

June 2011

DISCUSSION PAPER 2: DRONE ATTACKS, INTERNATIONAL LAW, AND THE RECORDING OF CIVILIAN CASUALTIES OF ARMED CONFLICT

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EXECUTIVE SUMMARY

The Oxford Research Group's Recording of Casualties of Armed Conflict Project in their first discussion paper⁴ identified all of the elements of the international legal responsibility to identify, bury and record civilian casualties of armed conflict in the same way as military casualties are treated. The project team in the second phase of the project has conducted research which involves applying this international legal obligation to record civilian casualties of armed conflict to the drone attacks that are currently being conducted by the United States Central Intelligence Agency in Pakistan and Yemen. The standards identified in the previous discussion paper are repeated and applied to this current conflict situation.

The project team determined that this situation represents an egregious example of the violation of the various components of the obligation to record civilian casualties. It is complicated by the fact that there are various participants involved in these attacks, all who share the legal obligation. These include the United States government, the Pakistani authorities, the Yemeni government and the non-state actors involved in acts of terrorism being perpetrated in both Pakistan and Yemen.

The report has determined the following:

1. **A Non-International Armed Conflict exists in Pakistan which is part and parcel of the Non-International Armed Conflict in Afghanistan.**
2. **Those drone attacks that occur in the Northwest Frontier Province (officially Khyber-Pakhtunkhwa Province), and Federally Administered Tribal Areas are governed by the law applicable to Non-International Armed Conflict.**
3. **There is an evolving armed conflict in Yemen though it is not part of the CIA drone campaign.**
4. **Drone attacks that take place in Yemen and in the areas of Pakistan not part of the Non-International Armed Conflict in Afghanistan are governed generally by domestic law enforcement law and international Human Rights Law. The intended targets of drone attacks are by and large classified as civilians save and except for those who are at the time of attack directly participating in a Non-International Armed Conflict.**
5. **The United States, Pakistan, Yemen, and organised non-state actors all fall within the international legal obligation associated with civilian casualties.**
6. **The legal obligations binding all of the participants in the drone attacks relevant to areas of armed conflict are:**

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⁴ 'Discussion Paper: The Legal Obligation to Record Civilian Casualties of Armed Conflict', Oxford Research Group, June 2011

http://www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/discussion_paper_legal_obligation_record_civilian_casualty

http://www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/discussion_paper_2

- a. **to search for all missing civilians as a result of hostilities, occupation or detention;**
 - b. **to collect all of the casualties of armed conflict from the area of hostilities as soon as circumstances permit;**
 - c. **if at all possible the remains of those killed is to be returned to their relatives;**
 - d. **the remains of the dead are not to be despoiled;**
 - e. **any property found with the bodies of the dead is to be returned to the relatives of the deceased;**
 - f. **the dead are to be buried with dignity and in accordance with their religious or cultural beliefs;**
 - g. **the dead are to be buried individually and not in mass graves;**
 - h. **the graves are to be maintained and protected;**
 - i. **exhumation of dead bodies is only to be permitted in circumstances of public necessity which will include identifying cause of death;**
 - j. **the location of the place of burial is to be recorded by the party to the conflict in control of that territory;**
 - k. **there should be established in the case of civilian casualties an official graves registration service.**
7. **Those attacks that take place outside of the geographical area of armed conflict are extra-judicial killings contrary to international Human Rights Law and domestic criminal law unless the persons involved were killed while trying to evade lawful capture.**
 8. **Those authorities responsible for the territory in which these extra judicial killing occur are responsible to investigate every incident of casualty and fulfil the same obligations as set out above in armed conflict.**

1) INTRODUCTION

The Oxford Research Group's Recording of Casualties of Armed Conflict Programme seeks to raise public awareness and build political will towards establishing a global and systematic mechanism of recording the details of every individual killed as a consequence of armed conflict. This second part of the research applies the identified international legal obligation to record civilian casualties of armed conflict, which was established in the first discussion paper, to the specific situation of the Central Intelligence Agency drone campaign in Pakistan and Yemen. Drones defined as unarmed combat aerial vehicles,⁵ have become weapons of choice in the fight against terrorism, particularly with respect to targeted killings of suspected terrorists. The administration of President Obama employs drones operated by the CIA in extra-judicial killings particularly in Pakistan and Yemen.⁶ Drones have also been used by the military in the war zones of Iraq and Afghanistan but the CIA are involved in these operations as well.⁷ The decision to employ drones to carry weapons (they were previously only used 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.⁸

The use of drones in Pakistan has resulted in a large number of persons being killed along with the intended targets.⁹ However, 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. The Oxford Research Group has

⁵ UN Doc. A/HRC/14/24/Add.6, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston to the UN Human Rights Council and the United States Department of Defence 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).

⁶ The United States has also used drones in Somalia and Iraq .

⁷ M. E. O'Connell, 'Unlawful Killing with Combat Drones' found at <http://ssrn.com/abstract=1501144>, accessed 10 May 2011, pp.5-6.

⁸ Jane's, Yemen Drone Strike: Just the Start? 8 Nov. 2002, available at http://www.janes.com/aerospace/military/news/jdw/jdw021108_1_n.shtml.

⁹ M.E. O'Connell, op.cit p.6.

been following the eight institutions that have been monitoring civilian casualties from drones in Pakistan. The estimates of the numbers of civilian casualties vary widely as there are several different monitoring organisations and widely different views on whether the casualties are civilian or militants. But all agree that civilians are among the dead, who are usually unnamed, unidentified and unaccounted for.¹⁰ This discussion paper examines some 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.¹¹

2) METHODOLOGY

This discussion report is the result of a full literature review of the responsibilities of states in armed conflict, with a focus on the protection of civilians and the rights of combatants and civilians under existing legal frameworks. It rests on a comprehensive database of the relevant Conventions and treaties, as outlined in our first discussion paper which provides an analysis of the law and the practical problems arising in the application of these legal instruments. The branches of international law considered in this report are the law of armed conflict, International Humanitarian Law, International Human Rights Law and the law of State Responsibility. One of the major sources considered in this report is the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston to the UN Human Rights Council.¹² A further essential source is the International Committee of the Red Cross Interpretive Guidance on Direct Participation in Hostilities that has provided much of the framework for the consideration of the participants in the drone attacks.¹³ The International Committee of the Red Cross Customary Humanitarian Law Study is the primary source for the legal obligation with respect to the recording of casualties.¹⁴ The final crucial sources were the Articles of State Responsibility and the commentary to those articles by Professor James Crawford.¹⁵

From these resources the authors arrived at their conclusion that a governmental responsibility exists to record all of the casualties of the drone attacks in Pakistan and Yemen. The legal arguments are outlined in detail below.

3) STRUCTURE OF THE KEY SECTIONS OF THIS REPORT

The fourth section of the report engages in an analysis of 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 report reviews firstly the controversies concerning the threshold for armed conflict and secondly the classification of this type of armed conflict. Finally, an alternative legal regime of law enforcement is examined, which is a model governed by the domestic law of the countries involved in the specific attacks and by International Human Rights Law.

The fifth section of this report reviews the distinction between civilians and combatants in the complex arena of terrorism, assuming that these attacks take place within the legal context of an armed conflict.

¹⁰ See Jacob Beswick, 'Working Paper: The Drone Wars and Pakistan's Conflict Casualties, 2010 (2nd version)' http://www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/working_paper_drone_wars_and_pakistan%E2%80%99s_conflict_casualties which analyses the discrepancies between the results of various casualty recording projects

¹¹ S. Breau and R. Joyce, 'Identifying and Recording Every Casualty of Armed Conflict' in *International Journal of Contemporary Iraqi Studies* upcoming 2012.

¹² UN Doc. A/HRC/14/24/Add.6, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, May 2010. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/137/53/PDF/G1013753.pdf?OpenElement>

¹³ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Nils Melzer ed., 2009), accessed 2 May 2010
at: <http://www.icrc.org/eng/resources/documents/publication/p0990.htm> hereafter ICRC Guidance

¹⁴ J-M Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, (Cambridge University Press, 2005)

¹⁵ J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (Cambridge University Press, 2003) and *Articles on Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, 28 January 2002.

The loss of civilian immunity from being the subject of an attack only takes place with the contexts of direct participation in the armed conflict. However, there is an unresolved legal issue within International Humanitarian Law of what actually constitutes direct participation.

The sixth section of the report outlines the legal regime for the recording of civilian casualties within both International Humanitarian Law and International Human Rights Law and applies this regime to the situation of drone attacks in Pakistan and Yemen.

The seventh section of the report determines which of the parties conducting or receiving the drone attacks is responsible for identifying and accounting for the casualties.

4) THE ISSUE OF THE EXISTENCE OF AN ARMED CONFLICT

The first of the major issues is whether or not the drone attacks conducted by the United States can be viewed within the legal framework of armed conflict, or if they are to be assessed under the law enforcement model. Where International Armed Conflicts normally are easy to identify, such as the use of armed forces between states,¹⁶ the determination of the existence of Non-International Armed Conflicts is a far more difficult task, since such conflicts are sometimes hard to distinguish from riots and internal disturbance falling below the threshold for armed conflict.

There is no agreed legal definition of a Non-International Armed Conflict within International Humanitarian Law. Some conflicts fulfil only the criteria in Common Article 3 of the Geneva Conventions of 1949¹⁷ and customary law, whereas others also reach the higher threshold provided by Additional Protocol II of 1977¹⁸. Whereas conflicts which are subject to Additional Protocol II are also governed by Common Article 3 and customary International Humanitarian Law, many internal armed conflicts do not fall within the scope of the Protocol. This is due to its narrow definition of armed conflict together with the fact that many States are not parties to the Protocol. On the other hand, hostilities falling outside the scope of Additional Protocol II may often be considered armed conflict as defined by practice and customary law and are therefore ruled by the principles laid down in Common Article 3 and customary law.

When assessing whether a situation reaches the threshold for armed conflict, it is possible to identify within treaty and customary international law two key criteria. The first is the existence of parties to the conflict and the second is intensity of the violence.

4.1) PARTIES TO THE CONFLICT

Common Article 3 provides no definition of armed conflict, but simply states its applicability to armed conflicts 'not of international character'. It applies to 'each Party to the conflict' thereby implying that there must be at least two parties, without defining what kind of Parties they may be. A broader definition was provided by the International Criminal Tribunal for Yugoslavia (ICTY) in its judgement in *Prosecutor v. Tadic* where it stated that, 'an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.'¹⁹ According to the ICTY, the application of Common Article 3 does

¹⁶ See e.g. How is the Term "Armed Conflict" Defined in International Humanitarian Law?, International Committee of the Red Cross (ICRC) Opinion Paper, March 2008, p 5.

¹⁷ Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949

Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 1949

Geneva Convention III relative to the Treatment of Prisoners of War. Geneva, 1949

Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War. Geneva, 1949

¹⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977

¹⁹ *Prosecutor v. Dusko Tadic (aka Dule)*, No. IT-94-1-AR72, para 102 (20 October 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

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.²⁰

The Rome Statute of the International Criminal Court (hereafter ICC) has yet another definition of armed conflict, based on the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). 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.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. This ICC provision is yet to reach the status of customary law yet it is an important piece due to the strong influence of the International Tribunals and the ICC Statute on state parties.

Additional Protocol II on the other hand offers a narrow definition of armed conflict, requiring a state party and thereby excluding conflicts between two organised non-state actors from its applicability.²² 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.

To be able to be a 'party' of an armed conflict under Common Article 3, 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 Article 3 in order to be a 'party' to an armed conflict.²³

4.2) 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.²⁴

Regarding the duration of the hostilities, the Inter-American Commission on Human Rights found in the *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.²⁵ As has been mentioned, the ICTY requires the violence to be 'protracted' in order for an armed conflict to be at hand, a criterion used by the court when assessing both the intensity and the duration.²⁶

Regarding the intensity of the violence, Schindler provides that:

²⁰ Ibid. See also L. Moir, *The Law of Internal Armed Conflict* 2nd edition, (Cambridge University Press, 2009)

²¹ Rome Statute, Article 8(2)(f).

²² Article 1 Additional Protocol II.

²³ L. Moir, *The Law of Internal Armed Conflict*, op.cit. p. 36.

²⁴ *Prosecutor v Akayesu*, Judgment of Trial Chamber, 2 September 1998, ICTR-96-4-T.

²⁵ *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.

²⁶ *Prosecutor v. Tadic*, See also J. Pejic, *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.

...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.²⁷

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.²⁸ 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.²⁹

4.3) CLASSIFICATION OF THE TYPE OF ARMED CONFLICT

Once determined that an armed conflict is at hand, the rules of International Humanitarian Law applies. 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. Though, since some differences of opinion still exist, it remains important to distinguish between international and Non-International Armed Conflicts.

4.3.1) IAC – INTERNATIONAL ARMED CONFLICT

An International Armed Conflict exists whenever there is 'resort to armed force between two or more States.'³⁰ Common Article 2(1) to the 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.³¹

As has 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.'³² Hence, war can either be produced by a declaration of war or by the actual and comprehensive uses of force between States. As can be seen in the second section of the Article, there is no requirement that the attacked State use 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 2008,³³ 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 based on factual grounds rather than a declaration of war.

²⁷ D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, Recueil des cours, Volume 163/II, 1979, p. 147.

²⁸ L. Moir, *The Law of Internal Armed Conflict*, p 38 ff.

²⁹ Ibid p 39.

³⁰ International Committee of the Red Cross Opinion Paper March 2008 accessed at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> on 3 May 2011, p 5.

³¹ Geneva Conventions I-IV of 1949, Common Article 2.

³² Y. Dinstein, *War, Agression and Self-Defence* (Cambridge University Press, 4th edn, 2005), p. 15.

³³ International Committee of the Red Cross Opinion Paper March 2008Ibid, p 5.

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.³⁴

The ICRC also argues that Article 1, paragraph 4 in Additional Protocol I extends the definition of International Armed Conflicts to include wars of national liberation, where people fight in the exercise of their right to self-determination.³⁵

4.3.2) NON-INTERNATIONAL ARMED CONFLICT

As mentioned above, treaty law 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.³⁶

The ICRC provides:

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.³⁷

The first part of the definition shows two key criteria for determining whether an armed conflict is of internal or international character; the territorial limitations and the limitations as to the parties involved.

The territorial limitation in Common Article 3 provides that the conflict must take place in the territory of 'one of the High Contracting Parties'. A strict reading of this Article leads to the conclusion that the conflict must remain within the borders of one single State, but it is asserted that the Article does not cease to apply just because the conflict spills over to the territory of another State.³⁸ According to the ICRC, the conflict shall arise on the territory of a State for Common Article 3 to be applicable, clearly opening for the possibility of "spillover" effects into the territory of other States.³⁹ Pejic 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.⁴⁰

The same view was taken by the United States Supreme Court in *Hamdan*⁴¹ where it disregarded the opinion of The Bush Administration that the conflict between the United States and al-Qaeda was a 'global war on terror' not to be ruled under International Humanitarian Law. The US Administration argued that the conflict was not an International Armed Conflict, since al-Qaeda was not a State party. It also

³⁴ J. Pictet (ed.), *Commentary to the third Geneva Convention relative to the Treatment of Prisoners of War* (Geneva, ICRC, 1960), p 23.

³⁵ Additional Protocol I, art. 1, para. 4: "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

³⁶ J. Pejic, 'The protective scope of Common Article 3: more than meets the eye', (2011) 93 *International Review of the Red Cross* 1 p. 3.

³⁷ International Committee of the Red Cross Opinion Paper March 2008, *Ibid*, p 5.

³⁸ J. Pejic, 'The Protective Scope of Common Article 3: more than meets the eye', *op.cit.* p.6.

³⁹ International Committee of the Red Cross Opinion Paper, *op.cit.*

⁴⁰ J. Pejic, 'The protective scope of Common Article 3: more than meets the eye', *op.cit.* p 6.

⁴¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)

argued that it was also not an internal armed conflict since it exceeded the territory of one state.⁴² The Court held that regardless of the territorial issues, the conflict as a minimum should be ruled by Common Article 3.

The Manual of Non-International Armed Conflict seems to agree and defines internal conflicts as: 'armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government.'⁴³

It is argued here that the drone attacks conducted by the CIA in north-western Pakistan (see further below) are targeting extremist groups fighting the NATO forces in Afghanistan and shall therefore be seen as a part of the Non-International Armed Conflict taking place in Afghanistan.

Additional Protocol II provides a 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. However, Common Article 3 and customary law will still apply. Whether or not the existence of a Non-International Armed Conflict requires a State party to be involved has been discussed above regarding the threshold for armed conflict. When the distinction is to be made as to whether an existing conflict is international or non-international, it is necessary to examine the involvement of other States. 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.'⁴⁴

Some scholars also use the term "internationalised armed conflict", for Non-International Armed Conflicts with an international dimension, which are legally in between internal and International Armed Conflicts. James Stewart 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.⁴⁵

However, the Manual on the law of Non-International Armed Conflict 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.⁴⁶

According to this definition there is no doubt that the situation in Pakistan, in that it reaches the threshold for an armed conflict, is of non-international character. Even if the United States has in fact been intervening in an existing armed conflict between Pakistan and the TTP (which is the Tehrik-e-Taliban

⁴² 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.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (last visited 26 May 2011).

⁴³ M.N. Schmitt, C.H.B. Garraway and Y. Dinstein, *The Manual of Non-International Armed Conflict With Commentary* (San Remo: International Institute of Humanitarian Law, 2006), reprinted in 36 *Israel Yearbook on Human Rights* (2006) (special supplement, 17 pp.). See also <http://www.dur.ac.uk/resources/law/NIACManuallyBHR15th.pdf>

⁴⁴ Ibid.

⁴⁵ J. Stewart, 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict', (2003) 85 *International Review of the Red Cross* 315.

⁴⁶ M.N. Schmitt, C.H.B. Garraway and Y. Dinstein, *The Manual of Non-International Armed Conflict With Commentary* op.cit.

Pakistan an umbrella group for Muslim extremist groups operating in Pakistan),⁴⁷ the United States is doing so in support of the governmental forces and the conflict therefore remains a non-international one.

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 already mentioned 'spillover' NIAC, currently existing in Pakistan, where the hostilities cross the border to a neighbouring 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.⁴⁸ 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 organised armed groups on its territory.

In the United States, there is also the existing view that the country is involved in a 'transnational' Non-International Armed Conflict with 'al-Qaeda and its affiliates'⁴⁹. As mentioned above, the argument that the conflict would not be covered by Common Article 3 was superseded by the United States Supreme Court in the Hamdan case. 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.⁵⁰

4.3.3) 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 the law enforcement model and 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.⁵¹

CIA operatives have reportedly been involved in targeted killing operations using drones in Pakistan and Yemen. At the time of writing, the situation is yet to reach the one of armed conflict, which is why drone attacks, as well as other acts of violence, are to be assessed under the law enforcement model. Even if the situation in Yemen would evolve into an armed conflict, the United States drone attacks take place within the context of an argument of a 'war on terror' which is not included in any definition of conventional armed conflict. It is not contemplated in the existing international law literature or treaties that one can engage in an armed conflict with a concept such as a "War on Terror". To this date the drone attacks conducted by, or with the support of, the CIA, are to be assessed under a peacetime paradigm.

The same applies to the parts of Pakistan not considered to be part of the territory for the armed conflict in Pakistan. Hence, the drone attacks taking place outside north-western Pakistan (FATA and NWFP) shall be assessed under the rules of the law enforcement model. The possibility of using 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.

⁴⁷ See e.g. L. R. Blank and B. R. Farley, 'Characterizing US operations in Pakistan: Is the United States engaged in an armed conflict?' (2010-2011)34 Fordham Int'l L.J. 151 .

⁴⁸ J. Pejic, 'The protective scope of Common Article 3: more than meets the eye', op.cit., p 7.

⁴⁹ See 'Remarks by the President on national security', National Archives, Washington DC, 21 May 2009, available at: http://www.whitehouse.gov/the_press_office/Rema. See also 'Report of the United States of America submitted to the U.N. High Commissioner for Human Rights in conjunction with the Universal Periodic Review', p. 20, available at: <http://www.state.gov/documents/organization/146379.pdf> (last visited 26 May 2011)

⁵⁰ Ibid.

⁵¹ See eg M.E. O'Connell, 'The choice of law against Terrorism', (2010) 4 Journal of National Security Law and Policy 343.

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.⁵² Although Alston agrees that it may be legal for a law enforcement officer to kill a suspect posing an immediate threat, he stresses that the goal of a law enforcement operation always should be not to kill.⁵³ International Human Rights Law allows the use of lethal force against individuals threatening the security of a state, as long as all other measures to arrest the suspect are exhausted and the operation is pre-emptive rather than retributive.⁵⁴

Regarding the use of drone attacks to target suspected militants, it is important to note that law enforcement officials generally warn their object before resorting to 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. In the situation of a drone attack being used for law enforcement there is no question of any sort of warning being given. As a result, casualties occur that are unaccounted for and undocumented.

The first time a targeted killing was used as a counterterrorism measure within the 'war on terror', was in Yemen in November 2002 when a Predator drone killed Qaed Salim Sinan Al-Harethi, suspected of the USS Cole bombing, along with four others, including one Yemeni-American citizen. The attack was executed with the consent of the Yemeni government.⁵⁵

According to the Inter-American Commission on Human Rights in its Report on Terrorism and Human Rights⁵⁶ 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.⁵⁷ Further, the Report provides that:

states 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.⁵⁸

It is also 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. According to the Parks memorandum⁵⁹ the violation of Article 2(4) of the Charter of the United Nations can be justified since the targeted killings are a matter of self-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.⁶⁰

⁵² See e.g. *Tennessee v. Garner*, 471 U.S. 1 (1985).

⁵³ Report, para 9, page 5

⁵⁴ 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.unhcr.ch/tbs/doc.nsf//28Symbol/29/CCPR.CO.78.ISR.En?OpenDocument>.

⁵⁵ G. Blum and P. Heymann, 'Law and Policy of Targeted Killing', (2010) 1 Harv. Nat'l Sec. J. 145, p. 150.

⁵⁶ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights,

OEA/Ser.L/V/II. 116, Doc. 5 Rev. 1 Corr (Oct. 22, 2002), available at <http://www.cidh.oas.org/Terrorism/Eng/exe.htm>, last visited 2 June 2011.

⁵⁷ *Ibid* § 87.

⁵⁸ *Ibid*. §91.

⁵⁹ W. Hays Parks, "Memorandum of Law: Executive Order 12333 and Assassination," DAJA-IA (27-. 1a), The Army Lawyer 4 (Dec. 1989)

⁶⁰ *Ibid*, at 7.

Using this argument, the drone attacks in Yemen and Pakistan may well have been justified by being framed as an exceptional use of force in self-defence alongside peacetime law enforcement. However, it seems as though the United States in its assessment of the law enforcement paradigm has turned the exceptional into the continuous in order to justify its targeted killings outside the battlefields of the armed conflicts.

One important difference between the drone attacks in Pakistan and the attacks in Yemen is that the Yemeni government openly has given its consent to the attacks, which are also sometimes carried out by Yemeni forces with the support of the CIA, whereas the Pakistani government officially condemn the attacks on its territory and has ordered the United States to stop.⁶¹ There are, however, some media reports that the Pakistani government indeed has tacitly approved the drone attacks conducted by the United States.⁶²

An important difference between the law of armed conflict and the law enforcement model is that while the former requires civilian casualties to be proportional to the military advantage gained, the latter generally does not accept any casualties of innocent bystanders at all. This means that if there are civilian casualties, together with a high al-Qaeda operative this may be regarded as proportional under the laws of war - is an unlawful killing under the law enforcement model.

4.4) ASSESSMENT OF THE CURRENT SITUATION

4.4.1) AFGHANISTAN

The situation in Afghanistan can be described as a multinational Non-International Armed Conflict between NATO, its allies and the government of Afghanistan on one side, and the organised group the Taliban and other terrorist groups, foremost al-Qaeda, on the other. The conflict was one of international character until the fall of the Taliban, when the international forces supported the Northern Alliance in the fight against the Taliban regime. After this the allies have fought on the same side as the government and the conflict is therefore no longer of international character.

4.4.2) PAKISTAN

The situation in Pakistan is largely infected with acts of violence on several fronts. Parts of the tribal areas of north-western Pakistan; in the Federally Administered Tribal Areas ("FATA") and the North-West Frontier Province ("NWFP") are controlled by Islamist militant groups. Many of those groups are part of, or affiliated with, the umbrella group, Tehrik-e-Taliban Pakistan ("TTP").⁶³ The mission of the TTP is to overthrow the current leadership and establish an Islamic emirate in Pakistan, and the group is thereby directly opposing the Pakistani government. The TTP is closely related to the Haqqani Network which also operates in north-western Pakistan and considered to be the strongest fighter against international forces in central and eastern Afghanistan. The Haqqani Network does not oppose the government, but rather NATO and Afghan forces.

Since 2004, the CIA has been flying drones over the tribal areas, targeting suspected militants in hundreds of strikes. Some of the militant groups are active in fighting NATO in Afghanistan and are able

⁶¹ Times Topics: Pakistan, New York Times, available at http://www.nytimes.com/2011/04/14/world/asia/14pakistan.html?_r=1&ref=pakistan, last referenced on June 20 2011

⁶² There are numerous media reports alleging complicity by the Pakistani armed and security forces in drone attacks, but there is not a governmental public statement supporting the CIA operations. US diplomatic cables on Pakistan obtained by WikiLeaks were published in The Dawn newspaper in May 2011. It reports: "Another previously unpublished cable dated May 26, 2009 details President Zardari's meeting on May 25 with an American delegation led by Senator Patrick Leahy." While referring to a drone strike "in the tribal area that killed 60 militants," Ambassador Patterson wrote that "Zardari reported that his military aide believed a Pakistani operation to take out this site would have resulted in the deaths of over 60 Pakistani soldiers." He requested drones for Pakistan. <http://www.dawn.com/2011/05/20/zardari-asks-for-drone-technology-for-pak-army.html>

⁶³ The National Counter-Terrorism Calendar 2011, available at <http://www.nctc.gov/site/groups/ttp.html> accessed 3 June 2011.

to hide in Pakistan due to ceasefire agreements with the Pakistani government. Most of the US hostilities in Pakistan have taken place in the tribal areas. However, on a few occasions, they have moved deeper into Pakistani territory.

The first drone attack to occur outside the Tribal areas was on 19 November 2008, in Bannu (NWFP). Unlike the Tribal areas, Bannu is not controlled by militant groups but by 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 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 militant groups, essentially leaving them alone as long as they refrain from attacking Pakistani targets. It has also been shown through diplomatic documents released by WikiLeaks in 2010, that the Pakistani Intelligence agency (ISI) has been co-operating with the Haqqani Network.⁶⁴ In April 2011, Pakistan required that the United States reduce the number of C.I.A operatives on its territory and that they cease the use of drones, those demands were not obeyed by the United States.⁶⁵

The drone attacks conducted by the United States in north-west Pakistan are a 'spillover' effect from the conflict in Afghanistan and therefore to be assessed within that Non-International Armed Conflict. The drone attacks targeting militants outside the tribal areas and the NWFP are ruled by the law enforcement model. They raise questions on state sovereignty as well as unlawful killings. The hostilities between Pakistan and the TTP might reach the threshold for armed conflict, but is regardless of that, a separate conflict to which the United States is not a party.

4.4.3) YEMEN

At the time of writing this report, the situation in Yemen remains volatile and drone attacks in the country are increasing. It is reported that the Obama administration has intensified the CIA drone attacks as one of the few options to prevent the militants linked to Al Qaeda from seizing power.⁶⁶ Those drone attacks do not form part of the Non-International Armed Conflict that might be emerging from the civil disturbances. It is the opinion of the authors of this report that a law enforcement model continues to apply to the drone attacks.

4.5) CONCLUSION

There is no doubt that the situation in Afghanistan is a Non-International Armed Conflict and therefore shall be ruled under International Humanitarian Law. The drone attacks conducted by the CIA in north-western Pakistan are to be seen, not as a part of a transnational armed conflict with al Qaeda and its affiliates, but rather as a part of the multinational NIAC in Afghanistan.

Even if Pakistan on several occasions has claimed that the United States is not respecting its sovereignty, there have been no hostilities between the United States and Pakistani forces. The conflict therefore remains one of non-international character. Importantly the spillover effects from the armed conflict in Pakistan can only be said to include the NWFT and the tribal areas. The drone attacks in the rest of Pakistan should therefore be ruled by the law enforcement model. Even if the hostilities in Yemen are on the edge of an internal armed conflict, the drone attacks conducted by the United States is not part of this conflict and are to be assessed under the law enforcement model.

5) THE DISTINCTION BETWEEN CIVILIANS AND COMBATANTS

As the drone attacks are primarily conducted within a Non-International Armed Conflict, it means that some of the targets of these attacks are the members of the organised military groups and could be seen

⁶⁴ <http://www.nytimes.com/2010/07/26/world/asia/26isi.html?pagewanted=all>, last referenced on June 22 2011

⁶⁵ Ibid.

⁶⁶ M. Mazetti, 'U.S. is Intensifying a Secret Campaign of Drone Attacks,' New York Time, 9 June 2011, p.A6.

as being the lawful targets of attacks. However, one of the major principles in the law of armed conflict is the distinction between civilians and combatants.⁶⁷ Yet this rule requires careful examination as some of those targeted do not fit neatly into either category.

5.1) INTERNATIONAL ARMED CONFLICT

In an International Armed Conflict, combatants may be targeted at any time and at any place, whereas civilians are to be immune from attack.⁶⁸ 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.”⁶⁹ As a result, a combatant cannot be prosecuted for killing or wounding an enemy combatant but is subject to prosecution for war crimes if International Humanitarian Law is violated.⁷⁰ Combatants are defined within 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’.⁷¹

However, during the recent International Armed Conflicts in Iraq and Afghanistan, with irregular armed forces participating in hostilities, the issue of combatancy 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.⁷² 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. This debate continues and is discussed in detail in the section below, but it seems evident that most of those who participated in the International Armed Conflicts in Afghanistan and Iraq, such as the Iraqi armed forces and the Taliban forces, were clearly combatants.

O’Connell argues that those without a right to take a direct part in hostilities are unlawful combatants and may be charged with a crime.⁷³ It is evident that if such persons are captured, Article 5 of Geneva Convention III (and Additional Protocol I, Article 45) provides for a special procedure to determine the captive’s status.⁷⁴ For the purposes of attack, Dormann asserts that there is no such thing in International Humanitarian Law as a right to target an unlawful combatant. 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.⁷⁵ Therefore, the major issue with respect to those persons who do not fall into the traditional definition of combatant is to determine the issue of direct participation in armed conflict. Direct participation is even more pertinent in a Non-International Armed Conflict where combatants are even more difficult to identify.

5.2) NON-INTERNATIONAL ARMED CONFLICT

As the classification of the situation in which many of the drone attacks occur is a Non-International Armed Conflict, the status of the intended targets is an important issue. Regrettably, in a Non-

⁶⁷ 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.

⁶⁸ 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’, (2009) 103 Am. J. Int’l L. 48.

⁶⁹ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/- V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 68.

⁷⁰ K. Dörmann, ‘The Legal Situation of unlawful/unprivileged combatants’, (2003) 85 International Review of the Red Cross 45, p.45.

⁷¹ 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.

⁷² K. Dörmann, op.cit.p.45.

⁷³ M.E. O’Connell, op.cit.p.22.

⁷⁴ K. Dörmann, op.cit.p.47.

⁷⁵ Ibid, pp.72-73.

International Armed Conflict the rules are not clear because there are usually not organised armed forces involved in the fighting. Treaty provisions governing Non-International Armed Conflict do not use the term combatants and the Manual for Non-International Armed Conflict uses the term 'fighters'.⁷⁶

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.⁷⁷

It is evident that members of organised armed forces can be targeted at any time. However, with many of the victims of drone attacks it is unclear whether the 'militants' are actual members of armed forces or an organised armed group.⁷⁸ The definition of what constitutes an organised armed group is highly contentious. The International Committee of the Red Cross recently released their Interpretive Guidance on Direct Participation in Hostilities, written by Nils Melzer.⁷⁹ Although these ICRC guidelines are not legally binding, 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.⁸⁰ These guidelines define organised armed groups in relation to their activities described as 'continuous combat function'.⁸¹ The continuous combat function can be 'openly expressed through the carrying of uniforms, distinctive signs or certain weapons'.⁸² The Interpretive Guidance indicates "the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities."⁸³

To further complicate the situation, there is also no commonly accepted definition of directly participating in hostilities.⁸⁴ 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.⁸⁵ According to the ICRC's guidance, civilians who have a continuous combat function may be targeted at all times and in all places.⁸⁶ 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'.⁸⁷

Furthermore under the ICRC's Guidance, there is consideration of direct participation by civilians who might not be members of an organised armed group. In that case each specific act by a civilian must meet three cumulative requirements to constitute Direct Participation in Hostilities.

⁷⁶ R. Goodman, op.cit. pp.49-50 and MN Schmitt, CHB Garraway and Y Dinstein, 'The Manual on the Law of Non-International Armed Conflict With Commentary', op.cit.

⁷⁷ Manual of Non-International Armed Conflict, op.cit., p. 4.

⁷⁸ For an excellent discussion of organised armed groups see K. Watkin, 'Opportunity Lost: Organised Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance' (2010) 42 *International Law and Politics* 641 see also L. Zegveld, *The Accountability of Armed Opposition Groups in International* (Cambridge University Press, 2002)

⁷⁹ ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, hereafter ICRC Guidance

⁸⁰ W. Fenrick, 'ICRC Guidance on Direct Participation in Hostilities', (2009) 12 *Yearbook of International Humanitarian Law* 287, p. 288.

⁸¹ *Ibid*, pp. 653-657.

⁸² ICRC Guidance op.cit. p.35.

⁸³ *Ibid*, p.33.

⁸⁴ P. Alston, op.cit. p.19.

⁸⁵ P. Alston, op.cit. p.19.

⁸⁶ ICRC Guidance, p. 66.

⁸⁷ *Ibid*, p.22.

- (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.⁸⁸

The former Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston asserts 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)’.⁸⁹ It has to be acknowledged that this view is not the only view on terrorists, as acts of terrorism can be viewed as armed attacks within the law of armed conflict. There are circumstances when those who may be classified as civilians and who are also terrorists are taking direct part in hostilities.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³ Yet the support network participants are also being targeted in drone attacks.

In conclusion, even if a conflict is established, a continuous combat function is essential for a targeting decision to be made by the operator of the drone and not past participation in a completed terrorist attack. As O’Connell points out ‘[s]uspected militant leaders wear civilian clothes’.⁹⁴ This does not leave the law enforcement system with no recourse, as an act of terrorism is clearly criminal and efforts must be made to apprehend the suspect, not murder him in his home or bed together with the members of his family that might be present. There is also the issue of the rule of proportionality in targeting decisions which has been canvassed extensively in other publications.⁹⁵

5.3) CONCLUSION

It is the conclusion of the research for this section of the report that those who are targeted, even if they can be called unlawful combatants, need not be distinguished for the purpose of recording casualties, even if they can be targeted as direct participants in the armed conflict. There is no such thing in International Humanitarian Law or Human Rights Law as a status that negates a state or non-state actor’s obligation to record the casualty.

⁸⁸ Ibid, pp.16-17.

⁸⁹ P. Alston, op.cit. p.20.

⁹⁰ W. Fenrick, op.cit, p.287.

⁹¹ R. Goodman, op.cit. p.51.

⁹² Ibid, pp.52-53.

⁹³ Ibid p.54.

⁹⁴ M.E. O’Connell, op.cit. p.23.

⁹⁵ The authors of this publication determined that the issue of proportionality will involve a further research project not completed at this time. For academic discussion of targeting issues see the publications of M. N. Schmitt, Professor of International Law, University of Durham.

6) OBLIGATIONS TO RECORD CIVILIAN CASUALTIES WITHIN AN ARMED CONFLICT

6.1) INTERNATIONAL HUMANITARIAN LAW TREATY REGIME

As identified in the first discussion paper⁹⁶, within International Humanitarian Law also known as the *jus in bello*, there are extensive obligations to account for military casualties in armed conflict. The Geneva Conventions of 1949 are now universally ratified and therefore it is arguable that the provisions respecting the dead are customary international law binding not only on States but on non-state actors.⁹⁷ These extensive provisions impose obligations on the parties to search for and collect the wounded and sick, and search for the dead and prevent their bodies from being despoiled. Armistices or other arrangements are to be concluded as soon as circumstances permit, to collect the wounded and dead from the battlefield. Critically, there is an obligation to record civilian casualties.⁹⁸ However, for the purposes of this analysis it is worth repeating the scant treaty provision with respect to the collection of civilian casualties. 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.⁹⁹

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. It is not until Additional Protocol 1 (of which some key countries including the United States are not parties) that there are detailed rules concerning provisions for missing persons including recording of information.¹⁰⁰ The provisions begin with a general statement of the 'right of families to know the fate of their relatives.'¹⁰¹

⁹⁶ 'Discussion Paper: The Legal Obligation to Record Civilian Casualties of Armed Conflict', Oxford Research Group, June 2011

<http://www.oxfordresearchgroup.org.uk/sites/default/files/1st%20legal%20report%20formatted%20FINAL.pdf>

⁹⁷ See the next section on the ICRC Customary Humanitarian Law Study

⁹⁸ Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31. Parties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.

These records should if possible include:

- (a) Designation of the Power on which he depends;
- (b) Army, regimental, personal or serial number;
- (c) Surname;
- (d) First name or names;
- (e) Date of birth;
- (f) Any other particulars shown on his identity card or disc;
- (g) Date and place of capture or death;
- (h) Particulars concerning wounds or illness, or cause of death.

As soon as possible the above mentioned information shall be forwarded to the Information Bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

⁹⁹ 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, in force 21 October 1950, (1950) 75 UNTS 287-417, Article 16.

¹⁰⁰ To be discussed in following section on customary humanitarian law.

¹⁰¹ Additional Protocol I of 1977, Article 32.

There are specific provisions on searching for the missing and the recording of deaths.¹⁰² However, these provisions are not applicable in Non-International Armed Conflict and Additional Protocol II (where once again the United States and Pakistan are not parties) contains only a limited provision.

Article 8

Whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

As emphasized in the previous discussion paper, it is customary International Humanitarian Law, applicable in Non-International Armed Conflict which is relevant for the analysis here.

6.2) CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

The United States and Pakistan are not parties to Additional Protocols I or II, but Yemen is a party to the two Protocols. 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. The landmark ICRC Customary International Humanitarian Law Study¹⁰³ 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. It is these customary rules that clarify the content and scope of the obligation. The rules will be repeated here from the first report and then the rule applied to the current conflict. The rules are as follows:

¹⁰² 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 such teams to be accompanied by personnel of the adverse Party while carrying out the missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

Article 34.-Remains of deceased

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:

- (a) To facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
- (b) To protect and maintain such gravesites permanently;
- (c) To facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin...

4. (b) Where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinterment..

¹⁰³J-M Henckaerts and L. Doswald-Beck, Customary International Humanitarian Law Volume I: Rules, (Cambridge: Cambridge University Press, 2005), Chapters 35 and 36.

Rule 112

Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.¹⁰⁴

One of the aspects of drone attacks is that the attack is not usually part of an uninterrupted battle 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 to conduct such an activity must not be denied arbitrarily. It seems essential that the United States, Pakistani and Yemeni governments must put into place a civilian casualty recording mechanism to comply with this obligation.

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.¹⁰⁵

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.¹⁰⁶

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, culturally appropriate reaction to the drone attack.

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.¹⁰⁷

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 bombing were truly heroic, even though the nature of the attack meant that 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. This has similarities to the situation of being bombed in a drone attack which would often require DNA analysis to actually identify the remains of the dead in order to return them to their families. Thus, the casualty recording mechanisms would require an embedded forensic capability in order for this international legal obligation to be complied with.

Rule 115

The dead must be disposed of in a respectful manner and their graves respected and properly maintained.¹⁰⁸

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 or the express wish of the deceased. Burial also

¹⁰⁴ Ibid. p.406.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid, p.409.

¹⁰⁷ Ibid, p.411.

¹⁰⁸ Ibid, p.414.

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.¹⁰⁹

In the examination of state practice gives the example of a disrespectful disposal of dead civilians in Papua New Guinea which was condemned by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. A further example of Non-International Armed Conflict was that the Columbia Council of State held that the deceased must be buried individually and not in mass graves.¹¹⁰ This is another responsibility of the civilian casualty recording mechanism. In most circumstances this will be accomplished by burial by family members but again the dignified burial of the deceased is the legal obligation.

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.¹¹¹

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 which not only records location of burial but records the identity of those missing in action. All of the graves of the casualties of drone attacks should be recorded particularly in the event that further investigation is required.

This is supported by consistent practice 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. International Human Rights Law also mandates that measures to identify the dead and investigate the cause of death must be taken, in particular in order to protect the right to life. The Inter-American Court ruled in *Velasquez Rodriguez and Godinez Cruz* cases that the State was obliged to do all it could to inform the relatives of the location of the remains of persons killed as a result of enforced disappearances.¹¹² Human Rights Special Rapporteurs and other human rights mechanisms have called for measures in the context of the conflicts in Chechnya, El Salvador, and former Yugoslavia. In December 1991, when the conflict in 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.¹¹³

The international community has also acted to support this obligation including the 1974 General Assembly Resolution which called upon parties to cooperate 'in providing information on the missing and dead in armed conflicts.'¹¹⁴

6.3) CONCLUSION

It is evident that in customary humanitarian law there are significant obligations with respect to the recording of civilian casualties. However, these rules are also supported by obligations in International Human Rights Law which is examined in the next section.

6.4) INTERNATIONAL HUMAN RIGHTS LAW

The obligation under International Humanitarian Law to record civilian casualties is supported by the treaty and customary provisions in International Human Rights Law. This is particularly pertinent for the

¹⁰⁹ Ibid, pp.414-417.

¹¹⁰ Ibid.

¹¹¹ Ibid, p.417.

¹¹² *Velasquez Rodriguez Case*, Judgment of July 29, Inter-Am. Ct. H. R. (Ser. C) No. 4 (1988)

¹¹³ Ibid.

¹¹⁴ Ibid.

victims of drone attacks outside of the geographical area of the armed conflict. The Universal Declaration of Human Rights includes commitment by all nations to uphold the dignity of all persons and provide recourse to justice for those aggrieved.¹¹⁵ The first relevant provision is Article 3 which confirms that every person is entitled to the right of life, liberty and security of the person. Articles 10 and 11 confirm the right to a fair trial to determine criminal charges against a person and a presumption of innocence. Furthermore, Article 12 confirms that no one shall be subjected to arbitrary interference with privacy, family, home or correspondence, or to attacks upon honour and reputation. These articles have been argued to be part of customary international law.

The UDHR provided the basis for several human rights Conventions that are directly relevant to the parties involved in drone attacks. These are the International Covenant of Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), the American Declaration of the Rights and Duties of Man (1948), the American Convention of Human Rights 1969 (ACHR) and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT).

As a result of these treaties it is evident that each and every victim of drone attacks has the right to have their death recorded, investigated and, if appropriate, prosecuted. Each family member has the right not to suffer inhumane or torturous treatment in the absence of information about the fate of a loved one, where the state fails to provide a proper investigation or a method of recording relevant data which would, if in existence, remove the agony of uncertainty. These are basic human rights, granted by the various instruments of IHRL and to be upheld by procedures of the state. In this case as well the dominant right to life is engaged as within the law enforcement model discussed earlier, a suspect has the right to challenge his or her detention and to hold the state to the obligation of proving criminal charges against him or her. The drafters of this discussion paper would recommend that all review the report of Philip Alston with respect to extra-judicial killings that comes to the conclusion that these killings violate the fundamental norms of human rights law.

6.4.1) PROTECTIONS UNDER IHRL AND THE STATE'S ABILITY TO DEROGATE

International Human Rights instruments contain both derogable and non-derogable rights. Derogations allowed with regard to lawful acts of war are permitted, subject to strict criteria of necessity and lawfulness. These derogations exist to take the realities of war and situations of public emergency into account while providing the utmost protection to those under the state's power. It is evident that Pakistan and Yemen are in situations of armed conflict or public emergency. However, these States cannot freely disregard the derogable rights outlined herein. An obligation continues to exist, subject to necessary restrictions.¹¹⁶ Yemen and Pakistan as States Parties to the ICCPR must demonstrate the necessary nature of such measures¹¹⁷, and prove that they remain consistent with international law.

The ICCPR states that derogations may be made from the provisions of the Covenant in times of an officially proclaimed public emergency, which "threatens the life of the nation".¹¹⁸ This measure is curtailed by requirements stating that the derogation must be strictly required in the context of the emergency and must not be based on discriminatory grounds of "race, colour, sex, language, religion or social origin".¹¹⁹ But of the rights identified in the previous discussion paper as being relevant to this project, no derogation is allowed from Article 6—the right to life—or Article 7—the right not to be subjected to torture or to cruel, inhuman or degrading treatment.¹²⁰ Notably, the right to life provides that nobody should be "arbitrarily" deprived of his or her life.¹²¹ It is within this word that deaths in the context of conflict can fall outside the remit of the right to life in the ICCPR. Military action carried out in a legitimate

¹¹⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

¹¹⁶ Hampson, F. (1994) "Using International Human Rights Machinery to Enforce the International Law of Armed Conflict"

¹¹⁷ Ibid.

¹¹⁸ ICCPR, Part II, Article 4 (1)

¹¹⁹ Ibid.

¹²⁰ ICCPR, Part II, Article 4 (2)

¹²¹ ICCPR, Part III, Article 6 (1)

fashion will not, in the event of deaths incurred, amount to a breach of this right as it will not be considered unlawful, therefore not 'arbitrary.' However, the *lex specialis* of International Humanitarian Law would be engaged in the context of an armed conflict.

Article 17 protects the individual from unlawful interference with one's privacy, family, home and correspondence. Article 23 notes the status of the family as "the natural and fundamental group unit of society" and emphasises that it should be protected by the state.¹²² These articles are derogable in times of emergency but nevertheless point to an understanding of the importance of the family unit and offer a commitment to protect that unit.

The measures in the ICCPR are drawn directly from the UDHR, which recognises the above rights as the "inalienable rights of all the members of the human family" which are the "foundation of freedom, justice and peace in the world".¹²³ Furthermore, the ICESCR gives an identical description of the family unit's status in society to the UDHR and the ICCPR and recognises that protection and assistance should be accorded to it, in the "widest possible" manner.¹²⁴ This phrasing suggests that it is protected only in relation to the limitations created by emergency circumstances. Limitations (derogations) may only be put in place when determined by law, accepted as compatible with the nature of the rights, and when the derogation exists only to promote the general welfare of society.¹²⁵ Surely, this cannot mean that a family is to be prohibited from learning the fate of their loved ones.

6.4.2) CONCLUSION

The international human rights obligations as applied in this section to drone attacks in Pakistan and Yemen reveal further support for the necessity of urgent action by all parties to comply with these rules. The next section discusses who is responsible for implementing the necessary measures to ensure compliance with these obligations.

7) THE INTERNATIONAL RESPONSIBILITY OF STATES

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.'¹²⁸ 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.¹²⁶

Although there was agreement in the international community that there were primary rules of conduct that might engage responsibility, there has never been agreement as to the content of those rules. Brownlie in his influential study on State responsibility delineated causes of action involving the responsibility of States that had been invoked in practice. Although he examined several heads of relief in pleadings he found only a few that directly related to State responsibility. His final list follows:

1. State responsibility arising from a breach of a treaty obligation
2. State responsibility arising otherwise from a breach of duty set by general international law (customary international law)
3. Claims of sovereignty or title
4. Action for a declaration of the validity of a State measure in general international law
5. Violation of the sovereignty of a State by specified acts
6. Infringement of the freedom of the high seas or outer space
7. The unreasonable exercise of a power causing loss or damage (abuse of rights)
8. Usurpation of jurisdiction

¹²² ICCPR, Part III, Article 17 (1) & (2), ICCPR Part III, Article 23 (1)

¹²³ UDHR, Preamble

¹²⁴ ICESCR, Article 10 (1)

¹²⁵ ICESCR, Article 4

¹²⁶ Ibid.

9. Breach of an international standard concerning the treatment of aliens (denial of justice)
10. Breach of human rights standards, in particular the forms of unlawful discrimination
11. Unlawful confiscation or expropriation of property
12. Unlawful seizure of vessels¹²⁷

There are very few treaty rules in existence that specifically deal with state responsibility but a prominent one is Article 3 of the Fourth Hague Convention of 1907, on the Laws and Customs of War on Land which is still applicable in times of occupation:

A belligerent party which violated the provisions of the said Regulations, shall if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. ¹²⁸

This was one of the few provisions that specified the laws that could be breached. Generally there is a vague statement of responsibility for breach of an international rule. Cassese concludes that firstly the rules on State responsibility were rudimentary as they did not (i) specify some general elements of international delinquency or (ii) the legal consequences of international wrongs.¹²⁹

A long and difficult process in the International Law Commission resulted in the Articles on State Responsibility. These articles deal with secondary rules of State responsibility which is the consequences of the violations of the rules of primary responsibility.

Chapter II of the Articles concerns attribution of conduct to a State. Of interest to this study is Article 7 dealing 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. 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 official capacity.'¹³⁰ This rule is also supported in the 1977 Geneva Protocol I which provides that a 'party to a conflict (...) shall be responsible for all acts by persons forming part of its armed forces'.¹³¹

In Chapter II of the Articles 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 *Factory at Chorzów* case.¹³² 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.¹³³ This modality is to remedy moral and legal damage.¹³⁴

¹²⁷ Ibid, p.85.

¹²⁸ Cassese, *Supra*, p.242 and Hague Convention of 1907 on the Laws and Customs of War on Land.

¹²⁹ Ibid., p.242.

¹³⁰ Ibid., p.106.

¹³¹ 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, Article 91 see also the *Caire* case, R.I.A.A. , vol.V, p.516 (1929) p.531 and Velásquez Rodríguez, *Inter-Am. Ct.H.R.*, Series C, No. 4 (1989), at para, 170; I.L.R. , vol. 95, p.259, at p.296.

¹³² *Factory at Chorzów* Merits, 1928, P.C.I.J. Series A, No. 17, p.48.

¹³³ Articles on Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83, 28 January 2002, Article 37.

¹³⁴ *Rainbow Warrior* Arbitration, R.I.A.A., XX, 217 pp.272-273.

The discussion of these rules is important as it is clear that situations described in this discussion paper are the very types of violations of treaty and customary obligations that give rise to claims of State responsibility.

There are three separate states whose international responsibility is considered in this section of the report 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.

7.1) THE UNITED STATES

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.

7.2) 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, 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.

7.3) 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.

7.4) 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.¹³⁵ In Afghanistan and Pakistan today far more civilian casualties are caused by non-state actors than by international or government forces.

8) CONCLUSIONS

An examination of the facts of drone use in Pakistan and Yemen, coupled with an analysis of relevant law yields some very clear conclusions.

¹³⁵ L. Moir, *op. cit.*

- There is a legal requirement to record the casualties that result from drone use, regardless of whether these result from an international conflict, a non-international conflict, or a non-conflict situation.
- 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.
- 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 USA, Pakistan, and Yemen. While legal duties fall upon all the parties mentioned, it is the United States (as the launcher and controller of drones) which has least justification to shirk its responsibilities.
- 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 implications of these findings go well beyond the particularities of these weapons, these countries, and these specific uses. The legal obligations enshrined as they are in International Humanitarian Law, International Human Rights Law, and domestic law, are binding on all parties at all times in relation to any form of violent killing or injury by any party.

States, individually and collectively, need to plan how to work towards conformance with these substantial bodies of law. Members of civil society, particularly those that seek the welfare of the victims of conflict, have a new opportunity to press states towards fulfilling their obligations under law. This is not asking for the impossible. The case of Osama Bin Laden suggests the lengths to which states will go to confirm their targets when they believe this to be in their own interest. Had the political stakes in avoiding mistaken or disputed identity not been so high, Bin Laden (and whoever else was in his home) would almost certainly have been typical candidates for a drone attack.

9) RECOMMENDATIONS FOR IMMEDIATE ACTION

Here follow a set of detailed recommendations for the United States, Pakistan, and Yemen, addressing the current situation in Pakistan and Yemen, where the issue of drone strikes by the United States and the recording of their casualties is of real and practical urgency. As outlined above, while legal duties fall upon all the parties mentioned it is the United States that has the major and most immediate responsibility.

- All possible measures must be taken to search for, collect and evacuate the dead resulting from drone attacks.
- Bodies must be identified and the cause of death determined before burial.
- The dead must be buried according to the rites of the religion to which they belonged.
- Burial should be in individual, not mass, graves.
- All of the graves of the casualties of drone attacks must be recorded, particularly in the event that further investigation is required.

- All civilian casualties in areas not part of the International Armed Conflict in Afghanistan should be investigated as extra-judicial killings.
- A wide-ranging discussion involving state and non-state actors is urgently required to rectify the current shortcomings in the international regime and work towards an environment when no casualty of conflict goes unrecorded.

10) APPENDIX 1: SCHEMATIC DIAGRAM

The following schematic diagram sets out comprehensively the various components of the legal obligation imposed on states following civilian casualties that result from armed conflict either international or Non-International Armed Conflict. This includes both treaty and customary law obligations, the obligations found by the ICRC Study forming the basis for the structure of the diagram.

1. Search for and Collection of the Dead		
	International Humanitarian Law	International Human Rights Law
(a) Search for Missing Persons	Article 33 Additional Protocol I (hereafter AP I) includes the obligation as soon as circumstances permit and at the latest from the end of active hostilities, each party to the conflict shall search for parties that have been reported missing by the adverse party.	The Right to Recognition before the Law: Universal Declaration of Human Rights (hereafter UDHR), Article 6 & Article 15 (1); International Covenant on Civil and Political Rights (hereafter ICCPR), Part III, Article 16. The Right to Liberty and Security of Person: ICCPR, Part III, Article 9 (1). The Right to Life: UDHR, Article 3; European Convention of Human Rights (hereafter ECHR), Article 2; ICCPR, Part III, Article 6. Includes the procedural obligation of the state to investigate causes of death, to determine 'intentional' or 'arbitrary' nature of death: ICCPR, Part II, Article 2 (3); Article 2, ECHR, supported by European Court of Human Rights (hereafter ECtHR) case law (see <u>Varnava & Others v. Russia</u>).
(b) Search for and collection of the dead	Article 16 2nd paragraph GC IV As far as military considerations allow, each Party to the Conflict shall facilitate the steps taken to search for the killed. Article 33 (4) AP I and Article 8 AP II – all possible measures to search for the dead.	Part of the state's obligation to investigate the fate of missing persons: The Right to Recognition before the Law, the Right to Liberty and Security of the Person, the Right to Life (as above).
(c) Provision of Information on Missing Persons	Article 33 AP I Each party shall record the information with respect to persons that have died in detention and to the full extent possible record information of persons that have died as a result of hostilities or occupation. Article 136 Geneva Convention IV (hereafter GC IV) –each party to the Conflict shall establish an Official Information Bureau responsible for transmitting	The state must account for missing persons. Necessary to ensure the protection of the Right to Recognition before the Law, the Right to Liberty and Security of the Person, the Right to Life (as above). The family of the missing have the right to be free from the agony of uncertainty regarding the fate of their family members. The Right to be Free from Torture: UDHR, Article 5; ECHR, Article 3, supported by ECtHR

	information with respect of the POW's and protected persons who are in its power.	case law (see <u>Cyprus v. Turkey</u>) ; ICCPR, Part III, Article 7; Convention Against Torture (hereafter CAT), Article 2 & 14. The state must provide such information where available, and otherwise undertake an investigation.
(d) International Cooperation to Account for Missing Persons	Article 140 GC IV – a Central Information Agency shall be created in a neutral country for the purpose of collecting all information it may obtain respecting internees.	UN Charter, Article 55: Member States have Pledged to Cooperate in order to achieve its purposes, including universal respect for, and observance of, human rights and fundamental freedoms. To include the Right to Recognition before the Law, the Right to Liberty and Security of the Person, the Right to Life, and The Right to be Free from Torture.
(e) Right of the Families to Know the Fate of their Relatives	Article 26 GC IV – Each party to the conflict shall facilitate inquiries by members of families with respect to other family members. Article 32 AP I – implementation of the sections with respect to missing or dead prompted by the right of families to know the fate of their relatives.	Recognition of the Importance of the Family Unit: UDHR, Article 12 & Article 16 (3); ECHR, Article 8; ICCPR, Article 17 & 23; International Convention on Economic Social and Cultural Rights (hereafter ICESCR), Preamble & Article 10. The Right to be Free from Torture (as above). The Right to Freedom of Information: UDHR, Article 19. The Right to Effective Remedy for Violations: UDHR, Article 8.
Customary International Law Rule: <i>Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction. (Rule 112)</i>		

2. Treatment of the Dead		
	International Humanitarian Law	International Human Rights Law
<ul style="list-style-type: none"> Respect for the Dead 	<p>Article 16 2nd paragraph GC IV – protection of those killed against ill-treatment</p> <p>Article 34(1) AP I – remains of persons killed shall be respected.</p> <p>Article 4 AP II – prohibition against outrages on personal dignity</p>	<p>Inherent Dignity of the Human Person: UDHR, Preamble; ICESCR, Preamble; ICCPR, Preamble; CAT, Preamble; ECHR based on UDHR's fundamental principles.</p> <p>Committing Outrages against Personal Dignity is a war crime under the Statute of the ICC, Articles 8(2)(b)(xxi) and 8(2)(c)(ii).</p>
<ul style="list-style-type: none"> Protection of the Dead from Despoliation 	<p>Article 16 2nd paragraph GC IV – protection against despoliation</p> <p>Article 4 AP II – prohibition against pillage of dead persons</p>	<p>Inherent Dignity of the Human Person, see above.</p> <p>The Right to be Free from Torture. See in particular <u>Akkum</u>.</p>

	Article 8 AP II – prevention of dead from being despoiled.	<u>& Others V. Turkey</u> . The anguish caused to the applicant as a result of the mutilation of the body of his son was held to amount to degrading treatment contrary to Article 3, ECHR. Committing Outrages against Personal Dignity is a violation of IHRL (see above).
Customary International Law Rule: <i>Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. (Rule 113)</i>		

3. Return of the Remains and Personal Effects of the Dead		
	International Humanitarian Law	International Human Rights Law
(a) Return of Remains	Article 130 2nd paragraph GC IV - ashes of deceased detainees returned to next of kin Article 34 AP I - remains of persons who have died as a result of hostilities or occupation to be returned to next of kin or maintain gravesites	Inherent Dignity of the Human Person , see above. Recognition of the Importance of the Family Unit , see above.
(b) Return of Personal Effects	Article 139 GC IV – return of valuables of internees Article 34 (2) (c) AP I – adverse parties conclude agreements for to facilitate return of personal effects of the dead	The Right to Own Property and Not to be Arbitrarily Deprived of One’s Property: UDHR, Article 17. This right extends to the property and inheritance rights of heirs, where the individual is missing or dead. The state is obliged to return property to the family of the deceased. Articles of sentimental value may fall within the obligation to ensure Recognition of the Importance of the Family Unit.
Customary International Law Rule: <i>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. (Rule 114)</i>		

4. Disposal of the Dead with Dignity		
	International Humanitarian Law	International Human Rights Law
(a) Respect for the Religious Beliefs of the Dead	Article 130 1st paragraph GC IV – burial if possible according to the rites of religion to which they belonged.	The Right to Freedom of Religion: UDHR, Article 18; ICCPR, Article 18; ECHR, Article 9. Inherent Dignity of the Human Person , see above. The state must dispose of the body in accordance with the wishes of the dead, where known. Refusal of a proper burial as Committing Outrages Against Personal Dignity.

(b) Cremation of the Dead	Article 130 2nd paragraph GC IV – cremation only for imperative reasons of hygiene or for motives based on the religion of the deceased and the reasons shall be set out in detail in the death certificate.	The Right to Freedom of Religion. The Inherent dignity of the Human Person. Also, Recognition of the Importance of the Family Unit would suggest that families ought to be able to mourn in accordance with their wishes and religious beliefs. States must avoid Committing Outrages Against Personal Dignity.
(c) Burial in Individual Graves	Article 130 2nd paragraph GC IV – deceased detainees in individual graves unless unavoidable circumstances require the use of collective graves	The Right to Freedom of Religion. The Inherent dignity of the Human Person. Recognition of the importance of the family unit. To avoid Committing Outrages Against Personal Dignity.
(d) Respect for and Maintenance of Graves	Article 130 1st paragraph GC IV – graves shall be respected and properly maintained. Article 34 AP I – as soon as possible agreements to be concluded to maintain the gravesites permanently.	The Right to Freedom of Religion. The Inherent dignity of the Human Person. Recognition of the importance of the family unit.
Customary International Law Rule: <i>The dead must be disposed of in a respectful manner and their graves respected and properly maintained. (Rule 115)</i>		

5. Accounting for the Dead		
	International Humanitarian Law	International Human Rights Law
(a) Identification to the Dead prior to Disposal	Article 129 2nd paragraph GC IV – deaths of internees shall be certified by a doctor and a death certificate showing the cause of death Article 33 (2) AP I – each party record information on those who have died during period of detention and carry out the search for and recording of information concerning persons who died in other circumstances as a result of hostilities or occupation and agree on arrangements for teams to identify the dead from battlefield areas.	Right to Recognition before the Law, the Right to Liberty and Security of the Person, 3rd the Right to Life. The missing and the deceased must be accounted for by the state in accordance with these rights, and also to prevent violations of the Right to be Free from Torture of the family members of the missing or deceased.
(b) Recording of the Location of the Graves	Article 130 3rd paragraph GC IV - lists showing the exact location and marking of graves	Accountability extends to the proper burial and recording of the details of the place of

	together with particulars of the dead interred therein shall be made by the Graves Registration Service lists to be forwarded to the Power on whom the deceased depended.	burial. Right to Recognition before the Law, the Right to Liberty and Security of the Person, the Right to Life. Providing details of the place of burial supports the Recognition of the importance of the family unit. Avoids Committing Outrages Against Personal Dignity.
(c) Marking of Graves and Access to Gravesites	Article 130 1st paragraph GC IV – graves must be marked so that they can easily be found. Article 34 AP I – facilitate access to gravesite by relatives of the deceased.	Providing access to and full details of the place of burial supports the Recognition of the importance of the family unit and avoids Committing Outrages Against Personal Dignity.
Customary International Law Rule: <i>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. (Rule 116)</i>		

6. Identification of the Dead after Disposal	
International Humanitarian Law	International Human Rights Law
Article 34 (4) AP I – exhumation is allowed only where it is a matter of overriding public necessity, including cases of investigative necessity.	The Right to Life. Procedural element includes that states must investigate cause of death. Supported by ECtHR case law. (See Cyprus v. Turkey) The Right to be Free from Torture. Identification of the deceased is necessary end the ‘agony’ endured by the family due to state failure to provide information. (See Cyprus v. Turkey)
Customary International Law Rule: <i>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. (Rule 116)</i>	

7. Information Concerning the Dead (Death Certificate)	
International Humanitarian Law	International Human Rights Law
Article 130 GC IV – provides for the establishment of an Official Graves Registration Service. Article 33 AP I – parties shall record the information specified in Article 138 of the Fourth Geneva Convention with respect to persons who died in detention and for those who died in other circumstances as a result of hostilities or occupation record information and search for the casualties.	The Right to Recognition before the Law necessarily includes the right to have one’s death officially recognised.
Customary International Law Rule: <i>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. (Rule 116)</i>	

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