

# Chapter 9

## Drone Attacks under the *Jus ad Bellum* And *Jus in Bello*: Clearing the ‘Fog of Law’

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### 9.1 Introduction

As the war in Afghanistan and the fight against transnational terrorism wage on with no immediate end in sight, US forces have increasingly turned to drone (technically labeled an unmanned aircraft system or UAS) strikes to target Taliban insurgents and Al Qaeda terrorists, especially in Pakistan’s tribal areas of North and South Waziristan. Between 2004 and 2007, a mere nine such attacks were conducted. By contrast, in 2010 there were 118, and by mid-February 2011 US forces had already launched 12.<sup>1</sup> The tactic has proven highly effective in disrupting enemy operations. Since 2004, 32 senior members of al Qaeda and the Taliban have been killed. In 2010, for instance, the US successfully targeted such key figures as Ibne Amin, an al Qaeda linked Swat Taliban commander; Ali

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<sup>1</sup> New American Foundation, The Year of the Drone, available at <http://counterterrorism.newamerica.net/drones>. For comparable data, see Roggio and Mayer 2011.

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Marjan, a local Lashkar-e-Islam commander; Sheikh al-Fateh, the al Qaeda chief in Afghanistan and Pakistan; Hamza al-Jufi, an al Qaeda commander; Sadam Hussein Al Hussami, an al Qaeda planner and explosives expert; Mohammad Qari Zafar, a Taliban commander wanted in connection with the 2006 Karachi consulate bombing; Sheikh Mansoor, an Egyptian-Canadian al Qaeda leader; Abdul Haq al-Turkistani, an al Qaeda linked leader of the Turkistani Islamic Party; Jamal Saeed Abdul Rahim, wanted for his alleged role in the 1986 hijacking of a Pan American World Airways flight; and Mahmud Mahdi Zeidan, a Jordanian Taliban commander. Overall, US air strikes are estimated to have killed between 1,060 and 1,707 members of al Qaeda, the Taliban and associated groups in the past 6 years.<sup>2</sup>

Although the drone strikes into Pakistan dominate current headlines, they have been employed elsewhere. The first to draw international attention was a 2002 CIA-operated Predator drone strike against a vehicle in Yemen containing al Qaeda operative Ali Qaed Senyan al-Harithi, who was allegedly involved in the bombing of the USS *Cole*. The CIA reportedly mounted the operation with the consent and cooperation of the Yemeni intelligence agency.<sup>3</sup> Since then, drones have been widely employed in both conventional military operations, such as those in Iraq, and in a counter-terrorism or counter-insurgency mode, as in Somalia.

Despite their evident military utility, controversy has erupted over the operations.<sup>4</sup> The State Department's Legal Adviser, Harold Koh, has asserted that 'U.S. targeting practices, including lethal operations with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war'.<sup>5</sup> Yet Philip Alston, in his role as Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, has opined that 'outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal'.<sup>6</sup>

Most legal criticism focuses on two issues—the use of drones in other states' territory and the incidental civilian deaths caused by the drone attacks. The former derives from the *jus ad bellum*, that aspect of international law restricting the resort to force by states, whereas the latter is based in the *jus in bello* (international humanitarian law), which governs how combat operations may be conducted.

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<sup>2</sup> Year of the Drone, supra n 1 (data current to 25 February 2011). See also Roggio and Mayer 2010.

<sup>3</sup> Mayer 2009 p 36; Roggio and Mazzetti 2009, A1.

<sup>4</sup> US House of Representatives, Subcommittee on National Security and Foreign Affairs: Written Testimony of Kenneth Anderson, *Rise of the Drones: Unmanned Systems and the Future of War*, 18 March 2010; Testimony of Kenneth Anderson, *Examining the Legality of Unmanned Targeting*, 28 April 2010; Written Testimony of Mary Ellen O'Connell, *Lawful Use of Combat Drones*, 28 April 2010.

<sup>5</sup> Harold Koh, The Obama Administration and International Law, Remarks at the Annual Meeting of the American Society of International Law, 25 March 2010, available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

<sup>6</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, 28 May 2010, UN Doc. A/HRC/14/24/Add. 6, at para 85 (hereinafter Alston Report).

Unfortunately, discourse over these and related issues has evidenced serious misunderstanding of the strictures of international law.

This brief article explores both the *jus ad bellum* and *jus in bello* implications of drone attacks. It is intended to clear the ‘fog of law’ that surrounds the operations, much of it resulting from either misunderstanding of the weapon system or misinterpretation of the applicable law. The article concludes that there is little reason to treat drones as distinct from other weapons systems with regard to the legal consequences of their employment. Nor is there a sound basis for heightened concern as to their use. On the contrary, the use of drones may actually, in certain cases, enhance the protections to which various persons and objects are entitled under international humanitarian law (IHL).

## 9.2 Drones

The nature and use of drones varies widely. Most are unarmed and used for intelligence, reconnaissance and surveillance (ISR) functions. For instance, the RQ-11B Raven is a ‘man-portable’ surveillance and reconnaissance drone which is carried in a backpack and has a flight time of nearly an hour and a half. Particularly useful for special operations, the Raven is operated by two individuals and can either be controlled manually or navigate autonomously along a preplanned route. During daylight, it uses a color electro-optical sensor to transmit images to ground forces; at night it can perform the same function using an infrared camera.<sup>7</sup> By contrast, the RQ-4 Global Hawk is a large high-altitude ISR drone operated by a crew of three located far from the battlefield. The Raven is especially useful because of its range of nearly 9,000 nautical miles and its ability to stay over an area for long periods. Its sensors include synthetic aperture radar and electro-optical and medium-wave infrared cameras, and it will eventually have signals (communications) intelligence gathering capability.<sup>8</sup>

Drones used for ISR raise few legal issues beyond that of where they may fly (such as over flight rights in another country’s airspace), a limitation that applies equally to manned aircraft. Rather, it is the use of armed drones which has drawn the ire of critics.

The two most prominent armed drones are the Predator and the Reaper. The MQ-1B Predator is medium altitude drone with a range of nearly 700 nautical miles used for close air support (supporting ground forces), air interdiction (striking specific targets) and ISR missions. It is crewed by a pilot and a weapons and sensor operator located beyond the battlefield. The Predator carries the Multi-

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<sup>7</sup> United States Air Force, Factsheet—RQ11B Raven, 14 January 2010, available at <http://www.af.mil/information/factsheets/factsheet.asp?fsID=10446>.

<sup>8</sup> United States Air Force, Factsheet—RQ-4 Global Hawk, 19 November 2009, available at <http://www.af.mil/information/factsheets/factsheet.asp?fsID=13225>.

spectral Targeting System, or MTS-A, which contains an infrared sensor, a color/monochrome daylight TV camera, an image-intensified TV camera, a laser designator and a laser illuminator. It is armed with two laser-guided AGM-114 Hellfire missiles, which either guide on the internal laser designator or one used by ground forces. The Hellfire missile is a highly accurate system with the ability to engage both personnel and vehicles or other objects.<sup>9</sup>

The MQ-9 Reaper is also commonly relied on to conduct attacks. A medium-to-high altitude system with a range of over 1,000 nautical miles, it, like the Predator and Global Hawk, has the ability to stay aloft for extended periods. The drone carries the MTS-B, a variant of the system used on the Predator. However, in terms of weaponry, it is more versatile than the Predator. For instance, in addition to a suite of four Hellfire missiles, it is capable of employing the GBU-38 Joint Direct Attack Munitions bomb (JDAM) and such laser guided weapons as the GBU-12 Paveway II.<sup>10</sup>

With reference to conducting attacks, drones afford attackers vastly increased capabilities and dramatically expand the options available to them. ISR drones enhance the ability to verify the nature of a target before striking it with other assets (such as manned aircraft or ground assets), thereby diminishing the likelihood of mistaken attacks. Because the drones provide high quality information about the target area in real-time (or near real time), for extended periods and without risk to the operators, they also permit more refined assessments of the likely collateral damage to civilians and civilian objects. The ability of armed drones to observe the target area for long periods before attacking means the operators are better able to verify the nature of a proposed target and strike only when the opportunity to minimize collateral damage is at its height. Further, the fact that armed drones employ very accurate weapons enhances the likelihood of a successful strike, thereby limiting the need for a restrike on the target, which could risk further collateral damage. Obviously, the use of precision-guided weapons also helps attackers to minimize collateral damage.

### 9.3 The *Jus ad Bellum*

The *jus ad bellum* governs the resort to force by states. Article 2(4) of the UN Charter provides that '[a]ll Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the

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<sup>9</sup> United States Air Force, Factsheet—MQ-1B Predator, 20 July 2010, available at <http://www.af.mil/information/factsheets/factsheet.asp?fsID=122>.

<sup>10</sup> United States Air Force, Factsheet—MQ-9 Reaper, 18 August 2010, available at <http://www.af.mil/information/factsheets/factsheet.asp?fsID=6405>.

Purposes of the United Nations'. This treaty norm is reflective of customary international law and is of a *jus cogens* nature.<sup>11</sup> Reduced to basics, any military action by one state on another's territory which is not otherwise justified in international law is unquestionably a violation of the prohibition.

It is indisputable that one state may employ force in another with the consent of that state.<sup>12</sup> For instance, a state embroiled in an internal conflict with insurgents may request external assistance in restoring order. Contemporary examples include the ongoing US assistance to Iraq and NATO operations in support of the Afghan government. Additionally, a state may consent to defensive operations in its territory by another state, as in the cases of Pakistan, Yemen and Somalia sometimes assenting to US counter-terrorist strikes in their countries.<sup>13</sup> Of course, the territorial state may only grant consent to operations that it could itself legally conduct. Thus, the territorial state cannot lawfully allow attacks that would violate applicable human rights or humanitarian law norms, since it does not itself enjoy such authority.

The legal dilemma arises when the operations are conducted without the territorial state's acquiescence. Pakistan has objected, for instance, to certain of the US drone strikes on the basis that it did not grant prior consent.<sup>14</sup> Similarly, Lebanon protested when Israel mounted large scale operations against Hezbollah forces ensconced in the south of the country in 2006,<sup>15</sup> and the Republic of Congo brought the issue of Ugandan counter-insurgent forays into its territory before the International Court of Justice.<sup>16</sup>

Since the Peace of Westphalia in 1648, sovereignty and the derivative notion of territorial integrity have served as foundational principles of international law. By them, a state enjoys near absolute control over access to its territory. In affirmation, the UN General Assembly has unanimously cited the use of force by a state on the territory of another as an act of aggression.<sup>17</sup> Sovereignty is so essential to the structure of international law that even the lawfulness of intervention to stop an on-going genocide is of questionable legality.

The right of states to use force in self-defense, a customary law right enshrined in Article 51 of the UN Charter, is no less foundational. Article 51 provides that

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<sup>11</sup> See discussion of the issue by the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)*, 1986 ICJ Rep. 14, paras 187–191 (27 June) (hereinafter *Nicaragua*); On the *jus cogens* nature of the norm, see Draft Articles on the Law of Treaties, Report of the International Law Commission, 18th Session [1996] II ILC Yearbook p 247.

<sup>12</sup> Accord, Alston Report, *supra* n 6, para 35.

<sup>13</sup> See e.g., Schmitt and Mazzetti 2009, p 14; Warrick and Finn 2010, p A1.

<sup>14</sup> See e.g., Lander 2009, p A9.

<sup>15</sup> See discussion in Schmitt 2008a p 127.

<sup>16</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v Uganda)*, 2005 ICJ Rep. 116 (19 December).

<sup>17</sup> Definition of Aggression, GA Res. 3314 (XXIX), UN GAOR 6th Comm., 29th Sess., 2319th plen. mtg., Annex, UN Doc. A/RES/3314 (XXIX) (1975).

‘[n]othing 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’. The United States has justified its drone operations occurring outside the context of an armed conflict with another state on the basis of this right.<sup>18</sup> Yet the right of states to act defensively is not unfettered. When terrorists or insurgents seek sanctuary in another state, the right of the victim state to conduct drone or other military operations against them must be tempered by the territorial state’s undeniable right to control access to, and activities on, its territory.

International law does not require an either-or resolution of these counterpoised norms. Rather, when principles clash, law seeks that accommodation which best achieves their respective underlying purposes. Although the territorial state need not suffer unconstrained violations of its borders, neither does the victim state have to sit idly by while insurgents and terrorists attack it with impunity from abroad.

A fair balancing of the rights yields a sequential process. The victim state must first ask the sanctuary state to meet its legal duty to ensure its territory is not used to harm other states.<sup>19</sup> If that state complies and is mounting effective operations to remove the threat, then penetration of its territory by the victim state’s forces is impermissible. This follows from the principle of necessity, which, together with the principle of proportionality, has been recognized by the International Court of Justice as conditioning the right of self-defence.<sup>20</sup> Necessity requires that no viable alternative to the use of force exist before a state may defend itself forcefully against an armed attack. Therefore, when law enforcement or other measures by the territorial state will serve to safeguard the victim-state from further attacks, its right to resort to military force in self-defence has not matured. Although the concept of necessity is usually conceived of in terms of alternatives available to the state which has fallen victim to an armed attack, there is no reason to limit application to actions taken by that state. The fact that a non-consensual penetration of another state’s territory violates that state’s sovereign prerogatives reinforces this broader interpretation of the necessity principle.

But if, after being afforded an opportunity to do so, the territorial state fails to take appropriate action, either because it lacks the capability to conduct the operations or simply chooses not to do so (e.g., out of sympathy for the terrorists), the victim state may act militarily in self-defense, including through the use of drones, to put an end to the unlawful activities.<sup>21</sup> Were this not the case,

<sup>18</sup> Koh Statement, *supra* n 5.

<sup>19</sup> On the duty to police one’s own territory, see *Corfu Channel* (UK v Albania), 1949 ICJ Rep. 4 (9 April).

<sup>20</sup> *Nicaragua*, *supra* n 11, at 103; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, at 245 (8 July); *Oil Platforms* (Iran v US), 2003 ICJ Rep. 161, at 183, 196–198 (6 November); Congo, *supra* n 16, p 53.

<sup>21</sup> Accord, Alston Report, *supra* n 6, para 35. For a more detailed discussion of this approach, see Schmitt 2008b, p 1.

international law would effectively deprive the victim state of any meaningful ability to protect itself.

It is essential to highlight the likely possibility that the territorial state may be willing to conduct actions against the terrorists or insurgents but nevertheless be unable to do so in general or with regard to specific cases. The use of drones is particularly relevant in such circumstances since they often represent a way to react quickly to perishable intelligence or to reach otherwise inaccessible areas. For instance, the territorial state may not have air assets capable of reaching remote areas where terrorists or insurgents are located or, if they do, may not be able to strike them either in a timely fashion (e.g., before they move on) or with sufficient precision to ensure mission success. In these circumstances, the absence of territorial state consent cannot bar action by the victim state, since to do so would be to eviscerate the latter's right of self-defence.

The *jus ad bellum* requirement of proportionality also limits defensive options available to the victim state. Proportionality requires that a state acting defensively employ no more force than reasonably required to overcome a threat. In the context of cross-border operations, this requirement limits the scale and nature of the force employed. For instance, if targeted drone strikes against terrorist camps would suffice to damp down further attacks, it would be unlawful to mount large scale ground operations into the territorial state. The limitation is equally geographical. It would, for example, be unlawful to deploy forces into locations void of terrorists or insurgents. Finally, cross-border operations must be temporally limited in the sense that withdrawal or cessation is required once the threat has been extinguished.

Until the attacks of September 11, 2001, the right of self-defence had been perceived by most experts as applicable only to armed attacks by one state against another. Attacks conducted by non-state entities such as terrorists were deemed matters for law enforcement. This understanding changed overnight. In response to the 9/11 attacks, the UN Security Council, international organizations such as NATO and many individual states took actions that could only be characterized as acknowledging the right of self-defence through military force to counter transnational terrorism.<sup>22</sup> This understanding was subsequently confirmed when Israel attacked Hezbollah in 2006. As with Operation Enduring Freedom, the armed response to 9/11 in Afghanistan, the international community generally acknowledged Israel's right to defend itself against Hezbollah in Operation Change Direction, even though conducted in Lebanon (although some criticized the operation as violating the principle of proportionality).<sup>23</sup>

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<sup>22</sup> See e.g., UN SC Res. 1368 (12 September 2001); UN SC Res.1372 (28 September 2001); Press Release, North Atlantic Council, 12 September 2001, available at [www.nato.int/docu/pr/2001/p01-124e.htm](http://www.nato.int/docu/pr/2001/p01-124e.htm). On the reactions of States and international organizations, see Schmitt 2008, pp 9–11.

<sup>23</sup> See e.g., Kofi Annan, Secretary-General Statement to the Security Council, UN SCOR, 61st Sess., 5492 mtg. at 3, UN Doc. S/PV.5492 (20 July 2006).

Curiously, the International Court of Justice has twice ignored recent state practice by issuing opinions that seemingly require control over such groups by a state before their victim can resort to force in self-defense (as distinct from law enforcement).<sup>24</sup> The opinions have been roundly, and correctly, criticized, and in the key case on the subject three of the Court's judges authored compelling separate opinions condemning that aspect of the holding.<sup>25</sup> While the Court's stance is flawed, its apparent reticence to embrace a robust notion of self-defense is understandable. As with many other international legal norms, the right of self-defense is subject to abuse; indeed, most aggressors tend to couch their unlawful actions in the language of self-defense.

It should be noted that in the event of an international armed conflict (a conflict between states), the law of neutrality provides a separate basis for cross border strikes against armed groups that 'belong' to the opposing party, that is, which 'conduct hostilities on behalf and with the agreement of that party'.<sup>26</sup> Neutral territory may not be used for belligerent purposes and neutral states are obliged to ensure the non-use of their territory for said purposes. This is a longstanding customary law norm which was reflected during the last century in the 1907 Hague Conventions V and XIII, as well as the non-binding Hague Rules of Aerial Warfare.<sup>27</sup>

If a neutral is unable or unwilling to prevent the use of its territory by a belligerent or groups which 'belong' to it, and the consequences of violation of neutral territory are serious, the opposing belligerent party may use force, in the absence of reasonably effective non-forceful measures, to put an end to the misuse of neutral territory to its detriment.<sup>28</sup> The degree of force used cannot exceed that which is necessary to terminate the misuse. Since the use of drones is far less invasive than, for instance, land operations, resort to drones may actually be required by the law of neutrality in certain circumstances. Although the law of neutrality only bears on international armed conflicts, it is reasonable to extend this general approach into non-international armed conflicts that spill-over into neighboring states. The legal basis for doing so is the law of self-defence.

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<sup>24</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136, at 194 (9 July); *Congo*, supra n 16, p 53.

<sup>25</sup> Wall, supra n 24: Sep. Op. Judge Higgins, para 33; Sep. Op. Judge Kooijmans, para 35; Decl. Judge Buergenthal, para 6.

<sup>26</sup> Because the armed groups belong to a belligerent party, their passage into neutral territory is the equivalent of the crossing into that territorial by the armed forces of that party. On the notion of belonging to, see Melzer 2009, p 23.

<sup>27</sup> Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, 36 Stat. 2310, 1 Bevans 654; Convention Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907, 205 Consol. T.S. 395, 1 Bevans 723; 1923 Hague Rules of Aerial Warfare, reprinted in AJIL 17, (1923) Supplement 245. For a contemporary adoption of these principles, see Harvard Program on Humanitarian Policy and Conflict Research, Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare, Section X (2010) (hereinafter AMW Manual).

<sup>28</sup> AMW Manual, supra n 27, Rule 168(b).

## 9.4 The *Jus in Bello*

The *jus in bello*, or international humanitarian law, applies only in the event of an armed conflict, whether international or non-international. When operations do not rise to this level, they will be governed by applicable domestic and human rights norms.<sup>29</sup> Two major legal obstacles stand in the way of clarity in this regard. First, the extraterritorial application of human rights norms is a matter of some controversy. Generally, they are viewed as applicable only to areas under the control of a state conducting the operation in question, with some states, such as the United States and Israel, more broadly denying their extraterritorial effect.<sup>30</sup> Second, it is uncertain whether transnational terrorism without any nexus to an ongoing conflict constitutes an “armed conflict” as a matter of law, even when it is of sufficient intensity to otherwise rise to that level. One school of thought argues that it does not and is instead merely highly violent criminality. A second suggests that transnational terrorism should be treated as an international armed conflict, a position adopted to an extent by the Israeli Supreme Court in the *Targeted Killings* case.<sup>31</sup> Finally, the view that such activities are non-international armed conflict appears to increasingly be the preferred characterization. The United States has adopted this stance.<sup>32</sup>

If conducted during an armed conflict, cross border military operations, regardless of the platforms or forces employed, must comport with international humanitarian law. Significant criticism has been leveled against the legality of drone strikes under IHL. Such charges evidence unfortunate misapprehension as to the operational aspects of the strikes and the law that applies to them.

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<sup>29</sup> See generally, Schmitt 2008c, pp 525–554.

<sup>30</sup> See e.g., UN Human Rights Comm., *Third Periodic Reports of States Parties Due in 2003: United States of America*, at 109, UN Doc. CCPR/C/USA/3 (28 November 2005) (the position taken by the United States regarding the International Covenant on Civil and Political Rights); *Banković and Others v Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* 123 Eur. Ct. H.R 335, para 71 (2001) (on the control issue).

<sup>31</sup> HCJ [High Court of Justice] 796/02, *Public Committee against Torture in Israel et al. v Government of Israel et al.*, para 21 (13 December 2006).

<sup>32</sup> At the 2010 meeting of the American Society of International Law, State Department Legal Adviser Harold Koh stated that the ‘United States is in an armed conflict with al Qaeda’. Koh statement, supra n 5. Although he did not indicate clearly whether the conflict was international or non-international, references to Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II to those conventions suggest the US views the conflict as non-international. Further, the United States Supreme Court, in the case of *Hamdan v Rumsfeld*, has opined that such conflicts are ‘not of an international character’. *Hamdan v Rumsfeld*, 548 US 557, 630–631 (2006). Finally, in a Statement to the UN Human Rights Council, the United States confirmed that the conflict with al Qaeda was non-international in nature. Report of the United States of America Submitted to the UN High Commissioner for Human Rights In Conjunction with the Universal Periodic Review, UN Doc. A/HRC/WG.6/9/USA/1, 23 August 2010, at para 84.

Some of the controversy surrounds the facts that the drones are piloted from a ground station that may be based thousands of miles away and that the attacks are conducted using video feeds with no human ‘eyes on target’. This purportedly results in mistaken attacks or unnecessary civilian casualties. Such counterfactual criticism merits only short shrift. Drone attacks rely on high resolution imagery usually transmitted in real time to a drone crew which, undistracted by any threat, engages the target. When feasible and necessary, drones can be used to carefully monitor the potential target for extended periods before engaging it with precision weapons. Compared to attacks by manned aircraft or ground-based systems, the result is often a significantly reduced risk of misidentifying the target or causing collateral damage to civilians and civilian property. For instance, a drone can track a target, attacking only when he is at some distance from civilians. It can also be used to conduct the ‘pattern of life’ analysis that is now common in targeting conducted by advanced militaries. In such an analysis, the activities of the civilian population are monitored to assess when and where an attack may be conducted to best avoid causing civilian casualties. Moreover, the weapons employed by drones are generally as good as or better than those carried by manned aircraft. And, because the crew is not at risk, drone operations avoid the stress of combat and its attendant tendency to thicken the fog of war.

Drones are, however, not a panacea. While reliable data is difficult to obtain, civilians have at times been wrongly identified as targetable insurgents or terrorists. It is equally incontestable that many civilians have been killed incidentally during drone strikes.<sup>33</sup> Tragic as such losses are, they do not necessarily render the attacks unlawful. In the confusion of battle, mistakes are inevitable; but they are only unlawful when the attacker has acted unreasonably.<sup>34</sup> For instance, it is sometimes asserted that drone attacks rely on highly questionable human intelligence.<sup>35</sup> If a strike relies on the sort of intelligence that a reasonable attacker would not depend upon in the same or similar circumstances, it is unlawful. But the fact that the attack was conducted using a drone has no bearing on the legality of the operation. It is the unreasonable reliance on suspect intelligence, not the platform used to exploit it, which renders the attack unlawful.

Somewhat curiously, it has been suggested that ‘because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audiofeed, there is a risk of developing a “Playstation” mentality to killing’.<sup>36</sup> Such claims are speculative at best. But even if they are accurate, the assertion misses the point. It is not the mental attitude of the attacker which matters, but rather his or her ability to properly identify lawful

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<sup>33</sup> One source reports 108 civilian deaths from 2006, while others suggest the figure could be as high as the 500 range. See e.g., Roggio and Mayer 2010, 2011.

<sup>34</sup> AMW Manual, *supra* n 27, p 86. The Rome Statute excludes criminal liability when a mistake of fact negates the mental element required by the crime. Rome Statute of the International Criminal Court, Art. 32.1, 17 July 1998, 2187 UNTS 90.

<sup>35</sup> See discussion in Alston Report, *supra* n 6, paras 82–83.

<sup>36</sup> *Ibid.*, para 84.

targets and avoid collateral damage to the extent possible. In other words, it is correct application of the law that will best protect the civilian population. Whether correct application derives from a sense of compassion, commitment to the rule of law, professionalism or a purported desire to win what is perceived as a video game is irrelevant. To the civilian on the ground results matter.

In fact, the IHL which applies to drone strikes is precisely same law which applies to all attacks; generally, the principles and rules governing targeting apply equally in both international and non-international armed conflicts. To begin with, it is unlawful to employ an indiscriminate means of warfare, that is, a weapon or weapon system which cannot be directed at a lawful target or the effects of which cannot be controlled.<sup>37</sup> Since drones employ precision guided munitions such as laser-guided missiles or the JDAM, they are self-evidently not indiscriminate means of warfare. On the contrary, they are far more capable of being aimed at targets than many other weapons systems commonly employed on the battlefield.

However, the indiscriminate use of a discriminate weapon is unlawful. For instance, failing to aim a weapon, such as blindly releasing bombs, constitutes an indiscriminate attack, as does treating clearly ‘separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians’ as a single military objective.<sup>38</sup> It is difficult to imagine drone operations violating this proscription. In that the weapons they employ are all guided (i.e., they must be directed at something), the very nature of a drone weapon system augurs against the likelihood of such attacks.

Drones could be used to directly attack civilians or civilian objects in violation of the principle of distinction.<sup>39</sup> Yet this is true of every weapon and there is nothing inherent in the drone itself or the method of its use that makes such attacks more likely. Similarly, drones might be used against objects or individuals about which there is disagreement in IHL circles. In light of current drone operations, the situations most likely to raise questions of legality would be either attacks on individuals believed to be members of armed groups, but who do not perform a ‘continuous combat function’ within the group, or civilians involved in the conflict, but who are not engaged in combat actions at the time of attack (or engaged in activities about which disagreement exists as to whether they comprise ‘direct’

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<sup>37</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts Art. 51.4 (b), 8 June 1977, 1125 UNTS 3 (hereinafter AP I). Certain States, notably the United States and Israel, are not Party to Additional Protocol I. However, many of the rules contained therein reflect customary norms. These norms have been set forth in such publications as the AMW Manual, and in the military manuals of non-party States. Regarding Article 51.4, see, e.g., AMW Manual, *supra* n 27, Rule 5(a); US Dept. of the Navy, US Marine Corps, US Coast Guard, Commander’s Handbook on the Law of Naval Operations, NWP1-14 M, MCWP 5-2.1, COMDTPUB P5800.7, para 9.1.2 (2007) (hereinafter NWP).

<sup>38</sup> AP I, *supra* n 37, Arts. 51.4 and 51.5; AMW Manual, *supra* n 27, Rules 13(b), (c); NWP, *supra* n 37, para 5.3.2.

<sup>39</sup> AP I, *supra* n 37, Art. 48, 51.1 and 52.1; AMW Manual, *supra* n 27, Rule 11; NWP, *supra* n 37, para 8.3.

participation in hostilities).<sup>40</sup> These issues have fueled a firestorm of controversy. Yet, the legal question in such debates is not the weapon system employed, but rather the legal status of its target. That a drone may have been used in the attack is neither here nor there.

When harm to civilians cannot be avoided during an attack on a lawful target, as in the case of civilians who are collocated with the enemy or near military objectives, the *jus in bello* principle of proportionality applies. This principle is wholly distinct from the *jus ad bellum* principle of the same name discussed *supra*. Rather, IHL proportionally 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’.<sup>41</sup>

Two aspects of the rule bear on criticism of the drone strikes. First, it must be understood that the very existence of the principle is an acknowledgement that attacks may in some cases be lawful even when there is absolute certainty that civilians will be killed or injured or that civilian property will be damaged or destroyed. The legal question is whether the civilian harm that an attacker reasonably expects to cause is ‘excessive’ in light of the military benefits the attacker hopes to attain. Second, proportionality is not assessed with the benefit of hindsight, but instead from the perspective of an attacker in the circumstances. In other words, had the situation been as the attacker reasonably believed it to be, based on intelligence and other information, would the harm have been excessive? Whether it in fact turned out to be excessive, either because the attack caused greater collateral damage than expected or because the mission was less successful than anticipated, is irrelevant as a matter of law.

The paradigmatic case is a drone strike on a building where a major Taliban leader is believed to be hiding. Assume the attacker has reliable intelligence that the home is inhabited by three civilians, reasonably believes that if an attack is delayed the operative will escape, and no alternatives to a drone strike exist. In light of the operative’s importance, most commentators would conclude that attacking the individual would be proportionate. Yet, without the knowledge of the attacker, the operative had already fled in the darkness of night and four more civilians entered the house. The ensuing attack kills seven civilians, but no Taliban fighters. In this case, the actual results of the attack would have no bearing on the legality of the strike; it would be proportionate based on the earlier reasonable, albeit mistaken, judgment of the attacker.

When assessing IHL proportionality, the weapon or weapon system used is completely irrelevant. The sole issue is whether the expected civilian casualties or damage were excessive relative to the military gain the attacker reasonably

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<sup>40</sup> The ICRC’s position on direct participation in hostilities is set forth in Interpretive Guidance, *supra* n 26. For contrary views on certain of the ICRC’s positions, see Boothby 2010, p 741; Hays Parks 2010, p 769; Schmitt 2010a, p 697; Watkin 2010, p 641; Schmitt 2010b, p 5.

<sup>41</sup> AP I, *supra* n 37, Arts. 52.5(b), 57.2(a)(iii) and 57.2(b); AMW Manual, *supra* n 27, Rule 14; NWP, *supra* n 37, para 8.3.1.

anticipated from the strike. A drone strike may violate the rule of proportionality, but only because of the consequences caused, not because a drone conducted the attack. On the other hand, the choice of weapon or weapon system is relevant in the context of the requirement to take ‘precautions in attack’. IHL requires an attacker to take ‘constant care ... to spare the civilian population, civilians and civilian objects’.<sup>42</sup> This requirement plays out in a variety of ways.

First, an attacker must ‘do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects’.<sup>43</sup> So long as the attacker has complied with this requirement and still has reasonable grounds to believe the target is a member of the enemy’s armed forces, a civilian ‘directly participating in hostilities’ or a military objective, the attack is lawful.<sup>44</sup> The crux of the requirement is the term ‘feasible’. Feasible steps are those which ‘are practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations’.<sup>45</sup> Attackers need not exhaust all possible means to verify the target, but must avail themselves of those that make sense militarily. For instance, if a drone is reasonably available to provide imagery of a target and such imagery would enhance the attacker’s ability to ensure it qualifies as a military objective, then the use of a the drone would be required as a matter of law. Of particular note in this regard is the capability of drones to loiter over a target, thereby extending the period during which the status of the target can be verified. Note that the benefits of using the drone must be clear, rather than merely speculative, before the requirement attaches.

During drone attacks, other assets reasonably available to verify a target must be resorted to if doing so would measurably improve verification of the target. In many cases, this may involve coordination with troops on the ground who can observe the target and target area. Since they operate from a different perspective, their observation may offer information unattainable from the air. Again, the requirement is conditioned by feasibility. Troops may not be in the area, the attack may be time-sensitive or troops in the area may be occupied with higher priority tasks (like engaging in combat themselves). Nevertheless, to the extent the use of other means of verifying the target (and assessing likely collateral damage) would make good military sense, they must be so used.

The requirement to take precautions in attack also mandates the use of those feasible means and methods of attack which will minimize harm to civilians and

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<sup>42</sup> AP I, supra n 37, Art. 57.1; AMW Manual, supra n 27, Rule 31; NWP, supra n 37, para 8.1.

<sup>43</sup> AP I, supra n 37, Art. 57.2(a)(i); AMW Manual, supra n 27, Rule 32(a); NWP, supra n 37, para 8.1.

<sup>44</sup> Civilians who directly participate in hostilities lose their immunity from attack. AP I, supra n 37, Art. 51.3; AMW Manual, supra n 27, Rule 28; NWP, supra n 37, para 8.2.2.

<sup>45</sup> See e.g., AMW Manual, supra n 27, Rule 1(q); Declarations made by States at the time of ratification, in Roberts and Guelff (eds) 2000, pp 498–512; Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Amended Protocol II) Art. 3(10), 3 May 1996, S. Treaty Doc. No. 105-1 (1997).

civilian objects, at least to the extent that no military advantage is sacrificed.<sup>46</sup> In this regard, drones loom large. If use of a drone, because it is a relatively precise weapon system and its loiter capability often affords a longer window of opportunity within which to strike, would likely result in less collateral damage than use of other systems (such as a manned aircraft, artillery or ground attack), and if such drone use is militarily feasible, the drone must be employed as a matter of law. Conversely, other systems must be used in lieu of a drone when doing so is feasible and their use will lessen collateral damage without forfeiting military advantage. Since the use of a drone presents no risk to the operator and in light of its unique capabilities, such circumstances will be rare.

Required precautions in attack also include the issuance of ‘effective advance warning ... of attacks which may affect the civilian population, unless circumstances do not permit’.<sup>47</sup> This requirement does not extend to attacks which only affect civilian property. The rule is subject to an important caveat. It is well accepted that the need for surprise in certain attacks is a circumstance which may preclude the issuance of warnings.<sup>48</sup> When a targeted individual might flee or take cover if a warning is provided to civilians who might be affected, the warning need not be issued. In most drone attacks, surprise is a critical element in mission success.

Finally, significant confusion has surrounded the issue of the status of individuals operating drones, especially intelligence personnel and civilian contractors. Such controversy is misplaced. During an international armed conflict, international law does not prohibit individuals who are not members of the armed forces from engaging in hostilities. Rather, such ‘unprivileged belligerents’ do not enjoy the rights associated with combatant status, specifically treatment as a prisoner of war and belligerent immunity. The immunity shields a combatant from prosecution for acts which are lawful under IHL but would not be during peacetime, most notably attacking other combatants and destroying property qualifying as a military objective.<sup>49</sup> Those who are not lawful combatants may therefore be prosecuted for acts which are unlawful under the domestic law of a state with jurisdiction over the individual and the offense.<sup>50</sup> Additionally, since they are directly participating in hostilities, they may be attacked.<sup>51</sup> Yet, neither they nor the state using them violate IHL merely on the basis of the fact of their involvement in the conflict. The situation is especially clear in non-international armed conflicts, where the use of law enforcement, civilian intelligence and

<sup>46</sup> AP I, supra n 37, Art. 57.2(a)(ii); AMW Manual, supra n 27, Rule 32(b).

<sup>47</sup> AP I, supra n 37, Art. 57.2(c). AMW Manual, supra n 27, Rules 37 and 38; NWP, supra n 37, para 8.9.2.

<sup>48</sup> AMW Manual, supra n 27, p 133; ICRC, Henckaerts and Doswald-Beck (eds) 2005, p 64.

<sup>49</sup> AP I, supra n 37, Art. 43.2: ‘Members of the armed forces of a Party to a conflict...are combatants, that is to say, they have the right to participate directly in hostilities’.

<sup>50</sup> See the discussion in Dinstein 2004, pp 27–44.

<sup>51</sup> AP I, supra n 37, Art. 51.3; AMW Manual, supra n 27, Rule 28; NWP, supra n 37, para 8.2.2.

contractor personnel is commonplace. After all, a rebellion is, despite constituting an armed conflict, also a violation of domestic criminal law.

## 9.5 Concluding Thoughts

Ultimately, any appraisal of the *jus ad bellum* aspects of cross border strikes must proceed on a case-by-case basis. Did the territorial state consent, either explicitly or implicitly, to a specific operation? If not, was a demand made that it comply with its obligation under international law to police its territory? Was there time to seek consent or allow the territorial state's forces to act? Did those forces have the capability to act effectively in the circumstances? How certain were the victim-state's forces that the target was in fact an insurgent or terrorist? What did that state hope to gain through the attack? Did the scope and scale of the victim-state's operations track the extent of the threat it was meant to neutralize?

But these are precisely the same questions asked about any cross-border operation conducted pursuant to the law of self-defense (or the law of neutrality during an international armed conflict). The sole relevance of drones operations is that they may not be mounted if less forceful measures would suffice ... and must be conducted if likely to suffice in lieu of more forceful and invasive measures.

The brouhaha over the *jus in bello* issues implicated by drone strikes is equally misguided. Precisely the same law applies to drone operations as those conducted using other weapons and weapon systems. The one area where drones are of particular relevance is with regard to the requirement to take precautions in attack. Here a drone must be used when reasonably available and its use is operationally feasible, but only if such use would minimize likely collateral damage without sacrificing military advantage. Conversely, drones may not be used when other means or methods of warfare that would result in less collateral damage with an equivalent prospect of mission success are available.

Reduced to basics, then, the sole legal issue specific to drone operations under both the *jus ad bellum* and the *jus in bello* is weapon choice. As correctly noted by Special Rapporteur Alston, 'a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL'.<sup>52</sup> Claims to the contrary are the product of poor understanding of drones and their means of employment, a failure to understand application of the law to such operations or simple emotionalism.

Nearly two centuries ago Clausewitz noted that: '[t]he great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not infrequently—like the effect of a fog or moonshine—gives to things exaggerated dimensions and unnatural

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<sup>52</sup> Alston Report, *supra* n 6, para 79.

appearance'.<sup>53</sup> Yet, the law applicable to the drone strikes, albeit multifaceted and complex, exists neither in twilight, nor fog. The pundits would do well to consult it more carefully.

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<sup>53</sup> Clausewitz 1832, vol 2, ch 2 para 24.