

Contemporary  
Issues

# Killing by Drones: Legality under International Law

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Policy Brief

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The Foundation for Law, Justice and Society



# Executive Summary

The United States is using unmanned aircraft, colloquially called 'drones', to kill individuals outside its own territory. These targeted killings raise four principal issues of international law.<sup>1</sup>

- *First*, does the use of force infringe the sovereignty of the State in which the force is used? Although the facts are uncertain, in most cases the territorial State in question seems to have consented, and consent negates any sovereignty issue. Absent consent, the US must establish the right of self-defence, including for the use of force in anticipation of an armed attack. The touchstone for such 'anticipatory' self-defence is *necessity*, whether there are alternatives short of the use of force.
- *Second*, are the drone strikes taking place in the context of an armed conflict? The existence (or not) of an armed conflict determines which legal rules apply, and an intentional extrajudicial killing outside of armed conflict is likely to violate international law. The debate over an alleged 'global' armed conflict is irrelevant because there are *domestic* armed conflicts in all of the States in which drone strikes have taken place — conflicts between those States' governments and insurgent groups that seek to overthrow the government.
- *Third*, if there is an armed conflict, do the drone strikes comport with International Humanitarian Law, especially the principle of distinction, that military targets may be the subject of armed force but civilians may not? We follow the International Committee of the Red Cross (ICRC) in concluding that members of organized armed groups who have a 'continuous combat function' may be targeted and killed. The public debate on this subject thus often misses the point. So-called 'kill lists' and 'signature strikes' are not per se illegal and may in fact ensure compliance with the principle of distinction if the lists and the 'signatures' are sufficiently precise.
- *Fourth*, what legal duty does the US have to be 'transparent'? Article 51 of the UN Charter requires that the US disclose, in general terms, the '[m]easures taken' in self-defence when it uses force on the territory of another State. The US made such disclosures for Afghanistan, Iraq, and Syria, but notably not for Pakistan. On the other hand, there is no broader international law disclosure duty in an armed conflict. As a policy matter, however, secrecy surrounding the drones programme may have unintended negative consequences.

# Killing by Drones:

## Legality under International Law

### ***ius ad bellum, consent, and self-defence***

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International law generally prohibits the use of force on the territory of another State. Article 2, Section 4 of the UN Charter provides: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'. The Charter contains two relevant exceptions to this prohibition.<sup>2</sup>

*First*, Article 2(4) prohibits only the unilateral use of force. Consent by the territorial State means that there is no sovereignty issue.<sup>3</sup> The States seem to have consented, although the secrecy surrounding the programme makes it difficult to conclude that with certainty. For example, the government of Yemen informed the UN Special Rapporteur that the US 'routinely seeks consent, on a case-by-case basis' and that '[w]here consent is withheld, a strike will not go ahead'.<sup>4</sup> In Pakistan, where the largest number of drone strikes has been carried out, the facts are unclear. Former President Pervez Musharraf admitted that his administration had a secret agreement with the US to allow drone strikes on Pakistani territory,<sup>5</sup> and cables released by WikiLeaks indicate that senior Pakistani officials consented to US drone strikes, even while publicly speaking out against them.<sup>6</sup> In public statements in 2013 however, the Pakistani government denounced all US drone strikes, declaring that they are a breach of its sovereignty.<sup>7</sup> More recent information may indicate that the Pakistani government has resumed its consent secretly, despite continuing to condemn the strikes publicly.<sup>8</sup>

*Second*, States may use force in accordance with the right of self-defence. Article 51 of the UN Charter provides: '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'.

The contours of this right of self-defence are the subject of considerable debate,<sup>9</sup> in particular concerning the scope of a State's right to use force against non-State actors in anticipation of a future attack. Although some scholars argue that force may not be used until an 'armed attack' actually has occurred,<sup>10</sup> the International Court of Justice and a majority of writers take the view that Article 51 preserves the 'inherent right' of self-defence that preceded the Charter, which included the right to act to prevent an attack from occurring.<sup>11</sup> This debate has taken on a new dimension following the attacks of September 11, 2001, which proved that non-State actors are capable of sudden attacks on a massive scale. As one scholar has noted, '[t]he problem of how one characterizes a "defensive" response is even more apparent in the context of responding to terrorist attacks, which are designed as sudden, single attacks without further sustained paramilitary engagement'.<sup>12</sup> Awaiting an 'armed attack' or even allowing one to become 'imminent' may leave a State without an effective ability to defend its people.

Rather than focusing on the concept of 'imminence',<sup>13</sup> the better view, which is more in keeping with the history of the doctrine, is that the touchstone for anticipatory self-defence is 'necessity', meaning that in order to use force legally a State must be without any non-forcible options to protect itself. As US Secretary State Daniel Webster wrote in the 'Caroline Case' of 1837, a State must have 'no choice of means' to defend itself, short of the use of force.<sup>14</sup> In the case of a non-State actor planning a large-scale attack, a State might find itself without any non-forcible options before the non-state actor is on the verge of an attack.<sup>15</sup> On the other hand, the

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requirement of ‘necessity’ is not met if a future attack is merely speculative or nonspecific.<sup>16</sup>

### **Jus in bello: armed conflict**

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The existence of an armed conflict determines whether International Humanitarian Law (IHL) or International Human Rights Law (IHRL) applies to the killing of an individual. Since, except in extreme circumstances, a targeted killing outside of an armed conflict violates the right to life guaranteed by IHRL,<sup>17</sup> and the rules of IHL, which apply during armed conflict, are more permissive, the existence of an armed conflict may determine whether a particular killing is legal.

An armed conflict exists when two criteria are satisfied.<sup>18</sup> *First*, the violence must be of sufficient *intensity*; an ‘armed conflict’ is distinguished from ‘internal disturbances’ or ‘isolated and sporadic acts of violence.’<sup>19</sup> *Second*, the belligerents must be sufficiently organized to be identified as *parties* to an armed conflict.<sup>20</sup> Generally speaking, a non-State actor that has a hierarchy, a chain of command, and the ability to carry out military operations, is sufficiently organized to be considered a ‘party.’<sup>21</sup>

The analysis has been complicated by the rhetoric for and against the existence of a global armed conflict, whether it be the Bush administration’s so-called ‘global war on terror’, or the Obama administration’s claim to a transnational armed conflict against ‘al-Qaeda, the Taliban, and their associated forces.’<sup>22</sup> As a matter of international law, that debate is largely beside the point.<sup>23</sup> There have been, and are now, armed conflicts in Afghanistan (with a spill-over into Pakistan), Iraq, Libya, Mali, Somalia, Syria, and Yemen — all the countries in which drone strikes are reported to have taken place. The conflicts are between the governments of those States — supported by the United States, with the exception of Syria — and an organization dedicated to the overthrow of the government, such as AQAP in Yemen, al-Shabaab in Somalia, ISIS in Iraq and Syria, AQIM in Mali, and the Taliban in Pakistan. Indeed, even critics accept that there are now, and have been, domestic armed conflicts in several States. For example, Amnesty International has concluded that there have been armed conflicts taking place in certain regions of Pakistan;<sup>24</sup> Human

Rights Watch has acknowledged that there has been an armed conflict between Yemen and AQAP at least since 2011;<sup>25</sup> and a UN Special Rapporteur concluded that ‘[t]he overwhelming majority of remotely piloted aircraft strikes have been conducted within conventional theatres of armed conflict.’<sup>26</sup>

### **The principles of IHL: ‘kill lists’ and ‘signature strikes’**

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In an armed conflict, the intentional use of lethal force — that is, killing the enemy — is legal, so long as it complies with the principles of IHL, sometimes referred to as *ius in bello* or the Law of Armed Conflict.

The most important of those principles is the principle of *distinction*, which identifies individuals engaging in military operations as legitimate targets of armed force, whereas those that are not engaged in military operations are legally protected.<sup>27</sup>

The principle of distinction is difficult to apply in conflicts involving non-State actors, both because the terms ‘civilian’ and ‘armed forces’ are not defined in the relevant treaties,<sup>28</sup> and because members of armed groups often do not take steps to distinguish themselves from those not engaged in hostilities.<sup>29</sup> The leading authority on the application of the principle of distinction in such armed conflict is the ICRC guidance which was published after years of study.<sup>30</sup> The ICRC considers that, just as States have armed forces and civilians, non-State actors have ‘organized armed groups’ which constitute their ‘armed forces’ and consist of those individuals who take on a ‘continuous combat function’ for the non-State party.<sup>31</sup> Thus, Taliban fighters are legitimately the subject of attack, whereas Taliban propagandists and politicians are not, unless and for such time as they take a direct part in hostilities.<sup>32</sup> By focusing on ‘organized armed groups’, the ICRC’s test ties the principle of distinction to the test for the existence of an armed conflict, which requires that there be a group with sufficient ‘organization’ to constitute a party.

The public debate on *ius in bello* often misses this point. Although critics complain about ‘kill lists’ — lists of individuals who may be targeted for death — in an armed conflict, a premeditated killing,

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whether or not from a kill list, is legal so long as it is directed at a legitimate target and otherwise complies with IHL. Indeed, maintaining a kill list may be one way to ensure compliance with the principle of distinction.<sup>33</sup> Similarly, complaints about ‘signature strikes’ are often misguided. Signature strikes are attacks on individuals carried out based upon their behaviour, when their identity is not known. The legality of a signature strike depends on whether the ‘signature’ is adequate to comply with the principles of distinction and precaution. It is not per se illegal to use conduct as a means of distinguishing between legitimate and illegitimate targets; indeed, it would be rare in war for a party’s armed forces to know the identities of its enemy’s soldiers. As UN Special Rapporteur Christof Heyns explains:

*The legality of such strikes depends on what the signatures are. In some cases, people may be targeted without their identities being known, based on insignia or conduct. 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.*<sup>34</sup>

### Is there a duty of disclosure?

#### *ius ad bellum*

Article 51 of the UN Charter provides that ‘[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council’.

The United States made Article 51 disclosures regarding the 1998 strikes on al-Qaeda under President Clinton;<sup>35</sup> the 2001 operation in Afghanistan under President Bush;<sup>36</sup> and the recent operation in Syria under President Obama, where the US claims a right of ‘collective self-defence’ on behalf of Iraq.<sup>37</sup> The United States has not made any such disclosure in relation to Pakistan, despite the extensive use of force on Pakistani territory. Although some argue that Pakistan has given secret consent to all the operations on its territory, we conclude that, if the United States has carried out strikes beyond the scope of Pakistani consent, as Pakistan has stated publicly, the US should be making Article 51 disclosures setting out the self-defence basis for the use of force.<sup>38</sup>

As a policy matter, the lack of disclosure on Pakistan, and on other States where the United States has been silent, may indicate that the US is engaging in ‘ostrich diplomacy’. By refusing to acknowledge what it is doing, the United States may be trying to avoid putting pressure on local governments to acknowledge their own role in these strikes. As Admiral Denis C. Blair, the former US Director of National Intelligence, stated in 2013:

*Pakistan could shut us down anytime... [T]hey have what they think is the best of all worlds; they get attacks against militants who are a threat to them as well as to us in Afghanistan and they get to blame us... for it.*<sup>39</sup>

Blair’s point is illustrated in a statement by Pakistani Prime Minister Yousaf Raza Gilani, who stated: ‘I don’t care if they do it as long as they get the right people. We’ll protest in the National Assembly and then ignore it.’<sup>40</sup>

But as current events indicate, those governments do not have, and have not had, the luxury of ignoring the insurgents. While the various non-State actors are targeting the United States, they are enemies of their home governments as well. As a consequence, the United States has taken what is a domestic problem in the Middle East and has made it an American problem, exercising force on behalf of foreign governments while enabling those governments to deny any involvement — and even to demonize the United States for the very conduct they have welcomed and authorized. This policy may have the counterproductive effects of further radicalizing individuals in the region and letting local governments escape responsibility for their own problems.

#### *ius in bello*

Many critics have contended that the United States is *legally* obliged, under international law, to disclose the facts surrounding the drones programme, including about individual drone strikes, as well as the legal basis for such strikes. Although there are public policy issues raised by the lack of transparency,<sup>41</sup> there is no broad international law duty of disclosure.

*First*, since international law is based on consent, either as expressed in treaties or as implied by

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custom, we look for evidence of such consent on this issue without finding any.

Mankind has been engaged in warfare throughout recorded history, and warfare is an activity that lends itself, often legitimately, to claims of secrecy. There is no evidence of a customary international law duty of disclosure, and we have not seen arguments to the contrary. Indeed, State practice appears fairly uniformly to be that such facts are kept secret so as to protect States' intelligence-gathering, military operations, strategy, and other secrets. Moreover, other than Article 51 of the UN Charter, there is no treaty setting out requirements that States disclose publicly the forcible measures they have carried out during war time, or the legal basis for each use of force.

*Second*, efforts to infer a broad disclosure requirement from a duty to investigate potential grave breaches of the Geneva Conventions are unconvincing.<sup>42</sup> A duty to investigate potential 'grave breaches' does not imply a corresponding duty to disclose the results of such investigations. Indeed, the US Department of Defense has introduced a duty to investigate that goes considerably beyond the grave breaches regime.<sup>43</sup>

*Third*, despite the contrary assertion of some scholars, the Turkel Commission report of February 2013, which conducted an in-depth analysis of the duty to investigate under IHL and IHRL, does not support the conclusion that there is a duty of disclosure in wartime. Although the Turkel Commission identified a principle of 'transparency' in IHRL, the Commission explained that 'there is no explicit recognition of the principle of transparency in international humanitarian law'.<sup>44</sup> It further explained that '[i]nternational humanitarian law does not require that investigators and prosecutors comply with the rules of transparency that relate to specific victims' rights' and noted that the national security considerations that arise in war mean that '[t]he level of transparency expected of human rights investigations is not always achievable in situations of armed conflict'.<sup>45</sup>

## Conclusion

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A US drone strike complies with international law if it (a) is carried out with the consent of the territorial State or in the valid exercise of the right of self-defence; (b) takes place in an armed conflict; and (c) complies with the rules of IHL, including the principle of distinction. The public information suggests that the first two criteria largely have been satisfied (with the possible exception of Pakistan during certain periods), and we are without information to determine if the US has satisfied the third criterion in each particular case.

We offer the following suggestions on matters of law and policy:

*First*, if the US is acting, or has acted, outside the scope of Pakistan's consent to use force on its territory, the US should make disclosures to the Security Council under Article 51.

*Second*, 'necessity' — not 'imminence' — is the touchstone for the right of anticipatory self-defence. In articulating a self-defence basis for its actions, as the US has with regard to Afghanistan and Syria, the US should explain why the use of force is 'necessary', meaning that there are no means short of force to remove the threat to the US (or in the case of Syria, the threat to Iraq).

*Third*, as a matter of international law, the public discussion on armed conflict should move away from a debate over the Bush-era relic of a 'global war' and focus instead on the reality, namely that the US is participating in discrete domestic armed conflicts, against different enemies, at the behest of multiple foreign governments, and doing so largely in secret. This raises serious policy issues, which the US has been able to avoid facing while the public debates the existence of a 'global war'.

*Fourth*, although there is no broad international law duty of transparency, the US should rethink its policy of conducting these wars in secret. Secrecy has led to misconceptions concerning issues such as the legality of 'kill lists' and 'signature strikes', which hinders the United States in the propaganda war against the non-State actors. It arguably compromises democratic values domestically, and

runs counter to the view that international legal norms should be arrived at openly by consensus among the various States. Importantly, secrecy has given foreign governments the luxury of taking

advantage of US military strength to combat their own enemies while denying any involvement and even demonizing the US for the conduct they have authorized. We question whether that is good policy.

## Notes

- <sup>1</sup> Although the analysis does not depend on whether the killings are done by soldiers, a missile, a drone, or a manned aircraft, drones have faced the traditional disfavour placed on new weapons that kill from afar. For example, the anathema apparently placed on the crossbow in the Second Lateran Council in 1139 or Cervantes' dislike of artillery in *Don Quixote* (1605).
- <sup>2</sup> Although Article 42 provides that the Security Council may authorize force 'to maintain or restore international peace and security', this provision is not relevant.
- <sup>3</sup> See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 51, UN Doc. A/68/389 (18 Sept. 2013) (by Ben Emmerson).
- <sup>4</sup> See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 52, UN Doc. A/68/389 (18 Sept. 2013) (by Ben Emmerson); accord Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism, *Civilian impact of remotely piloted aircraft*, ¶ 29, UN Doc. A/HRC/25/59 (10 Mar. 2014) (by Ben Emmerson).
- <sup>5</sup> See Sib Kaifee, 'US drone pact revealed by former Pakistani president', *Fox News* (13 Apr. 2013), <http://www.foxnews.com/world/2013/04/13/us-drone-pact-revealed-by-former-pakistani-president/>
- <sup>6</sup> WikiLeaks, 'Kayani wanted more drone strikes in Pakistan', *Express Tribune* (20 May 2011), <http://tribune.com.pk/story/172531/wikileaks-kayani-wanted-more-drone-strikes/> (quoting Prime Minister Gilani as stating 'I don't care if they do it as long as they get the right people. We'll protest in the National Assembly and then ignore it').
- <sup>7</sup> See 'Pakistan summons US ambassador to protest against latest drone killings', *The Guardian* (8 June 2013), <http://www.theguardian.com/world/2013/jun/08/pakistan-us-drone-killings>
- <sup>8</sup> Compare, e.g., Press Release, Ministry of Foreign Affairs of the Government of Pakistan, 'Pakistan Condemns US Drone Strike in North Waziristan' (26 Nov. 2014), available at <http://www.mofa.gov.pk/pr-details.php?prID=2395> with Javed Hussain, 'US drone strike in Pakistan kills five suspected militants', Reuters (26 Nov. 2014).
- <sup>9</sup> For a discussion of the debate surrounding the right of self-defence, see New York City Bar Association, 'The Legality under International Law of Targeted Killings by Drones Launched by the United States' (16 June 2014), pp. 60–98, available at: <http://www2.nycbar.org/pdf/report/uploads/20072625-TheLegalityofTargetedInternationalKillingsbyUS-LaunchedDrones.pdf>
- <sup>10</sup> See Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), pp. 275–8; Noam Lubell, *Extraterritorial use of Force against Non-State Actors* (Oxford: Oxford University Press, 2010), pp. 56–7 (summarizing this view).
- <sup>11</sup> See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. US), 1986 I.C.J. 14, ¶ 176; Sean D. Murphy, 'The Doctrine of Preemptive Self-Defense', 51 *Villanova Law Review* 699, 711–12 (2005).
- <sup>12</sup> Sean D. Murphy, 'The Doctrine of Preemptive Self-Defense', 50 *Villanova Law Review* 699, 734–35 (2005).
- <sup>13</sup> In addressing the leeway granted by that 'inherent' right to act in anticipation of a future attack, some have focused on a concept of 'imminence', arguing that a State may resort to armed force only if a specific known attack is 'imminent'. See, e.g., Lubell, *Extraterritorial use of Force against Non-State Actors*, p. 62. Both the origin and the meaning of that term are unclear. The United States has contended that the concept of 'imminence' must be interpreted more broadly in addressing potential attacks by non-State actors, so as *not* to require 'clear evidence that a specific attack will take place in the immediate future'. See DOJ White Paper at 8 (arguing that '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 use of force appropriate'). Others claim that 'the precise threshold for determining imminence is the subject of dispute'. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 57, UN Doc. A/68/389 (18 Sept. 2013) (by Ben Emmerson).
- <sup>14</sup> See Daniel Webster, *The Diplomatic and Official Papers of Daniel Webster while Secretary Of State* (New York: Harper and Brothers, 1848), p. 118.
- <sup>15</sup> See, e.g., Michael N. Schmitt, *State-sponsored Assassination in International and Domestic Law*, 17 *YALE J. INT'L L.* 609, 647–8 (1992) (arguing that 'imminence' should be defined in relation to the 'window of opportunity' to prevent a terrorist attack, noting that 'a state that hesitates to act against terrorists may lose the opportunity to act at all'). For example, the window for the effective use of non-forcible measures may run out if a terrorist group is on the verge of acquiring weapons of mass destruction, even if the use of such weapons is not imminent.
- <sup>16</sup> See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 148 (Dec. 19) ('Article 51 ... does not allow the use of force by a State to protect perceived security interests'); Lubell, *Extraterritorial use of Force against Non-State Actors*, p. 63.
- <sup>17</sup> Under IHRL, a state extrajudicial killing outside the context of an armed conflict is legal only if it is 'proportionate', meaning that the killing is required to protect life, and 'necessary', meaning that there are no other means, such as capture, to prevent the threat. Targeted killings could not meet those standards except under extreme, and perhaps purely theoretical, circumstances. See, e.g., Lubell, *Extraterritorial use of Force against Non-State Actors*, p. 173; Molly McNab and Megan Matthews, 'Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, Armed Conflict, and International Humanitarian Law', *Denver Journal of International Law & Policy* 39/661 (2011), 671–2.
- <sup>18</sup> The governing treaties do not set forth a definition of 'armed conflict'. In the absence of such guidance, the most authoritative source is the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia. See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY 2 Oct. 1995); *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 175 (ICTY 10 July 2008); *Prosecutor v. Limaj*, Case No. IT-03-66-T, ¶ 84 (ICTY 30 Nov. 2005); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 602, 625 (2 Sept. 1998).
- <sup>19</sup> See *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 175 (ICTY 10 July 2008); see also Kelisiana Thynne, 'Targeting the "Terrorist Enemy": The Boundaries of an Armed Conflict Against Transnational Terrorists', *Australian International Law Journal* 16 (2009), 161, 166.
- <sup>20</sup> See *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 175 (ICTY 10 July 2008); see also Lubell, *Extraterritorial use of Force against Non-State Actors*, p. 173; Thynne, 'Targeting the "Terrorist Enemy"', 169.

- <sup>21</sup> See *Prosecutor v. Bošković*, Case No. IT-04-82-T, Judgment, ¶¶ 199-203 (ICTY 10 July 2008) (detailing five categories of factors).
- <sup>22</sup> The US notion of transnational armed conflict is that related groups — al-Qaeda, the Taliban, AQAP, AQIM, al-Shabaab, ISIS, and others — are ‘co-belligerents’ in a single armed conflict. See, e.g., Jeh Johnson, ‘National security law, lawyers and lawyering in the Obama Administration’, Speech at Yale Law School (22 Feb. 2012) (transcript available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>). Whether it is viable as a legal matter, or a factual matter, is the subject of considerable debate. See, e.g., *Hamli v. Obama*, 616 F. Supp. 2d 74-75 & n.16 (D.D.C. 2009); Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 61, UN Doc. A/68/382 (Sept. 13, 2013) (by Christof Heyns).
- <sup>23</sup> We do not here address the significant issues of domestic law and public policy that such involvement raises — questions about the scope of congressional authorization under the Authorization for the Use of Military Force (AUMF) passed following the terrorist attacks of September 11, and public policy issues associated with US involvement in civil wars in the Middle-East and North Africa without specific congressional authorization and without public disclosure.
- <sup>24</sup> See Amnesty International, ‘“Will I Be Next?": Us Drone Strikes In Pakistan’ (2013), p. 48.
- <sup>25</sup> Human Rights Watch, ‘Between A Drone And Al-Qaeda’: The Civilian Cost Of Us Targeted Killings In Yemen’ (2003), p. 84.
- <sup>26</sup> Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 59, UN Doc. A/68/389 (18 Sept. 2013) (by Ben Emmerson).
- <sup>27</sup> See AP I, art. 51, ¶ 2 (providing that the ‘civilian population as such, as well as individual civilians, shall not be the object of attack’); Commentary on the Additional Protocols 598 (1987) (explaining that the principle of distinction is ‘the foundation on which the codification of the laws and customs of war rests’); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (explaining that among the ‘cardinal principles contained in the texts constituting the fabric of humanitarian law’ is the principle ‘aimed at the protection of the civilian population and civilian objects [that] establishes the distinction between combatants and non-combatants’).
- <sup>28</sup> See Jann K. Kleffner, ‘From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference’, *Netherlands International Law Review* 54/2 (2007), 315, 321 and 324; Noam Lubell, ‘What’s in a Name? The Categorisation of Individuals under the Laws of Armed Conflict’, *Journal of International Peace and Organization* 86 (2011), 83, 88.
- <sup>29</sup> ICRC, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, 90 *International Review of the Red Cross* 991, 1007 (2009) (‘ICRC Guidance’), available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>
- <sup>30</sup> See ICRC Guidance. Reports of the ICRC’s series of meetings on the subject of distinction in non-international armed conflict can be found on the ICRC website. See ICRC, ‘ICRC clarification process on the notion of direct participation in hostilities under international humanitarian law (proceedings)’ (2009), available at <http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm>.
- <sup>31</sup> See ICRC Guidance at 1002-03, 1006.
- <sup>32</sup> See ICRC Guidance at 1002 (defining ‘civilians’ as ‘all persons who are not members of State armed forces or organized armed groups of a party to the conflict’ and explaining that, like civilians in an international armed conflict, such persons are entitled to protection from attack ‘unless and for such time as they take a direct part in hostilities’). The principle of *precaution* in International Humanitarian Law holds that a presumption of civilian status should be applied in cases of uncertainty. On the other hand, mistaken killings do not necessarily indicate a violation of international law.
- <sup>33</sup> See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Interim report to the General Assembly on the use of remotely piloted aircraft in counter-terrorism operations*, ¶ 24, UN Doc. A/68/389 (18 Sept. 2013) (by Ben Emmerson) (explaining that ‘the adoption of a pre-identified list of individual military targets is not unlawful; if based upon reliable intelligence it is a paradigm application of the principle of distinction’).
- <sup>34</sup> Special Rapporteur on extrajudicial, summary or arbitrary executions, *Armed drones and the right to life*, ¶ 72, UN Doc. A/68/382 (13 Sept. 2013) (by Christof Heyns).
- <sup>35</sup> Letter Dated 20 August 1998 from the Permanent Rep. of the United States of America to the UN Addressed to the President of the Security Council, UN Doc. S/1998/780 (20 Aug. 1998).
- <sup>36</sup> Letter dated 7 October 2001 from the Permanent Rep. of the United States of America to the Security Council, UN Doc. S/2001/946 (7 Oct. 2001).
- <sup>37</sup> Letter dated 23 September 2014 from the Permanent Rep. of the United States of America to the Secretary-General, UN Doc. S/2014/695 (23 Sept. 2014).
- <sup>38</sup> This does not suggest that the United States should disclose each drone strike or each military operation as such acts take place. Rather, as it has done previously, it should disclose in general terms (a) the armed attacks giving rise to the right of self-defence; (b) whether measures short of force have failed or are futile; and (c) the actions that it is taking in self-defence.
- <sup>39</sup> Admiral Dennis C. Blair, ‘Discussion on US Drone Strike Policies’, CFR (22 Jan. 2013).
- <sup>40</sup> See ‘WikiLeaks: Kayani wanted more drone strikes in Pakistan’, *The Express Tribune* (20 May 2011), <http://tribune.com.pk/story/172531/wikileaks-kayani-wanted-more-drone-strikes>
- <sup>41</sup> The flawed debate in this area may be yet another outgrowth of the failure to address publicly the issue of drone strikes. Silence by the US on the legal basis for its actions has fostered confusion about the rules governing targeted killings. The notion that ‘kill lists’ and ‘signature strikes’ are per se illegal is wrong. Similarly, the notion that civilian casualties are per se illegal is wrong; under the IHL principle of proportionality, the civilian casualties must only be in proportion to the expected military advantage conferred by the strike. The excessive secrecy behind the drones programme emanates in part from the delegation of that programme to the CIA, which is required under domestic law to act covertly, rather than to the Department of Defense. Although the Obama administration claims to have a preference to transfer the programme from the CIA to the DOD to remove that obstacle to greater disclosure (see, e.g., President Barack Obama, ‘Remarks by the President at the United States Military Academy Commencement Ceremony’ (28 May 2014) (transcript available at <http://www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony>) there has been little progress on those efforts.
- <sup>42</sup> The leading proponent of this theory is Philip Alston, the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. See Philip Alston, ‘The CIA and Targeting Killings Beyond Borders’, New York University School of Law *Public Law & Legal Theory Research Paper Series Working Paper No. 11-64* (2011); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶¶ 87, 93, UN Doc. A/HRC/14/24/Add. 6 (28 May 2010) (by Philip Alston).
- <sup>43</sup> Amichai Cohen and Yuval Shany, ‘Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts’, *Yearbook of International Humanitarian Law* 14/37 (2011), 53 (noting that Department of Defense Directive 2311.01E defines a ‘reportable incident’ as any ‘possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict’).
- <sup>44</sup> Turkel Commission, ‘Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law’ ¶106 (Feb. 2013).
- <sup>45</sup> *Ibid.* at ¶106, ¶107.





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