Can Targeted Killing Ever Be Legally Justified?

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LL.M. International Law

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Title: *Can Targeted Killing Ever Be Legally Justified?*

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Abstract

Can Targeted Killing Ever Be Legally Justified?

The object of this work is three-fold: Firstly to explore the legal issues surrounding the question of whether or not so-called '*targeted killing*' can ever satisfactorily defined and/or justified? Secondly, in the light of modern technology development (drones), where the decision making process can be entirely automated – 'taking the finger off the trigger' – I will examine the use of remote targeted killing, and the ethical and moral questions of whether the human element should ever be completely removed from the decision to strike. Thirdly, with international law currently in no position to either determine or even guide State behaviour with respect to targeted killings, is it likely that such acts will become the Norm in international counter-terrorism practice? If so, should the international legal community take this opportunity to provide more defined guidelines on the legitimate use of targeted killing?

Upon these three grounds, I shall address the question of whether targeted killing can ever be legally justified.

Chapter One

Justifying Targeted Killing

"It is my conviction that killing people under the cloak of war,

is nothing but an act of murder"

Albert Einstein, 1947

1.1 The difficulty defining targeted killing

Before any attempt is undertaken to determine the justification (or otherwise) of targeted killing, there remains the perplexing question of *defining* exactly what '*targeted killing*' is? Currently, the term 'targeted killing' has no fixed or finite definition under international law[1] – and for a very specific reason, the nature of which shall be looked at in due course; however, academics have, for at least the last fifteen years, struggled to agree with one another over an acceptable definition that serves not only the international legal community, but the media and of course the public – in whose name and future security these killings are carried out[2].

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[1] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (1st edn, Cambridge University Press, 2010)

[2] Marcus Gunneflo, *Targeted Killing: A Legal and Political History* (1st edn, Cambridge University Press, 2016)

Regardless of this lack of definition, targeted killing *is* inclined to be accepted as a 'form of assassination', based upon the presumption of some criminal guilt[3]. Indeed, the very use of the term targeted killing is a fairly recent addition to what has historically been known under a number of descriptions including: '*extrajudicial elimination*', '*remote-killing*', '*covert action*', and of course '*assassination*' (as well as a whole host of more colourful and rather cold and callous terminology)[4]. In essence, targeted killing refers to a method of 'anticipatory self-defence', employing lethal force against human beings which almost always involves the use of some form of weaponry (although there are no limitations to alternative methods of taking a human life)[5].

The term 'anticipatory' in a military context (and with specific context to targeted killing as a weapon), refers to:

> "*...the ability to foresee consequences of some future action, and thereafter take some measures aimed at checking or countering those consequences*"[6]

While there may not yet be an agreed definition for the term targeted killing, the right to self-defence is, of course, a natural one, known and recognised since time immemorial[7]. It is a right available to all individuals and, after the emergence of States, to those States as sovereign entities[8]. But, in order for any measure carried out in self-defence to be lawful,

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[3] Nils Melzer, *Targeted Killing in International Law* (1st edn, Oxford University Press, 2008)
[4] Marcus Gunneflo, *Targeted Killing: A Legal and Political History* (1st edn, Cambridge University Press, 2016)
[5] Nils Melzer, *Targeted Killing in International Law* (1st edn, Oxford University Press, 2008)
[6] Christopher C. Joyner and Anthony C. Arend, 'Anticipatory Humanitarian Intervention: An Emerging Legal Norm (1999) *United States Air Force Association Journal of Legal Studies* 10(27) 32-47, 1999/2000
[7] Major Joshua E. Kastenberg, 'The use of conventional international law in combating terrorism: a Maginot Line for modern civilisation employing the principles of anticipatory self-defence and pre-emption' (2004) *Air Force Law Review* 55(1) 87-125, January 2004
[8] Niaz A. Shah, 'Self Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response To Terrorism' (2007) *Journal of Conflict and Security Law* 12(1) 95-126, 2007

a State considering the use of targeted killing has to comply with the rules of International Humanitarian Law (IHL) – the '*jus in bello*'[9] – or the Law Of Armed Conflict (LOAC). The legal sources for these are: the 1907 Hague Conventions[10], the Geneva Conventions of 1949[11], and its Additional Protocols[12], and the fundamental principles of international law [with respect to refraining from the use of force, and, thereafter, the lawful use of force in the event of an armed attack or in self-defence] which are enshrined within Article 2(4)[13] the '*jus ad bellum'*[14], and Article 51[15] respectively, of the United Nations Charter[16]

Nobody denies States the right to self-defence, and while there have been spirited debates about the right to engage in anticipatory self-defence, most governments and scholars[17],

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[9] '*jus in bello*' – 'justice in conducting war' – the laws concerning the conduct of war

[10] The Hague Conventions of 1907: Convention IV with Respect to the Laws and Customs of War on Land, preamble, 18 October 1907, 36 stat., 2277 <http://avalon.law.yale.edu/20th_century/hague04.asp#iart4> accessed 20 December 2017.

[11] 'Geneva Convention Relative to the Protection of Civilians in time of war, 12 August 1949' (un.org 2017) <http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf> accessed 21 December 2017.

[12] 'Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 8 June 1977: Part III, Methods and Means of Warfare Combatant and Prisoner-Of-War Status, Section I, Methods and Means of Warfare: Article 36 'New Weapons'' (un.org 2017) <https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17512-english.pdf> accessed 21 December 2017; and 'Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 8 June 1977: Part IV, Civilian Population, Chapter II, Civilians and Civilian Population: Article 51 'Protection of the civilian population'' (un.org 2017) <https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17512-english.pdf> accessed 21 December 2017.

[13] Article 2(4) requires that states refrain from the use of force, and states that: "*[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*"

[14] '*jus ad bellum*' – Justice in going to war

[15] Article 51 envisages a further lawful use of force in the event of an armed attack: "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security*"

[16] United Nations General Assembly, 'The Charter of the United Nations, 26 June 1945' (un.org, 2017) <http://www.un.org/en/charter-united-nations/> accessed 23 December 2017.

[17] Oscar Schachter, *International Law in Theory and Practice* (2nd edn, Martin Nijhoff Publishers, 1991)

as well as the International Court of Justice[18], appear to agree that self-defence *is* permitted under Article 51, but *only* when there has been an armed attack. The infamous '*Caroline*' case[19] – long been taken as an authoritative source for self-defence – was about self-defence against a non-State actor[20].

But what is an 'armed attack'? There is no legal definition for what comprises an 'armed attack' (all of which amply demonstrates the vital need for accepted legal definitions in time of conflict so that all parties understand and abide by the LOAC). According to the overwhelming majority of legal doctrine[21], the term 'armed attack' refers to an *actual* armed attack[22]. This is certainly the position under the UN Charter and, as no state has, as far as we know[23], claimed anticipatory self-defence under Article 51, hence, any counter argument must be based on *customary law*.

With the term 'armed attack' so vaguely defined, it consequently offers those who would contemplate self-defence a 'window of opportunity' within which no legal framework currently exists to restrict them[24]. Therefore, we can say that anticipatory self-defence takes on two forms: firstly: '*Pre-emptive self-defence*' – military action taken against an

[18] *Nicaragua v United States of America*, 1986 ICJ 14
[19] *The Caroline v The United States* 11 U.S. (7 Cranch) 496 (1813)
[20] Kenneth R. Stevens, *Border Diplomacy- The Caroline and McLeod Affairs in Anglo-American-Canadian Relations, 1837-1842* (1st edn, University of Alabama Press, 1989)
[21] Anthony Clark Arend, 'International Law and the Pre-emptive Use of Military Force' (2003) *The Washington Quarterly* 26(2) 89-103, Spring 2003
[22] ibid
[23] Albrecht Randelzhofer and Georg Nolte, *Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression Article 51 [Ch.VII] – from: The Charter of the United Nations – A Commentary, Volume II* (3rd edn, Oxford University Press, 2012)
[24] Sean D. Murphy, 'Terrorism and the Concept of 'Armed Attack' in Article 51 of the UN Charter' (2002) *Harvard International Law Journal* 43(1) 41-51, Winter 2002

imminent attack; and secondly: '*Preventative self-defence*' – military action taken against a threat that has not yet materialised, and that is uncertain or remote in time[25]. It is this second form that usually constitutes targeted killing[26]. Nevertheless, and in spite of the *rules* put in place to govern conflict, the very idea that 'official' or 'government sanctioned' use of lethal force could even be possible, is repellent to most of us. The average citizen would, at the very least, have questions about such an act carried out in their name, and expect such methods to only ever be used as a last resort, or, only in time of war.

On the whole then, targeted killing is something that most of us would like to believe remains primarily within the realms of Hollywood fiction, or on the pages of spy novels. Unfortunately, the truth is somewhat different. Whether the nature of the government is democratic or despotic, liberal or radical, the employment of targeted killing as a method of eliminating unwanted persons whose very existence may cause political or military embarrassment is very wide spread …and historically, always has been[27].

So, *why* is there no defined legal definition of 'targeted killing' under international law?[28] In the aftermath of 9/11, a concerted effort was adopted by both academics and the media to describe the new policies being instigated by various States in respect of this new term, known as: 'targeted killing' – partly to justify those policies and their use as a viable, open and legitimate political and military strategy, but, also, in part to address the myriad legal

[25] René Värk, 'Terrorism, State Responsibility and the Use of Armed Force' (2011) *Estonian National Defence College Proceedings* 14(1) 74-111, 2011
[26] Anthony Clark Arend, 'International Law and the Pre-emptive Use of Military Force' (2003) *The Washington Quarterly* 26(2) 89-103, Spring 2003
[27] ibid
[28] Nils Melzer, *Targeted Killing in International Law* (1st edn, Oxford University Press, 2008)

issues and expected consequences arising as a result of its actual use. The search for a definition for the new 'media-bite' was on, and none too soon as questions about targeted killing and its legitimacy emerged almost as soon as it was evident that States *were* using it as a weapon in the war on terror.

Figure 1. The way the world has come to understand 'targeted killing'
- through the use of Unmanned Aerial Vehicles (UAVs) or 'drones'

Writing in 2003, just two years after 9/11, and at the height of the Iran and Afghanistan Wars when targeted killings by Unmanned Aerial Vehicles (UAVs), or 'drones' as they are now more commonly known, was front-page news, Professor of International Relations at John Hopkins University, Stephen R. David, suggested that the definition of targeted killing should be:

> "*…the intentional slaying of a specific alleged terrorist or group of alleged terrorists undertaken with explicit governmental approval when they cannot be arrested using reasonable means*"[29].

[29] Stephen R. David, 'Israel's Policy of Targeted Killing' (2003) *Ethics and International Affairs* 17(1) 111-126 March 2003

While this definition allows for the narrowing of the target to 'specific terrorist groups', or even 'alleged terrorists', if we take the Professor's definition at face value, then it pre-supposes that targeted killing is an 'accepted', or even 'acceptable' part of *any* State policy provided it is approved at '*some level*' – assuming that that approval is '*explicit*'. But what approval? And at what level? Where, and from whom would such an 'explicit' approval come from – i.e. who are the approvers, and to whom do they answer? We can guess at 'Executive Authority', but none of this is explained or answered, merely hinted at. Moreover, dismissing alternative methods of arrest simply because they are unavailable through 'reasonable means', is no legal defence under IHL[30]. For a start, how would '*reasonable means*' be legally determined? And to what lengths should a State go, trying to exact the arrest of a wanted individual, before resorting to targeted killing?

If it were the case that States could act without recourse to other methods of arrest – 'reasonable means' aside – then *any* State, *any* government, *anywhere* on the planet could claim that they had simply exhausted 'all reasonable means of arrest', and then resort to the 'only other option' available to them – assassination through targeted killing. As such, targeted killing could be used by any State as part of an open policy for the assassination or removal of *any* unwanted individual (or individuals), provided they fall into the category of terrorist or alleged terrorist, and that arresting them in some other way was not an option[31]. Would that be an acceptable policy? Most people would probably think not[32].

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[30] Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) *European Journal of International Law* 26(1) 109-138, Spring 2015
[31] Mary Ellen O'Connell, 'The Resort to Drones under International Law' (2011) *Denver Journal of International Law and Policy* 39(2) 585-593
[32] House of Lords House of Commons Joint Committee on Human Rights, '*The Government's Policy on the use of drones for Targeted Killing*' Second Report of Session 2015-2016, HL Paper 141, HC 574

Back in 2003, with the lack of qualified information or a better definition, scholars, academics and the legal community had struggled to find a concise way to describe the use of targeted killing; but five years later, in his 2008 book: '*Targeted Killing in International Law*'[33], Professor Nils Melzer, made another attempt to extend the definition:

> "*…the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them*"[34].

Serving for twelve years as Legal Advisor to the International Committee of the Red Cross (ICRC)[35], Professor Melzer has, since 2016, been UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[36]. Hence you could be forgiven for thinking that *his* definition – if anybody's – could, and indeed would go some way towards satisfying the requirements of the international legal community – even if it is somewhat coldly defined. However, this is not the case[37]. Much re-quoted and argued over ever since publication, as with Professor David in 2003, Melzer had coined such a

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(gov.uk 2018) <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf> accessed 22 January 2018

[33] Nils Melzer, *Targeted Killing in International Law* (1st edn, Oxford University Press, 2008)

[34] ibid

[35] International Committee of the Red Cross, '*Interpretive Guidance on the Notion of Direct Participation in Hostilities under Humanitarian Law – 21 December 2010*' (icrc.org, 2017) < https://www.icrc.org/en/publication/0990-interpretive-guidance-notion-direct-participation-hostilities-under-international> accessed 13 December 2017

[36] United Nations Human Rights: Office of the High Commissioner, '*Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*' (unchr.org, 2017) < http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/NilsMelzer.aspx> accessed 13 December 2017

[37] Marcus Gunneflo, *Targeted Killing: A Legal and Political History* (1st edn, Cambridge University Press, 2016)

broad (and cold) definition that yet again it left the public somewhat perplexed as to its actual meaning… and the media unsatisfied as to a suitable definition[38].

Professor Melzer suggests once more that targeted killing is (to some extent at least), an accepted, even 'normal' policy – just another part of the arsenal of any given State for them to use as they see fit. This is quite clearly a definition intolerable and unsupportable to the international legal community.[39] The Melzer definition would infer that simply because the target is not in the 'physical custody' of the State, then the use of targeted killing is acceptable[40]. But is this the case? If, as he advocates, a targeted killing may be carried out on 'any subject [*any person*] of international law', then there is bound to be a huge fuss kicked-up in the media, political and legal communities every time it is employed – after all, the person on the end of that targeted killing could be… anyone.

To me, the answer remains simple enough – *any* subject of international law can be 'you' or 'me', or indeed… *anybody*; if States can target 'anybody' in this way then such a policy, such a weapon, and its use without proper recourse to scrutiny and authorisation *cannot* be acceptable in our society. The State could quite literally kill any person that they want to[41]. Media and political attention would automatically be polarized – and, of course, as a consequence, legal questions arising from the use of targeted killing by the State – any

[38] Marcus Gunneflo, *Targeted Killing: A Legal and Political History* (1st edn, Cambridge University Press, 2016)
[39] Professor Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions – Study on Targeted Killing, 28 May 2010 UN Doc A/HRC/14/24/Add.6* (un.org, 2017) <http://undocs.org/A/HRC/14/24/Add.6> accessed 12 December 2017
[40] Nils Melzer, *Targeted Killing in International Law* (1st edn, Oxford University Press, 2008)
[41] Mary Ellen O'Connell, 'The Resort to Drones under International Law' (2011) *Denver Journal of International Law and Policy* 39(2) 585-593

State – are brought to the fore[42]. Targeted killing is simply *not* an accepted norm… or at least, it isn't yet!

With the search for an acceptable legal definition still high on the agenda[43], academics looked further into the arguments both for and against the use of targeted killing in contemporary IHL. Perhaps the closest we have come yet to a definition (one which might be acceptable to the international legal community) was suggested two years later in May 2010, by Australian International Law Scholar and Human Rights Practioner, Professor Philip Alston. In his report[44] to the UN he defines targeted killing as:

> "*…the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organised armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator*"[45].

Holding a number of senior appointments over the past three decades, including UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions from 2004 until 2010, and (since 2014), UN Special Rapporteur on Extreme Poverty and Human Rights[46], Professor Alston goes on to say:

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[42] Christopher C. Joyner and Anthony C. Arend, 'Anticipatory Humanitarian Intervention: An Emerging Legal Norm (1999) *United States Air Force Association Journal of Legal Studies* 10(27) 32-47, 1999/2000
[43] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) *The European Journal of International Law* 16(2) 171-212, 2005
[44] Professor Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions – Study on Targeted Killing, 28 May 2010 UN Doc A/HRC/14/24/Add.6* (un.org, 2017) <http://undocs.org/A/HRC/14/24/Add.6> accessed 12 December 2017
[45] ibid
[46] United Nations Human Rights: Office of the High Commissioner, '*Special Rapporteur on Extreme Poverty and Human Rights*' (unchr.org, 2017)

> "*…in recent years, a few States have adopted policies that permit the use of targeted killings, including in the territories of other States. Such policies are often justified as a necessary and legitimate response to 'terrorism' and 'asymmetric warfare', but have had the very problematic effect of blurring and expanding the boundaries of the applicable legal frameworks*"[47].

And it is this very deliberate '*blurring and expanding the boundaries of the applicable legal frameworks*' that is at the heart of the legal question surrounding not only the 'definition' of, but critically also the 'justification' of targeted killing. The blurring process serves only to placate those States who already use targeted killing as a weapon. With little or no legal definition, they need not concern themselves (for the time being at least) with legal ramifications in respect of using targeted killing[48]. Why? Because no such ramifications yet exist.

Obviously, it is in the interests of these States that any definition of targeted killing remain 'blurred' for as long as possible, and while the international legal community cannot agree upon a definition, no legal framework can be properly enforced. No justification is therefore necessary, and those governments can simply ride out any temporary 'media storm' giving away little or no explanation for their use of targeted killing or, at best, mollify it through some vague reference to the use of 'necessary security measures'[49].

<http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx> accessed 12 December 2017

[47] ibid

[48] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) *The European Journal of International Law* 16(2) 171-212, 2005

[49] ibid

As with the use of any force in an armed conflict, the legality of that use depends, to a greater extent, upon its conformity with the principles of IHL – the three overriding principles of which are: distinction, necessity and proportionality. While in theory the same is true for the use of targeted killing, because there is no definition for 'targeted killing', the current justification in respect of IHL used by States is, at the very least 'questionable', and at worst quite probably illegal[50].

Under the current circumstances then, these deliberately 'muddied waters' cannot hope to produce a clear, agreed upon legal definition – one which would, at the very least, serve the needs of the international legal community. If ever there was any doubt as to why we need a clear definition, then that doubt is now gone. Only then, within the constraints of an agreed definition could the LOAC applicable to the use of targeted killing be determined, understood and thence correctly applied[51]. For the time being at least, it seems that no legal *justification* can exist without an accepted *definition* of what is targeted killing[52]. All of which means that we neatly find ourselves back again with the issues of how to justify anticipated self-defence in the name of the security of the State[53].

Unfortunately, there remains vital, unanswered questions which bring into doubt the cogency of each of the published definitions I have mentioned above. So much so, that

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[50] Natalino Ronzitti, 'The Expanding Law of Self-Defence' (2006) *Journal of Conflict and Security Law* 11(1) 343-351
[51] Sascha-Dominik Bachmann, 'Targeted Killings: Contemporary Challenges, Risks and Opportunities' (2013) *Journal of Conflict and Security Law* 18(2) 259-288, 2013
[52] Nils Melzer, *Targeted Killing in International Law* (1st edn, Oxford University Press, 2008)
[53] Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) *European Journal of International Law* 26(1) 109-138, Spring 2015

regardless of the portfolio, international respect for, and experience of their learned authors, they endure at the very root of the problem in defining 'targeted killing'.

The legal question, it seems to me, is therefore not so much one of 'definition' *per se*, but of the search for 'justification' in using such a method, leading to legitimisation. From the search for the one, we may yet come to the answer for the other.

1.2 Justification of targeted killing by States

Undoubtedly this perplexing question of trying to define exactly what '*targeted killing*' is, will remain a challenge to both academics and media alike for some time to come, if only because, as we have seen, such blurred boundaries preclude an agreeable legal definition from being reached at the moment[54]. While the question of definition is vital for any international legal framework to be established, it is the justification issues which are at a more critical stage as these revolve around the question of its use – i.e. whether or not the weapon should be used at all? For the time being then, let us leave behind the matter of 'definition', and look at the somewhat different issues required for the 'justification' of the use of such a weapon – the most obvious and immediate considerations for which must come from the LOAC.

[54] Jeremy Rabkin and John Yoo, *Striking Power: How Cyber, Robots, and Space Weapons Change the Rules for War* (1st edn, Encounter, 2017)

The central tenet in international law is the legal regulation of the use of force. The nature, content and effectiveness of this area of international law mirrors, much more clearly than any other branch, the very character of international law[55]. The '*bellum justum'* doctrine – the idea of a '*just*' war – which originated in the Middle Ages, legitimised the resort to violence in international law as a procedure of self-help, but, *only* if certain criteria were met relating to a belligerent's authority to make war, its objectives and its intent[56]. The paradigm of this (known as the '*doctrine of double effect*'[57]) is that:

> "*Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now, moral acts take their species according to what is intended and not according to what is beside the intention*"[58]

Basically, the legitimate authority's power to decide when, where and how to wage war.

The laws concerning the conduct of war – the '*jus in bello'* – apply from the very moment a state of armed conflict exists between the protagonists[59]. That conflict can of course be anything from an international battle between States, or, a non-international armed skirmish between a State and a non-State armed group such as the United States and al-Qaeda (where the existence of an armed conflict has been accepted, but *only* when the violence reached a significant threshold[60]). In any given conflict, once a certain threshold has been reached, the LOAC applies – even in situations where the overall legality of the

[55] Rein Müllerson, 'Jus ad Bellum and International Terrorism' (2002) *Israel Yearbook on Human Rights* 32(1) 1-52, 2002
[56] Leo van den Hole, 'Anticipatory Self-Defence Under International Law' (2003) *American University International Law Review* 19(1) Article 4, 69-106, 2003
[57] Laurie Calhoun, *We Kill Because We Can: From Soldiering To Assassination In The Drone Age* (1st edn, Zed Books, 2015)
[58] Quote: St. Thomas Aquinas; medieval scholar who articulated the idea of the doctrine of double effect
[59] Oscar Schachter, *International Law in Theory and Practice* (2nd edn, Martin Nijhoff Publishers, 1991)
[60] Antonio Cassese, *International Law* (2nd edn, Oxford University Press, 2004)

use of interstate force – the '*jus ad bellum'* – is questionable[61]. That means in cases where legitimate self-defence is doubtful[62].

Whenever *any* level of interstate aggression happens, the vast majority of the world's nations routinely club together and make it a priority to automatically condemn it as illegal. It's been well established since 9/11, that decision-makers from those States who have actually been subjected to serious terrorist attacks, often think the 'war on terror' justifies the actions that they take in the name of the defence of their State and its people – even if such actions are totally inconsistent with normal standards of human rights and IHL[63].

However, isn't it interesting to note that when considering issues such as the use of force for humanitarian intervention, those *very same* States who were so quick to condemn, adopt very different practices, and very conflicting views[64]. Using force for humanitarian intervention is somehow 'excluded' from the justification process – or, is it that's what we're supposed to believe? Diametrically, human rights NGOs, as well as some human rights institutions and politicians from States who have (thus far) been free of terror attacks, spend as much time and energy arguing that there's 'great danger' in 'overreaction to terror', and sometimes offer what have been termed:

> "*…nice recipes, that have little practical relevance*"[65].

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[61] Rein Müllerson, 'Jus ad Bellum and International Terrorism' (2002) *Israel Yearbook on Human Rights* 32(1) 1-52, 2002
[62] ibid
[63] Laurie Calhoun, *We Kill Because We Can: From Soldiering To Assassination In The Drone Age* (1st edn, Zed Books, 2015)
[64] Anne Slaughter and William Burke-White, 'An International Constitutional Moment' (2002) *Harvard International Law Journal* 43(1) 1-21, Winter 2002
[65] Rein Müllerson, 'Jus ad Bellum and International Terrorism' (2002) *Israel Yearbook on Human Rights* 32(1) 1-52, 2002

In other words, they want to be seen to be reacting – to do anything else but react would be tantamount to an endorsement of terrorist activities – but their solution (in the absence of any better ideas) is to take a somewhat liberal approach, always using contemporary methods – debate, concession and conciliation – in fact *anything*, rather than resorting to technology-driven, long-distance assassination as the *only* solution to the problem[66]. It's exactly this level of hypocrisy that encourages the international legal community to demand justification for the use of targeted killing.

Of course, both arguments have some merit – the use of drones for targeted killing has had some success in eliminating the hierarchy of the world's terrorist organisations[67], of that there is no doubt[68]. The opposite argument is that is serves no purpose, for, as soon as one terrorist leader is eliminated, another one pops up and the problem doesn't go away, it simply re-invents itself somewhere else[69].

Those who advocate the use of targeted killing say that the ends justifies the means – a legal argument which has never been particularly convincing in any court[70]. Those against

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[66] Laurie Calhoun, *We Kill Because We Can: From Soldiering To Assassination In The Drone Age* (1st edn, Zed Books, 2015)

[67] According to data compiled by the New America Foundation, since Obama has been in the White House, U.S. drones have killed an estimated 3,300 al Qaeda, Taliban, and other jihadist operatives in Pakistan and Yemen. That number includes over 50 senior leaders of al Qaeda and the Taliban—top figures who are not easily replaced. Source: New America Foundation (newamerica.org 2018) <https://www.newamerica.org/in-depth/world-of-drones/> accessed 2 January 2018

[68] Jack McDonald, *Enemies Known and Unknown: Targeted Killing in America's Transnational War* (1st edn, Hurst & Co, 2017)

[69] ibid

[70] Sascha-Dominik Bachmann, 'Targeted Killings: Contemporary Challenges, Risks and Opportunities' (2013) *Journal of Conflict and Security Law* 18(2) 259-288, 2013

its use argue – quite correctly – that if targeted killing is not subject to some level of legal justification then where are the boundaries? When does a State stop killing *only* those persons who have been identified as terrorists, and starts killing innocent civilians, or, perhaps even more frightening, starts 'removing' people simply because they are a political or military or social embarrassment to that government?[71]

In the years after 9/11, some of the world's worst despots… eventually… succumbed to the long arm of international justice (Saddam Hussein, Muammar Gaddafi and even Osama Bin Laden) without the use of targeted killing [though there is some argument that the killing of OBL was a 'targeted killing][72]. At the same time, official U.S. figures released in July 2016, show that under President Barrack Obama (2009-2015), some 2,372-2,581 'hierarchy terrorist combatants' were killed as a result of some 563 drone strikes on Pakistan, Somalia, Yemen and Afghanistan (as compared with just 57 such strikes under President George W. Bush, from 2001-2008)[73]. Which is the more efficient method?

Celebrated with awesome, and impressive video footage showing missiles literally flying in through the windows of a house, or targeting a single car on a highway obliterating an identified terrorist target, the cold men of the military assure the public and media that before drones make these 'surgical strikes' (as they're known), *every* effort is taken to ensure absolute accuracy with these weapons. It all 'looks' *very* efficient.

[71] Leo van den Hole, 'Anticipatory Self-Defence Under International Law' (2003) *American University International Law Review* 19(1) Article 4, 69-106, 2003
[72] A.V.P. Rogers and Dominick McGoldrick, Assassination and Targeted Killing: The Killing of Osama Bin Laden (2011) *The International and Comparative Law Quarterly* 60(3) 778-788, July 2011
[73] Jack McDonald, *Enemies Known and Unknown: Targeted Killing in America's Transnational War* (1st edn, Hurst & Co, 2017)

	Pakistan (June 2004 to date)	Yemen (Nov 2002 to date)*	Somalia (Jan 2007 to date)*	Afghanistan (Jan 2015 to date)*
US drone strikes	419	102-122	15-19	29-61
Total reported killed	2,467-3,976	471-700	25-108	308-677
Civilians reported killed	423-965	65-97	0-5	14-39
Children reported killed	172-207	8-9	0	0-20
Reported injured	1,152-1,731	92-221	2-7	18-31

* Bureau of Investigative Journalism estimates are based predominantly on open source information like media reports. Sometimes it is not possible to reconcile details in different reports which is why ranges are used for the record of casualties and, in the case of Yemen and Somalia, strike tallies.

Figure 2. Recorded US Drone Strikes 2002-2015: Source: The Bureau of Investigative Journalism[74]

The official civilian death count [according to the same source and for the same period] is 64-116; but estimates from bodies outside the White House (such as The Bureau of Investigative Journalism), place the real figure much, much higher (possibly as high as 5,000-10,000)[75]. Since 2002, at least eight American civilians have been killed in US drone strikes in Pakistan and Yemen[76], only one of whom – Anwar al-Awlaki, a US-born cleric accused of serving as a senior al-Qaeda operative in Yemen – was targeted intentionally[77].

[74] Jack McDonald, *Enemies Known and Unknown: Targeted Killing in America's Transnational War* (1st edn, Hurst & Co, 2017)

[75] Jack Serle and Abigail Fielding-Smith, '*US Drone Wars in Pakistan, Afghanistan, Yemen and Somalia: Monthly Report July 2015*' (thebureauinvestigates.com 2018) <https://www.thebureauinvestigates.com/stories/2015-08-03/us-drone-wars-in-pakistan-afghanistan-yemen-and-somalia-monthly-report-july-2015> accessed 3 February 2018

[76] Source: Department of Justice White Paper: 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operation Leader of al-Qaeda or Associated Force' U.S. Attorney General, Eric Holder, June 2010 – See *Appendix III*

[77] Greg Miller, 'Hostages' deaths raise wider questions about Drone strikes' civilian toll' *The Washington Post* (Washington, 23 April 2015) <https://www.washingtonpost.com/world/national-security/hostages-deaths-raise-wider-questions-about-drone-strikes-civilian-toll/2015/04/23/c70568f6-e9e5-11e4-9767-6276fc9b0ada_story.html?tid=a_mcntx> accessed 22 January 2018

So, which method is more efficient – the long, patient wait for a regime to fall, or the surgical removal of a threat as soon as it's discovered? The technology employed in the latest generation of drones is impressive to say the least and, compared to the 'carpet bombing' tactics employed in wars of the 20th Century, the 'surgical strike' capability of the drone is accurate beyond belief; but it isn't as infallible as those who use these drones would like us to believe. Like all weapons with destructive capability, there will always a price to pay, some level of 'collateral damage', and in this case it is usually civilians. So, the question arises can such civilian losses ever be legally justified and/or tolerated? The principle of proportionality requires complex analysis, but I would suggest that any such 'collateral damage' is *already in direct contravention* of Article 51(5) of Additional Protocol I, and possibly also Article 57 as well.

In today's media-driven, world of 'sound-bites', we're all 'victims' of the 'level' and 'quality' of information that we are given. For most of the citizens of those States who currently operate drones – even the dissenting voices in the media – with the LOAC in place, they can 'probably live with the fact' that their government uses targeted killing as a weapon, acting on *their* behalf, and for the 'general security of *their* State'. Many will think it not only correct, but absolutely necessary. In any case, they would certainly rather endorse surgical strikes, than risk the alternative: waiting, while questions of legality and justification are debated, and in the meantime suffer other attacks like those of 9/11[78]. But is that 'correctness' in fact a 'justification' in legal terms for the use of targeted killing?

[78] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) *The European Journal of International Law* 16(2) 171-212, 2005

The question is a paradox, for here the issues become far more complex: on the one hand all States have the right to self-defence, and, as we've seen, the rules of engagement are at best 'woolly' on anticipatory self-defence[79]. Then the use of targeted killing by that State probably *would have* the necessary justification – at least in the eyes of the populous. And, indeed, in most States who currently employ targeted killing with drones, these are exactly the circumstances in which they operate and 'justify' their use[80]. On the other hand, if it were as simple as that, then it begs the question why is there always such an outcry in the media, not to mention the huge fuss in the international legal community every time targeted killing is used by States to remove such persons?

War has to some extent always involved the intentional, pre-meditated killing of groups of people. Drone warfare – it could be argued – is innovative in that it involves the intentional, pre-meditated killing of *specific* groups of people, *one* by *one*[81]. Which is correct? The answer, it seems to me, is simple enough, and presents itself thus: targeted killing is *not* acceptable at *any* level of approval when it is committed by a State in the name of the people of that State, unless there is an *absolute* legal justification for its use.

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[79] Major Joshua E. Kastenberg, 'The use of conventional international law in combating terrorism: a Maginot Line for modern civilisation employing the principles of anticipatory self-defence and pre-emption' (2004) *Air Force Law Review* 55(1) 87-125, January 2004
[80] Jeremy Rabkin and John Yoo, *Striking Power: How Cyber, Robots, and Space Weapons Change the Rules for War* (1st edn, Encounter, 2017)
[81] Laurie Calhoun, *We Kill Because We Can: From Soldiering To Assassination In The Drone Age* (1st edn, Zed Books, 2015)

Chapter Two

The Human Element

"THE WORLD OF THE FUTURE WILL BE AN EVEN MORE DEMANDING STRUGGLE AGAINST THE LIMITATIONS OF OUR INTELLIGENCE, NOT A COMFORTABLE HAMMOCK IN WHICH WE CAN LIE DOWN TO BE WAITED UPON BY OUR ROBOT SLAVES"

Norbert Weiner, The Use Of Human Beings: Cybernetics & Society, 1950

2.1. Technology takes us to places we may not want to go

As shown, much of the current debate about the use of targeted killing is quite correctly addressed at the issues of legal definition and justification. The (initially covert) introduction of drones for targeted killing in the early 1990s came as something of a shock when it was revealed that pilotless aircraft, capable of staying aloft for days at a time, were being operated remotely from bases half-a-world away, and yet still had the capability to scan the ground below, identify a target and then deliver a lethal blow without so much as the target ever knowing the drone was even there. It all seemed like science fiction.

Recently however, science-fact has raised the 'high bar' has to a new and frightening level of technology, one that not only questions the legal, moral and ethical use of such weapons,

but which may well have devastating consequences for the future of warfare, and potentially even our very existence on this planet.

The very latest drones – many of which remain totally secret – have the added ability of artificial intelligence (AI); and, while they are at the time of writing being very closely studied and their full capability still evaluated, their actual use in the field of combat has (other than in testing programs) to some extent been proportionately stalled: this is the role of final decision making: i.e. whose finger should ultimately be on the 'fire' button? As things currently stand, *all* the decision making processes in respect of the use of drones for targeted killing are conducted by teams of people who, at various levels of security clearance and authority, make moment-to-moment decisions about whether or not to fire upon a target, once that target has been identified.

Much like the dilemma that occupied submarine Captain's in the 1980s and 1990s, the 'final decision' to commence an attack upon an identified enemy should always – and currently does – remain with those persons *who have the authority* to permit such an action to take place. It may be the President or the Prime Minister of a State who passes that authority down from themselves, through the military chain of command; but in *all* cases that decision is made by a human being – known as the 'Human-In-The-Loop' or 'HITL'[82].

The *new* moral question we are faced with today differs however, from the submarine Captain of the past in that *he* could 'override' any given command to fire with an

[82] James Foy, 'Taking the Human out of Humanitarian Law' (2004) *Dalhousie Journal of Legal Studies* 23(1) 47-70, Spring 2014

independent authority already held by him (as a consequence of his position as Captain). Effectively, this meant that the decision to fire a weapon (or, perhaps more importantly the decision 'not to fire') which had been given to him by the leader of his State, could be countermanded by that Captain, and he was therefore free to make his own, independent decision to fire upon the enemy. As soon as this 'loophole' in the decision-to-fire process was discovered, the Captain's independent authority was immediately rescinded[83], and today the final decision rests *exclusively* with Executive authority[84]. But, again, in all cases, that decision is being made by a human being.

Now, AI technology has allowed the modified drones to utilise the data given to them, and thereafter to determine, completely independently of any HITL intervention, whether or not the target is viable, legitimate and consequently whether or not to open fire upon that target. They're known as 'Lethal Autonomous Weapons Systems' (LAWS) – an ironic name, considering that no laws yet exist to regulate these weapons or their use in combat[85]; indeed, most States who have these types of new weapon have, until very recently, denied they even exist[86]. Unsurprisingly therefore, there is no international consensus on what constitutes LAWS, (also known as a fully autonomous weapons system), and without going into all the issues surround legal definition once again, suffice to say that they have been described as 'systems that can target and fire alone without meaningful human control'[87].

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[83] Paul Joseph and Simon Rosenblum (editors), *Search for Sanity: The Politics of Nuclear Weapons and Disarmament* (1st edn, South End Press, 1984)
[84] Eric Gartzke and Jon R. Lindsay, 'Thermonuclear Cyberwar' (2017) *Journal of Cybersecurity* 3(1) 37-48, 14 February 2017
[85] Aiden Warren and Alek Hillas, 'Lethal Autonomous Weapons Systems: Adapting to the Future of Unmanned Warfare and Unaccountable Robots' (2017) *Yale Journal of International Affairs* 12(1) 71-85, Spring 2017
[86] ibid
[87] ibid

In essence, they are machines with built-in hardware and software that allows them to function *completely independently* of humans, once they are turned on. They function through AI alone – with algorithms assessing a situational context, and determining the corresponding response[88]. The human finger has been 'taken off the trigger'. One of the worst nightmares of science fiction, has now become science fact – the world of *killer robots* is quite literally upon us[89].

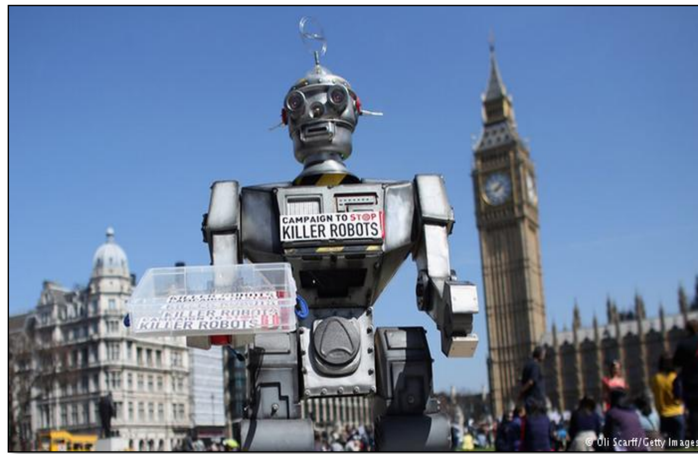

Figure 3. The age of 'killer robots' is upon us

The idea of people creating killer robots sounds like something from the pages of science fiction novels of the 1930s. However, the stark reality is these LAWS currently flying around above the world's conflict zones, already have the ability to 'decide' for themselves – without any HITL intervention whatsoever – if a target should be destroyed, and whether or not to open fire. The only reason that they don't currently do so, is that for the time being

[88] Chase Winter, '*Killer Robots: Autonomous Weapons Pose Moral Dilemma*' (dw.com 2018) <http://www.dw.com/en/killer-robots-autonomous-weapons-pose-moral-dilemma/a-41342616> accessed 12 February 2018

[89] Patrick Lin, George Bekey and Keith Abney, 'Autonomous Military Robotics: Risk, Ethics and Design' (2008) *US Department of Navy, Office of Naval Research*, Ver.1.0.9, 1-108, 20 February 2008

at least, they are restricted through a 'failsafe' condition that we humans have put in place i.e. we have taken that authority away from the LAWS, and disengaged their ability to determine to fire without HITL intervention[90].

The UN Convention on Certain Conventional Weapons (CCW), which concluded at Geneva as long ago as 1980, resulted in a treaty[91] seeking to prohibit or restrict the use of certain conventional weapons considered excessively injurious, or, whose effects are indiscriminate. Foreseeing that legal restrictions would count for nothing if LAWS were allowed to proliferate, CCW campaigners are now making a case at the UN for a global prohibition on them, warning:

> "*[LAWS] will permit armed conflict to be fought at a scale greater than ever, and at timescales faster than humans can comprehend. The deadly consequence of this is that machines – not people – will determine who lives and dies*"[92]

In July 2015, a group of more than 1000 of the world's top scientists, philosophers and technology experts, including Stephen Hawking, Elon Musk from SpaceX and Apple co-founder Steve Wozniak issued an Open Letter[93] with an even sterner portent against a

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[90] Jeremy Rabkin and John Yoo, *Striking Power: How Cyber, Robots, and Space Weapons Change the Rules for War* (1st edn, Encounter, 2017)
[91] United Nations, 'Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III), Geneva, 10 October 1980' UN Treaty Series Vol.1342, p.137, C.N.356.1981 Entry into force: 2 December 1983, No.22495 (un.org 2018) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-2&chapter=26&clang=_en> accessed 22 December 2017
[92] Chase Winter, '*Killer Robots: Autonomous Weapons Pose Moral Dilemma*' (dw.com 2018) <http://www.dw.com/en/killer-robots-autonomous-weapons-pose-moral-dilemma/a-41342616> accessed 12 February 2018
[93] See: *Appendix II*

global arms race of 'killer robots'[94]. Professor of Computer Science at Berkeley University, California, Stuart Russell, who has worked in AI for more than 35 years, said:

> "*…killer robots are here right now, and they need to be banned. Allowing machines to choose to kill humans would be devastating for world peace and security, and the window to ban these lethal robots is closing, fast*" [95].

At the 2017 International Joint Conference on AI, another senior robotics developer said:

> "*…unlike other potential manifestations of AI [that] remain the realm of science fiction, autonomous weapons systems… have a real potential to cause significant harm to innocent peopl*e"[96]

We've all seen the movies where things go horribly wrong and the killer robot simply can't be stopped, can't be reasoned with, where they won't ever give up until all the humans are dead: the T-800 Terminator[97], ED-209 in Robocop[98] and 'Bomb 20' in Dark Star[99]. What may have been yesterday's movie fantasy… may well be tomorrows frightening reality.

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[94] Chase Winter, '*Killer Robots: Autonomous Weapons Pose Moral Dilemma*' (dw.com 2018) <http://www.dw.com/en/killer-robots-autonomous-weapons-pose-moral-dilemma/a-41342616> accessed 12 February 2018

[95] Mike Wright, 'Killer robots are almost a reality and should be banned, warns leading AI scientist' *The Telegraph* (London, 14 November 2017) <http://www.telegraph.co.uk/technology/2017/11/14/killer-robots-almost-reality-need-banned-warns-leading-ai-scientist/> accessed 13 February 2018

[96] John Wallace, '*SciFi Eye: The disturbing future of autonomous weapons*' (theengineer.co.uk 2018) <https://www.theengineer.co.uk/autonomous-weapon-systems/> accessed 13 February 2018

[97] *The Terminator* (1984) Orion Picture

[98] *Robocop* (1987) Orion Pictures

[99] *Dark Star* (1974) Bryanston Pictures

2.2 *Targeted Killing – is there really a moral dilemma to address?*

On 20 February 2018, the AI Ethics Research Group released a disturbing report entitled 'The Malicious Use of Artificial Intelligence'[100], which warns that AI is ripe for exploitation by rogue states, criminals and terrorists. The report calls for four high-level recommendations:

1. Policymakers should collaborate closely with technical researchers to investigate, prevent, and mitigate potential malicious uses of AI;
2. Researchers and engineers in AI should take the dual-use nature of their work seriously, allowing misuse-related considerations to influence research priorities and norms, and proactively reaching out to relevant actors when harmful applications are foreseeable;
3. Best practices should be identified in research areas with more mature methods for addressing dual-use concerns, such as computer security, and imported where applicable to the case of AI; and
4. Actively seek to expand the range of stakeholders and domain experts involved in discussions of these challenges[101].

Shahar Avin, from Cambridge University's Centre for the Study of Existential Risk, explained that the report concentrates on areas of AI that are available now or likely to be available within five years, rather than looking to the distant future. Particularly worrying

[100] Artificial Intelligence Ethics Research Group Report, '*The Malicious Use of Artificial Intelligence – February 2018*' (maliciousaireport.com 2018) <https://img1.wsimg.com/blobby/go/3d82daa4-97fe-4096-9c6b-376b92c619de/downloads/1c6q2kc4v_50335.pdf> accessed 23 February 2018
[101] ibid

is the new area of reinforcement learning where AI is trained to superhuman levels of intelligence, but without human examples or guidance[102]. Miles Brundage, Research Fellow at Oxford University's Future of Humanity Institute, said:

> "*AI will alter the landscape of risk for citizens, organisations and States - whether its criminals training machines to hack or 'phish' at human levels of performance, or privacy-eliminating surveillance, profiling and repression – the full range of impacts on security is vast*"[103]

If we, here in the UK, decide as citizens of a State (actively advocating the use of LAWS in counter-terrorism), that there is a moral high-ground which we must now populate in order to bring about the attention needed to regulate targeted killing, then firstly, on what grounds should that moral message be presented? Do we simply argue, as the above report would have us believe, that circumstances are now spiralling out of hand so quickly that if we don't do something soon, then control will be wrestled from our hands where it might not be possible to re-gain it in the future? Certainly that would be one approach; and while the well-meaning scientists and researchers in the AI industry pay homage to the idea, does their conscience prevent them – *actually prevent them* – from working on their current projects? I haven't yet heard of *any* AI and robotics researchers 'downing tools'.

But, if that *is* the case, then does our moral dilemma *only* extend to an initial outcry of shock and disbelief at the technology being presented to us – as it always has throughout

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[102] Jane Wakefield, '*AI ripe for exploitation, experts warn*' (bbc.co.uk 21 February 2018) <http://www.bbc.co.uk/news/technology-43127533> accessed 22 February 2018
[103] ibid

the millennia when there are significant advances in weaponry? The tools may have changed, but aren't LAWS just an extension of the bow and arrow, or the cannon, or the machine-gun… or the thermonuclear bomb? What's the difference? They all kill people – each in turn more efficiently than the last. I don't recall J. Robert Oppenheimer and the scientists at Los Alamos all refusing to build the Atomic bomb in 1945 – *because it offended their morality*! It seems to me that the *real* issue that most of us have with LAWS, lays with that final decision-making factor… the artificial intelligence within that gives a machine the capability to kill a human… without HITL intervention.

If we unleash that currently withheld option for LAWS to determine for themselves whether or not to open fire on a target, then surely *all* the rules, *all* the treaties, *all* the laws in the world will mean and count for nothing. Empowering a machine to kill a human being somehow violates human dignity – isn't that the case? Now, *that* definitely seems closer to the real issue to me; but is that really it? As an example, let us suppose for a moment that a drone, flying around above your head makes a decision to target *your* mother, and HITL-free acts upon its decision to open fire – killing your mother… only to discover later that a mistake was made in the identification process, and actually your mother *wasn't* the underground al-Qaeda operative being sought, but an innocent civilian – now dead. Who would you blame? Who are you going to prosecute? What use will all the legal power in the world be to you when the culprit, the murderer of your mother is… *a machine*?

To say that LAWS violate human dignity because machines shouldn't be able to make those decisions, is utter hypocrisy! With that logic, human dignity has been violated since

man invented *any* lethal weapon: the atom bomb, the airplane, the gun, the arrow. Each of these weapons removes the human from directly killing another human, and, while it's true that a human being makes the decision to employ them, there's no way of knowing for sure if others will be hurt or killed when they're employed. In that sense, the only way to restore 'human dignity' in warfare would be to forego using *any* weapons at all, and return to a time when combatants only killed using hand-to-hand combat[104].

This may all seem like some mad futuristic argument at the moment, a kind of crazy science-fiction gone wrong, but we all know that machines are not infallible, and that all the 'fail-safe' and 'backup systems' in the world do not preclude computers from crashing, and electronics to falter. What if something were to go wrong in a targeted killing scenario… but no human was there to decide what to do… only a robot? Now *that's* what really frightens us about LAWS and brings us to the question of ethics and morality.

Too far-fetched? Possibly. But consider this… there is some evidence[105] (albeit unconfirmed, but, intriguingly not denied) to show that Israel *may* already have committed the unthinkable – they *may* have already given LAWS the go-ahead to determine whether to open fire[106]. Israel of course… says nothing[107]. The IDF[108] and IAF[109] neither confirm

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[104] Major Amanda Del Re, 'Lethal Autonomous Weapons: Take The Human Out Of The Loop' (2017) *Journal US Naval War College, Newport, Rhode Island* DOD Directive 5230.24, 1-41, 16 June 2017
[105] Michael Carl Haas and Sophie-Charlotte Fischer, 'The evolution of targeted killing practices: Autonomous weapons, future conflict and the international order' (2017) *Contemporary Security Policy* 38(2) 281-306, 2017
[106] Major Amanda Del Re, 'Lethal Autonomous Weapons: Take The Human Out Of The Loop' (2017) *Journal US Naval War College, Newport, Rhode Island* DOD Directive 5230.24, 1-41, 16 June 2017
[107] Yaakov Katz and Amir Bohbot, *The Weapons Wizards: How Israel Became a High-Tech Military Superpower* (1st edn, St. Martin's Press, 2017)
[108] Israeli Defence Force
[109] Israeli Air Force

nor deny anything, as has been their policy for years now[110]. We do know however, that they have *far* more technologically advanced LAWS than any other nation on earth at the moment[111], and it may well be that Israel – not the US, or Russia or China – is in fact the most powerful, technologically-advanced, military superpower on the planet[112]. And, simply because of the fragile nature of their homeland security, Israel is unlikely to dwell for very long over any moral or ethical decisions whether or not to use *its* military advantage; they'll simply use that advantage – no matter how controversial or possibly illegal it may prove to be – just in order to survive[113].

2.3 The historic use of targeted killing – has anything really changed today?

Over many centuries, targeted killing has proved to be an effective and useful weapon in a State's arsenal. The use of LAWS for targeted killing is only the very latest manifestation in a long line of ingenious different methods that have been employed over the years, all designed to ensure the ultimate 'removal' of the target in question. The early Egyptians, the Persians, the Greeks, and later the Romans all engaged in such killings so that by the fourth Century BC, it was commonplace for States

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[110] Stephen R. David, 'Israel's Policy of Targeted Killing' (2003) *Ethics & International Affairs* 17(1) 111-126, 2003
[111] Edmund F. Byrne, 'Making Drones To Kill Civilians: Is It Ethical?' (2018) *Journal of Business Ethics* 147(1) 81-93, Spring 2018
[112] Yaakov Katz, 'Why Israel has the most technologically advanced military on earth' *The New York Post* (New York, 29 January 2017) <https://nypost.com/2017/01/29/why-israel-has-the-most-technologically-advanced-military-on-earth/> accessed 18 February 2018
[113] Edmund F. Byrne, 'Making Drones To Kill Civilians: Is It Ethical?' (2018) *Journal of Business Ethics* 147(1) 81-93, Spring 2018

to solve their problems by simply ‘eliminating’ an enemy’s leadership, using individualised targeting[114]. Because traditionally, this targeting of specific persons wasn’t limited to the context of a prototypical war, such killings were on the whole an accepted (or at least acceptable), part of the development of a civilisation, sometimes agued as necessary and therefore largely uncontroversial[115]. Today, we would call this a *jus cogens* [compelling law] norm.

There were however, limits on what was considered permissible. One of the lingering questions from ancient history was whether targeted killing could ever be used outside of an armed conflict, thereby blurring the lines drawn between peace and war, and between illegal assassination and lawful killing?[116] We get our word ‘assassination’ from the ‘Assassins’, an eleventh-Century warlike sect, mostly hidden away in mountain fortresses in Arabia, blindly obeying a mysterious leader known as the ‘Old Man of the Mountain’[117]. Over the next two centuries, returning Crusaders brought back terrifying stories – adding sensational new details to the legend of the Assassins – of whom it was said were experts in the craft of murder, trained from childhood to use stealth and deceit, and were so devoted to their leader they would sacrifice their lives for his slightest whim. Their fanatical determination grew into legend, and from these the word ‘assassin’ entered European languages as a common noun meaning ‘a murderer who kills for politics or money’[118].

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[114] Mark V. Vlasic, ‘Assassination and Targeted Killing – A Historical and Post Bin Laden Legal Analysis’ (2012) *Georgetown Journal of International Law* 43(2) 259-271

[115] Jordan J. Paust, ‘Permissible Self-Defence Targeting and the Death of Bin Laden’ (2011) *Denver Journal of International Law and Policy* 39(1) 569-573

[116] Uri Freidman, ‘Targeted Killings: A Short History’ (foreignpolicy.com, 13 August 2012) <http://foreignpolicy.com/2012/08/13/targeted-killings-a-short-history/> accessed 17 December 2017

[117] Bernard Lewis, *The Assassins: A Radical Sect in Islam* (3rd edn, Oxford University Press, 1967)

[118] ibid

Over successive centuries, many States have resorted to 'assassins' to solve their problems through the covert, surgical removal of unwanted political or military rivals outside of an armed conflict. Certainly there is evidence that the Serbian government sanctioned, and possibly even armed the members of the ultra-nationalist organisation known as 'the Black Hand'. They included Gavrilo Princip, the man who assassinated Archduke Franz Ferdinand in Sarajevo in June 1914 – the heir-presumptive to the Austro-Hungarian Empire –an action which ultimately led to the First World War[119].

During the early stages of World War Two, the British hatched any number of plans to assassinate Adolf Hitler[120]. However, as the war progressed it became obvious that the Führer's military strategy was inept at best and often bizarre in the extreme, so that as his decision-making became more and more advantageous to the allies, so any thought of killing him was put on hold[121]. More dangerous by far was Hitler's potential successor, Reinhard Heydrich, the Reichsprotektor of Bohemia and Moravia (Czechoslovakia). A truly evil man, Heydrich was the consummate Nazi, having been responsible for organising '*Kristallnacht*', the formation of the '*Einsatzgruppen*' murder squads in Easter Europe and hosting the Wannsee Conference on the '*Final Solution*'[122].

After several aborted attempts, a group of Czech-born, British-trained assassins finally succeeded in killing Heydrich in Prague in June 1942, in what can *only* be described as a

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[119] Robin Doak, *Assassination at Sarajevo: The Spark that started World War I* (1st edn, Compass, 2008)
[120] Mark Seaman, *Operation Foxley: The British Plan To Kill Hitler* (1st edn, PRO Publications 1998)
[121] ibid
[122] Robert Gerwarth, *Hitler's Hangman: The Life of Heydrich* (2nd edn, Yale University Press, 2012)

targeted killing[123]. The Czech government (in exile in London), supported by the British, justified[124] the killing as a necessary act of war[125] and as such its legality was never brought into question. However, in direct retaliation for Heydrich, the Germans rounded up and murdered every citizen of the town of Lidice – some 340 men, women and children – while the town itself was raised to the ground and removed from all maps[126].

Figure 4. The targeted killing of SS-Obergruppenführer Reinhard Heydrich, Prague, June 1942

The concept of government or State-sanctioned operatives roaming the world with a 'licence to kill' was partly the inspiration for the post-war writings of Ian Fleming – the creator of James Bond – who had himself been recruited (under the codename '17F'[127]), at the beginning of the Second World War, working at the Admiralty in London as Personal Assistant to the Director of Naval Intelligence[128]. Fleming had ample material to draw upon

[123] Callum MacDonald, *The Killing Of Reinhard Heydrich: The SS 'Butcher Of Prague'* (1st edn, DaCapo Press, 1998)
[124] Tracy A. Burns, The Assassination of Reinhard Heydrich (private-prague-guide.com, 2018) https://www.private-prague-guide.com/article/assassination-of-reinhard-heydrich/ accessed 13 January 2018
[125] ibid
[126] John Fortinbras, 'The Truth About Lidice' (1946) *The War Illustrated* 10(242) 355-356 27 September 2946
[127] Donald McCormick, *17F: The life of Ian Fleming* (1st edn, Peter Owen Publishers, 1993)
[128] ibid

for the character of ‘Bond’ as he was a Liaison Officer with other sections of the government's secret wartime administration, such as the Secret Intelligence Service, the Political Warfare Executive, the Special Operations Executive (SOE), the Joint Intelligence Committee and Prime Minister Winston Churchill’s staff.

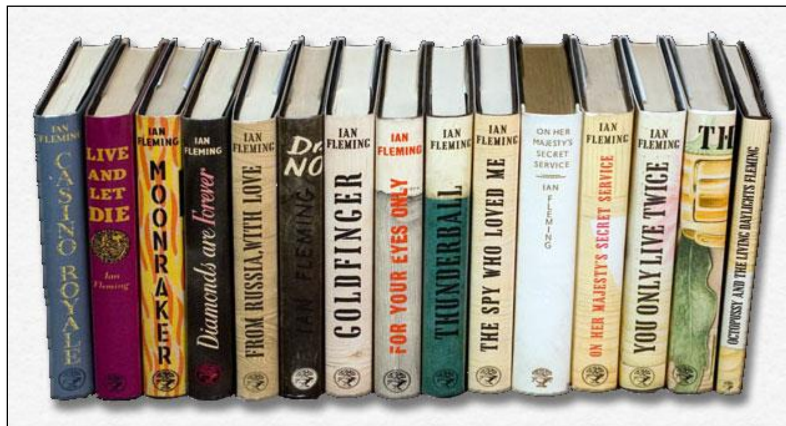

Figure 5. Much of Ian Flemings’ alter ego ‘James Bond’ is associated with targeted killing

In spite of the best efforts of authors like Fleming and Robert Ludlum to keep characters like James Bond and Jason Bourne contained within the realms of fiction, the concept of shadowy persons operating with a ‘licence to kill’ is not a new one. So, while the ‘character’ of Bond and his official or government sectioned ‘00’ rating through MI6 (United Kingdom Secret Intelligence Service) is indeed pure fiction, actual targeted killings take place all over the world – a fact that cannot, and indeed has not been denied.

In 1978, Bulgarian dissident, Georgi Markov, was working in London as a broadcaster and journalist for the BBC World Service. Openly critical of the Communist-backed Bulgarian regime in his home country (from which he has defected ten years earlier), on 7 September Markov was waiting at a bus stop near Waterloo Bridge on his way to work, when he felt

a sharp pain on the back of his right thigh. He looked behind him and saw a man picking up an umbrella off of the ground. The man hurriedly crossed to the other side of the street and got in a taxi which then drove away. Markov quickly developed a fever, and within four days he was dead[129].

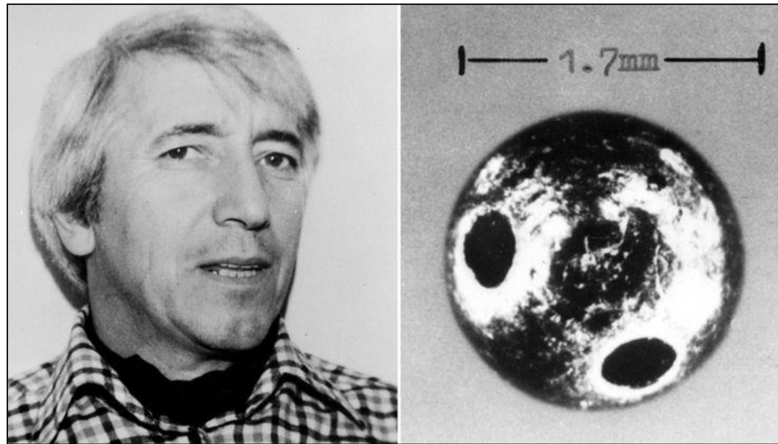

Figure 6. Bulgarian dissident, Georgi Markov was killed with a micro-pellet fired from an umbrella

An autopsy discovered that he had been assassinated via a micro-engineered pellet containing 0.2mg of the deadly poison *ricin*, fired from the umbrella. Known as the 'Umbrella Murder', the weapon had been wielded by someone associated with the Bulgarian Secret Police (claimed to be Francesco Gullino, codenamed '*Piccadilly*'), who, it has been speculated, asked the KGB for help[130].

In Gibraltar in March 1988, three members of the Provisional IRA, suspected of planning a bombing campaign, were killed in broad daylight on the forecourt of a petrol station. No

[129] Megan Friedman, '*Georgi Markov and the Umbrella Gun*' (time.com 2018) <http://content.time.com/time/specials/packages/article/0,28804,1964842_1964844_1964790,00.html> accessed 20 December 2017
[130] John Emsley, *Molecules of Murder: Criminal Molecules and Classic Murders* (1st edn, Royal Society of Chemistry, 2008)

weapons or detonators were found on the dead men. They'd been tracked by a specially trained squad of British SAS soldiers in a targeted killing called '*Operation Flavius*'[131]. A month and a half after the shootings, an extremely controversial ITV documentary '*Death on the Rock*' was broadcast, in which the possibility was put forward that the IRA members had been unlawfully killed, and that the SAS had a 'shoot on sight' policy[132].

Figure 7. SAS soldiers surround the dead bodies of three suspected IRA bombers, Gibraltar, March 1988

Several British newspapers described the programme as: '*trial by television*', but, as a result, an inquest[133] into their deaths was opened in September 1988. Each of the SAS soldiers testified that they had *only* opened fire in the belief that the suspected bombers were reaching for weapons or a remote detonator. Many of the civilian eyewitnesses who gave evidence were 'discovered' by *Death on the Rock*, and gave varying accounts of

[131] Nick Holdsworth and Robert Mendick, 'Prime suspect in Georgi Markov 'Umbrella Murder' tracked down to Austria' *The Telegraph* (London, 23 March 2013) <http://www.telegraph.co.uk/news/uknews/crime/9949856/Prime-suspect-in-Georgi-Markov-umbrella-poison-murder-tracked-down-to-Austria.html> accessed 14 January 2018
[132] David Elstein, 'Death on the Rock: 21 years on and still the official version lives on' (opendemocracy.net, 2009) <https://www.opendemocracy.net/ourkingdom/david-elstein/death-on-rock-21-years-later-and-still-official-version-lives-on> accessed 12 January 2018
[133] Lord Windlesham and Richard Rampton, *The Windlesham/Rampton Report on Death on the Rock* (1st edn, Faber & Faber, 1989)

seeing the three men shot without warning, with their hands up, or while on the ground. Astonishingly, in 1989, the inquest jury returned a verdict of 'lawful killing'[134]. Dissatisfied, the families of the dead men took the case to the European Court of Human Rights, and in 1995 it delivered its judgement[135] finding the operation *had* been in violation of Article 2 ECHR1950 as the authorities had failed to arrest the suspects at the border, and this, combined with information given to the soldiers, meant the use of lethal force was 'almost inevitable'. The decision was a landmark case in the use of force by a State[136].

Perhaps the most 'Bond-like' targeted killing of recent times is the assassination of Russian dissident intelligence officer, Alexander Litvinenko in London in 2006. An outspoken critic of President Vladimir Putin during his six years in Britain, Litvinenko wrote two books accusing the Russian Secret Services of staging terrorist acts in an effort to bring Putin to power. He also accused Putin of ordering the murder of the Russian journalist Anna Politkovskaya in Moscow on 7 October 2006[137].

On 1 November 2006, Litvinenko suddenly fell ill and was hospitalised in what was established as a case of acute poisoning by radioactive Polonium-210 which resulted in his death on 23 November[138]. The events leading up to this are a matter of controversy,

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[134] Lord Windlesham and Richard Rampton, *The Windlesham/Rampton Report on Death on the Rock* (1st edn, Faber & Faber, 1989)
[135] *McCann & Others V The United Kingdom* Series A, No.324: ECHR Application No.18984/91 (1995)
[136] ibid
[137] Andrew E. Kramer, 'More of Kremlin's opponents are ending up dead' *The New York Times* (New York, 20 August 2016) <https://www.nytimes.com/2016/08/21/world/europe/moscow-kremlin-silence-critics-poison.html> accessed 13 February 2018
[138] Sir Robert Owen, '*The Litvinenko Inquiry: Report into the death of Alexander Litvinenko – January 2016*' (Crown Copyright, HC695, 21 January 2016) <http://webarchive.nationalarchives.gov.uk/20160613090324/https://www.litvinenkoinquiry.org/report> accessed 13 February 2018

spawning numerous theories relating to his poisoning and death, but it seems that the Polonium-210 was introduced to his body… in a cup of tea[139].

Figure 8. Alexander Litvinenko lays dying after having radioactive Polonium-210 slipped into his tea

Each of these examples from history is undoubtedly a 'targeted killing', and while we may find them fascinating and astounding, disturbing and possibly even abhorrent, the real question we have to ask ourselves remains: is there *anything* fundamentally different – from an ethical or moral standpoint – about the historic targeted killings of Archduke Ferdinand, SS Reichsprotektor, Reinhard Heydrich, Georgi Markov, the IRA Bombers in Gibraltar or Alexander Litvinenko, and today's world with drones flying around our skies targeting individuals? I think on the whole, the answer has to be there probably isn't.

In each of the above, the circumstances were all *very* different. And the 'killing' was conducted under very differing situations: Heydrich, for example, was killed during a time

[139] Neil Tweedie, 'The assassination of Alexander Litvinenko: 20 things about his death we have learned this week' *The Telegraph* (London, 31 January 2015) <http://www.telegraph.co.uk/news/uknews/law-and-order/11381789/The-assassination-of-Alexander-Litvinenko-20-things-about-his-death-we-have-learned-this-week.html> accessed 13 February 2018

of war. So was this a targeted killing (as we understand it today), or simply an assassination necessary to remove an evil Nazi who might one day potentially succeed Adolf Hitler? The answer is probably a bit of both. Nevertheless, each case does carry the same, chilling set of criteria in that an individual, or individuals, having been targeted and, with approval and sanction from government or State (at least at some level) were assassinated. Is that really any different to a drone, flying above an identified al-Qaeda operative, hiding out somewhere in Afghanistan, and launching a missile? I think not.

What then *is* the difference? And why do we, in the 21st Century find the killing of individuals sanctioned by the State, whether it be through a James Bond-like 'licence to kill', or by drones flying above us, so very absorbing and indeed terrifying? The former Head of MI6, Sir Richard Billing Dearlove testified in court during the 2007/2008 'Death of Diana Princess of Wales Investigations'[140] that the:

> *"…legitimacy of deadly force usage from country to country is controlled through statute, particular and direct executive orders, common law, or the generally accepted rules of engagement [LOAC], and that it does therefore provide a 'licence to kill', subject to a 'Class Seven Authorisation' from the country in question*"[141].

This truly staggering admission resulted in the then Labour government under Tony Blair, quickly rallying around to try and defuse the embarrassing situation, and 'water-down' Sir

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[140] Louise Radnofsky, 'MI6 did not assassinate Diana, ex-chief tells inquest' *The Guardian* (London, 20 February 2008) <https://www.theguardian.com/uk/2008/feb/20/diana.monarchy> accessed 13 February 2018

[141] Nick Allen, 'Ex-MI6 Head: We did not assassinate Diana' *The Telegraph* (London, 20 February 2008) <http://www.telegraph.co.uk/news/uknews/1579233/Ex-MI6-head-We-did-not-assassinate-Diana.html> accessed 13 February 2018

Richards' unusually frank and open comments[142]. In a statement to the House of Commons, the then Defence Secretary, the Rt. Hon. Des Browne MP, explained that Sir Richards' comments were:

> "*…lamentable, and negative in the extreme, opening up as they do an unnecessary can-of-worms at a time when this country is embroiled in a series of as-yet, on-going inquiries into accusations against the special security forces of the nation*"[143]

It was a time when the UK government were reeling from the successive findings of a number of inquiries into failed covert security operations, all of which seemingly had some substance to them, but each of which had gone badly wrong[144]. These had culminated in the killing of Jean Charles de Menezes in July 2005, a 27-year old Brazilian citizen who, in the aftermath of the 7/7 and 21/7 bombings in London, had been wrongly identified by armed officers of the Metropolitan Police, suspecting him to be another suicide bomber[145].

Why then do we find the murder of Jean Charles de Menezes so very troubling? It certainly doesn't appear to have the usual attributes of a targeted killing. Is it because he was incorrectly identified by the Police who, according the later inquiry shouted *no* warnings, made *no* genuine attempt to confirm him as a suspect, but simply jumped on this man and

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[142] Rebecca English, 'Ex-MI6 chief admits agents do have a licence to kill, but denies executing Diana' *The Daily Mail* (London, 20 February 2008) <http://www.dailymail.co.uk/news/article-516712/Ex-MI6-chief-admits-agents-licence-kill-denies-executing-Diana.html> accessed 2 January 2018
[143] David Omand, *Securing the State: Intelligence and Security* (1st edn, C. Hurst & Co, 2011)
[144] Juliana Van Hoeven, 'Counter-Terrorism Measures and International Humanitarian Law: A Case Study of the 'Troubles' in Northern Ireland' (2016) *University of Pennsylvania Journal of International Law* 37(3) 1091-1153, Art. 6, 2016
[145] Cian O'Driscoll, 'Fear and Trust: The Shooting of Jean Charles de Menezes and the War on Terror' (2008) *Millennium Journal of International Studies* 36(2) 339-360, 2008

then shot him *seven times* in the head at point blank range?[146] Or is it perhaps that we could all imagine ourselves in the same situation – after all, Menezes was just another man, quietly going about his daily business in London, only to die in a hail of bullets, probably completely unaware of what it was he was supposed to have done?

Figure 9. The body of Jean Charles de Menezes, shot dead in the London Underground

Again, I think that it's a bit of both: Jean Charles de Menezes could have been anybody – he could've been… *me*. He could've been… *you*. And *that's* what is so frightening about this kind of attack[147]. In July 2006, the Crown Prosecution Service found insufficient evidence to prosecute *any* of the named Police officers (a ruling later upheld[148] at the European Court of Human Rights[149]), although a criminal prosecution of the Commissioner of the Metropolitan Police in his official capacity on behalf of his Police Force was brought

[146] Charlotte Gill, 'Police shot Menezes in head seven times 'without shouting any warning' witness says' *The Daily Mail* (London, 31 October 2008) <http://www.dailymail.co.uk/news/article-1081796/Police-shot-Menezes-head-seven-times-shouting-warning-say-witnesses.html> accessed 30 December 2017
[147] James Sturcke, 'Met Police guilty over De Menezes shooting' *The Guardian* (London, 1 November 2007) <https://www.theguardian.com/uk/2007/nov/01/menezes.jamessturcke2> accessed 29 December 2017
[148] *Case of Armani de Silva v The United Kingdom* ECHR Application No.5878/08 30 March 2016
[149] Adam Withnall, 'Police Officers who shot dead Jean Charles de Menezes 'should not be prosecuted' rules ECHR' *The Independent* (London, 30 March 2016) <http://www.independent.co.uk/news/uk/home-news/jean-charles-de-menezes-ruling-european-court-of-human-rights-rejects-call-to-prosecute-police-a6959666.html> accessed 29 December 2017

under the Health and Safety at Work etc. Act 1974, on the basis of a failure of the duty of care due to Menezes. The Commissioner was found guilty, and *his office* was fined![150]

In November 2000, Israel became the first State to openly acknowledge that it was operating a policy of targeted killing (as part of its State-sanctioned, counter-terrorist attacks against the militants of the al-Aqsa Intifada)[151]. Since its creation in 1948, Israel has regularly resorted to the covert use of targeted killing to 'remove' its' many enemies. These include Egyptian Intelligence Officers infiltrating the Israeli-Egyptian border region in 1950s, German scientists helping Nasser's Egypt to develop long-range missiles for use against Israel in the 1960s, the members of Black September following the Munich Olympics massacre in 1972, and prominent leaders of the PLO, Hezbollah and Hamas in the 1980s and 1990s. It's even been rumoured that Israel had a targeted killing operation ready to go at a moment's notice against Saddam Hussein during the Gulf War[152].

As part of its 'war on terrorism' following the 9/11 attacks, the US government announced that they too:

> "*…were adopting methods of targeted killing in an effort to counter terrorism and insurgency both domestically and internationally*"[153].

[150] Independent Police Complaints Commission Report, 'Stockwell Two: An investigation into complaints about the Metropolitan Police Service's handling of public statements following the shooting of Jean Charles de Menezes on 22 July 2005' <http://policeauthority.org/metropolitan/downloads/scrutinites/stockwell/ipcc-two.pdf> accessed 31 December 2017

[151] W. Jason Fisher, 'Targeted Killing, Norms, and International Law' (2007) *Columbia Journal of Transnational Law* 45(3) 711-758

[152] Gabriella Blum and Philip Heymann, 'Law and Policy of Targeted Killings' (2010) *Harvard National Security Journal* 1(2) 145-170 27 June 2010

[153] Mark David Maxwell, 'Targeted Killing, the Law and Terrorists: Feeling Safe?' (2012) *Joint Force Quarterly* 64(1) 122-130

Not long after this, Russia then Pakistan and then the United Kingdom, followed by Germany, Switzerland and France all reported that targeted killing would be an 'accepted part' of future policy in both domestic and international law enforcement, and used as a 'method of last resort' particularly in the situations of hostage-taking and against suspected suicide bombers[154].

As I have shown, throughout history mankind has – *at every possible instance* – taken advantage of *any* slight improvement in weaponry to kill his fellow man. So with the huge advances in lethal potential that LAWS promise, it's hardly surprising that we find the idea of their use so unnerving. Equally, it is just as unsurprising that all commanders in the field of combat will want to make use of that advantage in order to win. If history teaches us anything at all in respect of war, then it shows that we learn absolutely nothing from studying our past. The historic mistakes that we made 'yesterday' will therefore most probably count for nothing 'today'.

I believe that the moral and ethical questions which we are facing in respect of LAWS will therefore serve *no restriction whatsoever* upon their further development, manufacture or eventual deployment. It is inevitable.

[154] Nils Melzer, *Targeted Killing in International Law* (1st edn, Oxford University Press, 2008)

Chapter Three

Targeted Killing As A Norm

"Drones that dropped drones, that released drones

that then silently killed people"

Brett Arquette, *Operation Hail Storm*, 2016

3.1 Differentiating combatants – a very real predicament

Modern warfare is a very much more complicated matter than it used to be, even from as little as half a century ago – now, in the 21st Century, the 'enemy' no longer wears a different uniform to the 'good guys', thus distinguishing themselves and presenting a nice, obvious target on the field of battle! Instead, he… or she, dresses just like you and I. They look like *us*, talk like us, act like *us* – they may even be '*us*'[155]. The 'field of battle' has also changed from those faraway places that you've never heard of, and now includes *everywhere*, from towns, to cities, to modes of transport and *every* part of modern society – we live in an age of terrorism where the 'bad guys' can be anybody from your friend to your neighbour, from your brother to your work colleague – and they live in the shadows, evolving over time, changing with the wind,

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[155] Matthew Evangelista and Henry Shue (eds.), *The American Way of Bombing: Changing Ethical and Legal Norms from Flying Fortresses to Drones* (1st edn, Cornell University Press, 2014)

working towards unknown intentions which are often not manifested until the very moment of action[156].

As the war on terrorism has progressed over the last five decades, so the very distinctions between war, peace and armed conflict have become a material part, vital in understanding the constitution of, and interpretation therein, of political and religious violence[157]. On 10 June 1998, Osama Bin Laden (OBL) said:

> "*Through history, America has not been known to differentiate between the military and the civilians or between men and women or adults and children. Those who threw atomic bombs and used the weapons of mass destruction against Nagasaki and Hiroshima were the Americans. Can the bombs differentiate between military and women and infants and children? …We do not have to differentiate between military or civilian. As far as we are concerned, they are all targets, and this is what the fatwah says*"[158].

In so stating, OBL exposed everybody, military and civilian alike to the same potential threat. Perhaps for the first time in the long history of global conflict, all human beings were to be considered 'legitimate' targets[159].

On the battlefield of the 21st Century there is no doubt that a proudly worn dress uniform can quickly become a burden and may even be counterproductive in military terms. As a

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[156] Toni Pfanner, 'Military Uniforms and the Law of War' (2004) *International Review of The Red Cross* 86(853) 93-124 March 2004
[157] Jack McDonald, *Enemies Known and Unknown: Targeted Killing in America's Transnational War* (1st edn, Hurst & Co, 2017)
[158] John Miller, interview with Osama Bin Laden for ABC News Corp
[159] Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) *European Journal of International Law* 26(1) 109-138, Spring 2015

consequence, distinctive signs (particularly of rank) may be reduced to a minimum or even dispensed with entirely to reduce the visibility of combatants thus enhancing operational flexibility, especially in covert operations. In guerrilla warfare, combatants often don't display *any* distinctive signs, but deliberately seek to blend in with the rest of the population in order to avoid identification.

However, the very principle of distinction is one of the foundations upon which the laws and customs of war rest. Article 48[160] of the 1977 Additional Protocol I to the Third Geneva Conventions 1949, explicitly defines the principle for the first time:

> "*In order to ensure respect for and protection of the civilian population and civilian objects, the parties to a conflict are required at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly must conduct their operations only against military objectives*"[161]

Of course, killing, and the very act of killing, is an essential part of war and armed conflict. Therefore, the existence of an armed conflict will most probably be a key factor in determining the rights and wrongs of any acts of violence committed during that combat[162]. Historically, the principle of wearing a military uniform as such a distinction between combatants and civilians, has determined the legal ramifications engendered. Under the

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[160] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 8 June 1977: Article 48 <https://ihl-databases.icrc.org/ihl/WebART/380-600055?OpenDocument> accessed 20 January 2018

[161] Third Geneva Convention 1949, Additional Protocol I, Article 48, 8 January 1977

[162] Rosa Brooks, 'Drones and the International Rule of Law' (2013) *Journal of Ethics and International Affairs* 28(1) 83-114, 2013

LOAC, the killing of combatants wearing military uniform distinguished them as *lawful* combatants when engaged in military hostilities, and subsequently as prisoners of war in case of capture. This question arose in relation to captured Taliban soldiers who were denied prisoner of war status by the United States during the war in Afghanistan, *inter alia* on the basis that they were not wearing uniforms[163].

What then, from a legal perspective, *is* ‘a time of peace’? This perplexing question has resulted in many of the justifications used by States for targeted killings in the years since 9/11[164]. Certainly the United States sees itself as being ‘at war’ with al-Qaeda, but is that in fact the case? And, even if a *de facto* state of war exists between the United States and al-Qaeda, is that enough in itself to justify the many uses of targeted killing?[165] There’s no doubt that at some level an armed conflict exists between al-Qaeda and a host of States, as the many attacks around the globe have shown, but al-Qaeda is a shadowy, organisation (not to mention hard to distinguish or discover) and certainly not a State-like entity such as the United States or Britain. Can such a conflict be considered a war? In all probability, it cannot.

War is very much a ‘state of mind’ in the human consciousness. What may well have been a ‘war’ for President George W. Bush, and President Obama, was – and still is – a struggle for religious and political freedom over Western oppression, for the fighters of al-Qaeda.

[163] Jack McDonald, *Enemies Known and Unknown: Targeted Killing in America’s Transnational War* (1st edn, Hurst & Co, 2017)
[164] Sean D. Murphy, ‘Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the UN Charter’ (2002) *Harvard International Law Journal* 43(1) 41-51, Winter 2002
[165] Rosa Brooks, ‘Drones and the International Rule of Law’ (2013) *Journal of Ethics and International Affairs* 28(1) 83-114, 2013

The current UN Charter paradigm concerning the use of force can be called 'normative positivism'[166][167] since it's based on the consent of States, and not upon what States (or at least most of them) do in practice. It is 'normative' since it's not premised on the actual practice of States, and it is 'positivist' since it doesn't make distinctions between just, unjust, more justified, and less justified causes for the use of force[168]. When the UN Charter was drafted, humanitarian crises or even civil wars were not considered to constitute threats to international peace and security, the 'magical talisman' for UN Security Council approval[169]. Today we know this to be very different, and actually treat humanitarian crisis as conflict conditions capable of developing very quickly into escalated armed situations requiring careful management.

In war, people used to wear uniforms to distinguish one another. They would abide by the LOAC, and act in a manner which seems to us in the 21st Century to be archaic in the extreme. And yet, in spite of every level of deceit thrown at our armed forces by the

[166] Legal positivism is a school of thought of analytical jurisprudence, largely developed by eighteenth- and nineteenth-century legal thinkers such as Jeremy Bentham and John Austin. The most prominent legal positivist writing in English has been H. L. A. Hart, who in 1958 found common usages of 'positivism' as applied to law to include the contentions that: 1) Laws are commands of human beings; 2) There is no necessary connection between law and morals – that is, between law as it is and as it ought to be; 3) Analysis (or study of the meaning) of legal concepts is worthwhile and is to be distinguished from history or sociology of law, as well as from criticism or appraisal of law, for example with regard to its moral value or to its social aims or functions; 4) A legal system is a closed, logical system in which correct decisions can be deduced from predetermined legal rules without reference to social considerations; and 5) Moral judgments, unlike statements of fact, cannot be established or defended by rational argument, evidence, or proof ('noncognitivism' in ethics). Historically, legal positivism sits in opposition to natural law theories of jurisprudence, with particular disagreement surrounding the natural lawyer's claim that there is a necessary connection between law and morality.
[167] Deryck Beyleveld and Roger Brownsword, 'Normative Positivism: The Mirage of the Middle Way (1989) *Oxford Journal of Legal Studies* 9(4) 463-512, 1989
[168] Rein Müllerson, 'Jus ad Bellum and International Terrorism' (2002) *Israel Yearbook on Human Rights* 32(1) 1-52, 2002
[169] Sean D. Murphy, 'Terrorism and the Concept of 'Armed Attack' in Article 51 of the UN Charter' (2002) *Harvard International Law Journal* 43(1) 41-51, Winter 2002

terrorists, we still have some sense of expectation that the forces acting in our name – those who protect and defend our security – will do so in accordance with the rules: that they will wear uniforms, and distinguish the combatants from the civilians. It is for these reasons that we reel from the uncontrolled use of LAWS in combat, without HITL… as they seem to set a standard of deceit in conflict beyond which most of us are prepared to sanction.

3.2 Holding back the tide – the inevitable move towards a jus cogens 'Norm'

What then of the future? Will the use of HITL-free LAWS eventually become just another *jus cogens* 'norm'? If we leave aside tricky questions of the legal 'definition' and 'justification' of targeted killing, and try to move away from the ethical and moral dilemma that surrounds the actual use of LAWS free from HITL intervention, then currently, in order to be deemed legitimate under international law, a targeted killing using drones *must* successfully pass through a series of interlocking 'gates' which guide policy decisions[170]. As we've seen, debates have arisen over many aspects of targeted killing, with particular focus being whether or not the United States and Israel have been conducting drone operations in conformity with international law[171]. The use of so called 'signature strikes' against suspected terrorists has been singled

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[170] Jeremy Rabkin and John Yoo, *Striking Power: How Cyber, Robots, and Space Weapons Change the Rules for War* (1st edn, Encounter, 2017)

[171] Milena Sterio, 'The United States' use of Drones in the War on Terror: The (il)legality of Targeted Killing under International Law' (2012) *Case Western Reserve Journal of International Law* 45(1) 197-214, Fall 2012

out by critics who allege that some targets have been neither combatants in a war zone nor positively identified as al Qaeda or other terrorist leaders, and point to the growing numbers of civilian casualties as positive proof of this. Worries have also arisen that other countries might use armed drones in secret, without clear legal foundation, and against those not clearly identified as combatants in a conflict[172].

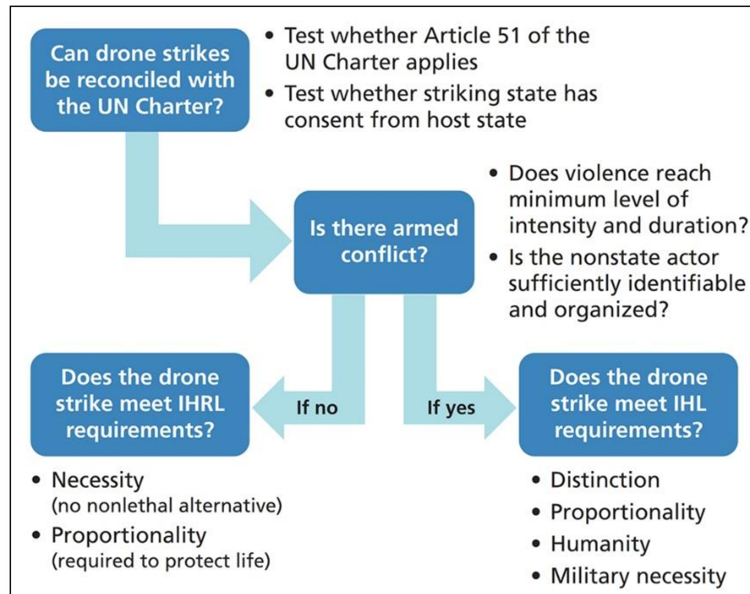

Figure 10. Charting International Law through Policy 'gates' for decisions on drone strikes and targeted killing: source: Rand Corporation[173]

Scarier still, the terrorists are using the same technology to develop their own attack drones. They may be crude at the moment, but then terrorists don't have to abide by considerations such as *jus cogens* norms, do they? The obligations deriving from *jus cogens* norms are not like usual contractual obligations, but are obligations owed to the international community

[172] Lynn E. Davis, Michael McNerney and Michael D. Greenberg, '*Clarifying the Rules for Targeted Killing: An Analytical Framework for Policies Involving Long-Range Armed Drones*' (rand.org 2018) <https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1610/RAND_RR1610.pdf> accessed 4 January 2018
[173] ibid

as a whole – these are, in fact, a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances. By virtue of Article 103[174] of the Charter of the United Nations, a *jus cogens* norm prevails over an obligation arising out of *any* other international agreement[175]. In other words, a violation of a *jus cogens* norm breaches the essential interests of every State; therefore, not only the directly injured State but also any other State is entitled to invoke the responsibility of the violating State[176].

In the weeks following the aftermath of 9/11, a frantic level of political manoeuvring culminated in the 2001 Congressional Resolution[177] granted[178] the President of the United States the right to use:

> "*…all necessary and appropriate force*" [against the 9/11 attackers][179].

No measure was to be ruled out, no measure was to be overlooked – surely, at the very least an incitement to breach pre-existing *jus cogens* Norms. However, the words 'all necessary and appropriate' gave President George W. Bush exactly what he had wanted – Congressional approval to do pretty much anything he liked[180], just so long as he:

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[174] Charter of the United Nations, Chapter XVI – Miscellaneous Provisions – Article 103' <http://legal.un.org/repertory/art103.shtml> accessed 20 January 2018

[175] Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation under the UN Charter' (2005) *Santa Clara Journal of International Law* 3(1) 72-98, Article 3, 2005

[176] Annie Bird, 'Third-State Responsibility for Human Rights Violations' (2011) *European Journal of International Law* 21(4) 883-900, Autumn 2011

[177] See: *Appendix I*

[178] 107th Congress, Public Law 40, 'Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States' PL107-40 (18 September 2001), S.J. Res. 23 <https://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm> accessed 3 January 2018

[179] Juliet Lapidos, '*Are Assassinations Ever Legal?*' (slate.com, 2018) <http://www.slate.com/articles/news_and_politics/explainer/2009/07/are_assassinations_ever_legal.html> accessed 3 January 2018

[180] Milena Sterio, 'The United States' use of Drones in the War on Terror: The (il)legality of Targeted Killing under International Law' (2012) *Case Western Reserve Journal of International Law* 45(1) 197-214, Fall 2012

"*...hunt down and find those folks who committed [that] act*".[181]

The paper's basic contention was that the government has the authority to carry out the extrajudicial killing of an American citizen or a citizen of any other State for that matter if:

> "*...an informed, high-level official deems him to present a 'continuing' threat to the country*"[182].

This sweeping authority is said to exist *even* if the threat presented isn't imminent in any ordinary sense of that word; and, even more worrying from a legal standpoint, if the 'target' has never been charged with a crime or informed of the allegations against him. The strike can in fact be carried out even if the target is not located anywhere near an actual battlefield. The white paper purports to recognise 'some limits' on the authority it sets out, but the limits are so vague and elastic that they will be easily manipulated[183].

Why then, is this so important? Well, if a State kills a person in time of peace for no apparent reason, then, as already discussed, we are deeply offended by this and it's generally held that such an act is a misdeed against society in general[184]. Such a killing could be of anybody – you or me – the State has acted with no apparent reason against an innocent person in time of peace, and we deem this to be incorrect; and rightly so, as this is a total violation of that person's right to life – something most of us have a very strong

[181] President George W. Bush: speech given at Emma E. Booker Elementary School in Sarasota, Florida after hearing of the 9/11 attacks upon the United States, 11 September 2001
[182] Jameel Jaffer, '*The Justice Department's White Paper on Targeted Killing – 4 February 2013*' (aclu.org 2018) <https://www.aclu.org/blog/national-security/justice-departments-white-paper-targeted-killing> accessed 15 January 2018
[183] David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) *European Journal of International Law* 16(2) 171-212, Spring 2005
[184] William E. Conklin, 'The Peremptory Norms of the International Community' (2012) *European Journal of International Law* 23(3) 837-891, Autumn 2012

concept of, and hold very dear. Such a disproportionate act cannot and should not go unpunished, and the law allows that a person(s) found responsible for such acts be held accountable for their actions – even if such an act was done in the 'name of the State'[185].

The *prima facie* question in relation to anticipatory self-defence is therefore whether or not Article 51 has become the *only* source of a State's right to self-defence? If this is the case, does it therefore limit that State to considering whether Article 51 permits anticipatory self-defence, or, whether it only imposes *certain conditions* for the application of a pre-existing, inherent right of self-defence?[186] If that's not the case, then what other options are available to ensure a State's right to self-defence under international law – i.e. does this include targeted killing?[187] Certainly that's the interpretation put upon the matter by Israel, the United States and the majority of the other States currently using targeted killing[188].

Taken at face value, the language of Article 51 suggests that a State *can* respond with extraterritorial military action when targeted by violent aggression[189]. Furthermore, the expression 'armed attack', while ambiguous, implies perpetrators bearing weapons that carry out violent strikes against the State and/or its citizens[190]. However, the critical element to consider is that such attacks – *even* if they have risen to a level of salience such

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[185] Nils Melzer, *Targeted Killing in International Law* (1st edn, Oxford University Press, 2008)
[186] Leo van den Hole, 'Anticipatory Self-Defence Under International Law' (2003) *American University International Law Review* 19(1) Article 4, 69-106, 2003
[187] ibid
[188] Sean D. Murphy, 'Terrorism and the Concept of 'Armed Attack' in Article 51 of the UN Charter' (2002) *Harvard International Law Journal* 43(1) 41-51, Winter 2002
[189] Major Amanda Del Re, 'Lethal Autonomous Weapons: Take The Human Out Of The Loop' (2017) *Journal US Naval War College, Newport, Rhode Island* DOD Directive 5230.24, 1-41, 16 June 2017
[190] Professor Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions – Study on Targeted Killing, 28 May 2010 UN Doc A/HRC/14/24/Add.6* (un.org, 2017) <http://undocs.org/A/HRC/14/24/Add.6> accessed 12 December 2017

that a national self-defence response is both meaningful and appropriate – still requires a series of corresponding judgment calls that need to be made. These are required in order to determine whether Article 51 is appropriate as a justification for the use of military force under the UN Charter[191] (where one would consider, in addition to Article 51, customary international law)[192] as this would maintain that Article 51:

> "*...only highlights one form of self-defence (namely in response to an armed attack)*"

And that the right of self-defence is a pre-existing *jus cogens* norm, an inherent right recognised in customary international law[193].

Of course, one must consider the prohibition of the use of force under the UN Charter in light of other relevant provisions: e.g. how imminent and specific does an armed (terrorist) threat need to be for the target State to meet the criterion of responding in self-defence?[194] Is operational intelligence required concerning plans for a specific, future attack?[195] How much aggregation is permissible and appropriate in construing whether the nature and breadth of a terrorist threat constitutes an armed attack?[196] Who gets to make these

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[191] Daniel K. Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors' (2012) *American Journal of International Law* 106(1) 1–8, 2012
[192] Leo van den Hole, 'Anticipatory Self-Defence Under International Law' (2003) *American University International Law Review* 19(1) Article 4, 69-106, 2003
[193] Nils Melzer, *Targeted Killing in International Law* (1st edn, Oxford University Press, 2008)
[194] Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (2005) *Chatham House Journal of International Law* ILP WP 05/01, 1-70, October 2005
[195] Major Amanda Del Re, 'Lethal Autonomous Weapons: Take The Human Out Of The Loop' (2017) *Journal US Naval War College, Newport, Rhode Island* DOD Directive 5230.24, 1-41, 16 June 2017
[196] Daniel K. Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors' (2012) *American Journal of International Law* 106(1) 1–8, 2012

decisions? How much disclosure and formal oversight at the national and international levels ought to apply, for example, whether and when the Security Council is notified?[197]

All of this however, is merely 'puff', part of the ongoing arguments put up by States who have, in all probability, already decided their policy on LAWS and HITL for the forthcoming decade at least. Israel has been using what we would call 'drones' since 1969, when soldiers fitted model aircraft with lightweight video cameras, and flew them across the Egyptian and Jordan borders to spy on military movements[198]. Today, Israel's 'Harpy NG' and 'IAI Harop' are 'Fire-and-Forget' LAWS, designed to detect, attack and destroy radar emitters. They *already* have the capability to act without HITL authorisation, and may well have been used by now against Palestinian insurgents in Gaza City[199].

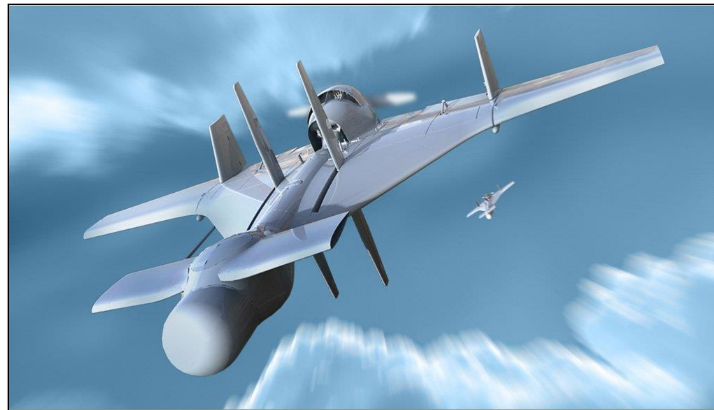

Figure 11. The latest version Israeli 'Harpy NG' is a 'fire and forget' LAWS that already has the capability to operate without HITL

[197] Sean D. Murphy, 'Terrorism and the Concept of 'Armed Attack' in Article 51 of the UN Charter' (2002) *Harvard International Law Journal* 43(1) 41-51, Winter 2002

[198] Yaakov Katz and Amir Bohbot, *The Weapons Wizards: How Israel Became a High-Tech Military Superpower* (1st edn, St. Martin's Press, 2017)

[199] Daniel Tepper, '*Israel boasts of latest drones, some used in Gaza*' (middleeasteye.net 2018) <http://www.middleeasteye.net/in-depth/features/israel-boasts-latest-drones-some-first-used-gaza-1379210706> accessed 7 February 2018

Britain's BAE Aerospace 'Taranis' is just one of a series of jet-propelled combat LAWS prototypes that can autonomously search, identify and locate enemies but currently can only engage with a target when authorised by mission command (although this option can be removed)[200]. It can also automatically defend itself against enemy aircraft[201]; but until very recently *didn't even exist*… according to the UK government![202]

Figure 12. The BAE Systems 'Taranis' attack LAWS,

which until recently didn't even exist - according to the UK government

With growing concern over the UK's rapid development of HITL-free LAWS for both our home and overseas security, the All-Party Parliamentary Group on Drones, called for a Joint Committee on Human Rights Report clarifying the UK's position on these weapons, and to what extent they shall be implemented into future UK Defence Policy. The Fourth Report of Session 2016-17, published on 12 October 2016 stated:

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[200] United Kingdom Government, Joint Committee on Human Rights, '*The Government's Policy on the Use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16; Fourth Report of Session 2016-17*' HC 747/HL 49, app. 1, 14 (UK) <http://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/747.pdf> accessed 29 January 2018

[201] 'Taranis' (baesystems.com 2018) <https://www.baesystems.com/en/product/taranis> accessed 29 January 2018

[202] David Turns, 'The United Kingdom, Unmanned Aerial Vehicles and Targeted Killing' (2017) *American Society of International Law* 21(3) 3-6, 24 February 2017

> "*The [recent report]… found that 'although the Government says that it does not have a 'targeted killing policy', it is clear that the Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes.' It also found that 'the Government's position that the Law of War applies to the use of lethal force abroad outside armed conflict, and that compliance with the Law of War satisfies any obligations which apply under Human Rights Law, is based on a misconception about the legal frameworks that apply*"[203]

In other words the UK government's position is to sit on the fence and do, and say as little as possible without actually hindering the Committee. This has been policy[204] for successive governments for decades in respect of secret weapons developments because such weapons are a vital income to the country. Like it or not, Britain and Israel lead the way in HITL-free LAWS development[205]. There's little doubt therefore that the use of 'Fire and Forget' HITL-free LAWS for targeted killing will – at some point in the future – become just another part of the regular military arsenal of States around the world in the fight against terrorism; in fact it could be argued that a *de facto* situation of that nature already exists, and that it only lacks legal definition and justification.

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[203] United Kingdom Government, Joint Committee on Human Rights, '*The Government's Policy on the Use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16; Fourth Report of Session 2016-17*' HC 747/HL 49, app. 1, 14 (UK) <http://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/747.pdf> accessed 29 January 2018

[204] David Turns, 'The United Kingdom, Unmanned Aerial Vehicles and Targeted Killing' (2017) *American Society of International Law* 21(3) 3-6, 24 February 2017

[205] Yaakov Katz and Amir Bohbot, *The Weapons Wizards: How Israel Became a High-Tech Military Superpower* (1st edn, St. Martin's Press, 2017)

We may be some way away from a *jus cogens* norm to that effect, but only because the legal community is so far behind the technological development of these weapons, that it will take some considerable time for a legal framework of any kind to be agreed upon and catch up. Will that inevitably lead to the eventual removal of the HITL element in the decision-making process of when to press the 'fire' button? Yes, I believe that it will, if it hasn't happened already, and we just don't know about it.

Conclusion

"THE BEST GOVERNMENT IS A BENEVOLENT TYRANNY,

TEMPERED BY AN OCCASIONAL ASSASSINATION"

Voltaire, 1776

The object of this research was to explore the 'three-fold' legal question of how to determine firstly what form of legal definition and justification – if any – can be attributed to so-called 'targeted killing', secondly if the removal of the human factor in the decision process to attack and kill a given target can ever be fully justified and what the legal ramifications of such a decision would be for long-term International Humanitarian Law, and thirdly, if targeted killing could ever become a Norm of International Law, acceptable as a 'weapon' of war, and justified in its use.

The first of these questions is certainly the most perplexing. There is no tangible guidance to be found within the *jus in bello*, and for that reason – if no other – there remains no possibility of a legal justification, a 'legal framework' within which IHL can bring to justice those who abuse the current *jus cogens* norms. Brought about partly by a total lack of desire on the part of those States currently using targeted killing as a policy, there is also a palpable lack of understanding of the technology and potential for these weapons by the

international legal community, not helped it is true, by the continuous blurring and expanding of the existing legal framework boundaries within which they're expected to work. The most immediate solution to this problem would be for the international legal community to work more closely with those States currently employing a policy of targeted killing using drones, so that they can agree upon a definition of targeted killing *per se*, from which a legal framework for the justification of their use in combat may be drawn up as part of IHL. I do not say that this is an easy task, in fact, everything thus far I have read would indicate quite the opposite. I merely suggest the most immediate solution.

The second question addresses the frightening prospect of HITL-free LAWS, and the moral and ethical consequences of their use in combat. At first, humans may well remain in the loop; but, as the technology progresses, human interaction with LAWS will likely decrease until humans are out of the loop altogether. As I have demonstrated, the removal of humans from the decision-making loop leads to profound concerns that LAWS will be incapable of adhering to the principles of IHL[206] as they will have to overcome issues of weak machine perception, the computational challenges of an open environment, *and* the potential of poorly constructed and written software. Their '*judgment*' must also meet the standard of a reasonable commander[207] however, as with submarine Captains of the 1980s and 1990s, when given an independent authority that can supersede the chain of command,

[206] Jeremy Rabkin and John Yoo, *Striking Power: How Cyber, Robots, and Space Weapons Change the Rules for War* (1st edn, Encounter, 2017)
[207] James Foy, 'Taking the Human out of Humanitarian Law' (2004) *Dalhousie Journal of Legal Studies* 23(1) 47-70, Spring 2014

there is always the temptation and possibility that it will be used. The use of LAWS in compliance with the principles of IHL will prove challenging at the very least, and maybe even become impossible at some point in the future.

Thirdly, I addressed the question of whether targeted killing could ever become a *jus cogens* norm under IHL. Mankind's policy of always favouring the aggressor, is a fundamental issue which the UN Charter cannot and does not address properly, and is at the root of all the issues – especially in the Middle East – where poverty, discrimination, repression, inequality and religious intolerance all contribute to the creation and sustainment of terrorism – these factors are well known and even better documented. However, equally well-demonstrated is that not all the poor and oppressed of the world are, or become, terrorists, and perhaps most interestingly of all, most of the terrorists in the world are neither at all poor, nor necessarily oppressed.

Successful States throughout the world use both criminal justice and social programs in efforts to lower the crime rate and abolish poverty. Similarly, in international society it would be inadequate for States to resort to only one category of measures to counteract terrorism[208]. Conditions conducive to terrorism have to be addressed, and terrorists and those who support them must be arrested and tried, but moreover, where necessary, military force, as a measure of self-defence or collective security, must be used against them – and

[208] Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence' (2005) *Chatham House Journal of International Law* ILP WP 05/01, 1-70, October 2005

this will inevitably mean that technology, at whatever level it is available to both the military and the politician, will be used[209].

Reliance on the protections of Article 51 alone would leave governments prostrate in defeating the threat of terrorism. States not only have a duty to ensure basic human rights are enforced, but they also have an obligation to protect their citizens and residents from crime. Terrorism is not only a threat to national security; it constitutes a *jus cogens* crime[210]. As such, there are plenty of people, both in the military and in government who would argue that it requires a *jus cogens* norm to restore the balance against it.

In conclusion then, it is with some concern for the future, like those many thousands who have signed the open letters calling for the control or even banishment of these lethal automated weapon systems, that I have to conclude that international law is currently in no position to guide State behaviour with respect to targeted killing. That's not to say that I do not expect a *jus cogens* norm permitting the use of targeted killing for counter-terrorism to become a reality within a very short space of time. I believe it is inevitable, and once unleashed will be adopted by all States, and indeed most probably widely used. Whether that norm will include or allow HITL-free, LAWS remains to be seen.

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[209] Rein Müllerson, 'Jus ad Bellum and International Terrorism' (2002) *Israel Yearbook on Human Rights* 32(1) 1-52, 2002

[210] Major Joshua E. Kastenberg, 'The use of conventional international law in combating terrorism: a Maginot Line for modern civilisation employing the principles of anticipatory self-defence and pre-emption' (2004) *Air Force Law Review* 55(1) 87-125, January 2004

As I have already demonstrated, the international legal community is deeply divided over the legality of the use of targeted killing as a counter-terrorism tactic, and unable to even come up with an agreed-upon definition for what targeted killing is, much less a framework within which it can justify its use in the field of combat. The international legal community is so fractured at the present time with regard to the targeted killing question that there is not even agreement on which legal regime – IHR, the law of belligerent occupation, or IHL, international humanitarian law – should apply to an assessment of the tactic's legality[211].

We must not be under any illusion that the commanders of our military will, with the sanction of the leaders of our governments, use these weapons to gain whatever military advantage they see them reaping. Winning is everything in war. There are no medals for second place in armed conflict. Regardless of how frightening HITL-free LAWS may appear to be, irrespective of how many important scientists and dignitaries sign open letters against them, and utterly dismissive of the potential outcome for the future of mankind, our only recourse at this stage in the development of targeted killing is to hope that men of conscience and courage can gather together to attempt some level of legal control over the use of these weapons. The alternative doesn't bear thinking about.

In the search for a way forward, I would propose that the starting point might be to agree – in principle at least – to distinguish targeted killing from other forms of extrajudicial

[211] W. Jason Fisher. 'Targeted Killing, Norms and International Law' (2007) *Columbia Journal of Transnational Law* 45(1) 711-758, 2007

execution and assassination, thereby protecting those important proscriptive legal rules and norms which we have laboured for centuries to put in place, and thereafter to concentrate on an acceptable legal definition of exactly what targeted killing actually is[212]. From there, at least, with a clear understanding from which all can work forward, the blurring of the boundaries will cease, and the inevitable proliferation of these weapons can be controlled within a legal framework so that everybody knows the legal limitations of their use, and, consequently, the legal ramifications as a result of their use.

Put simply… until these, or other legal control systems are put in place, then there can be *no* justification for the use of targeted killing.

[212] W. Jason Fisher. 'Targeted Killing, Norms and International Law' (2007) *Columbia Journal of Transnational Law* 45(1) 711-758, 2007

Appendix I

United States 107th Congress: Law 40: To authorise the use of United States Armed Forces against those responsible for the recent attacks launched against the United States on 11 September 2001

[107th Congress Public Law 40] [From the U.S. Government Printing Office]

[DOCID: f:publ040.107] Public Law 107-40, 107th Congress

Joint Resolution

To authorise the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defence and to protect United States citizens both at home and abroad; and Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, Authorisation for Use of Military Force. 50 USC 1541

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorisation for Use of Military Force"

SECTION 2. AUTHORISATION FOR USE OF UNITED STATES ARMED FORCES.

(a) In General:- That the President is authorised to use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons.

(b) War Powers Resolution Requirements:-

(1) Specific statutory authorization:- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorisation within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of other requirements:- Nothing in this resolution supersedes any requirement of the War Powers

Resolution. Approved September 18, 2001.

LEGISLATIVE HISTORY--S.J. Res. 23 (H.J. Res. 64):

Appendix II

Autonomous Weapons: An Open Letter from AI & Robotics Researchers

Autonomous weapons select and engage targets without human intervention. They might include, for example, armed quadcopters that can search for and eliminate people meeting certain pre-defined criteria, but do not include cruise missiles or remotely piloted drones for which humans make all targeting decisions. Artificial Intelligence (AI) technology has reached a point where the deployment of such systems is — practically if not legally — feasible within years, not decades, and the stakes are high: autonomous weapons have been described as the third revolution in warfare, after gunpowder and nuclear arms.

Many arguments have been made for and against autonomous weapons, for example that replacing human soldiers by machines is good by reducing casualties for the owner but bad by thereby lowering the threshold for going to battle. The key question for humanity today is whether to start a global AI arms race or to prevent it from starting. If any major military power pushes ahead with AI weapon development, a global arms race is virtually inevitable, and the endpoint of this technological trajectory is obvious: autonomous weapons will become the Kalashnikovs of tomorrow. Unlike nuclear weapons, they require no costly or hard-to-obtain raw materials, so they will become ubiquitous and cheap for all significant military powers to mass-produce. It will only be a matter of time until they appear on the black market and in the hands of terrorists, dictators wishing to better control their populace, warlords wishing to perpetrate ethnic cleansing, etc. Autonomous weapons are ideal for tasks such as assassinations, destabilizing nations, subduing populations and selectively killing a particular ethnic group. We therefore believe that a military AI arms

race would not be beneficial for humanity. There are many ways in which AI can make battlefields safer for humans, especially civilians, without creating new tools for killing people.

Just as most chemists and biologists have no interest in building chemical or biological weapons, most AI researchers have no interest in building AI weapons — and do not want others to tarnish their field by doing so, potentially creating a major public backlash against AI that curtails its future societal benefits. Indeed, chemists and biologists have broadly supported international agreements that have successfully prohibited chemical and biological weapons, just as most physicists supported the treaties banning space-based nuclear weapons and blinding laser weapons.

In summary, we believe that AI has great potential to benefit humanity in many ways, and that the goal of the field should be to do so. Starting a military AI arms race is a bad idea, and should be prevented by a ban on offensive autonomous weapons beyond meaningful human control.

To date, the open letter has been signed by 3,722 AI/Robotics researchers and 20,467 others. The list of signatories includes:

Stephen Hawking, Director of research at the Department of Applied Mathematics and Theoretical Physics at Cambridge, 2012 Fundamental Physics Prize laureate for his work on quantum gravity;

Elon Musk, SpaceX, Tesla, Solar City;

Steve Wozniak, Apple Inc., Co-founder, member of IEEE CS;

Jaan Tallinn, Co-founder of Skype, CSER and FLI;

Frank Wilczek, MIT, Professor of Physics, Nobel Laureate for his work on the strong nuclear force;

Max Tegmark, MIT, Professor of Physics, co-founder of FLI;

Daniel C. Dennett, Tufts University, Professor, Co-Director, Center for Cognitive Studies, member of AAAI;

Noam Chomsky, MIT, Institute Professor emeritus, inductee in IEEE Intelligent Systems Hall of Fame, Franklin medalist in Computer and Cognitive Science;

Barbara Simons, IBM Research (retired), Past President ACM, ACM Fellow, AAAS Fellow;

Stephen Goose, Director of Human Rights Watch's Arms Division;

Anthony Aguirre, UCSC, Professor of Physics, co-founder of FLI;

Lisa Randall, Harvard, Professor of Physics;

Martin Rees, Co-founder of CSER and Astrophysicist;

Susan Holden Martin, Lifeboat Foundation, Advisory Board, Robotics/AI;

Peter H. Diamandis, XPRIZE Foundation, Chairman & CEO;

Hon. Jean Jacques Blais, Founding Chair, Pearson Peacekeeping Center, Former Minister of Defence for Canada (1982-83);

Jennifer M Gidley, President, World Futures Studies Federation, Futures Researcher and Psychologist.

AI/Robotics Researchers:

Stuart Russell, Berkeley, Professor of Computer Science, director of the Center for Intelligent Systems, and co-author of the standard textbook 'Artificial Intelligence: a Modern Approach';

Nils J. Nilsson, Department of Computer Science, Stanford University, Kumagai Professor of Engineering, Emeritus, past president of AAAI;

Barbara J. Grosz, Harvard University, Higgins Professor of Natural Sciences, former president AAAI, former chair of IJCAI Board of Trustees;

Tom Mitchell, CMU, past president of AAAI, Fredkin University Professor and Head of the Machine Learning Department;

Eric Horvitz, Microsoft Research, Managing director, Microsoft Research, past president of AAAI, co-chair of AAAI Presidential Panel on Long-term AI Futures, member of ACM, IEEE CIS;

Martha E. Pollack, University of Michigan, Provost, Professor of Computer Science & Professor of Information, past president of AAAI, Fellow of AAAS, ACM & AAAI;

Henry Kautz, University of Rochester, Professor of Computer Science, past president of AAAI, member of ACM;

Demis Hassabis, Google DeepMind, CEO;

Yann LeCun, New York University & Facebook AI Research, Professor of Computer Science & Director of AI Research;

Oren Etzioni, Allen Institute for AI, CEO, member of AAAI, ACM;

Peter Norvig, Google, Research Director, member of AAAI, ACM;

Geoffrey Hinton, University of Toronto and Google, Emeritus Professor, AAAI Fellow;

Yoshua Bengio, Université de Montréal, Professor;

Erik Sandewall, Linköping University, Sweden, Professor of Computer Science, member of AAAI, ACM, Swedish Artificial Intelligence Society;

Francesca Rossi, Padova & Harvard, Professor of Computer Science, IJCAI President and Co-chair of AAAI committee on impact of AI and Ethical Issues, member of ACM;

Bart Selman, Cornell, Professor of Computer Science, co-chair of the AAAI presidential panel on long-term AI futures, member of ACM;

Joseph Y. Halpern, Cornell, Professor, member of AAAI, ACM, IEEE;

Richard S. Sutton, Univ. of Alberta, Professor of Computer Science and author of the textbook 'Reinforcement Learning: An Introduction';

Toby Walsh, Univ. of New South Wales & NICTA, Professor of AI and President of the AI Access Foundation;

David C. Parkes, David Parkes, Harvard University, Area Dean for Computer Science, Chair of ACM SIGecom, AAAI Fellow and member of AAAI presidential panel on long-term AI futures, member of ACM;

Berthold K.P. Horn, MIT EECS & CSAIL, Professor EECS, member of AAAI, IEEE CS;

Gerhard Brewka, Leipzig University, Professor for Intelligent Systems, past president of ECCAI, member of AAAI;

John S Shawe-Taylor, University College London, Professor of Computational Statistics and Machine Learning, member of IEEE CS;

Hector Levesque, University of Toronto, Professor Emeritus, Past President of IJCAI, member of AAAI;

Ivan Bratko, University of Ljubljana, Professor of Computer Science, ECCAI Fellow, member of SLAIS;

Pierre Wolper, University of Liège, Professor of Computer Science, member of AAAI, ACM, IEEE CS;

Bonnie Webber, University of Edinburgh, Professor in Informatics, member of AAAI, Association for Computational Linguistics;

Ernest Davis, New York University, Professor of Computer Science, member of AAAI, ACM;

Mary-Anne Williams, University of Technology Sydney, Founder and Director, Innovation and Enterprise Lab (The Magic Lab); ACM Committee Eugene L. Lawler Award for Humanitarian Contributions within Computer Science and Informatics; Fellow, Australian Computer Society, member of AAAI, IEEE CIS, IEEE CS, IEEE RAS;

Frank van Harmelen, VU University Amsterdam, Professor of Knowledge Representation, ECCAI Fellow, member of the Academia Europeana

Csaba Szepesvari, University of Alberta, Professor of Computer Science, member of AAAI, ACM;

Raja Chatila, CNRS, University Pierre and Marie Curie, Paris., Researcher in Robotics and AI, member of AAAI, ACM, IEEE CS, IEEE RAS, President IEEE Robotics and Automation Society (Disclaimer: my views represent my own);

Noel Sharkey, University of Sheffield and ICRAC, Emeritus Professor, member of British Computer Society, Institution of Engineering and Technology UK;

Ramon Lopez de Mantaras Artificial Intelligence Research Institute, Spanish National Research Council, Director, ECCAI Fellow, former President of the Board of Trustees of IJCAI, recipient of the AAAI Robert S. Engelmore Memorial Lecture Award;

Carla Brodley, North-eastern University, Dean and Professor of the College of Computer and Information Science, member of AAAI, ACM, IEEE CS;

Nowe Ann, Vrije Universiteit Brussel, Professor of Computer Science (AI), ECCAI board member, BNVKI chairman, member of IEEE CIS, IEEE CS, IEEE RAS;

Stefanuk, Vadim, (Moscow) IITP RAS, RUPF, Leading Researcher, Professor of AI in RUPF, ECCAI Fellow, Vice-Chairman of RAAI;

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Bernhard Schölkopf, Max Planck Institute for Intelligent Systems, Director, member of ACM, IEEE CIS, IMLS board & NIPS board;

Mustafa Suleyman, Google DeepMind, Co-Founder & Head of Applied AI;

Jüergen Schmidhuber, The Swiss AI Lab IDSIA, USI & SUPSI, Professor of AI;

Dileep George, Vicarious, Co-founder;

D. Scott Phoenix, Vicarious, Co-founder;

Ronald J. Brachman, Yahoo, Chief Scientist and Head of Yahoo Labs, member of AAAI, ACM, Former president of AAAI, former Secretary-Treasurer of IJCAI, Inc., Fellow of AAAI, ACM, and IEEE;

Jay Tuck, Airtime Dubai, Journalist, Television Producer, Author;

Mike Hinchey, International Federation for Information Processing (IFIP) on behalf of the IFIP General Assembly, President, member of ACM, IEEE CIS, IEEE CS, IFIP.

Appendix III

Department of Justice White Paper on Lethal Operations Against Al-Qa'ida Leaders

[1] This white paper sets forth a legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa'ida *{sic}* or an associated force of al-Qa'ida – that is, an al-Qa'ida leader actively engaged in planning operations to kill Americans. The paper does not attempt to determine the minimum requirements necessary to render such an operation lawful; nor does it assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances, including an operation against enemy forces on a traditional battlefield or an operation against a U.S. citizen who is not a senior operational leader of such forces. Here the Department of Justice concludes only that where the following three conditions are met, a U.S. operation using lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force would be lawful: (1) an informed, high level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles. This conclusion is reached with recognition of the extraordinary seriousness of a lethal operation by the United States against a U.S. citizen, and also of the extraordinary seriousness of the threat posed by senior operational al-Qa'ida members and the loss of life that would result were their operations successful.

[2] The President has authority to respond to the imminent threat posed by al-Qa'ida and its associated forces, arising from his constitutional responsibility to protect the country, the inherent right of the United States to national self defense {sic} under international law, Congress's authorization of the use of all necessary and appropriate military force against this enemy, and the existence of an armed conflict with al-Qa'ida under international law. Based on these authorities, the President may use force against al-Qa'ida and its associated forces. As detailed in this white paper, in defined circumstances, a targeted killing of a U.S. citizen who has joined al-Qa'ida or its associated forces would be lawful under U.S. and international law. Targeting a member of an enemy force who poses an imminent threat of violent attack to the United States is not unlawful. It is a lawful act of national self defense. Nor would it violate otherwise applicable federal laws barring unlawful killings in Title 18 or the assassination ban in Executive Order No 12333. Moreover, a lethal operation in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted.

[3] Were the target of a lethal operation a U.S. citizen who may have rights under the Due Process Clause and the Fourth Amendment, that individual's citizenship would not immunize him from a lethal operation. Under the traditional due process balancing analysis of Mathews v. Eldridge, we recognize that there is no private interest more weighty than a person's interest in his life. But that interest must be balanced against the United States' interest in forestalling the threat of violence and death to other Americans that arises from

an individual who is a senior operational leader of al-Q'aida or an associated force of al-Q'aida and who is engaged in plotting against the United States.

[4] The paper begins with a brief summary of the authority for the use of force in the situation described here, including the authority to target a U.S. citizen having the characteristics described above with lethal force outside the area of active hostilities. It continues with the constitutional questions, considering first whether a lethal operation against such a U.S. citizen would be consistent with the Fifth Amendment's Due Process Clause. As part of the due process analysis, the paper explains the concepts of "imminence," feasibility of capture, and compliance with applicable law of war principles. The paper then discusses whether such an operation would be consistent with the Fourth Amendment's prohibition on unreasonable seizures. It concludes that where certain conditions are met, a lethal operation against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces – a terrorist organization engaged in constant plotting against the United States, as well as an enemy force with which the United States is in a congressionally authorized armed conflict – and who himself poses an imminent threat of violent attack against the United States, would not violate the Constitution. The paper also includes an analysis concluding that such an operation would not violate certain criminal provisions prohibiting the killing of U.S. nationals outside the United States; nor would it constitute either the commission of a war crime or an assassination prohibited by Executive Order 12333.

I.

[5] The United States is in an armed conflict with al-Qa'ida and its associated forces, and Congress has authorized the President to use all necessary and appropriate force against

those entities. See Authorization for Use of Military Force (AUMF). In addition to the authority arising from the AUMF, the President's use of force against al-Qa'ida and associated forces is lawful under other principles of U.S. and international law, including the President's constitutional responsibility to protect the nation and the inherent right to national self defense recognized in international law (see, e.g., U.N. Charter art. 51). It was on these bases that the United States responded to the attacks of September 11, 2001, and "[t]hese domestic and international legal authorities continue to this day."

[6] Any operation of the sort discussed here would be conducted in a foreign country against a senior operational leader of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States. A use of force under such circumstances would be justified as an act of national self-defense. In addition, such a person would be within the core of individuals against whom Congress has authorized the use of necessary and appropriate force. The fact that such a person would also be a U.S. citizen would not alter this conclusion. The Supreme Court has held that the military may constitutionally use force against a U.S. citizen who is a part of enemy forces. See Hamdi, 542 U.S. 507, 518 (2004) (plurality opinion); id. at 587, 597 (Thomas, J., dissenting); Ex Parte Quirin, 317 U.S. at 37-38. Like the imposition of military detention, the use of lethal force against such enemy forces is an "important incident of war." [See Case No. 99, United States, Ex Parte Quirin et al.] Hamdi, 542 U.S. at 518 (plurality opinion) (quotation omitted). […] International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) § 4789 (1987) ("Those who belong to armed forces or armed groups may be attacked at any

time."); […]). Accordingly, the Department does not believe that U.S. citizenship would immunize a senior operational leader of al-Qa'ida or its associated forces from a use of force abroad authorized by the AUMF or in national self-defense.

[7] In addition, the United States retains its authority to use force against al-Qa'ida and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans. The United States is currently in a non-international armed conflict with al-Qa'ida and its associated forces. See Hamdan v. Rumsfeld, 548 U.S. 557, 628-31 (2006) (holding that a conflict between a nation and a transnational non-state actor, occurring outside the nation's territory, is an armed conflict "not of an international character" (quoting Common Article 3 of the Geneva Conventions) because it is not a "clash between nations") [see Case No. 263, United States, Hamdan v. Rumsfeld]. Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities. For example, the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes. None of the three branches of the U.S. Government has identified a strict geographical limit on the permissible scope of the AUMF's authorization. […] Bensayah v. Obama, 610 F.3d 718, 720, 724-25, 727 (D.C. Cir. 2010) (concluding that an individual turned over to the United States in Bosnia could be detained if the government demonstrates he was part of al-Qa'ida) […][8] Claiming that for purposes of international law, an armed conflict generally exists only when there is "protracted armed violence between governmental authorities and organized armed groups, "Prosecutor v. Tadic, Case No. IT-94-1AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 70 (Int'l Crim. Trib. for the Former

Yugoslavia, App. Chamber Oct. 2, 1995) [see Case No. 211, ICTY, The Prosecutor v. Tadic, p. 1758], some commenters have suggested that the conflict between the United States and al-Qa'ida cannot lawfully extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself. There is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict. Thus, in considering this potential issue, the Department looks to principles and statements from analogous contexts.

[9] The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in the new location. That does not appear to be the rule of the historical practice, for instance, even in a traditional international conflict. Particularly in a non-international armed conflict, where terrorist organizations may move their base of operations from one country to another, the determination of whether a particular operation would be part of an ongoing armed conflict would require consideration of the particular facts and circumstances in each case, including the fact that transnational non-state organizations such as al-Qa'ida may have no single site serving as their base of operations. See also, e.g., Geoffrey S. Corn & Eric Talbot Jensen, Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror, 81 Temp. L. Rev. 787, 799 (2008) (“If... the ultimate purpose of the drafters of

the Geneva Conventions was to prevent 'law avoidance' by developing de facto law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context of transnational counterterrorist combat operations serves to frustrate that purpose.”).

[10] If an operation of the kind discussed in this paper were to occur in a location where al-Qa'ida or an associated force has a significant and organized presence and from which al-Qa'ida or an associated force, including its senior operational leaders, plan attacks against U.S. persons and interests, the operation would be part of the non-international armed conflict between the United States and al-Qa'ida that the Supreme Court recognized in Hamdan. Moreover, such an operation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted. In such circumstances, targeting a U.S. citizen of the kind described in this paper would be authorized under the AUMF and the inherent right to national self-defense. Given this authority, the question becomes whether and what further restrictions may limit its exercise.

II.

[11] The Department assumes that the rights afforded by Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, attach to a U.S. citizen even while he is abroad.. The U.S. citizenship of a leader of al-Qa'ida or its associated forces, however, does not give that person constitutional immunity from attack. This paper next considers whether and in what circumstances a lethal operation would violate any possible constitutional protections of a U.S. citizen.

[12] The Due Process Clause would not prohibit a lethal operation of the sort contemplated here. In Hamdi, a plurality of the Supreme Court used the Mathews v. Eldridge balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen who had been captured on the battlefield in Afghanistan and detained in the United States, and who wished to challenge the government's assertion that he was part of enemy forces. The Court explained that the “process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process.” Hamdi, 542 U.S. at 529 (plurality opinion) (quoting Mathews v. Eldridge, 424 U.S. 319,335 (1976)). The due process balancing analysis applied to determine the Fifth Amendment rights of a U.S. citizen with respect to law-of-war detention supplies the framework for assessing the process due a U.S. citizen who is a senior operational leader of an enemy force planning violent attacks against Americans before he is subjected to lethal targeting.

[13] In the circumstances considered here, the interests on both sides would be weighty. An individual's interest in avoiding erroneous deprivation of his life is “uniquely compelling.”. No private interest is more substantial. At the same time, the government's interest in waging war, protecting its citizens, and removing the threat posed by members of enemy forces is also compelling.. As the Hamdi plurality observed, in the “circumstances of war,” “the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process ... is very real,”, and, of course, the risk of an erroneous deprivation of a citizen's life is even more significant. But, “the realities of combat” render certain uses of force “necessary and appropriate,” including force against U.S. citizens who

have joined enemy forces in the armed conflict against the United State and whose activities pose an imminent threat of violent attack against the United States - and "due process analysis need not blink at those realities.". These same realities must also be considered in assessing "the burdens the Government would face in providing greater process" to a member of enemy forces.

[14] In view of these interests and practical considerations, the United States would be able to use lethal force against a U.S. citizen, who is located outside the United States and is an operational leader continually planning attacks against U.S. persons and interests, in at least the following circumstances: (1) where an informed, high-level official of the. U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) where a capture operation would be infeasible—and where those conducting the operation continue to monitor whether capture becomes feasible; and (3) where such an operation would be conducted consistent with applicable law of war principles. In these circumstances, the "realities" of the conflict and the weight of the government's interest in protecting its citizens from an imminent attack are such that the Constitution would not require the government to provide further process to such a U.S. citizen before using lethal force.

[15] Certain aspects of this legal framework require additional explication. First, the condition that an operational leader present an "imminent" threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future. Given the nature of, for example, the terrorist attacks on September 11, in which civilian airliners were hijacked to strike the World Trade Center and the Pentagon, this definition of

imminence, which would require the United States to refrain from action until preparations for an attack are concluded, would not allow the United States sufficient time to defend itself. The defensive options available to the United States may be reduced or eliminated if al-Qa'ida operatives disappear and cannot be found when the time of their attack approaches. Consequently, with respect to al-Qa'ida leaders who are continually planning attacks, the United States is likely to have only a limited window of opportunity within which to defend Americans in a manner that has both a high likelihood of success and sufficiently reduces the probabilities of civilian casualties. Furthermore, a "terrorist 'war' does not consist of a massive attack across an international border, nor does it consist of one isolated incident that occurs and is then past. It is a drawn out, patient, sporadic pattern of attacks. It is very difficult to know when or where the next incident will occur.". Delaying action against individuals continually planning to kill Americans until some theoretical end stage of the planning for a particular plot would create an unacceptably high risk that the action would fail and that American casualties would result.

[16] By its nature, therefore, the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans. Thus, a decision maker determining whether an al-Qa'ida operational leader presents an imminent threat of violent attack against the United States must take into account that certain members of al-Qa'ida (including any potential target of lethal force) are continually plotting attacks against the United States; that al-

Qa'ida would engage in such attacks regularly to the extent it were able to do so; that the U.S. government may not be aware of all al-Qa'ida plots as they are developing and thus cannot be confident that none is about to occur; and that, in light of these predicates, the nation may have a limited window of opportunity within which to strike in a manner that both has a high likelihood of success and reduces the probability of American casualties.

[17] With this understanding, a high-level official could conclude, for example, that an individual poses an imminent threat of violent attack against the United States where he is an operational leader of al-Qa'ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States. Moreover, where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.

[18] Second, regarding the feasibility of capture, capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. Other factors such as undue risk to U.S. personnel conducting a potential capture operation also could be relevant. Feasibility would be a highly fact-specific and potentially time-sensitive inquiry.

[19] Third, it is a premise here that any such lethal operation by the United States would comply with the four fundamental law-of-war principles governing the use of force: necessity, distinction, proportionality, and humanity (the avoidance of unnecessary suffering). For example, it would not be consistent with those principles to continue an

operation if anticipated civilian casualties would be excessive in relation to the anticipated military advantage. An operation consistent with the laws of war could not violate the prohibitions against treachery and perfidy, which address a breach of confidence by the assailant. These prohibitions do not, however, categorically forbid the use of stealth or surprise, nor forbid attacks on identified individual soldiers or officers. And the Department is not aware of any other law-of-war grounds precluding use of such tactics. Relatedly, "there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict – such as pilotless aircraft or so-called smart bombs – as long as they are employed in conformity with applicable laws of war." Further, under this framework, the United States would also be required to accept a surrender if it were feasible to do so.

[20] In sum, an operation in the circumstances and under the constraints described above would not result in a violation of any due process rights.

[21] Similarly, assuming that a lethal operation targeting a U.S. citizen abroad who is planning attacks against the United States would result in a "seizure" under the Fourth Amendment, such an operation would not violate that Amendment in the circumstances posited here. The Supreme Court has made clear that the constitutionality of a seizure is determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Even in domestic law enforcement operations, the Court has noted that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Thus, "if the suspect threatens the officer with a

weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

[22] The Fourth Amendment "reasonableness" test is situation-dependent. What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations differs substantially from what would be reasonable in the situation and circumstances discussed in this white paper. But at least in circumstances where the targeted person is an operational leader of an enemy force and an informed, high-level government official has determined that he poses an imminent threat of violent attack, against the United States, and those conducting the operation would carry out the operation only if capture were infeasible, the use of lethal force would not violate the Fourth Amendment. Under such circumstances, the intrusion on any Fourth Amendment interests would be outweighed by the "importance of the governmental interests [that] justify the intrusion," – the interests in protecting the lives of Americans.[…]

III.

[23] A lethal operation against an enemy leader undertaken in national self-defense or during an armed conflict that is authorized by an informed, high-level official and carried out in a manner that accords with applicable law of war principles would fall within a well-established variant of the public authority justification and therefore would not be murder [prohibited under U.S. domestic legislation].

[24] The United States is currently in the midst of a congressionally authorized armed conflict with al-Qa'ida and associated forces, and may act in national self-defense to protect U.S. persons and interests who are under continual threat of violent attack by certain al-

Q'aida operatives planning operations against them. The public authority justification would apply to a lethal operation of the kind discussed in this paper if it were conducted in accord with applicable law of war principles. As one legal commentator has explained, “if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder,” whereas, for example, if that soldier intentionally kills a prisoner of war - a violation of the laws of war – “then he commits murder.” Moreover, without invoking the public authority justification by its terms, this Department's OLC has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of potentially lethal force.

[25] The fact that an operation may target a U.S. citizen does not alter this conclusion. As explained above, the Supreme Court has held that the military may constitutionally use force against a U.S. citizen who is part of enemy forces. Similarly, under the Constitution and the inherent right to national self-defense recognized in international law, the President may authorize the use of force against a U.S. citizen who is a member of al-Qa'ida or its associated forces and who poses an imminent threat of violent attack against the United States.

[26] In light of these precedents, the Department believes that the use of lethal force addressed in this white paper would constitute a lawful killing under the public authority doctrine if conducted in a manner consistent with the fundamental law of war principles governing the use of force in a non-international armed conflict. Such an operation would not violate the assassination ban in Executive Order No. 12333. Section 2.11 of Executive Order No. 12333 provides that “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” A lawful

killing in self-defense is not an assassination. In the Department's view, a lethal operation conducted against a U.S. citizen whose conduct poses an imminent threat of violent attack against the United States would be a legitimate act of national self-defense that would not violate the assassination ban. Similarly, the use of lethal force, consistent with the laws of war, against an individual who is a legitimate military target would be lawful and would not violate the assassination ban.

IV.

[27] The War Crimes Act, 18 U.S.C. § 2441 (2006) makes it a federal crime for a member of the Armed Forces or a national of the United States to “commit[] a war crime.” The only potentially applicable provision of section 2441 to operations of the type discussed herein makes it a war crime to commit a “grave breach” of Common Article 3 of the Geneva Conventions when that breach is committed “in the context of and in association with an armed conflict not of an international character.” As defined by the statute, a “grave breach” of Common Article 3 includes “[m]urder,” described in pertinent part as “[t]he act of a person who intentionally kills, or conspires or attempts to kill... one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.”

[28] Whatever might be the outer bounds of this category of covered persons, Common Article 3 does not alter the fundamental law of war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces or eliminate a nation's authority to take legitimate action in national self-defense. The language of Common Article 3 “makes clear that members of such armed forces [of both the state and non-state parties to the conflict]... are considered as 'taking no active part

in the hostilities' only once they have disengaged from their fighting function ('have laid down their arms') or are placed hors de combat; mere suspension of combat is insufficient." International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 28 (2009). An operation against a senior operational leader of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States would target a person who is taking "an active part in hostilities" and therefore would not constitute a "grave breach" of Common Article 3

V.

[29] In conclusion, it would be lawful for the United States to conduct a lethal operation outside the United States against a U.S. citizen who is a senior, operational leader of al-Qa'ida or an associated force of al-Qa'ida without violating the Constitution or the federal statutes discussed in this white paper under the following conditions: (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation is conducted in a manner consistent with the four fundamental principles of the laws of war governing the use of force. As stated earlier, this paper does not attempt to determine the minimum requirements necessary to render such an operation lawful, nor does it assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances. It concludes only that the stated conditions would be sufficient to make lawful a lethal operation in a foreign country directed against a U.S. citizen with the characteristics described above.

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