

Covert Drone Strikes and the Rules on Targeting: Obama's Troubling Legacy

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Introduction

A key component of the United States's (U.S.) foreign policy during the Obama regime was to dismantle and defeat the al-Qaeda and its associate forces (whom the U.S. regarded as a transnational non-state entity which posed a constant threat to its national security and also with whom the U.S. was engaged in an ongoing conflict) that mostly operated in regions along the Afghan-Pakistan border.¹ In an attempt to step up the war against al-Qaeda, the U.S. increasingly relied upon the use of unmanned aerial vehicles (UAVs) or drones to target and kill 'terrorists'.² 'Drones are remotely piloted unmanned aerial vehicles (UAVs) equipped with surveillance technology and accurate missiles and are able to hover over terrorist and insurgent strongholds for long periods to identify and strike targets'.³ Post 2009, drones have become a crucial part of U.S. counter-terrorism operations in Afghan-Pakistan region.⁴ Drones strikes have proven to be immensely effective for the U.S. administration in terms of locating and killing terrorists while avoiding the challenges that come with

¹ Barack Obama, 'Remarks by the President at the National Defense University' (*National Defense University*, 23 May 2013), <<https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>>. (Here and subsequently, all internet links were last accessed on 6 November 2018.)

² David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', in *European Journal of International Law*, Vol. 16 (2005), p. 173.

³ Megan Smith & James Igoe Walsh, 'Do Drone Strikes Degrade Al Qaeda? Evidence From Propaganda Output', in *Terrorism & Political Violence*, Vol. 25 (2013), p. 311.

⁴ Jordan J. Paust, 'Self-Defense Targetings of Non-State Actors and Permissibility of U.S. use of drones in Pakistan', in *Journal of Transnational Law & Policy*, Vol. 19 (2010), p. 275.

employing traditional armed forces.⁵ Nonetheless, the U.S. drone policy has faced criticism on a number of grounds, most importantly, the compliance of U.S. drone program with the principles of international humanitarian law.⁶ Following the critique from the international community, the United Nations and other non-governmental organisations for the legal justification provided for the drone strikes by the U.S., Harold Koh, the former U.S. State Department Legal Adviser presented the 'considered view' of the Obama Administration in relation to the U.S. targeting operations.⁷ Koh mentioned that 'great care is taken to adhere to the principles of distinction and proportionality in both planning and execution of lethal targeting operations, and emphasised that such operations comply with all the applicable laws, including the laws of war'.⁸ However, Koh's remarks with reference to 'Use of Force as part of the Law on 9/11'⁹ and subsequent policy documents released by the U.S. administration in order to legally justify the use of drones as part of counter-terrorism operations to target al-Qaeda terrorists in the context of non-international armed conflict, have failed to adequately explain how far does the U.S. foreign policy obey international laws.¹⁰

Although a lot has been written about the 'global war against terrorism' and the use of force by the U.S. in response to 9/11, the present paper takes a closer look at the specific features of the U.S. drone policy under the Obama administration in the current phase of the war against al-Qaeda within the framework of legal rules and principles governing the laws of armed conflict. This paper aims to provide a legal assessment of

⁵ Ryan J. Vogel, 'Drone Warfare and Law of Armed Conflict', in *Denver Journal of International Law and Policy*, Vol. 39 (2010), p. 103.

⁶ *Ibid.*, p. 103.

⁷ Harold Hongju Koh, 'The Obama Administration and International Law' (*Annual Meeting of the American Society of International Law*, 25 March 2010) <<https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>>.

⁸ *Ibid.*

⁹ Koh, 'The Obama Administration and International Law'. – The 'Law of 9/11', in general terms is the practice undertaken by the U.S. administration in all aspects of ongoing armed conflicts in particular, detention operations, targeting, and prosecution of terrorist suspects – in a manner consistent not just with the applicable laws of war, but also with the Constitution and laws of the United States.

¹⁰ Vogel, 'Drone Warfare and Law of Armed Conflict', p. 103.

U.S. drone strikes within the framework of armed conflict. It also examines some of the underlying principles that regulate the law on targeting such as (1) indiscriminate attacks, (2) proportionality (3) precaution and (4) distinction *vis-à-vis* the al-Qaeda conflict. In short, this paper draws attention towards the controversies resulting from the legal principles of *jus in bello* and their application/interpretation with regard to the use of drones. The paper attempts to address the following fundamental questions through Section 1: first, is it against the international humanitarian law principles to conduct a drone strike indiscriminately? And second, does the U.S. policy governing its use of drones comply with the international humanitarian principles of distinction and proportionality? Section 2 examines how the notion of direct participation in hostilities has been interpreted in the context of the al-Qaeda conflict. The primary goal of this paper is to examine the general principles on targeting governing the use of lethal force in an armed conflict, examine them, and reflect on whether or not the U.S drone program abides by those rules.

SECTION 1

Evaluating U.S. Drone Strikes under the Core Principles of International Humanitarian Law

Today, a number of legal objections have been raised against the U.S. targeting policies and its interpretation of international law. It is alleged that, the use of drones extraterritorially to dismantle al-Qaeda networks is violative of the laws of war.¹¹ On the other hand, the Obama administration has claimed that it followed the laws of war while using force in foreign territories.¹² In this regard, it is essential to examine certain key underlying principles that regulate the laws on targeting (indiscriminate attacks, proportionality precaution and distinction) to ascertain how far the legal

¹¹ Martin S. Flaherty, 'The Constitution Follows The Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards', in *Harvard Journal of Law & Public Policy*, Vol. 38 (2015), p. 26.

¹² Koh, 'The Obama Administration and International Law'.

rules are applied in conducting drone operations and what limitations do these rules place on drone warfare.¹³

a. Indiscriminate Attacks

The ICRC has attempted to put to rest the debate surrounding what constitutes indiscriminate attacks for the purposes of non-international armed conflict. Following are some of the arguments advanced by the ICRC in relation to applying the definition of indiscriminate attacks as used in international armed conflicts and non-international armed conflicts. Article 51(4) (a) of Additional Protocol I Relating to the Protection of Victims of International Armed Conflicts 1977, provides the definition of indiscriminate attacks.¹⁴ Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts 1977 does not define indiscriminate attacks. However, 'subsections (a) and (b) of the definition contained in Article 51(4) are included by inference within the prohibition contained in Article 13(2) on making the civilian population the object of attack'.¹⁵ Other than that the definition of indiscriminate attacks is also included in various military manuals applied to both international and non-international armed conflicts.¹⁶ Additional evidence of the applicability of the definition of indiscriminate attacks in both international and non-international armed conflicts can be found in the advisory opinion of the International Court of Justice in the Nuclear Weapons case.¹⁷ On the issue

¹³ Shakeel Ahmad, 'A Legal Assessment of the US Drone Strikes in Pakistan', in *International Criminal Law Review*, Vol. 13 (2013), p. 925.

¹⁴ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art 51 (4) (a).

¹⁵ ICRC, 'Customary IHL Database', <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter3_rule12>.

¹⁶ Ibid.

¹⁷ ICRC, 'Customary IHL Database'. - the International Court of Justice stated in the Nuclear Weapons case that the prohibition of weapons that are incapable of distinguishing between civilian and military targets constitutes an 'intransgressible' principle of customary international law. The Court observed that, in conformity with this principle, humanitarian law, at a very early stage, prohibited certain types of weapons 'because of their indiscriminate effect on combatants and civilians'.

of method and means of combat, it is important to note that, although drones represent a superior tool for the application of force, the same does not make them inherently illegal in an armed conflict as long as they are employed in conformity with the laws of war.¹⁸ With regard to directing an attack against military objectives, under non-international armed conflicts, it is vital on part of attacking states to clearly distinguish between specific military objectives and from civilians/civilian objects.¹⁹ This distinction is important given that 'the presence of members of an armed group in a particular area can lead to the destruction of the entire area, even in situations in which the members could be targeted in isolation and on an individual basis'.²⁰ In relation to the al-Qaeda conflict, one particular criticism levelled against drones is that they are responsible for the deaths of innocent civilians.²¹ The U.S. however, claimed that its drone operations are lawful under international humanitarian law. According to P.W. Singer, drones are 'cleaner' alternatives to traditional methods of aerial attacks because of their ability to hover over a territory for hours together and perform precision attacks.²² Singer further mentions that, the use of armed drones have offered numerous ways of reducing the mistakes and unintended costs of war by including the use of better sensors and advanced method for processing information that allow decisions to be made in a more conscious manner removing the possibility of human error.²³ The accuracy of drones, as per Singer, reduces by a great margin the number of mistakes made, as well as the number of civilian casualties that may occur.²⁴ Senior U.S. officials have consistently said that the procedures

¹⁸ Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, 2008), p. 371.

¹⁹ Michael W. Lewis & Emily Crawford, 'Drones and Distinction: How IHL encouraged the rise of drones', in *Georgetown Journal of International Law*, Vol. 44 (2013), p. 1153.

²⁰ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2014), p. 348.

²¹ Allen Buchanan & Robert O. Keohane, 'Toward a Drone Accountability Regime', in *Ethics & International Affairs*, Vol. 29 (2015), p. 22.

²² P.W. Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-first Century* (Penguin Press, 2009), pp. 397-398.

²³ P.W. Singer, 'Military Robots and Laws of War', in *The New Atlantis: A Journal of Technology & Society*, Vol. 23 (2009), p. 40.

²⁴ *Ibid.*

and practices involved in identifying targets in the al-Qaeda conflict are extremely rigorous, and the use of advanced technology has helped to make the targeting more accurate.²⁵ They also add that the use of drones for targeting operations is beneficial because the same has in fact promoted the humanitarian objective of sparing civilians by conducting precision attacks.²⁶

However, as per Kevin Jon Heller, contrary to the claim made by U.S. officials, the U.S. appears to have conducted drone strikes on the basis of a number of signatures that are either by itself unlawful under the law of armed conflict or can only be lawful if interpreted in a manner inconsistent with the international legal rules.²⁷ Furthermore, there are also serious questions about whether the U.S. requires 'evidence of targetability, sufficient to rebut the presumption of civilian status attached to individuals and many kinds of objects under the international humanitarian law'.²⁸ Nevertheless, the U.S. has consistently argued that it continues to comply with all international humanitarian laws in its conflict with al Qaeda.²⁹ Yet, how far the U.S. responses to al Qaeda's threat take into consideration al-Qaeda's blending in with the civilian population in territories of Pakistan, Yemen and Somalia remains unclear. Further, 'between 2009 and 31 December 2015, the administration has claimed that it launched 473 strikes, mostly with drones, that led to the death of almost 2,500 terrorist 'combatants' - raising significant questions on the over usage of drone technology. However, the data provided by the administration has also been criticised of it being less than the actual number of attacks.³⁰

²⁵ Koh, 'The Obama Administration and International Law'.

²⁶ *Ibid.*

²⁷ Kevin Jon Heller, 'One Hell of a Killing Machine: Signature Strikes and International Law', in *Journal of International Criminal Justice*, Vol. 11 (2013), pp. 97-103.

²⁸ *Ibid.*, p. 119.

²⁹ Koh, 'The Obama Administration and International Law'.

³⁰ Amos N. Guiora, 'Determining a Legitimate Target: The Dilemma of the Decision-Maker', in *Texas International Law Journal*, Vol. 47 (2012), p. 327. See Spencer Ackerman, 'Obama claims US drone strikes have killed up to 116 civilians', in *The Guardian*, 1 July 2016, <<https://www.theguardian.com/us-news/2016/jul/01/obama-drones-strikes-civilian-deaths>>.

b. Principle of Proportionality

Similar to the discussion on indiscriminate attacks, the principle of proportionality reflects upon the results of an attack on civilian objects and civilians with regard to the accomplishment of a military objective. Article 51(5)(b) of Additional Protocol I relating to the Protection of Victims of International Armed Conflicts 1977 codifies the principle of proportionality in attack.³¹ Even though Additional Protocol II 1977 does not make an explicit mention of the principle of proportionality in attack, it has been argued that 'it is inherent in the principle of humanity which was explicitly made applicable to the Protocol in its preamble and that as a result, the principle of proportionality cannot be ignored in the application of the Protocol'.³² The rule on proportionality has also been described as a 'general principle of humanitarian law' which is applicable in all conflicts. It also finds support in treaty law which is applied to non-international armed conflicts.³³ In addition, military manuals that are used in non-international armed conflicts have included the principle of proportionality in attack.³⁴ According to Harold Koh, in relation to the al-Qaeda conflict, the U.S. administration when conducting lethal operations using armed drones, took great care to abide by the principle of proportionality in both planning and execution and to ensure that only legitimate objectives are targeted and not civilians.³⁵ Furthermore, the use of drones in targeting of individuals has helped in minimizing broader harm to civilians and civilian objects to a great extent.³⁶ But, contrary to Koh's arguments, the increased number of civilian casualties which include, children and women has

³¹ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art 51 (5) (b).

³² ICRC, 'Customary IHL Database', <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14>.

³³ Ibid.

³⁴ Vogel, 'Drone Warfare and Law of Armed Conflict', p. 124.

³⁵ Koh, 'The Obama Administration and International Law'.

³⁶ Richard Jackson & Samuel Justin Sinclair (eds.), *Contemporary Debates On Terrorism* (Routledge, 2012), p. 171.

shown that the U.S. seems to think of many civilians as legitimate targets if they are present in the vicinity of high value targets.³⁷

It is worth noting that, the determination of whether or not drone strikes meet the requirements of principle of proportionality will vary from case to case³⁸ to ascertain whether the expected damage was excessive in relation to the military advantage anticipated or not.³⁹ It is possible that, even heavy losses to the civilian population or major damage to civilian objects may still meet the proportionality test. For instance, targeting of a senior leader of an armed group in a civilian area whose death may most likely result in termination of hostilities may not be considered illegal. On the other hand, targeting low level fighters in places where civilian casualty is guaranteed may well be termed as illegal.⁴⁰ Therefore, how many civilians were killed or how many terrorists were eliminated, only forms the first part of the analysis. The key aspect, however, in fulfilling the test of proportionality is to establish whether the targeted individual was of sufficient value and whether the attack provided genuine military advantage and was the operation conducted with all appropriate caution in order to ensure the safety of civilians.⁴¹

c. Precaution in planning and carrying out attacks

The duty to take precaution in planning and carrying out attacks is clearly codified under Article 57(1) of Additional Protocol I 1977.⁴² Though, Additional Protocol II 1977 does not specify the rules on precaution, it does not mean that the obligation to take precaution is not applicable to non-

³⁷ Ahmad, 'A Legal Assessment of the US Drone Strikes in Pakistan', p. 926. See, Amnesty International, 'Will I be next? Drone Strikes in Pakistan' <<https://www.amnestyusa.org/reports/will-i-be-next-us-drone-strikes-in-pakistan/>>. Rafeequl Rehman, 'My Mother was a Victim of a U.S. Drone', in *TIME*, <<http://time.com/4422469/u-s-drone-strikes/>>.

³⁸ Vogel, 'Drone Warfare and Law of Armed Conflict', p. 127.

³⁹ Sivakumaran, *The Law of Non-International Armed Conflict*, p. 350.

⁴⁰ *Ibid.*, p. 350.

⁴¹ Vogel, 'Drone Warfare and Law of Armed Conflict', p. 127.

⁴² Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art 57 (1).

international armed conflicts.⁴³ The requirement to take precaution in attacks is directly linked to other customary rules applicable to non-international armed conflict, for example, the principles of distinction and proportionality.⁴⁴ In addition, as per the International Committee of the Red Cross (ICRC), 'state practice establishes the rule of precaution as a norm of customary international law applicable in both international and non-international armed conflicts'.⁴⁵ As per the rule of precaution, the attacking state is required to take all feasible measures to ensure that only legitimate objectives are made targets and that precaution is taken to reduce collateral damage.⁴⁶ The discussion on how the drone technology affects the principle of precaution needs to take place keeping in mind a fundamental point that, there is a shift in the situation to which the rule is to be applied, i.e., from an intense combat situation to situations of 'signature strikes'.⁴⁷ The argument here is that under intense combat situations, the immediate need is to protect troops on ground, maintain position and defeat the enemy. On the other hand, in situations of signature strikes, the only risk is of missing the opportunity of killing a suspected target. The former situation leaves little to no time for considering and taking precautionary steps than the latter. Nonetheless, the principle of precaution is applicable in both situations.⁴⁸

Now, whether or not armed drones abide by the rule of precaution is a controversial and divisive claim. Note that, in relation to making of kill-list, the U.S. administration claimed to have taken great efforts with respect to the selection of targets, such as, validating and vetting targets to satisfy its duty of precaution, thereby ensuring accuracy and limiting abuse of

⁴³ Sivakumaran, *The Law of Non-International Armed Conflict*, p. 351.

⁴⁴ *Ibid.*

⁴⁵ Jean-Marie Henckaerts & Louise Doswald-Beck, 'Customary International Humanitarian Law Volume I: Rules' (*International Committee of the Red Cross (ICRC)*, 2005).

⁴⁶ ICRC, 'Customary IHL Database', <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter5_rule15>.

⁴⁷ Frederik Rose'n, 'Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility', in *Journal of Conflict and Security Law*, Vol. 19 (2014), p. 128.

⁴⁸ *Ibid.*

international humanitarian law principles.⁴⁹ In addition, the claim is that the video feed available from the drone also aids in the monitoring of the target before action is taken; thereby, providing an opportunity to the drone operator to ensure the absence of civilians in and around the blast radius.⁵⁰ Moreover, 'except for Hellfire missiles using a thermobaric warhead, most missiles launched from armed drones are believed to have a smaller blast radius than other conventional munitions,' further reducing the likelihood of harm to civilians and civilian objects.⁵¹ Therefore, the use of armed drones fulfils the rule of precaution as it presents an efficient defensive measure which guarantees almost no risk to pilots and also allows for prior assessment of targets.⁵² Although, no lives are put in danger on the side of the drone-operating state, the accuracy of aiming at a target with armed drones should not be overstated.⁵³ As noted by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, considerable failings have undeniably occurred by the U.S. in conducting of drone strikes resulting in civilian deaths.⁵⁴ Therefore, the question which drone technology presents before us is - What would constitute 'all feasible precautions' in the context of the al-Qaeda conflict? In other words, the obligation to take all 'feasible precautions' would depend on how the term 'feasible' is interpreted.⁵⁵ The drone technology, simply put, alters the conventional understanding of feasible precautionary measures.⁵⁶ Considering the fact that in the near future the number of drones the U.S. possesses is most likely to increase and so will its use, in such a situation, what would be the material content of all feasible means; how much

⁴⁹ Gregory S. McNeal, 'Targeted Killing and Accountability', in *Georgetown Law Journal*, Vol. 102 (2014), pp. 728-729.

⁵⁰ Stuart Casey-Maslen, 'Pandora's box? Drone strikes under jus ad bellum, jus in bello and international human rights law', in *International Review of the Red Cross*, Vol. 94 (2012), p. 607.

⁵¹ *Ibid.*

⁵² Rose'n, 'Extremely Stealthy and Incredibly Close', p. 114.

⁵³ Hitomi Takemura, 'Unmanned Aerial Vehicles: Humanization from International Humanitarian Law', in *Wisconsin International Law Journal*, Vol. 32 (2014), p. 532.

⁵⁴ *Ibid.*, p. 533.

⁵⁵ Rose'n, 'Extremely Stealthy and Incredibly Close', p. 128.

⁵⁶ *Ibid.*, p. 130.

surveillance/intelligence gathering is required to satisfy the principle of precaution under international humanitarian law or where would be the line of precaution be drawn, are first of many questions that are yet to be answered.⁵⁷

d. Principle of Distinction

The common principle which underlies the law on targeting is distinction: 'the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives'.⁵⁸ This is accepted as one of the fundamental principles of the laws of armed conflict.⁵⁹ The principle of distinction is based upon the notion that during armed conflict, civilian population and civilian objects must be respected and protected and for this the division of objects and people into separate categories is necessary.⁶⁰ In relation to the law on targeting, the categorisation of objects and people is of utmost importance; this becomes the deciding factor in determining whether the targeting of a particular individual was lawful or not.⁶¹ Put differently, 'an individual might be lawfully targeted and killed on account of his category of status rather than whether he poses an individual threat at that particular moment'.⁶² In the context of international armed conflict, the principle of distinction is therefore, based upon the assertion that an individual either falls into the category of a civilian or a combatant.⁶³

Combatants

⁵⁷ Ibid.

⁵⁸ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art 48.

⁵⁹ Advisory opinion on the legality of the Threat or Use of Nuclear Weapons [1996] ICJ Rep, 8 July 1996, para. 78.

⁶⁰ Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford University Press, 2011), p. 135.

⁶¹ Ibid.

⁶² Lubell, *Extraterritorial Use of Force against Non-State Actors*, p. 135.

⁶³ Michael N. Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', in *New York University Journal of International Law and Politics*, Vol. 42 (2010), p. 700.

The term 'combatant' does not find a mention in the rules pertaining to non-international armed conflict.⁶⁴ According to international humanitarian law rules governing international armed conflicts, combatants are those who are allowed to take part in hostilities and who are entitled to prisoner of war status upon capture.⁶⁵ There is, however, a drawback to being recognised as a combatant. While achieving a combatant status confers combatant privilege on an individual, it also subjects that particular individual to an attack at any time during the hostilities.⁶⁶ Given that, 'targeting of combatants is based upon their status as combatants and not upon their dangerousness; combatants may be lawfully targeted regardless of whether they pose a current threat to their opponents, whether or not they are armed, or even awake. The only situations in which international humanitarian law limits the right to attack a combatant are when that combatant has surrendered or been rendered *hors de combat*.⁶⁷

Civilians

International humanitarian law governing international armed conflicts does not provide a descriptive definition for the term 'civilian'; nevertheless, the law defines civilians negatively as all non-combatants.⁶⁸ Under non-international armed conflict, defining a civilian is even more complex.⁶⁹ Even as Common Article 3 does not make an express mention of the term 'civilian', Additional Protocol II 1977 appears to use the notion of 'civilian' to portray any person not fitting into one of the categories mentioned in Article 1 (1) of Additional Protocol II.⁷⁰ There appears to be

⁶⁴ Lubell, *Extraterritorial Use of Force against Non-State Actors*, p. 136.

⁶⁵ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art 43 (2) and art. 44 (1).

⁶⁶ Michael W. Lewis, 'Drones and the Boundaries of the Battlefield', in *Texas International Law Journal*, Vol. 47 (2012), p. 309-310.

⁶⁷ *Ibid.*

⁶⁸ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art 50 (1).

⁶⁹ Andrew Clapham & Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014), p. 317.

⁷⁰ *Ibid.*

no clear demarcation between combatants and civilians among non-state actors engaged in a non-international armed conflict.⁷¹ With regard to the rules on targeting, under international humanitarian law, civilians are immune from being targeted, unless they give up their immunity by taking direct part in hostilities.⁷² Thus, by participating in hostilities civilians forfeit their immunity for the duration of their participation.⁷³ Note that, the protection under Article 51 (3) of Additional Protocol I, which is also a customary law,⁷⁴ 'refers to the prohibition contained in Articles 51(1), (2), and (4) through (8), which provides that civilians are not to be made the object of attack, and that civilians are to be protected from the dangers arising from military operations'.⁷⁵ The rule under Article 51 (3) is also applicable to non-international armed conflicts.⁷⁶

But, the interpretation of Article 51 (3) has become the subject of furious debate, especially regarding the issue of categorisation of members of organised armed groups in a non-international armed conflict either as combatants or as civilians who lose their immunity against attack while taking part in hostilities. In addition, despite the implication of direct participation in hostilities for the protection of civilians, there is no definition provided under international humanitarian law for the term 'unless and for such time as they take a direct part in hostilities'.⁷⁷ Nonetheless, it seems clear that, states need to comply with the principle of distinction while using force under international humanitarian law, i.e., only combatants or military objectives can be targeted and not civilians or civilian objects, unless the protected status has been forfeited by taking part

⁷¹ Lewis & Crawford, 'Drones and Distinction', p. 1146.

⁷² Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 51 (3).

⁷³ Lubell, *Extraterritorial Use of Force against Non-State Actors*, p. 142.

⁷⁴ The Public Committee Against Torture in Israel and Ors. v Israel and Ors, HCJ 769/02, 13 December 2006, (para 30).

⁷⁵ Lewis & Crawford, 'Drones and Distinction', p. 1146.

⁷⁶ Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of Non-International Armed Conflicts (Protocol II), art 13 (3).

⁷⁷ Lubell, *Extraterritorial Use of Force against Non-State Actors*, p. 140.

in hostilities.⁷⁸

Coming back to the al-Qaeda conflict, the main criticism against the U.S. targeting practices has been its failure to meet the requirement of distinction, i.e., whether or not drone strikes sufficiently distinguishes between civilian and military targets, taking into consideration the loss of civilian protected status by direct participation.⁷⁹ The following section will therefore, address this issue in light of the controversies associated with the phrase, direct participation in hostilities.

SECTION 2

Notion of Direct Participation in Hostilities

It needs to be understood that, in so far as the al-Qaeda conflict is considered, terrorists often target civilians, conduct operations in civilian surroundings and by posing as civilians they, also, intentionally try to conceal their combatant status.⁸⁰ In addition, al-Qaeda and its associate force, regularly use civilians and civilian objects as shields to protect themselves from drone strikes.⁸¹ Therefore, the U.S. has been repeatedly forced to battle al-Qaeda terrorists in a civilian setting. Because of such a situation, the U.S. has the responsibility to take all feasible measures to ensure that it is targeting the right persons and if civilians are being targeted, to make certain that such civilians have given up their protected status by directly taking part in hostilities.⁸² Although, there is a debate with reference to whether or not 'combatant status' ought to be recognised in non-international armed conflicts, that debate is not relevant as far as the question pertaining to the status of al-Qaeda and its associate forces is concerned (because combatant status is based upon membership in a group that organisationally enforces compliance with the rules of international

⁷⁸ Clapham & Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, p. 309.

⁷⁹ Vogel, 'Drone Warfare and Law of Armed Conflict', p. 118.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Lewis, 'Drones and the Boundaries of the Battlefield', p. 310.

law applicable in armed conflict. Groups such as al-Qaeda, whose means and methods of warfare include, deliberately targeting civilians, cannot claim combatant status for their members).⁸³ Under international humanitarian law, if an individual does not fulfill the requirement of a lawful combatant, he is engaging in a conflict without combatant privilege; therefore, he is either an unlawful combatant or a civilian who has given up his protected status. Likewise, members of al-Qaeda and its associate forces, do not meet the requirements of a lawful combatant status, and hence are unprotected civilians.⁸⁴ The issue of when or under what circumstances does a civilian lose his protected status is of great importance to the al-Qaeda conflict.⁸⁵ However, as mentioned in the above section, international humanitarian law does not define the phrase, 'unless and for such time as they take direct part in hostilities', as it appears respectively in Protocol I and II.⁸⁶ Thus, in order to interpret the notion of direct participation in hostilities in light of the circumstances existing in modern-day armed conflict, the ICRC conducted an informal clarification process from 2003 to 2008 which concluded in June 2009 with the publication of ICRC Interpretive Guidance that defines direct participation in both international as well as non-international armed conflict as explained below.⁸⁷

In a non-international armed conflict, as per the ICRC, an individual needs to carry out a 'continuous combat function' in order to be targetable as a combatant.⁸⁸ Furthermore, the ICRC makes a distinction between civilians that are engaged in a 'continuous combat function' and who constitute the organised armed groups of a non-state actor, from those 'civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganised basis, or who assume exclusively political,

⁸³ Ibid.

⁸⁴ Vogel, 'Drone Warfare and Law of Armed Conflict', p. 119.

⁸⁵ Lewis & Crawford, 'Drones and Distinction', p. 1142.

⁸⁶ Ibid.

⁸⁷ Clapham & Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, p. 324.

⁸⁸ Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (*International Committee of the Red Cross (ICRC)*, 2009).

administrative or other non-combat functions'.⁸⁹ According to the ICRC, civilians who temporarily participate in hostilities may only be targeted for the time they are engaged in such a conduct.⁹⁰ The Interpretive Guidance also states that, 'in order to qualify as direct participation, a specific act must meet the following constitutive elements: (1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result either from that act or from a coordinated military operation of which that act constitutes an integral part (direct causation); (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁹¹ The elements proposed by the ICRC are intended to ensure that those individuals who perform a subsidiary function or provide marginal support are excluded from being targeted, setting aside targeting for serious actions that have an adverse effect on the enemy.⁹² But despite the ICRC's interpretation, what remains unclear, or less accurately explained in the context of contemporary armed conflict, is which activities can be linked to a 'continuous combat function' in order to result in the forfeiture of protected status.⁹³ In other words, a question still remains as to what constitutes a combat function or a direct participation in hostilities. The categorisation of certain actions, for example, issue concerning individuals like bomb makers is highly controversial and as per the Interpretive Guidance, bomb makers do not fall into the category of individuals who carry out continuous combat function.⁹⁴ However, it can be argued that bomb makers as 'continuous combat functionaries are targetable if they are providing a military capacity otherwise unavailable to

⁸⁹ *Ibid.*, pp. 33-34.

⁹⁰ Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', p. 70.

⁹¹ Lewis & Crawford, 'Drones and Distinction', p. 1147.

⁹² Michael N. Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', in *New York University Journal of International Law and Politics*, Vol. 42 (2010), p. 718.

⁹³ Lewis & Crawford, 'Drones and Distinction', p. 1148.

⁹⁴ *Ibid.*

their armed group'.⁹⁵ Coming to the final part of the overall test proposed by the ICRC, i.e., the temporal aspect of loss of protected status; as per the Interpretive Guidance, civilians only lose their immunity from attack for the duration of each act of direct participation in hostilities.⁹⁶ On the other hand, high-level members of organised armed groups lack this 'revolving door' of protection/loss of protection. For the time such individuals are believed to be performing a continuous combat function, they remain targetable.⁹⁷ One ought to note that the loss of protected status for individual acts comprises a temporal element: 'measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act'.⁹⁸

But, contrary to the ICRC's position on direct participation in hostilities, the Obama administration considered individuals who are merely part of an armed group to be belligerents and therefore, lawful targets under international law.⁹⁹ In addition, as per Harold Koh, 'Targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects'.¹⁰⁰ It is argued that, the ICRC's position on individuals who involve themselves in hostilities only on a 'spontaneous, sporadic, or unorganised basis' or those who do not engage in combat functions may not be targeted, appears to have misinterpreted the true nature of the al-Qaeda conflict.¹⁰¹ The main purpose of al-Qaeda as a transnational non-state entity is to spread its ideology through violent means across the globe.¹⁰² For that reason, it is most likely that, according to the U.S., every individual member (from religious leaders to low-level individuals performing support functions) of al-Qaeda and its associate forces supports al-Qaeda's mission. Thus, in such

⁹⁵ Ibid.

⁹⁶ William Boothby, "'And for such time as": The Time Dimension to Direct Participation in Hostilities', in *New York University Journal of International Law and Politics*, Vol. 42 (2010), p. 758.

⁹⁷ Ibid., p. 761.

⁹⁸ Lewis & Crawford, 'Drones and Distinction', pp. 1148-1149.

⁹⁹ Koh, 'The Obama Administration and International Law'.

¹⁰⁰ Ibid.

¹⁰¹ Vogel, 'Drone Warfare and Law of Armed Conflict', p. 121.

¹⁰² Barack Obama, 'Remarks by the President at the National Defense University'.

a situation, every individual of al-Qaeda is engaged in hostilities or is performing a combat function against the U.S.¹⁰³

However according to the ICRC's test, such individuals are most likely not to be covered under the continuous combat function description.¹⁰⁴ Thus, 'to permit a state to target a terrorist only for such time as he is engaged in a hostile act is to give the terrorist the best of both worlds - the protections of a civilian and the rights of a combatant'.¹⁰⁵ As a result, in light of the controversy regarding the ICRC's interpretation of direct participation, the issue of whether or not U.S. drone strikes distinguish between civilians and combatants most likely depends upon the understanding of when does a civilian lose his protected status and becomes legally targetable under international humanitarian law.¹⁰⁶

Conclusion

The debate regarding the unique nature of the U.S. drone policy is the result of an over reliance on the novelty of drones, and not enough on the repercussions resulting from its unfettered use. The U.S. counter-terrorism policy under the Obama administration created an unparalleled militarised approach to counter-terrorism in the form of unmanned aerial vehicles or drones.¹⁰⁷

However, its response to transnational terrorism has caused a never-ending debate, especially since the 9/11 attacks. Issues such as lack of adequate information about the target and the strike location have raised questions on the legality and accountability of the drone operation. Another greater concern pertains to the unregulated use of drones, i.e., since drones make it easier to kill, therefore, policy makers are more tempted to interpret the legal restrictions on who can be killed, and under what circumstances, too broadly. Therefore, in the absence of clarity on U.S. drone policy and the fact that the drone usage is only going to increase in

¹⁰³ Vogel, 'Drone Warfare and Law of Armed Conflict', p. 121.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., p. 122.

¹⁰⁷ Michael J. Boyle, 'The Costs and Consequences of Drone Warfare', in *International Affairs*, Vol. 89 (2013), p. 2.

the near future, it is required that the rules on targeting and identification of parties to the conflict are interpreted more comprehensively.¹⁰⁸ Additionally, on the issue of accountability, which is a major concern *vis-à-vis* drone usage, it is necessary that the U.S. and other similar administrations voluntarily give out essential details about their targeting practices. Furthermore, if any of the state employed standards are found to be incompatible with existing laws, then they should not form part of security policies.¹⁰⁹

In short, the attempt should not be to force down an accountability regime at the outset, especially to a novel, ever-changing area of which is concerned with national and global security. Neither should a complete change of existing laws be advocated so as to only suit a specific weapon problem or propose standards that cannot be applied to practical situations. Instead, efforts should focus on setting agreeable standards that not only help in achieving military objectives but also recognise those fundamental principles that form the basis of the law of armed conflict. This is because unless such measures are in place, states are bound to twist existing rules to justify their actions.

¹⁰⁸ Afsheen John Radsan & Richard Murphy, 'The Evolution of Law and Policy for CIA Targeted Killing', in *Journal of National Security Law & Policy*, Vol. 5 (2012), p. 463.

¹⁰⁹ *Ibid.*