

Drones at Trial. State and Individual (Criminal) Liabilities for Drone Attacks

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Abstract

This article delves into issues of individual and State (criminal) liability for (lethal) drone operations; a yet unexplored area given the proliferation of drone attacks in recent years. The criteria under which military and political leaders can (possibly) be held criminally accountable for conducting drone attacks within and outside an armed conflict are outlined, based upon ICTY, ICC and ECHR-case law. Against this background, the discrepancies and pitfalls of the U.S. policy vis-à-vis drone attacks are discerned, as well as the subject-matter of responsibilities of third states which facilitate principal States such as the U.S. in these attacks.

Keywords

drones – international (criminal) law – extrajudicial killings – legal regime – criminal liabilities

1 Introduction: Facts and Figures

The proliferation of drone attacks particularly instigated by the U.S. Obama Administration raises several questions as to individual and State (criminal) liability. Different figures feature as to the exact number of drone attacks

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as well the number of civilian casualties. The New America Foundation, an independent investigative organisation, reported a total number of 428 drone strikes carried out by the Bush- and Obama Administrations in Pakistan and Yemen, resulting in between 2439 and 3982 deaths (period 2004–2013). Out of this number between 276 and 368 were civilians.² Despite the fact that drones strikes have become more precise, the non-militant fatality rate under President Obama is still estimated at 14 per cent.³ The number of drone attacks carried out in Afghanistan is even higher than in Pakistan and Yemen combined. In 2012, one drone attack per day has been carried out by the U.S. in Afghanistan on average.⁴ According to U.S. Air Force statistics 1160 strikes have been carried out in Afghanistan from January 2009 through October 2012, with 333 attacks since the beginning of 2012.⁵ Despite the fact that troops are being withdrawn from Afghanistan – and drones were initially deployed to support troops on the ground – the U.S. Air Force has an ever increasing demand for drone pilots.⁶ In addition, the CIA urged the White House in October 2012 to approve a significant expansion of its drone fleet.⁷

In February 2013, NBC News revealed a classified memo of the Department of Justice, outlining the U.S. policy on drone operations directed against U.S. citizens in a foreign country outside the context of active hostilities.⁸

2 *The Year of the Drone. An Analysis of U.S. Drone Strikes in Pakistan, 2004–2012*, New America Foundation <<http://counterterrorism.newamerica.net/drones>>, 25 April 2013.

3 *Ibid.*, under the Bush Administration this number was 46 per cent.

4 Aaron Mehta, 'USAF Releases UAV Strike Stats', *DefenseNews* 9 November 2012, <<http://www.defensenews.com/article/20121109/DEFREGo4/311090011/USAF-Releases-UAV-Strike-Stats>>, 12 March 2013.

5 *Ibid.*

6 'Air Force Military Jobs', <<http://www.usmilitary.com/29254/air-force-military-jobs-drone-pilots/>>, 1 March 2013.

7 'CIA Proposes Increase in Drone Fleet', *The Washington Post*, video footage of an interview with Greg Miller, 19 October 2012, <http://www.washingtonpost.com/video/theworld/cia-proposes-increase-in-drone-fleet/2012/10/19/fdce9fd2-1a18-11e2-bd10-5ff056538b7c_video.html>, 12 March 2013.

8 'Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qaeda or an Associated Force', *Department of Justice White Paper*, <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf>, 1 March 2013; the paper was obtained and published by NBC News on 4 February 2013, see Michael Isikoff, 'Justice Department Memo Reveals Legal Case for Drone Strikes on Americans', *NBC News*, 4 February 2013.

The memo stipulates that the use of lethal force against a U.S. citizen who is a senior operational leader of Al Qaeda or an associated force, is legitimate if the following requirements are met:

- “(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 U.S. continues to monitor whether capture becomes feasible; and
- (3) the operation would be conducted in a manner consistent with applicable law of war principles”,⁹ embracing: necessity, distinction proportionality and humanity.¹⁰

Therefore, U.S. citizenship does not guarantee constitutional immunity from attack under the Fourth and Fifth Amendments to the U.S. Constitution once the person is deemed a leader of Al Qaeda or its associated forces,¹¹ albeit that the U.S. Attorney General Eric Holder during the ‘Filibuster’ debate at the U.S. Senate on 7 March 2013 (appointment of John Brennan as CIA director) conceded that U.S. citizens could not be subjected to drone attacks.¹² U.S. policy also dictates that non-U.S. citizens who are qualified as ‘unlawful enemy combatants’ can be subjected to a U.S. drone attack.¹³ The use of force against Al Qaeda and its associated forces is considered justified on the basis of the following parameters:

- the inherent right of self-defence under international law;
- authorization by the U.S. Congress;¹⁴

9 ‘Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force’, *DoJ White Paper*, *ibid.*, p. 16.

10 *Ibid.*, p. 8.

11 *Ibid.*, p. 5.

12 Peter Finn and Aaron Blake, ‘John Brennan Confirmed as CIA Director, but Filibuster Brings Scrutiny of Drone Program’, *The Washington Post*, 7 March 2013, <http://www.washingtonpost.com/politics/rand-paul-says-hes-satisfied-with-obama-administrations-response-on-drones/2013/03/07/9b20aa44-875d-11e2-98a3-b3db6b9ac586_story.html>, 12 March 2013.

13 See ‘Drones’, *American Civil Liberties Union*, <<http://www.aclu.org/blog/tag/drones>>, 4 April 2013; see also Geert-Jan Alexander Knoops, ‘Legal, Political and Ethical Dimensions of Drone Warfare under International Law: A Preliminary Survey’, 12 *International Criminal Law Review* (2012) 697–720.

14 See Authorization for Use of Military Force (AUMF), Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001).

- the existence of an armed conflict between the U.S. and Al Qaeda;
- the constitutional responsibility of the U.S. President to protect the country.¹⁵

Finally, the use of force is considered lawful “if conducted in a manner consistent with the fundamental law of war principles governing the use of force in a non-international armed conflict.”¹⁶ The question though, remains: Who is to determine as to whether an ‘armed conflict’ exists, the U.S. President or the U.S. Congress?¹⁷

Conducting drone attacks brings many legal challenges. To date, no judicial precedents are available dictating the criteria under which military and political leaders can be held criminally accountable for launching drone attacks within and outside an armed conflict. The U.S. policy on drone attacks is shrouded in secrecy whilst the documents thereto, if available, display diffuse parameters.¹⁸ Another complication with regard to drone attacks is the remote nature of the operation as well as the remote authorization of the killing. Within the current international criminal law framework, the criminal liabilities for drone attacks are yet to be crystallized.¹⁹ The delicate and at the same time controversial U.S. drone policy was not without effect on the American public. A pole held in April 2013 revealed that only 65 per cent of the U.S. population support drone strikes against high target suspects.²⁰ This apparently led the U.S. Administration to augment its course of action, perhaps also due to international criticism.²¹ After an increase of drone strikes in the first

15 ‘Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force’, *supra* note 8.

16 *Ibid.*, p. 15.

17 According to the U.S. War Powers Resolution the U.S. President has to obtain the explicit approval of the U.S. Congress to carry out a military operation abroad that lasts more than 60 days; President Obama did not obtain Congressional approval for the military intervention in Libya in 2011, however, he asserted that the intervention was justified because the “American Intervention fell short of full-blown hostilities”, see Charlie Savage and Mark Lander, ‘White House Defends Continuing U.S. Role in Libya Operation’, *The New York Times*, 15 June 2011, <<http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all>>, 12 March 2013.

18 See also Knoops, *supra* note 13, pp. 697–720.

19 See also Knoops, *supra* note 13.

20 Scott Shane, ‘Targeted Killing Comes to Define War on Terror’, *New York Times*, 7 April 2013, <http://www.nytimes.com/2013/04/08/world/targeted-killing-comes-to-define-war-on-terror.html?pagewanted=all>, 15 April 2013.

21 See also Mark Mazzetti and Scott Shane, ‘As New Drone Policy Is Weighed, Few Practical Effects Are Seen’, *The New York Times*, 21 March 2013, <<http://www.nytimes.com/2013/03/22/>

two years of the Obama administration, a decline is to be detected. As for Pakistan, in 2010 some 117 strikes were reported, while in 2011 the number fell to 64. This number decreased further in 2012 to 46 and so far in 2013 only 11 strikes were reported.²²

This article examines the principles of accountability in international criminal law that may arise from drone attacks. To this end, Section 2 delves into drone attacks within the ambit of war crimes. Does the deployment of ('seek and destroy') drones amount to war crimes? As can be derived from the above, the estimated number of individuals killed by drones is not limited to just 'enemy combatants'. Sections 3 and 4 discern criminal law dimensions of drone operations outside an armed conflict. Section 3 contemplates the question whether drone attacks can be seen as a crime of aggression. Section 4 analyses lawsuits that assented to the issue of liability for drone attacks. Both in Germany and the U.K. litigation has been initiated against government officials for assisting the U.S. in their drone operations. By delving into potential liabilities, the jurisprudence of the European Court of Human Rights (ECHR) is assessed. Finally, Section 5 turns to (civil) responsibilities of states for drone operations.

2 Drones within the Ambit of War Crimes

2.1 *Drone Attacks and the Contemporary Contours of War Crimes*

A prerequisite for labelling drone attacks as 'war crimes' is that the attack pertains to an armed conflict, either internationally or internally.²³ Deployment of drones as such, within an armed conflict, presupposing such a conflict exists, is not prohibited under International Humanitarian Law (IHL). As long as these automated systems are capable of discriminating between civilian and military targets within an armed conflict, it is a legitimate method in order to kill the adversary.²⁴ This principle of discrimination between civilians and combatants during hostilities constitutes the Achilles heel of the drone program; can 'robots' or sensors within drones be programmed accordingly

us/influential-ex-aide-to-obama-voices-concern-on-drone-strikes.html?pagewanted=all &pagewanted=print>, 15 April 2013.

22 Shane, *supra* note 20.

23 Two minimum criteria have been adopted in order to establish whether there is an armed conflict, namely: "(a) the existence of organized armed groups, (b) engaged in fighting of some intensity", see International Law Association, Use of Force Committee, 'Final Report on the Meaning of Armed Conflict in International Law', *The Hague Conference* (2010).

24 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, Cambridge University Press, 2004), pp. 83–5.

to draw such a distinction? At present, drone operators ‘push the buttons’ on the basis of target information which is prepared by military and civilian intelligence services.

A specific drone attack failing to properly discriminate between a military and a civilian target, contravenes IHL. Yet, in itself, this action does not qualify as a war crime. Politicians sometimes fail to differentiate between violations of IHL on the one hand and war crimes on the other hand. For the nature of the liabilities to be imposed, though, this differentiation is crucial.

Violations of IHL can result in civil liabilities whilst war crimes lead to criminal liabilities. The decisive and distinguishing element is constituted by ‘criminal intent’. The decision to eliminate a person through a drone attack is most often made by political and/or military leaders. The question merits thought as to whether such leaders – apart from civil liability akin to the lawsuit filed in the *Al Awlaki v. Panetta et al.* case²⁵ – can incur criminal liability for drone attacks which result in civilian casualties. The answer to this question is predicated on two elements:

- (i) The act should qualify as a war crime; in that the *actus reus* elements are met, and
- (ii) The act should be accompanied with the requisite mental element (i.e. *mens rea*).

The next paragraphs unravel both elements, which have to be met cumulatively in order to qualify a drone attack as a ‘war crime’. The first widely accepted codification of the modes of criminal liability for international crimes is Article 25 of the ICC Statute which enumerates the various types of criminal liability, ranging from principal perpetration, Article 25(3)(a), to accessory liability, Article 25(3)(b)–(d).²⁶ This provision seems to reflect a general principle of International Criminal Law since the ICC Statute has now been ratified by 122 States, except for several major States which are equipped with drone technology such as the U.S., China, Russia, Pakistan and Israel.²⁷ Yet, Article 25 may be

25 *Al Awlaki v. Panetta, McRaven, Votel and Petraeus*, United States District Court for the District of Columbia, No. 12-cv-01192-RMC, complaint filed on 18 July 2012.

26 The philosophy originating from the Nuremberg Tribunal that “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”, is reflected in Article 25 of the ICC Statute; see William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (Cambridge, Cambridge University Press, 2007), pp. 210–211.

27 ‘Ratification of the Rome Statute’, *Coalition for the International Criminal Court*, <<http://www.iccnw.org/?mod=romeratification>>, accessed 25 April 2013; Trevor Moss, ‘Here

of guidance when scrutinizing individual criminal liability for drone attacks. This provision specifies the criteria in order to ascertain when a person “shall be criminally responsible and liable for punishment” for a crime within the jurisdiction of the Court.²⁸ The liability modes encompassed by Article 25 may dictate criminal liability not only for politicians in charge of drone programs but also for (military and civilian) drone operators, since this provision encompasses liability modes of committing, ordering and aiding and abetting.²⁹

2.2 *The Actus Reus and Mens Rea of War Crimes According to ICTY Case Law: Implications for Drone Attacks*

As said, violations of IHL can result in civil liabilities whilst war crimes lead to criminal liabilities. The decisive and distinguishing element is constituted by ‘criminal intent’. This paragraph draws on existing case law of international criminal tribunals on criminal intent, which did postulate the contours of individual criminal responsibilities for war crimes.

Criminal intent revolves around the (mental) notion of ‘wilfully’ and ‘foreseeability’; two parameters that feature in Article 30 of the ICC-Statute.³⁰ For international crimes, such as war crimes, to be proven, this provision defines the mental element of a criminal act.

Article 30 constitutes the first international codification of the mental element required for international crimes, including war crimes. The ICTY and ICTR Statutes failed to delineate the prerequisites for war crimes other than

Come...China's Drones', *The Diplomat*, 2 March 2013, <<http://thediplomat.com/2013/03/02/here-comes-chinas-drones/?all=true>>, accessed 25 April 2013; Drone Wars UK, 'Mapping Drone Proliferation: UAVs in 76 Countries', *Global Research*, 18 September 2012, <<http://www.globalresearch.ca/mapping-drone-proliferation-uavs-in-76-countries/5305191>>, 25 April 2013.

28 Article 25 (2) Rome Statute.

29 See Article 25(3) for the liability modes; Article 25(3)(e) of the Rome Statute penalizes incitement for the crime of genocide; Article 25(3)(f) penalizes the attempt to commit a crime within the jurisdiction of the Court.

30 Article 30 of the Rome Statute reads: “(1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. (2) For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. (3) For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.”

generally referring in Articles 2 and 4 of these Statutes to the ‘grave breaches provision’ of the Geneva Conventions. Yet the jurisprudence of the ICTY Trial Chamber, advances two distinctive elements for war crimes:

- a) The *actus reus* (physical element); and
- b) The *mens rea* (mental element).

For different forms of liability, such as aiding and abetting or ordering, ICTY case law has promulgated the requisite level of knowledge of the accused (i.e. the mental and physical element). With regard to accomplice liability in a joint criminal enterprise, for example, mere negligence of the accused does not suffice in order to establish this form of liability.³¹

In the *Prosecutor v. Blaskic* case, the court faced the question whether the accused could be held criminally responsible for alleged crimes he did not physically commit (i.e., “for being the actual perpetrator of the *actus reus* of any of the crimes”).³² To this end Article 7(1) of the ICTY Statute is relevant, which provides that:

[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for that crime.

The Trial Chamber in *Blaskic* adopted the standard set in the *Celebici* case, holding that direct (physical) perpetration is not required in order to establish individual criminal responsibility:

[t]he principles of individual criminal responsibility enshrined in Article 7, paragraph 1, of the Statute reflect the basic understanding that individual criminal responsibility for the offences under the jurisdiction of the International Tribunal is not limited to persons who directly commit the crimes in question.³³

31 *Appeals Chamber Judgment (Prosecutor v. Dusko Tadic)*, 15 July 1999, International Criminal Tribunal for the former Yugoslavia, No. IT-94-I-A, para. 220, <<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>>, 12 March 2013.

32 *Trial Chamber Judgment (Prosecutor v. Tihomir Blaskic)*, 3 March 2000, International Criminal Tribunal for the former Yugoslavia, No. IT-95-14-T, para. 265 <<http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>>, 1 March 2013.

33 *Ibid.*, para. 263, referring to *Celebici* Trial Chamber Judgment, para. 321.

The Appeals Chamber in the *Blaskic* confirmed this approach. The Appeals Chamber – as did the Trial Chamber – reiterated the correct standard for the *actus reus* relative to aiding and abetting: “the *actus reus* of aiding and abetting ‘consists of practical assistance, encouragement or moral support which has a substantial effect on the perpetration on the crime.’”³⁴

Furthermore, the Trial Chamber’s opinion that the *actus reus* of aiding and abetting may be ‘committed’ through an omission, was confirmed by the Appeals Chamber albeit under a specific condition.³⁵ It was stipulated that “one of the requirements of the *actus reus* of aiding and abetting is that the support of the aider and abettor has a substantial effect upon the perpetration of the crime.”³⁶ This may be either before, during or after the actual crime took place. The location of the *actus reus* may differ from the location of the actual crime. In addition, proof that there existed a causal relationship between the conduct of the aider and abettor and the commission of the crime is not required.³⁷

For military commanders (also relative drone strikes) the ICTY Appeals Chamber judgment of 28 February 2013 in *Prosecutor v. Perisic* is notable.³⁸ The Appeals Chamber contemplated that the position of Perisic as the Chief of Staff of the Yugoslav Army (Vojaska Jugoslavija, VJ) was insufficient to serve as a basis for a conviction for superior responsibility, stating that:

A superior cannot be held criminally liable for acts of his subordinates unless he or she exercised effective control over his or her subordinates . . . An accused may not be held liable under Article 7 (3) of the Statute for failure to punish crimes that were committed by a subordinate before the accused assumed command over the subordinate.³⁹

For the liability mode of aiding and abetting to be incurred the Trial Chamber held that the acts of the aider and abettor did not require specific direction towards assisting the crimes of the principal perpetrators. The Trial Chamber

34 *Appeals Chamber Judgment (Prosecutor v. Tihomir Blaskic)*, 29 July 2004, International Criminal Tribunal for the former Yugoslavia, No. IT-95-14-A, para. 46, <<http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>>, 1 March 2013.

35 *Ibid.*, para. 47.

36 *Ibid.*, para. 48.

37 *Ibid.*

38 *Appeals Chamber Judgment (Prosecutor v. Momcilo Perisic)*, 28 February 2013, International Criminal Tribunal for the former Yugoslavia, No. IT-04-81-A, para. 87, <http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf>, 13 March 2013.

39 *Ibid.*, para. 87.

found that the *actus reus* of aiding and abetting was proved based on the finding that VJ assistance “had a substantial effect on the crimes perpetrated by the VRS [Army of Republika Srpska] in Sarajevo and Srebrenica”.⁴⁰ “Specific direction” was, according to the Trial Chamber, not a requisite element of the *actus reus* of aiding and abetting.⁴¹ The Appeals Chamber reversed this ruling and recalled the first appeal judgment in this regard, outlining the parameters of the *actus reus* of aiding and abetting:

The aider and abettor carries out acts *specifically directed* to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton, destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.⁴²

The *actus reus* of aiding and abetting does, in contrast to the *actus reus* of a JCE, require that the assistance is ‘specifically directed’ towards the crimes in question, rather than ‘in some way’.⁴³ The Appeals Chamber found no reason to depart from this view and concluded that “no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly.”⁴⁴ The Appeals Chamber observed that an analysis of specific direction has not been conducted in previous appeal judgments, which could be explained by the fact that prior convictions for aiding and abetting ‘involved relevant acts geographically or otherwise proximate to, and thus not remote from, the crimes of the principal perpetrators.’⁴⁵ The appeals judges introduced the element of proximity as a potential indicator for the application of the ‘specific direction’ criterion being part of *actus reus*. It held that in case of proximity, other elements of aiding and abetting, for example ‘substantial contribution’, may emerge to demonstrate specific direction. In contrast, in cases where no such proximity exists and the accused aider and abettor is thus remote from the relevant crimes, other elements – according to the Appeals Chamber – may not be sufficient to

40 *Ibid.*, para. 17.

41 *Ibid.*

42 *Appeals Chamber Judgment (Prosecutor v. Dusko Tadic)*, 15 July 1999, International Criminal Tribunal for the former Yugoslavia, No. IT-94-1-A, para. 229, <<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>>, see *Prosecutor v. Perisic*, *supra* note 31, para. 26.

43 *Prosecutor v. Perisic*, *supra* note 38, para. 27.

44 *Ibid.*, para. 36.

45 *Ibid.*, para. 38.

prove specific direction. These cases require, as the Appeals Chamber held, an explicit consideration of specific direction.⁴⁶ While the criterion of 'specific direction' can be interpreted in varying ways, the element of 'proximate to the perpetrators of the crime', it is of significance especially to drone operations. The drone operator is situated not proximate to the actual 'battlefield'; this similarly counts for the previous decision to effectuate a drone attack. In case of remoteness, the acts of the aider and abettor must be 'specifically directed' towards the crimes of the principal perpetrator. This question is even more of perennial concern, when third States provide other States with intelligence information, thereby enabling them to carry out drone attacks.

The mental element of aiding and abetting was contemplated by the ICTY Appeals Chamber in, *inter alia*, the *Blaskic* case:

it is not necessary that the aider and abettor... know the precise crime that was intended and which in the event was committed. If he is aware that one of number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.⁴⁷

In the Appeal's Chamber judgment of *Hardinaj et al. mens rea* was specified as encompassing two elements:

- (i) 'It must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal'; and
- (ii) that the aider and abettor was 'aware of the essential elements of the crime which was ultimately committed by the principal.'⁴⁸

The ICTY Appeals Chamber in *Lukić* considered that the mental element of aiding and abetting requires that the defendant knew 'that his acts would assist in the commission of the crime by the principal perpetrator' and that he must have been 'aware of the 'essential elements' of the crime.'⁴⁹ Sredoje Lukić

46 *Ibid.*, para. 39.

47 *Prosecutor v. Blaskic*, *supra* note 34, para. 50.

48 *Appeals Chamber Judgment (Prosecutor v. Hardinaj, Balaj and Brahimaj)*, 19 July 2010, International Criminal Tribunal for the former Yugoslavia, No. IT-04-84-A, para. 58, <<http://www.icty.org/x/cases/haradinaj/acjug/en/100721.pdf>>, 13 March 2013.

49 *Appeals Chamber Judgment (Prosecutor v. Milan Lukic and Sredoje Lukic)*, 4 December 2012, International Criminal Tribunal for the former Yugoslavia, No. IT-98-21/1-A, para. 428, <http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/acjug/en/121204_judgement.pdf>, 13 March 2013.

had challenged the Trial Chamber's application of *mens rea* contending that an aider and abettor must have 'intended' to aid and abet the crimes, instead of having mere knowledge. According to the ICTY Trial Chamber:

The *mens rea* for aiding and abetting is knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence . . . The aider and abettor need not share the *mens rea* of the principal perpetrator but must be aware of the essential elements of the crime ultimately committed by the principal, including his state of mind.⁵⁰

The Appeals Chamber contemplated that the Trial Chamber had not misstated the *mens rea* of aiding and abetting. It held that a shared intention with the principal perpetrator is not required.⁵¹

Apart from the liability mode of 'aiding and abetting', the liability modes of 'ordering' and 'superior responsibility' emerge within the armed conflict model. The latter two liability modes require the *mens rea* on part of the accused.

A government official or military leader ordering a drone attack, might incur liability on the basis of 'ordering'. What requirements have to be fulfilled in order to hold an individual liable for ordering a drone attack, based upon ICTY case law? The mental element for the liability mode "ordering" seems to encompass a higher 'knowledge' threshold as opposed to aiding and abetting. In the *Blaskic* case, the Appeals Chamber held that 'a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability'.⁵² The Appeals Chamber opined that the Trial Chamber erred in this regard, because '[t]he knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law'.⁵³ Thus, simply issuing an order does not suffice to meet the *mens rea* threshold. In any military operation there is always a risk that operational rules or the laws of war are broken. However, for liability based on ordering; 'an awareness of a higher likelihood of risk and a volitional element must be incorporated'.⁵⁴

50 *Ibid.*, para. 426.

51 *Ibid.*, paras. 427–429.

52 *Prosecutor v. Blaskic*, *supra* note 34, para. 42.

53 *Ibid.*, para. 41.

54 *Ibid.*, para. 41, *see also* paras. 166 and 428.

The boundaries of the liability mode of superior responsibility were reflected by the Appeals Chamber in the *Blaskic* case.⁵⁵ The Chamber held that ‘the mental element ‘had reason to know’ as articulated in the Statute, does not automatically imply a duty to obtain information.’ It was furthermore emphasized that ‘responsibility can be imposed for deliberately refraining from finding out but not for negligently failing to find out.’⁵⁶ The latter view suggests that superiors, who order drone attacks, can only be held criminally liable for indiscriminate attacks when they deliberately ignore intelligence reports, putting them on notice that particular targets might be civilian objects.

The text of Article 30 of the ICC Statute,⁵⁷ addressing the requisite mental element for international crimes under the ICC, raises the question as to how to define “wilfully”? Does it include *dolus eventualis*? The Pre-Trial Chambers of the ICC have displayed no unanimous view on the level of *mens rea* required.

On 30 September 2008 the Pre-Trial Chamber, in the case of Katanga, contemplated that:

the suspects are aware of the factual circumstances enabling them to exercise control over the crime through another person. Regarding this last requirement, the suspects must be aware of the character of their organisations, their authority with the organisation, and the factual circumstances enabling near-automatic compliance with their orders.⁵⁸

As to intentionally directing attacks against the civilian population, the Pre-Trial Chamber held that:

the perpetrator must intend to make individual civilians not taking direct part in the hostilities or the civilian population the object of the attack. This offence therefore, first and foremost, encompasses *dolus directus* of the first degree.⁵⁹

55 *Ibid.*

56 *Ibid.*, para. 406.

57 Article 30 (2) of the ICC Statute reads that a person has intent where: ‘(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.’

58 *Pre-Trial Chamber I Decision on Confirmation of the Charges (Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui)*, 30 September 2008, International Criminal Court, No. ICC-01/04-01/07, para. 534, <<http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>>, 13 March 2013.

59 *Ibid.*, para. 271.

The elements of the crime are also fulfilled if the attack is launched by the perpetrator with two distinct specific aims, namely: '(i) to target a military objective within the meaning of articles 51 and 52 of AP I; and simultaneously, (ii) to target the civilian population or individual civilians not taking direct part in the hostilities who reside in the vicinity.'⁶⁰

On 15 June 2009 the ICC Pre-Trial Chamber, deciding on the confirmation of the charges in the case against Jean-Pierre Bemba in the situation of the Central African Republic, opined that:

With respect to *dolus eventualis* as the third form of *dolus*, recklessness or any lower form of culpability, the Chamber is of the view that such concepts are not captured by article 30 of the Statute.⁶¹

In the case of *The Prosecutor v. Lubanga* the ICC Trial Chamber, in its final judgment of 14 March 2012, stipulated that the prosecution must prove in relation to each charge (in this case: recruitment of child soldiers) that:

- i. there was an agreement or common plan between the accused and at least one co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;
- ii. the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;
- iii. the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or he was aware that by implementing the common plan these consequences "will occur in the ordinary course of events";
- iv. The accused was aware that he provided an essential contribution to the implementation of the common plan; and
- v. The accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.⁶²

The elements in sub (iii) (iv) and (v) cover *mens rea*.

⁶⁰ *Ibid.*, para. 273.

⁶¹ *Pre-Trial Chamber II Decision on the Confirmation of the Charges (Prosecutor v. Jean-Pierre Bemba Gombo)*, 15 June 2009, International Criminal Court, No. ICC-01/05-01/08, para. 360, <<http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>>, 13 March 2013.

⁶² *Trial Chamber I Judgment (Prosecutor v. Thomas Lubanga Dyilo)*, 14 March 2012, International Criminal Court, No. ICC-01/04-01/06, para. 1018, <<http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>>, 13 March 2013.

In this first ICC judgment, it was stipulated that the mental element of Article 30 of the ICC Statute embraces a degree of risk which must be ‘no less than awareness on the part of the co-perpetrator that the consequence ‘will occur in the ordinary course of events.’⁶³

The terminology ‘no less than awareness’ seems to encompass a lower threshold for establishing *mens rea* compared to the requirement of the SCSL in the *Taylor* case, bolstering the criterion of ‘substantial likelihood’.

In the *Charles Taylor* judgment of the SCSL the elements of *mens rea* and *actus reus* in relation to aiding and abetting war crimes were promulgated as follows:

In order to find the Accused criminally responsible ... for aiding and abetting ..., the Trial Chamber must be satisfied beyond reasonable doubt that the Accused provided practical assistance, encouragement, or moral support which had a substantial effect upon the commission of the crimes (*actus reus*). Furthermore, the Trial Chamber must be satisfied beyond reasonable doubt that the Accused knew that his acts or omissions would assist the commission of the crime, or that he was aware of the substantial likelihood that his acts would assist in the commission of the crime, and that the Accused was aware of the ‘essential elements’ of the crime committed by the principal offender, including the state of mind of the principal offender (*mens rea*).⁶⁴

If the threshold of the SCSL is followed (‘substantial likelihood’), a drone operator who assists in executing orders (drone attacks) only incurs criminal liability if it is proven that he or she was aware of the substantial likelihood that his or her assistance would contribute to committing a war crime. In such a situation it cannot be excluded that a drone operator could successfully invoke Article 33 of the ICC Statute (superior orders), presupposing that the order to launch a drone attack was ‘not manifestly unlawful’.⁶⁵

2.3 ‘Margin of Error’ of Drone Attacks: A Potential Actus Reus?

As mentioned in the preceding paragraph, drone attacks can constitute war crimes when the principles of distinction and proportionality are not honoured.

⁶³ *Ibid.*, para. 1012.

⁶⁴ *Trial Chamber II judgment (Prosecutor v. Charles Ghankay Taylor)*, 18 May 2012, International Criminal Court, No. SCSL-03-01-T, para. 6904, <<http://www.sc-sl.org/LinkClick.aspx?fileticket=k%2b03KREEPCQ%3d&tabid=107>>, 13 March 2013.

⁶⁵ See for Superior Orders, Yoram Dinstein, *The Defense of ‘Obedience to Superior Orders’ in International Law* (Oxford: Oxford University Press, 2012) pp. xx–xxii.

As a matter of fact, drone attacks within the context of armed conflicts equates to the use of ordinary weapons of war, such as precision or smart bombing. Yet, the conditions under which they ought to be deployed can be derived from those encompassing the phenomenon of 'targeted killings'. Targeted killings are only permissible when certain conditions are met. Melzer (2010) summarizes these parameters as follows:⁶⁶

- The targeted killing 'is directed against a person subject to lawful attack';⁶⁷
- The targeted killing has to be conducted in such a way that erroneous targeting is avoided and civilian casualties are avoided or at least minimized;
- The possible civilian damage done with the targeted killing must stand in proportion to the expected military advantages;
- The targeted killing must be suspended 'when the targeted person surrenders or otherwise falls to hors the combat';
- The targeted killing may not be conducted by resorting to illegal means or methods of warfare.⁶⁸

These five conditions have to be cumulatively met. In any event, a targeted killing may not be conducted if there are other options to neutralize the threat posed by the 'targeted person', such as capture or other non-lethal means, thereby avoiding (civilian) casualties.⁶⁹

A contrario, in the event one of these parameters is not met, the *actus reus* prerequisite to qualify an act as a war crime is (objectively) fulfilled. The most prominent requirement being the first condition, i.e. the (drone) attack should be directed at a combatant or a military target.

From a military-operational perspective, one of the most crucial elements thereto pertains to the identification process of military targets and the acceptable 'margin of error' once an attack is launched. For the implications of such 'margin of error' in determining criminal guilt, the acquittal of General Ante Gotovina by the ICTY Appeals Chamber is illustrative. In its majority judgment

66 Nilz Melzer, 'Targeted killings in operational law perspective', in Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press, 2010) pp. 277–302, at p. 287.

67 *Ibid.*

68 *Ibid.*

69 *Ibid.*, pp. 287–288.

of 16 November 2012,⁷⁰ the Appeals Chamber reversed the conviction of Gotovina for participating in an alleged joint criminal enterprise (JCE) relative to forced transfer of Serbs in the Krajina area, which participation allegedly consisted of ordering unlawful artillery attacks on several towns and the failure to make a serious effort in preventing or investigating crimes committed by his subordinates.⁷¹ The Trial Chamber had based its conviction for participation in a JCE on the finding that unlawful artillery attacks had been carried out; a finding that was based on a so-called 'Impact Analysis'. Individual impact sites in four towns were analysed, with use of a 200 meter margin of error. The impact sites that were located more than 200 meters from a target that was deemed legitimate, were used as evidence for an unlawful artillery attack.⁷² The Appeals Chamber contended that the Trial Chamber had insufficiently explained on what basis it arrived at the 200 meter margin of error as a reasonable interpretation of the evidence on the record.⁷³ The Trial Chamber had acted inconsistently by, on the one hand, accepting the view of the witness Koning that 'increased distance from a target would increase range of error,' while, on the other hand, relying 'on a single margin of error for the artillery shelling'.⁷⁴ This resulted in the Appeals Chamber's conclusion that the Trial Chamber had erred with regard to the margin of error since it was not based on any evidence nor was any explanation offered as to the basis of this margin of error.⁷⁵

Hence, the legal outcome of a criminal case, i.e. a conviction or an acquittal for war crimes charges, can be dictated by the appreciation of the exact 'margin of error' of weaponry.

2.4 *Practical Implications of a 'War Crimes' Classification*

It has been argued that drone attacks feature within a legal grey zone and could (even) constitute war crimes. In his report of 10 April 2012, Christof Heyns, the UN Special Rapporteur on Extrajudicial killings, summary or arbitrary executions, concedes that:

70 *Appeals Chamber Judgment (Prosecutor v. Ante Gotovina and Mladen Markač)*, 16 November 2012, International Criminal Tribunal for the former Yugoslavia, No. IT-06-90-A, <http://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf>, 13 March 2013.

71 *Ibid.*, para. 3.

72 *Appeals Judgment Summary for Ante Gotovina and Mladen Markac*, International Criminal Tribunal for the former Yugoslavia, 16 November 2012, <http://www.icty.org/x/cases/gotovina/acjug/en/121116_summary.pdf>, 11 March 2013.

73 *Prosecutor v. Gotovina and Markač*, *supra* note 70, para. 58.

74 *Ibid.*, para. 60.

75 *Ibid.*, para. 61.

An intentional attack against civilians, including journalists, amounts to a grave breach of the Geneva Conventions and a war crime under the Rome Statute of the International Criminal Court.⁷⁶

The qualification of drone attacks as war crimes (or human rights violations) could have serious implications. Recently, legal (redress) actions have been instigated against U.S. and U.K. authorities for the indiscriminate use of drones which led to the death of innocent bystanders.

The U.K.-based human rights group “Reprieve” instigated several legal actions with regard to the CIA drone program, referring to it as “the death penalty without trial”.⁷⁷ In July 2011 Pakistani lawyers together with Reprieve, called for the arrest of John Rizzo, the CIA’s former legal chief, because he had approved of drone attacks carried out in Pakistan, which he had openly admitted. In November 2011 Reprieve, acting on behalf of Noor Kahn, a Pakistani student whose father had been killed in a drone attack, asked the U.K. government to clarify its policy regarding its assistance to U.S. drone attacks. In December 2011, Reprieve notified Cameron Munter, the U.S. ambassador to Pakistan, that it planned on filing a lawsuit against him for his complicity in killing Pakistani citizens. Such actions resulted in calling upon the UN to adopt a resolution demanding the end to drone strikes in Pakistan.⁷⁸ Furthermore, Reprieve reported that two separate constitutional petitions were filed to the High Court in Peshawar. The petitions were filed by the Foundation for Fundamental Rights (FFR) against the Pakistani government, as a reaction to a CIA drone attack on 17 March 2012 killing fifty people in North Waziristan. The first petition was filed on behalf of the just-mentioned Noor Kahn; the second petition was filed on behalf of eight families who lost their relatives in the attack. The petition called upon the Pakistani government for more protection of its citizens and made notice of the fact that any agreement between the CIA and Pakistan to carry out drone strikes killing civilians is illegal.⁷⁹ Moreover, in March 2012, Human Rights lawyers filed a lawsuit with a

76 Christof Heyns, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’, *United Nations*, 10 April 2012 (A/HRC/20/22), para. 70, <<http://www.unhcr.org/refworld/pdfid/5006doe92.pdf>>, 1 March 2013.

77 ‘Drone Strikes’, *Reprieve UK*, <<http://www.reprieve.org.uk/investigations/drones/>>, 12 March 2013.

78 ‘Pakistani Human Rights Group Calls for UN Resolution to End CIA Drone Strikes’, *Reprieve*, 1 February 2012, <http://www.reprieve.org.uk/press/2012_02_01_FFR_drones_Pakistan_UN/>, 1 March 2013.

79 ‘Drones Victims Sue Pakistan for Complicity in CIA Killing of 50 Villagers’, *Reprieve*, 9 May 2012, <http://www.reprieve.org.uk/press/2012_05_09_drones_victims_sue_pakistan>

British court on behalf of Noor Kahn against the U.K. Foreign Secretary William Hague because of the U.K.'s (illegal) drone policy.⁸⁰ The U.K. allegedly provides the U.S. with intelligence in order to carry out drone attacks, a policy that could be qualified as 'encouraging or assisting' to murder. In October 2012 the High Court in London heard the arguments in this case. The U.K. government argued that U.K. courts did not have jurisdiction to rule on this case, whereas the lawyers acting on behalf of Noor Kahn conceded the intelligence officers "were UK nationals and could be criminally liable under English domestic law, or their actions might constitute war crimes or crimes against humanity."⁸¹ In December 2012 the High Court in London consented with the U.K. government's arguments and rejected Noor Kahn's application.⁸² The lawyers acting on behalf of Noor Kahn announced their intention to appeal this ruling, thereby continuing their efforts to determine the legality of intelligence sharing in which the U.K. government is engaged.⁸³

As to the level of criminal liabilities, the German Federal Prosecutor's Office is one of the first European prosecution services to have instigated a criminal investigation into a U.S. drone attack.⁸⁴ The German Federal Prosecutor's Office assumed jurisdiction to commence this inquiry since the victim of this 2010-drone attack was a German national of Turkish descent, Mr. Bünyamin E. However, it was deemed unlikely beforehand that the investigation into the death of Mr. E. would actually culminate into criminal charges. First, it had to be established whether the attack constituted a violation of international law and second, it was said that the German authorities would rather opt for the

_complicity/>, 1 March 2013; 'FFR's Current Litigation', <<http://www.rightsadvocacy.org/ffr-current-litigation>>, 1 March 2013.

- 80 The case was raised at the High Court in London, see 'William Hague Facing Legal Action Over Drone Strikes', *BBC News*, 11 March 2012, <<http://www.bbc.co.uk/news/uk-17335368>>, 1 March 2013.
- 81 John Aston, 'Drone Attacks Challenge Blocked', *The Independent*, 21 December 2012, <<http://www.independent.co.uk/news/uk/home-news/drone-attacks-challenge-blocked-8428604.html>>, 1 March 2013.
- 82 *Ibid*; *Khan v. SSFCA*, High Court (Queen's Bench Division), 21 December 2012, [2012] EWHC 3728 (Admin).
- 83 'Drone Victim to Appeal Ruling over UK Support for CIA Strikes in Pakistan', *Leigh Day*, 20 December 2013, <<http://www.leighday.co.uk/News/2012/December-2012/Drone-victim-to-appeal-ruling-over-UK-support-for->>, 1 March 2013.
- 84 Holger Stark, 'Drone Killing Debate: Germany Limits Information Exchange with U.S. Intelligence', *Spiegel Online*, 17 May 2011, <<http://www.spiegel.de/international/germany/drone-killing-debate-germany-limits-information-exchange-with-us-intelligence-a-762873.html>>, 2 May 2013.

legal and administrative cooperation of the U.S. authorities.⁸⁵ However, after this attack and the subsequent pressure on the German government, it is said that the German authorities became more reserved in providing the U.S. with intelligence information. This creates a dilemma since a government like that of Germany is most often dependent on cooperation with the U.S. when combating terrorism.⁸⁶

In October 2010, Mr. E. travelled to the tribal area of North Waziristan (Pakistan) where he was killed by a U.S. drone; it was suggested that E. was a radical Islamist. A complicating factor though was that the German Federal Police Agency itself was most likely involved; it is suggested that it provided the U.S. with telecom data in order to locate E. as well as his date of departure from Germany. The involvement of German officials in the events prior to the drone attack may constitute a third reason for not bringing charges in this case against the U.S. or German officials.⁸⁷

This paragraph differentiated the implications for drone attacks within the armed conflict model, presupposing an armed conflict exists. In turn, drone attacks can transgress into war crimes. Drone attacks in the context of an armed conflict have to comply with principles of distinction and proportionality and, most prominently, the attack must be directed against someone who is deemed subject (a military target) to such an attack beforehand. Case law of international criminal tribunals has paved the way for criminal liability in terms of aiding and abetting, ordering and superior responsibility. These liability modes are to be transposed onto drone operators and government officials or superiors, ordering such an attack. The identification process of military targets and the acceptable 'margin of error' can be decisive for the qualification of an act as a 'war crime'. Practically, as evidenced by contemporary litigation, this qualification issue is of significant importance.

3 Drone Attacks: Potential Crimes of Aggression?

3.1 *Introduction: The ICC System on Aggression*

The proliferation of drone attacks within the discipline of international criminal law is yet to be crystalized. The preceding paragraph elucidated on drone

85 Christina Ruta, 'The Legal Gray Zone of Drone Attacks', *Deutsche Welle*, 23 July 2012, <<http://www.dw.de/the-legal-gray-zone-of-drone-attacks/a-16118788-1>>, 1 March 2013.

86 Stark, *supra* note 84.

87 Ruta, *supra* note 85.

operations within the purview of war crimes. This paragraph revolves around a different categorization under international criminal law based upon the newly established international ‘crime of aggression’.⁸⁸ It is far from unrealistic that drone attacks might fall under the ambit of the crime of aggression within the system of the ICC. This follows from the UN General Assembly Resolution 1974 which lists seven acts that can be perceived as crimes of aggression. One of these acts is the ‘Bombardment by the armed forces of a State against the territory of another State or the use of any weapon by a State against the territory of another State’.⁸⁹ Arguably, a drone strike conducted by State A on the territory of State B – outside an armed conflict – could be perceived as an act of aggression against State B.

Also cross border drone strikes might amount to a crime of aggression. Ben Emmerson, the UN Special Rapporteur on human rights and counterterrorism recently opined that the drone campaign ‘involves the use of force on the territory of another state without its consent and is therefore a violation of Pakistan’s sovereignty’.⁹⁰

88 No sooner than 1 January 2017 this crime will enter into force.

89 Resolution RC/Res.6, Annex I, ‘Amendments to the Rome Statute of the International Criminal Court on the crime of aggression’, Article 8bis (2)(b) Crime of aggression. Other acts listed are:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of a State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

90 ‘U.N. Official Says U.S. Drones Breach Pakistan’s Sovereignty’, *The New York Times*, 15 March 2013, <http://www.nytimes.com/2013/03/16/world/asia/un-official-denounces-us-drone-use-in-pakistan.html?_r=0>, 24 April 2013.

3.2 *Aggression: An International or Political Crime?*

From the outset of the promulgation of the ICC Statute, it included the crime of aggression, albeit that its definitional scope had to be codified. At the first Review Conference of the ICC in 2010 in Kampala, Uganda, the contours of the crime of aggression within the ICC system was enacted as follows:

the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁹¹

Jurisdiction over this crime is to be exerted once a two-third majority of the member states has activated the Court's jurisdiction through a decision to be taken after 1 January 2017 and after ratification of the amendments by at least 30 member states.⁹² The negotiations at the Kampala-conference resulted in the prohibition to exercise jurisdiction in case the crime was committed by nationals or on the territory of any non-state party.⁹³

At the core of the definition lies the criterion of 'a manifest violation of the UN Charter'. This suggests a considerable political influx of the UN Security Council. Contrary to the other ICC crimes (genocide, crimes against humanity and war crimes), the ICC prosecutor's initiation of an investigation into a situation (of aggression) is contingent upon approval by the UN Security Council.⁹⁴ Before commencing an investigation *proprio motu* or on the basis of a state referral, the prosecutor is required to notify the UN Security Council. If the Security Council does not respond to this notification within six months or determines that no crime of aggression emerged, the prosecutor may only proceed with an investigation after the Pre-Trial Chamber's approval.

91 Resolution RC/Res.6, adopted at the 13th plenary meeting, on 11 June 2010, by consensus; see also The Crime of Aggression, *Coalition for the International Criminal Court*, <<http://www.iccnw.org/?mod=aggression>>, 28 February 2013; the act of aggression is "the use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council."

92 The Crime of Aggression, *Coalition for the International Criminal Court*, <<http://www.iccnw.org/?mod=aggression>>, 28 February 2013.

93 Geert-Jan Knoops, 'Introductory Note. The International Criminal Court in 2010 Pitfalls and Progress of the ICC', *The Global Community Yearbook of International Law and Jurisprudence* 2011 (1), pp. 461–468 at p. 461.

94 Article 15^{ter} ICC Statute, see The Crime of Aggression, *supra* note 91.

This political interference with a judicial body clearly constitutes a violation of the well-established *Trias Politica* principle. Moreover, some of the permanent members of the Security Council, such as France, the U.K. and the U.S. (a non-ratifying state party to the ICC), will most likely have various reasons to use their veto in such scenarios.⁹⁵

For two reasons this ICC-system vis-à-vis the crime of aggression introduces an indeterminate political dimension:

- (i) First, the voting-composition within the UN Security Council is determinative for the initiation of a particular criminal investigation;
- (ii) Second, in the event the Security Council abstains from deciding within the time frame of six months, such decision lies within the discretionary powers of the Office of the Prosecutor, i.e. to ascertain a ‘manifest violation of the UN Charter’.

Bearing in mind the multi-interpretability of the doctrine of anticipatory self-defence,⁹⁶ such prosecutorial determination will be far from unambiguous. UN General Assembly Resolution 1974 enumerates *inter alia* the following acts as potential acts of aggression: the blockade of ports or coastlines of one State by the armed forces of another State; an attack by the armed forces of one State on the sea, land or air forces, or on marine- or air fleets of another State; the use of armed forces by one State within the territory of another State – with the permission of the attacked State, but in violation with the preconditions of the agreement.⁹⁷

These enumerations create many pitfalls. Is the shooting down of an American drone by two Iranian fighter jets east of Kuwait to be seen as a crime of aggression against the U.S.?⁹⁸

Construing the crime of aggression in this manner, may result in abuse of international criminal law. In this construction, a political body – the UN Security Council – de facto dictates the prosecution of the actions of one country, for a “crime” which in itself already has a political

95 Knoops, *supra* note 93, p. 462.

96 Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge, Cambridge University Press, 2005), p. 175 *et seq.*

97 See Article 8bis of the Rome Statute.

98 In December 2011 and again in December 2012 Iranians claimed to have downed a U.S. drone, see Lex Boon, ‘Iran Claimt Opnieuw Onderschepping Amerikaanse Drone – VS Ontkennen’, *NRC Handelsblad*, 4 December 2012, <<http://www.nrc.nl/nieuws/2012/12/04/iran-claimt-opnieuw-onderschepping-amerikaanse-drone/>>, 28 February 2013.

connotation.⁹⁹ Thus, the law is invaded by a double political standard, which can be decisive in prosecuting State officials for the crime of aggression. Political, economic, religious and ethical interests within the Security Council – and not legal considerations – can be profoundly determinative for the legality of military operations conducted by States, for example, on the basis of anticipated self-defence.¹⁰⁰

3.3 *Implications for Drone Attacks*

With the advent of the international crime of aggression, the criminalization of drone attacks advances. An attack by armed forces of State A within the territory of State B can constitute a (future) potential crime of aggression.

Yet, these situations can have a deleterious effect on future State relations, particularly in light of its inherent diffusion. Is merely one drone attack sufficient to qualify this act as a manifest violation of the UN Charter or should there be a multiplicity of such attacks? Whilst one drone attack *eo ipso* may not meet the threshold of an armed conflict, it might constitute an act of aggression. For the crime of aggression, an armed conflict is not a prerequisite element. Merely the existence of a ‘manifest violation of the UN Charter’ dictates the presence of the crime of aggression. The reference within the definition of aggression to persons in ‘a leadership position’ suggests that both civilian and military leaders can be subjected to criminal prosecution. This implies that directors of intelligence agencies, such as the CIA, can incur criminal liability for ‘planning, preparing, initiating, or executing’ drone attacks which fail to comply with the armed conflict or law enforcement model.

Even the planning of an act of aggression by a person in a ‘leadership role’ may incur this type of liability, meaning that, for instance, that the U.S. President – who authorizes the mentioned ‘kill list’ – may be eligible for criminal prosecution at the ICC.¹⁰¹

On the other hand, States such as the US, the UK, Russia, China and France which have a permanent right to veto within the UN Security Council, can simply prevent any prosecution before the ICC for this crime. Drone operations conducted by these States or their allies may therefore most likely (practically) never be subjected to ICC prosecution. Thus, assertions that drone attacks

99 See also Michael P. Scharf, ‘Universal Jurisdiction and the Crime of Aggression’, 53 *Harvard International Law Journal* (2012) 357–389, at p. 381, citing Richard Goldstone, ‘Prosecuting Aggression’, *International Herald Tribune*, 2 July 2010.

100 See Geert-Jan Knoops, ‘Internationaal Strafhof wordt geopolitiseerd door nieuw delict’, *NRC Handelsblad*, 7 January 2013; see also Knoops, *supra* note 93.

101 If only the U.S.A. were to ratify the Rome Statute.

might constitute crimes of aggression, can enable one State to pressurize another State or its officials by pushing for criminal liabilities in order to pursue (hidden) political agendas.

4 (Criminal) Responsibilities under Law Enforcement Principles

4.1 *The Influx of ECHR Standards*

Legal responses to targeted killings outside the context of an armed conflict are predominantly dictated by human rights law.¹⁰² Specifically, ECHR case law has promulgated criteria for the use of force within law enforcement operations. Targeted killings outside armed conflicts which invade the sovereignty of states, (additionally) triggers international law governing the use of interstate force. While human rights law aims at protecting the injured individual, the latter system protects the injured State. In order for a targeted killing outside an armed conflict to be lawful, both systems have to be respected. Practically, the law enforcement model (compared to the armed conflict model) is of more relevance since in essence 'all targeted killings except those directed against a legitimate military target in a situation of armed conflict remain subject to the legal paradigm of law enforcement.'¹⁰³

If one were to summarize the law of targeted killings (e.g. by drone attacks) within the law enforcement model, one of the most concise reflections is given by Nilz Melzer (2010):

Outside the conduct of hostilities in armed conflict, a targeted killing can be permissible only in very exceptional circumstances, namely where it cumulatively:

- (a) aims at preventing an unlawful attack by the targeted person on human life;
- (b) is absolutely necessary for the achievement of this purpose;
- (c) is the result of an operation which is planned, prepared and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force. States have a duty to regulate the use of lethal force by their agents in accordance with these standards.¹⁰⁴

¹⁰² Knoops, *supra* note 13, pp. 697–720.

¹⁰³ Melzer, *supra* note 66, 282.

¹⁰⁴ *Ibid.*, p. 281.

Even if a targeted killing is labelled as strictly necessary, as required under sub b, a proportionality assessment has to be made. If the threat to be fought by conducting a targeted killing is deemed disproportionate compared to the gravity of this method, then lethal force is deemed unlawful. The proportionality assessment should be made for each particular case and requires that the use of lethal force is not allowed, except to:

- (1) defend any person against the imminent threat of death or serious injury;
- (2) prevent the perpetration of a particularly serious crime involving grave threat to life;
- (3) arrest a person presenting such a danger and resisting arrest, or to prevent his or her escape.¹⁰⁵

Thus, the requirement is that a person – at least – has to pose a concrete threat to human life while at the same time being suspected of having perpetrated a serious crime, i.e. “the intentional killing of an individual can only be justified by the protection of human life from a concrete and specific threat.”¹⁰⁶

4.2 *Deadly Force as Last Resort*

Essentially, the most decisive criterion dictating the use of drones within the law enforcement mechanism (i.e. to eliminate terrorist suspects) is reflected by Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, dictating that:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.¹⁰⁷

¹⁰⁵ *Ibid.*, p. 284.

¹⁰⁶ *Ibid.*, p. 285.

¹⁰⁷ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <<http://www2.ohchr.org/english/law/firearms.htm>> 28 February 2013.

The last criterion ('intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life') shifts the burden of proof onto law enforcement officials who resort to deadly force. The question merits thought as to when an 'unavoidable' situation arises.

The answer to this was – partially – addressed by the ECHR judgment of 20 December 2011 in *Finogenov and others v. Russia*.¹⁰⁸ This case involved the attack on the Dubrovka Theatre in Moscow (2002) in order to liberate the nearly 900 civilians taken hostage by over 40 Chechen 'terrorists'.¹⁰⁹ While the terrorists 'demanded' the retreat of Russian Defence Forces out of Chechen, the Russian authorities denounced serious negotiations in order to arrive at a peaceful solution. Rather, on 26 October 2002 the Russian anti-terrorist unit of the FSB (Federal Security Service) raided the theatre. Prior to this action they administered gas in the theatre; most likely fentanyl.¹¹⁰ Most of the "terrorists" were killed by the gas while the remaining "terrorists" were killed by the members of the FSB. The hostages also fell victim; ultimately 129 civilians died as a result of lethal gas. This number of civilian casualties was also due to the absence of well-coordinated medical assistance.¹¹¹

The victims and/or relatives of the victims (the applicants) filed a complaint against Russia with the European Court of Human Rights (ECHR), based on Article 2 (the right to life) of the Convention. The plaintiffs contended that the raid on the theatre was not strictly necessary. In the first place, as argued, there were other means to end the siege, such as negotiating with the terrorists. In the second place, the terrorists did not have the intention to kill the hostages, as was shown by the fact that the terrorists did not detonate their bombs after they noticed that gas was put into the theatre. Additionally, it was conceded that the authorities had failed to plan a proper rescue operation, causing the death of 129 civilians and severe health damage and psychological trauma to the survivors of the gas attack.¹¹²

108 *Finogenov and others v. Russia*, 20 December 2011, European Court of Human Rights, Nos. 18299/03 and 27911/03, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108231>>, 13 March 2013.

109 Over 730 people were released, however, the number is unclear since not all of the hostages reported to the authorities, 129 hostages died; see *Finogenov and others v. Russia*, *ibid.*, para. 24.

110 D.F. de Bijl, 'Rechtmatige Geweldstoepassing bij Binnenlandse Terreurbestrijding: De Beëindiging van de Gijzeling in het Dubrovka Theater', 5 *Militair Rechtelijk Tijdschrift* (2012) 227–235.

111 *Finogenov and others v. Russia*, *supra* note 108, paras. 24–25 and paras. 237–252.

112 *Ibid.*, para. 3.

As to the application of deadly force, the ECHR adopts three standards. First, whether an operation falls under the ambit of Article 2 of the Convention. Second, the ‘level of scrutiny’ (i.e. to what extent was the operation monitored or judged by the national legal authorities in anticipation of the operation) and, third, the actual review of the deadly force used.¹¹³

As to the first prong, the ECHR held that a causal relationship had to be established between the use of the gas and the death of the hostages. Accordingly, Article 2 was held to be applicable to this case. As to the second prong, the ECHR outlined that national authorities are endowed with a certain ‘margin of appreciation’, even if afterwards ‘some of the decisions taken by the authorities may be open to doubt’.¹¹⁴ Despite the fact that lethal force may only be deployed when ‘absolutely necessary’, the Court held that ‘certain aspects of the situation lie far beyond the Court’s expertise and where the authorities had to act under tremendous time pressure and where their control of the situation was minimal’.¹¹⁵ In short, in some situations the departure of this absolute necessity standard may be justified. As to the third prong, the actual use of force is examined. To this end, Article 2(2) of the Convention lists three grounds on which the use of force may be justified:

- (a) In defence of any person from unlawful violence;
- (b) To effect a lawful arrest or prevent escape; or
- (c) To quell a riot or insurrection.¹¹⁶

The ECHR’s starting point is the assumption that all three grounds listed in Article 2 were pursued simultaneously by the Russian authorities. Therefore the central question for the ECHR revolved around the availability of other (non-lethal) means, such as negotiating, to achieve the aims listed in Article 2. The ECHR attached weight to the information available to the authorities at the time of the events.¹¹⁷ The Court reiterated that the “necessity” criterion for the use of lethal force is not met ‘where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence’.¹¹⁸

¹¹³ De Bijl, *supra* note 110, p. 229.

¹¹⁴ *Finogenov and others v. Russia*, *supra* note 108, para. 213.

¹¹⁵ *Ibid.*, para. 211.

¹¹⁶ *Ibid.*, para. 217.

¹¹⁷ *Ibid.*, paras. 218–219.

¹¹⁸ *Ibid.*, para. 220; *Nachova and others v. Bulgaria*, 6 July 2005, European Court of Human Rights, Nos. 43577/98 and 43579/98, para. 95, <<http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=001-69630>>, 13 March 2013.

Ultimately, the ECHR arrived at the conclusion that the raid did not constitute a violation of Article 2 of the Convention, since there existed a real, serious and immediate risk of mass human losses and ... the authorities had every reason to believe that a forced intervention was the 'lesser evil' under the circumstances.¹¹⁹ Thus, the decision of the Russian authorities to raid the theatre did not constitute a violation of Article 2 of the Convention. The Court proceeded with examining whether the use of gas was a legitimate means. At this point, the ECHR concluded that such use was not disproportionate given the circumstances of the case.¹²⁰ The Court opined, though, that the Russian authorities had failed in their rescue and evacuation operation. Here, it stipulates the test that "the more predictable the hazard, the greater the obligation to protect against it."¹²¹ A State has the obligation to 'take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, minimising, incidental loss of civilian life.'¹²² In this regard, the ECHR held that the Russian authorities did breach their positive obligations under Article 2.

Thus, in examining whether the use of deadly force deployed by (federal) authorities in a certain situation, is justified, the following should be taken into consideration: The available information at that time, whether there were other reasonable means to terminate the crisis situation (proportionality requirement) and whether there were feasible precautions in place to prevent against additional (foreseeable) damage. For drone operations under the law enforcement model, analogous parameters seem applicable.

5 State Responsibilities for Drone Attacks under Public International and Human Rights Law

5.1 Introduction

Apart from potentially incurring criminal liabilities, drone attacks may incur state (civil) liabilities under public international and human rights law. This paragraph illuminates state liabilities for drone attacks from the perspective of human rights principles. It contemplates the parameters for this type of state responsibility on the basis of existing ECHR case law.

119 *Finogenov and others v. Russia*, *supra* note 108, para. 226.

120 *Ibid.*, para. 236.

121 *Ibid.*, para. 243.

122 *Ibid.*, para. 265.

5.2 *Direct and Indirect State Liability*

State responsibility may arise either by direct perpetration or by indirect perpetration. Notwithstanding that no specific judgments have yet been rendered by the ECHR vis-à-vis state responsibility for drone attacks, a precedent thereto may be derived from state responsibility for the U.S. Rendition Program. This type of state responsibility was at first addressed in an ECHR-judgment of 13 December 2012 in the case of *El-Masri v. the former Yugoslav Republic of Macedonia*.¹²³ The *El-Masri* case is compelling since some of its components may apply to state liabilities for drone attacks, either directly or indirectly by way of third state responsibility. In December 2003, Mr Khaled El-Masri, a German citizen of Lebanese descent, was arrested by Macedonian agents at the Serbian-Macedonian border when suspicion arose as to the validity of El-Masri's passport. El-Masri was taken to a hotel room and repeatedly interrogated for the course of twenty-three days. During this time, he was held incommunicado even from contact with the German embassy.¹²⁴

Around 23 January, El-Masri most likely was handed over to a CIA 'Rendition Team' at Skopje Airport and flown to Afghanistan, while Macedonian security guards monitored his transfer.¹²⁵ Before the flight, El-Masri, while hand cuffed and blind folded was severely beaten by disguised men; he was stripped of his clothes, sodomised with an object, placed in a nappy and dressed in a tracksuit.¹²⁶ El-Masri's treatment before the flight showed similarities with a subsequently disclosed CIA document describing 'capture shock' treatment. During the flight El-Masri was put under anaesthesia. At the CIA detention facility in Afghanistan (a small, dirty and dark cell in a brick factory nearby Kabul), El-Masri was interrogated, while being severely threatened and molested. On the 10th of April 2004 on the thirty-seventh day of the hunger strike, which El-Masri had started in March 2004 as a protest against his detention, he was subjected to forced-feeding; a feeding tube was forced through his nose into his stomach. Following this forced-feeding, El-Masri became extremely ill and suffered severe pain.¹²⁷

On 28 May 2004, the CIA apparently conducted a 'reverse rendition' to Albania, where El-Masri's blindfold was removed and he was 'released'.

123 *El-Masri v. the former Yugoslav Republic of Macedonia*, 13 December 2012, European Court of Human Rights, No. 39630/09, <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>>, 13 March 2013.

124 *Ibid.*, para. 18.

125 *Ibid.*, para. 157.

126 *Ibid.*, para. 21. 205.

127 *Ibid.*, para. 28,

Ultimately the Albanian authorities put El-Masri on a plane to Frankfurt. By that time, El-Masri had lost eighteen kilograms of body weight.¹²⁸ Apparently, the U.S. authorities discovered that El-Masri, who had the same name as an Al Qaeda operative, was a different person than they initially thought.

In Germany, El-Masri contacted a local lawyer who has filed several legal actions since. In 2004, a criminal investigation was opened in Germany based upon El Masri's complaint that he had been unlawfully abducted, detained and abused. In January 2007, the public prosecutor in Munich issued arrest warrants for various CIA agents for their alleged involvement in El-Masri's rendition.¹²⁹

El-Masri continued to challenge the actions of CIA-operatives. In 2005, the American Civil Liberties Union petitioned on behalf of El Masri and made a similar complaint against the former CIA director and certain unknown CIA agents.¹³⁰ Up to the U.S. Supreme Court (October 2007), the complaint was rejected; the U.S. Supreme Court held that the State's interest in protecting national secrets prevailed over El-Masri's rights. Additionally, in December 2008, the Skopje public prosecutor dismissed a criminal complaint filed by El-Masri with the Macedonian authorities against 'unknown' (Macedonian and U.S.) law enforcement officials for alleged unlawful detention and abduction. The Macedonian authorities asserted that El Masri was only interviewed by the border police, being suspected of travelling with false documents while entering the country on 31 December 2003. The Macedonian authorities argued that El-Masri ultimately was permitted to enter the country but left the country for Kosovo.¹³¹

Prior to petitioning the ECHR, an inquiry was conducted into allegations of 'extraordinary rendition' in Europe and the involvement of European governments, among which the *El-Masri* case. In 2006 and 2007, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, chaired by Senator Dick Marty of Switzerland, investigated those allegations. In its 2007-report (the so-called 2007-Marty-report), it was concluded that *El-Masri's* case qualified as 'a case of documented rendition' whilst

128 *Ibid.*, paras. 18–34.

129 *Ibid.*, paras. 55–58.

130 *Complaint (El Masri v. Tenet)*, 6 December 2005, United States District Court for the Eastern District of Virginia, Alexandria Division, <http://www.aclu.org/files/safefree/rendition/asset_upload_file829_22211.pdf>, 25 April 2013; see also 'El Masri v Tenet', *American Civil Liberties Union*, 1 June 2011, <<http://www.aclu.org/national-security/el-masri-v-tenet>>, 25 April 2013.

131 *El-Masri v. the former Yugoslav Republic of Macedonia*, *supra* note 123, paras. 37 and 39.

the arguments of the Macedonian authorities were 'utterly untenable'.¹³² The Marty-Report was based on the following evidence:

- Aviation logs confirming that a business jet registered by the U.S. Federal Aviation Administration had landed at Skopje airport on 23 January 2004 and had left Skopje on the same evening for Kabul via Baghdad;
- Flight logs confirming that a CIA-chartered plane had taken off from Kabul on 28 May 2004 and landed at a military airbase in Albania;
- Scientific testing of El-Masri's hair follicles – which took place in the course of the German criminal investigation – confirming that he had spent time in a South Asian country and had been deprived of food for an extended period of time;
- Geological data confirming that El-Masri's memory of minor earthquakes in Afghanistan which happened during his detention;
- Sketches drawn by El-Masri of the Afghan prison which were recognized by another rendition victim detained by the U.S. in Afghanistan.¹³³

Furthermore, in 2009, a parliamentary commission of inquiry of the German parliament (*Bundestag*) issued a report. It was concluded that El Masri's version of the events in Macedonia and Afghanistan was credible.

After having exhausted national legal avenues – to no avail – and led by the evidence described above, El-Masri lodged an application with the ECHR on 20 July 2009. El-Masri alleged that he had been subjected to a secret rendition operation, namely that agents of the Macedonian State had arrested him, held him incommunicado, questioned and ill-treated him before handing him over at Skopje airport to CIA agents who then transferred him on a special CIA operated flight to a CIA run secret detention facility in Afghanistan where he had been ill-treated for over four months.

The Grand Chamber of the ECHR, on 13 December 2012, unanimously ruled that the Macedonian Government was responsible for the torture, ill-treatment and secret rendition of El-Masri, in particular for violation of the

132 *Ibid*, paras. 45–46; Dick Marty, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, 11 June 2007 (Doc. 11302), para. 314; see also Dick Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States, Draft Report – Part II* (Explanatory Memorandum), 7 June 2006, p. 24, <http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf>, 11 March 2013.

133 *El-Masri v. the former Yugoslav Republic of Macedonia*, *supra* note 123, para. 45; see also Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States, Draft Report – Part II*, *ibid.*, p. 24.

Articles 3, 5, 8 and 13 of the European Convention of Human Rights.¹³⁴ Notably, during the proceedings before the ECHR, the Minister of the Interior of Macedonia acknowledged that Macedonian law enforcement authorities, acting upon an international arrest warrant, issued by the U.S. authorities, had detained El-Masri and kept him incommunicado in Skopje under supervision of Macedonian agents of the State Intelligence Service before handing him over to a CIA 'rendition team'.¹³⁵

The judgment of the ECHR in the *El-Masri* case is relevant in light of the following particulars:

- (i) Contrary to other (former) U.S. terrorism detainees, El-Masri turned out to be an 'innocent' person, since the U.S. erred as to his real identity.¹³⁶
- (ii) The U.S. lawsuit launched against former CIA director George Tenet and the owners of the CIA rendition aircrafts, was dismissed at U.S. district and appellate levels on the basis of the legal doctrine of 'state secrets privilege' which allows for the exclusion of evidence if this evidence discloses information endangering national security.¹³⁷ The U.S. Supreme Court rejected El Masri's request for writ of certiorari without motivation.¹³⁸

The *El-Masri* case actually pertains to both direct and indirect perpetration (i.e. State B acts upon orders of State A) by two States; apart from the role of the U.S. as direct perpetrator of torture and illegal detention, Macedonia detained El-Masri incommunicado for twenty-three days prior to surrendering him to the CIA, which relates to direct perpetration by Macedonia.¹³⁹ It is conceivable that a similar reasoning can be pursued in the situation of a third state providing intelligence or otherwise military or law enforcement support to the U.S. or any other 'drone State', which is a type of indirect perpetration.

¹³⁴ *El-Masri v. the former Yugoslav Republic of Macedonia*, *supra* note 123, para. 273.

¹³⁵ *Ibid.*, para. 74.

¹³⁶ Alka Pradhan, 'Outside the United States, Extraordinary Rendition on Trial', 15/29 *American Society of International Law*, 2 November 2011, <<http://www.asil.org/insights/11102.cfm>>, 1 March 2013.

¹³⁷ *El Masri v. Tenet*, 437 F. Supp. 2d 530, 2006.

¹³⁸ *El Masri v. United States*, 479 F. 3d 296 (4th Circuit 2007), cert. Denied, 128 S. Ct. 373 (2007); see Pradhan, *supra* note 136.

¹³⁹ Pradhan, *ibid.*, p. 3.

5.3 *Transposition of the El-Masri Ruling on (Third) State Responsibility for Drone Attacks*

The reasoning of the ECHR in the *El-Masri* case seems applicable to drone attacks which fail to comply with the parameters of the law enforcement model. The *El-Masri* model provides for state responsibility for states which directly or indirectly 'fail to take reasonable steps to avoid a risk of ill-treatment about which they [the authorities, GJK] knew or ought to have known.'¹⁴⁰ This type of state responsibility may also arise in the context of drone attacks, in particular when a third state submits information or otherwise provides operational or intelligence support to a state which transforms such support into the execution of drone attacks, whilst the third state knows that this information or support is meant to facilitate drone attacks whereby civilians are likely to be killed.

In the *El-Masri* case, Macedonia (being the third state) was held responsible for violation of Article 3 of the European Convention for the following reasons:

- (i) The Government of Macedonia knew or ought to have known that the U.S. adhered to an illegal rendition practice since several reports of (human rights) organizations covered the methods and expressed 'grave concerns' thereto. Accordingly, this material being in the public domain prior to the actual transfer of El-Masri into the custody of the U.S., the Macedonian authorities should have been aware that El-Masri – if transferred – was to be exposed to a real risk of being 'subjected to a violation of Article 3'.¹⁴¹
- (ii) In light of this risk, the Macedonian authorities failed to seek 'any assurances from the U.S. authorities to avert the risk of the applicant being ill-treated'.¹⁴²

The parallel to drone attacks outside the scope of armed conflicts emerges in the event third states provide information about individuals (for instance, their mobile phone records and numbers or location) knowing that this information will expose that person to 'a real risk' of being (extra-judicially) killed by a drone attack.

For the ECHR's findings relative to Article 5 of the European Convention, a similar analogy can be drawn. In paragraph 239 of the *El-Masri* ruling, the

¹⁴⁰ *El-Masri v. the former Yugoslav Republic of Macedonia*, supra note 110, para. 198.

¹⁴¹ *Ibid.*, para. 218.

¹⁴² *Ibid.*, para. 219.

ECHR qualifies an extraordinary rendition as entailing detention “outside the normal legal system”.¹⁴³ This may resemble an extraordinary killing of a terrorist suspect through a drone attack. The ECHR considers such action as being a “deliberate circumvention of due process” and contrary to “the rule of law and the values protected by the Convention”.¹⁴⁴ Once a third state is actively facilitating such a circumvention of Article 5 or any other human right – covering the law enforcement model – while being aware of the risks of this circumvention, state responsibility arises.

5.4 *Concluding Remarks Relative the El Masri Analogy*

In the *El-Masri* case, the ECHR found that the particular third state violated Articles 3, 5 and 8 (respect for private and family life) as well as Article 13 (effective remedy). Accordingly the third state was held responsible for these violations. Three major conclusions arise from this analysis.

- (i) First; the reasoning of the Court is to a large extent applicable to interstate cooperation vis-à-vis drone operations within the law enforcement model.
- (ii) Second; the rendition program of the U.S. at the time of El-Masri's detention was set up within the ‘War on Terror’. The potential justification pertaining to the political rationale of the War on Terror, is implicitly rejected by the ECHR, saying in paragraph 256 that ‘[t]his scrutiny [of the effective remedy under Article 13] must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State’.¹⁴⁵ Given the parallel between the U.S. rendition program and the U.S. drone operation program, this reasoning will equally apply to the latter.
- (iii) Third; civilian victims of drone operations which contravene human rights principles governing law enforcement operations, can resort to civil litigation on the basis of state responsibility as delineated in the *El-Masri* judgment.

5.5 *Drones at Trial: Other Types of Litigation Regarding Drone Attacks*

The practicality of the potential implications of the *El Masri* ruling emerges in light of the incentives of relatives of drone victims to initiate court cases against governments. On 18 July 2012 the first ‘wrongful death lawsuit’ in the

¹⁴³ *Ibid.*, para. 239.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*, para. 256.

US based upon a drone operation was filed against US officials. At that time, the estate of the late Anwar Al Awlaki (and that of his son Abdulrahman) and that of Samir Khan – three US citizens – filed a petition to the US District Court for the District of Columbia in order to hold the four US senior national security officials responsible for the death of these three US citizens. The defendants, who were sued for authorizing and directing the drone operations between 30 September 2011 and 14 October 2011 in Yemen that killed said individuals, were: Mr. Leon Panetta, US Secretary of Defense, Mr. David Petraeus, (former) Director of the CIA, Mr. William McRaven, Commander of the US Special Operations Command (USSOCOM) and Mr Joseph Votel, Commander of Joint Special Operations Command (JSOC).

The Complaint sought compensatory damages based upon the following causes of action:

- c) Due process rights under the Fifth Amendment to the U.S. Constitution were violated, because the defendants authorized and directed their subordinates to use lethal force.¹⁴⁶
- d) Unreasonable seizure under the Fourth Amendment, because the defendants authorized and directed their subordinates to use lethal force.¹⁴⁷
- e) A violation of the U.S. Constitution's Bill of Attainder Clause, because the Al Awlaki's and Samir Kahn were deprived of the legal protections of a U.S. trial.¹⁴⁸

The introduction of this Complaint portrays targeted killings through drone attacks within the context of the overall US policy. Paragraph 1 of this complaint reads:

Since 2001, and routinely since 2009, the United States has carried out deliberate and premeditated killings of suspected terrorists overseas. The U.S. practice of 'targeted killing' has resulted in the deaths of thousands of people, including many hundreds of civilian bystanders. While some targeted killings have been carried out in the context of the wars in Afghanistan and Iraq, many have taken place outside the context of an armed conflict, in countries including Yemen, Somalia, Pakistan, Sudan,

146 *Al Awlaki and Kahn v. Panetta et al.*, 18 July 2012, United States District Court for the District of Columbia, para. 41, <http://www.aclu.org/files/assets/tk_complaint_to_file.pdf>, 28 February 2013.

147 *Ibid.*, para. 42.

148 *Ibid.*, para. 43.

and the Philippines. These killings rely on vague legal standards, a closed executive process, and evidence never presented to the courts. This case concerns the role of Defendants . . . in authorizing and directing the killing of three American citizens in Yemen last year. The killings violated fundamental rights afforded to all U.S. citizens, including the right not to be deprived of life without due process of law.¹⁴⁹

The paragraphs 19–20 of the Complaint describe the methodology the CIA and JSOC entertains in regard to the ‘kill lists’. Names of individuals are put on the list following a standing order, based on information or belief, which authorizes and instructs certain government personnel to eliminate that person. The Complaint also refers to an interview in *Newsweek* with John Rizzo, a former acting general counsel for the CIA, stating that ‘there are approximately 30 individuals on the list ‘at any given time’, and that ‘[t]he Predator [drone] is the weapon of choice, but it could also be someone putting a bullet in your head’.¹⁵⁰ More strikingly senior U.S. government officials such as John O. Brennan (the new CIA director) and Dennis C. Blair (U.S. director of National Intelligence) have previously conceded that the elimination of persons on the list extends to U.S. citizens, even outside of the context of an armed conflict.¹⁵¹ The selection system to have (U.S.) citizens or other individuals been put on the list seems rather arbitrary, given the ‘incomplete and inconsistent explanations of the legal standards that govern the placement of U.S. citizens on the kill lists.’ The term ‘imminent’, for example, is defined so broadly that it is hard to establish when someone poses an ‘imminent threat’, which is a prerequisite to having someone put on the kill list.¹⁵² According to the U.S. Department of Justice’s White Paper (2013), outlining the U.S. policy on drone attacks, the

149 *Ibid.*, para. 1.

150 *Ibid.*, para. 19; *see also* Tara McKelvey, ‘Inside the Killing Machine’, *Newsweek*, 13 February 2011.

151 *See*, however, the letter of U.S. Attorney General Eric Holder of 7 March 2013 denouncing this possibility; Peter Finn and Aaron Blake, ‘John Brennan Confirmed as CIA Director, but Filibuster Brings Scrutiny of Drone Program’, *Washington Post*, 7 March 2013, <http://www.washingtonpost.com/politics/rand-paul-says-hes-satisfied-with-obama-administrations-response-on-drones/2013/03/07/9b20aa44-875d-11e2-98a3-b3db6b9ac586_story.html>, 12 March 2013; the letter reads as follows: “Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil? The answer to that question is no”, 7 March 2013, available at: <<http://www.theblaze.com/stories/2013/03/07/holder-sends-sen-rand-paul-another-letter-about-drones-on-american-soil-here-it-is/>>, 12 March 2013.

152 *Al Awlaki and Kahn v. Panetta et al.*, *supra* note 146, para. 20.

threat posed by Al Qaeda and its associated forces, is said to require, by its nature, a 'broader concept of imminence'. The U.S. is not required 'to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.'¹⁵³ And what if someone has been on the list for some time? Is there a mechanism for review of the continuation of the threat they pose and is that threat reviewed before they are killed? According to the plaintiffs, Mr. Al-Awlaki did not pose a threat and at the time lethal force was used against him, he was "not engaged in activities that presented a concrete, specific, and imminent threat to life, even though there were means short of lethal force that could reasonably have been used to address any such threat."¹⁵⁴ News articles revealed that Al-Awlaki was already under surveillance of the U.S. authorities three weeks before the strike, so it is questionable whether the lethal force used really was a last resort.¹⁵⁵

The plaintiffs in the *Al-Awlaki* case contended that the strike was not even permissible under the laws of war, because Al-Awlaki was not actively taking part in hostilities.¹⁵⁶ The U.S. government responded on 14 December 2012, by filing a motion to dismiss the lawsuit. The ACLU summarized the essence of the government's arguments and the consequences thereof, by submitting that the government:

has the authority to kill Americans not only in secret, but also without ever having to justify its actions under the Constitution in any courtroom . . . the courts have no role at all to play in assessing whether the government's targeted killings of Americans are lawful – even after the fact – simply cannot be squared with the due process clause . . . If the Court accepts the government's position, it is not only the current president but every future president who will wield the power to kill any American he or she deems to present a threat to national security, without ever having to explain that action to a judge. The Constitution requires more.¹⁵⁷

153 'Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or an Associated Force', *DoJ White Paper*, *supra* note 8, p. 7.

154 *Al-Awlaki and Kahn v. Panetta et al.*, *supra* note 146, para. 24.

155 *Ibid.*, para. 31.

156 *Ibid.*, para. 34; *see also* 'Al-Aulaqi v. Panetta: Lawsuit Challenging Targeted Killings', *American Civil Liberties Union*, 6 February 2013, <<http://www.aclu.org/national-security/al-aulaqui-v-panetta>>, 1 March 2013.

157 'U.S. Asks Court Not to Consider Targeted Killing Challenge', *American Civil Liberties Union*, 14 December 2012, <<http://www.aclu.org/national-security/us-asks-court-not-consider-targeted-killing-challenge>>, 12 March 2013; At the time of writing, a ruling had not yet been issued in this case.

These cases illustrate the legal implications of potential unlawful drone attacks for government officials responsible for the decision-making process and the execution of these operations.

Conclusions

The criminalization of dubious drone operations – such as the contemporary CIA drone strikes – is contingent upon the underlying system; the armed conflict or law enforcement model.

Within armed conflicts, drone operations are a perfectly legal means and method of warfare as long as the basic principles of warfare are adhered to, most significantly the principle of discrimination between combatants and civilians. Drone operations may amount to ‘war crimes’ when, apart from the *actus reus*, the *mens rea* threshold is met. For the ICC in the *Lubanga* case, a degree of risk which must be no less than awareness on the part of the co-perpetrator that the consequence ‘will occur in the ordinary course of events’ suffices to accept *mens rea*.¹⁵⁸ Awareness that a specific drone operation bears a risk that the consequence of the operation will be a violation of the principle of discrimination between combatants and civilians or the principle of proportionality, can thus incur criminal liability.

Within the law enforcement model, drone attacks seem a less obvious methodology in light of the ‘last resort’ requirement, which condition is absent in an armed conflict.

The crime of aggression revolves around one central element: the existence of ‘a manifest violation of the UN Charter’. The initiation of an investigation to such a crime is contingent on approval by the UN Security Council; thus, a considerable political influx of this institution is to be anticipated. This is even more striking when taking into account that the Security Council requires – at least – the approval of its five permanent members (the U.S., China, Russia, France and the U.K.). It is unlikely that, for example, the U.S. would vote for an investigation into their ‘own’ potential crimes of aggression. Within the realm of military operations using drones, international politics will invade the courts due to the political nature of prosecution based on the crime of aggression. The parameters for international crimes (*actus reus* and *mens rea*) constraint frivolous prosecutions.

Lastly, this article addressed state responsibility for drone attacks. State responsibility, as opposed to international criminal liability on this issue,

¹⁵⁸ *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 62, para. 1012.

seems a more extensive concept from the perspective of the human rights paradigm. This is particularly true in view of several ECHR judgments on (third) state responsibility. It was argued that these judgments may analogously embrace (third) state liability for drone operations under the law enforcement system. Apart from civil litigation based upon constitutional or human rights violations, no judicial precedent for criminal prosecutions for drone operations (within the law enforcement model) yet exists. The reason for this might be that such operations feature within interstate relations, whilst jurisdictional and national interests may vitiate such individual prosecutions.