DRONES: A SYMPTOM OF REGRESSION IN THE PRINCIPLE OF DISTINCTION?

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Drones targeting practices are said to comply with all applicable laws, including the laws of war. Targeted strikes with un-manned drones are conducted pursuant to the well-known principles of distinction and proportionality. Drones are piloted remotely and are subject to some significant degree of very long-distance computer control. This article asks whether the principle of distinction, as it applies to drone strikes, might suggest a regression to the older formulations of the principle. It argues that to show that states might resort to covert forms of *levées en masse*, as a regression to older forms of the doctrine of distinction, based on the Clausewitz formulations of war, to secure passive and widespread protection for their technological support infrastructures. The views of Clausewitz seem to provide a rationale for targeted killings in the current counterinsurgency context. They represent the older formulations of the principle of distinction, providing little protection unless a person was totally harmless, and ignoring those laws of war encoded in international conventions.

I INTRODUCTION

The United States deploys two kinds of drones:[1] smaller ones,

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mainly to carry out surveillance missions far away; and larger ones, which may transport hellfire missiles to distant targets. Larger ones have been used for both strikes and targeted killings. Targeted drone strikes have been executed by the US military and by the United States Central Intelligence Agency.[2] Mayer observed the US runs two drone programs — the military's version, and the CIA's program, which is aimed at targeted killings of terror suspects around the world.[3] Non-state terrorism may be defined as follows:

> Non-state terrorism refers to the premeditated use, attempt to use, or threat to use violence by private individuals or members of non-state organizations against non-combating civilians who, although anonymous, share symbolic characteristics of (a) social group(s) which the perpetrators want to place in a state of chronic fear in order to serve aims they define as ideological and/or political.[4]

State-sponsored terrorism has a similar definition, except with attempts or threats by state-sponsored individuals, or members of state organizations. It appears that the sole aim of this targeted killing program is the killing of individuals who are designated extra-judicially as non-combatant targets. Therefore, the object of this article is to investigate critically how this drones program garners the necessary legal support.

The United States State Department Legal Advisor, Harold Koh, stated: 'it is the considered view of this Administration ... that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, [drones] comply with all applicable

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1 Drones are remotely piloted, unmanned aerial machines that vary in size and function. A Leander, 'Technological Agency in the Co-Constitution of Legal Expertise and the US Drone Program' (2013) 26 *Leiden Journal of International Law* 811, 812.

2 Melina Sterio, 'The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under International Law' (2012) 45(1 & 2) *Case Western Reserve Journal of International Law* 197, 199, 198.

3 Jane Mayer, 'The Predator War: What Are the Risks of the CIA's Covert Drone Program?', *The New Yorker* (New York), 26 October 2009.

4 M Gottschalk and S Gottschalk, 'Authoritarianism and Pathological Hatred: A Social Psychological Profile of the Middle Eastern Terrorist' (2004) 35(2) *The American Sociologist* 38, 39.

law, including the laws of war.'[5] Koh referenced both domestic and international law to sustain the view that the United States was engaged in armed conflict with al-Qaeda, the Taliban, and their associated forces,[6] in accordance with the *jus ad bellum*.[7] Sterio inferred that this suggested that the United States conducted targeted strikes pursuant to what she called the well-known principles of distinction and proportionality.[8] She reasoned that this would ensure the targets were legitimate, and that such precautions would minimise collateral damage to civilians.[9] Others argue that the American view follows the dicta of Prussian general Carl Clausewitz,[10] as to his trinity of violence, hatred and enmity, which totally unite the people and the army into total war.[11]

The scholarship assumes the principle of distinction is, through its codification and with respect to drones, both well-known and well understood.[12] However, drones are piloted remotely and are subject to some significant degree of very long-distance computer control, introducing new parameters for applying any principle of distinction. Because the United States Central Intelligence Agency has run a secret drone program in Pakistan and other places, the following argument cannot determine conclusively whether this program

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5 Harold Hongju Koh, 'The Obama Administration and International Law' (Speech delivered at the Annual Meeting of the American Society of International Law, 25 March 2010).

6 Ibid.

7 'The laws of war'.

8 The principle of distinction simply requires actors to distinguish between soldiers and civilians. Robert D Sloan, 'The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War' (2010) 34 *Yale International Law Journal* 47, 69.

9 Sterio, above n 2, 200.

10 1780 – 1831.

11 Carl von Clausewitz, *On War* (Princeton University Press, 1976) 89.

12 Douglas Guilfoyle, *International Criminal Law* (Oxford University Press, 2016) 204; *Drone strikes under international law (WP1249)*, 17th - 19th April 2013, Wilton Park 3; Rachel Alberstadt, 'Drones under International Law' (2014) 4 *Open Journal of Political Science* 221, 221-232; Mary Ellen O'Connell, *Drones under International Law* (Whitney R Harris World Law Institute, 2010) 1-2; S Wuschka, 'The Use of Combat Drones in Current Conflicts — A Legal Issue or a Political Problem?' (2011) 3(3) *Goettingen Journal of International Law* 891 894.

satisfies the proportionality and necessity requirements of the *jus ad bellum*.[13] Thus, this article is delimited to excluding discussion of the international law doctrines of proportionality and necessity. It does, however, discuss the principle of distinction, in theory, as it might apply to drone strikes. It asks whether the principle of distinction, as it applies to drone strikes, might suggest a regression to the older formulations of the principle.

Our argument tries to show that states might resort to covert mobilisation of *levées en masse*,[14] as part of a regression to older forms of the doctrine of distinction, based on the Clausewitz formulations of war, to secure passive and widespread protection for their technological support infrastructures. They might conduct total war without informing the people of their de facto active roles. The paper considers the older international law sources, as well as modern codifications and international case law. It begins with a concise briefing on the Clausewitz concept of total war, followed by a critical description of the *levée en masse*, leading into a survey of the law of the principle of distinction. This article applies this data to a discussion of the weapons range of drones in the light of their computer long-range control. Then, critical discussion assesses how these standards might have altered in the context of declared irregular warfare. This will allow a synthesis of applying distinction to the specific case of targeted killings by drones, then seeing the net effect in a counterinsurgency environment.

The outcomes of the research suggest that the views of Clausewitz

[13] Melina Sterio, above n 2, 204.

[14] A *levée en masse* is 'the spontaneous uprising of the civilian population against an invading force – has long been a part of the modern law of armed conflict with regards to determining who may legitimately participate in armed conflict. The concept originated during the French Revolution, and was internationalized with its inclusion in the rules of armed conflict adopted by the Union Army during the American Civil War. *Levée en masse* continued to be included in the major international law of armed conflict documents from that time on, including The Hague Regulations of 1907 and the Geneva Conventions of 1949.' Emily Crawford, 'Levée En Masse — A Nineteenth Century Concept in a Twenty-First Century World' (24 May 2011) Sydney Law School Research Paper No. 11/31 (Sydney University, 2011) abstract.

seem to provide a rationale for drones' targeted killings in a counterinsurgency context, as states respond to inevitable terrorist activity. They represent the older formulations of the principle of distinction, providing little protection unless a person was totally harmless. This infers states were responding with covert *levées en masse*, in order to secure protection for their military support infrastructures, by popular acquiescence, thereby ignoring the modern encoded laws of war. In this way, the civilian drone pilot is technically a non-combatant, operating the drone from a leafy suburb, protected by an ideologically primed population, while the drone kills targets in far-away lands, suggesting the likely development of a terrorist insurgency at home, with the state's use of drones ultimately committing the entire population to a natural regression to total war.

II TOTAL WAR

Carl Philipp Gottfried von Clausewitz was a Prussian general and military theorist, who characterised all war as total war. He noted how unexpected developments unfolding under the so-called fog of war, that is, in the face of incomplete, dubious, and often completely erroneous information and high levels of fear, doubt, and excitement, called for rapid decisions by alert commanders.[15] This dialectic tended to argue against a spontaneous uprising of the people emerging from public chaos, and instead, suggested the prior acts of wise and experienced commanders who already had prepared the people to accept timely emergency orders.[16]

The synthesis of Clausewitz's dialectical examination of the nature of war was his so-called trinity, advocating that war was:

[15] See Youri Cormier, 'Hegel and Clausewitz: Convergence on Method, Divergence on Ethics' (2014) 36(3) *International History Review* 419.

[16] Ibid.

> a fascinating trinity — composed of primordial violence, hatred, and enmity, which are to be regarded as a blind natural force; the play of chance and probability, within which the creative spirit is free to roam; and its element of subordination, as an instrument of policy, which makes it subject to pure reason.[17]

Cronin believes that 21st century mobilization includes a return to individualised, mob-based and feudal forms of warfare, of primordial violence, hatred and enmity, such as took place during the times of rapid expansion in mass communications during the French Revolution. She posits that the current phase in development of the Internet is analogous to the times of rapid expansion in communications prior to and during the French Revolution, giving rise to popular leaders and mobs in cyberspace,[18] where creative spirits are free to roam. The kind of knowledge generated in cyberspace is filled with tropes and bare allegations — much of it unauthoritative as facts, but still very persuasive. During the French Revolution, people were told they were fighting 'to cement the edifice of sovereignty of the People.' Through this ideological kind of battle for minds, they were told they achieved immortality, because since the civilian fighter was 'King, he seizes heaven.'[19] The civilian seemingly exercised the king's own prerogative of making war, suggesting mass action with the ostensible authority of reason.

Wholly in the worldwide public domain, in parallel to old tropes of edifices of sovereignty and the seizure of heaven, today's Internet serves, for example, as a worldwide mass recruitment tool for ISIS.[20] There are instructions published on the Internet on how to make improvised bombs.[21] Modern insurgents use the Internet to broadcast

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17 Carl von Clausewitz, above n 11, 89.

18 Audrey Kurth Cronin, 'Cyber-Mobilization: The New Levée en Masse' (2006) 36(2) *Parameters* 77, 81.

19 Thomas Hippler, *Citizenship and Discipline: Popular Arming and Military Service in Revolutionary France and Reform Prussia, 1789-1830*, (PhD dissertation, European University Institute, Florence, 2002) 138.

20 Rukmini Callimachi, 'ISIS and the Lonely Young American', *The New York Times* (New York), 27 June 2015.

21 Richard Esposito, 'San Bernardino Attackers Had Bomb Factory in Garage', *NBC News*, 4 December 2015.

beheadings,[22] to mobilise disaffected people who are potential supporters of their insurgencies.[23] This sounds like a form of *levée en masse* emerging spontaneously in cyber-pockets of insurgency or counterinsurgency. This contemporary version of a *levée en masse* thus appears to be driven by the same mob drives and instincts outlined in the Clausewitz trinity of total war.

III *LEVÉE EN MASSE*

During the early and brief period of an initial invasion, the mass civilian population of unoccupied territory could simply and spontaneously form a mass agreement to go to war, then take up arms, again spontaneously, to delay progress by the invading army.[24] Further underlying this subsisting idea, and tending to oppose the idea of spontaneity in it, there has been continuing patriotic zeal coupled with the citizen soldier's initiative under emergency circumstances,[25] suggesting both the fog of war and a command structure. Thus, this *levée en masse* was likely to have been a new appearance of a subsisting total war, of inherent primordial violence, hatred and enmity, to defend the nation until the enemy was repelled or defeated.[26] Those participating in a *levée en masse* now are considered by international law to be lawful combatants.[27]

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[22] Jenny Stanton, 'Held Down by Three Jihadis and Beheaded: Shocking New Video Shows Depraved Boko Haram Decapitate a Policeman in Nigeria', *Daily Mail* (online), 5 August 2015.

[23] Brian Rohan, 'In Egypt, Disaffected Youth Increasingly Drawn to Extremism', *Associated Press*, 4 August 2015.

[24] David Wallace and Shane R Reeves, 'The Law of Armed Conflict's "Wicked" Problem: *Levée en masse* in Cyber Warfare' (2013) 89 *International Law Studies* 646, 649, 650, citing Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 1st ed, 2004) 42.

[25] Diek Walter, *A Military Revolution?: Prussian Military Reforms before the Wars of German Unification* (Institute for Defense Studies, 2001) 8.

[26] Scott Lytle, 'Robespierre, Danton and the *Levée en masse*' (1958) 30(4) *Journal of Modern History* 325, 325.

[27] *Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 UST 3316, 75 UNTS. 135 art 4(A)(6).

Suggestive of a mass national insurgency, the example of the French Revolution is said to have marked the beginning of a new age of modern warfare. This age showed a shift from the wars of the prerogatives of kings to mass popular participation in nations' wars.[28] It meant the apparent exercise of a people's prerogative, due to a collapse in the state's basic compact. In its first meaning as the concept of *levy*, the element of *levée* within the *levée en masse*, literally meant the French decree of 23 August 1793, issued by the French National Convention, obliging the entire French population to serve in the war. A second meaning of the term *levée* was that of uprising.[29] The French decree was announced in the following terms, suggesting that no person was completely harmless in war:

> every Frenchman is permanently requisitioned for service with the armies. The young men shall fight; married men will manufacture weapons and transport stores; women shall make tents and nurse in the hospitals; children shall turn old linen into lint; the old men shall report to the public square to raise the courage of the warriors and preach the unity of the Republic and hatred against the kings.[30]

No government could succeed in such a wide-ranging proclamation unless the people already were primed for the zeal of wartime and community defence. Thus, before and during the course of the French Revolution, the number of journals published in Paris grew from 4 to 355, the number of printing houses grew by a factor of four, and the number of publishers grew by a factor of three.[31] The French people were bombarded with rhetorical information from their new ruling elites, the French nation becoming one with the army in total war.[32]

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28 Cronin, above n 18, 78.

29 Ibid 78.

30 Reproduced from Lytle, above n 26, 325.

31 Robert Darnton and Daniel Roche (eds), *Revolution in Print: The Press in France, 1755-1800* (University of California Press, 1989) 226.

32 Hippler, above n 19, 153.

The Commentary to the Third Geneva Convention observes, without offering in-depth analysis, that a *levée en masse* is quite ephemeral. It is a spontaneous uprising and ultimately it will become structured formally, or else be in occupied territory.[33] If the *levée en masse* continued after the initial invasion, 'the authority commanding the inhabitants who have taken up arms, or the authority to which they profess allegiance, must either replace them by sending regular units, or must incorporate them in its regular forces.'[34] The so-called spontaneity could be illusory, as the combatants might have arisen under some prior authority, already communicated — in the past by the paper press and public square announcements, today quite possibly by the Internet.

Clearly, there are differences of conception between the French Revolution formulation of *levée en masse*, the Third Geneva Convention formulation, and a modern cyber mobilisation. The NATO Cooperative Cyber Defence Centre of Excellence had commissioned a collaboration of experts to prepare the *Tallinn Manual on the International Law Applicable to Cyber Warfare* to assist governments in dealing with the legal implications of cyber operations.[35] This Tallinn Manual recognises a role of cyber operations within a *levée en masse*,[36] with the proviso that were a computer to be considered as a weapon, it would not serve well as a distinguishing characteristic of a combatant using it for cyber operations.[37] If an active soldier appeared out of uniform and carrying an iPad, for example, few might suggest he or she was armed with a weapon capable of kinetic effects.

From this, we might set aside, for the moment, our positive law definitions of *levée en masse*. While they are useful for litigation,

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[33] *Commentary, Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 68.

[34] Ibid.

[35] Michael Schmidt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (NATO Cooperative Cyber Defence Centre of Excellence, 2013).

[36] Ibid r 27.

[37] Ibid 100.

they could cause distortions in meta-legal analyses. Instead, let us define the *levée en masse* in the Aristotelian form of *per genus et differentiam*.[38] Many legal theorists have commented on the common law's relative absence of precise definitions and the courts' preferences for mere descriptions.[39] For Bentham, definition *per genus et differentiam* was the sole preferred form of definition.[40]

In this form, let us say that a *levée en masse* is a kind of subsisting mass rhetorical militia, commanded secretly by authorities through mass-disseminated persuasive rhetoric. Today, its officers are the prototype armed mass mob of zealots, armed with computers, who refine the rhetoric and disseminate it ever more widely to the *mob*, until the message achieves *viral* character. As this process is now constant and unceasing, Clausewitz's total war is arguably today's reality, apparently without distinction as to lawful combatant status. Thus, the development of the international law of war's doctrine of distinction must be considered.

IV EARLY CONSIDERATIONS OF DISTINCTION

In Lieber's 1863 reframing of the rules of war, as civilians were not the enemies of the warring American states, and thus, they ought to be spared as far as practicable from the conflict's deleterious consequences, war was reconceived as a struggle between states, rather than between peoples.[41] The Lieber Code of 1863, as the first

[38] An Aristotelian pattern of definition that proceeded by citing a genus to which a term belonged, and then the difference that gave its species and so located it within the genus. The classic example was the definition of humans as rational animals. *Oxford Reference*, <http://www.oxfordreferenc e.com/view/10.1093/oi/authority.20110803100317283>.

[39] See, eg, *Commissioners of Inland Revenue v Muller & Co Margarine* (1901) AC 215 (MacNaghten LJ).

[40] C K Ogden (ed), *Bentham's Theory of Fictions* (Routledge, 2002) lxxvi.

[41] Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002) 19; Jordan J Paust, 'Dr. Francis Lieber and the Lieber Code' (2001) 95 *American Society of International Law Proceedings* 112, 114.

attempt at codifying the laws of war, sustained this precept, and was recognized by the United States for governing its civil war era armies in the field.[42]

Its formulation suggested that Lieber's private individual was the same as the unarmed citizen. He ought to be spared, providing he did not get in the way, or was not a citizen. However, the principle of distinction may be grounded in a more widely accepted belief stated in the 1868 Declaration of St. Petersburg.[43] The Preamble to the 1868 Declaration of St. Petersburg declared that the only legitimate object of war was to weaken the enemy's military forces.[44] To some, this gave approval to the emerging argument that peoples of warring states were not enemies of each other, or of the warring forces.[45] This ignored the argument that the whole of society strengthened the armed forces, raising the possibility of the concept of an implied or covert *levée en masse*.

In 1897, Risley wrote of non-belligerent subjects of a party to the conflict, '[a]s soon as an individual ceases to be harmless, he ceases to be a non-combatant, and must be reckoned a combatant; and unless he bears the distinguishing marks of an open combatant, he puts himself outside the laws of war.'[46] Risley's wide proposition could now include, as combatants, the children turning linen into lint, or any corollary thereof.

Finally, Wheaton had clarified that the protected person was engaged in civil pursuits, not directly in military operations, and not

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42 *United States in General Orders No 100*, issued by the War Department on April 24, 1863.

43 'Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight' [St. Petersburg Declaration], (1868), reprinted in D Schindler and J Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* (Brill, 4th ed, 2004).

44 Ibid 91, 92.

45 L Nurick, 'The Distinction between Combatant and Noncombatant in the Law of War' (1945) 39(4) *The American Journal of International Law* 680, 681.

46 John Shuckburgh Risley, *The Law of War* (A D Innes & Co, 1897) 107-108.

guilty of breaching the rules of war. This was sustained thematically in early works on the law of armed conflict.[47]

V THE ENCODING OF DISTINCTION INTO CONVENTIONS

This theme of immunity of civil pursuits was not universally encoded until the 1949 Geneva Conventions,[48] and it was not particularized until the 1977 Additional Protocols.[49]

In this encoding, the principle of distinction encompassed the novel idea that civilians ought to be immune from being targeted.[50] Explicit provisions apparently providing for civilian immunity were only introduced in the 1977 Additional Protocol I,[51] which provides that parties shall direct their operations only against military objectives.[52] The International Committee of the Red Cross Study on

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47 Henry Wheaton, *Elements Of International Law* (Stevens and Sons, 1916) 362, §345.

48 The Geneva Conventions, as they are collectively known, are the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Aug. 12, 1949, 6 UST 3217, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; and *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 UNTS 287.

49 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1977, 1125 UNTS 609. The two protocols are generally known as Protocol I and Protocol II, or the Additional Protocols.

50 Karma Nabulsi, *Traditions of War: Occupation, Resistance And The Law* (Oxford University Press, 2005) 1.

51 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1977, 1125 UNTS 609.

52 Ibid art 48.

Customary International Humanitarian Law considered this description of the principle of distinction to represent customary international law, despite the apparent anomaly that many states had not ratified Additional Protocol I.[53]

This obligation is stated in Article 58(b) of Protocol I, providing that parties to the conflict 'shall, to the maximum extent feasible ... (b) [a]void locating military objectives within or near densely populated areas.'[54] The Study notes that Article 58(b) was adopted by eight votes in favor, with none against, and eight abstentions. This is in addition to Article 51(7) of the Protocol, which prohibits the use of civilians to shield military attacks.[55] These two articles added prohibitions against the arrangement of the civilian population to shield military objects, a prohibition which arguably could either be blurred, or subject to a newly formed enemy construction of the facts, after the event.

Thus, the principle of distinction is a two-part rule. First, parties to the armed conflict must always distinguish between combatants and civilians. Combatants are susceptible to being targeted because of their combatant status, and, civilians must not specifically be targeted for attack. The upshot of this dual principle is the parties' obligation not to confuse military and civilian actors. Therefore, combatants must distinguish themselves from civilians by wearing uniforms and displaying other insignia designating them as military. Military emplacements also must be signified. They must not be located in areas densely populated with civilians, so to purport to inoculate combatants from attack.

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[53] However, Article 58(b) has been deemed, under the International Committee of the Red Cross Study on Customary International Humanitarian Law, to be of customary status. ICRC, J-M Henckaerts & L Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, Rule 24.

[54] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1977, 1125 UNTS 609 art 58(b).

[55] Ibid art 51(7).

The International Criminal Tribunal for the Former Yugoslavia has affirmed the customary status of Article 58,[56] a remarkable judicial opinion considering the article's high rate of voting abstentions. In some cases, including those of *Kupreškić*,[57] *Galić*,[58] and *Dragomir Milošević*,[59] the International Criminal Tribunal for the Former Yugoslavia affirmed that the parties to a conflict had an obligation to remove civilians, as far as practicable, from the neighborhood of military objectives. They also must avoid fixing military objectives close to densely populated areas.[60] This suggested a negligence style of characterization for the principle of distinction.

These requirements apply to states parties. However, Protocol I only applies to international armed conflicts. Its tenets are unclear as to whether they apply to non-state armed actors. The International Committee of the Red Cross Commentary to Protocol I[61] indicates that a defending state is responsible to its own population for ensuring that military objectives are not closely proximate to the civilian population.[62] However, any subsisting duty for irregular armed groups to distinguish themselves from civilians must be grounded in general principles of humanity. It cannot be grounded in a state's duty to its population.[63] Rather, such irregular armed groups must be considered to be in a state of violence, hatred and enmity, which is an indicium of a covertly organised *levée en masse*.

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56 Ibid art 58.

57 *Prosecutor v Kupreškić et al*., Judgment, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-16-T, Jan 14, 2000) [52].

58 *Prosecutor v Galić*, Judgment, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-98-29-T, Dec. 5, 2003) [61].

59 *Prosecutor v Dragomir Milošević*, Judgment, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29/1-T, Dec. 12, 2007) [949].

60 M W Lewis and E Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones' (2013) 44 *Georgetown Journal of International Law* 1127, 1138.

61 ICRC, Yves Sandoz et al. (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, 1987) 692, [2239].

62 Ibid.

63 Lewis and Crawford, above n 60, 1139.

The prohibition against targeting civilians is thus not unqualified. Those persons that the law of armed conflict, the *ius ad bellum*, permits to participate in hostilities are called combatants. The rules governing their status are in the Geneva Conventions of 1949 and Additional Protocol I.[64] Article 4A of the Geneva Convention III categorizes all those entitled to prisoner of war status, if captured during armed conflict.[65] Articles 43 and 44 of Additional Protocol I define the term combatants and armed forces as necessarily including a command structure.[66] Combatants are allowed to participate in armed hostilities. They are immune from criminal prosecution for their hostile acts, if in keeping with the laws of armed conflict.[67] This immunity is known as the *combatants' privilege*. The combatant's privilege is, in essence, a license to kill or wound enemy combatants and destroy other enemy military objectives,[68] such as for example, the enemy's operational support systems.

When civilians unlawfully engage directly in hostilities, they can achieve neither combatant immunity nor prisoner-of-war status. Consequent on their participation in 'specific acts carried out ... as part of the conduct of hostilities between parties to an armed

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64 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 arts 13(1)-(2); *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 arts 4A(1)-(2); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1977, 1125 U.N.T.S. 609 arts. 43-44.

65 *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 art 4A.

66 *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.

67 K Ipsen, 'Combatants and Non-Combatants' in D Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2nd ed, 2008) 301-302.

68 *Report on Terrorism and Human Rights*, Inter-Am. Commission H.R., OEA/Ser.L/-V/ II.116, doc. 5 rev. 1 corr (2002) [68].

conflict'[69] is that they will be deemed to have taken a 'direct part in hostilities'[70] and they will forfeit their civilian's immunity.[71] This renders these civilians as prospective targets while they continue to participate in hostilities.[72] This wide prescription removes the positive international law's veneer of protection for civilians.

In Protocol I, the civilians' immunity appears in Article 51(3), stating '[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.'[73] The 'protection afforded by this Section' refers back to the prohibitions of Articles 51(1), (2), and (4) - (8). These articles provide that civilians must not be targeted for attack,[74] and civilians must be protected from dangerous military operations. They impose prohibitions on conflicting parties conducting indiscriminate attacks, and from employing civilians to shield military emplacements.[75] Article 51(3) contains no reservations to its application.

Protocols I and II state the prohibition of direct participation in hostilities as applying only to civilians. The International Committee of the Red Cross Interpretive Guidance on Direct Participation in Hostilities categorized the actors as those participating in either international or non-international armed conflicts.[76]

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69 N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross, 2009) 995.

70 *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).

71 Ibid.

72 Lewis and Crawford, above n 60, 1141.

73 *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).

74 ICRC, J-M Henckaerts & L Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, Rules 5-10.

75 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1977, 1125 UNTS 609 art 13(3).

76 Melzer, above n 69, 995.

The meaning of direct participation in hostilities is, however, as expected, not clear. The Diplomatic Conferences did not agree on an exact definition of this term when debating Article 51 of Protocol I.[77] The International Committee of the Red Cross Commentary Study on the Customary Status of International Humanitarian Law stated that: '[a] precise definition of the term "direct participation in hostilities" does not exist.'[78]

The International Criminal Tribunal for the Former Yugoslavia considered *direct participation* in the case of *Prosecutor v Strugar*,[79] in which the court defined direct participation as 'acts of war, which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party.'[80] The International Criminal Tribunal for the Former Yugoslavia elaborated on this holding as follows:

> bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces.[81]

Considering the reality of the population of relatives, friends and

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[77] Federal Political Department Bern, *Official Records Of The Diplomatic Conference On The Reaffirmation And Development Of International Humanitarian Law Applicable In Armed Conflicts: Geneva (1974-1977)* (Federal Political Department ,1978) vol 15, 330, 1978); ICRC, *Commentary On The Additional Protocols of 8th June 1977 to The Geneva Conventions of 12th August 1949* 618-19, 1942-45; Michael Bothe, Karl Josef Partsch & Waldemar A Solf, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff Publishers, 1982) 301-04, [2.4]-[2.4.2.2].

[78] I CRC, J-M Henckaerts & L Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, rule 22.

[79] *Prosecutor v Strugar*, Judgment, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-01-42-A, Jul. 17, 2008) [178].

[80] Ibid.

[81] Ibid.

colleagues supplying and supporting soldiers, this holding is inadequate. A more thorough analysis of the concept of direct participation in hostilities was considered in the Israeli Supreme Court case of *Public Committee Against Torture in Israel v Government of Israel, The Targeted Killings Case*.[82]

The Israeli Court declared customary status for the principle underlying Article 51(3),[83] although some argued this declaration was only procedural, because Israel was not party to Additional Protocol I.[84] The Court began with an analysis of direct participation in hostilities and whether the civilian immunity from targeting was forfeited.[85] It identified categories of those who could be considered to have taken direct part in the hostilities.[86] These included people gathering military intelligence; people taking unlawful combatants to or from active sites of hostilities; and, people operating weapons also used by unlawful combatants, supervising their operation, or servicing them.[87] This latter term, servicing, takes war right back to the *levée en masse* and its drives expressed in the Clausewitz trinity. The Court also deliberated on civilians transporting ammunition to sites of hostilities, and the status of those acting as voluntary human shields as taking direct part in the hostilities,[88] holding: 'Those who have sent him, as well, take *a direct part*. The same goes for the person who decided upon the act, and the person who planned it.'[89]

The Court excluded specific people and their actions from the status of direct participation. These specific people included sellers of foods and medicines to unlawful combatants; providers of

[82] *The Public Committee Against Torture in Israel v Government of Israel*, *Targeted Killings Case*, [2006] HCJ 769/02 (Israel).

[83] *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.

[84] *The Public Committee Against Torture in Israel v Government of Israel*, *Targeted Killings Case*, [2006] HCJ 769/02 (Israel) [23], 29-30.

[85] Ibid 29-40.

[86] Ibid 31.

[87] Ibid 35.

[88] Ibid 35-36.

[89] Ibid 37.

strategic analysis, logistical, financial and other backing; and, distributors of propaganda.[90] Each of these categories arguably constituted a genus of functional direct support to the military effort, apparently excluding an implied or covert *levée en masse*. It held that a person ceasing to take a direct part in hostilities regained protection from targeting.[91] The Court held that, for members of terrorist organisations, their rest intervals were not a cessation of terrorist activity, these being merely brief interludes preparatory to the next act of hostility.[92] In this way, unlawful combatants could argue their immunity by constructing their status as taking an *indirect part*.

VI THE RED CROSS INTERPRETATIVE GUIDANCE ON DISTINCTION

A determination of what might constitute the indicia of membership of a terrorist group, rendering an individual targetable, had to await the International Committee of the Red Cross's 2009 study. Thus, the Interpretive Guidance from the International Committee of the Red Cross concentrated on three problems: (a) who was a civilian for the purposes of the principle of distinction; (b) which conduct amounted to direct participation in conflicts; and, (c) what governed loss of protection against direct assault.[93] It defined civilians as all persons who were neither members in the armed forces of a conflicting party, nor participants in a *levée en masse*, in which the entire population responded to a general call to arms.[94] Thus, members of a covert *levée en masse* could be defined as noncombatant civilians. These persons were entitled to protection against direct attack unless during any time they took direct part in hostilities.[95] While this definition applied easily to civilians in international armed conflicts, it might be more problematic in the case of non-international armed conflicts.

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90 Ibid 35.
91 Ibid 39.
92 Ibid 39-40.
93 Melzer, above n 69, 994.
94 Ibid 995.
95 Ibid 997.

Common Article 3[96] and Protocol II[97] deal with non-international armed conflicts. While they acknowledge civilian participation in armed conflict, they do not appear to authorize it, with no clear divide between combatants and civilians among non-states in non-international armed conflicts.[98] This leaves quite open the status of a clearly belligerent internal mass insurgency, probably consigning it to police responsibility.

The Interpretive Guidance on participation in non-international armed conflicts is thus more intricate than that for international armed conflicts. All those who are non-members of State armed forces, or an organized armed group of a party in the hostilities, are deemed to be civilians. They are therefore entitled to protection against direct attack unless while they undertake direct hostilities, unless they successfully argue their participation in indirect hostilities. In non-international armed conflicts, organized armed groups comprise the armed forces of a non-State party in the conflict. Their members are only those people whose continuous role is to take part directly in hostilities in a continuous combat function.[99]

Use of the term continuous combat function reaffirmed the Israeli Supreme Court's view that organizational members did not reacquire their civilian immunity, during their rest intervals, if their organizational role included combat tasks.[100] The term also worked to prevent support people from losing their immunity when not engaged in combat functions.[101]

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96 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31 art 3. Article 3 is known as Common Article 3.

97 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, June 8, 1977, 1125 UNTS 609.

98 Lewis and Crawford, above n 60, 1146.

99 Melzer, above n 69, 1002.

100 Ibid 1007-08.

101 Ibid 1008.

The Interpretive Guidance developed a cumulative and narrow formula for characterising direct participation, comprising the following three elements: the threshold of harm, direct causation and the belligerent nexus.[102] To be direct participation, a hostile act must be likely to affect adversely the military operations or capacity of a party in the armed conflict. In the alternative, it must inflict death, destruction or injury on targets protected against direct attack. This is the threshold of harm. There must be direct causation between the act and the resulting harm. The hostile act must be designed expressly to cause the threshold of harm for a party in the conflict and to the detriment of some other party. This is the belligerent nexus.[103] These elements appear to ensure that persons supplying ancillary support are excluded from being targeted. The Red Cross Guidance, thus, appears to treat a subsisting *levée en masse* as an essentially pacified group.

The Interpretive Guidance suggests that bomb makers are not continuous combat actors. It compares them to civilian munitions workers.[104] The Guidance provides that civilians participating directly will lose protected status during each act of direct participation.[105] However, as long as people assume a continuous combat function, they will be deemed as targets.[106] This loss of protection for discrete acts includes all 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.'[107] Civilians travelling to and from their act of direct participation lose their protection.[108]

[102] Lewis and Crawford, above n 60, 1147.
[103] Melzer, above n 69, 1016.
[104] Ibid 1020-22.
[105] Ibid 1034.
[106] Ibid 1034-35.
[107] Ibid 1031.
[108] Lewis and Crawford, above n 60, 1149.

VII DRONES WEAPON RANGE

Some civilians drive to work from the suburbs, only to enter a secret facility and sit down for a work shift of piloting a drone. This drone might fly half a world away from the civilian's leafy suburban office in the United States. There can be no doubt this can be seen as a very radical extension of weapon range. The application of such new weapons is limited only by the imprecise customary practices of war,[109] suggesting as has been seen above that customary practices of war are likely to be less than customary, and appearing to weaken these limitations. They might be more in the nature of habitual only by virtue of current convenience. Thus, these limitations are grounded in the old traditional warfare, and are inferences from those special methods emanating from the weapons and technologies of former times.[110] Drones must therefore invoke older doctrines of war. The idea of the 'zone of military operations', for example, emanated from the technical limitations to artillery bombardment.[111] By way of illustration, in a zone of military operations, all bombardment by artillery was permitted, unless proscribed by Article 27 of the Hague Regulations.[112]

Article 27 of the Hague Regulations contains no limitations against the bombing of non-combatants.[113] Non-combatants inside the zone of operations had no immunity from bombardment.[114] No legal duty compelled the attackers to limit their bombardments of the enemy's fortifications. Obliteration of all buildings by bombardment has been one of the lawful means of persuading the enemy to

[109] M W Royse, *Aerial Bombardment and the International Regulation of Warfare* (Harold Vinal, 1928) 238.
[110] Nurick, above n 45, 683.
[111] United States War Department, *TM 27-251 Treaties Governing Land Warfare* (US Government Printing Office, 1944) 25.
[112] *Regulations Concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907, Annexed to Hague Convention II of 1899 and Hague Convention IV of 1907 art 27.
[113] Ibid.
[114] Nurick, above n 45, 684.

surrender,[115] all buildings naturally including non-combatants, as a logical consequence of the operation of a total war paradigm.

The rule appears unchanged for artillery bombardment even when there is no intention to occupy the assailed area. Oppenheim argued in 1940 that if bombardment by aircraft were lawful in the greater zone of operations, even when there was no intention to occupy that area of operations, then similarly, bombardment by long-range guns also would be legitimate.[116] This view did not foresee such a weapon as the robot rocket bomb used by the Germans against London. However, if the rules for artillery bombardment were considered by analogy to these robot rocket bombs, arguably the robots only had extended their artillery's zone of operations. Thus, they might be used quite legally against a distant target, such as London.[117]

Royse noted that, so long as any increase in artillery range was gradual, the zone of operations rule would be accepted. However, when the range of fire was increased suddenly, through a leap in technology, the innovation would generate widespread resentment. A salient example was during World War I when the Germans shelled Paris from 70 miles away.[118] Royse argued that had the Germans been able to mass-produce this long-range cannon, it would have been merely a legitimate expansion of the zone of operations.[119] Drones are now mass-produced, and, mutatis mutandis, they create a legitimate expansion of the zone of operations.

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[115] L Oppenheim, H Lauterpacht (ed), *International Law* (Longmans Green, 6th ed, 1940) vol. 2, 328; *Correspondence Respecting the Brussels Conference on the Rules of Military Warfare*, Part I, 7, 13,19, 5-197; William E Birkhimer, *Military Government and Martial Law* (Franklin Hudson Co, 2nd ed, 1892) 196; J W Garner, *International Law and the World War* (Longmans, 1920) vol 2, 422; P Fauchille, *Le Bombardement Aréien*, in Revue Général de Droit International Public, (1917) vol 24, 56.

[116] L Oppenheim, H Lauterpacht (ed), *International Law* (Longmans Green, 6th ed, 1940) vol 2, 327 n 3.

[117] Nurick, above n 45, 684.

[118] Ibid 685.

[119] M W Royse, *Aerial Bombardment and the International Regulation of Warfare* (Harold Vinal, 1928) 239.

Thus, a naval commander might fire at will over a defended town. Military targets could be bombarded irrespective of any incidental damage to private property or non-combatants. However, the 1907 Hague Rules prohibited bombarding undefended emplacements.[120] Nevertheless military emplacements could be bombarded.[121] There is no responsibility incurred for unavoidable harm to undefended places or the inhabitants.[122] Royse argued this inferred an inevitable, and therefore tolerated, natural dispersion in the case of long-range bombardment.[123]

In effect, drones are an alternate form of long-range computer-controlled bomb. Human pilots drive them. This is by means of a computer system and a long-distance radio transmission system. These aspects of drones are said to reduce the monetary, material, and human costs of air warfare.[124] They minimise the requirement for human interference in, or troop deployment to, the target areas. As such, they effectively protect the attacking combatants and their servicing non-combatants.

Drones are said to be accurate and of most use in dangerous or difficult circumstances. These drones armed with missiles use surveillance probes to scan, then digitally enhance the image, arguably for greater accuracy of targeting. However, enhancement technology may introduce inaccuracy through its interpolation algorithms. Lasers affixed onto the drone's camera allow for precision-guided targeting.[125] This camera technology provides night

[120] *Convention (IX) concerning Bombardment by Naval Forces in Time of War*, The Hague, 18 October 1907 art 1.

[121] Nurick, above n 45, 685.

[122] *Convention (IX) concerning Bombardment by Naval Forces in Time of War*, The Hague, 18 October 1907 art 2.

[123] M W Royse, *Aerial Bombardment and the International Regulation of Warfare* (Harold Vinal, 1928) 229.

[124] See M W Lewis, 'Drones and the Boundaries of the Battlefield' (2012) 47 *Texas International Law Journal* 299.

[125] M N Schmitt, 'Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the "Fog of Law"' (2011) 13 *Yearbook of International Humanitarian Law* 311.

vision, infrared, and digital imagery at almost, but not actual, real time speed,[126] suggesting some hysteresis in targeting.[127]

Drones also have prolonged hovering capability,[128] to hover over their target to collect, in apparent or simulated real time, the most recent high-resolution imagery.[129] These data allow the pilot to commence the attack in more optimised circumstances of maneuver warfare, because the pilot can assess the target's general patterns and those of the wider area,[130] or, the zone of operations.

Drones may carry missiles varying in size and impact, to be directly proportionate to the magnitude of the drone's function.[131] Missiles carried on armed drones can be reduced to a low enough power to minimize impact, while the size of the drone is optimised for accuracy and agility. Large-scale explosions can be effected only with multiple attacks.[132] For example, hellfire missiles are one of the largest drone payloads, but their blast radius is constrained to only 15 feet. They can be detonated with a timer,[133] arguably jettisoning human target accuracy. The operator can wait until the target walks out of a civilian-occupied building on schedule, to minimize collateral risk. A drone operator might fire on and kill targets in one room, and leave civilians unharmed in the adjoining room, while

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126 Ibid.

127 Hysteresis is retardation of an effect, when the forces acting upon a body are changed. Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/hysteresis>.

128 Lewis, above n 124.

129 Schmitt, above n 125.

130 M Matthews and M McNab, 'Clarifying the Law Relating to Unmanned Drones and the Use of Force: The Relationships between Human Rights, Self-Defence, Armed Conflict and International Humanitarian Law' (2011) 39(4) *Denver Journal of International Law and Policy* 661.

131 P Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', Philip Alston: United Nations General Assembly, Human Rights Council, A/HRC/14/24/Add 6, 2011.

132 Rachel Alberstadt, 'Drones under International Law' (2014) 4 *Open Journal of Political Science* 221, 222.

133 Matthews and McNab, above n 130.

ignoring analysis of the fate of non-targets in the targeted room's zone of operations. This would be as if they were, by association, an integral part of the target. The target could well have been conferring with mission planners. In the result, drones effectively assume those in the target room as being part of a total war, and kill them all, combatants and non-combatants alike.

VIII AN ALTERED STANDARD FOR IRREGULAR WARFARE

Targeting terrorist planners in a single room may be reframed as irregular sniping at non-soldiers. Irregular warfare subsists because states either direct or support, or tolerate, or fail to control such activities on their territory.[134] Terrorists and similar private actors need a sanctuary, to train and plan, without hindrance. The combination of state sponsors and private actors is a significant factor in irregular warfare.[135]

In 1949 the International Court of Justice held, in the *Corfu Channel Case*,[136] that each state must not allow knowingly its territory to be used contrary to the rights of other states. Prior to 9/11, there was no general international consensus on allowing military action against states not executing this duty.

In the pre 9/11 *Nicaragua Case*,[137] the International Court of Justice considered state responsibility for the hostile acts of irregular forces. The Court began by considering whether an armed attack should be by a regular army, or, whether an armed band could constitute armed attack. The United Nations General Assembly

[134] Daniel Byman, *Deadly Connections: States That Sponsor Terrorism* (Cambridge University Press, 2005) 219.
[135] Ibid.
[136] *Corfu Channel case*, Judgment of April 9th, 1949: ICJ Reports 1949, 4.
[137] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v U.S.*), 1986 ICJ Rep 14 195.

defined *aggression* broadly as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State.[138]

Referring to this definition of aggression,[139] the Court held that a state's deployment of armed bands constituted an armed attack.[140] However, the mere provision of 'financial, military, logistical, or other support' did not constitute an armed attack by the principal state. Therefore, such support did not trigger the right to self-defence,[141] even although such support arguably is essential. As for attribution of responsibility, the International Court of Justice established an effective control test. According to the Court, effective control must be over: '[P]articipation ... in the financing, organizing, training, supplying and equipping of the ....'[142]

In *Prosecutor v Tadić*, [143] the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia diluted the effective-control standard enunciated by the International Court of Justice in *Nicaragua*. They argued that states needed to exercise only an *overall* control over private armed bands, in order to attribute responsibility to the state for the band's wrongful acts.[144]

Successive United States administrations have maintained the proposition that a state is responsible for the acts of private actors on its territory, even without either effective or overall control over their acts. Thus, self-defense may be exercised against the private actor and its state sponsor jointly and severally. In 1984, a Reagan administration memorandum argued that states becoming victims of

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[138] *Definition of Aggression*, GA Res. 3314 (XXIX) (Dec. 14, 1974) art 1.
[139] Ibid.
[140] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v U.S.*), 1986 ICJ Rep 14 [195].
[141] Ibid [195].
[142] Ibid [115].
[143] *Prosecutor v Tadić*, Judgment, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. No. IT–94–1–A, July 15, 1999).
[144] Ibid [120].

terrorist attacks had the right 'to act in legitimate self-defense including, if necessary, the use of appropriate force.'[145] The nonconsensual use of force was justified only when the victim state was 'unable or unwilling to take effective action.'[146] Later United States administrations have continued to invoke this harboring doctrine to justify many overseas targeted military interventions.[147].

IX TARGETED KILLINGS

States are limited in their choices of methods and means for warfare.[148] The chief limitation is the principle of distinction between combatants, civilians who directly participate in hostilities, and the selected military objectives, and civilians and civilian targets on the enemy side.[149] Second, international humanitarian law prevents states from using 'weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.'[150] The International Court of Justice held, in the *Nuclear Weapons Opinion*, that these constraints were the cardinal principles[151] of international humanitarian law and as such were

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[145] Robert C. McFarlane, 'Memorandum for Edwin Meese III', Aug. 15, 1984, <http://www.washingtondecoded.com/files/nsdd.pdf>, retrieved 4th July 2018 [The Use of Force against Terrorist Acts].

[146] Ibid.

[147] Christine Gray, *International Law and The Use of Force* (Oxford University Press, 2004) 160–64.

[148] *Regulations Concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907, Annexed to Hague Convention II of 1899 and Hague Convention IV of 1907 art 22; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 23 January 1979, 1125 UNTS 3 art 35(1); Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2nd ed, 2010) 8, [18].

[149] This rule is incorporated into *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 23 January 1979, 1125 UNTS 3 art 48.

[150] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 23 January 1979, 1125 UNTS 3 art 35(2).

[151] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 226, 257, [78].

binding on all states as intransgressible customary law.[152] Thus, they must be observed in both international and non-international hostilities.[153]

A targeted military killing is the application of lethal force against a selected person, who is not held in custody by the targeting force, with the deliberate and premeditated intent to kill that person,[154] a description largely fitting a drone attack. Targeted killings have occurred regularly throughout history, such as in the case of snipers.[155] Under international humanitarian law, targeted killings are likely to be always unlawful. This is because 'it is never permissible for killing to be the sole objective of an operation.'[156] The main legal basis for this assessment is the International Covenant on Civil and Political Rights,[157] which provides that no person shall be deprived of life arbitrarily. It forbids lethal force without lawful reasons.[158] A theory of war based on the Clausewitz trinity would ignore this line of reasoning.

A killing is only legal when done to prevent an imminent and concrete threat to life. There must be no alternative non-lethal method for preventing that life threat.[159] In the instance of armed

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[152] Ibid [79]; Wuschka, above n 12, 894.

[153] ICRC, J-M Henckaerts & L Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, rules 11-13, 70-71.

[154] N Melzer, 'Targeted Killings in Operational Law Perspective' in T D Gill & D Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press, 2010) 277-278.

[155] Wuschka, above n 12, 900.

[156] P Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings' UN Doc A/HRC/14/24/Add 6, 28 May 2010 [33].

[157] *International Covenant on Civil and Political Rights*, 23 March 1976, 999 UNTS 171 art 6.

[158] Human Rights Committee, *Chongwe v Zambia*, UN Doc CCPR/C/70/D/821/ 1998, 9 November 2000, [5.2]; M E O'Connell, 'The Choice of Law Against Terrorism' in *Notre Dame Law School, Legal Studies Research Paper No. 10-20* (Notre Dame, 2010, 4.

[159] *McCann and Others v United Kingdom*, Judgment, (European Court of Human Rrights, Grand Chamber, No.18984/9, 27th September 1995), 1, [145]; *Human*

conflict, the International Court of Justice held in its *Nuclear Weapons Opinion*[160] that

> whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the International Covenant on Civil and Political Rights, can only be decided by reference to the law applicable in armed conflict.[161]

In international armed conflicts, legitimate human targets usually are combatants. This includes all members of the armed forces of a state party to the hostilities.[162] Civilians taking direct part can be targeted lawfully.[163] This applies also to non-international armed conflicts,[164] governed by Common Article 3 of the Geneva Conventions,[165] Additional Protocol II,[166] and the customary international law.[167] Most modern US drone strikes are arranged to fight the terrorist network Al-Qaeda, whose targets are not armed forces members, and

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Rights Committee, General Comment No. 6, UN Doc HRI/GEN/1/Rev.1 at 6 (1994) [3]; *Concluding Observations of the Human Rights Committee: Israel*, UN Doc CCPR/CO/78/ISR (21 August 2003) [15]; P Alston, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', Philip Alston: United Nations General Assembly, Human Rights Council, A/HRC/14/24/Add 6, 2011 [32]; N Melzer, *Targeted Killings in International Law* (Oxford University Press, 2008) 59.

160 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226.

161 Ibid [25].

162 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 23 January 1979, 1125 UNTS 3 art 43(2); K Ipsen, 'Combatants and Non-Combatants' in D Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2nd ed, 2008) 84.

163 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 23 January 1979, 1125 UNTS 3 art 51(3).

164 Common art 3 and *Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 7 December 1978, 1125 UNTS 609 art 13(3).

165 *Geneva Conventions I to IV*, 12 August 1949, 75 UNTS 31 85, 135, 287.

166 *Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 7 December 1978, 1125 UNTS 609.

167 ICRC, J M Henckaerts & L Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, Rule 6.

who some have argued have the status in law of non-combatants.

If the international humanitarian law applied in those cases, the decisive criterion would be whether a targeted person directly participated in the hostilities.[168] The term 'direct participation in hostilities' is not defined in the Geneva Conventions, or in the Additional Protocols. As discussed above, in 2006, the Israeli Supreme Court was tasked with determining the legality of Israel's policy of targeted killings.[169] The Court delimited its determinations as for an international armed conflict. Israel was not a signatory to AP I, and thus, Chief Justice Barak formulated an interpretation of direct participation from within the customary rule stated in Article 51(3) AP I.[170] The Israeli Supreme Court adopted a functional approach[171] to decide which actions constituted direct participation, by asking whether civilians were performing combatants' functions.[172] Chief Justice Barak outlined the two extremes of the argument. His honor observed that civilians detached from sporadic acts of war were entitled to protection under the international humanitarian law.[173] However, permanent members of terrorist organisations would lose such protection.[174]According to the Court, customary law had not yet crystallized, for cases in the intermediate areas between these two extremes.[175]

Thus, an actor undetached from a sporadic act of war, or being an active terrorist, would infer that actor to be of combatant status. In the case of an insurgent terrorist, the affected state might assume there was an operating insurgency against it, in the nature of

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168 Melzer, above n 69, 43.

169 *The Public Committee Against Torture in Israel v Government of Israel*, *Targeted Killings Case*, [2006] HCJ 769/02 (Israel).

170 Ibid [29-40].

171 H Keller and M Forowicz, 'A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing' (2008) 21 *Leiden Journal of International Law* 1, 185, 207.

172 Ibid.

173 *The Public Committee Against Torture in Israel v Government of Israel*, *Targeted Killings Case*, [2006] HCJ 769/02 (Israel) [39].

174 Ibid.

175 Ibid [40].

evolving total war.

X THE CONSEQUENCES OF A COUNTERINSURGENCY STRATEGY

A counterinsurgency argument would posit that targeted killings of terrorist actors in a semi-failed state would achieve little without general public support. From 2002 to 2008, military strategists have altered the national security scaffolding from a so-called war on terror to one of counterinsurgency. Counterinsurgency represents a rejection of the kill-capture military strategy, now adopting a strategy to win the population's hearts and minds.[176] This shift was juxtaposed with the 2007 publication of The U.S. Army/Marine Corps Counterinsurgency Field Manual.[177] There are some structural differences between terrorism and insurgency.[178] Terrorism is subordinate to insurgency, as terrorism is a specific tactic of war. However, insurgency means the rejection of an entire political command system.[179]

Insurgency success depends on the support or acquiescence of the population.[180]Insurgents employ methods of disorder to undermine the counterinsurgent.[181] Insurgents are advocates for alternate ideologies.[182] They may pay people to conduct violent or

[176] Spencer Ackerman, 'The Rise of the Counterinsurgents', *Washington Independent*, 27th July 2008, <http://washingtonindependent.com/426/series-the-rise-of-the counterinsurgents>.

[177] D Jehl & T Shanker, 'For the First Time Since Vietnam, the Army Prints a Guide to Fighting Insurgents', *New York Times*, 13th November 2004 A12

[178] Robert D Sloane, 'Prologue to a Voluntarist War Convention' (2007) 106 *Michigan Law Review* 443, 450.

[179] Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (Alfred A Knopf, 2008) 27.

[180] David Galula, *Counterinsurgency Warfare: Theory and Practice*, Praeger Security International (Wesport, 1964) 7-8.

[181] Ibid 11.

[182] US Department of the Army, *The U.S. Army/Marine Corps Counterinsurgency Field Manual* (US Department of the Army, 2007) [1-75].

intimidating operations,[183] in order to exploit community grievances.[184] They are a direct threat to the state's mobilisation plan for a possible *levée en masse*, because they can alter the ideologies of the masses.

Counterinsurgency may be defined as the 'military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency,'[185] and its success 'depends on the people taking charge of their own affairs and consenting to the government's rule.'[186] This kind of mass mobilisation is not inconsistent with the apparent spontaneity inherent in the idea of a covert *levée en masse*. The community's decisions as to ideology amount to an election to follow a specific command structure, either that of the insurgents or that of the counterinsurgents.

Counterinsurgency operations are divided into the following: (a) ensuring civil security for the population; (b) ensuring the continuity of essential services; (b) establishing structures for governance; (c) developing the economy and capital infrastructure; and, (d) facilitating communications with the population.[187] These appear at once to follow the principle of distinction, and at once to effect a mass mobilisation of the people, suggesting that the Lieber Code effected a new counterinsurgency after the American Civil War.

The war on terror has not altered differences over the principle of distinction, as it is often difficult to discern between a civilian drone pilot and a combatant, or a civil object and a military object. For example, what of the civilian who takes up arms every day, but who

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[183] David Kilcullen, 'Counter-insurgency Redux' (2006) 48(4) *Survival: Global Politics and Strategy* 111, 119.

[184] James D Fearon & David D Laitin, 'Ethnicity, Insurgency, and Civil War' (2003) 97 *American Political Science Review* 75, 75-76, 79, 88.

[185] US Department of the Army, *The U.S. Army/Marine Corps Counterinsurgency Field Manual* (US Department of the Army, 2007) [1-2].

[186] Ibid [1-4].

[187] Ibid fig 5-1.

returns home at night?[188] Should a television station broadcasting enemy propaganda be adjudged a military object, when it effects mass mobilisation of the public?[189]

The Additional Protocols demand consideration of any 'concrete and direct military advantage expected.'[190] These provisions have two debatable limbs: (a) the military nature of the operations; and, (b) a direct link between the operations and the actor or the object.[191] The military hostilities limb depends on what is included as military or hostilities. One argument includes preparations for attack and returning home from conducting an attack. But these are not, technically, either military activities or hostilities.[192] An extension of this argument designates civilian support for the overall war effort as a military activity.[193] Within this interpretation, the terms military or hostilities include anything seeking 'to adversely affect the enemy's pursuance of its military objective or goal.'[194] An alternate view interprets the provision as necessitating the use of force, or military activity, targeting the enemy. The requirement that any attack must

[188] Michael N Schmitt, 'Humanitarian Law and Direct Participation in Hostilties by Private Contractors or Civilian Employees' (2005) 5 *Chicago Journal of International Law* 511, 535-36.

[189] *International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, (2000) 39 LLM 1257 1277.

[190] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 23 January 1979, 1125 UNTS 3 art 51(5).

[191] G Sitaraman, 'Counterinsurgency, the War on Terror, and the Laws of War' (2009) 95(7) *Virginia Law Review* 1745, 1783.

[192] ICRC, *Commentary on the Additional Protocols of 8th June 1977 to the Geneva Conventions of 12th August 1949* (Martinus Nijhoff Publishers, 1987) [1943]; Daphne Richemond, 'Transnational Terrorist Organizations and the Use of Force' (2007) 56 *Catholic University Law Review* 1001, 1022.

[193] Michael Walzer, *Just and Unjust Wars* (Basic Books, 1977) 146; James A Burger, 'International Humanitarian Law and the Kosovo Crisis: Lessons Learned or to be Learned' (2000) 82 *International Review of the Red Cross* 129, 132; J W Crawford, III, 'The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems' (1997) 21 *Fletcher Forum of World Affairs* 101, 101-102.

[194] ICRC, *Summary Report, Third Expert Meeting on the Notion of Direct Participation in Hostilities*, (Geneva, 2005) 27.

provide a specific military advantage suggests that a military style of attack would be unlawful if its main objective was to affect adversely the civilian population's public order, without reducing the enemy's military strength.[195]

The International Committee of the Red Cross Commentaries interpret the directness requirement as seeking a 'direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.'[196] Thus, direct causal relationships exist when actions are 'intended to cause actual harm to the personnel and equipment of the armed forces.'[197] This view infers 'a clear distinction between direct participation in hostilities and participation in the war effort.'[198] The International Committee of the Red Cross interpretive guidance on direct participation in hostilities provides that an act must have a direct causal link between the act and the harm that involves only one causal step between the action and the harm.[199] Thus, builders of improvised explosive devices would fail to meet this International Committee of the Red Cross test because the harm they cause is not within one causal step.[200] The alternative view is broader, allowing objects to be targets that 'indirectly but effectively support and sustain the enemy's war-fighting capability.'[201] Parks argued that this so-called modern American drones approach followed the Prussian general Clausewitz's arguably very practical gloss that war includes

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[195] Marco Sassòli and Laura M. Olson, 'The Relationship between International Humanitarian and Human Rights Law where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) *International Review of the Red Cross* 599, 616.

[196] ICRC, *Commentary on the Additional Protocols of 8th June 1977 to the Geneva Conventions of 12th August 1949* (Martinus Nijhoff Publishers, 1987) 1679 4787. 'Direct participation in hostilities 'implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.'

[197] ICRC, *Commentary on the Additional Protocols of 8th June 1977 to the Geneva Conventions of 12th August 1949* (Martinus Nijhoff Publishers, 1987) 1942.

[198] Ibid [1945].

[199] Melzer, above n 69, 51, 53.

[200] Ibid 54.

[201] Michael N Schmitt, 'The Principle of Discrimination in 21st Century Warfare' (1999) 2 *Yale Human Rights & Development Law Journal* 143, 149.

society's total capacity, and in particular, the warlike tendency inherent in all the people.[202]

XI CONCLUSION

The early writers took the view that so-called combatant civilians received no protection from any law. This guilty civilian person would be armed and caught in the crossfire. Others who were unarmed, and stayed out of the crossfire, would be protected unless they were considered part of the overall war effort of the general society. The only person truly protected was the completely harmless civilian, entirely engaged in civil pursuits and outside of direct operations to the complete exclusion of military operations. The later encoding of the principle of distinction appeared to adopt a negligence-like standard, with belligerent actors incurring duties to make prior arrangements to protect civilians. The case law suggested that the idea of direct operations excluded all but those involved in the overt command structure. The Red Cross' further interpretations appeared to ensure that persons supplying merely ancillary support to military operations were excluded from being targeted. The trend appears to have been to exclude more of the general society from retribution, allowing states to arrange their war effort on the basis of a covert and protected *levée en masse*, allowing a larger civilian *de facto* participation in the wider war effort. This could explain why the term *levée en masse* is now used so seldom.

Nevertheless, a drone could kill non-combatants in a target room. With targeting hysteresis and image enhancement interpolation, along with transmission delays, weapons feedback control loops would have uncertain maneuver warfare accuracy. In this case, an argument could be made that remotely piloted drones are of the same genus as artillery, carrying a zone of operations and a certain level of uncontrollable collateral damage. Targeting a specific room and expecting to kill only one person with a drone rocket might be

[202] W Hays Parks, 'Air War and the Law of War' (1990) 32(1) *Air Force Law Review* 113, 113-116.

fanciful. In any event, the likelihood of satisfying the principle of distinction seems remote in such circumstances, suggesting that the principle is not observed in drone attacks. Were the principle of distinction to suggest that all people in the target's room were closely associated with direct military operations, or simply getting in the way, it would appear that the early writings on distinction remained the applicable and operational standard. These early writing were not inconsistent with the views of Clausewitz of total war involving the entire population.

The state of the customary international law for targeted killings is unclear, the chief limitation being the principle of distinction. In the case of a covert *levée en masse*, or a putative state fighting an administratively propped-up failed state, the issues of insurgency and counterinsurgency might provide clarification, with the Lieber Code suggesting counterinsurgency as a permanent state of affairs.

The views of Clausewitz seem to provide a rationale for targeted killings in a counterinsurgency context. They represent the older formulations of the principle of distinction, providing little protection unless a person was totally harmless. This theoretical totally harmless person could be made to disappear with the appropriate counterinsurgency rhetoric.

However, the US Army Field Manual disagrees by purporting to protect passive supporters, thereby suggesting that the principle of distinction has no analogy in the laws of negligence. Thus, for the context of counterinsurgency, arrangements to remove civilians from the zone of operations seem irrelevant, unless only for purposes of winning the hearts and minds of the people in order to maintain a failing state. This suggests it is open to consider whether some states are deliberately running covert *levées en masse*, arguably in order to secure shielding for their military and technological support infrastructures, under the guise of the well-sanitised concept of counterinsurgency. Thus, the civilian drone pilot is technically a non-combatant, operating the drone from a leafy suburb while the drone

kills targets in far-away lands, suggests the inevitable development of a terrorist insurgency at home, with the use of drones committing the entire population to a natural regression to total war.