionality' (*Just Security*, 23 June 2016) <https://www.justsecurity.org/31631/lowm-threat-principle-proportionality/> and Marty Lederman, 'Troubling proportionality and rule-of-distinction provisions in the Law of War Manual' (*Just Security*, 27 June 2016) <https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality/#more-31661>, accessed 12 December 2018.

[533] Marty Lederman, 'Troubling proportionality and rule-of-distinction provisions in the Law of War Manual' (*Just Security*, 27 June 2016) <https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality/#more-31661>, accessed 12 December 2018. Lederman identifies thirteen different sections in the Manual which assert this principle.

[534] Ibid.

> 'if assumption of risk is sufficient to disqualify a civilian from consideration in a proportionality analysis, then any civilian in the vicinity of a military object no longer counts for purposes of a proportionality analysis.'

This assessment of the proportionality principle, combined with the U.S.' expansive approach to the targeting of war-sustaining objects, as discussed earlier, combine to form a 'toxic brew.'

Ultimately, under the Manual's interpretation, if an action is deemed to be in the United States' anticipated concrete and direct military advantage, despite the presence of a disproportionate number of civilians, the action could go ahead anyway because civilians in the vicinity of the area would have 'assumed the risk'. This makes the principle of proportionality almost meaningless.

The principle of distinction, meanwhile, is codified in Article 48 of Additional Protocol I, which states: 'The Parties to the conflict shall at all times distinguish between the civilian population and combatants.'[535] It, too, is a norm of customary international law applicable in both international and non-international armed conflicts.[536] On this subject, the Manual states:

> 'Distinction may be understood as encompassing two sets of reinforcing duties. Parties to a conflict must apply a framework of legal classes for persons and objects, by: (1) discriminating in conducting attacks against the enemy; and (2) distinguishing a party's own persons and objects.'[537]

The principle of distinction is probably the most important principle in international humanitarian law; indeed, Schmitt says that the distinction between civilians and combatants is 'one of the seminal purposes of the law', while Solis describes it as 'the most significant battlefield concept a combatant must observe.'[538] Aside from distinguishing between combatants and non-combatants, parties to the conflict must also distinguish between civilian objects and military objectives.

As noted earlier, distinguishing lawful targets – that is, members of organised armed groups and civilians directly participating in hostilities – is particularly difficult in the context of non-

[535] Protocol Additional to the Geneva Conventions of 12 August 1949 (n466).
[536] ICRC, 'Rule 1. The Principle of Distinction between Civilians and Combatants (Customary IHL database), https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1, accessed 12 December 2018.
[537] U.S. Department of Defense (n516) 62.
[538] Michael N. Schmitt, '"Direct Participation in Hostilities" and 21st Century Armed Conflict', available at https://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt_direct_participation_in_hostilties.pdf, accessed 15 December 2018; Solis (n31) 25.

international armed conflicts. Distinguishing military objectives from civilian objects also presents further challenges in the context of non-international armed conflict. However, difficulty does not mean responsibility can be shirked. There is an onus on the State party to the conflict to 'take reasonable steps to determine whether or not a person or object is a legitimate target.'[539] The principle of distinction is of particular importance in the targeted killing programme.

The targeted killing programme and targeting: personality and signature strikes

If we accept that the United States is in a non-international armed conflict with al-Qaeda and associated forces, do their targeting decisions stand up to scrutiny? Two main types of targeted killing take place in the targeted killing programme. These are known as 'personality' strikes and 'signature' strikes. 'Personality' strikes involve identifying a high-value target, placing the individual on a 'kill list', and vetting him or her closely before striking. These lists are presented to President Obama, who makes the final decision as to whether a drone strike should go ahead, unlike signature strikes which do not require his personal approval.[540]

Many of the targeted killings carried out by the CIA are not personality strikes, and are not 'targeted' at all, in the sense that 'targeted' is generally taken to mean. In fact, the majority of drone strikes are what are known as 'signature' strikes. Signature strikes, also referred to as 'crowd kills' or 'terror attack disruption strikes' (TADS) are strikes conducted against individuals whose identity is not known but who are targeted 'based on a pattern of activity' – that is, those whose behaviour matches a 'pre-identified "signature" of behaviour that the U.S. links to militant activity'. Whilst what exactly constitutes this type of behaviour remains classified, it is believed to include such behaviour as 'a gathering of men, teenaged to middle-aged, travelling in convoy or carrying weapons'[541] or 'loading a truck with what appears to be bomb-making material or even crossing a border multiple times in a short period.'[542] Such a system is open to much error, particularly in countries such as Yemen, where 'every Yemeni is armed,' making it even harder to distinguish between civilians and those involved in terrorist

[539] Solis (n32) 254.

[540] Jo Becker and Scott Shane, 'Secret 'kill list' proves a test of Obama's principles and will' (*The New York Times,* 29 May 2012) <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=0>, accessed 03 July 2015.

[541] Spencer Ackerman , 'Inside Obama's drone panopticon: a secret machine with no accountability' (*The Guardian,* 25 April 2015) <http://www.theguardian.com/us-news/2015/apr/25/us-drone-program-secrecy-scrutiny-signature-strikes> accessed 02 July 2015.

[542] Boyle (n210) 8.

activity.[543] Apparently, there is a joke in the U.S. State department which says that when the CIA sees 'three guys doing jumping jacks', they decide it is a terrorist training camp.[544] In practice, this means that signature strikes:

> '…in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.' [545]

This section aims to clarify the legality or otherwise of both personality strikes and signature strikes under the international humanitarian law applying to non-international armed conflicts.

Whether personality strikes or signature strikes satisfy these rules and the principles of proportionality and distinction must be assessed on a case-by-case basis. In this area, too, the lack of transparency surrounding the targeted killing programme makes such a determination very difficult. The Obama administration has repeatedly stated that the U.S. adheres to the principles of distinction and proportionality in every case in which the U.S. takes military action, whether in or outside an area of active hostilities.[546] It has also specifically affirmed that 'targeted strikes conform to the principle of necessity… Targeted strikes conform to the principles of distinction. Targeted strikes conform to the principle of proportionality.'[547] Yet without specific information regarding individual strikes, how are we to determine whether strikes do actually satisfy the principles of proportionality and distinction? For the moment, we must rely solely on anecdotal evidence and the reportage of figures surrounding civilian deaths provided by organisations such as The Bureau of Investigative Journalism and Reprieve. As Bachmann correctly concludes, the lack of transparency is itself a violation of international law' because, as Alston explains:

> 'Assertions by Obama administration officials, as well as by many scholars, that these operations comply with international standards are undermined by the total absence of any forms of credible transparency or verifiable accountability… This in turn means

[543] Ibid.
[544] Becker and Shane (n527).
[545] Becker and Shane (n527)
[546] U.S. Department of State (n439).
[547] John O. Brennan (2012), quoted in Solis (n232) 557.

> that the United States cannot possibly satisfy its obligations under international law to ensure accountability for its use of lethal force, either under IHRL or IHL.'[548]

Personality strikes

If we assume the existence of a non-international armed conflict and accept the continuous combat function test, targeting is relatively unproblematic once the individual or individuals targeted have been established as carrying out a continuous combat function. A strike against a known individual or group of individuals will comply with international humanitarian law once it adheres to the principles of proportionality and distinction. Hence, personality strikes are not generally considered to be an issue in this context. It is when personality strikes disregard the principles of proportionality and distinction, or where they have incorrectly identified the individual to be targeted, that problems arise. For example, personality strikes have raised issues around proportionality – notably, the charity Reprieve has alleged that some 1,147 people were killed in attempts to target 41 specifically named individuals.[549]

Yet personality strikes should not be taken as entirely unproblematic in the context of the war on terror. As Bachman pointed out, 'who is on the Obama administration's kill list is classified, as is the criteria for being placed on it.'[550] The same applies to personality strikes carried out under the Trump administration.

Furthermore:

> '…once added, these individuals will have no knowledge of it or any way to challenge it. Therefore, it remains possible that particular personality strikes may violate the principle of distinction by targeting and killing individuals who were wrongfully added to the kill list.'[551]

Signature strikes

Signature strikes are more problematic, for a number of reasons. As previously stated, signature strikes target individuals whose identity is not known but who are assumed to be functional

[548] Alston, quoted in Jeffrey Scott Bachman, 'The Lawfulness of U.S. Targeted Killing Operations Outside Afghanistan', Studies in Conflict & Terrorism (2015) 38 (11) 914.
[549] Ackerman (n299).
[550] Bachman (n535) 911.
[551] Ibid.

members of al-Qaeda or an affiliated force due to 'pattern of life' analysis. Given the difficulties inherent in positively identifying unknown individuals using data which may often be lacking or indeed, which may simply be incorrect, signature strikes may (and apparently often do) erroneously target individuals who are not involved in the armed conflict, and who do not have a continuous combat function, fulfil the U.S. functional membership test, or be civilians directly participating in hostilities – they may just be individuals who happen to be in the wrong place, at the wrong time. Signatures strikes are extremely concerning considering the importance of the principle of distinction, and many have voiced their worries about the tactic. Rogers and Hill write that 'the U.S. turn to assessing "patterns of life" as a way to distinguish between enemies and non-combatants fails to meet even the most basic tests', while Heyns and Knuckey describe them as 'troubling.'[552] Meanwhile, Solis contends that:

> 'When invoking the state's targeted killing apparatus to kill a human target whose name is unknown, without signals intelligence or human intelligence to independently confirm the target's status as an enemy fighter before he is killed, or the ability to make on-the-ground after-action assessments, or confirm the reliability of the signature targeting process, the basic requirement of distinction cannot be satisfied.'[553]

Signature strikes are not in and of themselves categorically contrary to international humanitarian law, and should not be considered as such. As Pejic notes:

> 'The concept of signature strikes is not a legal term of art and risks creating confusion by suggesting the possible introduction of a new (legal) notion. The way in which this concept is used – i.e., in distinction to "personality" strikes – also erroneously implies that targeting under IHL will only be lawful if the identity of the person targeted is known. This requirement is not an element of the principle of distinction and would for the most part not be possible to fulfil in the reality of armed conflict. What is required is a determination that a person constitutes a lawful target, either because of a continuous combat function or because he or she is a civilian who is taking a direct part in hostilities, and sufficient evidence of either one or the other.'[554]

[552] Ann Rogers and John Hill, *Unmanned: Drone Warfare and Global Security* (Pluto Press 2014) 110.; Christof Heyns and Sarah Knuckey, 'The Long-Term International Law Implications of Targeted Killing Practices' (2013) Harvard International Law Journal 2013 (54), 111.
[553] Solis (n32) 561.
[554] Pejic (n397) 92.

The next section assesses the legality of specific signatures.

Assessing the legality of signatures

Almost two decades after their first use, signature strikes remain problematic for legal analysis, primarily because we do not know what exactly the 'signatures' are that the United States use. In Heyns' assessment:

> '…the legality of such strikes depends on what the signatures are…The legal test remains whether there is sufficient evidence that a person is targetable under international humanitarian law…by virtue of having a continuous combat function or directly participating in hostilities…'[555]

As such, the lack of transparency surrounding U.S. signature strikes is a major impediment to assessing the legality of these strikes.[556] Heller estimates that there are 'at least 14 distinct signatures' which the U.S. believes 'are sufficient to establish that a drone attack complies with the principle of distinction.'[557] He asserts that establishing the legality of a signature strike under IHL requires answering 'two interrelated questions':

> 'First, was the particular signature legally sufficient to establish that the victim of the strike was targetable? Secondly, was the evidence sufficient to determine that the targeted individual was engaged in the signature behaviour?'[558]

In attempting to answer the first of these questions, Heller undertakes a lengthy analysis of the legality of such strikes. He considers signatures such as planning attacks, transporting weapons, handling explosives, evidence of an al-Qaeda compound, and evidence of an al-Qaeda training camp as 'always legally adequate', while operating an AQ training camp and training to join AQ are 'possibly legally adequate'. Signatures which cannot be considered as legally adequate are the targeting of 'military-age males', 'consorting with known militants', 'armed men travelling in trucks', and a '"suspicious" compound in an AQ-controlled area'.[559]

[555] United Nations General Assembly, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (13 September 2013), A/68/382.
[556] Bachman (n535) 914.
[557] Heller (n214) 92.
[558] Ibid 94
[559] Ibid.

In the context of an NIAC, a strike against unknown individuals planning attacks satisfies the relevant requirements of direct participation in hostilities,[560] while 'both weapons and the means of transporting weapons, such as a truck, are legitimate military objectives'.[561] Strikes against al-Qaeda compounds and training are similarly unproblematic, given that they would also be considered legitimate military targets. [562]

While Heller is correct in his assertion that the deaths of those transporting weapons would be 'permissible collateral damage', he fails to note that when targeting weapons transportation, the transporting should be 'an integral part of a specific military operation.' As the Interpretive Guidance notes:

> '…Individual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities… examples of indirect participation include scientific research and design, as well as production and transport of weapons and equipment unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm.'[563]

Heller's assessment is also contentious due to the fact that the U.S. appears to be expanding its definition of 'legitimate military objective'. This is exemplified in the debate, discussed earlier, around the targeting of ISIL oil trucks in Syria and Iraq. Although the targeting of weapons and the means of transporting those weapons are legitimate military objectives, the legitimacy of targeting other objects – such as oil trucks, oil wells or 'bulk cash stockpiles' remains dubious.[564]

On the handling of explosives, Heller suggests that strikes against individuals involved in bomb-making or unloading explosives are 'clearly' legal, 'because the bombs and explosives would qualify as legitimate military objectives'.[565] 'Moreover', he writes, 'the location where the bombs were being made or the explosives stored would itself be targetable…'. [566]Again,

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[560] Ibid.
[561] Ibid 95.
[562] Ibid 96.
[563] ICRC (n474) 53.
[564] Marty Lederman, 'Is it legal to target ISIL's oil facilities and cash stockpiles?' (*Just Security*, 27 May 2016), https://www.justsecurity.org/31281/legality-striking-isils-oil-facilities-cash-stockpiles/, accessed 17 December 2018.
[565] Heller (n214) 96.
[566] Ibid.

this is a matter of some contention. An individual making a bomb, who does not have a continuous combat function but who is rather a civilian directly participating in hostilities, may never use the bomb – is that civilian targetable anyway? Are civilians working in munitions factories targetable? This is a question which the Interpretive Guidance tried to tackle. As noted above, the production of weapons and equipment are examples of indirect participation in hostilities, unless carried out as an integral part of a specific military operation. Footnote 123 of the guidance also notes that during the expert meetings:

> '…there was general agreement that civilian workers in an ammunitions factory are merely building up the capacity of a party to a conflict to harm its adversary, but do not directly cause harm themselves. Therefore, unlike civilians actually using the produced ammunition to cause harm to the adversary, such factory workers cannot be regarded as directly participating in hostilities.'[567]

However, as Lewis and Crawford note, the experts involved in the Interpretive Guidance were divided on this issue, with some asserting that some bomb makers may be targetable 'as continuous combat functionaries if they are providing a military capacity otherwise unavailable to their armed group.'[568]

On the two signatures which may be legally adequate, regarding the training of fighters, as stated earlier, the Interpretive Guidance states that:

> 'an individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a CCF even before he or she first carries out a hostile act.' [569]

Heller points out, however, that when targeting al-Qaeda trainees outside of a training camp, the U.S.:

> '…must have evidence that the trainee is not simply a reservist, such as evidence that the training is for a specific military operation (not simply 'possible operations') or that the trainee has previously directly participated in hostilities.'[570]

[567] ICRC (n474) 53.
[568] Michael W. Lewis and Emily Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones' (2012) *Georgetown J of Intl' Law* 44, 1148.
[569] ICRC (n474) 33.
[570] Heller (n214) 102.

Pothelet, in a discussion centring around the targeting of individuals by France in ISIL training camps aimed at training recruits for attacks in Europe, examines this issue and concludes that under the Interpretive Guidance, new recruits to ISIL are unlikely to qualify as assuming a CCF, and if considered as civilians, their training wouldn't amount to an act of DPH, due to the fact that if trained for suicide missions, they will not have a continuous combat function, and nor will they immediately be directly participating in hostilities.[571] Dunlap, however, disagrees, asserting that 'there does not seem to be any state practice to establish or reinforce a norm that would require any distinction between ISIL trainees in a training camp based on their future objectives.'[572] Such discussion is also relevant to U.S. targeting of al-Qaeda and other training camps, such as the targeting of an al-Shabab training camp in Somalia in March 2016.[573]

Each of the four signatures considered to never be legally adequate are 'plainly inconsistent with the principle of distinction'.[574] The 'military-age male' signature, for example, is 'not simply brutal. It is also unlawful'.[575] And while 'consorting with known militants' could be considered as 'sympathizing' or 'collaborating' with an organised armed group, 'neither activity makes an individual a lawful target'.[576]

Three further signatures which may be legally adequate, depending on how the U.S. interprets them, are also identified - with some possible interpretations justifying a signature strike, and others not. These include 'groups of armed men travelling towards conflict', individuals who 'facilitate terrorist activity', and 'rest areas'. 'Travelling towards a combat zone' may be adequate 'depending on the circumstances of the signature strike in question'. If the U.S. has evidence that the men are travelling to the combat zone for a specific hostile purpose, they do not have to wait until they reach their destination, or start fighting, to target them. Some examples of 'facilitating' activity certainly qualify as DPH: gathering military intelligence in enemy territory, providing ammunition to fighters during hostilities, and acting as a guide. However most other 'facilitating acts' qualify simply as 'war-sustaining' activities, rather than

[571] Elvina Pothelet, 'Are people in Islamic State training camps legitimate targets?' (*Just Security*, 04 March 2016) https://www.justsecurity.org/29728/people-islamic-state-training-camps-legitimate-targets/, accessed 17 December 2018.
[572] Charles J. Dunlap, Jr. 'Yes, we can lawfully target Islamic State trainees preparing to conduct terrorist attacks in Europe and Elsewhere', (*Just Security*, 25 March 2016) https://www.justsecurity.org/30228/lawfully-target-isil-trainees-preparing-terrorist-attacks-europe/, accessed 17 December 2018.
[573] Dunlap (n559)
[574] Heller (n214) 97.
[575] Ibid.
[576] Ibid 98.

DPH.[577] Meanwhile, if a 'rest area' is already a legitimate military objective (such as a barracks), it is targetable, but is not targetable if the 'rest area' is considered to be a civilian house 'that occasionally provide lodging to fighters.'[578]

Conclusion

Even when operating under the assumption that the United States is involved in a non-international armed conflict with al-Qaeda and associated forces, the targeted killing programme remains extremely legally problematic. In many cases, it appears that targeting decisions fail to meet the principles of proportionality and the principles of distinction. Furthermore, given the United States' overbroad 'functional membership' test, in many cases it is targeting individuals whose identity is unknown, and whose duties within an armed group do not equate to having a continuous combat function. The legality of signatures strikes in particular remains dubious, and as Heller notes, it is unlikely that the U.S. even attempts to make the distinction between members of organised armed groups and civilians who DPH. Nor has the U.S. publicly identified any temporal limits on the targetability of such individuals, suggesting that 'it does not limit membership in an armed group to those who assume a CCF in it.'[579] Solis describes signature strikes as 'treading close to the outer edge of distinction'.

There have been many assurances from the United States that its actions are lawful, but in the case of the targeted killing programme, we must remain circumspect. It is not difficult to see the shadow of *Kriegsraison* lurking in the Manual's interpretation of proportionality, in the targeted killing programme's disregard for the principle of distinction and successive administration's broader targeting of war-sustaining objects. Such interpretations of international humanitarian law highlight the United States' push to prioritise the principle of military necessity above all other aspects of the law.

These legal interpretations become all the more problematic when examined through the lens of international human rights law. Despite the United States' assertion that it is involved in an internationalised armed conflict with al-Qaeda and affiliated forces, it is possible that in many contexts, the law applicable to numerous instances of targeted killing is not international

[577] Ibid 103.
[578] Ibid.
[579] Heller (n214) 106.

humanitarian law, but international human rights law. As such, the next chapter examines the legality of targeted killing under this body of law.

Chapter Four: International Human Rights Law: Extraterritoriality, Armed Conflict, and the Targeted Killing Programme

Having assessed the legality of the targeted killing programme in relation to the international humanitarian law applicable to international and non-international armed conflicts, this chapter examines the question of the application of international human rights law to the targeted killing programme. The U.S. contends it is involved in a transnational non-international armed conflict with al-Qaeda and affiliated forces to which international humanitarian law, and international humanitarian law only, applies.[580] This is despite much agreement that, during armed conflict, international human rights law continues to apply.[581] Of course, the United States' reasoning regarding its apparent involvement in a non-international armed conflict with a transnational character is erroneous, as was discussed in detail in the previous chapter. In many (indeed, the majority) of cases in which targeted killings have been used, the level of violence simply does not cross the threshold of intensity relevant to create an armed conflict. Furthermore, and as has also already been established, al-Qaeda and the affiliated and/or associated forces to which the United States refers are not sufficiently organised or connected to be categorised as one 'organised armed group.' It is therefore reasonable to assert that the majority of targeted killings do not take place within the nexus of a non-international armed conflict. As such, the legality or otherwise of these targeted killings should not be assed under the rubric of international humanitarian law, but under the international human rights law framework.

Before this legality can be assessed, a number of issues must be tackled. One of the principle issues here is whether international human rights law applies extraterritorially. This issue is examined first, before assessing how international human rights law applies in armed conflict and its relationship in such instances with international humanitarian law. The final section then examines the targeted killing programme itself under international human rights law.

[580] See, for example, U.S. Department of State (n495); U.S. Department of State (n438); U.S. 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>, accessed 17 December 2018.
[581] UNHRC (n148) 10.

Does international human rights law apply extraterritorially? The U.S. position

As stated in previous chapters, the United States maintains that it is involved in a non-international armed conflict with al-Qaeda and affiliated forces. As such, the only body of law which the United States recognises as applying to targeted killings is the law of armed conflict as it applies to non-international armed conflicts (in Yemen, Pakistan and Somalia) and the law of armed conflict as it applies to international armed conflicts (in Afghanistan). However, this is a position that we must take umbrage with. While it is not disputed that the law of armed conflict applies to the United States' operations in Afghanistan, it is dubious as to whether it is the sole body of law which applies in Pakistan, Yemen and Somalia – or whether it even applies at all. This chapter therefore examines the role of international human rights law in targeted killing operations.

Whether or not international human rights law, and more specifically the International Covenant on Civil and Political Rights (ICCPR), applies extraterritorially has been a matter of contention within the international community for many years, and the issue continues to arise today.[582] This section focuses primarily on U.S. arguments against the extraterritorial application of the ICCPR, as it is the treaty most relevant to U.S. targeted killings abroad.

The extraterritorial application of human rights treaties is a particularly pertinent issue; perhaps, as Milanovic argues, due to the synergy of globalization and the increasing emphasis on individual human rights.[583] This is likely to remain the case, as 'States are increasingly asserting their power abroad in ways that affect the rights of individuals beyond national borders.'[584] The extraterritoriality of human rights is also a key factor in assessing the legality or otherwise of targeted killings, and international human rights law also raises some concerns around the use of drones themselves.

The U.S. has 'long held' the position that international human rights law, including the ICCPR, does not apply extraterritorially in any circumstances.[585] In the view of the United States:

> 'arguments for the extraterritorial application of the Covenant are not supported by the text, objectives and drafting history of the Covenant; ignore the primacy of

[582] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011) 1.
[583] Marko Milanovic, 'Response to Raustiala, McGuinness, Parrish and Cleveland' (*Opinio Juris*, 05 December 2011) http://opiniojuris.org/2011/12/05/reply-to-raustiala-mcguinness-parrish-and-cleveland/, accessed 17 December 2018.
[584] Beth Van Shaack, 'The United States Position on the Extraterritorial Application of Human Rights Obligations: Now Is The Time For Change' (2014) Int'l. L. Stud 90, 20.
[585] Gerd Oberleitner, *Human Rights in Armed Conflict* (Cambridge University Press 2015) 148.

humanitarian law; lead to legal and operational confusion; and increase the gap between legal theory (which supports the extra-territorial application of human rights law in armed conflict) and state practice (which points towards the contrary)'.[586]

This position has been described by commentators as 'increasingly out of step',[587] and, by the State Department's then Legal Advisor Harold Koh in 2010, as 'no longer tenable' and standing 'in significant tension with the treaty's object and purpose.'[588]

The United States' strict anti-extraterritorial ICCPR application position was first articulated in 1995 by Conrad Harper, in his position as Legal Adviser to the State Department, in response to an oral question from the UN Human Rights Committee on the U.S. position on extraterritoriality. Harper stated that:

> '…the Covenant was not regarded as having extraterritorial application. In general, where the scope of application of a treaty was not specified, it was presumed to apply only within a party's territory. Article 2 of the Covenant expressly stated that each State party undertook to respect and ensure the rights recognized "to all individuals within its territory and subject to its jurisdiction." That dual requirement restricted the scope of the Covenant to persons under United States jurisdiction and within United States territory. During the negotiating history, the words "within its territory" had been debated and were added by vote, with the clear understanding that such wording would limit the obligations to within a Party's territory.'[589]

The United States most recently reaffirmed its unyielding stance on the extraterritorial application of the ICCPR in 2014 and 2015, in its response to the UN Human Rights Committee's 2014 Priority Recommendations on the implementation of the ICCPR.[590] Then acting-Legal Advisor in the State Department, Mary McLeod, stated that:

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[586] Oberleitner (n572) 148.
[587] Van Shaack (n571) 23.
[588] U.S. Department of State, 'Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights' (Harold Hongju Koh, 19 October 2010)
[589] UNHCR, Fifty-third session: Record of the 1405th Meeting - Statement of State Department Legal Adviser, Conrad Harper, (April 24, 1995), CCPRIC/SR 1405.
[590] Charlie Savage, 'U.S., rebuffing U.N., Maintains Stance That Rights Treaty Does Not Apply Abroad' (*The New York Times*, March 13 2014, http://www.nytimes.com/2014/03/14/world/us-affirms-stance-that-rights-treaty-doesnt-apply-abroad.html, accessed 17 December 2018.

> 'The United States continues to believe that its interpretation – that the covenant applies only to individuals both within its territory and within its jurisdiction – is the most consistent with the covenant's language and negotiating history.'[591]

This position was underscored by the U.S. in its 2015 written response to the UNHRC's 2014 Priority Recommendations on the implementation of the ICCPR, in which the U.S. notes three times that it is 'the longstanding position of the United States that obligations under the Covenant apply only with respect to individuals who are both within the territory of a State Party and within its jurisdiction.'[592]

This uncompromising position holds, despite belief that the Obama administration would soften the U.S. position, particularly given the content of two lengthy memos by Harold Koh, former Legal Advisor at the Department of State, in 2010 and 2013, which offered an opinion on the extraterritoriality of human rights treaties contrary to the 1995 position.[593] The 2010 memo, which deals with the ICCPR, states that Koh no longer believes the 1995 interpretation to be the 'best reading of the treaty', as 'the protections afforded by the Covenant do not in all cases stop at the water's edge'[594]. The memo argues:

> 'On examination, the 1995 Interpretation asserts three propositions: (1) that unless otherwise specified, treaties were presumed to apply only within a party's territory; (2) that the "and" in Article 2(1) operated conjunctively, not disjunctively; and (3) that "within its territory" was added to limit the Covenant's obligations to a Party's territory. But despite extensive examination, we have not been able to locate any underlying legal analysis conclusively establishing any of these three elements of the 1995 position.'[595]

Koh's position with regard to the ICCPR was supported by Michael Posner, former assistant secretary for human rights.[596] Both of Koh's legal opinions highlight the United States' exceptional and aberrant position with regards to the extraterritorial application of multilateral

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[591] Savage (n577).

[592] United States of America, 'One-Year Follow-Up Response of the United States of America to Priority Recommendations of the Human Rights Committee on its Fourth Periodic Report on Implementation of the International Covenant on Civil and Political Rights' (31 March 2015) <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_FCO_USA_19957_E.pdf>, accessed 17 December 2018.

[593] Van Shaack (n571) 25.

[594] U.S. Department of State (n575).

[595] Ibid.

[596] Charlie Savage, 'U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad' (*The New York Times*, 06 March 2014), http://www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html, accessed 17 December 2018.

human rights treaties, in particular the ICCPR. The release of these legal opinions shortly before the U.S. was due to appear before the UN Human Rights Committee in 2014 prompted Milanovic to comment that he could not think of a similar situation 'in which the disclosure of internal legal advice and the timing of that disclosure have so fatally compromised a state's public legal position on a matter of comparable importance…'.[597]

Indeed, as these leaked opinions show, the U.S. position on the extraterritorial application of the ICCPR, rather than being an actual legal position, is actually a 'strategic policy choice to endeavour to evade scrutiny of its extraterritorial exploits...'[598]

It is now almost universally accepted that the ICCPR applies extraterritorially. The position that the International Convention on Civil and Political Rights and human rights in general is not applicable extraterritorially, or in an armed conflict situation, is 'generally discredited' today.[599] Human rights law is not entirely 'displaced' by international humanitarian law, and 'can at times be directly applied in armed conflict situations'; as Lubell notes, those who resist such a position are 'fighting a losing battle.'[600] Numerous commentators point out that this is a question that has broadly been settled for some time. Ramsden writes that 'weighty international support says yes' to the question of whether international human rights law applies extraterritorially,[601] while Oberleitner notes that however fervently the U.S. argues its case, this case rests on extremely fragile grounds.[602] Rather than such grounds even being extremely fragile, the grounds do not exist – the U.S. position on the extraterritorial application of the ICCPR lies in an abyss, with those fragile grounds that may have once existed collapsing a long time ago. The UN Human Rights Committee has repeatedly noted that the U.S. continues to maintain its position on this important subject 'despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice.'[603]

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[597] Marko Milanovic, 'Harold Koh's Legal Opinions on the Extraterritorial Application of Human Rights Treaties', (*EJILTalk*, 07 March 2014), http://www.ejiltalk.org/harold-kohs-legal-opinions-on-the-us-position-on-the-extraterritorial-application-of-human-rights-treaties/, accessed 17 December 2018.

[598] Van Shaack (n571) 24.

[599] Stuart Casey-Maslen, 'Pandora's box? Drone strikes under jus ad bellum, jus in bello, and international human rights law' (2012) *International Review of the Red Cross* 94, 621.

[600] Noam Lubell, 'Challenges in applying human rights law to armed conflict' (2005) *International Review of the Red Cross* 738.

[601] Michael Ramsden, 'Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki' (2011) *Journal of Conflict & Security Law* 393.

[602] Oberleitner (n572) 149.

[603] UNHRC, Concluding observations on Report of the United States (2014) 2.

The U.S. relies heavily upon the drafting comments of the ICCPR to justify its strictly territorial approach to the extraterritorial application question; however, as Lubell points out, on closer inspection the drafting actually uncovers support for the extraterritorial application of human rights.[604] As such the more pertinent question to ask is not whether human rights law applies outside the territory of the U.S., but rather how, and to whom, it applies.

Extraterritorial jurisdiction

Article 2 (1) of the ICCPR, which deals with the application of the treaty, reads:

'Each State Party to the present Covenant undertakes to respect and ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[605]

The phrase 'within its territory and subject to its jurisdiction' raises the most issues for the ICCPR when dealing with its extraterritorial application.

First, it should be noted that jurisdiction of the kind expressed in human rights treaties differs greatly from that expressed in general international law. Oberleitner, for example, writes that jurisdiction is an 'ambiguous term with multiple meanings and no treaty-based definition.'[606] Unlike domestic jurisdiction, jurisdiction under international human rights law differs in that it is:

> 'not about a state's ability to legislate and enforce law abroad, but may describe the factual exercise of power or control or authority over territory and/or persons. It is also about the extent of duties owed towards an individual, and it delimits a state's obligation to respect, protect and fulfil human rights.'[607]

Meanwhile, Milanovic writes that:

> 'the…classical doctrine of jurisdiction in general international law refers to the state regulation of the conduct of persons, natural or legal, and the consequences of their

[604] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford University Press, 2010), 202
[605] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2. Emphasis added.
[606] Oberleitner (n572) 144.
[607] Ibid 144-145.

actions under domestic law. In other words, it delimits the municipal legal orders of states, which can and do overlap…'.[608]

In sum, the notion of jurisdiction in human rights treaties:

> 'relates essentially to a question of fact, of actual authority and control that a state has over a given territory or persons. 'Jurisdiction', in this context, simply means actual power, whether exercised lawfully or not – nothing more, nothing less.'[609]

Of course, this interpretation of jurisdiction leaves us to grapple with the terms 'effective control' and 'power', both of which have different meanings in the different models of extraterritorial jurisdiction – territorial and personal - discussed in the succeeding sections.

Extraterritorial jurisdiction: what does jurisprudence say?

What can existing jurisprudence tell us about how far extraterritorial jurisdiction can reach? The little jurisprudence that exists on this subject is far from consistent. As Oberleitner writes:

> ' …the jurisprudence of human rights bodies and courts is only partly helpful in delineating the contours of the extra-territorial application of human rights treaty law. It supports, as a matter of principle, the idea that such extra-territorial application of human rights… is possible, but the human rights bodies differ in the way they understand jurisdiction as control over territory and/or persons.'[610]

As such, there is no one coherent or over-arching approach to the extraterritorial application of human rights. Van Shaack deems jurisprudence in the area to have evolved 'rather haphazardly in the face of idiosyncratic fact patterns that have come before different human rights treaty bodies and international tribunals in a range of conflict and non-conflict situations',[611] and Milanovic writes that the question of extraterritoriality has never been approached in a 'methodical way'.[612]

As noted above, existing jurisprudence points toward two different models of extraterritorial jurisdiction: the territorial or spatial model, and the individual or personal model. For the

[608] Milanovic (n569) 33.
[609] Milanovic (n569) 41.
[610] Oberleitner (n572) 156.
[611] Van Shaack (n571) 31.
[612] Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) European J. of Int'l L. 23, 122.

purposes of this assessment of extraterritorial jurisdiction, this section focuses on the jurisprudence of the European Court of Human Rights (ECtHR), the United Nations Human Rights Committee (UNHRC), the Inter-American Commission on Human Rights and the relevant jurisprudence of the International Court of Justice.

The spatial or territorial model of extraterritorial jurisdiction is that most supported by the jurisprudence of the European Court of Human Rights (ECtHR) and the jurisprudence of the ICJ. The individual or personal model finds its support in the jurisprudence of the UNHRC and the Inter-American Commission.

Why discuss the ECHR and the ECtHR's decisions at all, given that the U.S. is not a State Party to the ECHR and is not under its jurisdiction? As Van Shaack notes, the ECtHR's decisions have been 'highly salient' in the extraterritorial application of human rights debate, and as such its jurisprudence should be scrutinised 'in so far as it impacts and is consistent with the direction the law has moved.'[613] The ECtHR's jurisprudence also receives the most attention in the field of human rights itself.[614]

Extraterritorial jurisdiction: the territorial model

The spatial model conceives of jurisdiction as effective overall control of an area, which, as Milanovic notes, is 'undoubtedly the model with the most textual support' and that which 'fits best with the current state of jurisprudence.'[615] Yet, while the spatial model of jurisdiction is the most supported model in existing jurisprudence, it is not couched in the strictly territorial terms advocated by the United States. The most pertinent decisions of the relevant bodies relating to the spatial model of jurisdiction include, from the ECtHR, the *Lozidou*, *Cyprus v Turkey*, and *Bankovic* decisions; and, from the ICJ, the *Wall* and *Congo* decisions. As the ICJ's *Wall* and *Congo* decisions deal only briefly with the extraterritorial jurisdiction of human rights treaties, these are discussed first.

The International Court of Justice, in its decisions in the *Wall* and *Congo* cases, has stated that extraterritorial jurisdiction does exist. In the *Wall* case, the Court stated that 'The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be

[613] Van Shaack (n571) 27.
[614] Ibid 32.
[615] Milanovic (n569) 127.

exercised outside the national territory' and further stated that:

> '…the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.'[616]

The European Court of Human Rights, in its decision in *Lozidou v. Turkey*, held that:

> 'the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory. Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.'[617]

This is the 'effective control' standard, which is similarly referenced in the Court's decision in *Cyprus v. Turkey*.[618]

In the controversial and much-criticised *Bankovic* decision, the Court found that jurisdiction is primarily territorial, and that any recognition of extraterritorial jurisdiction by a Contracting State is exceptional, occurring only when:

> 'the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.'[619]

It further stated that those rights in the European Convention on Human Rights cannot be divided and tailored; that is, certain rights can't be taken into account and others ignored due to the particular circumstances of an extraterritorial act. Finally, the Court said that the

[616] *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004.
[617] *Loizidou v. Turkey*, 40/1993/435/514, Council of Europe: European Court of Human Rights, 23 February 1995.
[618] *Cyprus v. Turkey*, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001.
[619] *Bankovic v. Belgium*, 52207/99, Council of Europe: European Court of Human Rights, 12 December 2001.

Convention operates in an 'essentially regional context and notably in the legal space (espace juridique) of the Contracting States.'[620] According to the Court, the FRY 'clearly' did not fall within that legal space. As such, the Court stated:

> 'The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.'[621]

Although the Court recognised that this could lead to a 'gap or vacuum in human rights' protection', it continued that the Court had previously avoided this gap by 'establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.'[622]

In sum, the Court's decision in *Bankovic* found that extraterritorial jurisdiction exists only in those cases where a Contracting State has effective control of an area or territory to the extent that it exercises some or all of the public powers normally exercised by the Government of that area, where the Contracting State can secure the entire range of substantive rights to those within its jurisdiction, and where that area or territory is within the regional legal space 'espace juridique' of the Convention, i.e. the territories of the member states of the Council of Europe.[623] This of course would mean that extraterritorial application of the ECHR would occur only in very specific and limited circumstances.

What are the positives of the spatial model? It can be argued that it:

> 'seems to reconcile the normative demands of universality and the factual demands of effectiveness, as extraterritorial application would happen when it is realistically possible, in the circumstances of state control over territory.'[624]

Yet, as Milanovic and numerous other commentators recognise, the spatial model presents a number of problems.[625] What is an area? What is effective control? As discussed above, the U.S. adopts a strictly territorial interpretation of jurisdiction (which, when positioned alongside an exclusivist understanding of *lex specialis* during armed conflict, leaves no space for human

[620] *Cyprus v. Turkey* (n605).
[621] *Cyprus v. Turkey* (n605)
[622] Ibid.
[623] Ibid.
[624] Milanovic (n569) 128.
[625] Ibid.

rights in armed conflict beyond a state's territory, as will be discussed later).[626] Adopting a strictly spatial position means that the U.S. could harm people abroad in 'ways that would be prohibited at home' – a position that Van Schaak describes as 'untenable and perverse.'[627] Milanovic also recognises this tension, writing that a strict adherence to the spatial model:

> '…would lead to numerous morally intolerable situations – intolerable from the standpoint of universality – in which a state acts extraterritorially but the relevant human rights treaty would not apply.'[628]

This rather narrow conception of extraterritorial jurisdiction is at odds with the model propounded by the United Nations Human Rights Committee and the Inter-American Commission. It is also somewhat mitigated by the European Court's decision in *Al-Skeini*, all of which are discussed below.

The individual model of jurisdiction

The personal model of jurisdiction assesses the power or effective control of a state over an individual. A number of bodies increasingly favour this personal model, including the UN Human Rights Committee and the Inter-American Commission on Human Rights. The decisions of the European Court of Human Rights take a somewhat contradictory approach, in terms of its pre- and post-*Bankovic* decisions. Those that do apply to the U.S. – namely the ICCPR and the Inter-American Commission – consistently argue in favour of this personal or individual model of jurisdiction.

The UNHCR, which is the treaty body which deals with the ICCPR, first dealt with the issue of extraterritorial jurisdiction in the *Lopez-Burgos v. Uruguay* and in *Casariego v. Uruguay* cases. Here, the Committee found that:

> 'Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but this does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of

[626] Oberleitner (n572) 145.
[627] Van Shaack (n571) 24.
[628] Milanovic (n569) 128.

another State, whether with the acquiescence of the Government of that State or in opposition to it. According to article 5 (1) of the Covenant:

"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[629]

In General Comment No.31, the Committee stated:

'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'[630]

As such, this position:

'espouses the so-called disjunctive-conjunctive interpretation of the jurisdiction clause of Article 2(1) ICCPR… by saying that the words 'within its territory and subject to its jurisdiction' mean that ICCPR rights must be respected and ensured to all persons who may be within the state's territory *and* to all persons subject to its jurisdiction.'[631]

The Committee has explicated on this further and extended the reach of human rights treaties, when it found in *Munaf* that a State party to the ICCPR may be responsible for extraterritorial violations of the Covenant 'if it is a link in the causal chain that would make possible violations in another jurisdiction.'[632]

[629] *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).
[630] UNHRC, International Covenant on Civil and Political Rights, General Comment No.31 (29 March 2004), CCPR/C/21/Rev.1/Add. 1326.
[631] Milanovic (n569) 178.
[632] *Mohammad Munaf v. Romania*, CCPR/C/96/D/1539/2006, UN Human Rights Committee (HRC), 21 August 2009.

For the UNHCR, then, extraterritorial jurisdiction exists where a Contracting State has power or effective control over any individual, whether or not that individual is situated within the Contracting State's territory. This jurisdiction now extends even to cases in which a State is a link in the causal chain that made a Covenant violation possible, where that violation was a 'necessary and foreseeable consequence' of the Contracting State's action.[633]

The Inter-American Commission on Human Rights has likewise consistently found in favour of the personal model of extraterritorial jurisdiction, and has done so for some time. In its 2002 Report on Terrorism and Human Rights, the Commission stated:

> '…a state's human rights obligations are not dependent upon a person's nationality or presence within a particular geographic area, but rather extend to all persons subject to that state's authority and control. This basic precept in turn is based upon the fundamental premise that human rights protections are derived from the attributes of an individual's personality and by virtue of the fact that he or she is a human being, and not because he or she is the citizen of a particular state.'[634]

The Inter-American Commission first asserted this standard of 'authority and control' in the *Coard* case in 1999, and has consistently applied this standard in subsequent cases in which the issue of extraterritorial jurisdiction over an individual has been an issue.[635]

This formulation of the personal model by the UNHRC and the Inter-American Commission represents a broad form of the personal or individual model, known as the 'state-agent authority' model of extraterritorial jurisdiction. According to this model, if an agent or authority acting on behalf of the state has sufficient control or power over an individual, the state has jurisdiction over the individual in question. In applying the individual model of extraterritorial jurisdiction, the key question hinges on what 'effective control and/or 'power' over an individual amount to.

Meanwhile, the European Court of Human Rights, in both *Ocalan v. Turkey* and *Issa and others v. Turkey*, found that jurisdiction was exercised extraterritorially in situations in which Turkey did not have effective or overall control over an area. In *Ocalan v. Turkey*, the Court stated that

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[633] UNHRC (n619).

[634] Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 22 October 2002.

[635] *Coard et Al. v. United States*, Report N. 109/99 - Case 10.951, Inter-American Commission on Human Rights (IACHR) 29 September 1999.

once the applicant had been handed over to Turkish agents by the Kenyan authorities, the applicant was:

> 'under effective Turkish authority and was therefore brought within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.'[636]

In *Issa and others v. Turkey,* the Court stated that:

> [A] State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.[637]

The above positions of the ECtHR, in judgments which followed the Court's decision in *Bankovic*, therefore make the Court's approach to extraterritorial jurisdiction rather confusing. The *Al-Skeini* decision, discussed in detail below, has somewhat (but not entirely), mitigated this confusion.

The *Al-Skeini* decision: overturning *Bankovic*?

As stated above, the ECtHR's extremely narrow conception of extraterritorial jurisdiction in *Bankovic* and the subsequent confusion arising from its positions in *Ocalan v. Turkey*, and *Issa and others v. Turkey* has been mitigated (though not, as some commentators opine, completely overturned) by its 2011 decision in *Al-Skeini*. *Al-Skeini*, Wilde observes, 'appears to combine both the 'territorial' and 'individual' triggers that had hitherto been treated separately'.[638] In *Al-Skeini*, the Court found that, while jurisdiction is primarily territorial:

> 'as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its

[636] *Ocalan v. Turkey*, 46221/99, Council of Europe: European Court of Human Rights, 12 March 2003.
[637] *Issa and ors v Turkey*, 31821/96, Council of Europe: European Court of Human Rights, 16th November 2004.
[638] Ralph Wilde, 'The extraterritorial application of international human rights law on civil and political rights', in Scott Sheeran and Sir Nigel Rodley eds., *Routledge Handbook of International Human Rights Law,* (Routledge 2013) 647.

own territory.'[639]

The Court noted that in addition to the exercising of public powers discussed in *Bankovic*, or the acts of its diplomatic and consular agents in certain circumstances, 'the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction.'[640]

The Court further held:

> 'It is clear that, whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".

This of course directly contradicts, and indeed corrects, the Court's earlier decision in *Bankovic* regarding the 'dividing and tailoring' of Convention rights. The Court also dismissed the idea of 'espace juridique' as articulated in the *Bankovic* decision, stating that:

> The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a "vacuum" of protection within the "legal space of the Convention" (see Cyprus v. Turkey, cited above, § 78, and Banković and Others, cited above, § 80). However, the importance of establishing the occupying State's jurisdiction in such cases does not imply, a contrario, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States.'[641]

However, as previously noted, the Court's decision in *Al-Skeini* does not 'overturn' its earlier decision in *Bankovic*. As Cowan writes:

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[639] *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011.
[640] *Al-Skeini* (n626)
[641] Ibid.

> '…the decision leaves unanswered some key questions on the interrelationship between the effective control exception and the state agent authority exception, and the relevance of the "exercise of public powers" in relation to those exceptions.'[642]

Nor does *Al-Skeini* provide the clarity, so badly needed, as to when exactly the ECHR applies extraterritorially.

A third model of extraterritorial jurisdiction?

As has been detailed above, both models of jurisdiction are somewhat lacking and, if taken alone, either allow for States' to act abroad in ways which they would not be able to at home, or for jurisdiction to be extended to cover almost any act performed by a State overseas. To correct this, Milanovic proposes a third model of extraterritorial jurisdiction, which is entirely sensible, practical, and practicable.[643] Described by Heyns et al as 'a normatively desirable and principled basis for holding states to account' in situations such as those examined here, this model melds, to an extent, the territorial model and the individual model.[644] Milanovic's model proposes that the notion of jurisdiction in human rights treaties 'would be conceived of only territorially, as de facto effective overall control of areas and places.'[645] This threshold would apply 'only to the state's obligation to secure or ensure human rights, but not to its obligation to respect human rights, which would be territorially unbound.'[646]

In this model, where a State has effective overall control over a territory, it would be obligated to respect and *ensure* the rights of those within that territory. Where the agents of a State have control over an individual only, and not territory, it is not obligated to ensure rights which it is not in a position to guarantee (e.g. right to a fair trial), but it is obligated to respect those rights which it can affect – for example, in the case of targeted killing, the right to life.[647]

In this model, the distinction rests on *positive* and *negative* obligations. The State does not have

[642] Anna Cowan, 'A New Watershed? Re-evaluating Banković in Light of Al-Skeini'(2012) Cambridge J. of Int'l and Comparative L. 225.
[643] Milanovic (n569) 209.
[644] Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta, 'The International Law Framework Regulating the Use of Armed Drones' (2016) ICLQ 825.
[645] Milanovic (n569) 210.
[646] Ibid.
[647] Ibid.

a *positive* obligation to *ensure* the right to life of the individual in question if it does not have effective control over the territory in which the individual is situated. Rather, it has a *negative* obligation to ensure that it does not affect the individual's right to life by killing her or him arbitrarily, and an obligation to investigate its own agents if the individual's right to life is affected. Milanovic explains that he is not 'advocating a strict separation between negative and positive obligations':

> 'Rather, I am arguing for a separation between those positive obligations which require control over territory in order to be effective, such as the obligation to prevent inhuman treatment or secure human rights generally even from third parties, and those obligations whose effectiveness depends only on the state's control over its own agents.'[648]

He further clarifies:

> '…for example, in the context of the right to life, the state has the negative obligation not to take life unjustifiably, but also the positive obligation to conduct an independent and effective investigation into a possible taking of life by its own agents…'[649]

Milanovic discusses the *Al-Skeini* case to illustrate how this model works:

> 'Assume, for the sake of the argument, that even though the killings took place in British-occupied Basra, because of the strength of the insurgency Basra could not be qualified as an area under the UK's effective overall control, and was hence outside its jurisdiction. Even so, in my view, the UK would still have not only the negative obligation to refrain from depriving the five applicants of life unjustifiably, but would also have the positive procedural obligation to conduct an effective investigation into their killing. Its existence depends solely on the UK's own involvement in the killing, and in order to comply with it the UK need not do anything more than investigate the conduct of its own troops, which it is in principle perfectly able to do.'[650]

He also applies the model to *Bankovic*:

> '…on the facts of *Bankovic*, the respondent states should have been asked by the Court

[648] Milanovic (n569) 215-216.
[649] Ibid 216.
[650] Ibid 218.

> to justify on the merits their killing of individuals who were not within their jurisdiction territorially conceived, as the killing implicates the states' negative obligation to which some positive obligations may attach… though in my view the correct result in *Bankovic* would probably have been that the killings were unlawful, it is far from obvious that this should have been the case. The respondent states would have a case to answer, but they would also have something to answer the case with.'[651]

Milanovic finds support for this model through textual interpretation of the relevant treaties and in customary international law. Regarding customary international law, as Droege writes, it is 'uncontroversial' that the prohibition on the arbitrary deprivation of life forms part of customary international law, as 'respect for customary human rights is not a matter of extraterritorial application, because outside of treaty application clauses, respect for human rights has never been territorially confined.'[652] Similarly, Heyns et al write that:

> 'In its customary form, at least the negative obligation not arbitrarily to deprive someone of their life appears not to be limited to application within a State's territory. Indeed, the Universal Declaration of Human Rights does not contain a limitation clause on its geographical application and simply states that '[e]veryone has the right to life'.[653]

As already stated, this model makes sense, providing us with:

> 'the best balance between universality and effectiveness with regard to the extraterritorial application of human rights treaties. Instead of being artificially limited, universality is brought to its logical (and moral) conclusion. States would have the same obligation to respect human rights both within and outside their territories. Whether they use drones for the targeted killings of suspected terrorists, use force in more conventional military operations…states would still have to abide by the restrictions that human rights law places on the arbitrary exercise of their power, and do so regardless of territorial boundaries. When, however, states are expected to do more than just refrain from adversely affecting the lives of others, when they need to take positive steps, from preventing domestic violence and safeguarding private property to

[651] Ibid.
[652] Cordula Droege, 'Elective affinities? Human Rights and humanitarian law' (2008) Int'l Review of the Red Cross 90 (2008) 520.
[653] Heyns et al (n631) 823.

> protecting lawful public assemblies and the free exercise of religion, they cannot fulfil such obligations effectively without having the tools to do so. Such obligations should, therefore, be territorially limited to areas and places under the state's jurisdiction.'[654]

Clearly, in the case of targeted killing, this model makes immediate sense. The current formulation of the state-agent authority or individual model of extraterritorial application, while at first glance seemingly applicable to such cases, is less convincing under examination given that the state-agent authority model privileges *physical* control or power over an individual as creating a jurisdictional link – something that is lacking in those targeted killings carried out by drones which are under examination here. However, under Milanovic's model, where a State such as the U.S. had carried out a targeted killing by drone in another State in a non-armed conflict scenario, and where this operation had killed a person or persons, the United States would 1) have the negative obligation to ensure it had not deprived this person or persons of their right to life unjustifiably and arbitrarily and 2) the positive obligation to conduct an effective investigation into the killing or killings.

Despite the jurisprudence of the ECtHR, perhaps the most important of the international human rights treaty bodies, providing little clarity as to when exactly the Convention applies extraterritorially, extraterritorial jurisdiction is certainly experiencing 'a progressive unhinging of international human rights obligations from territoriality'.[655] Furthermore, those human rights treaty bodies of which the United States is a member – namely, the ICCPR and the American Convention – have consistently applied a broad interpretation of extraterritorial jurisdiction based on the state-agent authority model. The tide of extraterritorial jurisdiction thus pulls heavily against the United States' unsupported position that human rights do not apply extraterritorially, and it can be asserted that where the United States targets an individual or individuals outside the nexus of an armed conflict, it has a duty to respect the right to life of the individuals in question and, at the very least, the negative obligation not to arbitrarily deprive those individuals of their right to life.

[654] Milanovic (n569) 219.
[655] Oberleitner (n572) 165.

The application of international human rights law in armed conflict

It has now been established that international human rights law applies extraterritorially, where a State has effective overall control over a territory and where a State's agents have power or control over an individual. It is now also widely accepted that international human rights law continues to apply during times of armed conflict. However, and again, akin to the extraterritoriality of human rights law issues, the primary question regarding the relationship between international human rights law and international humanitarian law today is not whether international human rights law applies, but *how* and *to what extent* it applies.

While Milanovic notes that co-applying international human rights law with the law of armed conflict aims to further humanise international humanitarian law,[656] Verdirame contends that, aside from any moral argument, it is also recommendable by virtue of practicality:

> 'international human rights law benefits from an enforcement machinery that, for all its faults and limits, is still much better developed than what international humanitarian law offers. Victims, and their lawyers, often have no alternative to articulating their cases in human rights term…'[657]

As such, international courts have avoided dismissing such cases outright, and have instead preferred to broaden the scope of human rights.[658]

The issues surrounding international human rights law and the 'war on terror' are well-documented, as are the dangers of the increasing number of States applying an armed conflict, rather than a law-enforcement lens, to their uses of force abroad. Lubell succinctly sums up the dangers, well demonstrated with the targeted killing problem, of allowing international humanitarian law to become the dominant international law paradigm in the use of force :

> 'Accepting the complete dominance of IHL…combined with the possibility of existing interpretations of the threshold of armed conflict and determinations of individual status, risks creating situations in which it would be too easy for states to claim that

[656] Marko Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' in *Human Rights and International Humanitarian Law, Collected Courses of the Academy of European Law* Vol.XIX/1, Orna Ben-Naftali (ed., Oxford University Press 2010). Available at SSRN: https://ssrn.com/abstract=1531596. Accessed 17 December 2018.
[657] Guglielmo Verdirame, 'Human rights in wartime: a framework for analysis' (2008*)* European Human Rights L. Rev. 691.
[658] Ibid.

> individuals are not protected civilians and that they are part of an armed conflict, and can therefore be targeted with a shoot-to-kill approach.'[659]

As with the extraterritoriality of international human rights law in peacetime, the United States has consistently denied that international human rights law applies during armed conflict, and to the targeted killing programme, which it says operates as part of their non-international armed conflict with al-Qaeda and affiliated forces.[660] While it is true that there are some targeted killings in an active theatre of war to which international humanitarian law obviously applies, and where recourse to international human rights law will likely be unnecessary - for example, those targeted killings which take place in Afghanistan - for the vast majority of targeted killings, the interaction between international humanitarian law and human rights law is of extreme importance.

International human rights law and international humanitarian law: Interpreting '*lex specialis*'

As established in Chapter One, the primary body of law which applies in armed conflicts, both of an international and non-international character, is international humanitarian law. During armed conflict, international humanitarian law is considered *lex specialis*. The International Court of Justice first expressed its position regarding the relationship between international humanitarian law and international human rights law in its *Nuclear Weapons* advisory opinion in 1996. The Court stated:

> '…the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of

[659] Lubell (n591) 243.
[660] See U.S. Department of Justice (n2).

> the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.'[661]

The Court's position in the *Nuclear Weapons* opinion was taken by some to mean that international humanitarian law, as *lex specialis*, completely replaced international human rights law in armed conflict. However, the Court further clarified its stance regarding the application of international human rights law in armed conflict in its judgment in *The Wall,* when it found:

> '…the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.'[662]

The Court again noted this position in its judgment in *DRC v Uganda*.[663] However, the phrase '*lex specialis*' is open to some interpretation. Prior to the growing influence and codification of international human rights law, it was often held that international humanitarian law was the primary, and only, body of law applicable during times of armed conflict, displacing human rights law completely and unequivocally. This position still finds some support today, though supporters of this position are increasingly few and far between.[664] The most common interpretation, and the one that the majority of commentators, courts and treaty bodies support, is that while international humanitarian law retains its primacy during armed conflict, international human rights law is not displaced completely in armed conflict. Instead, international human rights law continues to apply, but with derogation to international humanitarian law. As such, international humanitarian law and international human rights law

[661] *Legality of the Threat or Use of Nuclear Weapons* (n123)
[662] *Legality of the Threat or Use of Nuclear Weapons* (n123).
[663] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J. Reports 2005, p.168, International Court of Justice (ICJ) 19 December 2005.
[664] See, for example, Michael J. Dennis and Andre M. Surena, 'Application of the International Covenant on Civil and Political Rights in times of armed conflict and military occupation: the gap between legal theory and state practice' (2008) European Human Rights L. Rev.

have a complementary relationship in armed conflict, with the *lex specialis* principle drawing upon the 'natural complementarity' of IHL and IHRL 'in an attempt to interpret and apply the two legal regimes in a manner which renders them mutually reinforcing.'[665]

As the right to life is the right most relevant to the discussion on targeted killing, the next section examines the right to life and its application during armed conflict.

The issues and intricacies of concurrent applicability: applying the right to life in armed conflict situations

This section addresses the complex issue of how international human rights law is applied in times of armed conflict, specifically regarding the right to life. The right to life is considered the 'supreme' and most fundamental of all human rights.[666] Protected under Article 6 (1) of the ICCPR, Article 2 (2) of the ECHR, Article 4 (1) of the American Convention of Human Rights and Article 4 of the African Charter on Human and People's Rights, the right to life is also considered customary law. Three of these treaties – the ICCPR, the ACHR and the ACHPR - state that no person may be '"arbitrarily" deprived of life without further explanation.'[667] The ECHR, as Doswald Beck notes, gives us further guidance, providing three provisions under which the deprivation of life shall not be regarded as inflicted in contravention of the Convention.[668] The right to life is also non-derogable under all four of these treaties, though the European Convention 'does make an exception for "deaths resulting from lawful acts of war."'[669] To date, however, no State Party to the Convention which has been before the European Court has used this exception.[670] Given its status as customary law, the right to life creates obligations for all states, regardless of whether they are a party to any of the aforementioned treaties.[671] The fact that provisions for derogation in times of public emergency and armed conflict exist in human rights instruments also highlights that non-derogable human rights continue to apply in armed conflict – 'absent derogation, human rights

[665] Sean Aughey and Aurel Sari, 'Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence' (2015) Int'l L. Stud. 112.
[666] UN Human Rights Committee, ICCPR General Comment No.6: Article 6 (Right to Life), 30 April 1982, http://www.refworld.org/docid/45388400a.html. Accessed 17 December 2018.
[667] Louise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?' (2006) *Int'l Rev. of the Red Cross* 864, 883.
[668] Ibid.
[669] Ibid.
[670] Ibid.
[671] Lubell (n591) 170.

obligations as a general rule continue to apply in times of armed conflict.'[672] According to Heyns, 'this applies even more so to the right to life…'[673]

Article 6 (1) of the ICCPR is most relevant to this discussion on the right to life in armed conflict, as the United States is, like the vast majority of states, a party to the ICCPR. It states:

> 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'[674]

As the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* note, non-violent means should be used, as far as possible, before force or firearms are used in a law-enforcement operation.[675] This is the well-established international human rights law principle of use of force as a last resort. When attempting, for example, to prevent an individual from committing a crime, non-violent means must be the first option employed; force should always be at the minimum level possible if force is used, and lethal force should only be used when strictly unavoidable.[676] Any force used must also be necessary and proportionate, with intentional force 'used only where strictly necessary to protect against an imminent threat to life.'.[677]

The concepts of necessity and proportionality in international human rights law are starkly different to those concepts in international humanitarian law. In international human rights law, necessity means 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…'[678]

While proportionality means that:

> 'for the use of lethal force to be considered a proportionate measure, its objective should be the prevention of a real threat to life, and outside the preservation of life, lethal force is likely to be disproportionate.'[679]

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[672] UNHRC (n542).
[673] Ibid.
[674] UN General Assembly (n592) Article 6.
[675] United Nations Human Rights Office of the High Commissioner, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (07 September 1990).
[676] Lubell (n591) 238.
[677] UNHRC (n658).
[678] Lubell (n591) 173.
[679] Lubell (n591) 173.

The ECthR, in *McCann and others v. United Kingdom*, 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'.[680]

The concept of imminence in terms of the *jus ad bellum* under the law of international self-defence was discussed at some length in the previous chapter. Like the concepts of proportionality and necessity, the human rights concept of imminence is very different from its counterpart found in the international law on the use of inter-state force. Despite their difference in meaning, the U.S. has consistently conflated the two concepts.

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.'[681] This imminence requirement is distinct from the concept of imminence required for the use of force by a State in pre-emptive or anticipatory self-defence.[682] 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.

It may seem paradoxical to discuss a right to life in armed conflict, given that an integral part of international humanitarian law is the ability to kill an individual based on their status and the use of force as a first resort, whereas killing is antithetical to the idea of human rights':

> 'A universal right to life simply does not exist in IHL; indeed the entire body of law is based on its rejection because IHL assumes that killing in warfare can be regulated by distinguishing between lawful and unlawful targets.'[683]

While international human rights law 'confers rights and fundamental freedoms on every person without distinction and discrimination, the level of protection offered by the law of armed conflict to an individual depends on his or her status.'[684] The primary purpose of IHL is

[680] *McCann And Others v. UK* (App.No. 18984/91); [1995] ECHR 18984/91.
[681] Heller (n214) 115.
[682] UNHRC (n148).
[683] Jens David Ohlin, 'The Duty to Capture' (2013) *Minnesota L. Rev.* 97, 1316.
[684] Aughey and Sari (n652) 91.

not, in fact, humanitarian – rather, it has the joint purpose of regulating warfare and balancing humanitarian considerations with military necessity.[685]

As such, it is necessary to provide a translation of concepts before one body of law can begin to understand the other. This is particularly true for the human rights concepts of necessity and proportionality, which, as mentioned already, are vastly different to the concepts of military necessity and proportionality expressed in international humanitarian law. Regarding military necessity, 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.'[686]

Military necessity is an unknown entity and a wildly alien concept to 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.'[687]

Regarding the law of armed conflict concept of proportionality, how can the destruction of property or life be deemed allowable because it is proportionate to the goal achieved? For human rights law - a system of law that places its greatest value on the life of the individual - it is surely anathema to accept that the law of armed conflict allows the individual's right to life to become subordinate to the collective, and subordinate to the aims of a State – those very entities which are obliged to protect human rights.

The targeting rules in each body of law are also at odds. In international humanitarian law, in an international armed conflict, two categories of person are targetable: combatants, at all times, unless they have surrendered or are hors de combat, and civilians directly participating in hostilities. In a non-international armed conflict, those members of an organised armed group who hold a continuous combat function, and civilians directly participating in hostilities, may

[685] Ibid.
[686] Verdirame (n644) 704.
[687] Ohlin (n670) 1316.

be targeted. As has previously been established, no other category of person – such as that of the 'unprivileged belligerent' or 'unlawful combatant' - exists. Any of these categories of individual can be targeted with lethal force as a first option, and not only as a last resort. This applies whether or not the threat from the individual is considered imminent. Persons who are not considered targetable are those who are *hors de combat*, and civilians.

In international human rights law, persons are not categorised according to their function. Each individual has the right to life, and the right not to be arbitrarily deprived of one's life, except in certain specific and strict instances, in which the resort to force should be a last resort, any force used must be the necessary amount of force used for the aim in question and should be proportionate. The death of the individual should never be the ultimate aim.

How then does the idea of international humanitarian law as *lex specialis* in armed conflict guide us in applying the right to life, particularly where individuals are targetable under very different strictures than those in international human rights law? As the ICJ stated in *Nuclear Weapons*, whether a particular loss of life is to be considered an arbitrary deprivation of life contrary to Article 6 of the ICCPR should be determined with reference to the applicable law.[688] In the case of armed conflict, then, international humanitarian law shapes the meaning of 'arbitrary' – any use of force that kills or injures an individual and that abides by the rules of international humanitarian law will not be considered an arbitrary deprivation of life. Alston, the former Special Rapporteur, confirmed this in his 2010 report to the UNHCR:

> '…whether a particular killing is legal is determined by the applicable *lex specialis*… To the extent that IHL does not provide a rule, or the rule is unclear and its meaning cannot be ascertained from the guidance offered by IHL principles, it is appropriate to draw guidance from human rights law.'[689]

As such, Murray asserts that 'in situations of armed conflict, deprivations of life consistent with the law of armed conflict will not be considered arbitrary'.[690] Those killings which are contrary to international humanitarian law – i.e. those deaths which are not militarily necessary or proportionate in the international humanitarian law sense, and any killing of civilians outside of those civilians directly participating in hostilities at the time they are targeted - will be considered as arbitrary deprivations of life under international human rights law.

[688] *Legality of the Threat or Use of Nuclear Weapons* (n123).
[689] UNHRC (n148).
[690] Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press 2016) 119.

International human rights law thus fills any lacunae in the application of international humanitarian law during armed conflict scenarios.[691]

However, according to some commentators, the situation is not quite so clear cut, particularly in a non-international armed conflict scenario. Milanovic contends that there may be situations in which a killing considered lawful under international humanitarian law is considered unlawful under international human rights law, and that in certain instances, the international human rights law standards should be upheld and applied:

> 'A bolder approach to the joint application of IHL and IHRL would ask whether there are killings which *do* comply with IHL but are *still* arbitrary in terms of IHRL. Can, in other words, IHRL during armed conflict impose *additional* requirements for the lawfulness of a killing to those of IHL? And can these requirements, while more stringent than those of IHL, still be somewhat less stringent than those set out in human rights jurisprudence developed in and for times of normalcy, and if so when and how? I think all these questions can be answered with a cautious 'yes.'[692]

The approach that international human rights law can impose additional requirements regarding the lawfulness of a killing is most relevant to the discussion on whether or not there exists a duty to attempt the capture of an individual before an attempt to kill him or her is made in a non-international armed conflict scenario. As discussed, in international human rights law the use of force must be a last resort, force should only be used where absolutely necessary, the use of force must be proportionate, and death should never be the intended outcome of a law enforcement operation. A duty to capture therefore exists under international human rights law. In a situation in which international human rights law only applies – that is, in a law enforcement operation occurring outside an armed conflict – it is 'uncontestably' the case that a duty to capture exists.

There are a variety of views to be found here regarding a duty to capture in an NIAC. Support for the existence of such a duty can be found in, for example, the ICRC's direct guidance on direct participation in hostilities, and in the Israeli High Court's *Targeted Killings* judgment,

[691] Though, as Elizabeth Wicks observes, international humanitarian law and international criminal law, rather than international human rights law, may be more likely to provide effective protection for the right to life in this context than international human rights law, particularly given that international criminal law allows for the prosecution of responsible individuals, and not solely States, as is the case in international human rights law. Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford University Press 2010) 100.

[692] Marko Milanovic, 'When to kill and when to capture?' (*EJILTalk* 06 May 2011), http://www.ejiltalk.org/when-to-kill-and-when-to-capture/, accessed 17 December 2018.

and is further supported by Milanovic and Droege. Others, including Ohlin, strongly resist suggestions that a duty to capture should exist in the context of NIACs and targeted killings. As Milanovic notes, such assessments are heavily fact-based. He has also noted that international humanitarian law is 'still a discipline about killing people, if in a civilized sort of way'.[693] Therefore, while it is certainly preferable for a State to attempt the capture of an individual where feasible, rather than kill that individual, the creation of a duty to do so in an armed conflict scenario, while plausible, is likely to be resisted by States.

Targeted killing and international human rights law

International human rights law applies to all law enforcement operations which occur outside the nexus of an armed conflict. As noted by Alston, the 'law enforcement' model does not apply only to police forces or only in times of peace – it also includes a 'State's military and security forces, operating in contexts where violence exists, but falls short of the threshold for armed conflict.'[694] Under scenarios which are governed solely by the international human rights law framework, the very idea of a 'targeted killing' operation is in and of itself illegal, as 'the specific goal of the operation is to use lethal force'.[695] Therefore, in most circumstances governed by the international human rights law framework, 'targeted killings violate the right to life.'[696] A state killing is, therefore, legal *only* if it is 'required to protect life… and there is no other means… of preventing that threat to life…'[697] If any other individuals are harmed or killed during such an operation, the right to life of those individuals will have been violated.

It has now been established that for a killing to be lawful under international human rights law, it must a) have been a last resort; b) force used must have been in response to an imminent threat to life and in pursuit of a legitimate aim; c) force used must have been that absolutely necessary to respond to the threat in question; and d) the force used must have been proportionate. Where this killing takes place extraterritorially, the use of force must have a) been consented to by the State within whose territory force is used; or b) have been carried out in self-defence.

[693] Milanovic (n643) 4.
[694] UNHRC (n148).
[695] Ibid.
[696] UNHRC (n148).
[697] Ibid.

As stated, the very idea of 'targeted killing' is in and of itself unlawful. However, where an individual presents an imminent danger to the lives of others, he or she may be targeted. As such, a personality strike against a known individual who presents an imminent danger to others will not be unlawful, so long as no other less harmful means are available to those involved in the planning and execution of the operation, in order to stop the threat. The lawfulness of every targeted killing is case-dependent, and questions as to why that individual could not have been captured or otherwise incapacitated before there was a lethal resort to force should be asked in every instance.

Given the prerequisites around lawful uses of force, human rights law strictures may lead us to conclude that all signature strikes are illegal under international human rights law. However, Heller finds that three signatures which are lawful or possibly lawful under IHL could also be lawful under IHRL: strikes that target individuals planning an attack; strikes targeting individuals handling explosives; and strikes which target individuals transporting weapons. According to Heller, each of these signatures could satisfy the proportionality requirement of IHRL, so long as the United States had evidence that the attack which these actions were related to involved a human target.[698] Whether they satisfy the principle of necessity, however, is a more complex issue. The legality of any action utilising any of these signatures will rely largely on the definition of imminence used. As Heller asks:

> 'At what point should we conclude that a planned attack was so imminent that the United States could not have reasonably pursued non-lethal means of preventing it, such as attempting to apprehend the suspects or at least warning them that they would be attacked unless they turned themselves in?'[699]

The United States erroneous conflation of imminence has already been mentioned. According to the U.S., the imminence of an attack depends on:

> 'considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attack.'[700]

[698] Heller (n214) 115.
[699] Heller (n214) 115
[700] Ibid.

Such a construction of imminence is alarmingly over-broad. Yet, 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, in the case of the three signatures mentioned above, the targets of such a strike:

> '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.'[701]

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.'[702]

The U.S. consistently justifies targeted killings by maintaining that every strike is conducted against an individual who poses an imminent threat.[703] 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.'[704]

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

[701] Ibid 116.
[702] UNHRC (n148).
[703] U.S. Department of Justice (n2).
[704] U.S. Department of Justice (n2).

> 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.'[705]

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*. As such, the U.S. stands accused of mangling the law.[706]

This is also the situation with regards to the United States' assurance that the 2013 Presidential Policy Guidance, which does not apply to 'areas of active hostilities' (such as Syria, Iraq and Afghanistan), 'generally requires an assessment that capture of the targeted individual is not feasible at the time of the operation.'[707] The U.S. has decided that, as a matter of policy and not of law, it will make an assessment as to whether the capture of an individual is feasible before it decides to kill that individual. The U.S. of course cannot detail every instance in which capture is not feasible, but the Obama administration has stated the following:

> '…terrorists are skilled at seeking remote, inhospitable terrain, places where the United States and our partners simply do not have the ability to arrest or capture them. At other times, our forces might have the ability to attempt capture, but only by putting the lives of our personnel at too great a risk. Often times, attempting capture could subject civilians to unacceptable risks. There are many reasons why capture might not be feasible, in which case lethal force might be the only remaining option to address the threat and prevent the attack.'[708]

It appears from this statement that there are likely very few cases in which capture would be considered feasible, making force the first, rather than last resort, in cases where the danger presented by a targeted individual or group of individuals is not at all 'imminent'.

The issue of state consent for the targeting killing is also one that is often in flux. While consent has been given to the U.S. by Pakistan, Somalia and Yemen, Pakistan's consent was then

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[705] Ibid.
[706] Stuart Casey-Maslen, *Weapons Under International Human Rights Law* (Cambridge University Press 2014) 390.
[707] U.S. Department of State (n439).
[708] John O. Brennan, 'The Efficacy and Ethics of U.S. Counterterrorism Strategy' (The Wilson Center, 30 April 2012) https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy, accessed 17 December 2018.

withdrawn, and while the consent of Yemen and Somalia continues, 'the authority of those governments might call the validity of that consent into question.'[709] Brian Egan, the former State Department Legal Adviser, has noted that:

> '…the concept of consent can pose challenges in a world in which governments are rapidly changing, or have lost control of significant parts of their territory, or have shown no desire to address the threat... In particular, there will be cases in which…it is necessary to act in self-defense against the non-State actor in that State's territory without the territorial State's consent.'[710]

Again, while the United States can use force in the territory of another state without that state's prior consent, in response to an actual imminent threat, the use of force must still be consistent with the applicable legal framework.

Rather than the '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.[711] In this way, the U.S. has purposely confused the applicable legal frameworks. While purporting to respect 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'.[712]

Conclusion

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 it is international human rights law, and not the law of armed conflict, which applies to many of the drone strikes in the targeted

[709] Heyns et al (n631) 797.
[710] U.S. Department of State (n437).
[711] Jameel Jaffer, *The Drone Memos: Targeted Killing, Secrecy and the Law* (The New Press 2016) 7.
[712] Jaffer (n698) 7.

killing programme, even as the U.S. continues to deny international human rights law's extraterritorial application and its complementary application with the law of armed conflict.

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.'[713] And what is this a symbol of, other thank *Kriegsraison*? The political expedience and hyperbole of *Kriegsraison* is demonstrated in the actions and words of the U.S. in relation to its position on the extraterritoriality of international human rights law and its application in armed conflict. Despite the widely accepted positions that international human rights law applies extraterritorially, and continues to do so during armed conflict, the U.S. continues to actively resist this stance 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.

The preceding legal analyses clarify the legality of the targeting killing programme, but it leaves two important questions unanswered, namely: why does the United States engage in such unlawful conduct, and how has it come to hold such contentious positions on international law and in the waging of war? The next chapter seeks to answer these questions through an examination of the place of war in U.S. history and national identity, and the domestic approach to Presidential war powers and international law.

Chapter Five: The American Approach to National Security: War, Law, and National Identity

'We're an empire now, and when we act, we create our own reality.'[714]

Previous chapters have shown how the United States has contravened and manipulated international humanitarian law, international human rights law, and the international law on the use of force in the pursuit of the war on terror, and in particular through the targeted killing

[713] Ibid.

[714] Senior Aide to President George W. Bush, quoted in Ron Suskind, 'Faith, Certainty, and the Presidency of George W. Bush' (*The New York Times*, 17 October 2004) https://www.nytimes.com/2004/10/17/magazine/faith-certainty-and-the-presidency-of-george-w-bush.html, accessed 17 December 2018.

programme. International law has long been a prized instrument in the United States' imperial toolkit, but giving full attention only to those legal elements relevant to the targeted killing programme, and the reintroduction of the *Kriegsraison* doctrine, would entail a failure to consider the framework, within which the conditions that make the targeted killing programme possible, are systematically reproduced.[715] It would also profoundly depoliticize both.[716] As Marks writes, the issue of causation has always had a place in discussions of internationally protected human rights, and in the legal context, causation is particularly relevant to the determination of state responsibility for failure to comply with obligations.[717] However, focusing on whether or not an actor can or should be held responsible for a legal wrong 'does not address the question of why that wrong occurred, how it relates to other wrongs, or what its enabling conditions were.'[718] When 'the systemic context of abuses and vulnerabilities' are 'removed from view', attempts to explain human rights violations make them seem 'random, accidental or arbitrary':

> 'And if human rights violations are random, accidental or arbitrary, then the prospects of putting them to an end become as remote as though they belonged to the order of nature.'[719]

As such, giving attention only to the legal aspects of the targeted killing programme and its violations of international human rights and international humanitarian law allows the United States to describe such violations using the language of 'accidents' and 'tragic mistakes' earlier described. Moreover, as Chimni argues, 'the foreign policy of a state is integrally linked to its domestic policy.'[720] An assessment of the legal reasoning of the U.S., absent an examination of the domestic realities that inform this reasoning, is 'both too abstract and too specific' to deal with the problem of targeted killing and America's predilection for *Kriegsraison*:

> 'Legal argument frames its participants as abstract, self-contained individuals; as such it treats their actions, rather than the reasons for these actions, as decisive… these actions become relevant only in as much as they form the content of a dispute of abstract

[715] Susan Marks, 'Human Rights and Root Causes' (2011) *Modern Law Review* 74 (1) 71.
[716] Robert Knox, 'Marxist Approaches to International Law' in *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 321.
[717]Marks (n702) 60.
[718] Ibid.
[719] Ibid 75.
[720] B.S. Chimni, 'Marxism and International Law: A Contemporary Analysis' (1999) *Economic & Political Weekly* 34 (6) 337.

> individuals without ever touching on the logics which shape and condition their actions, and in this sense it is too abstract.[721]

Furthermore, while legal argument can resolve specific violations of international law, 'it never questions the general structural logics that lurk beneath them, and so cannot fully eradicate the problems it addresses.'[722] This chapter attempts to understand more fully the general structural logic behind the United States' targeted killing programme, to understand why the *Kriegsraison* doctrine has found its modern expression in U.S. practices today, and to understand why the United States has such an ambivalent relationship with public international law. I aim to do so through an exploration of the influence of war and war-making on American national identity, with a particular focus on the place of war in *The Federalist Papers*; an examination of the centrality of law in U.S. society; an analysis of the war powers of the Executive Branch; and an enquiry into how U.S. presidents use their substantial executive power to influence international law creation and interpretation. *The Federalist Papers* are specifically examined here as they provide a compelling insight into the centrality of war and security in the creation of the modern American state, and in American national life, particularly as *The Federalist Papers* continue to influence readings of the U.S. Constitution in the present.

War and American national identity

War is not merely a shadow hanging over the United States of America; it is 'the substance of American history', argues historian Marilyn B. Young.[723] Michael Sherry writes that America is 'a nation deeply wedded to and defined by war, though maddeningly reluctant to admit it.'[724] War constitutes American history 'as much as race, class, gender, religion, capitalism…'; it is the 'engine' of the American state and the 'prototype' for much of the state's actions.[725] War, argues Sherry – 'gearing up for it, waging it, imagining many things in terms of it - is what the nation does'.[726] 'The seeds of the United States were sown in conflict', writes Haas, 'from the Battle of Lexington in 1775 to the ongoing war in Afghanistan and Syria, military conflict

[721] Robert Knox, 'Marxism, International Law, and Political Strategy (2009) *Leiden Journal of International Law* 22 (3) 430.
[722] Ibid 431.
[723] Marilyn B. Young, '"I was thinking, as I often do these days, of war": The United States in the Twenty-First Century' (2012) *Diplomatic History* 36 (1) 1.
[724] Michael Sherry, 'War as a way of life' (2018) *Modern American History* 1 (1) 95.
[725] Sherry (n711) 93.
[726] Ibid 95.

reliably marks the time in U.S. history.'[727] Or, as Roxanne Dunbar-Ortiz puts it, 'The United States has been at war every day since its founding, often covertly and often in several parts of the world at once.'[728]

A national preoccupation with matters of war and security was in evidence during the creation of the U.S. Constitution, and can be traced even further back in history than this. The early colonists and their communities perpetuated and experienced extreme violence, and 'the likelihood of violent consequences was never far from their minds.'[729] For example, historians write that there were striking parallels between the earlier occupation of Ireland and the occupation of North America,[730] and for approximately a century, from 1650 to about 1750, 'the English colonists in North America found themselves re-enacting on a small scale the horrors of Irish pacification and the Thirty Years War.'[731]

The American colonies experienced warfare 'less in terms of protection, of somehow insulating society against external violence…than in terms of retribution, of retaliating against violence already committed.'[732] This perception has stayed the course of American history. In his history of American identity and the Vietnam War, Appy describes the 'single potent assumption' upon which stories of American victimhood are based: '*our* innocence and *their* treachery':

> '…virtually every U.S. war to follow [the colonisation of America] was justified as a righteous response to a real or imagined first strike by non-Americans – from the Boston Massacre (1770), to the siege of the Alamo (1836), to the sinking of the *Maine* (1898) and the *Lusitania* (1915), to the attack on Pearl Harbor (1941), to the Gulf of Tonkin incident (1964)… The standard story featured an unprovoked attack followed by glorious victory. Temporary victimhood was quickly forgotten in the glow of righteous retribution.'[733]

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[727] Peter Haas, 'Does It Even Work? A Theoretical and Practical Evaluation of the War Powers Resolution' (2017) *Congress & the Presidency* 44 (2) 235.
[728] Dunbar-Ortiz, Roxanne (2018), 'What White Supremacists Know' (*The Boston Review*, 20 November 2018), <http://bostonreview.net/race/roxanne-dunbar-ortiz-what-white-supremacists-know>, accessed 02 December 2018.
[729] John Shy, 'The American Military Experience: History and Learning' (1971) *The Journal of Interdisciplinary History* 1 (2) 212.
[730] Natsu Taylor Saito, *Meeting the Enemy: American Exceptionalism and International Law* (New York University Press 2010) 58.
[731] Shy (n716) 213.
[732] Ibid.
[733] Christian G. Appy, *American Reckoning: The Vietnam War and Our National Identity* (Viking 2015) 228.

Similarly, writing on the aftermath of 9/11, Sherry refers to 'a belief that had long undergirded America's militarization':

> 'whatever military system it had, its leaders presented it as forced on them by enemies—not America's choice, not America's doing, not done in the pursuit of power or in blind rage but in the interest of protection.'[734]

With the advent in the 1700s of the long period of war between England and France, joined by Spain, the seventeenth-century military experience of the English colonists was intensified and perpetuated.[735] These European wars had consequences for America's English colonists, and left them 'puzzled and frustrated'. Eventually:

> 'Strong but highly vulnerable, angered and frightened by repeated and ruthless attack, bewildered by the causes of war, disrupted by its effects, and powerless to prevent it, articulate English colonists by the end of the seventeenth century were making extreme proposals for the solutions of their military problem. Nothing would do…but the complete elimination of French and Spanish power from North America; anything less, it was claimed by those who purported to speak for America, was worse than useless, because it would create a false sense of security.'[736]

Such 'fantastic' calls became commonplace, and by 1760 there already existed a 'classic American demand for a definitive military solution'.[737] These early experiences continue to have an important impact on the American approach to national security, and its perception and treatment of the *jus ad bellum* and *jus in bello*. As is discussed later, the framers of the U.S. constitution, for example, were heavily preoccupied with questions of national security and defence. The possibility of an internal war between the confederation of states themselves, and the threat of external hostility from foreign nations, was of great concern. As such, security has been one of the overarching and primary concerns in American national and political life since before the creation of the modern Constitution and was one of the most influential factors in its creation.

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[734] Michael Sherry, 'American Wars, Barely Visible to Americans', *Books & Ideas* (30 March 2015), http://www.booksandideas.net/American-Wars-Barely-Visible-to-Americans.html, accessed 17 December 2018.
[735] Shy (n716) 214.
[736] Ibid.
[737] Ibid.

America's military experiences in its first two centuries were formative, and in 'a political, if not a physical sense', military survival was a significant issue.[738]

The issue of the military survival of the state itself was an issue until after the War of 1812, whereupon the U.S. entered 'an age of free security'.[739] For a century, America 'enjoyed, and was conscious of enjoying, a remarkable freedom from external military threat.'[740] By this time, certain attitudes toward security and war had been 'implanted and powerfully reinforced.'[741] A deep respect for military prowess, a 'concept of military security that was expressed not in relative but in absolute terms', and 'an extraordinary optimism' about what could be achieved by the employment of American military force, were foremost amongst such beliefs.[742] Accompanying these convictions was a belief that 'military security was an absolute value'. This belief continued to grow when little occurred to disabuse the U.S. of the notion, cumulating with a faith that American society had been 'granted' military security, 'presumably deserved it, and ought to be able to keep it.'[743] The idea that the U.S. deserved absolute military security only reinforced further 'the typically American belief that nothing less than a complete solution was required to solve the problem of American military security.'[744] Both convictions continue to hold sway in American culture, and exert a considerable influence on U.S. war-making, just as they did in the nineteenth century.

Even while America lived through its 'age of free security', it did experience conflict. The Civil War is, of course, a defining conflict in U.S. history, but it is the other wars – the Mexican War, the Spanish-American war, and many small wars against indigenous tribes, which Shy argues are most relevant to the American military experience.[745] For the United States, each of these wars had a number of essential features in common, with the causes of each attributable to 'atrocious behaviour by the enemy'. Although 'enemy atrocities were by no means the only or even the main causes of these wars, and in all of them Americans themselves flagrantly broke the rules of civilized warfare…':

> '…the main point is that was very easy for Americans to explain and justify the outbreak of war in terms of the criminal conduct of an inhuman, perhaps degenerate,

[738] Shy (n716) 210.
[739] Ibid.
[740] Ibid 211.
[741] Ibid 216.
[742] Ibid.
[743] Ibid.
[744] Ibid 215.
[745] Ibid 217.

> foe. And once Americans had been attacked and killed, whether they were a few Western farmers or fur traders, a detachment of soldiers on the Rio Grande, or sailors on a battleship in Havana harbor, other arguments about the causes and objectives of war came to seem irrelevant.'[746]

Victory in these wars, and the resulting gains in American territory and control, were seen as 'the natural rewards of superior virtue and military skills.'[747] Later, America's experiences during both World Wars reified these 'historically implanted attitudes and beliefs', as:

> 'delayed entry… followed by fairly uninterrupted progress towards victory, made it possible…for American's to overlook the extent to which France, Britain, and Russia had worn down German strength, and instead to believe that the United States had really won the war.'[748]

Writing in 1971, Shy contended that the United States, with its 'absolute or dichotomous conception of security', believes that 'it is secure, or it is not; it is threatened, or it is not.'[749] Throughout American history, this absolute conception of security has markedly been expressed as absolute *insecurity* – as has been highlighted by President Donald Trump's exhortation in his statement of support for Saudi Arabia in November 2018 that 'the world is a very dangerous place!'[750]

This national identity, built on a permanent sense of insecurity and coupled with 'a fundamental self-confidence in the ability to fight',[751] contributes to what Marilyn B. Young identifies as a 'genuinely mad' conviction:

> '…that American power is such that it must prevail in any situation in which it has declared an interest; that the only obstacle to its triumph is the lack of determination to use that power.'[752]

The events of 9/11, and the subsequent War on Terror, confirm that the United States continues to maintain the same absolute conception of security, and a confidence in its military abilities,

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[746] Shy (n716) 217.
[747] Ibid 218.
[748] Ibid 221.
[749] Ibid 225.
[750] The White House (n19).
[751] Shy (n716) 221.
[752] Marilyn B. Young, 'Bombing Civilians from the Twentieth to the Twenty-First Centuries' in *Bombing Civilians: A Twentieth Century History*, Yuki Tanaka and Marilyn B. Young (eds., The New Press 2010) 167.

despite the fact that while the United States may excel at war, it no longer excels at winning it.[753] Calls from successive U.S. presidents advocating for the complete eradication of terrorism and terrorist threats against the U.S. invoke the same fantastical and absolutist approach to national security, and making such rhetoric compatible with international law seems near impossible.

American security in *The Federalist Papers*

As has been noted, concerns around America's security pre-date the Constitution, and abounded during its creation. While the "Founding Fathers" 'certainly considered other motives when devising the new government', 'one of if not their primary purpose for the Constitution was the survival of the states…'.[754]

The Founders presented the federal union as 'the explicit solution to the problems of dwarfdom and vulnerability that had so afflicted previous republics':[755]

> 'This union attempted to combine executive capability with mechanisms of popular accountability for a grouping of polities that were not city-states but rather as large and thus potentially powerful as a European nation-state, and that together would be as large as a Montesquieuean continental despotic empire. Their goal was nothing less than to transform the general prospects for free government by breaking the impasse of previous republics.'[756]

The 'provision of security through restraint on violence' was therefore one of the Framers' primary goals, with security an overarching issue at the Philadelphian Constitutional Convention in 1787.[757] Totten explains that a common theme which emerged from speeches made at the Philadelphia Constitution Convention included the argument that:

> '…constitutional reform was necessary to create a central government that could "draw forth the wealth and strength of the whole, for the defence of a part", referring to how

[753] Sherry (n711) 96.
[754] Robbie J. Totten, 'Security, Two Diplomacies, and the Formation of the U.S. Constitution: Review, Interpretation, and New Directions for the Study of the Early American Period' (2012), Diplomatic History 36 (1) 110.
[755] Daniel Deudney, *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton University Press 2007) 162.
[756] Ibid.
[757] Ibid 163.

> the Constitution allowed for a federal authority to pool the resources of the union to protect its part from foreign powers.'[758]

The first formal speech at the Convention, by Edmund Randolph, a representative for Virginia (who would later become the first United States Attorney General), criticised the existing Confederation for producing 'no security against foreign invasion', and its inability to 'check the quarrels between states, nor a rebellion in any'.[759] Randolph believed that uniting the States under the Constitution would make 'our means of defence…greater… and the danger of attack less probable.'[760] Future Chief Justice of the Supreme Court, John Marshall, also representing Virginia, argued that the objects of the national government would be 'to protect the United States… Protection in time of war is one of its principal objects.'[761] And, as Totten recounts:

> 'Well-known founders such as Fisher Ames, Bowdoin, Francis Dana, Ellsworth, Madison, John Marshall, Randolph, Roger Sherman, and Wilson, as well as many lesser-known leaders such as James Innes, Thomas McKean, and Thomas Thacher, repeatedly explained that the states would fall to foreign powers without stronger union under the new government.'[762]

James Wilson, 'considered the second "father" of the Constitution', asserted that the adoption of the Constitution would secure the States 'from danger and procure us advantages from foreign nations', elaborating that:

> '…this, in our situation, is of great consequence. We are still an inviting object to one European power at least, and, if we cannot defend ourselves, the temptation may become too alluring to be resisted.'[763]

Meanwhile, Madison argued that federal authority was a necessity, because without a 'controuling [*sic*] power to call forth the strength of the Union to repel invasions, the country might be over-run and conquered by foreign enemies.' [764]

More explicit articulations of the primacy of security concerns to the drafting of the Constitution are to be found in *The Federalist Papers* (hereafter the *Papers*), which proffer the

[758] Totten (n741) 108.
[759] Bruce D. Porter, *War and the Rise of the State: The Military Foundations of Modern Politics* (The Free Press 1994) 642.
[760] Totten (n741) 108.
[761] Ibid.
[762] Ibid 107-108.
[763] Totten (n741) 108.
[764] Ibid.

opinions of three of the "Founding Fathers" on the necessity of ratifying the new Constitution. In October 1787, Alexander Hamilton, John Jay, and James Madison, together under the pseudonym 'Publius', wrote the *Papers*, which are 'often considered the primary explanation of the Constitution.'[765] As Deudney explains, 'Publius' analyses the political theory of the American founding as 'a new solution to the severe security problems that had animated Republican security theory from its ancient inception.'[766]

Consisting of eighty-five essays, the *Papers* refer to 'security' 116 times, and 'war' and 'wars' 79 times. Numbers 1-9, as well as 22-29 and 41-43, 'concentrate entirely' on security issues, ranging from defence against external enemies to the roles of the militia, army and navy.[767] Reflecting the same preoccupation with the need for national unity and concerns regarding war and defence as had been heard in the Constitutional Convention in Philadelphia, Publius repeatedly argues that the adoption of the new Constitution is necessary to ensure the security of the union. The threat of hostility is not considered to emanate solely from foreign nations; addressing the danger of internal conflict between members of the Union is a priority:

> 'America, if not connected at all, or only by the feeble tie of a simple league…would by the operation of such opposite and jarring alliances be gradually entangled in all the pernicious labyrinths of European politics and wars; and by the destructive contentions of the parts, into which she was divided would be likely to become a prey to the artifices and machinations of powers equally the enemies of them all.'[768]

But it is hostile behaviour emanating from foreign nations that concerns Publius most in the first articles of the *Papers*. In Federalist 3, Publius, in this instance John Jay, argues that 'a cordial Union, under an efficient national government, affords… the best security that can be devised against HOSTILITIES from abroad', and further writes that 'one good national government affords vastly more security against dangers of that sort [war] than can be derived from any other quarter.'[769] The 'people of America', it is argued:

> 'are aware that inducements to war may arise… and that whenever such inducements may find fit time and opportunity for operation, pretenses to color and justify them will

[765] Totten (n741) 101.
[766] Deudney (n742) 162.
[767] Porter (n746) 643.
[768] *Federalist No. 7*, referenced in Totten (n741) 101.
[769] *Federalist No. 3*. Emphasis in original. Available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers.

> not be wanting. Wisely, therefore, do they consider union and a good national government as necessary to put and keep them in SUCH A SITUATION as, instead of INVITING war, will tend to repress and discourage it. That situation consists in the best possible state of defense, and necessarily depends on the government, the arms, and the resources of the country.'[770]

In Federalist 41, Publius (James Madison) writes that 'Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union.'[771] While it is argued in Federalist 3 that a national government, being 'more temperate and cool', would also be better at accommodating and settling amicably any likely cause of war, proceeding as it would with more 'moderation and candour', this coolness and moderation is lacking in those essays of the *Papers* which further elaborate on war, and the war powers granted to the respective branches of the federal government of the United States in the new constitution.[772] In Federalist 4, Publius writes that 'nations in general will make war whenever they have a prospect of getting anything by it',[773] which, as Levinson notes, presents an 'almost Hobbesian vision of the international political system'.[774] A similar vision is propounded in Federalist 31:

> 'To judge from the history of mankind, we shall be compelled to conclude that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and beneficent sentiments of peace; and that to model our political systems upon speculations of lasting tranquillity, is to calculate on the weaker springs of the human character.'[775]

Twice in the *Papers*, Publius makes dismissive reference to 'parchment barriers' and 'parchment provisions', and the prior-noted statements on war and foreign nations lead Levinson to posit that Publius:

> '…may have viewed treaties with other nations as what he would describe in a later essay as "parchment barriers," to be breached whenever it was thought

[770] *Federalist No. 4.* Available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers.
[771] Ibid.
[772] *Federalist No.3* (n756).
[773] *Federalist No.4* (n757).
[774] Sanford Levinson (2015), *An Argument Open to All: Reading The Federalist in the Twenty-First Century* (Yale University Press) 24.
[775] *Federalist No.31.* Available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers.

> advantageous to do so. Peace – and protection of vital American interests – required strength, which he believed could come only through union.'[776]

That Publius may have viewed treaties with other nations as mere 'parchment barriers' when vital American interests were at stake is compelling. On numerous occasions throughout the *Papers*, Publius writes on matters of defence in terms often starkly reminiscent of *Kriegsraison*. The following quote, penned by Alexander Hamilton and titled 'The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union' (Federalist 23) reminds us again of the centrality of security to America:

> 'These powers (the ability to raise and support armies and navies and to establish rules to govern them) ought to exist without limitation, BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed…
>
> This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the MEANS ought to be proportioned to the END; the persons, from whose agency the attainment of any END is expected, ought to possess the MEANS by which it is to be attained' (capitals in original).[777]

The above quote, as Levinson remarks, still holds the power to startle.[778] Later remarks by Publius (in this case, James Madison) support the above argument, and specifically invoke self-preservation:

> 'With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety.

[776] Levinson (n761) 21.
[777] *Federalist No. 23.* Available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers; Levinson (n761) 85.
[778] Levinson (n761) 85.

> How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules, and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions. If one nation maintains constantly a disciplined army, ready for the service of ambition or revenge, it obliges the most pacific nations who may be within the reach of its enterprises to take corresponding precautions.'[779]

Self-preservation is referenced in similar terms again in Federalist 43. Publius (Madison again), writing further on the powers of the Constitution, argues that Constitutional ratification was required from only nine of the thirteen states of the Confederation because 'To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member.' In answering the self-posed question 'On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it?', Publius writes:

> 'The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.'[780]

It is clear that the repetition of arguments of necessity and self-preservation 'underscores the fact that there was nothing remotely inadvertent about such appeals.'[781] As has been shown in previous chapters, similar appeals to 'necessity' are often made in alleged service to the security of the state today. We 'simply cannot escape the extent to which the drums of war provide the background accompaniment to most of Publius's arguments for adoption of the

[779] *Federalist No. 41* (n758).

[780] *Federalist No. 43*. Available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers; Levinson notes that the relevant quote features the only reference to God in any of the 85 essays of *The Federalist Papers*. Levinson (n761) 162.

[781] Levinson (n761) 162.

new U.S. Constitution.'[782] Nor can we escape the sound of those drums, which continue to reverberate through American political life some 230 years later.

The Founders' security concerns were enshrined within the Constitution. The Preamble to the Constitution explains that the Constitution will 'provide for the common defense', and in Article IV section 4 guarantees 'to every States in this Union a Republic form of Government' which will 'protect each of them against Invasion.'[783] Porter notes that 'of the eighteen clauses defining the powers of Congress, nine directly concern military affairs'.[784] The *Papers* continue to exert considerable influence on constitutional interpretation and wider American political life. Wood argues that this is because America's "Founding Fathers" continue to have a 'special significance' for Americans, a significance that is often linked to the relative youthfulness of the United States and its founding 'on a set of beliefs, and not...on a common ethnicity, language or religion.'[785] As a result, in order to establish their nationhood, Americans 'have to reaffirm and reinforce periodically the values of the men who declared independence from Great Britain and framed the Constitution.'[786] 'As long as the Republic endures', says Wood, 'Americans are destined to look back to its founding.'[787] Writing on the influence of the *Papers* on the Supreme Court, Durchslag posits that:

> 'citing "the Framers" generally and The Federalist Papers particularly is the secular equivalent to citing the Bible. It is an appeal to a higher and more revered authority. It not only establishes an ethos of objectivity but the perception of infallibility.'[788]

Of course, the Declaration of Independence and the "Founding Fathers" do not hold the same appeal for all peoples, and the idea that there existed 'one American people', though fatuous, was oft-repeated.[789] In Federalist 2, Publius wrote that:

> 'Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their

[782] Ibid 124.
[783] U.S. Constitution Article IV, Section 4.
[784] Porter (n746) 642.
[785] Gordon Wood, *Revolutionary Characters: What Made the Founders Different* (The Penguin Press 2006) 4.
[786] Ibid.
[787] Ibid.
[788] Melvyn R .Durchslag, 'The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?'(2005) *William & Mary Bill of Rights Journal* 14 (1) 315.
[789] Levinson (n761) 13.

> manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.'[790]

That the United States, even in 1787, consisted of 'one united people', with the same language and the same religious beliefs, is obviously erroneous. Levinson points out that even among the British settlers, 'there were remarkable variations of background.'[791] Statements alluding to 'one connected country' and 'one united people' are quite telling as to whom the "Founding Fathers" considered as American, and telling as to the racial, ethnic, and religious identities of the "Founding Fathers" themselves. Commenting on the 'myth of American unity' today, the author and journalist Ta-Nehisi Coates notes that 'American unity has always been the unity of the conquistadors and colonizers.'[792] Indeed, the character of the American revolution was not one in which the revolutionaries aimed to liberate themselves and wrest their identity away from a coloniser; rather, it was one in which the revolutionaries 'were asserting their superior rights *as* colonizers, claiming to be better representatives of the civilization being brought to the New World and denouncing Britain for treating them as colonial subjects rather than actors.'[793]

In any case, the increasing racial, ethnic, and religious diversity of the United States made it 'ever less feasible to base American nationalism on nationality.'[794] After the War of Independence, American society was as fractured as it had ever been, and, argues McDonnell, the Constitution and other national institutions were created through 'a sheer act of will' by a 'small group of elites' – the "Founding Fathers" – to foster amongst the wider public a national identity that, at that point in time, was non-existent.[795] Indeed, McDonnell determines that the Constitution was ratified 'not on the basis of a new and popular national identity forged in the revolutionary war, but despite an anti-national legacy, and in a critical sense, because of it.'[796] The republican beliefs upon which the United States was founded grew to become a 'very

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[790] *Federalist No.2*. Available at: https://www.congress.gov/resources/display/content/The+Federalist+Papers.
[791] Levinson (n761) 13.
[792] Ta-Nehisi Coates, 'I'm not black, I'm Kanye', *The Atlantic* (07 May 2018) <https://www.theatlantic.com/entertainment/archive/2018/05/im-not-black-im-kanye/559763/> accessed 07 May 2018.
[793] Taylor Saito (n717) 71.
[794] Porter (n746) 626.
[795] Michael McDonnell, 'National Identity and the American War for Independence Reconsidered' (2001) *Australasian Journal of American Studies* 20 (1) 11.
[796] Ibid 13.

developed and self-conscious republican political ideological tradition', and a central indicator of American identity:[797]

> 'Americans first and foremost thought of themselves as 'free' and 'virtuous'. At a time when individual freedom, political democracy, and social egalitarianism were rare and widely perceived to be precarious, this fundamental liberalism of the American people was both a potent and distinguishing basis of political identity.'[798]

Of course, these republican beliefs and values were altogether inconsistent with 'the United States' disparate treatment of those deemed Other.'[799] 'Freedom' and 'Liberty' did not apply to subjugated Native Americans and black slaves. Whiteness was a key element in determining eligibility for consideration as an American and of citizenship, and, at that, ideally that whiteness came of British or North-western European descent.[800]

'In many ways', writes Appy, 'the nation was founded on the faith that it was blessed with unrivalled resources, freedoms, and prospects', and these convictions become so deeply held and so deeply engrained in the American psyche that they were 'beyond debate.'[801]

Yet, even today, the idea that American citizens are 'freer' than those of other countries remains strong, and as Deudney and Vaswani have noted, the notion that the American regime and the American people are exceptional in their commitment to 'freedom' remains vibrant in American popular discourse:[802]

> 'According to this line of thought, the United States has been, through most of its history, sufficiently extraordinary in its 'liberalism' (in the broad sense of individual liberty, popular sovereignty, private property and limited constitutional government) to be not just different, but 'exceptional'.[803]

In an oxymoronic manner, another phenomenon has served to further support the confidence of many Americans in their republican values – war. As has already been discussed, war and

[797] Daniel Deudney and Sunil Vaswani, 'First in Freedom: War-Making, American Liberal International Identity and the Liberty Gradient', in Gunther Hellmann and Knud Erik Jørgenson (eds.) *Theorizing Foreign Policy in a Globalized World* (Palgrave Macmillan 2015) 232.
[798] Deudney (n742) 171.
[799] Taylor Saito (n717) 77.
[800] Taylor Saito (n717) 77.
[801] Appy (n720) XIV.
[802] Deudney and Vaswani (n784) 223.
[803] Ibid.

security were central in the development of America's political system, 'shaping the institutions of American government and stimulating its growth.'[804] Not only were these concerns extremely pertinent in the creation of the Constitution, but war and conflict, for example, also led to the 'first central administrative organs of American government came into being' during the War of Independence, while the Civil War invigorated and strengthened a previously much weaker Federal Government.[805] War was similarly important in the creation of American national identity. As has been mentioned, the Constitution itself came of a desire for security and attempts to solidify American identity after the War of Independence, while World War II is said to have given 'unprecedented salience to the ideological dimension: for 'a whole generation, the question "what does it mean to be an American?" was answered primarily by reference to "the values America stands for"…'[806]

With its many and disparate ethnic, racial and religious groups, war became a cultural and political touchstone for American society, with 'the collective efforts entailed in waging war' becoming 'one of the most important factors in shaping America's consciousness of itself as a unified nation':[807]

> 'War for America was "a factor as important as geography, immigration, the growth of business, the separation of powers…" War served as an engine of nationalism, a socializing and integrating force that united Americans of diverse origins in common efforts both on the battlefield and the home front. Every constitutional extension of the suffrage in American history – the 15th, 19th, and 26th Amendments – was enacted during or in the immediate aftermath of war.'[808]

As Young has posited, the United States has been involved in war to the point that America's 'progression' of wars looks 'less like a progression than a continuation…';[809] Dudziak observes that war is embedded in American culture to the point that it is a feature of everyday life;[810] Sherry argues that war has become both a habit and a way of life for the United States.[811] The set of founding beliefs integral to American mythos, the 'American creed' of 'freedom,

[804] Porter (n746) 642.
[805] Ibid.
[806] Philip Gleason, 'Americans All: World War II and the Shaping of American Identity' (1981) *The Review of Politics* 43 (4) 511.
[807] Porter (n746) 642.
[808] Ibid.
[809] Young (n710) 1.
[810] Mary L. Dudziak, 'Death and the War Power' (2017) *Yale Journal of Law and the Humanities* 30 (1) 32.
[811] Sherry (n710) 96.

equality, justice and humanity',[812] combined with America's militancy and its dichotomous approach to military security, have led to a conception of national identity in which we find 'two quite different representations of U.S. identity – one which is characterized by universalism and one which is characterized by particularism.'[813] 'The global military supremacy that the United States presently enjoys – and is bent on perpetuating – has become central to our national identity', writes Bacevich.[814]

On the one hand, the U.S. is a bastion of liberal, republican values. On the other, despite these values being considered universal, the U.S. is exceptional in the 'freedom' it embodies. It is widely accepted that military force should be used to protect this 'freedom'. Both these representations are usually deployed together, coalescing to create a representation of America as a powerful sovereign state, exceptional in its embodiment of universal values.[815] An inherent tension exists within such representations, explains Lock:

> 'The pursuit of military pre-eminence and the unconstrained use of force against existential threats is inconsistent with the construction of international rules and norms that might regulate international society and therefore require restraint on the part of the members of that society.'[816]

Yet American war-making has 'strengthened rather than weakened American national identity as liberal and democratic.'[817] Conflicts in which America has been involved are:

> 'explicitly constructed, interpreted and justified by leaders and viewed by large segments of the American public as wars to establish, expand or preserve free institutions against adversaries who were less liberal or anti-liberal.'[818]

Even the Vietnam War, which saw the creation of one of the largest ever American protest movements and which triggered the questioning of core assumptions about American identity by many, failed to have a substantial long-term effect on American war-making. Writes Appy:

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[812] Ed Lock, 'The Complex Fate of Being America: The constitution of Identity and the politics of security', in *United States Foreign Policy and National Identity in the 21st Century*, Kenneth Christie (ed., Routledge 2008) 70.
[813] Ibid 72.
[814] Andrew J. Bacevich, *The New American Militarism: How Americans are Seduced by War* (Oxford University Press 2005) 1.
[815] Lock (n799) 74.
[816] Ibid 81.
[817] Deudney and Vaswani (n784) 240.
[818] Ibid.

> 'The war divided every significant class, group, and category of Americans. There were bitter debates about the war within both major political parties, all the military branches, every religious denomination, every race and region, every school, every union and professional organization, the young and the old, the rich and the poor… It was no longer possible to see America as inevitably victorious and invincible; no longer possible for a vast majority of citizens to regard their nation as the greatest on earth or a clear force for good in the world.'[819]

Yet, any lessons learned in Vietnam did not stick.[820] Instead, an idea of the Vietnam war as an *American* tragedy 'that victimized our troops, our pride, our national identity' was reinforced: 'the destruction of Vietnam was supplanted by American suffering.'[821] An effort to rebuild American pride began under President Ronald Reagan – an effort that 'required some serious scrubbing of the historical record.'[822]Appy observes that while 'few Americans still believed their country had been "forced" to fight in Vietnam', Reagan 'certainly tapped a widespread desire to recover a faith in national virtue and resolve.'[823] Meanwhile, post-Vietnam nationalism contains striking similarities to the nationalism seen in the U.S. today:

> 'Post-Vietnam nationalism contained a deep animus toward "big government." By that, most people meant the immense, federal, civilian "bureaucracy." According to the most strident New Right critics, the government was a faceless bastion of waste, incompetence, and oppressive rule-mongering that was stripping the nation of the kind of virtues on display in Top Gun and The A-Team. Yet their critique carefully excluded the government's most significant institution – the military. The military could still be heroic, along with "anti-government" political leaders like President Reagan.'[824]

The United States' 'genuinely mad' conviction that 'the only obstacle to its triumph is the lack of determination to use that power' was certainly in evidence in the years after Vietnam, when the political right argued that the U.S. had lost the war 'only because soldiers had been "denied permission to win."'[825] Similarly, much as the Bush administration dismissed the Geneva

[819] Appy (n720) 216.
[820] Ibid 217.
[821] Appy (n720) 249.
[822] Ibid 285.
[823] Appy (n720) 286.
[824] Ibid 273.
[825] Ibid 247.

Conventions as 'obsolete',[826] President Trump argues today that giving the military 'total authorization' has made a 'tremendous difference' to the conflict in Afghanistan.[827]

Paradoxically, there is a strong history of considerable resistance to a robust centralised state in the U.S. One of the central attributes of this resistance had long been situated in hostility to standing armies. Indeed, as a standing army involved 'both high taxes and the threat of royal tyranny', this hostility was 'a central motivation for the American revolt against Britain'.[828] The 'Founding Father's saw standing armies as 'antithetical to liberty'.[829] James Madison, a staunch supporter of a centralised state, argued at the 1787 Philadelphian Constitutional Convention that 'a standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defence against foreign danger, have been always the instruments of tyranny at home.'[830] Bacevich observes that this did not mean that, in practice, Americans 'were given to pacifism. If anything, the reverse was true.' Prior to the creation of Truman's National Security Act (NSA) of 1947, which led to a major restructuring of the U.S. government's military and intelligence branches, the U.S supplemented its small, standing army by resorting to conscription. It did so to fight three wars – the Civil War, WWI and WWII – but, as Lieven notes, 'each time, victory was followed by very rapid demobilization.'[831]

The substantial standing army in existence today, along with the United States' enormous defence budget of some $695 billion dollars (more than the next seven countries combined)[832] comes as a result of Cold War foreign and defence policy and is entirely without precedent in American history. With the inauguration of the 1947 NSA and 1950's National Security Council document number 68 (NSC-68), which 'established the parameters and rationale for post-war United States foreign policy'[833], the growth of military spending and the 'military-

[826] Julian Borger (2004), 'Bush names new Attorney General' (*The Guardian*, 11 November 2004) https://www.theguardian.com/world/2004/nov/11/usa.julianborger, accessed 17 December 2018.
[827] Leo Shane, 'Trump: I'm giving the military "total authorization"' (*Military Times*, 13 April 2017) https://www.militarytimes.com/news/pentagon-congress/2017/04/13/trump-i-m-giving-the-military-total-authorization/.
[828] Lieven, Anatol, *America Right or Wrong: An Anatomy of American Nationalism* (Oxford University Press 2012) 165.
[829] Bacevich, Andrew, *American Empire: The Realities and Consequences of U.S. Diplomacy* (Harvard University Press 2002) 122. Resistance to a strong, centralised remains a feature of American life today, as exemplified by numerous groups and communities around the country, such as the sovereign citizens movement. See Southern Poverty Law Centre (2018), 'The Sovereign Files' (Southern Poverty Law Centre, 01 October 2018), <https://www.splcenter.org/hatewatch/2018/10/01/sovereign-files-october-1-2018>, accessed 02 December 2018.
[830] Yale Law School, The Avalon Project – Madison Debates, June 29. http://avalon.law.yale.edu/18th_century/debates_629.asp, accessed 12 December 2018.
[831] Lieven (n815) 165.
[832] The Peter G. Peterson Foundation (n18).
[833] Campbell, David, *Writing Security: United States Foreign Policy and the Politics of Identity* (University of Minnesota Press 1998) 23. Campbell notes that NSC-68 has also been described as a 'secular hymn to American values' (p.138).

industrial-academic sector' became 'fundamental to the U.S. economy, U.S. economic growth, and above all, U.S. technological development.'[834]

That the republican, liberal identity that associates American 'freedom' with war-making persists, despite the fact that, since the Cold War, war-making has strengthened the centralised American state and the Executive Branch, and weakened 'various forms of popular and individual liberty',[835] is attributed to 'the historical fact that there existed a strong 'liberty gradient' between the United States and its principle military adversaries', in terms of their systems of government:[836]

> '…that the United States was 'first in freedom', historically precocious in its adaptation of liberal-democratic forms, means that its inter-state rivalries and wars inherently were more likely to be against non-liberal and anti-liberal states. In short, because it was an 'early liberalizer', the process of nation and state-building in international war-making strengthened rather than weakened liberal-democratic political identity in America.'[837]

After the Cold War, demobilisation did not occur. Instead, the military retained the central position in U.S. national life that it occupies today. Bacevich identifies four premises that have steered U.S. military policy since the end of the Cold War: '…a broad (if unratified) consensus regarding the inherent desirability of military power; a commitment to maintaining U.S. global military supremacy in perpetuity; and support for maximising the utility of U.S. military might by pursuing an ambitious, activist agenda', as well as the maintenance of the international order, 'thereby enabling the processes of globalization to continue and the American people to reap its rewards.'[838]

This national identity, which is strongly informed by a belief in valorous war-making for the furthering of 'fundamental freedoms', combined with the militarisation of U.S. society and the United States' approach to military security, has had a profound impact on America's relationship with its domestic war powers and international law.

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[834] Lieven (n815) 165.
[835] Deudney and Vaswani (n784) 233.
[836] Ibid 240.
[837] Deudney and Vaswani (n784) bid 230.
[838] Bacevich (n816) 128.

A nation of war, a nation of law

The United States is not only a country built on war, but a country built on law.[839] It has been stated that law is 'the central instrument of the self-constituting of American society.'[840] Scott argues that it is due to the 'centrality of law in the US psyche and in the conduct of its foreign relations' that the U.S. often defends legally dubious actions 'with contrived legal justifications that lose sight of the spirit, if not the letter, of the relevant law.'[841] In other words, the legalistic nature of the U.S. domestic sphere extends into its international relations and foreign policy. Because the U.S. believes itself to be a protector and defender of those universal values which it claims to embody, it refuses to perceive of itself as a violator of international law and attempts to tailor international law to fit its policy positions, rather than the other way around. 'State identity shapes states interests which in turn shape policy over time', and the tensions in American national identity – that of being an exceptional state which embodies universal values and therefore must be protected – come to the fore in America's relationship with international law.[842] The U.S. has long presented itself as a champion of international institutions and international law, but tends to engage with international law only to the extent that it believes the law will maintain or further U.S. security. Scott argues that 'the nature of US engagement with international law has contributed to the relative power of the United States',[843] and that America's relationship with international law is the 'pursuit of legal security'.[844] Where international law impedes or frustrates U.S. action, the U.S. tends to either ignore it and act anyway, as in the case of President Trump's strikes in Syria against the Syrian government, or attempts to reconcile its unlawful positions with international law through the use of legalistic language, *á la* the targeted killing programme.

This has been the case since the foundation of the United States. The 'Founding Fathers' attempted to secure the United States from external threats 'by gaining recognition from the European powers of its independence and rights under international law.'[845] As such, 'the early American Republic embraced…the law of nations as a means of consolidating the sovereignty

[839] Shirley V. Scott, *International Law, US Power: The United States Quest for Legal Security* (Cambridge University Press 2012) 9.
[840] Ibid.
[841] Ibid 11.
[842] Mlada Bukovansky, 'American Identity and Neutral Rights from Independence to the War of 1812' (1997) International Organization 51 (2) 210.
[843] Scott (n826) 16.
[844] Ibid 17.
[845] Deudney (n742) 167.

of its people and securing its place among an international society of sovereign states.'[846] It was also a strong supporter of the institutions of international society, as they afforded the U.S. 'some relief from European predation.'[847] However, in invoking the law of nations, the 'Founding Fathers' were also immediately coming into conflict with that law. At that time, there was no right of self-determination under international law and colonies did not have a right to rebel, and it was therefore not possible to base their claims for independence in legal terms.[848] Furthermore:

> 'the international law they invoked…explicitly privileged the rights of colonizing powers over Indigenous peoples, and in asserting a legal right to rebel under these conditions the colonial leaders certainly were not prepared to recognize a similar right of American Indians to self-determination.'[849]

Notably, one of the grounds on which the revolutionaries claimed a right of self-determination was by proffering the accusation that the British monarch's actions 'were leaving them unprotected against "the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes, and conditions."'[850] The United States, then, has been creating exceptions to the application of international law to itself on the grounds of security since its creation. Indeed, 'its very existence represented an American exception to the prevailing structures of international legal theory, rationalized by the American claim to more fully represent the principles of freedom and democracy within a "higher" and universally applicable law', with identification as a "government of laws, not of men" central to American claims to legitimacy.[851] The Declaration of Independence itself, argues Taylor Saito, is a declaration of the existence of 'an unprecedented entity':

> '…a settler colonial state claiming that it should be recognized as a member of the hitherto exclusively European community of "civilized" nations because it represented a more evolved, "progressive" phase of Western civilization. To justify this expansion of the prevailing European paradigm, and its radical divergence from international law

[846] Jason G. Ralph, 'Republic, Empire or Good International Citizen? International law and American identity', in *United States Foreign Policy and National Identity in the 21st Century*, Kenneth Christie (ed.; Routledge 2008) 85.
[847] Deudney (n742) 167.
[848] Taylor Saito (n717) 71.
[849] Ibid.
[850] Taylor Saito (n717) 71.
[851] Ibid 75.

> as then framed, the American leaders called upon a "higher" law, a natural law that recognized freedom, equality and democracy as inherent rights.'[852]

At the domestic level, the concept of "rule of law":

> 'permeates the Constitution from its initial recognition of "We the People" to its explicit creation of a government of limited power, its complex system of checks and balances, and its specification of "the supreme Law of the land.'[853]

The 'Founding Fathers' were especially concerned with the conception of America as a 'government of laws', as a legal framework helped to further legitimise 'their claims for dominion over lands and peoples, for law was essential to distinguishing civilization from a "state of nature".[854] This, too, necessarily involved the embrace of international law to further the legitimacy and equality of the United States of America with other members of the 'community of "civilized nations"'.[855]

On many fronts, as discussed in previous chapters, the U.S. no longer embraces international law. Ralph puts forward the argument that perhaps this is so because of a fundamental mismatch between the United States' republican values and the universalism of human rights:

> '…as international society has evolved to include all human beings as rights-bearing citizens and as it considers delegating judicial authority to supranational courts in order to protect those rights, the match between republican and international principles has come under threat.'[856]

Both Deudney and Ralph assert that this behaviour can partially be explained by America's conception of itself not just as a self-governing republic, but as a self-governing republic that exemplifies universal, liberal values. For Ralph, the tensions inherent in U.S. interactions with international law can be understood:

> 'if one considers that the United States is founded on the universalist principles of natural law while simultaneously claiming to be a self-governing Republic with no

[852] Ibid 76.
[853] Ibid 82.
[854] Ibid.
[855] Ibid 83.
[856] Ralph (n833) 85.

international obligations other than those the representatives of the American people accept on their behalf.'[857]

Ralph illustrates this point with reference to the United States' approach to the ICC, and a discussion of the U.S. Alien Tort Statute and the *Filártiga* decision. Objections to the ICC, he says, arise from U.S. politicians who believe that the Court is not accountable to democratically elected politicians, and is therefore open to abuse.[858] Noting that supporters of the Court have pointed out that the Prosecutor can be checked by pre-trial judges and that all Court officials are accountable to the Assembly of State Parties, he writes:

> 'This is no consolation for American opponents of the Court whose main concerns is not checks and balances *per se*, but those specific checks and balances that hold prosecutors to account *before the American people*. In this respect, the issue of American opposition to the ICC is not a different conception of accountability but a different conception of the community that politicians, prosecutors and judges are accountable to.'[859]

With regard to the jurisdiction issue, in which the ICC asserts its jurisdiction over those American citizens who are accused of committing crimes on the territory of ICC state parties, the Bush administration, and subsequent U.S. administrations, have regarded this as 'a threat to U.S. sovereignty and thus to U.S. constitutional democracy.'[860] This reminds us that while the U.S. may claim to share the Court's values, 'US opposition to the ICC reminds us that the American Revolution was as much about asserting the independence of a particular community as it was about that community being governed by the rule of universal law.'[861] The American Revolution was not, after all, 'a war of rebellion by one ethnic or religious group against domination by another. Rather, this struggle was understood by Americans to be about the defence of their traditional rights as Englishmen.'[862]

Regarding customary international law, the *Filártiga* decision concerned Dolly Filártiga, a resident of the U.S. who had sued Norberto Peña-Irala, the former Inspector General of Police in Asuncion, for her brother's torture and murder. Both were Paraguayan citizens and the

[857] Ibid 91.
[858] Ibid 94.
[859] Ibid.
[860] Ibid.
[861] Ralph (n843) 93.
[862] Deudney and Vaswani (n784) 234.

alleged crime had occurred in Paraguay. Peña-Irala had been arrested in the U.S. for being an illegal alien, and Filártiga, hearing of his arrest, sued him in the United States. The Second Court of Appeals found in favour of Filártiga, overturning an earlier decision by the court for the Eastern District of New York, which had dismissed the case. The Appeals Court found that in §1350 of the 1789 Judiciary Act, known as the Alien Tort Statute (ATS), the first Congress had 'established District Court jurisdiction over "all causes where an alien sues for a tort only (committed) in violation of the law of nations."'[863] The Court of Appeals stated:

> 'Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates *universally accepted norms of the international law of human rights*, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders §1350 provides federal jurisdiction.'

This judgment was particularly controversial, notes Ralph, 'because the Second Court applied an interpretation of customary international law on torture that had not, at that time, been approved by Congress in the form of a statute or a treaty.'[864] While opponents to ATS litigation in general 'complain that it complicates investment decisions and that it impedes the fight against terrorism', these arguments are secondary and 'marginal compared with those that oppose ATS litigation on the grounds of American *identity*.'[865] Bradley provides an example of an identity-linked resistance to the application of customary international law:

> 'The most populist branch of government, the Congress, has at best a very indirect role in the formation of customary international law. Rather, US involvement in customary international law formation comes primarily from the Executive Branch. Nor, even with that involvement, is there any guarantee that the US position will prevail or that customary international law will reflect US legal traditions and culture. The United States simply has one important voice in a community of over 190 diverse states.'[866]

For many Americans, argues Ralph, customary international law is a law that exists in 'the normative imagination of legal scholars', which has neither received the consent of the

[863] Ralph (n843) 86.
[864] Ibid 87.
[865] Ibid.
[866] Bradley cited in Ralph (n843) 87.

American people nor the consideration of their representatives. Because of this, application of customary international law:

> 'cannot possibly be consistent with a notion of good international citizenship because it ultimately undermines the independence of peoples who have proclaimed the right to be self-governing, and although critics like Bradley do not use this kind of language, they clearly oppose *Filártiga* because in their eyes it cannot be squared with the idea of the United States as a self-governing Republic.'

Criticism of this and other ATS litigation provides:

> 'the decision on when and what aspects of international law should be applied is ultimately a political decision. This is necessary not only because the sovereignty of the American people is expressed through their political representatives but also because the Constitution has clearly invested the power to conduct foreign relations in the political branches of government. From this perspective then, the direct application of customary international law…undermines the principles of republicanism and is thus a threat to the vision of an international society based on orderly relations between self-governing republics.'[867]

Meanwhile, Deudney argues that any liberal internationalism which the United States proclaims to advance through international organisations is largely due to necessity, rather than any kind of Wilsonian idealism – in this reading, liberal internationalism is 'the continuation of isolationist republicanism in interdependent circumstances':[868]

> 'the republican security agenda of Liberal internationalism seeks to populate the international system with republics and to abridge international anarchy in order to avoid the transformation of the American limited government constitutional order into a hierarchical state.'

As Taylor Saito points out, U.S. history with international organisations is highly contradictory – the U.S., in certain domains, has exerted 'tremendous influence over the development of international institutions and simultaneously prevented them from fulfilling their potential'. On the other hand, the U.S. has, in general, tended to act quite quickly and in favour of international economic agreements and treaties. Rather than isolationism, then, the U.S. approach 'is perhaps

[867] Ibid 90.
[868] Deudney (n742) 187.

more accurately described in terms of the tension between unilateralism and multilateralism', with these contradictory positions reconciled 'when viewed through the lens of perceived American "interests" …'[869] Almost always, writes Taylor Saito, 'those advocating for unilateral or multilateral policies and practices …have agreed about the underlying principle of "America First."[870]

This republican security agenda was certainly in evidence during the presidency of Woodrow Wilson, when we first see U.S. foreign policy positions justified with legalistic rhetoric and appeals to higher ideals. America's entry into the First World War, for example, was framed by Wilson not as a war waged to protect American interests, but as 'a war fought to make the world safe for democracy', with Wilson telling Congress that the German people 'were not to be blamed' for the war, as the war was 'determined upon as wars used to be determined upon in the old, unhappy days when peoples were nowhere consulted by their rulers.'[871] 'Self-governed nations', he said:

> 'do not…set the course of intrigue to bring about some critical posture of affairs which will give them an opportunity to strike and make conquest. Such designs can be successfully worked out only under cover and where no one has the right to ask questions.'[872]

And while Wilson's League of Nations ultimately failed, partially due to the fact that the U.S. was not a member, its establishment 'marked a significant transition from an international legal system in which individual legal states were the only recognized subjects, or actors, to one in which those states had come together to create a supranational actor.'[873] Since the presidency of Theodore Roosevelt, U.S. leaders have seen:

> 'the development of an effective international legal system that would promote political stability and pave the way for economic expansion as very much in its national interest, and U.S. lawyers, operating solidly in the positivist tradition, played a significant role in ensuring its consolidation.'[874]

[869] Taylor Saito (n717) 214.
[870] Ibid 8.
[871] Ibid 171.
[872] Ibid 171.
[873] Taylor Saito (n717) 172.
[874] Ibid 167.

But it was Wilson's foreign policy, and its linking of American security with 'universal values', which paved the way for future U.S. involvement with international organisations. Walker notes that Wilson's goal with his Fourteen Point Plan was 'comparable to that of America's founding generation in that all peoples should aspire to republican governance, whereas the reality was that it would come sooner for some than for others…'.[875] Wilsonianism was infused with a logic of security, which turned:

> 'the exceptionalist credo from an ideal, which others might emulate, into a tocsin, a call to arms as it were, compelling the export of market capitalism and growth of democracy in the name of security…To be sure, Wilsonianism had an idealistic sheen; it also proffered a vision of political economy and a willingness to employ force… Wilsonianism and the various foreign policies it spawned were quintessentially American: They comprised an end-of-history project.'[876]

'The Wilsonian paradigm, - as worldview and as a basis for charting and articulating the nation's purpose – left an indelible imprint on American statecraft', writes Bacevich, and at its core, Wilson's vision 'sought a world remade in America's image and therefore permanently at peace.'[877] From Wilson onward, the U.S. has consciously associated its approach to foreign policy and international law as one of 'universal values' promotion. Even prior to the United States' entry into World War II, President Franklin D. Roosevelt stated that the war 'directly assailed' the 'democratic way of life', arguing that 'the future and the safety of our country and of our democracy are overwhelmingly involved in events far beyond our borders'.[878] Roosevelt also 'laid the groundwork for what would be a new global order by "look[ing] forward to a world founded upon four essential human freedoms." Freedom, said Roosevelt, "means the supremacy of human rights everywhere… To that high concept there can be no end save victory."'[879]

This identity is also intrinsically linked with the concept of 'civilization' and of the civilizing power of law. The concept of law as a product of Western civilization, and of the United States as the ideal and greatest example of Western civilization, as both a bastion and defender of the 'product', continues to exert great influence on American national identity, on American

[875] William O. Walker III, *National Security and Core Values in American History* (Cambridge University Press 2009) 69.
[876] Ibid 207.
[877] Bacevich (n801) 10.
[878] Taylor Saito (n717) 183.
[879] Taylor Saito (n717) 184.

foreign policy, and on American interpretations of international law, all of which have had significant consequences for international law and the international community.[880] The United States, through its words and deeds, exemplifies 'the belief that civilization constructs law':

> '…and that, because civilization is ever evolving towards higher stages, law as it is known at one stage of the process can be overridden in the interest of the further development or expansion of civilization. In turn, this belief has facilitated U.S. deviations from accepted international law, for when the larger goals of U.S. growth have conflicted with law, law has been "trumped" fairly consistently by the benefits to civilization said to accrue from such expansion."[881]

Indeed, the most recent example of a U.S. president invoking terms such as 'civilization' and 'barbarity' in relation to an unlawful use of force has also provided one of the most blatant examples of a President not just overstepping, but ignoring, their domestic war powers, in a use of force which was also a clear and stark violation of international law. In April 2018, President Trump announced that the U.S., despite the lack of Congressional authorization and absent any direct threat to the United States, would carry out military strikes against targets of the Al-Assad regime in Syria. President Trump noted that, a century ago, 'civilized nations' had joined together to ban the use of chemical weapons in warfare.[882] Trump asked Russia if it would 'join with civilized nations as a force for stability and peace.'[883] Arguing that the U.S., British, and French strikes were intended to provide a deterrent to further use of these weapons, Trump described the strikes as an example of Britain, France, and the United States marshalling their 'righteous power against barbarism and brutality.'[884] This vision of the United States as the epitome of Western civilisation, and as the defender of its associated values, coupled with a national identity which, to a great extent, has been forged through the waging of war, has not only had had consequences internationally. It has also had serious implications for U.S. presidential power and for domestic war powers.

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[880] Ibid 85.
[881] Ibid.
[882] CNN, 'READ: President Trump Announces Strikes in Syria (14 May 2018) <https://edition.cnn.com/2018/04/13/politics/donald-trump-remarks-syria/index.html>, accessed 17 December 2018.
[883] Ibid.
[884] Ibid.

War powers in the United States: The Imperial Executive Branch and the Irrelevance of Congress?

As has been discussed, the U.S. has played an important role in international law creation. Within the U.S., it is the President and the Executive Branch who possess the most power over international law interpretation and enforcement. It is therefore important to understand U.S. domestic law on the use of force and the division of war-making powers in the U.S. federal government, as this is 'crucial for understanding how the United States conceptualizes and engages with international law on the use of force'.[885] As Bradley and Galbraith note:

> 'Because the United States plays such a major role in relation to international law on the use of force – even though U.S. positions on this law are often in tension with prevailing interpretations – U.S. domestic law on the use of force has an important, though indirect, effect on the shape and development of international law.'[886]

U.S. war-making powers, presidential power over international law, and the place of international law in the U.S. legal system are hotly debated and widely interpreted. Nevertheless, it is possible to draw some conclusions as to what the Executive Branch itself perceives its powers over each of the first two areas to be, and to what extent it needs to take account of opinions of and from the third. Each of these three areas will be examined in turn.

War powers and the U.S. Executive Branch

With the U.S. being 'so practiced in the application of military force', writes Haas:

> 'the uninitiated might reasonably expect that the American political apparatus for employing the military works like a well-oiled machine. In truth, the federal government's power to make war represents a longstanding and contentious issue between the chief executive and the legislature, between a so-called imperial presidency and a watchdog Congress.'[887]

War-making powers in the U.S. are divided between Congress and the Executive Branch, and in theory (though, as is discussed, not in practice), the Executive Branch's ability to approve

[885] Curtis A. Bradley and Jean Galbraith, 'Presidential War Powers as an interactive dynamic: international law, domestic law, and practice-based legal change' (2015) NYU Law Review 91 (4) 748.
[886] Ibid.
[887] Haas (n714) 236.

the use of force is constrained by Congressional powers. Under the division of the war powers of the U.S. federal government according to the U.S. Constitution, the President is the Commander in Chief of the armed forces, as is stipulated in Article II, but it is Congress that has the power to declare war, and to raise and support the armed forces, according to Article I.[888] The difference in language between Article I and Article II means that Congressional powers are 'exhaustive', with Congress not allowed to do more than enumerated, while the illustrated powers for the Executive Branch are 'illustrative', 'implying the existence of powers not specifically mentioned in the government's written charter. As a result, advocates for increased presidential war making infer from this distinction just such power.'[889] Thus there is substantial debate as to the exact scope of Executive Branch power as it relates to national security, given that the U.S. constitution contains only a limited discussion of and reference to those powers,[890] and neither the term 'national security' nor 'foreign affairs' is used or referred to in the text of the constitution.[891] Gonzales identifies the three sources of presidential power most commonly cited by judges and scholars relating to the areas of national security and foreign affairs: 'authority expressly granted by the U.S. Constitution'; 'authority granted by Congress by statute or through a declaration of war or authorization to use force'; and 'inherent or implied authority emanating from the Constitution.' Even in the case of that authority expressly granted by the Constitution and authority granted by Congress, however, Gonzales writes that:

> '…while the text of the Constitution or a congressional statute may appear unambiguous, the authority of the Executive Branch to exercise discretion in the execution of our laws affords the President great flexibility. This in turn often gives rise to disagreements between the elected branches over the scope of power even when a statute or the Constitution appears unambiguous on its face.'[892]

While Gonzales (who, it should be noted, acted as legal counsel to Bush administration from 2001-2005), admits that from 'a strict construction of the Constitution's text… the President cannot declare war', and that 'one can argue that the President has no authority (beyond acting

[888] Library of Congress, 'War Powers' (2017) <https://web.archive.org/web/20171130174502/https://www.loc.gov/law/help/war-powers.php>, accessed 30th November 2018.
[889] Haas (n714) 238.
[890] Alberto R. Gonzales, 'Advising the President: The Growing Scope of Executive Power to Protect America' (2015) Harvard Journal of Law and Public Policy 38 (2) 457.
[891] Ibid 453.
[892] Gonzales (n877) 455.

in self-defense) to initiate force or engage in military operations unless authorized by Congress to do so', he also argues that war power roles have become 'increasingly murky' due to Congress' 'frequent reluctance and failure to act', the judiciary's 'inclination to demur', and the increasing number of severe threats 'requiring decisive and rapid responses that only the President can provide.'[893] Bradley, in broad agreement, writes that 'even if Congress has the sole power to declare war for the United States, the text of the Constitution does not clearly say that Congress has the sole power to authorize uses of military force when war is not declared,'[894] adding that 'it may be that not all uses of force even qualify as acts of war.'[895] As noted already, and by Gonzales and Bradley, it has generally been agreed historically that aside from the president's Constitutional Article II powers and absent agreement or permission from Congress, the Executive Branch also has the authority to respond in self-defence to an attack, and to take defensive measures in the face of an imminent threat.[896] To assume that these are the only circumstances in which a president may authorise the use of force today would be erroneous, but the extent to which presidents have a unilateral right to order the use of force is contentious. Haas identifies two major schools of thought regarding the subject of prerogative power and war powers. The first 'suggests that the president rightfully retains war-making powers independent of strict legislative approval by way of inherent powers'[897] The second approach argues that 'the Constitution leaves much less discretion to the president in the execution of the war power.'[898]

Former Assistant Attorney General William H. Rehnquist, and John Yoo, former deputy assistant attorney general in the Office of Legal Counsel during the George W. Bush administrations (and author of many of the so-called 'Torture memos' which asserted that the Geneva Conventions were not applicable to the war on terror),[899] are among the principal proponents of the first approach. Rehnquist envisions a 'core of exclusive presidential commander in chief authority', with Congress having the power 'in certain situations to restrict the President's power as Commander in Chief to a narrower scope than it would have had in

[893] Ibid 458.
[894] Curtis A. Bradley, 'U.S. War Powers and the Potential Benefits of Comparativism', in *The Oxford Handbook of Comparative Foreign Relations Law* (Curtis A. Bradley ed., forthcoming). Available at: https://scholarship.law.duke.edu/faculty_scholarship/3756.
[895] Ibid.
[896] Gonzales (n877) 460.
[897] Haas (n714) 240.
[898] Ibid.
[899] The New York Times, 'A Guide to the Memos on Torture' (2002) <https://archive.nytimes.com/www.nytimes.com/ref/international/24MEMO-GUIDE.html>, accessed 17 December 2018.

the absence of regulations.'[900] Ramsey, on the other hand, writes: 'the original war powers design, as we are able to understand it today, is best described as a core of exclusive congressional power surrounded by an area of arguable independent presidential authority', though this area of independent presidential authority is one which leaves the executive with 'substantial plausible avenues to justify the independent use of force.'[901] For example, an opinion from the White House's Office of Legal Counsel (OLC) of 1970, written by Rehnquist to defend the lawfulness of President Nixon's decision to deploy U.S. ground and air forces into Cambodia for the purpose of destroying base camps in use as supply depots and sanctuaries by the North Vietnamese and Viet Cong, offers a broader interpretation of executive war-making powers.[902] Rehnquist proffered the opinion that the Constitution accommodates two interests: 'the prohibition of one-man commitment of a nation to war and the need for prompt executive response to international situations', and further argued that 'in changing the original wording from the power of Congress to *make* war to the power of Congress to *declare* war', the "Founding Fathers" intended to distinguish between the initiation of armed conflict, which is for Congress to determine, and armed response to conflict situations, which the Executive may undertake.'[903] Rehnquist, writes Powell:

> 'argued that the history of political practice makes it appropriate to recognize the existence of some degree of presidential power to employ military force without statutory authorization, not only in the uncontroversial circumstance of an attack on the United States (a concept fuzzy on the edges, as we have seen) but also as a tool of foreign policy.[904]

The opposite conclusion, in which 'only the emergency created by an attack justifies non-statutory presidential action, is 'a poor fit with U.S. constitutional history', argues Powell, as it:

> 'disregards the claim of right under which presidents have made unilateral use of force, the reasoned discussions in Congress and between the political branches at various

[900] H. Jefferson Powell, *Targeting Americans: The Constitutionality of the U.S. Drone War* (Oxford University Press 2016) 101-102.
[901] Michael Ramsey, 'Constitutional War Initiation and the Obama Presidency' (2016) Am. J. Int' Law 110 (4) 705.
[902] U.S. Department of Justice, *Presidential Authority to Permit Incursion Into Communist Sanctuaries in the Cambodia-Vietnam Border Area*, (14 May 1970). Available at: https://web.archive.org/web/20131014113201/http://www.justice.gov/olc/1970/cambodia-1.pdf.
[903] Ibid.
[904] Jefferson Powell (n887) 99.

times about the validity of that claim, and Congress's general acquiescence over time.'[905]

Today, it is generally accepted that the President may also use military force without prior permission from Congress in the case of an emergency, in order to protect citizens or repel an invasion.[906] Murray notes that Congress has used full Declarations of War only sparingly, and instead has tended to authorise the President to use military force for specific instances through a statue, an example of which is the 2001 AUMF authorising the use of force against those responsible for the 9/11 attacks.[907] The 2001 AUMF is discussed in detail later in this chapter.

As the United States became more powerful and increased its military reach, establishing a 'large permanent military less dependent on the Congress to raise funds for action, presidents and lawmakers have begun to interpret the prerogatives of the Commander-in-Chief more broadly.'[908] Executive power has expanded, and the Executive has relied less and less on Congress when deciding to engage in hostilities. Following the United States' involvement in the conflicts in Korea and Vietnam – 'two long and unpopular wars' – Congress 'acted to reclaim its war-making authority.'[909] It did so partially on foot of a report by the Senate Foreign Relations Committee which said that 'Congress's failure to challenge executive claims to the war powers' was '"probably the singly fact most accounting for the speed and virtual completeness of the transfer" of authority and initiative.'[910] Failure to challenge the Executive Branch had led to Congress '"giving away that which is not its to give, notably the war power, which the framers of the Constitution vested not in the executive but, deliberately and almost exclusively, in the Congress."'[911]

The route Congress took in attempting to rein in presidential power led to their passing the War Powers Resolution (WPR), or War Powers Act, in 1973, over President Richard Nixon's veto.[912] The WPR is intended to:

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[905] Jefferson Powell (n887) 99. Of course, OLC opinions are created to support the president and assert the legality of his or her decisions. However, this is not 'prima facie evidence that the opinion is badly reasoned or insincere.'
[906] Shoon Murray, *The Terror Authorization: The History and Politics of the 2001 AUMF* (Palgrave Macmillan 2014) 11.
[907] Ibid, 12-13. Murray further notes that while the U.S. has engaged in armed conflict 'hundreds' of times, authorizations from Congress number in the dozens; however, prior to WWII, the majority of these instances of 'armed conflict' were 'brief Navy or Marine actions to protect U.S. citizens or promote U.S. interests.'
[908] Ibid 13.
[909] Ibid.
[910] Andrew Rudalevige, *The New Imperial Presidency: Reviving Presidential Power after Watergate* (University of Michigan Press 2006) 117.
[911] Ibid 117.
[912] Murray (n893) 13.

> 'insure that the collective judgment of both Congress and the president will apply to the introduction of United States into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.'[913]

The WPR further notes that the constitutional powers of the President as Commander-in-Chief to introduce U.S. armed forces into hostilities are exercised only pursuant to a declaration of war, specific statutory authorization, or a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[914] As noted above, President Nixon vetoed the WPR, claiming:

> 'it would limit flexibility in foreign policy; members of Congress responded that "flexibility has become a euphemism for presidential domination." The *nation's* ability to make decisive choices, they stressed, was not equivalent to the *president's* ability to do so.'[915]

However, since Nixon, U.S. presidents have 'consistently taken the position that the War Powers Resolution is an unconstitutional infringement upon the power of the Executive Branch',[916] and the Resolution has not been effective - pursuant to this, numerous U.S. presidents have approved the use of military force without prior Congressional approval, the most recent example, as mentioned earlier, being President Trump's military strikes on targets held by the Al-Assad regime in Syria on 14 April 2018.[917] Successive administrations have kept their 'flexibility' in spite of the existence of the 1973 WPR.

Furthermore, U.S. courts 'have not been willing to adjudicate challenges to purported presidential noncompliance with the War Powers Resolution.'[918] While presidents can deploy troops for short-term interventions of less than sixty days (having notified Congress of said troop deployment within the first 48 hours) under the WPR, these troops are supposed to return home to the U.S. if Congressional approval has not been given by the time the sixty-day mark has been reached. In practice, however, 'presidents have used loopholes, saying that deployed

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[913] H.J.Res 542 Public Law 93-148 Joint Resolution Concerning the war powers of Congress and the President (War Powers Resolution), available at: https://web.archive.org/web/20171130180346/https://www.govinfo.gov/content/pkg/STATUTE-87/pdf/STATUTE-87-Pg555.pdf, accessed 30 November 2018.
[914] H.J.Res 542 (n900).
[915] Rudalevige (n897) 118.
[916] Library of Congress (n875).
[917] CNN (n869).
[918] Curtis A. Bradley, *International Law in the U.S. Legal System* (Oxford University Press 2015) 298.

troops are not involved in "hostilities"'[919], and courts have 'reasoned that the meaning of "hostilities" in the Resolution…is a nonjusticiable political question that must be worked out by Congress and the Executive Branch rather than the courts.'[920] In cases where a military operation is expected to 'take time and cost American lives', presidents had generally come to Congress for an authorisation.[921] Yet presidents do not concede that a Congressional authorisation is necessary – presidents often see Congressional authorisation as "support" for their actions, rather than as "permission."[922]

The WPR also includes an obligation on presidents to submit a report to Congress 'within 48 hours any introduction of armed forces into hostilities or conditions where hostilities are likely to occur, along with details of the reason(s), circumstances, and authorities relevant to his decision.' Between 1975 and 2009, presidents submitted reports under the WPR 127 times, and given that, aside from this obligation, Presidents tend to ignore the WPR, this suggests that 'by and large, the WPR serves little purpose other than as a mechanism to force the president to report to Congress on his intentions to use force, or that he had already done so.'[923] In practice, then, the division of war powers does not occur exactly as laid out in the Constitution and the 1973 WPR. The Executive Branch now claims a wide range of powers related to war-making, and relatedly, to the interpretation of relevant international law.

It is notable that the 1973 WPR was enacted in an attempt to ensure that Congress was involved in decisions on the use of force after the 1970 OLC opinion discussed above. Despite this attempt to restrain Executive power, a number of scholars argue that the power of the President and of the wider Executive Branch over the initiation of the use of force continues to expand, especially since the events of September 11, 2001. Bradley and Goldbraith note that 'Executive Branch lawyers have been interpreting [the war powers] resolution in ways that whittle down its practical affect', and that 'where the Executive Branch is interpreting statutes that authorize presidential uses of force, it tends to read these statutes expansively.'[924]

Regarding the 1970 OLC opinions by Rehnquist, it seems reasonable to assert that his stance on the power of the president in this arena is correct in terms of what the Executive Branch today perceives its power to be. A 2011 OLC memo on the use of force in Libya by the Obama

[919] Murray (n893) 15.
[920] Bradley (n905) 298.
[921] Murray (n893) 15.
[922] Murray (n893) 15.
[923] Haas (n714) 244.
[924] Bradley and Galbraith (n872) 697.

administration, for example, also emphasised the power of the president to use force as a tool of foreign policy, asserting that the president can 'take military action [abroad] for the purpose of protecting important national interests, even without specific prior authorization from Congress.'[925] This position was highly disputed, however, as is discussed later in this section. In a letter to Congress, Trump's 2018 strikes in Syria were justified as being pursuant to his:

> '…constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive and in the vital national security and foreign policy interests of the United States to promote the stability of the region, to deter the use and proliferation of chemical weapons, and to avert a worsening of the region's current humanitarian catastrophe.[926]

Trump further asserted that 'the United States will take additional action, as necessary and appropriate, to further its important national interests.'[927] In 2016, Ramsey argued that the only major military actions taken since Vietnam which 'clearly lacked a basis in the Constitution's original allocation of war power' were the decisions of President Clinton to intervene in Kosovo, and the decision by President Obama to intervene in Libya. President Trump's 2017 and 2018 Syria strikes should certainly be considered under this rubric. Apart from Kosovo and Libya, wrote Ramsey, 'recent practice might be better described as consolidating presidential authority over the "grey areas" of the original Constitution's war powers rather than overthrowing the central constitutional allocation.'[928] While Ramsey had maintained that changes in the traditional understanding of presidential war-making powers had come 'not in actual practice but in presidential *assertions* of war initiation power,' recent practice belies this statement.[929] Furthermore, even assertions of unilateral presidential war-making power are important. A number of presidential assertions on the extent of executive power were put forward during the administration of President George W. Bush, following the events of September 11, 2001. The Bush administration was staffed by a number of 'executive power ideologues',[930] who pursued an exaggerated reading of the president's constitutional war-

[925] U.S. Department of Justice, Authority to Use Military Force in Libya (2011). Available at: https://www.justice.gov/olc/opinion/authority-use-military-force-libya.
[926] The White House, Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempere of the Senate (15 April 2018). Available at: https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-3/.
[927] Ibid.
[928] Ramsey (n888) 706.
[929] Ibid.
[930] Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (W.W. Norton 2007) 89.

making powers, repeatedly asserting that the president could use force where and when he saw fit.[931] One of the most pertinent memos relevant to such assertions is that written by John Yoo on September 25 2001, eleven days after the 2001 AUMF had been passed by Congress, in which it was stated that:

> 'military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups organization that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas.'

The memo further reasoned that Congressional statutes such as the WPR and the 2001 AUMF cannot:

> 'place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response…The President may deploy military force pre-emptively against terrorist organizations or the States that harbour or support them, whether or not they can be linked to the specific terrorist incidents of Sept. 11'.[932]

Murray notes that this opinion established that the president could 'unilaterally take the very actions that Congress had denied, meaning that the president could unilaterally use force against actors who did not attack the country on 9/11.'[933] However, despite the Bush administrations' 'aggressive assertions of presidential power', the administration nevertheless had no episodes of Congressionally unauthorised initiations of force – the 2001 AUMF was passed by Congress, as was the 2002 AUMF for use of force in Iraq.[934] That period, then, 'is more accurately described as encompassing significant presidential uses of force with arguable constitutional justifications, together with presidential assertions of broad and generally unspecified war initiation powers.'[935]

[931] Shoon Murray, 'The Contemporary Presidency: Stretching the 2001 AUMF: A History of Two Presidencies' (2015) *Presidential Studies Quarterly* 45 (1) 179.
[932] Murray (n893) 21.
[933] Ibid.
[934] Ramsey (n888) 706.
[935] Ibid 707.

An examination of President Obama's constitutional record on the use of military force by Ramsey finds that 'while the record is mixed, it is not clear that the administration's legacy will be or should be an expanded view of presidential war initiation powers.'[936] Ramsey argues that the Obama administrations' interpretation of the AUMF as applying to 'affiliated or associated' organisations of al-Qaeda may be debatable, but that it 'does not seem implausible', noting that the president and his spokespeople 'principally relied on congressional authorization rather than independent power, even though an independent power justification was potentially available.'[937] Obama's attempts to justify actions against ISIS in Iraq and Syria, however, were less well received domestically. Ramsey notes that the Obama administration originally relied on his independent constitutional authority, writing in a letter to Congress that:

> 'I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.'[938]

However, as operations expanded, Obama claimed that operations against ISIS were covered by the 2001 AUMF and the 2002 Iraq AUMF, writing that authority for such actions were provided to him by existing statutes, and expressing his commitment to working with Congress to pass a new AUMF.[939] Ramsey notes that both these arguments – that of existing statutory support for actions against ISIS and independent constitutional authority – met with strong objections.[940] Yet, Ramsey concludes that while the Obama administration 'arguably stretched the meaning of prior congressional authorizations and the War Powers Resolution, an aggressive reading of an express authorization reflects something of a concession on independent presidential power.'[941]

The Obama administration's 2011 air campaign in Libya is described as representing Obama's most aggressive unilateral use of force. While approved by the UN Security Council, there was, writes Ramsey, 'no plausible claim to congressional authorization.'[942] The OLC memo supporting U.S. actions in Libya concluded that 'the use of military force in Libya in was supported by sufficiently important national interests to fall within the President's

[936] Ramsey (n888) 707.
[937] Ibid 708.
[938] The White House, Letter from the President—War Powers Resolution Regarding Iraq (14 August 2014). Available at: <https://www.whitehouse.gov/the-press-office/2014/08/17/letter-president-war-powers-resolutionregarding-iraq>
[939] Ramsey (n888) 709.
[940] Ibid.
[941] Ibid 702.
[942] Ibid.

constitutional power', and argued that actions in Libya did not amount 'to a "war" in the constitutional sense necessitating congressional approval under the Declaration of War Clause.'[943] This defence was 'sharply criticized by commentators, and represented a substantial expansion in claimed presidential power, measured against either an originalist or pre-2008 modern baseline.'[944]

Overall, Ramsey believed that the Obama administration's war-initiation power legacy was 'likely more constraining than expansive', leaving executive power in the national security and foreign affairs arena as broad as Obama found it in 2008, if not slightly less so. Bradley and Galbraith, however, disagree. They write that when the U.S. executive pushes the boundaries of its legal authority, it is:

> 'simultaneously creating precedents that become part of legal discourse going forward. As these precedents build up, they then have the effect of expanding the actual or perceived scope of legal authority for the unitary actors.'[945]

As Bradley and Galbraith note:

> 'the OLC uses "historical precedents" as the "framework" for its constitutional analysis on the use of force. Although practice does not always favor executive power…its overall direction tends to do so... Historical practice both helps to provide a domestic law foundation for presidential actions relating to war and, over time, tends to further the development of the law in favour of stronger executive power.'[946]

While Presidents Bush and Obama might not have always acted practically to invoke their perceived constitutional war-initiation powers, the fact that this perception of unilateral presidential power was asserted, in statements, letters, and memos, demonstrated that those administrations believed that those broad powers existed for the Executive Branch, should a future president wish to rely on them. With President Trump's unauthorised strikes on Syria in both 2017 and 2018, past assertions of presidential power and past practice have coalesced to grant the Executive Branch an exceedingly broad remit in the area of the use of force, with Congress seemingly powerless to halt military action.

[943] U.S. Department of Justice (n912).
[944] Ramsey (n888) 711.
[945] Bradley and Galbraith (n872) 705.
[946] Ibid 706.

More importantly for the implications of this thesis, however, are the effects of such assertions of power on international law and interpretations of international law both domestically in the U.S. and internationally. Bradley and Galbraith find that domestically, U.S. separation of powers 'is relevant to international legal practice on the use of force, because it influences U.S. practice and the United States plays an outsized role internationally with regard to the use of force.'[947] Importantly, they find that where an Executive Branch is supported by strong domestic legal authority, whether that is either or both of constitutional war-making powers and/or congressional authorisation, the Executive Branch develops a broader international legal interpretation.[948] Congressional authorisation for the use of force is thus held to be a highly relevant factor in whether, and how far, a president may attempt to push the boundaries of international law.

In describing this 'interactive effect' of presidential decision-making on the use of force, Bradley and Galbraith note the example of United States' assertions of its right to invoke self-defence against non-state actors on the territory of states that are 'unwilling or unable' to suppress those non-state actors themselves.[949] Arguing that the U.S. acquired 'increased state acquiescence' for the existence of an "unwilling or unable" standard after September 11th, at a time when the Executive Branch had 'strong domestic legal grounding', the Executive Branch then invoked the "unwilling or unable" standard to justify uses of force to domestic audiences in situations where the President's 'domestic legal grounding was much weaker.'[950] Similarly, in its campaign in Syria against ISIS, for which the Obama administration had 'fairly weak authority under domestic law', it relied instead on 'some indeterminate combination of the President's constitutional authority and expansive readings of the 2001 AUMF and of the 2002 AUMF', while under international law, the U.S. relied on the "unwilling or unable" standard in conjunction with the collective self-defence of Iraq, as well as asserted individual self-defence. The 2013 DOJ targeted killing memo is also provided as a specific example of how international and domestic legal argumentation are intertwined in the U.S., wherein the Obama administration emphasized that its targeted killing policy would comply with international law

[947] Bradley and Galbraith (n872) 697.
[948] Ibid 728.
[949] Ibid 731.
[950] Whether the U.S. has actually acquired acquiescence for the existence of an 'unwilling or unable' standard is still, of course, highly debated – but for this particular discussion, the actual existence of international acquiescence to the 'unwilling or unable' standard is less important than its perceived existence by domestic audiences. Bradley and Galbraith (n871) 731.

when describing how the targeting policy would be consistent with domestic law.[951] Essentially:

> 'the U.S. pushes the boundaries and restraints of international law at a time when it has strong domestic support, claims that it has created a precedent in international law or an agreed-upon norm, and then invokes this precedent or norm to use force at a time when domestic support is lacking.'[952]

These prior examples are instructive on the leveraging of international law by the U.S. Executive Branch as a means to assert and expand presidential power in the realm of national security and foreign affairs. This is an issue which Ingber has explored in some depth. While international law has traditionally been understood as a constraining influence on state actors in general, Ingber argues that international law is regularly invoked as an enabling force within the U.S. domestic legal system.[953] In what Ingber deems the 'empowerment phenomenon', the U.S. executive uses international law to:

> 'support expansive interpretations of statutory or constitutional grants of authority; to narrow statutory or constitutional prohibitions on executive action…; and to justify the displacement of the ordinary operation of domestic legal rules, at times with the effect of exchanging the ordinary domestic legal architecture for a more permissive framework based in international law.'[954]

This empowerment phenomenon not only 'facilitates the Executive's aggrandizement of its own authority; at times it affirmatively induces it to do so.'[955] For the purposes of this discussion, Ingber's examination of presidential invocations of international law to expand executive power, while also referencing international law as a limiting principle in the area of the 2001 AUMF and targeted killing are particularly relevant. In both cases, international law is used to provide legitimacy for Executive Branch actions. It is then used to assert the Executive's 'wartime authority to act, at a minimum, to the limits of international law.'[956] The result of this empowerment phenomenon is to create an 'executive-inferred exception' to domestic constraints, 'shaped by an international law standard that the Executive defines.'[957]

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[951] Ibid 732.
[952] Bradley and Galbraith (n872) 732.
[953] Rebecca Ingber, 'International Law Constraints as Executive Power' (2016) Harvard Int. Law. J. 57 (1) 55.
[954] Ibid 55.
[955] Ibid 56.
[956]Ibid 88.
[957] Ibid 70.

Regarding the targeted killing memos, Ingber tracks the OLC's statutory and constitutional arguments, noting that while the OLC purported to apply and satisfy the Fifth Amendment's Due Process clause, instead the memoranda in question:

> 'the memoranda put forward a substantive standard under which the Executive may assert an exception to due process requirements. They base that exception upon a showing that 1) capture is infeasible; 2) the individual is part of enemy forces; and 3) the individual poses a "continued and imminent threat to U.S. persons or interests."'[958]

Given that the substance of each of the three requirements set out above are largely defined as the Executive Branch sees fit, 'the memoranda thus propose an exception to ordinary due process, defined by a substantive standard that turns predominantly on the Executive's international law analysis regarding the lawfulness of the target.'[959] The OLC's Fourth Amendment analysis also rests 'in large part on internal tests derived from international law.'[960]

Ingber concludes that, in essence:

> '…the Executive's position is that the existing executive order prohibiting assassination, statutory prohibitions on the killing of U.S. citizens, and fundamental constitutional protections all contain implicit exceptions for killing that is lawful under the international laws of war. The effect of this reasoning is thus: the lawfulness under domestic law of the targeted killing of an individual abroad turns on the Executive's interpretation of the lawfulness of the act as a matter of international law.'[961]

The 2001 AUMF

It is worth taking some time here to discuss the 2001 AUMF, as it has had profound implications for Executive war powers in the United States, for the role of Congress in restraining and overseeing those powers, and for the United States approach to international law and war-making. The 2001 AUMF is the Congressional authorisation which the U.S. Executive Branch continues to invoke as an umbrella to cover the majority of its range of anti-terror related activities, including the targeted killing programme. The importance of the 2001

[958] Ingber (n940) 68.
[959] Ibid 69.
[960] Ibid.
[961] Ibid 70.

AUMF and the implications it has had domestically and internationally since its passing are difficult to overstate, and a thorough discussion of the 2001 AUMF and its interpretation by the three presidents to which it has applied is of some importance. It has been described as 'unusual in its lack of limits', and as one of 'the most remarkable legal developments in American public law in the 21st century',[962] while the myriad possibilities in its interpretation have caused it to become 'a protean foundation for indefinite war against an assortment of terrorist organizations in numerous countries'.[963] It is a prime example of the effect of assertions of expansive Executive Branch war powers, coupled with a Congressional authorisation for the use of force and the 'empowerment phenomenon'. Successive presidential administrations, from the first George W. Bush administration to the Trump administration today - have derived their authority to use force against al-Qaeda and associated forces (and to detain alleged members of same) and to carry out military operations against ISIS outside Iraq, from this AUMF. This Congressional authorisation was passed on the 14th September 2001, following the 9/11 attacks three days previously, and signed into law by President George W. Bush on 18 September 2001. Since it was passed into law, the 2001 AUMF remains a controversial authorisation, given the ever-expanding range of uses of force in numerous territories and against the myriad non-state groups to which it has been said to apply.

A mere sixty words long, the 2001 AUMF reads as follows:

> IN GENERAL. – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

As stated in the text, the AUMF authorises the use of force only against those 'nations, organizations, or persons' that are determined to have been involved in the planning, authorisation, committing or aiding of the terrorist attacks of September 11, 2001, or that 'harboured such organizations or persons', so as to prevent any future acts of international terrorism against the United States.

[962] Curtis A. Bradley and Jack L. Goldsmith, 'Obama's AUMF Legacy' (2016) *American Journal of International Law* 110 (4) 628.
[963] Bradley and Goldsmith (n949) 628.

As Murray has recounted, the initiative for the AUMF came directly from President George W. Bush's White House. It was written in haste, and its passage was rushed.[964] A first draft for the AUMF created by the administration's Executive Branch lawyers was rejected by Congress on the evening of September 12 due to its sweeping language which, according to Senate Majority Leader Tom Daschle, would have granted the president 'a blank check to go anywhere, anytime, against anyone the Bush administration or any subsequent administration deemed capable of carrying out an attack.'[965] This draft read:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, harbored, committed, or aided in the planning or commission of the attacks against the United States that occurred on September 11, 2001, and to deter and pre-empt any future acts of terrorism or aggression against the United States. (Quoted in Abramowitz 2002, emphasis added).[966]

The wording of the AUMF was then 'haggled over', until the final wording of the Authorization that exists today was agreed upon.[967] Yet the final wording still provided the Executive Branch with much leeway, given that no clear geographical bounds were stipulated in the final wording, and nor were the 'nations, organizations, or persons' against whom force could be used clearly defined.[968] As a result, despite Congress's belief that it had successfully restrained the White House with the seemingly more restrictive language in the final version of the 2001 AUMF, in authorising authority against non-state actors without clear geographical bounds or an expiration date, it had still gifted the Bush Administration almost exactly what it had desired.[969] Given the failure of Congress to provide clear geographical boundaries for the use of force, and that the targets in question were left to presidential discretion,[970] the 2001 AUMF has since proven to be an imperfect and all too easily manipulated Congressional authorisation. To date, the 2001 AUMF has been invoked for uses of force in a number of states, including Afghanistan, Yemen, Pakistan, Somalia, Libya, Niger, Iraq and Syria, and against numerous non-state armed groups, some of which were not in existence at the time of the September 11 attacks. As such, many of these uses of force have occurred in states, and

[964] Murray (n918) 175.
[965] Ibid 177.
[966] Murray (n918) 177.
[967] Ibid.
[968] Murray (n893) 23.
[969] Ibid.
[970] Murray (n918) 175.

against groups, that have at best a tenuous connection to the September 11 attacks. Considering where and how the U.S. has used force, particularly pre-emptive force, and justified these actions with reference to the powers granted by the 2001 AUMF, the way in which the 2001 AUMF has been used in practice tracks much more closely with the language found in the draft AUMF rejected by Congress than with the final version of the AUMF passed by Congress. Yet the 2001 AUMF remains in place and seems unlikely to be replaced in the near future. No authorisation for the use of military force has been passed since the 2002 AUMF authorising war in Iraq. Recent practice by President Trump and by President Obama before him have confirmed the inadequacy of Congressional responses to unilateral presidential decisions on the use of force. No AUMF has been sought by the Trump administration to sanction uses of force in Syria against the Syrian government. Neither has Congress attempted to intervene in this situation, leading to the accusation that Congress:

> 'is abdicating its constitutional responsibilities to determine whether the United States should make war on other nations when it makes no effort to take advantage of the ample time available to it to deliberate on how the United States should respond to the use of chemical weapons by a rogue regime and when it makes no effort to develop a collective response to presidential threats to use military force against foreign governments with which the United States is not already at war. The executive branch is indicating the irrelevance of Congress to the warmaking process when it announces that the president's Article II authority should be understood to include the power to initiate military force against foreign nations whenever he deems American national interests to be at stake.'[971]

With the passing of the 2001 AUMF, it appears that Congress has effectively erased its own role in decision making around war powers, and at the very least, hastened its slide towards irrelevance in this area. As Rudalevige says:

> 'much of the expansion in presidential power has not been taken but given… While the framers expected that "ambition would counteract ambition," that other actors would rise to the occasion when presidential power overflowed its bounds, frequently in recent years this expectation has not been met.'[972]

[971] Keith E. Whittington, 'R.I.P. Congressional War Powers' (*Lawfare*, 20 April 2018) https://www.lawfareblog.com/rip-congressional-war-power, accessed 17 December 2018.
[972] Rudalevige (n897) 275.

'The accretion of central power in America has occurred most easily during wars', wrote Porter in 1994.[973] Now in a near-permanent state of war, the Executive Branch's war powers appear almost unlimited. The accretion of Executive Power cannot be considered at a remove from the society in which the U.S. government operates. The United States' obsession with war and security, so tied up in its national identity, has been a primary factor in the establishment of a new 'imperial' presidency. Coupled with the remove at which the majority of U.S. citizens experience war – that is to say, not at all – Presidents have been able to accrue more and more 'flexibility' in the area of war. Dudziak explains that a 'crucial…factor in the demise of political restraints on presidential power to use military force is the distance between American civilians and the carnage their wars have produced.'[974] The use of armed drones and the targeted killing programme only increases this distance, allowing the U.S. government to portray war as high-tech and almost risk free for those (very few) Americans fighting it.[975] As Dudziak notes, 'a president's ability, albeit imperfect, to shape the way Americans perceive war is a tremendously important aspect of presidential war power.'[976]

The President and International Law

Another way in which Presidents shape the way Americans perceive war is by portraying it as lawful. International law, war, and presidential war powers are intertwined. As has been discussed, war has been used to justify breaches of international law, and international law has been invoked to justify acts of war, with both acting as expansionary resources for executive power. As the 'sole organ of the nation in its external relations and its sole representative with foreign nations' and given that 'the restrictions on the use of force are directed at the political and military organs of government and concern relations between nations rather than the treatment of individuals',[977] the interpretation and enforcement of the international law of war occurs within the Executive Branch. There is little interference with presidential control over international law interpretation at the judicial level, as international law is generally considered to concern questions of politics rather than questions of law. This has partially contributed to the U.S. perception of international law as a pliant, legitimating tool and as a foreign policy

[973] Porter (n746) 521.
[974] Dudziak (n797) 26.
[975] In 2017, the percentage of Americans in active duty represented just 0.4% of the population. Pew Research Center (2017), '6 facts about the U.S. Military and its changing demographics' (13 April 2017) http://www.pewresearch.org/fact-tank/2017/04/13/6-facts-about-the-u-s-military-and-its-changing-demographics/.
[976] Dudziak (n797) 60.
[977] Bradley (n905) 287.

and security resource. The accumulation of war-making powers in the Executive Branch is thus a matter of concern for the international law on the use of force, as decisions taken by U.S. presidents to use armed force abroad against states and non-state actors directly implicate this law. As the exercise of the nation's foreign affairs is a matter for the Executive Branch, the President has the power to interpret, and to inform the creation of international law. U.S. courts have granted 'substantial deference to the President as to both the substance and form of international law-making.'[978] Given the increasing power of the Executive Branch over issues of war-making and uses of force, this is particularly concerning for the international law on the use of force.

In the United States, the President exercises vast control over international law, without any systemic regulatory or judicial oversight 'to guide or review the exercise of presidential discretion in this context.'[979] Presidents 'have come to dominate the creation, alteration, and termination of international law for the United States'[980], write Bradley and Galbraith, as has been demonstrated, by example, by President Trump's unilateral decision to remove the United States from the Iran nuclear deal.[981] 'However limited the President's domestic law-making authority may be', writes Weisburd, 'he clearly has considerable authority to create legal effects in the international context:'[982]

This presidential control is of particular concern in the area of customary international law, where the 'vast majority' of relevant U.S. governmental practice for customary international law is Executive Branch practice,[983] and where 'the President almost always decides the U.S. view on CIL… and is able to affect CIL both through affirmative actions and statements and through decisions about whether to acquiesce in the practices and statements of other nations.'[984] Weisburd notes that '…to the extent the United States participates in the formation

[978] Oona Hathaway, 'Presidential Power over International Law: Restoring the Balance' (2009) The Yale Law Journal 119 (2) 145.
[979] Curtis A. Bradley and Jack L. Goldsmith, 'Presidential Control over International Law' (2018) Harvard Law Review 131 (5) 1203.
[980] Bradley and Goldsmith (n966) 1203.
[981] The Guardian, 'Iran deal: Trump breaks with European allies over 'horrible, one-sided' nuclear agreement' (9 May 2018) https://www.theguardian.com/world/2018/may/08/iran-deal-trump-withdraw-us-latest-news-nuclear-agreement, accessed 17 December 2018.
[982] Arthur M. Weisburd, 'The Executive Branch and International Law' Vanderbilt Law Review (1988) 41, 1253.
[983] Bradley and Goldsmith (n966) 1207.
[984] Ibid 1228.

of customary international law, it does so largely through the President's acts.'[985] The U.S. Supreme Court's Banco Nacional de Cuba v. Sabbatino decision noted:

> 'When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.'[986]

Regarding judicial interference in the practice of Presidents with respect to customary international law, Weisburd argues that:

> '…since the President acts as the primary American legislator in the field of customary international law by determining the day-to-day practice of the United States, judicial efforts to control that practice on non-constitutional grounds amount to interference with legislative discretion vested in the President by the Constitution. The field of legislation is different – international as opposed to domestic law – but the constitutional question is the same. By giving the President control of most of the state practice of the United States, the Constitution vested the President with legislative discretion to cast the "vote" of the United States in matters of customary law.'[987]

Therefore, the accumulation of war-making powers in the Executive Branch has direct consequences for the creation of customary international law on the use of force, the interpretation of treaty rules regarding uses of force, and the interpretation of rules governing any uses of that force. This is not to say, of course, that enhanced or increased Congressional involvement with U.S. war powers and Presidential decision-making on the use of force would necessarily make any uses of force more compliant with existing customary international law or treaty law on the use of force, but rather that, without any significant Congressional involvement in war-making decisions, Presidential decisions to use force, and the accompanying interpretation of the relevant law, acquire even more importance. Furthermore, 'almost all courts have held that the president and other high-level executive officers (such as the Attorney General) have the domestic legal authority to violate CIL.'[988]

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[985] Weisburd (n969) 1254.
[986] *376 U.S. 398, 432-33 (Banco Nacional de Cuba v. Sabbatino) (1964)*.
[987] Weisburd (n969) 1255.
[988] Bradley (n905) 296.

Regarding arguments that the President's constitutional authority as Commander in Chief is 'implicitly limited by the international laws of war', Bradley argues that this is likely 'true only of the international law relating to *jus in bello* rather than *jus ad bellum*':

> 'Although modern international law does sharply limit the permissible use of force, as a matter of practice presidents have exercised the sovereign authority of the United States to decide whether and how to comply with the jus ad bellum, and a number of presidentially initiated military operations in the post-World War II period have arguably been inconsistent with it.'[989]

Congress could, writes Bradley, attempt to impose *jus ad bellum* restrictions on the President in the form of codified statues, but 'has shown no inclination to do so', and the completely ineffective 1973 War Powers Resolution, discussed earlier in this chapter, which represents Congress' 'most significant effort to regulate Presidential initiation of war', makes no mention of international law.[990] On 13th December 2018, the Senate invoked the WPR for the very first time when it passed a resolution calling for an end in U.S. military aid to the Saudi-led coalition fighting in the conflict Yemen. However, at the time of writing, this vote is largely symbolic – in order for the resolution to become law, it would have to also be passed by Congress, and could still face a veto from President Donald Trump.[991]

The two most significant attempts to influence customary international law on the use of force in the past two decades have come from U.S. presidents. For example, the attempted creation of an 'unwilling or unable' test, in which the U.S. asserts its right to use force in self-defence against a non-state actor in a third country, without the consent of that third country, if that country is unwilling or unable to address the threat posed by the non-state actor.[992] Attempts by the U.S. to expand the definition of 'imminence' for the purposes of the targeted killing programme also pose challenges for customary international law on the use of force.

In the realm of *jus in bello*, there also exists debate as to whether, and to what extent, the Executive Branch's constitutional power is bound by the relevant customary and treaty law, in particular the Geneva Conventions. The George W. Bush administration, for example, took a

[989] Ibid.
[990] Ibid.
[991] See Hirschfeld Davis and Schmitt (n7).
[992] Elena Chachko and Ashley Deeks (2016), 'Who is on board with "unwilling or unable?"' (*Lawfare*, 10 October 2016) <https://www.lawfareblog.com/who-board-unwilling-or-unable> accessed 17 December 2018.

very flexible approach to the Geneva Conventions application; the administration's position essentially being that:

> 'even assuming that the Geneva Conventions are binding on the United States as a matter of international law, they do not bind the President as a matter of domestic law because the President has the constitutional authority to violate specific provisions of the Conventions to protect national security.'[993]

This position was used to justify the use of torture against people suspected of involvement with al-Qaeda and affiliated forces, to justify holding suspects for years at Guantanamo Bay and to deny prisoners their habeas corpus rights, and to justify the use of military commissions to try individuals involved in the 9/11 attacks. In *Hamdi v. Rumsfeld* (2004), the Supreme Court ruled against the Bush administration and found that enemy combatants held in the United States had a right to due process,[994] and the Court's 2006 decision in *Hamdan v. Rumsfeld* rejected the Bush administration's attempts to create military tribunals, noting that, in the case of the war on terror, the use of such tribunals would violate the Geneva Conventions.[995] Regarding the use of torture under the administration, 'the legal memoranda justifying the use of these techniques only offer sustained analysis of whether the techniques constitute "torture" within the meaning of U.S. criminal law', and do not consider whether they violate the Geneva Conventions (though they undoubtedly did).[996] Jinks and Sloss state that the Executive Branch is bound by the Geneva Conventions,[997] though 'the precedent for implied limitations on the commander-in-chief is limited at best.'[998] As a presidential candidate, President Trump commented that the Geneva Conventions were a 'problem', opining that 'we can't waterboard, but they can chop off heads. I think we've got to make some changes, some adjustments.'[999] While President Trump has yet to comment on the Geneva Conventions at this point in his presidency, he has ushered in relaxed rules of engagement for the U.S. military.[1000] In October

[993] Derek Jinks and David Sloss, 'Is the President Bound by the Geneva Conventions?' (2004) Cornell Law Review 97 (1) 102.
[994] *Hamdi v. Rumsfeld* 03-6696) 542 U.S. 507 (2004).
[995] *Hamdan v. Rumsfeld* (No. 05-184) 415 F. 3d 33.
[996] Jinks and Sloss (n980) 200.
[997] Ibid 201.
[998] Bradley (n905) 296.
[999] Ben Schreckinger, 'Trump calls Geneva Conventions 'the problem'' (*Politico.com*, 30 March 2016) https://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/donald-trump-geneva-conventions-221394, accessed 17 December 2018.
[1000] Helene Cooper, 'Trump Gives Military New Freedom. But With That Comes Danger (*The New York Times*, 05 April 2017) https://www.nytimes.com/2017/04/05/us/politics/rules-of-engagement-military-force-mattis.html, accessed 17 December 2018.

2017, Trump said that he has 'totally changed the rules of engagement. I totally changed our military.'[1001] This relaxation or 'total change' in the rules of engagement has been accompanied by a substantial increase in civilian casualties in American theatres of war.[1002]

Conclusion

Why does this contextualisation of U.S. identity and war-making matter for international law and for the targeted killing programme? Why does the violence of early settler populations affect the U.S. today? And what does it have to do with *Kriegsraison*? It matters, writes Dunbar-Ortiz, 'because it tells us that the privatization of lands and other forms of human capital are at the core of the U.S. experiment':

> '…the origins of the United States in settler colonialism—as an empire born from the violent acquisition of indigenous lands and the ruthless devaluation of indigenous lives—lends the country unique characteristics that matter when considering questions of how to unhitch its future from its violent DNA.'[1003]

If we want to return *Kriegsraison* to its grave and effectively understand why the United States has the relationship with international law that it does, it is imperative that we understand how the U.S. views war and why it feels such insecurity.

It is also critical to examine what U.S. interpretations of international law and *Kriegsraison* can tell us about international law more generally. The next and final chapter of this thesis asks what the *Kriegsraison* doctrine itself represents for the international community and the international legal system, and what can be done to address this damaging doctrine.

[1001] Julian Borger, 'US air wars under Trump: increasingly indiscriminate, increasingly opaque' (*The Guardian*, 23 January 2018) https://www.theguardian.com/us-news/2018/jan/23/us-air-wars-trump, accessed 17 December 2018.
[1002] Ibid.
[1003] Dunbar-Ortiz (n715).

Chapter Six: Targeted Killing, *Kriegsraison*, and the Strategic Legalism of Imperialism

In prior chapters of this thesis I have asserted that the U.S. targeted killing programme violates numerous rules of international humanitarian law and international human rights law, and that it also violates the international law on the use of force. These violations, combined with the language of self-defence and necessity used in justifying the programme, are representative of *Kriegsraison*. But what does the resurrection of *Kriegsraison* represent itself? What is its place in the 'larger picture' of public international law and the international rule of law? What does it tell us about international law on the use of force, international humanitarian law and international human rights law? I contend that *Kriegsraison* is representative of imperial power, of conduct and actions at both the political and military level which operate not *outside* the existing liberal order but rather in a state of exception *inside* the liberal order, often through the harnessing of international law rules.

As discussed in the previous chapter, U.S. identity and the U.S. approach to international law have been strongly influenced by the country's history of war-making and war-fighting. Meanwhile, the United States' approach to public international law, in particular its approach to international human rights law and the international law on the use of force, is both highly utilitarian and deeply exceptionalist. While the U.S. views itself both as an exceptional state and as a state who can, when necessary, exempt itself from the international legal system and the rule of law, it tends to do so through the 'creative' interpretation of already existing legal rules, and of course the obvious flouting of others (in particular, the international law on the use of force). U.S. exceptionalism is thus situated not in a sphere outside the international rule of law, but rather in an exceptional space *within* a structurally imperial rule of law system. In his book 'Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century', Coates describes how 'it has become conventional to think about exceptionalism and empire, on one hand, and compliance with international law, on the other, as mutually exclusive. More international law means less empire; more exceptionalism means less international law.'[1004] Coates finds that history does not support this interpretation, noting that 'law did much to make empire possible', and that 'lawyers provided policymakers with

[1004] Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (Oxford University Press 2016) 178.

arguments to justify the annexation of the Philippines and US control over Panama.' And when, in the era of decolonisation, 'formal empire lost its lustre', lawyers 'advocated the spread of international legal institutions as a means of enforcing a basic standard of treatment for American overseas capital.'[1005] This is a phenomenon that continues today, though often through much more discreet and insidious means. This chapter thus aims to highlight the compatibility of international law and empire, of international law as a 'locus of oppression' through the targeted killing programme, but also to emphasise the emancipatory potential of international law and international law's 'constant promise for liberation.'[1006]

Accepting the premise that law and empire continue to be entwined of course has implications for the international rule of law and the ways in which we consider international law to operate, whether as a restraint on state action, or as a progressive good. This final chapter, then, explores the imperial character of the *Kriegsraison* doctrine, of the international law on the use of force, and the implications of the targeted killing programme for international law today. I find Susan Marks' conception of totality useful here, with totality in international law highlighting 'the need for a complex kind of analysis that connects international legal norms with the wider processes through which their interpretation is shaped and enabled.'[1007] The concept of totality, writes Marks, urges us 'to approach things relationally, rather than in isolation, and to pay attention to the larger social forces that create the conditions in which international legal ideas and concepts emerge, develop and get deployed.'[1008] In this thesis, in assessing not just the United States legal justifications for the targeted killing programme and examining the application of international humanitarian law and human rights law to the targeted killing programme, but also analysing the shaping of the concepts of necessity and military necessity in international law, discussing the portrayal of armed drones and the shaping of American national identity and its approach to international law, I have attempted to implement the concept of totality and keep to the fore the processes engaged by the U.S. to sustain the myth that the targeted killing programme is compliant with international law and that it is the best option for tackling the current cycle of terrorist violence. In this chapter, I present an overview of the ideas of 'legitimacy' and 'lawfulness' in the targeted killing programme during the

[1005] Coates (n991) 178.
[1006] Ntina Tzouvala, 'TWAIL and the 'Unwilling Or Unable' Doctrine: Continuities and Ruptures' (2015) AJIL Unbound 109, 269.
[1007] Susan Marks, *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008) 15.
[1008] Ibid.

Obama administration, and the use of the term 'civilization' in the Trump administration to date. Claims of 'lawfulness', and 'civilization' have long been ideas which are not only intrinsic to empire, but which are indispensable for its legitimacy and its maintenance. Or, as Poulantzas puts it, 'nothing could be more mistaken than to counterpose the rule of law to arbitrariness, abuse of power, and the prince's act of will….'[1009]

Writing on European empire in the nineteenth century, Jennifer Pitts describes 'the ideological complex…that Europeans had developed to justify their commercial and imperial depredations of societies throughout the extra-European world' – one that can be read as a description of American government today, and for many decades past:

> 'They read their military supremacy as evidence of their moral superiority; they looked with contempt on societies of which they lacked the most basic understanding; and with a stunning parochialism, they not only saw their own standards of beauty, right, and reason as paramount, but also expected others to embrace those supposed standards despite the Europeans' consistently abhorrent conduct. Central to this ideology was a story about law: about the supposed absence of law in the despotic empires of Asia, where tyrants dominated their enslaved subjects without any legal or moral restraints, and about the unique virtues of the European law of nations, which had tempered war with consensual rules among free and equal states and whose benefits would one day be conferred on others when they achieved "civilization."'[1010]

The imperial character of *Kriegsraison* is evident primarily in that, in the current system of international law, it can only be wielded effectively by those states that possess both political *and* military power. One of the means by which the U.S. wields *Kriegsraison* is through engaging in strategic legalism, defined by Maguire as 'the use of laws or legal arguments to further larger policy objectives, irrespective of facts or laws…'[1011] The U.S. has long engaged in such strategic legalism, and it is particularly observable in the targeted killing programme. As Gunneflo notes, '*legal* texts, laying down a specifically *legal* rationality, have played an enormously important role in the emergence of targeted killing.'[1012]

[1009] Nicos Poulantzas *State, Power, Socialism* (Verso 1990) 76.
[1010] Jennifer Pitts, *Boundaries of the International: Law and Empire* (Harvard University Press 2018) 1.
[1011] Peter Maguire, *Law and War: An American Story* (Columbia University Press 2001) 9.
[1012] Markus Gunneflo, *Targeted Killing: A Legal and Political History* (Cambridge University Press 2016) 233.

This is particularly interesting given that, on many occasions throughout its history and certainly with the Trump administration today, the United States has often taken an 'anti-legalist' approach to foreign policy, as described by Orford. This 'anti-legalist' approach presents 'legality' and 'legitimacy' as being in opposition to each other, with legality 'presented as involving a blind adherence to restrictive rules of limited relevance to contemporary security challenges and doubtful moral value in the face of pressing humanitarian crises'.[1013] It is worth quoting Orford at length here. Legitimacy is presented as:

> '…everything that law ought to be – it results from decision-making that is principle yet pragmatic, taken by actors who are representatives of conscience yet guarantors of protection, concerned with means yet never at the expense of ends, and leads to interventions undertaken by politically effective operators who are nevertheless committed to humane values and able to balance the demands of security and justice. While legality is rigid, legitimacy is flexible.'[1014]

While Orford discusses the ability to intervene in civil wars, her analysis here is also relevant to the targeted killing programme. 'Where international law is an ally to the extent that it preserves the equilibrium and stability of the existing order from which those states benefit', writes Orford, 'it is an enemy to the extent that it constrains the policy space for intervention.'[1015]

The differentiation between 'legality' and 'legitimacy' highlights the political character of international law and the ability for the U.S. to present its war on terror conduct as either legal, legitimate, or both. While international law is often considered as being inherently progressive, Hurd warns against taking 'an enchanted view' of international law, noting that international law tends to be viewed 'as a governance system that is either apolitical and technocratic or naturally beneficial.'[1016] Yet law is, as Koskenniemi writes, 'irreducibly political.'[1017] As Hurd explains:

> '…once the premise that lawfulness confers legitimacy is widely shared, then legal resources become useful instruments for political advantage and contestation. The

[1013] Anne Orford, The Politics of Anti-Legalism in the Intervention Debate (*Global Policy Journal blog*, 30 May 2014) <https://www.globalpolicyjournal.com/blog/30/05/2014/politics-anti-legalism-intervention-debate>, accessed 30 November 2018.
[1014] Ibid.
[1015] Ibid.
[1016] Ian Hurd, 'The Empire of International Legalism' (2018) Ethics & International Affairs 32 (3) 271.
[1017] Martti Koskenniemi, *The Politics of International Law* (Hart Publishing 2011) 64.

> political system that is thereby created requires governments to fit their policies within parameters defined by international law.'[1018]

As such, 'the international legal system is also a political system based on the dominance of law over politics for governments around the world. This relationship is appropriately described as an empire.'[1019] As has been pointed out by B.S. Chimni, political power is 'a force that continuously informs the creation, interpretation and enforcement of international law'.[1020] Despite this, 'interpretative disputes and their outcomes are never seen as a function of power but simply as a result of unclear texts that are a product of compromises arrived at during the course of international negotiations.'[1021] Chimni further observes that states usually act lawfully – because 'a complete mismatch between the rules of international law and the interests and practices of powerful states is rare', and as such, 'violation is not a frequent event. However, when there is a mismatch in periods of rapid development… either the rules themselves are transformed… or those are violated.'[1022] During the Obama administration, the United States 'helped advance a version of international law distorted by American interests, which allows powerful countries to engage in militarized policing at the time and place of their choosing.'[1023] With the targeted killing programme, the U.S. presented a policy – that of targeted killing – and in almost every instance discussed it in legal terms, which, as de Londras has discussed, has enabled the U.S. to 'get out of answering harder moral questions.'[1024]

Yet, as Koskenniemi notes, a demonstration that law '"all depends on politics" does not move one inch towards a *better* politics'.[1025] The political character of law does not 'cancel out' law's legal character – it merely points 'to the inevitable moment of choice in legal practice in favour of one contested meaning against another.'[1026] Legal interpretation and the politics of international law, the politics of choosing between different legal interpretations, has been

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[1018] Hurd (n1003) 266.

[1019] Hurd (n1003) 268.
[1020] B.S. Chimni, 'An outline of a Marxist course on public international law', in Marks, Susan (ed.), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008) 56.
[1021] Ibid 54.
[1022] Ibid 65.
[1023] Samuel Moyn, 'Beyond Liberal Internationalism' (2017) *Dissent* 64 (1) 119.
[1024] Fiona de Londras, 'Jihadi John': the legal and moral questions around targeted killings, (*The Conversation*, 13 November 2015), https://theconversation.com/jihadi-john-strike-the-legal-and-moral-questions-around-targeted-drone-killings-50683 accessed 30 November 2018.
[1025] Koskenniemi (n1004) 64.
[1026] Martti Koskenniemi (2008), 'What should international lawyers learn from Karl Marx?', in Marks, Susan (ed.), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press) 45.

especially in evidence in U.S. attempts to create a right of pre-emptive self-defence in international law, in establishing the category of 'unlawful combatant', in attempts to introduce the 'unwilling or unable' doctrine to international law, and in the naming of the tactic of 'targeted killing'. Here is where we situate *Kriegsraison*. The violence of the targeted killing programme is representative of *Kriegsraison* because it falls *outside* of the regulated violence usually deemed acceptable by international law, both in terms of the justification of the programme at the rhetorical and *jus ad bellum* level by the United States and in the use of force in the territory of a sovereign entity, and in terms of the actual physical manifestation of violence at the operational and *jus in bello* level, primarily in its unlawful targeting.

The imperial character of *Kriegsraison*: sporadic, disconnected acts & the issue of intervention

The issue of intervention is illustrative of the imperial character of the *Kriegsraison* doctrine. The targeted killing programme violates not just the rights of individuals, but also the rights of communities and states. But in its current iteration, *Kriegsraison* centres the individual and urges us to focus our attention on the harm committed against the individual. A focus on the individual, it has been argued, may lessen our attention on the 'bigger picture' of the targeted killing programme, with the programme represented as sporadic and disparate incidents of force used against specific targeted individuals, when it is in fact a programme of widespread violence, committed not just against individuals in militant groups, but against civilians and their communities, and the states in which they are situated. Today's American iteration of *Kriegsraison*, through the targeted killing programme, privileges the security of the United States and the perceived necessity of its self-defence over the sovereignty of those states in the 'Global South' in which the targeted killing programme operates, and over the rights of the communities and individuals affected by its violence.

Gunneflo has noted how a focus solely on the rights or status of individuals 'risks decontextualizing and depoliticising what amounts to one of the most systematic, if not extensive, forms of North on South violence in the post-colonial era'.[1027] Chimni, meanwhile, has highlighted how this exercise of unilateral extraterritorial jurisdiction is confined to

[1027] Markus Gunneflo, 'Drones and the Decolonization of International Law' (2018) *Middle East Insight No. 191*, accessed online at https://mei.nus.edu.sg/publication/insight-191-drones-and-the-decolonization-of-international-law/, accessed 10 October 2018.

advanced capitalist countries such as the United States.[1028] Parfitt argues that international law and its sovereigns – i.e. states - are characterised by an 'inherently expansionist logic'.[1029] But states, as Parfitt points out, cannot all be permitted to grow. Growth, whether through territorial conquest or access to markets, is the privilege of those states who possess the most power, of those states who, over the course of five centuries, have accumulated resources and been involved in their distribution.[1030] The international legal system was not created on a level playing field. Accepting that all states are 'free' and 'equal' has, as Parfitt argues, 'predictable and deleterious effects on the distribution of wealth, power and pleasure…'[1031] And 'only the most powerful states – those with the biggest 'markets' and the largest reservoirs of resources – can get away with resisting some of the rules they so rigorously enforce amongst their peers.'[1032] As Hurd notes, 'when a strong state has influence over what the law says, it can be expected to use that influence to decide that the two do indeed converge. Law and power become entangled by this process…'[1033]

Gunneflo is correct in his argument that treating the targeted killing programme as a question primarily of human rights and international humanitarian law, and not as one of intervention and aggression against sovereign states, contributes to 'a restructuring of legitimate forms of warfare with tremendous effects for post-colonial states and for international law more generally.'[1034] I am also in agreement with his assertion that the United States' treatment of the use of force appears to be developing in a similar manner as that seen in the shift in the international law regime on trade from an *inter*national regime to a *trans*national regime, and concur that should the use of force regime move from an international to a transnational regime, this would further embed, rather than break with, the colonial past of international law.[1035]

Though our current international law regime may be flawed, it does presents a barrier to U.S. imperial ambition, primarily with its privileging of state sovereignty. We cannot deny the colonial heritage of international law and the influence that this history continues to hold today. But, as Tzouvala points out, contemporary international law is 'more than an "undercover"

[1028] Ibid.
[1029] Rose Parfitt, 'Fascism, Imperialism and International Law: An Arch Met a Motorway and the Rest is History' (2018) *Lieden Journal of International Law* 31 (3) 515.
[1030] Parfitt (n1016) 532.
[1031] Ibid 528.
[1032] Ibid 515.
[1033] Hurd (n1003) 274.
[1034] Gunneflo (n1014).
[1035] Ibid.

continuation of older international legal structure.[1036] Since 1945, international law has experienced a 'profound reconfiguration', not least through the privileging of state sovereignty in Article 2 (4), which has been, and continues to be, an extremely important principle for postcolonial and non-Western states.[1037]

The prime example of U.S. attempts to influence, and indeed eradicate, the existing norm of non-intervention is represented in the 'unwilling or unable' doctrine, which advocates for a right of individual or collective self-defence against a threat 'when…the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.'[1038] The 'unwilling or 'unable' doctrine 'reintroduces a hierarchy of states in the operation of *jus ad bellum*', which is 'reminiscent of the infamous nineteenth-century distinction between civilized, semi-civilized and uncivilized states'.[1039] Tzouvala argues that the 'unwilling or unable' doctrine 'replicates this hierarchy, directly adopting certain "civilization" criteria, such as the existence of a strong, effective, centralized state with a certain level and certain mode of control over its territory.'[1040] All of the states in which the targeted killing programme operates are states of the Global South, and the 'unwilling or unable' doctrine similarly has also applied, in 'virtually all cases', to states of the Global South, a number of which do not have a strong, effective and centralised state.[1041] Tzouvala identifies a "red thread" connecting the standard of civilization with the 'unwilling or unable' doctrine, noting that the 'unequal international legal structure promoted by these arguments is intimately linked to an unequal political structure, characterized by the dominance of the Global North over the Global South.'[1042] The 'unwilling or unable' doctrine enables the states of the Global North to use force not only against the sovereignty of states, argues Tzouvala, but against the 'life and security of the citizens of states of the Global South…'[1043]

Even in cases where the 'unwilling or unable' doctrine is not invoked, and where the consent of the state in which a drone strike takes place has been given to the U.S., the issue of

[1036] Tzouvala (n993) 270.
[1037] Ibid.

[1038] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc. S/2014/695, 23 September 2014. Available online at: http://dag.un.org/bitstream/handle/11176/89298/S_2014_695-EN.pdf?sequence=21&isAllowed=y
[1039] Tzouvala (n993) 267.
[1040] Ibid.
[1041] Ibid.
[1042] Ibid 268.
[1043] Ibid 268.

sovereignty is still in question. Extraterritorial assassinations are, says Gunneflo, 'one of the most systematic, if not extensive, forms of North on South violence in the post-colonial era.'[1044] It is true that there has been a failure to deal with this issue of aggression. But, under the current international regime, if consent has been 'freely given' by the state in question to the United States, under the rules of international law it is difficult to argue that drone strikes constitute aggression. In order for consent for intervention to be accepted as legitimate, the International Law Commission requires that consent be 'freely given and clearly established.'[1045] This consent can be 'vitiated by error, fraud, corruption or coercion.'[1046] Consent must also be given by the 'legitimate' government of a state.[1047] This final qualification is interesting, considering that the *de facto* legitimacy of many of the countries in which the U.S. has government consent to carry out anti-terror operations is in question, if not their *de jure* legitimacy.[1048] As for the first criterion, that consent be 'freely given and clearly established', it is far from clear that the consent of governments in states such as Yemen, Libya and Somalia can be 'freely' given. Given the highly unequal power balance between the United States government and the governments of these states – states whose governments may have only *de jure* control of their respective territories at best, with little or no *de facto* control; states who rely heavily on development aid and other financial aid from the United States; can an equal relationship in which consent can be freely given actually be said to exist? All states may be equal in the eyes of the law, but in relations between states, some are more equal than others. If international law is to truly 'break with its colonial past', these inequalities must be taken into account.[1049]

Kriegsraison aims to elide discussions of sovereignty. Through 'necessity', whether actual or merely proclaimed, state sovereignty becomes irrelevant. What matters for *Kriegsraison* is whether the force employed is necessary – or can be claimed to be necessary - for the security of the state; in this case, the U.S. *Kriegsraison* bypasses questions of state sovereignty altogether. For *Kriegsraison*, sovereignty is irrelevant, because self-preservation makes it so.

The U.S. is thus impelled to portray the targeted killing programme both as one component in a larger battle against terrorism, and also as a set of separate, distinguishable, individual incidents of violence. *Kriegsraison* diverts the focus of our enquiries from whether the use of

[1044] Gunneflo (n1014).
[1045] Max Byrne, 'Consent and the use of force: an examination of 'intervention by invitation' as a basis for US drone strikes in Pakistan, Somalia and Yemen' (2016) *Journal on the Use of Force and International Law* 3 (1) 104.
[1046] Ibid 104.
[1047] Byrne (n1032) 98.
[1048] Ibid 112.
[1049] Gunneflo (n999) 6.

force is lawful in the first instance, i.e. at *the jus ad bellum* level; to whether the use of force is lawful at the second instance, i.e. the *jus in bello* level - whether or not this specific incident of violence can be said to be lawful and/or necessary. Because, to return to the first chapter of this thesis, *Kriegsraison* makes the belligerent 'the sole judge of the necessity' of using force – for the state whose practice amounts to *Kriegsraison*, it is not for those of us in academia, or for other states in the international community, to question this 'necessity'.

It is undoubtedly true that the rise of neoliberalism has been accompanied by an increased focus on the individual in international affairs,[1050] just as it is true that, regarding extraterritorial assassinations and the targeted killing programme of the United States, there has been a 'massive shift' in the past thirty years, with 'questions of sovereignty being consumed by consideration of the rights or status of the individual's affected.'[1051] The injustices of the targeted killing programme are disassociated from the wider war on terror, and made to appear as 'random, accidental and arbitrary'. And if, as Marks' writes, they are:

> '…random, accidental and arbitrary, then the prospects of changing them become every bit as remote as if they were fated. The category of possibility – not just abstract possibility, but real, historical possibility – drops out of sight.'[1052]

Like Gunneflo, Moyn also argues that there has been too great a focus on the harm done to the individual in the course of U.S. uses of force in the 'war on terror'.[1053] It is likely true that focussing on the legality or otherwise of the tactical and operational aspects of the targeted killing programme does nothing to dissuade the U.S. from its continuation, and does little to halt the further spread of the programme in the Middle East and Africa. Perhaps it may serve only to drive the U.S. to present the targeted killing programme as 'lawful' and 'clean'. 'Atrocitarianism', as Moyn terms it, 'fixates on the final step in the causal pathway to civilian mass death', noting that aside from the consequences for civilians, war is 'regularly disastrous for all others concerned.'[1054] Does a focus on making war more 'clean', and of ensuring that those individuals who are targeted are targeted 'legally', absolve itself of asking the perhaps more difficult, political questions? Decrying the lack of attention given to the aggressive manoeuvres of the United States, Moyn writes that, from the 1970s onward, 'atrocity took the

[1050] Gunneflo (n1014).
[1051] Gunneflo (n1014).
[1052] Susan Marks, 'False Contingency' (2009) *Current Legal Problems* 62 (1) 20.
[1053] Samuel Moyn, 'From Aggression to Atrocity: Rethinking the History of International Criminal Law', forthcoming in the *Oxford Handbook of International Criminal Law*. Available at SSRN: https://ssrn.com/abstract=2805952
[1054] Ibid 17.

place of aggression as what demanded most zealous opposition, and crimes of war became increasingly tolerable to a broad public that had once stigmatized war as crime.'[1055] Yet how much had war as a crime really been stigmatized? The ban on the use of force, except in cases of self-defence, was inaugurated only with the introduction of the U.N. Charter in 1945, and following its creation, the United States alone was involved in numerous foreign wars, including in Korea and Vietnam. While 'atrocity law' reflects 'good and honourable intentions', argues Moyn, it has also fit 'shifting international politics as the world moved from the age of global empire to the age of "globalization".[1056] He contends that the era since 9/11 surprises us 'precisely because it returned American security to the form of widespread direct intervention…':

> '…as a result, the risk of condemnation for atrocity certainly accrued…but the risk was largely contained. By contrast, the new international criminal law posed no obstacle to the new kind of war the times allowed and dictated: global, interminable, and clean. Even when America's own arguments for crossing others' borders in pursuit of terrorists fail to convince everyone, there is no charge of aggression to fear. Today, the way powerful states fight war…is fully compatible with an international criminal law that long excluded aggression to shift to atrocity instead.'[1057]

The perceived 'cleanliness' of the targeted killing programme, and 'the containment and minimization of violence in America's war… have only made it harder to criticize America's use of force in other countries', Moyn believes.[1058] This brings Moyn to the nub of his argument:

> 'The more containment succeeds…the more likely it is that the war will continue indefinitely. What if its worst feature is not collateral death, or even violence, but an attempt at global control and ordering that no one opposes?'[1059]

I agree with Moyn that the 'wars' in which the U.S. is currently engaged represent an attempt at 'global control and ordering'. The assertion that the U.S. practices 'containment', however, must be challenged. The war is 'contained' in as much as those of us in the Global North neither

[1055] Ibid 25.
[1056] Ibid 26.
[1057] Moyn (n1040) 27.
[1058] Samuel Moyn, 'A War without Civilian Deaths?' (*The New Republic*, 23 October 2018) <https://newrepublic.com/article/151560/damage-control-book-review-nick-mcdonell-bodies-person>, accessed 24 October 2018.
[1059] Ibid.

see nor experience the vast majority of the direct, physical violence inflicted by the United States in those countries targeted in the 'war on terror'. To say that U.S. violence in the Middle East is 'contained' is extremely misleading. A study released by Brown University in November 2018 found that, from 2001 to 2018, at least 38,480 civilians had been killed in Afghanistan, 23,372 civilians in Pakistan, and between 182,272 - 204,575 civilians in Iraq: an estimated total of between 244,124 - 266,427 civilians in total.[1060] These figures do not include civilian deaths in Yemen, Somalia, Libya or Syria. They do not account for the civilian wounded or psychological harm to civilians. Overall, including U.S. military and civilian contractors, National Military and Police forces, other Allied troops, opposition fighters, journalists and media workers, and humanitarian and NGO workers, an estimated 480,000 – 500,000 have been killed since the beginning of the war on terror.[1061] Again, this is 'an incomplete estimate of the human toll of killing in these wars', and the author of the report acknowledges that 'we may never know the total direct death toll in these wars.'[1062] While the United States has not been directly responsible for each of these deaths, its failure to contain the violence of its wars in Afghanistan and Iraq, and the violence of the targeted killing programme, has had an immeasurable influence on instability in the region. Describing the war on terror as 'clean' further feeds into U.S. government descriptions of its targeting measures.

I maintain, however, that a focus on the individual, and on the individual's rights in both international human rights and humanitarian law, remains important. As has been demonstrated in previous chapters, the targeted killing programme is far from compliant with either the international human rights or humanitarian law regime. I have discussed how the United States refuses to acknowledge the applicability of human rights law, in particular the ICCPR, to its targeted killing programme. Even as regards international humanitarian law, the United States has used IHL compliance as a smokescreen for the mistreatment and unlawful killing of individuals and for its unlawful use of force. For instance, the U.S. was particularly vocal about the lawfulness of its actions under the law on recourse to force and the law of armed conflict under the Obama administration, going so far as to assert that the administration held its drone

[1060] Neta C. Crawford, Human Cost of the Post-9/11 Wars: Lethality and the Need for Transparency, Brown University Costs of War Project (2018) <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2018/Human%20Costs%2C%20Nov%208%202018%20CoW.pdf>, accessed 09 November 2018.
[1061] Crawford (n1047).
[1062] Ibid.

strikes to higher targeting standards than required by IHL.[1063] Where the Bush administration asserted the war on terror's *legitimacy* to justify its internationally unlawful conduct to an electorate which was eager to see forceful action against those responsible for the 9/11 attacks, the Obama administration asserted its *legality* for an electorate jaded by war and aware of the scandals of Guantanamo Bay, torture and rendition. Meanwhile, the Trump administration shies away from statements and discussions about the international legality *or* the legitimacy of its conduct, with his primary constituency viewing international law as inherently anti-American.

In numerous speeches on the subject of counter-terrorism and defence, for example, President Obama took pains to convince the American public, and the wider world, of the legality of U.S. actions at the *jus ad bellum* level, and particularly at the *jus in bello* level, and of the 'high standards' to which the U.S. held itself, claiming that the U.S. often took measures that went above and beyond those required by international law. In his landmark speech at the National Defense University (in 2013, made the day after Obama had sanctioned the public release of the 2013 Presidential Policy Guidance, known widely as the drone 'playbook', Obama said:

> 'America's actions are legal. We were attacked on 9/11…. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces… So this is a just war -- a war waged proportionally, in last resort, and in self-defense…'[1064]

He went on to state that '…before any strike is taken, there must be near-certainty that no civilians will be killed or injured -- the highest standard we can set.'[1065]

Speaking again at the MacDill Airforce Base in Florida in December 2016, in one of the last major speeches of his presidency, President Obama against mentioned the 'high standards' of targeting, using almost the exact same words he had previously used in his 2013 NDU speech:

> '…under rules that I put in place and that I made public, before any strike is taken outside of a warzone, there must be near certainty that no civilians will be killed or injured. And while nothing is certain in any strike, and we have acknowledged that

[1063] Jennifer M. O' Connell, 'Applying the Law of Targeting to the Modern Battlefield', Remarks at NYU School of Law November 2016 <https://dod.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf>, accessed 29 September 2018.
[1064] The White House (n226).
[1065] Ibid.

there are tragic instances where innocents have been killed by our strikes, this is the highest standard that we can set.'[1066]

Other key figures in his administration also stressed this message. In a speech at New York University's School of Law in November 2016, Jennifer M. O' Connell, then General Counsel at the Department of Defense, remarked that:

'We [the United States] not only follow the law of armed conflict, but in many cases, when it is feasible, we do more than what the law requires by applying policies and standards that are more protective of civilians than required by the law of armed conflict. President Obama, like other Presidents before him, has established policies that apply conditions to military operations beyond what is required by the law when it is practicable to do so.'[1067]

Former State Department Legal Adviser Brian Egan, speaking earlier in 2016 at the Annual Meeting of the American Society of International Law, also extolled U.S. targeted standards, stating that the 2013 PPG: '…imposes certain heightened policy standards that exceed the requirements of the law of armed conflict for lethal targeting.'[1068] The President had imposed these standards, said Egan, out of a belief that the implementation of such standards outside of hot battlefields 'is the right approach to using force to meet U.S. counterterrorism objectives and protect American lives consistent with our values.'[1069] He also argued that the standard imposed by the PPG is: 'higher than that imposed by the law of armed conflict, which contemplates that civilians will inevitably and tragically be killed in armed conflict.'[1070] Egan also went on to add that 'the President always retains authority to take lethal action consistent with the law of armed conflict, even if the PPG's heightened policy standards may not be met.'[1071]

[1066] The White House (2016), Remarks by the President on the Administration's Approach to Counterterrorism, accessed online at < https://obamawhitehouse.archives.gov/the-press-office/2016/12/06/remarks-president-administrations-approach-counterterrorism>, accessed 29September 2018. Notably, President Obama took pains in this speech to distinguish drone strikes from air strikes, commenting that 'drone strikes allow us to deny terrorists a safe haven without airstrikes, which are less precise'.

[1067] O' Connell (n1049).
[1068] U.S. Department of State (n439).
[1069] Ibid.
[1070] Ibid.
[1071] Ibid.

Other administration figures, such as John O. Brennan, then Assistant to the President for Homeland Security and Counterterrorism, and Eric Holder, the then Attorney General of the United States, discussed and defended the legality of the targeted killing programme at the *jus ad bellum* and *jus in bello* levels.[1072]

Given what we know of the targeted killing programme at the *jus ad bellum* and *jus in bello* levels, of its targeting of groups deemed to be 'affiliated' with al-Qaeda, many of which were not in existence at the time of the September 11th attacks, and of the targeting of high- and low-level militants (whether 'continuous imminent threats' or not), of the 'accidental' targeting of civilians, and of civilians killed as collateral damage to drone strikes, it is clear that the U.S. has effectively been using its alleged 'higher standard' of targeting and of IHL compliance as a fig leaf to avoid deeper discussions about the legality and legitimacy of the targeted killing programme at the first instance, that is, at the *jus ad bellum* level. International humanitarian law, as Smiley observes when writing about the U.S. war in the Philippines and other historical colonial endeavours:

> '…could be relevant to imperial wars as more than a static set of constraints to be obeyed, a symbol invoked to justify colonialism, or an obstacle to be avoided. It was also a way to structure and articulate violence itself.'[1073]

This is precisely what has occurred with the targeted killing programme. The United States has used international humanitarian law to structure and articulate the violence of the targeted killing programme, and the wider war on terror. The use of armed drones in the fulfilment of such a programme was unprecedented by existing international law. While the U.S. saw itself as being exceptional enough to create and carry out the targeted killing programme regardless, it utilised existing laws to justify the programme and to assure the international community that the programme operated within the bounds of IHL.

Gunneflo's assertion that the focus on the individual has lessened, or altogether removed, the focus on the U.S.' supposed right of intervention in the territories where drone strikes take place, and on the aggression of U.S. actions as a violation of Article 2 (4) of the UN Charter,

[1072] See Brennan (n695); Department of Justice, Attorney General Eric Holder speaks at Northwestern University School of Law (2012). Available online at: https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law.

[1073] Will Smiley, 'Lawless Wars of Empires? The International Law of War in the Philippines, 1898 – 1903' (2018), *Law and History Review* 36 (3) 549.

may be correct.[1074] But a focus on the rights of individuals allows us to remove the United States' smokescreen of alleged IHL compliance, to see through the fog and understand that U.S. conduct has been far from compliant, that targeting standards and procedures remain extremely secretive and unaccountable, and that measures such as the 2013 Presidential Policy Guidance are, effectively, placebos – designed to make the U.S. government and domestic audiences feel more comfortable with U.S. drone strikes, and easy to remove with little notice and with no ill effects for the U.S., as evidenced by President Trump's September 2017 replacement of the 2013 PPG with a new set of guidelines, reportedly named the 'Principles, Standards and Procedures' (or PSP, for short).[1075] The PSP is apparently designed to make the bureaucracy of the PPG 'disappear', with fewer 'hurdles' for drone operators to clear before launching strikes, reinstating the CIA's purview, including over Afghanistan, where until 2017 all drone strikes were carried out by the military. It also reduces the need for higher-level government involvement, with more responsibility over strikes given to the Pentagon and the CIA, and eliminates the requirement that those targeted in strikes be considered an 'identified high-value terrorist' (a 'HVT'), or a terrorist that poses a continuing, imminent threat.[1076] Unfortunately, the PSP document has, to date, not been made public.

Furthermore, in March 2017 President Trump also took the decision to reclassify parts of Somalia and Yemen as being 'areas of active hostilities', i.e. territories in which the 'heightened' standards of the PPG do not apply.[1077] In September 2018, The New York Times reported the existence of a new CIA drone base in Niger, another state in which, prior to this, only the military has conducted strikes.[1078] At the time of reporting, one official alleged that drones flying from this base had been used only for surveillance.[1079] However, a Nigerien official said that a drone from that base had already targeted and killed an al-Qaeda member in

[1074] Gunneflo (n1014).
[1075] Charlie Savage and Eric Schmitt, 'Trump Poised to Drop Some Limits Drone Strikes and Commando Raids' (*The New York Times*, 21 September 2017) < https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>, accessed 27 September 2018.

[1076] The White House (2013), Procedures for Approving Direct Action against Terrorist Targets Located Outside the United States and Areas of Active Hostilities, accessed online at https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf, accessed 27September 2018.
[1077] Reuters.com, Trump grants U.S. military more authority to attack militants in Somalia (*Reuters.com*, 30 March 2017) <https://www.reuters.com/article/us-usa-defense-somalia-idUSKBN1712OD>, accessed 27 September 2018; Savage and Schmitt (n1061).
[1078] Joe Penney et al, C.I.A. Drone Mission, Curtailed by Obama, Is Expanded in Africa Under Trump (*The New York Times*, 9 September 2018)< https://www.nytimes.com/2018/09/09/world/africa/cia-drones-africa-military.html>, accessed 02 October 2018.
[1079] Ibid.

southern Libya.[1080] Another military base in Agadez, some 350 miles west of the CIA base, is used by the Pentagon to carry out lethal strikes, and represents the largest construction project ever undertaken alone by the Air Force.[1081] Aside from the expansion of the targeted killing programme in this manner, the number of civilian casualties in a number of territories has increased significantly.

We must remember, again, that the 2013 PPG and the new PPS applies only to those territories considered as 'areas outside of active hostilities'. The majority of U.S. drone strikes, and other air strikes, take place in 'areas of active hostilities', in Afghanistan, Iraq and Syria. Numerous reports state that U.S. airstrikes – those carried out by drones, helicopters, and fighter jets – more than doubled in the first year of Trump's presidency,[1082] while coalition strikes in the fight against ISIS rose by 50% in 2017, with a 215% rise in civilian casualties. In Iraq, the U.S. accounted for the vast majority of these strikes – some 68.4% up to June 2017.[1083] In Syria, U.S. strikes accounted for approximately 95.5% of strikes taken up to June 2017 (at which point the Combined Joint Task Force – Operation Inherent Resolve, aka CJTF-OIR, ceased to release strike data).[1084] Civilian casualties have reportedly also substantially increased in Afghanistan. The UN reported a 39% increase in civilian casualties from aerial attacks by U.S. and Afghan forces, with the U.S. responsible for about half of these.[1085] In 2016, the Obama administration introduced an executive order which required that the White House submit a report to Congress by 1st May every year detailing a list of all U.S. military operations which caused civilian deaths (the CIA was not included in this executive order).

However, the Trump administration has thus far failed to deliver any reporting on civilian casualties to Congress, and a White House spokesperson told The Washington Post on 1st May

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[1080] The Bureau of Investigative Journalism, Deciphering the New CIA Drone Base in Niger (*The Bureau of Investigative Journalism*, 09 September 2018), accessed online at https://www.thebureauinvestigates.com/stories/2018-09-11/deciphering-the-new-cia-drone-base-in-niger, accessed 02 October 2018.

[1081] Eric Schmitt (2018), A Shadowy War's Newest Front: A Drone Base Rising From Saharan Dust (*The New York Times*, 22 April 2018) <https://www.nytimes.com/2018/04/22/us/politics/drone-base-niger.html?module=inline> 02 October 2018/

[1082] The Bureau of Investigative Journalism (2017), US Counter Terror Air Strikes Double in Trump's First Year (*The Bureau of Investigative Journalism*, 19 December 2017), accessed online at https://www.thebureauinvestigates.com/stories/2017-12-19/counterrorism-strikes-double-trump-first-year, October 2018

[1083] Alex Hopkins, Airwars annual assessment 2017: civilians paid a high price for major Coalition gains, (*Airwars.org*, 18 January 2018), https://airwars.org/report/airwars-annual-assessment-2017/, accessed 02 October 2018.

[1084] Airwars.org (2018), War data (*Airwars.org*, 2018), accessed online at https://airwars.org/data/, accessed 02October 2018.

[1085] United Nations Assistance Mission in Afghanistan (2018), Quarterly Report on the Protection of Civilians in Armed Conflict: 1 January to 30 September 2018, accessed online at: https://unama.unmissions.org/sites/default/files/unama_protection_of_civilians_in_armed_conflict_3rd_quarter_report_2018_10_oct.pdf, accessed 02 October 2018'

2017 that the relevant executive order is 'under review' and could be 'modified' or 'rescinded'.[1086] Like the Obama administration's 2013 PPG, the executive order requiring the reporting of civilian casualties represented a panacea for accountability, with little practical effect, and extremely easy for the subsequent administration to ignore or overturn. While the Department of Defense must submit a similar report to Congress under Section 1057 of the 2018 National Defense Authorization Act (NDAA), and it seems that the Pentagon continues to take heed of the Obama administration's 2016 executive order, this report similarly doesn't include strikes by the CIA or other agencies.[1087] Moreover, as with previous U.S. claims around civilian casualties, this DoD report has been heavily criticised for undercounting civilian deaths.[1088]

The Trump administration does not appear to be particularly concerned with ensuring that U.S. policy is seen as either legal or legitimate under international law and indeed seems to have a deeply ambivalent relationship with international law on the whole. Legality and legitimacy featured little in the 2017 National Security Strategy, with questions of legality in the document mostly focused on immigration policy. Legality and legitimacy are little mentioned in speeches by President Trump. National Security Adviser John Bolton, in a September 2018 speech on U.S. policy towards the ICC, discussed the 'fantasies' of international law and was forthright on the United States' aversion to allowing the ICC to prosecute crimes of aggression. 'History has proven', argued Bolton, 'that the only deterrent to evil and atrocity is what Franklin Roosevelt once called "the righteous might" of the United States and its allies…'[1089] Aside from this speech, the most detailed legal position from the Trump administration has come in the form of a speech given by William S. Castle, Deputy General Counsel at the Department of Defense, to the New York City Bar Association in December 2017, on the subject of AUMFs, and why the administration does not believe that a new AUMF is necessary.

[1086] Greg Jaffe, 'White House ignores executive order requiring count of civilian casualties in counterterrorism strikes' (*The Washington Post*, 01 May 2017), accessed online at https://www.washingtonpost.com/world/national-security/white-house-ignores-executive-order-requiring-count-of-civilian-casualties-in-counterterrorism-strikes/2018/05/01/2268fe40-4d4f-11e8-af46-b1d6dc0d9bfe_story.html?utm_term=.8f85acf5035f, accessed 02 October 2018

[1087] Daniel R. Mahanty et al, The Department of Defense's Report on Civilian Casualties: A Step Forward in Transparency? (*Just Security*, 13 June 2018), accessed online at: < https://www.justsecurity.org/57718/department-defenses-report-civilian-casualties-step-transparency/>, 02 October 2018.

[1088] Helene Cooper, U.S. Strikes Killed Nearly 500 Civilians in 2017, Pentagon Says (*The New York Times*, 01 June 2018), accessed online at: https://www.nytimes.com/2018/06/01/us/politics/pentagon-civilian-casualties.html, accessed 02 October 2018

[1089] Just Security, 'Bolton's Remarks on the International Criminal Court (*Just Security*, 10 September 2018) <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/>, accessed 02 December 2018.

It would be dangerous, said Castle, to impose 'artificial and unnecessary limitations in any new AUMF, in particular imposing either temporal or geographic limitations', as such limitations could hinder the United States 'ability to respond effectively and rapidly to terrorist threats to the United States.'[1090] It would also be unwise, Castle argued, to 'put a timeline on this fight against an adaptive enemy or we risk unintentionally emboldening our enemies to outlast us.' Further, he stated that 'to define the geographic scope of military operations would undermine their efficiency by advertising to our enemies where to seek safe haven.'

The phrase above – 'emboldening our enemies to outlast us' – is striking. The 'war on terror' is still, seventeen years after the events of September 11th 2001, represented as an existential threat to the United States.

As stated earlier, that remote interventions of the kind typified by the targeted killing programme do not occur outside the 'Global South' is telling of the programme's neo-colonial and imperial impulses. Attempting to inflict lawfulness through violence has been a characteristic of colonialism throughout its history. That the violence of the targeted killing programme is inflicted through the use of UAVs, and not through 'boots on the ground', does not lessen its colonial qualities. In this sense, too, *Kriegsraison* is telling: as has already been noted, the U.S. can often achieve its policy goals while remaining observant of relevant law, making choices which are generally agreed to be lawful. Actions such as the drone strikes of the targeted killing programme, which are criticised as not being adherent to this law, further highlight the often imperial nature of the rule of law and of U.S. actions in the Middle East and Africa: policy choices made by the U.S., justified in the name of necessity and self-defence, which go far beyond what the law sanctions, are available to the U.S. because of the localities in which these actions are carried out, i.e. outside the 'west' or the 'Global North'. A worrying ahistoricism, typical of imperialism, also accompanies such actions; consider, for example, President Trump's statement on his administration's strikes on Syria in April 2018, in response to alleged chemical weapons use by pro-Assad forces. Trump deemed the Middle East a 'troubled place', stating that the U.S. will 'try to make it better' – failing to acknowledge (as with previous administrations) how U.S. actions have contributed to making the Middle East the 'troubled place' it is today.[1091]

[1090] William S. Castle, Congressional Authorizations on Use of Force (*Just Security*, 11 December 2017 <https://www.justsecurity.org/49220/global-war-terrorism-aumf/> , accessed 03 October 2018.
[1091] The White House, Statement by President Trump on Syria (13 April 2018)<https://www.whitehouse.gov/briefings-statements/statement-president-trump-syria/> accessed 03 November 2018.

The idea of 'civilisation' is inherent in this Global North - on - Global South violence. The trope of the West, and of white America (and Europe) representing a higher form of civilisation, prevalent for so much of world history, has appeared again in force under the Trump administration. Speaking at the G20 summit in Warsaw in July 2017, President Trump repeatedly referred to 'the West', alleging that there are 'dire threats to our security and to our way of life.'[1092] Trump asked those assembled, 'do we have the desire and the courage to preserve our civilization in the face of those who would subvert and destroy it?'[1093] Towards the end of his speech, Trump said: 'I declare today for the world to hear that the West will never, ever be broken. Our values will prevail. Our people will thrive. And our civilization will triumph.'[1094] In his April 2018 statement on U.S. strikes against Syria, President Trump twice referred to 'civilized nations', and declared that 'today, the nations of Britain, France, and the United States of America have marshalled their righteous power against barbarism and brutality.'[1095] The administration's 2017 National Security Strategy argues that 'the scourge of the world today is a small group of rogue regimes that violate all principles of free and civilized states.'[1096]

While 'civilization' was also mentioned in speeches given by President Obama during his administration, most notably in his 2009 speech at Cairo University in Egypt entitled 'A New Beginning', the difference in the manner in which 'civilization' is invoked in this speech compared to Trump's use of the term is striking. Obama references 'civilization' four times in the 'A New Beginning' speech, noting 'civilization's debt to Islam' and recognising the Middle East as the 'cradle of civilization.'[1097]

The use of 'civilization' as a concept also featured heavily, of course, in President George W. Bush's speeches, with the term 'becoming a permanent fixture of this president's statements' on the 'war on terror'.[1098] On the 20th September 2001, Bush referred to the 'war on terror' as 'civilization's fight.'[1099] In December 2001, Bush stated that the 'great divide' in our time was

[1092] CNN.com, Trump's speech in Warsaw (06 July 2017) < https://edition.cnn.com/2017/07/06/politics/trump-speech-poland-transcript/index.html>, accessed 03 November 2018.
[1093] Ibid.
[1094] Ibid.
[1095] The White House (n1078).
[1096] The White House (n20).
[1097] The White House, Remarks by the President at Cairo University (06 April 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-cairo-university-6-04-09>, accessed 17 December 2018.
[1098] Tanja Collet, 'Civilization and civilized in post-9/11 US presidential speeches' (2009) *Discourse & Society* 20 (4) 46.
[1099] Ibid 463.

'between civilization and barbarism.'[1100] Through her analysis of statements and speeches delivered by President Bush between 11 September 2001 and 2004, Collet finds that, for the Bush administration, civilization can be defined as:

> '(a) universally accepted standards of human dignity […] which are currently under threat from the Other, who seeks to impose its counterculture in every nation and might use weapons of mass destruction to do so.'[1101]

'Terror' is defined as 'an absolute negation of civilization', with the fight being one for 'all who believe in progress and pluralism, tolerance and freedom.'[1102] While Bush, unlike Trump, did not explicitly equate 'civilization' with the West, Collet argues that 'the implicit or tact presence of the *uncivilized world* in the…discourse may explain why so many Americans are convinced that their nation, and by extension the West, are involved in a 'clash of civilizations.'[1103] Furthermore, despite the ostensible differences in the political rhetoric of the Bush, Obama and Trump administrations, Pilecki et al find that 'President Obama largely maintained the war-on-terrorism discourse that emerged during the Bush administration.'[1104]

In practice, as I have shown in earlier chapters, the imperial character of the war on terror changed very little between administrations. President Obama may have condemned the use of terror and pledged to close the U.S. prison at Guantanamo, but the targeted killing programme was extended and industrialised, and the 2013 PPG has proven otiose in terms of placing any constraints on the targeted killing programme for the Trump administration. *Kriegsraison*, as a product of the United States' hegemonic project, is essentially impervious to administrative changes. Whether a U.S. president is a Democrat or a Republican matters little in terms of how the U.S. approaches and practices foreign and security policy and defence policy, such is the level of militarisation in U.S. society and its imperialist aims. Primary differences are found in terms of how foreign and security policies are presented to either Democratic or Republican electorates.

The relation between ideas of civilisation and the international law of war is, of course, far from recent. To return somewhat full-circle in the American story of law and war, it is useful

[1100] Ibid.
[1101] Ibid 461.
[1102] Ibid 465.
[1103] Ibid 461.

[1104] Andrew Pilecki et al, 'Moral Exclusion and the Justification of U.S. Counterterrorism Strategy: Bush, Obama, and the Terrorist Enemy Figure' (2014) *Peace and Conflict: Journal of Peace Psychology* 20 (3) 294.

to return again to Francis Lieber, the author of the '*Lieber Code'*, discussed in Chapter 1. Lieber considered international law itself as a 'blessing' of modern civilisation.[1105] Considered to have created one of the great humanitarian documents of law when he drafted his '*Instructions for the Government of Armies of the United States in the Field*', Lieber was not by any means anti-war. A number of Lieber's other views as regards war and civilisation are rarely discussed, perhaps because they are, today, unpalatable to many. Writing in 1844, Lieber stated that 'Blood is occasionally the rich dew of History. Christ proclaimed peace but struggle and contest too.'[1106] He believed that war had 'morally rescued' many nations, imparting them with 'new vigor.'[1107] The U.S. war with Mexico would, by advancing the sphere of Anglo-American civilization, 'be instrumental in achieving "the most momentous results in the history of civilization."[1108] Lieber believed that the 'Anglican race' had a 'peculiar gift', with 'civil liberty making up its very bones and marrow.'[1109]

In his book *On Civil Liberty and Self-Government*, his writings took on a particularly American and Wilsonian tone. Lieber wrote:

> 'We belong to that race whose obvious task it is, among other proud and sacred tasks, to rear and spread civil liberty over vast regions in every part of the earth, on continent and isle. We belong to that tribe which alone has the word Self-Government.'[1110]

While Lieber's alleged 'humanitarianism' apparently led him to '…regret the ruthless way in which the white exterminated or brutally pushed back the Indian into the less fertile places in the wilderness, he believed that such a fate was both inevitable and on the whole desirable.'[1111] Lieber was, at base, a white nationalist, and 'wanted the United States to be a white-man's country.'[1112] In one of his letters to Secretary of State Hamilton Fish in 1870, Lieber argued that 'the white race is to rule over the Earth and we are under no obligation to ruin our people by a bastard mixture of Mongolian, Negro and White'.[1113] That Lieber is generally presented as one of the great liberal humanitarian thinkers in international law is telling as to what international law and its practitioners have chosen to forget. This mixture of nationalism, a

[1105] Merle Curti, 'Francis Lieber and Nationalism' (1914) *Huntington Library Quarterly* 4 (3) 273.
[1106] Ibid 277.
[1107] Ibid 273.
[1108] Ibid.
[1109] Ibid 277.
[1110] Curti (n1092) 280.
[1111] Ibid 282.
[1112] Ibid 273.
[1113] Ibid 281.

belief in white racial superiority, the notion of the United States as a nation with an imperial 'manifest destiny', and with a government 'in which the sway of the law alone is acknowledged', as represented in Lieber's work, has long informed U.S. treatment of the law on the use of force.[1114] In the '*Lieber Code*' itself, 'civilized nations' are referred to three times, in Articles 14, 27 and 148. 'Uncivilized people' are referred to once, in Article 24. It is also made clear in the *Lieber Code* that 'uncivilized' peoples and 'barbarous' armies wage war by different rules.

Returning to the political organisation of a state and the right of intervention, Gong mentions that one 'objective' test for political organization, and thus recognition as a 'civilized state' in the early 1900s, was the ability of a state to organise for self-defence. In this case, notes Gong:

> '…where political organization is defined in terms of capability for self-defence, then 'civilized' states are those which successfully repel aggression; 'backward' or 'uncivilized' states are those which fail to do so. Such thinking reduces international law to the efficacy of force, and equates civilization with the ability to wage war.'[1115]

By any measure, the U.S. has quite clearly satisfied this test for at least the past seven decades. There is no other state in the current international system that could more successfully repel aggression, and no other state has proven more capable at organising for its self-defence. Successive U.S. presidents have proclaimed the might of the U.S. military, and it is regularly – and correctly – exalted as being the most powerful military in history. In 2018, the Trump administration received the largest military budget in the history of the United States. Trump argued that the figure allocated on military spending – some $1.3 trillion – was necessary because 'we have to have, by far, the strongest military in the world.'[1116] In a speech at Fort Drum on August 13 2018, Trump stated that:

> '…we know that to survive and having that survival of our freedom, it depends upon the might of our military. And no enemy on Earth can match the strength, courage, and skill of the American Army and the American Armed Forces. Nobody is even close. They never will be.'[1117]

[1114] Ibid 280.

[1115] Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford University Press 1984) 17.

[1116] Associated Press (2018), Trump: US Needs World's Strongest Military (Associated Press, 23 March 2018), accessed online at: https://www.youtube.com/watch?v=HD2OxqLU8Iw, accessed 30 October 2018

[1117] The White House (2018), Remarks by President Trump at a Signing Ceremony for H.R. 5515, "John S. McCain National Defense Authorization Act for Fiscal Year 2019", accessed online at https://www.whitehouse.gov/briefings-

Trump went on to say that 'military might is more important than even jobs', and said 'America is a peaceful nation. But if conflict is forced upon us, we will fight and we will win.'[1118] He stated that 'we will ensure that the next great chapter in history is written by the heroes of the United States military.'[1119] This extraordinary focus on the military might of the U.S. highlights that 'civilization' is now considered a 'contested and vulnerable concept that requires defending by a strong United States, acting unilaterally if necessary', with the U.S. intervening 'to defend civilization from barbarism or savagery, rather than to promote its development.'[1120] As has been demonstrated in this thesis, 'the result has been a series of high-profile rejections of international law and international legal institutions', but, as Coates points out, the contempt for international law expressed by the Bush administration, and subsequent administrations, represents a difference of degree rather than a 'dramatic break with the past.'[1121]

Focussing on the individual in international affairs

The critiques of Gunneflo and Moyn on the focus on the individual in international affairs is both well-meaning and necessary. They beg us to ask the question: if much of the international law framework can be utilised for violent, imperial policies, can we continue to utilise international law for truly progressive causes? The answer is yes.

A focus on the rights of the individual under international human rights and humanitarian law highlights that proclaimed U.S. adherence to the relevant law (which, as discussed in previous chapters, the U.S. holds to be only international humanitarian law) is merely that – proclaimed, but not actual. By removing the fig-leaf of precision and allegedly impeccable targeting standards from the U.S., it loses the primary basis under which it justifies its conduct in the 'war on terror 'and highlights the illegality and illegitimacy of the programme at all levels, whether *jus ad bellum* or *jus in bello*.

As recognised by O' Connell, there is a disjuncture in this question between critical theory and critical practice. While there is an increasing focus in academia on the problems with framing

statements/remarks-president-trump-signing-ceremony-h-r-5515-john-s-mccain-national-defense-authorization-act-fiscal-year-2019/, accessed 30 October 2018.

[1118] The White House (n1104)

[1119] Ibid.

[1120] Coates (n991) 182.

[1121] Ibid 182.

issues like the war on terror and the targeted killing programme in terms of the contravention of individual rights, at the actual level of the individual:

> '…millions of people are attempting to confront the misery and injustices heaped upon them by the contemporary global order through, in part, mobilising the language of human rights to advance and defend their interests.'[1122]

O' Connell goes on to write that:

> 'human rights cannot be blithely dismissed as a sham, or ideological apologia for the status quo. They often are these things, but at the very same time they provide a language for critiquing and challenging the extant social order.'[1123]

In the current system within which we live, then, 'the assertion of a human right becomes, of necessity, a rejection of the logic of the market, of the basic impulse of the capitalist system', and of the inherent violence of this system.[1124] We must continue to critique and reject the U.S. targeted killing programme on the basis of its human rights and international humanitarian law abuses, while also remaining alive to the fact that this violence should be criticised not only for these violations, and not only to make the use of force 'cleaner', but also criticised *in toto*, and treated as the imperial and neo-colonial form of violence that it represents. Human rights and its language may be, as Knox has argued, particularly susceptible to 'hijacking' by neoliberalism because the language of rights is abstracting, depoliticising, and elitist.[1125] Scrutinising U.S. conduct is essential, but it is not going to solve the problems presented by U.S. imperialism. Addressing these issues in order to bring about effective change requires a language other than that of pure law and the language of human rights. It requires re-envisioning the language of human rights, and actively articulating it as a language that is concrete and politicised, and not just egalitarian, but actively anti-elitist. For *Kriegsraison* and the targeted killing programme, this means a language couched in the effects of U.S. militarism and imperialism, not just for the human rights of individuals and communities, but on society at large.

[1122] Paul O' Connell, 'On The Human Rights Question' (2018) *Human Rights Quarterly* 40 (4) 963.
[1123] Ibid 984.
[1124] Ibid 988.
[1125] Rob Knox, 'Are Human Rights Neoliberal?', Panel Discussion on "Human Rights and the Rise of Neoliberalism *(*Birckbeck University, 22 November 2018), <https://backdoorbroadcasting.net/2018/11/are-human-rights-neoliberal/>, accessed 02 December 2018.

Conclusion

Overtly political choices continue to be made in U.S. legal interpretations. Rather than looking only at what the end results of these choices are – at the thousands of deaths resulting from the targeted killing programme, at the steady erosion of international law principles such as non-intervention and the attempted broadening of the right to use force in self-defence, we also need to ask what *interests* these choices serve. What interest is being served when the U.S. takes the *political* decision to interpret Article 51 of the UN Charter as allowing it to use force in pre-emptive self-defence? What interest is served when the U.S. takes the *political* decision to attempt to create a right of intervention if a state is 'unwilling or unable' to counter a terrorist threat emanating from its territory? What interest is served when the U.S. takes the *political* decision that the ICCPR does not apply extraterritorially? What interest is served when the Trump administration makes the *political* decision to relax the rules of engagement? What interest is served when the U.S. takes the *political* decision to refer to incidents in which civilians are killed in already unlawful strikes as 'accidents' or 'tragedies'?

These questions do not necessarily have easy answers, but they do all have one facet in common: each serves to make U.S. attempts at the ordering and control of the Global South and the wider international community easier, less bureaucratic, less lawfully problematic and more politically palatable. Accepting U.S. attempts to make many of these issues look like questions of law rather than questions of politics hides the irreducibly political choices behind them. Tying the answers to all of these questions to the issue of state security, the very survival of the United States, and indeed the survival of 'Western civilisation', allows the U.S. to frame the answers to all of these questions along similar lines, and in a similarly vague manner: each practice serves the interests of security; serves the interests of freedom; serves the interests of civilization; serves the interests of the rule of law.

For decades now, the U.S. has not believed that it 'wages' war. Instead, it believes that it is the world's policeman, imposing order where it finds necessary or in its best interests, and now, with the advent of drone warfare, 'raining security from the skies.'[1126] Since it began in 2001, the U.S. has presented the 'war on terror' as a 'war' waged to make not just the West, but the

[1126] Moyn (n1010) 118.

entire world, a safer and more liberal place. Yet, as Moyn as pointed out, the 'war on terror' has:

> 'involved a horrendous ethical price—achieving the opposite of its declared aims, breeding the insurgencies it was supposed to suppress, and failing to address the root causes of global violence…'[1127]

It has 'only produced an even greater dependence on violence, a proliferation of undeclared wars and new battlefields, a relentless assault on civil rights at home – an exacerbated psychology of domination…'[1128]

With security at the political level tied to military necessity at the operational level, *Kriegsraison* not only allows for but *encourages* the state to seek out figures, groups and territories that could potentially cause it harm, and encourages the state to address these potential threats through forceful and violent means. As discussed in the prior chapter, at the political level, the United States, throughout its history, has felt its foundational ideas to be under threat and its security imperilled. The U.S. continues to have a significant global military presence, with approximately 800 formal military bases in 80 countries, or more than 1000 if troops stationed at embassies, missions and 'lily-pad' bases are included – amounting to an estimated 138,000 soldiers around the world as of January 2018.[1129]

In 1978, Poulantzas wrote: 'it is exactly as if the State had to apply less force *to the very degree* that it holds a monopoly of its legitimate use.'[1130] While the U.S. may not hold a monopoly on the *legitimate* use of force, it certainly acts as if this is the case, and the targeted killing programme allows it to apply *less* force in *more* locations, instead of the traditional, large-scale warfare of the kind revisited during the Afghanistan and Iraq wars. The violence of the targeted killing programme, the violence not only from the kinetic force of hellfire missiles, but the violence of constant surveillance, has been perpetrated against peoples of the Global South for almost two decades now.

[1127] Ibid.

[1128] Pankaj Mishra, 'How colonial violence came home: the ugly truth of the first world war' (*The Guardian*, 10 November 2017), <https://www.theguardian.com/news/2017//nov/10/how-colonial-violence-came-home-the-ugly-truth-of-the-first-world-war>, accessed 30 November 2018.

[1129] Alice Slate, The US has Military Bases in 80 Countries. All of Them Must Close (*The Nation*, 24 January 2018) <https://www.thenation.com/article/the-us-has-military-bases-in-172-countries-all-of-them-must-close/>, accessed 30 November 2018.

[1130] Poulantzas (n996) 76.

In 2017, on the eve of the 99th anniversary of the official end of the First World War, Pankaj Mishra noted that 'the modern history of violence shows that ostensibly staunch foes have never been reluctant to borrow murderous ideas from one another.'[1131] At present, the United States is the only state with a far-reaching targeted killing programme. But for how long more? Armed drone proliferation has rapidly increased, and an estimated eighteen countries now possess the technology.[1132] While these states do not possess the worldwide military infrastructure of the U.S., nevertheless their acquisition of the technology will likely pose problems for international humanitarian law and international human rights law.

While the question of state sovereignty and intervention is a crucial one, in many of the states in the Global South, governments cannot, or will not, deny the U.S. the permission to intervene in their territory, and governments may not always take the best interests of their citizens into account. Effective resistance to the targeted killing programme is much more likely to come from below, at the level of the individual citizen acting within and through a concerned community. As Cox asks:

> '…who is to bring about change? It is…unlikely in the extreme that those who benefit from and control these processes and relationships will be the main actors in transforming them in a more democratic, egalitarian and diverse direction. It does not take very much reflection to conclude that it is the exploited, the (formally) powerless and the marginalised who have most to gain from a change of course.'[1133]

As such, analysing the targeted killing programme through the lens of the individual, asking which rights of the individual are harmed, and how, whether in an individual drone strike, through the targeted killing programme as a whole, or through militarism more generally, provides an explanatory account, most importantly, of the harms caused to humans as individuals and communities, and the harms caused to human rights law and international humanitarian law. This explanatory account can be harnessed for protesting and resisting the targeted killing programme and other forms of violence committed in the name of the 'war on terror'. In countering and impeding the spread of military violence, human rights are 'one of the key "inadequate tools" we have at our disposal today'.[1134] And, while 'the assertion of

[1131] Mishra (n1115).
[1132] Michael C. Horowitz and Andro Mathewson, 'A way to rein in drone proliferation' (*Bulletin of the Atomic Scientists*, 30 November 2018) <https://thebulletin.org/2018/11/a-way-to-rein-in-drone-proliferation/>, accessed 02 December 2018.
[1133] Cox, Laurence, Focus: Why Social Movements Matter (*Discover Society*, 06 November 2018) <https://discoversociety.org/2018/11/06/focus-why-social-movements-matter/>, accessed 02 December 2018.
[1134] O' Connell (n1109) 982.

human rights will not bring about fundamental transformation in and of itself', they can, as O' Connell contends, 'play an important role in broader struggles to do that'.[1135]

Five general themes of Marxist theory of law are articulated by Alan Hunt. They are as follows:

- Law is inescapably political…;
- Law and state are closely connected;
- Law gives effect to, mirrors or is otherwise expressive of the prevailing economic relations;
- Law is always potentially coercive and manifest's the state's monopoly of the means of coercion;
- The content and procedures of law manifest…the interests of the dominant classes;
- Law is ideological…[1136]

In answering the core questions set out in the introduction, this thesis has also successfully demonstrated that each of the five points above apply to international law as much as they do to domestic legal regimes. Through an examination of *Kriegsraison* and the principles of military necessity and self-defence in Chapter 1, the thesis shows how the spirit of Kriegsraison was kept alive, and its reinvigoration made possible, by Article 51 of the UN Charter, and is manifested today most explicitly through the U.S. targeted killing programme. In Chapter 2, its assessment of the use of the language of 'precision' and 'humanity' in the use of armed drones, the thesis highlights the important connections between international law and security policy, with the migration of the language of strategic legalism into the security field in order to make certain choices more palatable to differing publics, and more readily available to policy makers. Through the doctrinal analysis presented in Chapters 3 and 4, on the targeted killing programme's violation of the rules of international humanitarian law and international human rights law, the thesis elucidates how the content and procedures of both bodies of law favour the state, and not those who are the victims of an assault on their human rights. In Chapter 5, the discussion of the history of U.S. belligerency (within and outside the U.S.), the influence of *The Federalist Papers*, and the role of the Executive branch in deciding the U.S. approach to international law clarifies the ideology of international law, and its inescapably political nature.

[1135] Ibid 988.

[1136] Alan Hunt, 'Marxist Theory of Law', in *A Companion to Philosophy of Law and Legal Theory* (D. Patterson, ed.; Blackwell Publishers, 1996), 355.

In so doing, the thesis makes a substantial and original contribution to the field of critical international law and critical security studies, drawing together heretofore unconnected areas of both fields. In doing so, the thesis argues that while the entire field of international law is tainted by imperialism, the history and militarist national identity of the United States, combined with the U.S. enormous military reach and the level of influence the Executive branch holds over U.S. international law understandings, the United States is better placed than any other state to exploit this imperial character, and that it does so explicitly through the targeted killing programme, which is, in itself, a manifestation of Kriegsraison.

The use of *Kriegsraison* by the United States in the Global South should be a cause for concern for all who value human rights and respect for the international law on the use of force. The degradation of international law which began in earnest in 2001 carries on apace today, and, under the current U.S. administration, shows little sign of abating. The challenge presented to valued international norms should not be underestimated. As this thesis demonstrates, the U.S. resists the application of international human rights law in contexts where it should be applied, wilfully subverts the application of international humanitarian law and the law on the use of force, and avoids all attempts at meaningful oversight of the targeted killing programme, domestically and internationally. The extremely broad interpretations of the American national interest presented in various legal opinions by successive U.S. administrations underscores the imperial elements of the targeted killing programme, wherein national security neither admits to nor knows any geographical or temporal boundaries.[1137] Where the U.S. spreads its attempts at global ordering and control, *Kriegsraison* will likely follow.

[1137] See, for example: The White House Office of the Legal Counsel, Authority to Order Targeted Airstrikes Against the Islamic State of Iraq and the Levant (30 December 2014) https://www.documentcloud.org/documents/5030212-2014-12-30-Airstrikes-Isil.html, accessed 17 December 2018; The White House Office of Legal Counsel, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities (31 May 2018) <https://assets.documentcloud.org/documents/4491161/OLC-Opinion-on-Syria-Airstrikes.pdf>, accessed 17 December 2018.

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