Drone Attacks, International Law, and the Recording of Civilian Casualties of armed conflict

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Susan Breau and Marie Aronsson

1. Introduction

Drones, defined in this article as unmanned combat aerial vehicles, have become the weapons of choice in the fight against terrorism; employed with a view to undertaking targeted killings of suspected terrorists. President Obama’s administration utilizes drones operated by the CIA in extra-judicial killings most particularly in Pakistan and Yemen. Drones were used as weapons in the war in Iraq and are also being employed in the conflict in Afghanistan with the CIA being involved in these operations as well. The decision to employ drones as weapons (they were previously used exclusively for intelligence gathering) was made by the Bush administration after 11 September 2001. The first reported CIA drone killing occurred on 3 November 2002, when a Predator drone fired a missile at a car in Yemen, killing Qaed Senyan al-Harithi, an al-Qaeda leader allegedly responsible for the USS Cole bombing. The focus of this article is on the controversial drone attacks occurring in Pakistan and Yemen, although similar issues with respect to civilian casualties also occur in Iraq and Afghanistan.

As O’Connell asserts, the use of drones in Pakistan have resulted in a large number of civilians being killed along with the intended targets. Regrettably, there is not a complete count of the number of drone attacks that have taken place, nor the number of casualties involved in these attacks. There are eight separate studies on casualties in Pakistan for the year 2010 alone. The most conservative study commissioned by the New America Foundation estimates that during the almost six years and two months

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1 Susan Breau is Professor of International Law, School of Law, Flinders University. Marie Aronson LLM is a researcher with Professor Breau on the Recording of Civilian Casualties of Armed Conflict project of the Oxford Research Group.
2 UN Doc. A/HRC/14/24/Add.6, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston to the Human Rights Council and the United States Department of Defense defines drones as ‘powered aerial vehicle that does not carry a human operation,...can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or non-lethal payload.’ The Department of Defense Dictionary of Military and Associated Terms, 579, Joint Publication 1-02, 12 April 2001 (amended 17 October 2008).
3 The United States has also used drones in Somalia and Iraq.
6 It should also be noted that Israel also uses drones in the West Bank and Gaza. Drones used in the clearly existing armed conflicts in Iraq and Afghanistan are assessed based on targeting law and were and are primarily directed against combatants from the Iraqi army and the Taliban so that the issues of existence of an armed conflict and distinction are not as present although the issue of recording of civilian casualties is also an issue in both of those conflicts.
7 M.E. O’Connell, op.cit p.6.
prior to February of 2010, 114 drone attacks were launched by the United States causing between 830 and 1,210 deaths, with a range of between 550 and 850 of these deaths being militants.\(^9\) By these statistics (which are the most cautious estimates), almost thirty percent of those killed were civilian casualties who are usually unnamed and unaccounted for.\(^10\) There have been far fewer attacks in Yemen but again with unknown civilian casualties. However, with the recent instability in that country drone attacks have been increasing.\(^11\)

This article examines a few of the international legal issues associated with civilian casualties of CIA drone attacks with the major focus being the existing obligation of states who participate in armed conflict to record civilian casualties of armed conflict.\(^12\) In order to discuss the obligations with respect to civilian casualties there are threshold legal issues that must be canvassed.

The first of the major issues analysed in this article is what type of law is applicable to drone attacks and civilian casualties. Specifically, whether or not these drone attacks can be viewed within the legal framework of armed conflict which includes both *jus ad bellum* (the lawfulness of resort to force) and *jus in bello* (international humanitarian law). This section of the article reviews firstly, the controversies concerning the threshold for armed conflict and secondly, if an armed conflict exists in either Pakistan or Yemen, whether it is an international or non-international armed conflict. This discussion also includes an assessment of the Obama administration’s view of the conflict with the Taliban and al-Qaeda. Finally, in the event that an armed conflict does not exist, an alternative legal regime is proposed of domestic law enforcement. This model is governed by the domestic law of the countries involved in the specific attacks and by international human rights law.

A second threshold issue is the distinction between civilians and combatants, particularly in the complex arena of terrorism, assuming that these attacks take place within the legal context of an armed conflict. The loss of civilian immunity from being the subject of an attack can only occur as a result of membership of a group of fighters or within the context of direct participation in an armed conflict. However, there is an unresolved legal issue within international humanitarian law of what actually constitutes direct participation in an armed conflict. This portion of the article will review the newly released International Committee of the Red Cross Guidance on

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\(^10\) The Bureau of Investigative Journalism estimates there have been 291 drone attacks in Pakistan with the civilian casualties running at 40% of the casualty figure of 2292 see [http://www.thebureauinvestigates.com/2011/08/10/most-complete-picture-yet-of-cia-drone-strikes/](http://www.thebureauinvestigates.com/2011/08/10/most-complete-picture-yet-of-cia-drone-strikes/) accessed 5 September 2011.


\(^12\) Refer to article by Joyce and Breau.
Direct Participation to ascertain whether it is of assistance in clarifying when a civilian can be targeted.\textsuperscript{13}  

Once the existence of an armed conflict is established that results in civilian casualties, the proposed legal regime for the recording of civilian casualties within international humanitarian law is introduced. Notwithstanding the problem of classification of the casualty as civilian, combatants or civilians directly participating in an armed conflict, this part of the article will argue for identical treatment with respect to identification, notification of relatives and burial of the dead.

The final issue is to determine which of the parties conducting or receiving the drone attacks is responsible for identifying and accounting for the casualties. The countries involved in drone attacks are primarily the United States which launches the attacks and Pakistan and Yemen which are the principle locations of the attacks. There is an unanswered question concerning whether or not the countries which are the hosts of these alleged terrorists consent to the drone attacks being conducted on their soil. This part will pose a model of state responsibility; whether consent was given or whether it was not.

2. Threshold and Classification of armed conflict

The first question then is whether drone attacks conducted by the CIA on behalf of the United States government can be viewed within the legal framework of armed conflict, or if they are to be assessed under a domestic law enforcement model. Whereas international armed conflicts are normally easy to identify as the use of armed forces of sovereign states against each other,\textsuperscript{14} the determination of the existence of non-international armed conflicts is a far more difficult task involving much academic and practical debate.\textsuperscript{15} Such conflicts are sometimes hard to distinguish from riots and internal disturbances which fall below the threshold for armed conflict.\textsuperscript{16} It has to be noted that the issue of classification of a non-international armed conflict and the threshold of armed conflict often overlap as the issue of the threshold of conflict is applicable in both. However, in sequence, it is firstly necessary to ascertain whether a situation reaches the level of armed conflict.

2.1 Threshold of armed conflict

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The law regarding threshold of an armed conflict is governed by the treaties and customs that make up international humanitarian law. Within this regime, it is possible to identify two key criteria found primarily within customary humanitarian law as identified in the literature and case law.\textsuperscript{17} The first criterion is the existence of parties to the conflict and the second criterion is the intensity of the violence.\textsuperscript{18}

2.1.1. Parties to the conflict

Common Article 3 of each of the four Geneva Conventions of 1949 provides no definition of armed conflict, but simply states that the provision is applicable to armed conflicts ‘not of international character’ and ‘occurring in the territory of one of the High Contracting Parties’. It applies to ‘each Party to the conflict’ hereby implying that there must be at least two parties to conflict, without defining which those Parties may be. A broader definition of armed conflict based on this provision was provided by the International Criminal Tribunal for Yugoslavia, (ICTY) in its judgement in \textit{Prosecutor v. Tadic} where it stated that:

\begin{quote}
...an armed conflict exists whenever there is resort to armed force between states or protected armed violence between governmental authorities and organised armed groups or between such groups within a state.\textsuperscript{19}
\end{quote}

Therefore, according to the International Criminal Tribunal for the Former Yugoslavia (ICTY), the application of Common Article 3 does not require the involvement of a state actor; protracted armed violence between organised armed groups is enough for the threshold for armed conflict to be met and they are therefore, the parties to the conflict.\textsuperscript{20}

The Rome Statue of the International Criminal Court (ICC) confirms this definition of armed conflict. According to the Statute, an armed conflict can appear in the territory of a State, either between governmental authorities and organized armed groups or between such groups.\textsuperscript{21} Note that the definition requires no territorial control by the insurgent group and that an armed conflict hence can exist between two armed groups without territorial control, as long as the thresholds for organisation and intensity are met. Even though the provision is yet to reach the status of customary law; it is an important confirmation of the Tadic principle According to the International Law Association study on the meaning of armed conflict in international law the Tadić principle is the well supported definition of armed conflict in international law but the report does not go far as to argue it is customary.\textsuperscript{22}

\textsuperscript{17} As with Dr Cullen’s chapter on this issue, the pivotal case is \textit{Prosecutor v. Dusko Tadic} (aka Dule), No. IT-94-1-AR72, para 102 (2October 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

\textsuperscript{18} D Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, (1979) 163(ii) \textit{Recueil des Cours} 117, in which he summarises the legal literature on the threshold of armed conflict.

\textsuperscript{19} \textit{Prosecutor v. Dusko Tadic} (aka Dule), No. IT-94-1-AR72, para 102 (2October 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

\textsuperscript{20} Ibid. See also L. Moir, \textit{The Law of Internal Armed Conflict}, (Cambridge University Press, 2002)

\textsuperscript{21} Rome Statue, Article 8(2)(f) (f) which states: Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Regrettably these definitions, although very important, do not resolve the issue. Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts offers a much more narrow definition of armed conflict, requiring a state party and thereby excluding conflicts between two organised non-state actors from its applicability. The definition in Article 1 states:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and 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.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

It is evident from this provision that to be able to be a ‘party’ of an armed conflict, an armed non-state actor must reach a certain level of organisation. Exactly what level this is has not been agreed upon, but it appears to be the consensus that an insurgent group must be organised enough to fulfil the obligations imposed upon them by Common Article 3 in order to be a ‘party’ to an armed conflict.

The customary status of the threshold for armed conflict discussed in the Tadic case and the Additional Protocol II provisions are at odds. However, it can be argued, as was established in the Nicaragua decision, that customary humanitarian law can exist in tandem with treaty provisions and governs even those parties to Additional Protocol II. Schindler summarises the state of customary international law with respect to parties of the conflict in his seminal work in the field stating:

…Secondly, as to the insurgents, the hostilities are meant to be of a collective character, that is, they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements. Accordingly, the conflict must show certain similarities to a war, without fulfilling all conditions necessary for the recognition of belligerency.

The International Law Association report on armed conflict indicates that there are now two separate regimes for non-international armed conflict; those covered by Common Article 3 with ‘its relatively low threshold of application but limited

23 Article 1 Additional Protocol II.
24 L. Moir, op.cit., p. 36.
26 D. Schindler, op.cit.p.147.

\subsection*{2.1.2. Intensity and duration}

Armed conflicts shall be separated from situations of internal disturbances and isolated and sporadic acts of violence. The determination of whether or not the intensity threshold is met shall be based on objective criteria rather than the subjective judgement of the parties, since the parties involved often tend to minimise the intensity of their actions.\footnote{Prosecutor v Akayesu, Judgment of Trial Chamber, 2 September 1998, ICTR-96-4-T.}

Regarding the duration of the hostilities, the Inter-American Commission on Human Rights found in the \textit{Abella} case that Common Article 3 was applicable on the conflict between the Argentine military and a group of dissident officers, lasting only 30 hours.\footnote{Juan Carlos Abella v. Argentina, Case 11.137, Report No 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. At 271 – November 18, 1997.} The Russian Constitutional Court in 1995 indicated that Additional Protocol II (which Russia was a party to) was applicable to the fighting in Chechnya at that time, but when hostilities resumed in 1999, the Russian executive referred to their response to the situation as a counter-terrorist action.\footnote{J Peijic, ‘Status of armed conflicts’, in E Wilmshurst and S Breau (eds), Perspectives on the ICRC Study on Customary International Law (Cambridge: Cambridge University Press, 2007), p 79.} As been mentioned, the ICTY requires the violence to be ‘protracted’ in order for an armed conflict to be at hand, a criteria used by the court when assessing both the intensity and the duration.\footnote{Prosecutor v. Tadic, aka Dule), No. IT-94-1-AR72, para 102 (2October 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).and see also J. Pejic, \textit{The protective scope of Common Article 3: more than meets the eye}, International Review of the Red Cross, Volume 93 no 881 March 2011, p. 4.}

Regarding the intensity of the violence, Schindler provides that:

\begin{quote}
In the first place, the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces.\footnote{D. Schindler, op.cit. p. 147.} Moir regards this view as ‘sensible’, but stresses the fact that in many states the police forces are heavily armed and may therefore conduct acts of violence elsewhere reserved for the military and that the use of government forces therefore should not be an absolute requirement for the definition of an armed conflict.\footnote{L. Moir, \textit{op.cit.} p 38 ff.} He also points out that the mere use of armed forces does not turn disturbances into an armed conflict, since the military may support the police forces due to other reasons.\footnote{Ibid p 39.}
\end{quote}

However, one possible way to resolve this dilemma is to examine the scale and duration of the disturbances rather than merely the response used, together with a level of organization required of opposition forces. This test will be applied below to Pakistan and Yemen.
2.2 Classification of the armed conflict

Once determined that the threshold of an armed conflict exists, the rules of International Humanitarian Law also apply to the classification of that conflict. Traditionally, there have been different sets of rules for international and non-international armed conflicts, especially in treaty law. However, in the International Committee of the Red Cross (hereafter ICRC) Study on Customary International Humanitarian Law it was found that the great majority of customary law rules apply to both kinds of conflicts, making the threshold for the existence of an armed conflict of greater importance than the classification of the type. However, some differences still exist, in that some rules are only applicable to international armed conflict, so that it remains important to distinguish between international and non-international armed conflicts.

2.2.1. IAC – international armed conflict

An international armed conflict exists whenever there is ‘resort to armed force between two or more States.’ Common Article 2(1) to all four Geneva Conventions of 1949 states that:

...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the high contracting parties, even if the state of war is not recognised by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

As been mentioned, the Conventions do not provide a definition of either ‘armed conflict’ or ‘war’. Dinstein defines war as ‘a hostile interaction between two or more states, either in a technical or in a material sense.’ Hence, war can either be produced by a declaration of war or by the actual and comprehensive uses of force between States. There is no requirement that the State attacked uses force to protect itself from the attacking State, the comprehensive use of force from one of the States involved is enough for an international conflict to be at hand.

In its opinion paper on the definition of armed conflict from March 2008, the ICRC stresses that an international armed conflict can exist even if one of the Parties involved denies that there is an existent state of war, since the determination shall be

36 Ibid, see particularly Rules 3, 4, 41, 49, 51, 106-108, 114, 130, 145-147 out of the 161 rules which are only applicable in international armed conflict, which includes returning property of deceased persons.
38 Geneva Conventions I-IV of 1949, Common Article 2.
based on factual grounds rather than a declaration of war. It further holds that the
definition of persons covered by the Geneva Conventions is enough for them to be
applicable; leaving the duration of the hostilities and level of violence without
relevance.\textsuperscript{41} The important feature of an international armed conflict, then, is the
involvement of at least two states’ armed forces. There is an important caveat that
Additional Protocol I has also identified as international armed conflicts conflicts
between States and national liberation movements (Article 1(4)) but this part of the
definition does not apply to the situation of drone attacks either in Yemen or Pakistan.
This is because one could not classify either al-Qaeda or the Taliban as national
liberation movements.

2.2.2 Non-international armed conflict

International humanitarian treaty law again offers no universal definition of non-
international armed conflict. Though, it is widely accepted that internal armed
conflicts in the meaning of Common Article 3 are those pursued either between the
armed forces of a State and armed non-state groups or in between such groups as
contained in the \textit{Tadic} definition.\textsuperscript{42} This issue very much overlaps with the threshold
for armed conflict as it is in non-international armed conflict that the tension between
civil disturbances and actual armed conflict emerges.

The ICRC argues:

Non-International armed conflicts are protracted armed confrontations occurring
between governmental armed forces and the forces of one or more armed
groups, or between such groups arising on the territory of a State [party to the
Geneva Conventions]. The armed confrontation must reach a minimum level of
intensity and the parties involved in the conflict must show a minimum of
organisation.\textsuperscript{43}

This definition is very similar to Schindler’s summary of the customary definition
given in the previous section on the threshold of armed conflict. Yet the determination
of classification relies on two additional criteria. The first part of the definition shows
the two key criteria for determining whether an armed conflict is of internal or
international character; firstly, the territorial limitation of ‘arising on the territory of a
State’ and the criteria of the types of parties involved showing ‘a minimum of
organisation’.

The territorial limitation in Common Article 3 provides that the conflict must take
place in the territory of ‘\textit{one of the High Contracting Parties}’. A strict reading of the
Article leads to the conclusion that the conflict must remain within the borders of one
single State. In the situation of drone attacks particularly, the issue of ‘spill over’ into
another territory becomes pertinent. It is argued in this paper that it is a widely
accepted fact that Common Article 3 does not cease to apply just because the conflict
spills over to the territory of another State. According to the ICRC, the conflict shall

\textsuperscript{41} J. Pictet (ed.), \textit{Commentary to the third Geneva Convention relative to the Treatment of Prisoners of
\textsuperscript{42} J. Pejcic, \textit{The protective scope of Common Article 3: more than meets the eye}, International Review of
the Red Cross, Volume 93 no 881 March 2011, p 3.
\textsuperscript{43} International Committee of the Red Cross Opinion Paper March 2008 \textit{op.cit.} p 5.
arise on the territory of a State for Common Article 3 to be applicable, clearly opening for the possibility of non-international armed conflict “spilling over” effects into the territory of other States.44

Pejić states that:

it is submitted that the relations between parties whose conflict has spilled over remain at a minimum governed by Common Article 3 and customary IHL. This position is based on the understanding that the spillover of a non-international armed conflict into adjacent territory cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed.45

The United State Supreme Court in Hamdan46 had to consider this issue and the majority of the Justices disregarded the opinion of the Bush administration that the conflict between the US and al-Qaeda was a ‘global war on terror’ not to be ruled under international humanitarian law. The Administration argued that the conflict was not an international armed conflict, since al-Qaeda was not a State party. It was also not a non-international armed conflict as it did not occur in the territory of one of the High Contracting Parties, the exact wording of Common Article 3.47 This meant that the classification fell into neither category. However, the Court, although not specifically ruling on the issue of classification, held that regardless of the territorial scope, the conflict as a minimum should be ruled by Common Article 3.48 This could be taken by implication to suggest that the conflict is a non-international armed conflict which the Obama Administration subsequently argued in Al-Aulaqi v. Obama.49

However, Additional Protocol II as discussed above provides a much stricter definition and requires that the conflict takes place in a High Contracting Party, meaning that a conflict may not expand outside the territory of one State for the Protocol to be applicable and also may not encompass an armed conflict within organised armed groups within a State.50 Once again the United States and Pakistan are not governed by Additional Protocol II because they have not signed or ratified the Convention, although Yemen is a party to the treaty. Therefore, it is imperative to identify customary humanitarian law and the law of the original four Geneva Conventions which is applicable to the drone attacks in Pakistan.

44 Ibid.
47 See White House Memorandum of February 7, 2002 on the ‘Humane treatment of Taliban and Al Qaeda detainees’, secs 2(c) and (d), available at: http://www.pepc.us/archive/White_House/bush_memo_20020207_ed.pdf (last visited 26 May 2011) and S.L. Glabe, Conflict Classification and Detainee Treatment in the War Against Al Qaeda, (2011) (6) ARMY LAW. 112 (2010)...
49 Al-Aulaqi v. Obama 727 F. Supp.2d 1 (DC District Court)
It can be argued within customary international law that the involvement of another State does not automatically turn an internal conflict into one of international character. The Manual for Non-International Armed Conflict provides that an armed conflict is internal where ‘the armed forces of no other State are engaged against the central government.’

James Stewart proposes the term “internationalised armed conflict”, for non-international armed conflicts with an international dimension, which are legally in between internal and international armed conflicts. He states that:

The term “internationalized armed conflict” describes internal hostilities that are rendered international. The factual circumstances that can achieve that internationalization are numerous and often complex: the term internationalized armed conflict includes war involving a foreign intervention in support of an insurgent group fighting against an established government.

However, the Manual for Non-International Armed Conflicts disregards this definition and stresses that an armed conflict has to be either internal or international:

When a foreign State extends its military support to the government of a State within which a non-international armed conflict is taking place, the conflict remains non-international in character. Conversely, should a foreign State extend military support to an armed group acting against the government, the conflict will become international in character.

It can be argued, therefore, that there are several different kinds of non-international armed conflicts (NIAC). Except for the more traditional NIACs such as conflict between government forces and armed groups or between such groups there is also the possibility of a ‘spillover’ NIAC, where the hostilities cross the border to a neighboring State. It may also be argued that the engagement in hostilities by the forces of a State with an armed group from a different state which operates without that State’s support constitutes a ‘cross border’ non-international armed conflict. Further, there are so called ‘multinational non-international armed conflicts’, such as the current conflict in Afghanistan, where multinational forces support the host state in its conflict with one or more organized armed groups on its territory. All of these types of armed conflict are being analyzed in London, under the auspices of the international law programme at the Royal Institute of International Affairs (Chatham House) a study on the classification of armed conflict is being conducted by a group of humanitarian law experts but the results of this study are not available at present.

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52 See e.g. J. Stewart, Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict, IRRC, June 2003, Vol. 85, No 850
53 Ibid., p. 315.
56 J. Pejic, The protective scope of Common Article 3: more than meets the eye, p 7.
57 For further information see http://www.chathamhouse.org/research/international-law/current-projects/classification-conflicts accessed 5 September 2011.
The Position of the United States Government

In the United States administration there is also the existing view that the country is involved in a ‘transnational’ non-international armed conflict with ‘al-Qaeda and its affiliates’. As mentioned above, the argument that the conflict would not be covered by Common Article 3 was superseded by the US Supreme Court in the Hamdan case. On the 25th of March 2010, Harold Koh the Legal Advisor to the United States State Department gave a Speech to the American Society of International Law entitled ‘The Obama Administration and International Law’ in which he discussed the ongoing conflict with the Taliban and al-Qaeda. Koh stated that ‘as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.’ The territorial connection with the non-international armed conflict in Afghanistan is not present but he seems to place this conflict within the paradigm of a non-international armed conflict when he states:

As a nation at war, we must comply with the laws of war, but detention of enemy belligerents to prevent them from returning to hostilities is a well-recognized feature of the conduct of armed conflict, as the drafters of Common Article 3 and Additional Protocol II recognized and as our own Supreme Court recognized in Hamdi v. Rumsfeld. Therefore, it is worth noting that even if the Obama administration does not use the designation ‘global war on terror’, it still considers the United States to be at war with al-Qaeda within a categorization of non-international armed conflict ‘without borders’ This description of the conflict does not accord with the current state of international law unless it is directly connected with a territory involved in a non-international armed conflict such as Afghanistan. This broadening of the definition of non-international armed conflict to transnational conflict does not accord with the academic literature on the definition and classification of armed conflict or with international jurisprudence particularly the Nicaragua decision. As Greenwood argued:

In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting


60 Ibid.

61 Ibid.

the law while giving that group a status which to some implies a degree of legitimacy.\footnote{C. Greenwood, ‘War, Terrorism and International Law, (2004) Current Legal Problems 505 at 529.}

It is therefore asserted here that a non-international armed conflict must arise on one territory but it can involve more than one state’s armed forces and can spill over into another territory.

### 2.2.3 Law enforcement model

Hostilities that do not reach the threshold for an armed conflict are not to be ruled under international humanitarian law, but rather under a domestic law enforcement model which must comply with international human rights law. Although the United States consider itself ‘at war’ with al-Qaeda, counterterrorism measures outside of the battlefields of the non-international armed conflicts, shall be governed by the law enforcement model, rather than the law of armed conflict.\footnote{See eg M-E, O’Connell, ‘The Choice of Law Against Terrorism’ accessed at http://www.jnslp.com/2010/12/15/the-choice-of-law-against-terrorism/, 8 August 2011.}

The possibility to use targeted killings as a counterterrorism measure under the law enforcement model is more limited than under the law of armed conflict. For the United States administration to justify the targeted killings outside the war paradigm, it must show that an operation is lawful under the domestic law of homicide as well as human rights law and that they are carried out with respect for the sovereignty of other States.

Normally, a suspected criminal must impose an immediate and lethal threat in order for a law enforcement officer to be allowed to fire arms at him. However, such an officer may fire arms at a suspect even where such threat is lacking if he believes the suspect might cause serious physical harm.\footnote{See e.g. Tennessee v. Garner, 471 U.S. 1 (1985).} Although Alston agrees that it may be legal for a law enforcement officer to kill a suspected posing an immediate threat, he stresses that the goal of a law enforcement operation always should be not to kill.\footnote{Report, para 9, page 5}

International human rights law allows the use of lethal force to individuals threatening the security of a state, as long as all other measures to arrest the suspect are exhausted and the operation is preemptive rather than retributive.\footnote{U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Israel, 15, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003), available at http://www.unhchr.ch/tbs/doc.nsf//28Symbol/29/CCPR.CO.78.ISR.En?OpenDocument.} Regarding the use of drone attacks to target suspected militants it is important to note that law enforcement officials generally shall warn their object before the use of firearms. This principle may be disregarded where doing so ‘would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.’\footnote{Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, P9 (1990), available at http://www2.ohchr.org/english/law/pdf/firearms.pdf, para 10.
According to the Inter-American Commission on Human Rights in its *Report on Terrorism and Human Rights*\(^69\) from 2002, it is possible to use lethal force against suspected terrorists under a law enforcement model. It states that:

in situations where a state's population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations.\(^70\)

However, the Report provides that:

[S]tates must not use force against individuals who no longer present a threat as described above, such as individuals who have been apprehended by authorities, have surrendered or who are wounded and abstain from hostile acts.\(^71\)

The other important aspect in law enforcement is a respect for state sovereignty as it is a general principle of international law that a State is strictly prohibited from engaging in law enforcement operations in the territory of another State, especially when the operation, like drone attacks, includes the use of lethal force. It is generally the case that a state will request a suspect accused of a crime, once he or she is apprehended in another state, be extradited to face justice.

An important difference between the law of armed conflict and the law enforcement model is that when the former requires collateral damage to be proportional, the latter generally does not accept any collateral damage at all.\(^72\) This means that a killing of five civilians, together with a high Al-Qaeda operative that may be regarded as proportional under the laws of war, is an unlawful killing under the law enforcement model. However, it is worth mentioning the American Model Penal Code § 3.02, which allows conduct involving collateral damage where the law enforcement official considers it necessary and the omission to fire arms would lead to a greater harm than firing them. Hence, in some jurisdictions is possible to kill an active participant in a terrorist scheme to kill many others, even if this includes a risk for innocent bystanders, if it is believed to be necessary. Other jurisdictions do not at all allow intentional homicides or consideration of non-imminent harms.\(^73\)

However, some are using traditional international law of armed conflict known as *jus ad bellum* to justify these actions. According a United States memorandum on assassinations\(^74\), written by Hays Parks a noted expert in the law of armed conflict, the violation of Article 2(4) of the Charter of the United Nations (the primary prohibition on the use of force), can be justified since the targeted killings are a matter of self-


\(^70\) Ibid § 87.

\(^71\) Ibid. §91.


\(^73\) Ibid.

\(^74\) W. Hays Parks, ‘Memorandum on Executive order 12333 and Assassination’ http://www.hks.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks_final.pdf accessed 5 September 2011, p. 7
defense recognized in Article 51 of the Charter. If another State fails to fulfill its international obligations to protect United States citizens from acts of violence originating in or launched from its sovereign territory, or is culpable in aiding and abetting international criminal activities, the United States should be allowed to use military force on the territory of the State in question. It has to be pointed out that the requirements of self-defence, as established in the Nicaragua decision, also include the threat of an imminent attack and that the action be proportionate and necessary. However, this view of self-defence is not one that is shared by the authors of this article or many other experts in the law of self-defence including the late Professor Brownlie. Self-defence may well be triggered in the case of attacks by non-state actors but there has to be a degree of state sponsorship of those attacks and a clear demonstrated lack of response by the state in which these non-state actors are housed. This was the argument used by the United States in initiating Operation Enduring Freedom in Afghanistan but Christine Gray queries whether the customary law of self-defence has evolved to the extent of allowing attacks on states that harbor terrorists. Parks himself poses a test that the State has to have failed in its duty to protect United States citizens. This test must be applied to Yemen and Pakistan.

It is argued here, in spite of the Parks memorandum, it is unlikely that drone attacks are permissible in areas not involved in armed conflict and the model employed should be one of law enforcement and apprehension of terrorists in accordance of the law of the state in which they are apprehended.

2.2.4 Assessment of the current situation

The application of the threshold and classification of armed conflict to the situation of drone attacks in Pakistan and Yemen is a difficult one. Firstly, Afghanistan has to be examined as it was the first country of conflict in the so called ‘global war against terrorism’.

Afghanistan

The situation in Afghanistan can be described as a multinational non-international armed conflict between NATO, its allies and Afghanistan on one side and the Taliban and other terrorist groups, foremost al-Qaeda on the other. The conflict was one of international character between 7 October 2001 and the fall of the Taliban in June 2002, when the foreign forces supported the North Alliance in the fight against the Taliban regime. After June 2002 when the Loya Jirga was convened and the Karzai Government was established, the allies have fought on the same side as the Afghan government in attempting to defeat Taliban and al-Qaeda rebels and therefore, the

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75 Ibid.
78 Note the discussion of this issue in Nicaragua.
80 See eg J. Pejić, op.cit, p.95.
conflict is therefore no longer of international character but rather a long-standing non-international armed conflict.\textsuperscript{81}

This means that drone attacks within Afghanistan have to be assessed within the framework of international humanitarian law.

Pakistan
The situation in Pakistan is largely infected with acts of violence on several fronts. The tribal areas of north-western Pakistan, the Federally Administered Tribal Areas (“FATA”) and the Northwest Frontier Province (“NWFP”) (officially Khyber-Pakhtunkhwa Province) are in parts controlled by Muslim extremist groups. Many of those groups are part of, or affiliated with, the umbrella group, Tehrik-e-Taliban Pakistan (“TTP”). The mission of the TTP is to overthrow the current leadership and establish an Islamic emirate in Pakistan, like the one that was ruled by the Taliban in Afghanistan and the group is thereby directly opposing the largely secular Pakistani government.\textsuperscript{82} The TTP is closely related to the Haqqani Network, led by the Afghan Taliban leader Sirajuddin Haqqani who also operates in the tribal areas of northwestern Pakistan and considered to be the strongest fighter against international forces in central and eastern Afghanistan.\textsuperscript{83} The Haqqani network is believed by American forces to have contributed to the suicide bombing of the CIA base in Afghanistan in December 2009 that killed both CIA officers and a Jordanian intelligence officer and was the one most deadly episode for the CIA since the September 11, 2001, attacks.\textsuperscript{84}

Since 2004, the CIA has been firing drones into the tribal areas, targeting suspected militants. To date, 243 drone strikes have occurred on Pakistani territory, out of which 233 have taken place since January 2008.\textsuperscript{85} The majority of the attacks have been targeting Hafiz Gul Bahadur (73) (a Taliban group) and the Haqqani network (57).\textsuperscript{86} Both of these groups are playing an important role in fighting NATO and its allies in Afghanistan and are able to hide in Pakistan due to ceasefire agreements with the Pakistani government.\textsuperscript{87} Most of the US hostilities in Pakistan have taken place in the tribal areas. However, on a few occasions, they have moved further into Pakistani territory.\textsuperscript{88}

\begin{footnotes}
\footnote{However, for an opposing view see Y. Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 2nd edition, (Cambridge University Press, 2010) pp. 56-57}
\footnote{The National Counter-Terrorism Calendar 2011, available at http://www.nctc.gov/site/groups/ttp.html accessed 3 June 2011.}
\footnote{Ibid.}
\footnote{Ibid}
\footnote{Ibid}
\end{footnotes}
The first drone attack to occur outside the Tribal areas was on 19 November 2008, when a drone killed five militants in Bannu, Northwest Frontier Province. Unlike the Tribal areas, Bannu is not controlled by militant groups, but the regional government and the attack raised protests among the Pakistani population and officials.

The relationship between the United States and Pakistan is everything but uncomplicated. During the last decade, the United States has considered Pakistan as an important partner in the fight against terrorism, giving large financial support to the country. At the same time as co-operating with the United States, the Pakistani government has been concluding cease-fire agreements with some of the extremists groups, leaving them alone as long as they refrain from attacking Pakistani targets. It has also been shown through documents released by WikiLeaks in 2010 that the Pakistani Intelligence agency, ISI has been co-operating with the Haqqani Network. In April 2011, Pakistan required that the United States reduces the number of CIA operatives on its territory and that they ceased the use of drones, a demand complied with.

The killing of Osama bin Laden in Abbottabad in early May 2011, has complicated the relations between Pakistan and the US further. The fact that the al-Qaeda leader had been able to live in his residence so close to the capital has further raised the question on whether Pakistan has been playing a double sided game against the United States by protecting bin Laden at the same time as openly cooperation with the Americans against the terrorist groups. Regardless of the frosty relation between the countries, they are not involved in an armed conflict with each other.

It is therefore argued that the drone attacks conducted by the United States in the Tribal areas of Pakistan are a ‘spill over’ effect from the conflict in Pakistan and therefore to be assessed within that non-international armed conflict. The drone attacks targeting militants outside the tribal areas are ruled by the law enforcement model and raising questions on state sovereignty as well as unlawful killings. The hostilities between Pakistan and the TTP might reach the threshold for armed conflict, but it is a separate conflict to which the United States is not a party. Furthermore, even if the Parks memorandum describes the state of the law of self-defence it cannot be argued that Pakistan has reached a threshold of lack of cooperation with the American aim of combating al-Qaeda and the Taliban or exhibited an intention to harm American citizens by not providing them with protection.

The consistency and the duration of the attacks reaches the threshold for armed conflict at the same time as the parties involved are organized enough to be part of such a conflict. It is therefore likely that the United States conduct in Pakistan is to be examined in the light of the rules of armed conflict.

90 Ibid.
91 Ibid.
94 Ibid.
95 The United States has not been asked for military assistance in combating the TTP although it is giving large amounts of aid to Pakistan some used for military purposes.
According to this definition there is no doubt that the situation in Pakistan, as it reaches the threshold for an armed conflict, is of non-international character. Even if it has been that the United States had been intervening in an existent armed conflict between Pakistan and the TTP, the United States would be supporting the governmental forces and the conflict would remain a non-international one. Another view could be that there are two armed conflicts. The first would be the non-international armed conflict between the governmental forces of Pakistan and the non-state actors in Pakistan’s northwest and the second would be the non-international armed conflict defined in Hamdan that the United States is engaged with al-Qaeda, the Taliban and associated forces which has spilled over into the tribal areas of Pakistan.

Yemen
At the time of the writing of this article, Yemen is on the edge of civil war; the forces of President Ali Abdullah Saleh are fighting protest movements both in the streets of Sana’a and across the country. The hostilities have led to hundreds of casualties during these last few weeks. The situation is yet to reach the one of armed conflict as it does not reach the required level of intensity and the opposition forces do not reach the required level or organization. Therefore, drone attacks, as well as other acts of violence, are to be ruled under the law enforcement model.

Even if the situation in Yemen is evolving into a non-international armed conflict, the United States drone attacks take place within the context of an argument of a ‘war on terror’ which is not any within the existing international law standard to assess an armed conflict, although it could be within the United States view of the non-international armed conflict discussed above. However, it is worth noting that al-Qaeda together with other Islam militant groups have seized the city of Zinjibar and that the Yemeni government forces currently are pounding the city in order to regain control over it. It remains to be seen whether the hostilities between the militants and the government of Yemen is to evolve into an armed conflict and what role the United States is to play in such a conflict. To this date the drone attacks conducted by, or with the support of, the CIA, are to be assessed under a peacetime law-enforcement paradigm.

3. The distinction between civilians and combatants in drone attacks

Assuming that there is an armed conflict in existence for a large portion of these drone attacks which take place in the tribal areas of Pakistan, the next consideration is whether the targets of these attacks are civilians or combatants. In the case of distinction between civilians and combatants the issue of classification of armed
conflict is very important as it is only within international armed conflict that humanitarian law is more fully developed.

3.1 International armed conflict

One of the cardinal principles in the law of international armed conflict is the distinction between civilians and combatants.98 Combatants may be targeted at any time and at any place, whereas civilians are to be immune from attack.99 In a report on terrorism the Inter-American Commission stated: “the combatant’s privilege (...) is in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives.”100 As a result a combatant cannot be prosecuted for killing or wounding an enemy combatant but is only subject to prosecution for war crimes if international humanitarian law is violated.101 The definition of combatant is not free of controversy and the subject of much academic commentary.102

In early humanitarian law, members of armed forces had the status of belligerents and by their conduct were classed as combatants or non-combatants.103 Combatant is now the term to describe status within an armed conflict. One is either a combatant or civilian. Although the Third Geneva Convention did not use the word combatant it lists various categories of prisoners of war including: (1) Members of armed forces (2) Members of other militias (3) Members of armed forces who profess allegiance to a government not recognized by the Detaining Power and (6) inhabitants who take up arms with the approach of the enemy (known as a levée en masse). Combatants are more broadly defined in Article 43 of Additional Protocol I to the Geneva Conventions as ‘all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates’.104 Civilians are defined in Article 50 (1) of the same protocol as:

…any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

This also means that together with Article 4 (A) of the Third Geneva Convention that (4) persons who accompany armed forces and (5) members of the crews of the merchant marine and civil aircraft are civilians as well.

98 Rule 1 in the ICRC Study on Customary Humanitarian Law, ‘The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. J-M Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law, (Cambridge University Press, 2005) and see Articles 43(2) and 51 (3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict of 8 June 1977, 1125 UNTS 3.
99 AP I, art. 48; AP I, art. 51(2) (defining lawful targets); HPCR Commentary section A.1.(y)(1). The term “combatant” is not defined in IHL, but may be extrapolated from Geneva Convention III, art. 4(A); Ryan Goodman, The Detention of Civilians in Armed Conflict, 103 Am. J. Int’l L. 48 (2009).
103 Ibid, p.327.
104 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict of 8 June 1977, 1125 UNTS 3, Article 43.
The above definition is fairly straightforward in traditional warfare but during the recent international armed conflicts in Iraq and Afghanistan, with irregular armed forces participating in hostilities, the issue of combatant status emerged as a major debate in international humanitarian law. At various times the United States argued that both Al Qaeda and Taliban fighters were ‘unlawful combatants’ a highly disputed category in the law of armed conflict. The authority they relied on was a US Supreme Court case *Ex parte Quirin et al*, a case that considered German army saboteurs who discarded their uniforms who were labelled unlawful combatant subject to trial and punishment in additional to capture and detention. The reason for this is that they did not seem to have the level of organisation and command necessary to comply with the definition above. Eventually, the Taliban fighters were acknowledged to be combatants but the loosely organised Al Qaeda members never were as they do not conform to the conditions set out in Article 43 of Additional Protocol I nor customary humanitarian law.

Al-Qaeda members do not conform to the definition of a combatant and as O’Connell argues those without a right to take a direct part in hostilities are unlawful combatants and may be charged with a crime. It is evident if such persons are captured Article 5 of GC III (PI, Article 45) provides for a special procedure (competent tribunal) to determine the captive’s status. The United States established Combatant Status Review Tribunals to consider the detainees in Guantanamo Bay. For the purposes of immunity from attack, Dormann asserts that there is no such thing in international humanitarian law as a right to target an unlawful combatant as they are civilians. The rule is that for such time as they directly participate in hostilities they are the lawful targets of attack but when they do not they are protected as civilians and may not be directly targeted. Therefore, it becomes critical to determine the issue of direct participation in armed conflict and this is even more the case in a non-international armed conflict because of the lack of clearly delineated armed forces.

### 3.2 Non-international armed conflict

In a non-international armed conflict the rules are not nearly as clear because generally at least one of the parties in the conflict are not national armed forces but guerrilla groups. Treaty provisions governing non-international armed conflict do not use the term combatants. The provisions for non-international armed conflict within the Geneva Conventions are confined to Common Article 3 and Additional Protocol II of 1977 which contains meagre provisions. Neither Common Article 3 nor

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107 There are many academic articles that have considered this issue see for example: R.K. Goldman and B.D. Tittemore, ‘Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law’, (Washington, ASIL Terrorism Task Force Papers, 2002)
112 Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the
Additional Protocol II contains any provisions dealing with prisoners of war, or any definition of combatant.

The most important rules that govern non-international armed conflict have attained the status of customary international law. Therefore, the cardinal rule of distinction is also applicable to non-international armed conflict and includes the word combatant. Melzer argues that the term describes persons who do not enjoy civilian immunity but it does not imply a right to combatant privilege or POW status.\textsuperscript{113} Melzer argues that categories of persons protected against direct attacks include civilians; medical and religious personnel; and persons \textit{hors de combat} (those who have surrendered or are wounded and are unable to continue to take part).\textsuperscript{114}

The more controversial issue is to determine within a non-international armed conflict what persons are subject to direct attack. Melzer argues that those who belong to armed forces or armed groups may be targeted at any time. A group of humanitarian lawyers have released a Manual for Non-International Armed Conflict and within the manual members of armed groups are defined as ‘fighters’.\textsuperscript{115}

1.1.2 Fighters

a. For the purposes of this Manual, fighters are members of armed forces and dissident armed forces or other organized armed groups, or taking an active (direct) part in hostilities.

b. Medical and religious personnel of armed forces or groups, however, are not regarded as fighters and are subject to special protection unless they take an active (direct) part in hostilities.\textsuperscript{116}

Furthermore, just as in international armed conflict, persons benefiting from protection against direct attack may lost such immunity due to their individual actions.

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\textsuperscript{114} Ibid, pp.311-312.


\textsuperscript{116} Manual of Non-International Armed Conflict, \textit{op.cit.} p. 4.
conduct. Civilians lose their protection for such time as they directly participate in hostilities.\(^{117}\) The Manual acknowledges that targeting direct participants in armed conflict is lawful. With respect to terrorists, as with international armed conflict, the issue for discussion is whether terrorists are civilians who ‘directly participate in hostilities’.

Regrettably there is also no commonly accepted definition of directly participating in hostilities.\(^{118}\) Recently, Nils Melzer on behalf of the International Committee of the Red Cross released its Interpretive Guidance on Direct Participation that does assist to clarify when a civilian who directly participates in armed conflict might be targeted.\(^{119}\) These guidelines are not legally binding but they are of considerable assistance to national governments struggling to develop policy to cope with the growth of non-combat participants in armed conflict including military contractors and irregular forces.\(^{120}\) In spite of the controversies surrounding the guidance with respect to conduct that constitutes direct participation, the extent to which membership in an organised armed group may be used as a factor or how long direct participation lasts, there is agreement that direct participation may only include conduct close to that of a fighter, or that directly supports combat.\(^{121}\) In the ICRC’s guidance, civilians who have a continuous combat function may be targeted at all times and in all places.\(^{122}\) Combatants are given a wider definition that Additional Protocol I as armed forces consisting of ‘all armed actors showing a sufficient degree of military organization and belonging to a party to the Conflict.’\(^{123}\) Furthermore under the ICRC’s Guidance, each specific act by a civilian must meet three cumulative requirements to constitute Direct Participation in Hostilities.

(i) There must be a “threshold of harm” that is objectively likely to result from the act, either by adversely impacting the military operations or capacity of the opposing party, or by causing the loss of life or property of protected civilian persons or objects; and

(ii) The act must cause the expected harm directly, in one step, for example, as an integral part of a specific and coordinated combat operation (as opposed to harm caused in unspecified future operations); and

(iii) The act must have a “belligerent nexus” – i.e., it must be specifically designed to support the military operations of one party to the detriment of another.\(^{124}\)

The Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston asserts the position that these criteria do not include acts of terrorism stating ‘although illegal activities, e.g. terrorism may cause harm, they do not meet the criteria for direct participation in hostilities (emphasis Alston).\(^{125}\) It has to be

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\(^{117}\) Ibid, p.313.

\(^{118}\) P. Alston, op.cit. p.19.


\(^{121}\) P. Alston, op.cit. p.19.

\(^{122}\) ICRC Guidance, p. 66.

\(^{123}\) Ibid, p.22.

\(^{124}\) Ibid, pp.16-17.

\(^{125}\) P. Alston, op.cit. p.20.
acknowledged that this view is not the only view on terrorists. There are arguably circumstances when those who may be classified as civilians and who are also terrorists are taking direct part in hostilities.\textsuperscript{126} Civilians lose their immunity from attack when they directly participate in an armed conflict and it can be argued that they can be targeted for so long as they participate.\textsuperscript{127} As a way of distinguishing various participants in conflict, Goodman argues that civilians do not lose their immunity if they indirectly participate in hostilities or they are non-participants. Indirect participants could be those such as ‘supply contractors [and] members of labour units or of services responsible for the welfare of armed forces’. These also include political and religious leaders, financial contributors, informants, collaborators and other service providers without a combat function.\textsuperscript{128} Goodman defines indirect participation as not containing a direct causal relationship between the individual’s activity and damage inflicted on the enemy. It may not occur on a battlefield.\textsuperscript{129}

It is evident from the label ‘militants’ applied to those targeted in the drone attacks is a broader category of persons than fighters and those who are directly participating. The problem with this term is that there is no description of the methodology used to label these persons as militants. It is an over-inclusive term in international humanitarian law. There would be no difficulty in international humanitarian law with describing targets as fighters or as civilian who are directly participating in the conflict but that is not how they are categorised.

Even if a non-international armed conflict in the tribal areas of Pakistan is established, it is asserted that the person must be a member of an organized armed group; has a continuous combat function; or is directly participating in the non-international armed conflict, for a targeting decision to be made by the operators of the drone. This does not include past participation in a completed terrorist attack unless the person is a member of the armed group. As O’Connell points out ‘[s]uspected militant leaders wear civilian clothes’.\textsuperscript{130} Therefore, the issue of which of the targets are actually fighters, direct participants or immune civilians remains unresolved. The statistics of persons killed probably includes all three categories and it is to this obligation of recording civilian casualties that this article now turns.

\textsuperscript{126} W. Fenrick, \textit{op.cit.} p.287.  
\textsuperscript{127} R. Goodman, \textit{op.cit.} p.51.  
\textsuperscript{128} Ibid, pp.52-53.  
\textsuperscript{129} Ibid p.54.  
\textsuperscript{130} M.E. O’Connell, \textit{op.cit.} p.23.
4. Obligations to record civilian casualties within an armed conflict

Although it is evident that at least some of the persons killed may be classified as fighters or direct participants, it is equally certain that there are civilian casualties either as persons within the vicinity of the bombing or sympathizers with the terrorist cause. International law has been slow to develop a system of obligations associated with the civilian casualties of armed conflict but that has changed as a result of the seminal ICRC Customary Humanitarian Law Study. This is such an important area as unless the casualties are identified and recorded, classifying the victim as fighter, direct participant or immune civilian remains impossible.

4.1 International Humanitarian Law Treaty Regime

The scant treaty provision for the collection of civilian casualties is contained in Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. The provision states:

**Article 16**

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.\(^\text{131}\)

There is an important limitation within this provision, that searching for civilian persons can only be conducted **as far as military conditions allow**. The omissions are evident, there is no obligation to arrange for a cease-fire to collect the casualties and there is no obligation to record these casualties as is clearly specified in the other three Geneva Conventions regarding combatants.\(^\text{132}\)

It is not until Additional Protocol 1 (of which some key countries within the conflicts discussed here including the United States and Pakistan are not parties) that there are detailed rules concerning provisions for missing persons including recording of information.\(^\text{133}\) The provisions begin with a general statement of the ‘right of families to know the fate of their relatives.’\(^\text{134}\) There are specific provision on searching for the missing and the recording of deaths.\(^\text{135}\) It has to be noted that even within these

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\(^{132}\) Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, Articles 15-17, Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked of the Armed Forces at Sea, Articles 18-21 and Geneva Convention III Relative to the Treatment of Prisoners of War, Articles 120, 121.

\(^{133}\) To be discussed in following section on customary humanitarian law.

\(^{134}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict of 8 June 1977, 1125 UNTS 3, Article 32.

\(^{135}\) Additional Protocol I of 1977, Articles 33 and 34.

**Article 33.-Missing persons**

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches…

4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for
provisions there is an important limitation and that is that the obligation extends to those in detention and under occupation and those who are not nationals of the country in which the hostilities occur. This does not include those civilians, nationals of the country in which the hostilities occur which is not yet under occupation. Regrettably this includes many of the victims of drone attack although many are non-nationals.

4.2 Customary International Humanitarian Law

The United States and Pakistan are not parties to Additional Protocols I or II of 1977 to the Geneva Conventions of 1949. However, many of the treaty provisions within those protocols have emerged as customary rules since the treaty’s adoption in 1977. Therefore, an examination of customary humanitarian law becomes pertinent to the case study of drone attacks. The landmark ICRC Customary International Humanitarian Law Study in Chapter 35 ‘The Dead’ and Chapter 36 ‘The Missing’ argues for the customary status of the essence of the extensive treaty provisions in Additional Protocol I and argues that all the provisions will apply to non-international armed conflict. This study importantly also clarifies the scope of the obligation.

The rules within the study with respect to civilian casualties are outlined here with pertinent sections of the ICRC commentary. It is these rules that clarify the content and scope of the obligation. The rules are as follows:

**Rule 112**

Whenever circumstances permit, and particularly after an engagement, each part to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.\(^{137}\)

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One of the aspects of drone attacks is that the attack is not usually part of a series of attacks and once concluded parties can take all possible measures to search for, collect and evacuate the dead. This could include permitting humanitarian organisations or the civilian populations to assume this task. Permission for either to conduct such an activity must not be denied arbitrarily. It seems essential that the United States and Pakistani or Yemeni governments must put into place a civilian casualty mechanism to comply with this obligation.

The ICRC Study indicates that the rule applied to all the dead, without adverse distinction. This means the rule applies no matter what side the dead are from and also importantly to civilians. Support for this rule is found in the Israel High Court of Justice Judgement in the Jenin (Mortal Remains) case. The Court stated that the obligation to search for and collect the dead derived from ‘respect for all dead.’ The Court also held that locating the dead was an ‘important humanitarian act’ and that the ‘respondents are responsible for the location, identification, evacuation, and burial of the bodies. This is their obligation under international law.’ This is very important as Israel is not a party to Additional Protocol 1 and therefore, its practice has a special significance. Further support is found in the Annotated Supplement to the Naval Handbook, stating: ‘As far as military exigencies permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead.’

Good practice as identified in the ICRC study involves using humanitarian organisations such as the ICRC in the searching for, collecting and documenting the missing and deceased persons. Further practice outlined in the ICRC Customary Study is that humanitarian organisations including the ICRC have searched for and collected the dead.

**Rule 113**

Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. This obligation is surely part and parcel of the first obligation. One of the distressing parts of this situation is the necessity under the Islamic faith to bury the bodies as soon as possible. Notwithstanding this fact, authorities must ensure that the bodies are identified and the cause of death determined before burial and that might necessitate taking longer than 24 hours. Once again a mechanism must be in place for a swift reaction to the drone attacks.

An example of best practice and one which applies to every one of these customary rules is the practice of the City of New York following the World Trade Centre bombings. Although, it may be debateable whether or not this bombing was a criminal act or part of an armed conflict, the efforts to identify every casualty of the

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141 *Ibid*.

bombing was truly heroic, even though many of the bodies could never be found or identified. Not one relative of the victims of the bombings were left in any doubt of the efforts of the rescuers or the forensic scientists on their behalf. The memorials to the victims of the September 11 disaster are evident even in London’s Hyde Park and that pattern has continued with the other tragic terrorist attacks in Madrid, London and Bali.

As the situation in New York clearly revealed, being bombed regretfully requires often DNA analysis to actually identify the remains of the dead in order to return them to their families. The civilian casualty recording mechanism will require a forensic capability in order for this international legal obligation to be complied with.

It is certainly the case that Ground Zero was a very different circumstance from the situation in northwest Pakistan as the airspace above both the Pentagon and the World Trade Center was closed or heavily monitored. This rule and Rule 112 allow limitations on compliance by phrases such as ‘all possible measures’ and ‘whenever circumstances permit’. Nevertheless, there should be a mechanism in place to comply with these rules whenever possible.

**Rule 114**

Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.143

**Rule 115**

The dead must be disposed of in a respectful manner and their graves respected and properly maintained.144

These obligations were also upheld in the Jenin (Mortal Remains) case that burials should be performed with respect, in a timely manner and according to religious custom and if all possible remains returned to families.145

The requirements to protect and maintain gravesites are also laid down in numerous military manuals. The commentary to the rule states that the dead must be buried, if possible, according to the rites of the religion to which they belonged and that they may only be cremated in exceptional circumstances, namely because of imperative reasons of hygiene, on account of the religion of the deceased on the express wish of the deceased. Burial also should be in individual graves. Collective graves may only be used in circumstances do not permit the use of individual graves, or in cases of burial of prisoners of war or civilian internees, because unavoidable circumstances require the use of collective graves. Graves should be grouped according to nationality if possible.146 An example given of state practice in a non-international armed conflict was that the Columbia Council of State held that the deceased must be buried individually and not in mass graves.147

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143 Ibid, p.411.
144 Ibid, p.414.
145 *Baracke v.. Minister of Defense* also known as *Jenin (Mortal Remains Case)* Israel HCJ 2002, Judgment 14 April 2002, para. 10
147 Ibid.
Rule 116
With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves.148

This rule is reinforced by the requirement for respect for family life and the right of relatives to know the fate of their relatives (see the discussion on human rights below). The ICRC maintains a Central Tracing Agency but not a record of location of civilian graves. The best model to be found is the practice of Organisations such as the Commonwealth War Graves Commission. All of the graves of soldiers that are identified in battle are recorded but civilians do not have such a service.

There is state practice that supports this rule in non-international armed conflict. The case-law of Argentina and Columbia has required that prior to their disposal the dead must be examined so that they can be identified and the circumstances of death established. In December 1991, when the conflict in the former Yugoslavia was characterised as non-international, the parties to the conflict reached an agreement with respect to the exchange of information regarding the identification of the deceased.149 The other important evidence of state practice is the 1974 General Assembly Resolution which called upon parties to cooperate ‘in providing information on the missing and dead in armed conflicts’.150

Rule 117
Each party to the conflict must take all feasible measures to account for persons reported missing and as a result of armed conflict and must provide their family members with any information it has on their fate.151

This rule is argued to be customary in both international and non-international armed conflict. The General Assembly discussed just above provides support for this rule as it called upon states involved in armed conflict to provide information on the missing.152 The UN Commission on Human Rights in 2002 passed a resolution affirming that each party to an armed conflict ‘shall search for the persons who have been reported missing by an adverse party.’ 153

The practice in the study suggests that exhumation may be an appropriate method of establishing the fate of missing persons. Practice also indicates that possible ways of seeking to account for missing persons include the setting up of special commissions or other tracing mechanisms. Croatia’s Commission for Tracing Persons Missing in War Activities in the Republic of Croatia is one example. The UN Secretary-General’s Bulletin on observance by United Nations forces of international humanitarian law provides that the UN force shall facilitate the work of the ICRCs Central Tracing Agency.154 States and international organisations have on many

149 Ibid.
150 UN General Assembly, Res. 3220 (XXIX) (1974) (adopted by 95 votes in favour, none against and 32 abstentions)
152 UN General Assembly, Res. 3220 (XXIX) (1974) (adopted by 95 votes in favour, none against and 32 abstentions)
153 Ibid.
154 Ibid.
occasions requested that persons missing as a result of the conflicts in Bosnia and Herzegovina, Cyprus, East Timor, Guatemala, Kosovo and the former Yugoslavia be accounted for. In the Yugoslav conflict there was the creation of the position of Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia.155

This rule is argued in the study to be customary by practice as set forth in a number of military manuals. It is also contained in some national legislation and supported by official statements. In an official statement in 1987, the United States supported the rule that the search for missing persons should be carried out ‘when circumstances permit, and at the latest from the end of hostilities.’156 As indicated above, drone attacks are not part of a continuing battle so that searching for the missing can take place forthwith.

These rules are also supported by developments in international human rights law which includes the rights of families to know the fate of their relatives and obligations to investigate the cause of death, a procedural obligation under the right to life.157 When an armed conflict does not exist it is the obligations under human rights law both domestically and internationally that govern.158

5. Responsibility for civilian casualties of drone attacks

One of the principal areas ensuring accountability for the treaty and customary rules of public international law is the concept of state responsibility. Cassese defines state responsibility as designating ‘the legal consequences of the internationally wrongful act of a State.’159 The primary rules of state responsibility are those treaty and customary rules that bind all states. The secondary rules of state responsibility determine the obligations of the wrongdoer and the rights and powers of any states or the international community of states affected by the breach of the international obligation.160 States therefore are under the obligation to make reparations for breaches of international law.161

5.1 Articles of State Responsibility162

155 Ibid.
156 United States, Remarks of the Deputy Legal Adviser of the Department of State
157 See for example Ahmet Ozkan & Others v. Turkey, ECtHR, App. No. 21689/93, Para. 319 (6 April 2004)
158 For extensive discussion of the human rights aspect of recording civilian casualties see S. Breau and R. Joyce, 'Identifying and Recording Every Casualty of Armed Conflict' in the upcoming special edition of the International Journal of Contemporary Iraqi Studies.
160 Ibid.
161 Chorzów Factory (Jurisdiction) case, (1927), PCIJ, Series A, No. 9, p.21.
A long and tortuous process in the International Law Commission resulted in the Articles on State responsibility. Although these articles only deal with secondary rules of State responsibility the commentaries concerning these rules and the context of some of them tended to stray into consideration of primary rules of State conduct. Article I of the Articles specifies that:

Every internationally wrongful act of a State entails the international responsibility of that State.

In his commentary to the Article, Crawford discusses three separate views of this statement. The first is that the consequences of an internationally wrongful act should be seen exclusively in the bilateral relations between States. Another view association with Kelsen is that the legal order is a coercive order and that general international law empowers the injured State to react to a wrong and the obligation to make reparations is treated as a way in which the responsible State could avoid the application of coercion. The third and prevailing view, according to Crawford, is that the consequences of an internationally wrongful act cannot be limited either to reparations or sanctions and that in international law a wrongful act may give rise to various types of legal relations, depending on the circumstances. The critical factor of this new system of legal relations is that some wrongful acts can engage the responsibility of the State concerned towards several or many States and even towards the international community as a whole.

Article 2 sets out the constituent elements of such an act:

There is an internationally wrongful act of a State when conduct consisting of an action or omission;

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.

Chapter II of the Articles concerns attribution of conduct to a State. Article 7 deals with the question of unauthorized or ultra vires acts of State organs or entities. Article 7 States:

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Crawford points out that a State cannot take refuge behind the notion that these acts ought not to have occurred or ought to have taken a different form. This is so even when the organs of the State have disavowed the conduct of the organ or entity which has committed unlawful acts. Otherwise a State could rely on its internal law to escape liability. The British Government has stated that ‘all Governments should always be held responsible for all acts committed by their agents by virtue of their

163 J. Crawford, The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries, (Cambridge University Press, 2002), each article includes extensive commentary, see also the various reports of the International Law Commission on the Draft Articles and GA Res. 56/83, 28 January 2002 recommending the Articles of State Responsibility to the International Community, see the introductory chapter for the almost 50 year history of the drafting of these articles.

164 Ibid for each article’s extensive commentary, see also the various reports of the International Law Commission on the Draft Articles and GA Res. 56/83, 28 January 2002 recommending the Articles of State Responsibility to the International Community.

165 Ibid, pp. 78-79.

166 Ibid., p.79.
official capacity.’\textsuperscript{167} This surely must include the CIA personnel operating the drones as they are part of the State as employees of a stat organ.

In Chapter II on reparations, Article 34 states that full reparation for injury takes the form of restitution, compensation and satisfaction, either singly or in combination. The primary principle set out in Article 35 is that a State responsible for an internationally wrongful act is under an obligation to re-establish the situation which existed before the wrongful act was committed unless it is impossible. This Article reflects the ruling in the \textit{Factory at Chorzów} case.\textsuperscript{168} The other methods of compensation are also specifically set out including satisfaction which represents an expression of regret, a formal apology or another appropriate modality.\textsuperscript{169} This modality is to remedy moral and legal damage.\textsuperscript{170}

Another area included in the Articles was the defence of Consent. Article 20 states that:

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.\textsuperscript{171}

This means that it is certainly possible for Pakistan and Yemen to consent to drone attacks on their soil but the issue remains of whether they can consent to a State violating its international law obligations towards the civilian casualties. If a State allows another State to use its territory to conduct military operations those operations are still bound by the rules of international law. A State cannot consent to an illegal activity and if it does so, the legal responsibility extends to all those states involved.

Greig in his second edition of his text in International Law in 1976 indicated that one of the difficulties of State responsibility was the lack of compulsory judicial determination of disputes. This is still the case 35 years later.\textsuperscript{172} The positive development is the great increase in arbitrations and International Court of Justice cases that apply the rules of State responsibility including the international arbitrations between Ethiopia and Eritrea which specifically dealt with issues arising from armed conflict.\textsuperscript{173}

There are three separate states whose international responsibility is considered in this section of the article and there are a number of armed groups that also might shoulder international responsibility for civilian casualties. One of the major complications is the uncertain status of consent in this discussion. If the Pakistani and Yemeni authorities have consented to the presence of drones on their soil then they share in the international responsibility for violations of primary rules of public international law as represented by the rules of international humanitarian and human rights law. For the purposes of this section we shall consider both situations, consensual and non-consensual drone attacks.

\textsuperscript{167} Ibid., p.106.
\textsuperscript{169} \textit{Articles on Responsibility of States for Internationally Wrongful Acts}, Article 37.
\textsuperscript{171} \textit{Articles on Responsibility of States for Internationally Wrongful Acts}, Article 20.
\textsuperscript{173} Eritrea-Ethiopia Claims Commission, see for example Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea’s Claims 1,3,5, 9-13, 14, 21, 25 and 26, The Hague, 19 December 2005.
5.2 Attribution of Responsibility

THE UNITED STATES OF AMERICA
No matter whether the situation is consensual or non-consensual it is clear that the United States is the primary participant in drone attacks. With respect to primary rules of state responsibility, any unlawful killing of a civilian could enable Pakistan or Yemen to bring a claim against the United States for breach of either International Humanitarian Law or International Human Rights Law, or both. However, the primary issue that concerns the Recording of Casualties of Armed Conflict project is the obligation to ensure a civilian casualty recording mechanism. The United States as a participant either as part of the Non-International Armed Conflict or as a participant in a law enforcement action has an obligation to make reparations for the violation of the obligations with respect to civilian casualties as set out in this report.

PAKISTAN
The situation in Pakistan is somewhat more difficult given the governmental protests against drone attacks. If the drone attacks are not consensual then it is the United States that must shoulder the international responsibility. However, in the likely event that Pakistan consented to the drone attacks there is joint responsibility, However, the question remains as to whether the consent much be public or private as there is evidence of private consent in Wikileaks documents. Pakistan is equally and severally responsible for all of the obligations set out above. Furthermore, Pakistan may have to compensate those families for their complicity in these violations.

YEMEN
It seems more evident that Yemen has consented to drone attacks on their territory which are not yet part of an armed conflict but rather constitute extra-judicial killings. The government of Yemen (whichever government that might be) will be equally and severally responsible for compensating surviving family members of all of the victims of the attacks.

NON-STATE ACTORS
Finally, it has been argued elsewhere, that non-state actors, particularly those in armed groups are responsible to respect the rules and customs of armed conflict. In those situations in Pakistan where some of those being killed are members of an armed group, an argument could be made that those groups are also equally and severally liable for the civilian casualties. In Afghanistan and Pakistan today far more civilian casualties are caused by non-state actors than by international or government forces and they should be responsible to comply with their international law obligations or pay compensation to those families who have lost relatives.

6. CONCLUSIONS
An examination of the facts of drone use in Pakistan and Yemen, coupled with this analysis of relevant international law yields some very clear conclusions. Firstly, there is a legal requirement to record the casualties that result from drone use, regardless of

174L. Moir, op.cit pp..52-53.
whether these result from an international conflict, a non-international conflict, or a non-conflict law enforcement situation. Secondly, because the status of the victim is so often contested or undetermined at time of attack (and often for substantial post-attack periods), there cannot be separate recording requirements for combatants and civilians – every casualty must be properly identified post-attack. The universal right to life which specifies that no-one be “arbitrarily” deprived of his or her life cannot be seen to have been upheld unless the identity of the deceased is established – whether a casualty was the intended target or merely a person in the wrong place at the wrong time is critical. Thirdly, reparations and compensation for possible wrongful killing, injury and other offences also depend on full and proper recording of casualties and their identities.

The responsibility to properly record casualties is a requirement jointly held by those who launch and control the drones and those who authorise or agree their use. In the present world situation, such requirement is held by the governments of the United States, Pakistan, and Yemen. While legal duties fall upon all the parties mentioned, it is the United States (as the launcher and controller of drones) under the law of state responsibility that has the clear responsibility to comply with the rule of international law. Furthermore, non-state actors have a specific but still very real responsibility in this situation, which is to comply with their obligations to record civilian casualties with respect to areas under their control.

A particular characteristic of drone attacks is that efforts to disinter and identify the remains of the deceased may be daunting, as with any high-explosive attacks on persons. However, this difficulty in no way absolves parties such as those above from their responsibility to identify all the casualties of drone attacks. Another characteristic of drone attacks is that as isolated strikes, rather than part of raging battles, there is no need to delay until the cessation of hostilities before taking measures to search for, collect and evacuate the dead.

The obvious question is how this legal obligation might be complied with. States making up the international community should urgently meet to discuss how the extensive obligations with respect to civilian casualties might be implemented either through national or international mechanisms. It seems evident that those who are fighting the conflict are ill equipped to comply with obligations towards civilian casualties and that the responsibility of states involved with armed conflict could be delegated to an agency tasked with this specific responsibility. However, the method of compliance demands further study and negotiation.