# *International Regulation of Armed Conflicts:*

## *'Jus in Bello' in an Age of Increasingly Asymmetric and Hybrid Warfare.*

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***Abstract***

The changing character of warfare, exemplified by the increasingly asymmetric and hybrid character of modern armed conflicts, presents complex challenges for the international legal framework regulating armed conflicts - *Jus ad Bellum* and *Jus in Bello*. The key factor driving this change has been the growing involvement of non-State actors (combatants, insurgents, militants and terrorist groups) in armed conflicts. While acknowledging the normative progress made in articulating the principles of '*jus in bello'*, the paper highlights persistent and pervasive problems in the application of the law governing armed conflicts to battlefield situations. The article's key objective is to counsel the necessity for the further refinement and granulation of current 'signature policies' involving the use of armed drones in targeting terror suspects. This task is undertaken with a view to attaining a greater degree of accuracy, clarity and precision in calibrating the vital distinction between civilian status and the various categories of *presumed* combatants. The paper posits the impossibility of attaining the rule of distinction in the use of weapons of mass destruction (WMDs). It further argues that when viewed from this perspective, the mere possession and stockpiling of WMDS could *per se* be construed as constituting the requisite *mens rea*, or *animus belligerendi*, of preparation for the possible future commission of war crimes. The concluding part of the paper outlines a possible conceptual framework for establishing war crimes culpability in the context of nuclear warfare.

***Keywords- International law; law of war; asymmetric warfare; IHL principle of distinction; war crimes.***

### I. INTRODUCTION

Asymmetric warfare is a fairly old phenomenon in humanity, with historic examples such as the epic biblical contest pitting David *versus* Goliath still serving as an epithet for the unequal pairings of contestants in present-day sporting and battlefield episodes. However, there has been an acknowledged increase in both the number and the frequency of armed conflicts comprising some element of asymmetry; to wit, armed conflicts in which one of the sides enjoys an overwhelming military superiority over the adversary [1]. Evidentiary confirmation of this increasing phenomenon can be deduced from the various coalitions in the 'war against terror' to the wars in Iraq, Libya, Syria and Yemen. Further evidence stem from hybrid conflicts which combine the elements of both conventional (symmetrical) and unconventional (asymmetric) warfare in Syria and the sporadic outbreaks of conflict along the Israeli border, with the militant groups Hezbollah and Hamas, in particular, falling into the hybrid category of organizations capable of engaging in both types of warfare. On the other hand, symmetry in armed conflict (generally understood to involve classic armed combat with open battle confrontations between regular State forces of roughly equal strength or evenly matched government troops) is becoming a rare phenomenon [2]. Furthermore, the armed conflicts of the 21st century are increasingly internalized and 'privatized' through the involvement of non-State actors such as militant groups and insurgents. Such conflicts do nonetheless have international ramifications which confer on them a higher degree of complexity than inter-State symmetrical warfare. It is this complexity, borne out of the inequality in the belligerents' military strength that often leads the weaker party to adopting unconventional tactics and strategies. Viewed from a legal perspective, the ultimate outcome of such unconventional tactics is the use of unlawful methods of warfare, culminating in potential breaches of *jus in bello* norms including the key principle of distinction.

The phenomenon of asymmetric and hybrid warfare poses complex challenges to regular armed forces in terms of finding adequate strategic and tactical responses. The traditional response has often been the deployment of counter-insurgency measures including covert operations involving the deployment of special forces. [3] However, there is always a danger when faced with the complex challenges of asymmetric and hybrid warfare that regular forces may resort to waging total or unrestricted warfare; or they may employ strategies such as 'relentless pursuit' with the aim of countering the 'hit and run' guerrilla warfare tactics used by insurgents. Counter-insurgency strategies and tactics could, in turn, lead to an over-reaction on the part of regular soldiers or special forces, including exactions on civilian population founded on the presumption of civilian participation in the

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conflict. This in turn might inevitably lead to a consequential blurring or even an erosion of the vital distinction between combatants and civilians. This is especially the case in '*fog of war'* scenarios when civilian populations may be viewed through the hazy lens of 'presumed combatants'. It is this facet of the problem that this paper sets out to examine. The conceptual focus of the article is directed at a critique of the signature policies used for the profiling of terror suspects and presumed combatants in the war on terror and the implications of such policies for the IHL principle of distinction. It should perhaps be pointed out at this stage in the discourse that unlike a 'personality strike' in which a known individual (e.g. a known terrorist or militant combatant) is the subject of the targeting, in a 'signature strike' the precise identity of the targeted individual or group of individuals is not known. Rather the targeting (by the medium of unmanned remotely controlled drones armed with Hellfire missiles) is based on a particular 'signature policy' founded on specific traits and criteria which together generate and construct a profile for the target as a combatant (or more precisely a suspected terrorist or presumed combatant).

## II. AIMS AND OBJECTIVES OF THE PAPER

A review of academic literature on asymmetric warfare indicates that much of the discourse has been focused on analyzing the tactical [4] and strategic [5] aspects of the phenomenon. There have also been some studies conducted on the IHL [6] and international human rights law implications of asymmetric conflicts. However, none of these studies have dealt specifically with the IHL principle of distinction and its application to signature policies. And although signature policies themselves have been studied in some depth there have not been any attempts made to link such policies with the IHL principle of distinction and the potential for breach of the norm in the use of signature policies. The specific question concerning the targeting of presumed combatants through the deployment of armed drones and the implication of this battlefield strategy for the IHL principle of distinction thus presents a perceptible gap in the literature. It is this gap in the literature which this paper sets out to address.

Part III of the paper briefly sets out the scope and limitations of the study. Part IV provides the fulcrum of the article with an overview of some of the key issues by examining the main characteristics and features of asymmetric and hybrid armed conflicts, and the applicability of the rules of war to such conflicts. In Part V the research problem is identified and contextualized by examining the IHL principle of distinction against the background of asymmetric and hybrid conflicts. The focus of the discussion in this part is from the perspective of the regular forces engaged in asymmetric or hybrid warfare. Part VI represents the fulcrum of the discourse. In this part, the various signature policies are reviewed and critiqued. Part VII sets to develop a theoretical or conceptual framework for potential war crimes culpability by establishing a link between nuclear defence strategy and and breach of jus in bello norms governing armed conflict. Parts VIII and IX conclude the paper with some key recommendations for law reform.

## III. SCOPE AND LIMITATIONS OF THE RESEARCH

The scope of this article is broadly limited to the prescriptive norms of *jus in bello* (i.e. permissive rights and prohibitions derived from positivist international law rules governing the conduct of warfare). Its focal perspective is anchored on the IHL principle of distinction, with this perspective further narrowed down to identifying legal and practical problems associated with the application of the principle of distinction in situations of asymmetric warfare. The scope of the discourse, therefore, does not extend to *jus ad bellum* (rules governing the legal justification or rationale for going to war). It also does not cover international human rights law *vis-à-vis* the rules applicable to the treatment of non-combatants, civilian populations or prisoners of war. Nor does it extend to arguments underpinning the moral justification for waging war – i.e. the concept of 'just war' in the Augustinian sense of *jus bellum iustum.* There is developing an-built tension in the two main approaches to combating terrorism *vis-à-vis* their applicability in given

situations – on the one hand is an armed conflict model based on IHL, and on the other an enforcement model applying the rules of IHRL. Exploring the nature, scope and possible solutions to this tension could provide opportunities for future research.

## IV. Background to the Study

In 1648 the Peace Treaty of Westphalia sought to put an end to 'private' wars in Europe conducted by non-State parties, thus designating the waging of warfare as a sovereign prerogative. The Westphalian model, therefore, conceived and prescribed armed conflict as an exclusively State preserve (sovereign prerogative) by putting an end to the 'privatization' of war. In view of the geo-political circumstances of the time (with a Europe comprising of nation states of roughly equivalent populations and sizes and with international relations guided by the doctrine of equality of States) one of the main products of Westphalia was eventual symmetry in warfare. This is turn ushered in a prolonged period of approximate military parity in wars involving combat between government armies of roughly identical or equal military strength. Such wars proceeded on the basis of open confrontation at pre-selected geographically circumscribed battlefield locations, a fact evident from history lessons which often include repertoires (followed by the indexing) of battlefield names and their associated dates.[7]

This confining of the theater of conflict to a restricted area was particularly favorable to the customary norm which required distinguishing between combatants and civilians. It is this State-based model of warfare that provided the premise for the Prussian military theorist and strategist General C.G. von Clausewitz in his Hegelian dialectical rendering of battlefield strategies in his two monographs: the '*Principles of War*' and '*On War*'. The waging of war as a sovereign prerogative, and thus the exclusive preserve of statecraft, was equally the inspiration for the *Rousseau-Portalis* doctrine. In line with this doctrine, J-J Rousseau postulated that war does not involve a relationship between man and man, but between State and State, in which the men who fight each other are not enemies except by accident (of politics); and they fight not as ordinary or private citizens, but as soldiers and defenders of the fatherland [8].

This State-based model of warfare and its attendant symmetry fits in rather well with the norms governing the conduct of armed conflicts, not least because of the foundational element of reciprocity in the conduct of combat operations on which such wars were premised. It may even be argued that the norms of *jus in bello* (customary norms, IHL principles and the Geneva conventions) are conceived and designed with the Westphalian model of inter-State warfare (and *a fortiori* symmetry) in mind. It is arguably for this reason that when applied to asymmetric and hybrid conflicts, the norms of *jus in bello* tend to break down. Furthermore, the concepts of asymmetric and hybrid warfare challenge the very foundations of the Westphalian construct (through the involvement of non-State actors in the waging of armed conflict) as well as the Clausewitz conception of a battlefield strategy founded on symmetry.

### *A. Asymmetric and Hybrid Armed Conflicts: An Overview.*

The Westphalian model has given way once again to the 'privatization' of warfare with the resurgence in the number and frequency of armed conflicts involved non-State actors. Asymmetric and hybrid wars often have a transgressive agenda which may include effecting regime change, the violent pursuit of significant alterations in current government policy or the attainment of aspirational goals such as self-determination or a religiously inspired transformational agenda involving State governance. Unlike conventional state-on-state symmetrical wars, asymmetric and hybrid conflicts do not usually have a distinct beginning or structured ending in the form of a peace treaty or a formal agreement allocating to each side war gains or forfeitures. It is this intractability that confers on asymmetric and hybrid conflicts the character of wars of attrition which in turn can harbor disastrous consequences for IHL norms governing the conduct of warfare.

Given the vast inequality in military strength and war resources between the belligerent parties, the defining hallmark of asymmetry in warfare is the protraction of the war through a strategy of low-intensity conflict with the principal aim of wearing down the stronger adversary over time through war weariness. Viewed from the perspective of the weaker party, the primordial and cardinal rule of engagement in asymmetric warfare is unsurprisingly the avoidance of open combat with a vastly superior adversary in a geographically circumscribed battlefield location, employing classic troop formations, or adopting conventional strategies and tactics in line with the Clausewitz principles for conducting warfare. For the most likely outcome of such a conventional approach would be the annihilation of the weaker forces. To counter the superiority of the stronger adversary, non-State actors will traditionally resort to methods of waging war which attempt to leverage the weaknesses in their military structure and war resources[9].

The late Chinese leader, Mao Tse-Tung, can be considered to be to asymmetric and hybrid armed conflicts what Clausewitz was to symmetrical warfare. As part of Maoist philosophy, he outlined the strategy for conducting war against a vastly superior military force. In his view, insurgents and militant groups can only have a realistic prospect of victory over militarily superior government forces if the conflict is maintained in a protracted state with low levels of violence over a lengthy duration. This low level of violence is calibrated as the 'normal' or default position and should be lowered in the face of any attempt by the superior forces to escalate the conflict. This de-escalation strategy has a dampening effect and helps to stifle the momentum of the adversary. One of the problems faced by the stronger adversary is that continuation of the escalation under these circumstances would be construed in the court of public

opinion as an excessive, disproportionate or indiscriminate use of force against a weaker foe.

On the other hand, the weaker party should not lower the intensity of the war to the point of cessation of belligerent activities as this could snuff out the flame of the insurgency. They must continually agitate and harass the foe while avoiding an escalation to preserve the momentum of the conflict. It is precisely for this reason that non-State actors in asymmetric and hybrid wars hardly ever adhere fully to the terms of a ceasefire or truce agreement. Once the escalation campaign of the stronger adversary is over, the weaker party should then re-adjust its combat strategy back to the calibrated 'normal' of low-level protracted violence. In line with asymmetric/ hybrid war strategy, escalation of the conflict by the weaker side only occurs when conditions seem favorable for a victorious conclusion to the conflict. This is when an 'end game' scenario is in sight or if the political environment is conducive to the negotiation of favorable terms to settle the conflict.

From an IHL perspective, the Maoist philosophy differs from modern forms of asymmetric warfare in that with the former violence is aimed at a precise target (i.e. government forces), thus keeping the conflict within the threshold of distinction. Modern terror groups, on the other hand, are increasingly resorting to indiscriminate forms of urban warfare which include the targeting of civilians with unconventional weapons such as knives and vehicles. Apart from trying to wear down the enemy through combat fatigue, the rationale for protraction in contemporary asymmetric conflicts include taxing the resources of the superior military power by increasing security costs whilst undermining public confidence through war weariness - thus depleting public trust in State power and institutions. The *modus operandi* for this strategy include ambushes, guerrilla warfare tactics, outbreaks of sporadic violence, the bombing of civilian infrastructure and high value economic targets, and spectacular attacks on highly symbolic targets. Suicide bombings, the use of improvised explosive devices (IEDs), and 'lone wolf' attacks conducted with the use of 'sleeping cells' behind enemy lines or on enemy territory all constitute part of the armory of terrorist groups. As part of this strategy, non-State actors will also put in place a decentralized command structure, with organizations such as al Qaeda and ISIS known to source out their activities through 'terror franchising'. [10] This decentralization strategy has adverse implications for the enforcement of IHL, as renders difficult the attribution of responsibility if war crimes are committed.

From an IHL perspective the problem with asymmetric warfare resides in the fact that by shunning traditional open confrontation in favor of unconventional methods, non-State actors often resort to perfidious tactics to offset their comparative military disadvantage or weakness. These methods are known to include mingling with civilian populations and the occasional use of civilians as human shields with combatants disguising themselves as non-combatants, thus blurring the threshold of distinction. It may thus be argued that deceit and a disdain for the rules of war are perceived by terrorist groups in particular as part and parcel of the armory for leveraging or redressing their comparative disadvantage in military strength. Asymmetric warfare operates on the principle of war waged anywhere and at any time. There is no geographically circumscribed battlefield. Terror groups such as al-Qaeda, Boko Haram, and ISIS have even posited the universalization or regionalization (in the case of Boko Haram) of the theater of conflict parameters – i.e. a global or regional battlefield with a global audience. This strategy of regionalization or universalization of what is in effect an internal conflict *a priori* has the potential to erode or to even negative the rule on distinction through indiscriminate targeting of civilian populations and communities within the perceived universalized combat zone.

Hybrid warfare combines the principal features of both asymmetric and symmetric warfare, most notably in the use of quasi-military formations. Groups with hybrid warfare capabilities can often engage in a simultaneous operational fusion of asymmetric and symmetric combat techniques with the aim of achieving strategic and tactical synergy in the mobilization of war assets and resources. The expected outcomes of hybrid multi-modal war strategy are the realization of synchronous and synergistic effects which can be pivotal to promoting the overall war effort [11]. Illustrative examples of organizations with hybrid war capabilities include al-Shabaab, Boko Haram, the Taliban, Hezbollah, Hamas, and ISIS. The military response of regular forces to these unconventional strategies is often to employ counter-insurgency measures, including covert operations, which could equally have potentially negative impacts on the IHL principle of distinction.

### *B. The Applicability of 'Jus in Bello' to Asymmetric and Hybrid Armed Conflicts.*

Given that asymmetric and hybrid armed conflicts do not subscribe to the basic tenets of the Clausewitz construct of war or with the traditional concepts of IHL, this raises questions as to whether the humanitarian challenges they pose are adequately met by the current norms of *jus in bello*. For if state-on-state symmetric warfare is becoming a thing of the past, it is equally arguable that the laws of war which were conceived and designed with such conflicts in mind are also becoming obsolete. The guiding principle of *jus in bello* is that wartime conduct and operations should be solely aimed at achieving the objects of the war. This means that only legitimate war objectives should be pursued. Thus attacks on civilians or civilian objects, the use of disproportionate, indiscriminate, or gratuitous violence, would be amount to illegal conduct.

IHL norms apply to all types of wars irrespective of their actual character as long as the conflict in question can be categorized as an 'armed conflict'. This becomes the case

when separate or isolated attacks mounted by a well-structured organization crystalize to produce synergistic effects. The criterion of organizational structure is pivotal to the attribution of responsibility for any breaches of IHL norms, and this, in turn, requires a hierarchical, top-down group with defined positions and roles, including a command structure and an operational code of conduct. In the case of *The Prosecutor v Tadic*, the *International Criminal Tribunal for Former Yugoslavia (ICFY)* defined the term "armed conflict" as existing "*whenever there is a resort to armed force between States or protracted armed violence between government authorities and organized armed groups or between such groups within a state*."[12]

The norms of *jus in bello* thus only apply to wartime conduct. And they apply to all types of armed conflicts regardless of their nature or character – i.e. to asymmetric and hybrid as well as symmetrical armed conflicts. It is worth noting that reciprocity (or the expectation thereof) is not a pre-requisite or a requirement for the binding force of IHL norms of *jus in bello*. It would, however, be deemed unreasonable and unrealistic to expect that IHL norms should apply to a purely localized conflict such as inter-tribal conflict or to a village land dispute which results in casualties, notwithstanding the level of violence involved. Such conflicts can more appropriately be dealt with under national law. The principles governing the law of warfare are peremptory norms of international law. From an international law perspective *jus in bello* rules constitute *jus cogens* and can arguably be seen in the light of obligations *erga omnes* (owed towards all). It is for this reason that their breach, constituting a war crime, is assigned to the category of a 'crime against humanity' – thus attracting the procedural precept of universal jurisdiction. In an advisory opinion, the *International Court of Justice* has postulated that the *jus in bello* principle of distinction is fundamental to IHL and can therefore be considered as a cardinal rule of international law[13].

### C. *The Erosive impact of modern advances in warfare technologies on the IHL principle of distinction.*

Since the introduction of aerial combat in the early 20th-century technology has made significant inroads into the way warfare is conducted. New generation technologies (guided missiles systems, unmanned aerial vehicles (UAV or Reaper drones), smart bombs, IEDS, encrypted mobile phones, etc.) now form an integral part of battlefield strategy and combat tactics. But although many studies have examined the impact of technology on the conduct of modern warfare [14], the specific question regarding the potentially erosive impact of new battlefield technologies on the threshold of distinction remains either unexplored or under-explored. Aerial warfare in particular, with its associated lexicon of 'collateral (civilian) damage', has an irrefutable potential to blur or even erase the essential distinction between military and civilian targets, and between civilians and combatants. UAVs are increasingly being deployed on bombing missions by government forces as well as by insurgents and combatants, with both ISIS and Peshmerga forces known to be using commercial versions of UAVs for bombing missions in early 2017 in the battle for Mosul[15].

It is submitted, from the perspective of IHL, the increasing use of remotely controlled weapons systems poses a significant threat of erosion to the threshold of distinction given the potentially indiscriminate impacts of these systems which may extend to the inadvertent targeting of civilian objects and communities. Remotely controlled weapons systems increase the potential for mistakes, which, in turn, may culminate in the unintentional targeting of civilian objects or populations. This is a possible war crime if the burden of proof relating to the exercise of due diligence in the conduct of combat operations cannot be discharged. The potentially erosive impact of new generation war technologies and weapons systems remains a concern which as yet has not been sufficiently addressed even with the advent and deployment of so-called 'smart weapons' systems. In the meantime, the continuing evolution in technological warfare continues to reveal its more insidious and pervasive traits *vis-à-vis* its potentially harmful effects on civilians. Cyber warfare in particular, no matter how well targeted, carries with it a virulent toxicity which can inflict indiscriminately injurious impacts well beyond the intended target by infecting civilian computer systems even in neutral countries or venues.

These modern developments concerning advances in war technology pose significant challenges for the application of the IHL norms of *jus in bello* in a contemporary context in as much as there have not been any corresponding developments in the legal framework aimed at addressing these challenges in line with advances in the conduct of warfare.

## V. The Nature of the Problem with the IHL Principle of Distinction in Asymmetric and Hybrid Armed Conflicts: A Contextual Analysis.

### A. *The Protective Function of IHL and the Threshold of Distinction.*

The primary objective of the IHL principle of distinction is to protect civilians and civilian objects during armed conflict. This implies that only individuals who are exercising a continuous combatant function (CCF) through their membership of an organized armed group, or those taking a direct part in hostilities (DPH), can be directly targeted or attacked. In symmetric warfare enlisted uniformed soldiers of regular armed forces (traditional State armies) fit easily into the former group and can be identified with certainty as combatants in the CCF category. However, the threshold of distinction tends to break down in situations of asymmetric and hybrid warfare when individuals with a notional civilian status periodically engaged in armed combat. An illustrative example would be seasonal recruits who join the Afghan Taliban for the so-called Spring offensive which marks the start/ resurgence of insurgency following the winter lull in fighting. These perennial recruits then return to their normal

civilian occupations (farmers, shepherds, tailors, shopkeepers, drivers, teachers, etc.) at the beginning of the summer season. The IHL threshold of distinction becomes blurred when applied to such individuals. This is likewise the case with police officers, members of militia, the personnel of paramilitary organizations, and reservists who can only be targeted when exercising a DPH function.

In line with the IHL principle of distinction, civilians (including persons with a notional civilian status) can only be legally targeted or attacked if they are taking a direct part in hostilities (i.e. within the time frame if and when they assume DHP status). In other words, they can only be targeted at the point in time when they are engaging in hostile activities or armed conflict. Once they resume their civilian status, they cannot be targeted. The appropriate approach would be arrest and prosecution under relevant provisions of national law. However, membership of an organized armed group such as al-Qaeda or ISIS could *per se* be considered as assigning to the individual concerned a CCF status similar to an enlisted soldier in a regular army. A CCF status makes a person a legitimate military target in wartime; in addition, a CCF can be subject to an attack by enemy forces anywhere and at any time[16]. This can be the case if the individual concerned has a long-standing assimilation or association with an armed insurgency or terrorist group through recruitment, membership, training and being equipped by the organization for the purpose of direct engagement in hostilities. However, such engagement has to be in a continuous manner rather than on a spontaneous or sporadic basis or through unorganized participation. An individual with a CCF status only ceases to become a legitimate target when they put themselves '*hors de combat*' (or out of combat) through demobilization or retirement from active service and re-integration into civilian life. In the context of IHL, four groups of persons are identifiable when establishing the threshold of distinction; the four categories, in decreasing order of IHL level of protection, are:

- Civilians, who have a fully protected status under the IHL principle of distinction and should not be targeted or be subject to attack;
- DPH (persons involved in direct participation in hostilities): an activity-based category, individuals in this group are in principle considered to be civilians, in so far as they are not established members of any armed organization; they can thus only be targeted when engaging in belligerent activities – i.e. partial protection.
- CCF (continuous combatant function): belonging to the status-based category of a functional or active combatant; they can, therefore, be the subject of an attack anywhere and at any time, meaning that targeting need not be restricted to a geographically circumscribed battlefield zone; however, they are accorded some level of protection, most notably as prisoners of war (POW) when captured in combat.
- Spies: do not benefit from the protections accorded by IHL as espionage is not considered to be legitimate activity in the conduct of warfare (hence the customary epitaph of '*executed at dawn*'). However, spies are subject to protections under (international) human rights law (IHRL) regarding their treatment when in captivity.

The threshold of distinction tends to break down when an individual in the DPH group is targeted outside the specific time-frame when they are involved in belligerency. US military policy, in particular, has historically and in practice adopted the view that all the participants of terrorist organizations such as al-Qaeda and its associated forces are in fact exercising the CCF function - and in view of this status they are targetable anywhere and at any time.[17] However, depending on the organization and its nature, membership can be differentiated into various categories. In traditional state armed forces, membership is based on the employment of a uniformed individual within the organization. Members are therefore easily identifiable. However, with non-State, non-uniformed combatant groups, it could be argued that a more appropriate criterion for targeting would be a functional or activity-based status in that an individual takes or gives orders in a central and hierarchical chain of command, or takes a direct part in hostilities. If the group is a purely military organization similar to a traditional state army in that their primary activity is militant in nature (e.g. ISIS), then the targeting of group members should be a lawful military objective in line CCF functionality. Even so, direct targeting of such a group should be limited to exclusively military assets and installations that are not civilian objects. However, in asymmetric warfare, the problem of distinction is further compounded by the fact that combatants and military objects frequently inter-mingle with civilian populations and civilian objects, with militants using social occasions such as weddings, family reunions and funerals for the holding of informal meetings and consultations

Under Article 51(3) of API, civilians are not targetable unless at a time when they are taking a direct part in hostilities[18]. The ICRC guidelines provide that a civilian can be considered to be a DPH if the act he is performing is likely to significantly affect the military operations or the capacity of a party to the armed conflict, or if such actions inflict harm on persons or objects protected from direct attack. This does not require the materialization of harm, only an objective likelihood of it. When an act is reasonably expected to adversely affect military operations or the military capacity of a party to the conflict, it would have satisfied the threshold requirement, and the person who is engaging in the said act can thus become a legitimate target of an attack under the DHP category.

### *B. Establishing the Nexus of Belligerent Activity for the DPH Category.*

Participation in hostilities can either be direct or indirect. Participation on an indirect basis involves taking part in war

sustaining activities as opposed to directly contributing to the general war effort. With direct participation, an individual actually engages in conduct which has the likelihood of actualizing the materialization of the threshold of harm required, whereas indirect participation only contributes to a mere maintenance or build-up of the capacity required for causing such harm. For direct participation, there should be a sufficiently close causal link between the act and resulting harm which confers on the individual the status of a DPH. The act must form an essential part of such an organized military operation. It should also be one causal step away from the actualization of harm as opposed to a gradual build-up of actions. For the latter, arrest and prosecution provide a more lawful alternative to targeting in an armed attack

To be considered a DPH, there must, therefore, be a belligerent *nexus* or connection. This requirement is met when an act is explicitly designed to cause the required direct harm in support of one party to the detriment of another. To establish the belligerent *nexus* is a challenging task, but one should deduce from objectively verifiable factors or evidence whether the conduct of a civilian in the given circumstances, time and place can reasonably be interpreted to be an act in support of one belligerent party to the detriment of another by directly causing harm to the latter[19]. When applied together, the three requirements (based on the threshold of harm, direct causation and belligerent nexus) enable an appropriate distinction to be made between civilians or purely civilian objects on the one hand and, on the other hand, civilians and civilian objects which are taking a direct part in hostilities (i.e. civilian DPH). Whereas the former is protected under the IHL principle of distinction the latter is not and can thus become the legitimate target of a signature policy strike but only within the time frame when they are embarking on the DPH function.

As already seen the principle of distinction is a cardinal rule of *jus in bello* which provides protection for civilians from wartime attack. Article 57(2) of API stipulates that if a belligerent plans or decides to attack a target, they are under a duty to ensure that the object of the attack is not a civilian or a civilian object. If there is any doubt whatsoever as to whether a person is a CCF or DPH, Article 50(1) of API lays down a presumption to the effect that they should be considered to be a civilian and, therefore, not be subject to attack. Similarly, this presumption applies to objects such as places of worship, houses or other dwellings and facilities habitually used in a civilian capacity.

An associated problem concerns the difficulty of attaining a specific and precise definition of who a civilian or civilian object is in the context of armed conflict. This is because the focus has always been on defining what a military objective is for the purposes of what may be legally targeted.[20] In this regard Article 52(2) of API provides that attacks are strictly limited to military objectives. Military objectives are limited to objects that by their "nature, location, purpose or use… [make an effective contribution to the military action] …and whose total or partial destruction, capture or neutralization… [would offer] …a definite military advantage."

Viewed from the perspective of the principle of distinction, the problem with counter-insurgency policies or anti-terrorism covert operations stems from the fact all suspected operatives and associated groups (of al Qaeda or ISIS), for instance) together with their facilities are viewed as purely military objectives. This view runs counter to the requirement to distinguish between the CCF and DPH categories. Al-Qaeda and ISIS at their cores are widely regarded to be exclusively military or combatant organizations. However, some Al-Qaeda affiliated groups such as the Somali group al-Shabaab or the Afghan Taliban are not. Al-Shabaab, for example, engages in insurgency as well as in civil matters relating to administration and governance. The organization has a mix of civilian and military functionalities.[21] There are many Al-Shabaab operatives who exercise exclusively administrative or judicial offices and functions – i.e. who hold wholly civilian membership of the group. Some al-Shabaab facilities also have a wholly civilian function. The correct approach *vis-à-vis* the latter would be arrest and prosecution rather than military targeting unless when they are known to be exercising a DPH function at the time of the attack.

It is also worth pointing out that in line with the principle of distinction Article 50(3) of API provides that the presence of a military objective in its midst does not deprive the civilian population within the area of its civilian status and protection from direct attack. However, Article 51(7) of API does not confer immunity on an area to protect it from being targeted due to the presence of a civilian population. When considered together, there seems to be an inherent contradiction in these two provisions. However, it ought to be noted that there are some in-built precautionary measures included in Article 57(2) of API which require that an attack should be canceled or suspended where such an attack would be disproportionate to the direct military advantage expected if there is a high probability that it would cause incidental loss of life, injury or damage to civilian objects - i.e. if the potential for collateral damage is seen to outweigh the military gains from an attack, then such an attack should be aborted.

The principle of distinction thus establishes with varying degrees of clarity the threshold for what kinds of attacks are acceptable when dealing with different categories of persons or with a mix of civilian and military organizations. The principle of distinction, with its key objective of protecting civilians in times of conflict, requires civilian status presumptions and verifications of targets when in doubt. This implies that assailants must gather sufficient and reliable evidence regarding the groups being targeted and must exercise the utmost duty of care towards the civilian population. In the meantime, the problem of distinction is increasingly being exacerbated by the involvement of groups previously viewed as exclusively civilian – most notably

through the forced conscription of child soldiers by terror groups, the increasing deployment of female personnel to frontline combat duties, and the frequent usage by terror groups of under-age suicide bombers.

### C. *Breach of the IHL Principle of Distinction: Evidentiary Questions and the Burden of Proof.*

Battlefield commanding officers do not usually possess personal knowledge of the specific nature and character of a military objective that is about to be the object of an attack. They must, therefore, rely on information provided from another source such as the military intelligence section or the reconnaissance unit attached to battlefield command. Where the commanding officer is in doubt as to the precise nature of an object, they should request additional information to determine precisely whether the object in question is of military interest.[22] However, the selection of an object of attack remains the decision of the commanding officer. The final decision will be based on their knowledge and the information available to them prior to the attack being carried out. The value to be placed on the information available is to be left to the expertise and discretion of the commanding officer as long as they exercise this discretion in a reasonable manner in light of available evidence.

When deciding whether or not a decision is reasonable, a minimum amount or quantum of information is required on the basis of which such a decision can be made. However, there is no defined standard for determining the amount or the quality of evidence or information which would suffice as the basis for making a reasonable decision to attack. This raises the question as to the required threshold of information – i.e. what amount of '*minimum'* information or evidence is required in order to render a decision reasonable for the purposes of establishing a target as a military objective. Under international criminal law if an attack is knowingly and intentionally perpetrated on civilians or civilian objects this would constitute a breach of the IHL principle of distinction.[23] Any commander who willfully chooses, or ignores information which could have avoided the direct targeting of civilians or civilian objects, has in effect violated the principle and this could lead to the commission of a war crime. However, to establish unlawful conduct or illegality, the prosecution must prove beyond a reasonable doubt that there was no rational justification for viewing the target as a lawful military objective[24]. Proof of intent will require establishing that the decision to attack the target was unreasonable and amounted to improper conduct on the part of the commanding officer.[25]

It is worth noting that the increase in the number and frequency of asymmetric conflicts has been matched by a corresponding frequency and increase in the use of 'signature policies' to target suspected militants in the war against terrorism. This is notwithstanding the high burden of proof which is required under the IHL principle of distinction for the targeting of presumed combatants or terror suspects.

## VI. The Erosive Potential of 'Signature Policies' on the IHL Principle of Distinction: A Critique.

The war on terror has been and is still being conducted both openly and covertly. When employed on the international stage to combat terrorism, covert operations raised some questions relating to *jus in bello*. Such operations also have implications for international criminal law if covert operations result in the commission of war crimes. Foremost amongst the covert operations which have raised the most concern among jurists are strikes carried out by unmanned drones armed with Hellfire missiles against militant targets. From a legal perspective, drone strikes can be classified into two categories: (a) direct, or 'personality', strikes where the identity of the target or victim is either known or verifiable to the assailant; and (b) 'signature strikes', in which the identity of the target is not known but the suspect is deemed to exhibit the 'signature behavior' of a combatant or terrorist; in other words, the target displays suspicious patterns of conduct which are adjudged to correspond to the trademark characteristics and demeanour of a terrorist. Targets in the first category can be classified under the CCF category. To be considered legal, strikes conducted against targets in the second category must qualify as either a CCF or a DPH signature strike.

Signature strike targets are typically males of between 20-40 years of age - i.e. males of combat or military age (otherwise known as the MAM signature policy). From an IHL perspective the problem with 'signature policies' stems from the fact that there have been some high-profile cases in Afghanistan and Pakistan in which the victims of US signature strikes have turned out not to be combatants or terrorists but civilians. In a well-publicized incident which took place on 17 March, 2011, a meeting of tribal leaders or '*jirga*' was targeted in the town of Datta Khel in the Waziristan province of Pakistan with the loss of 42 civilian lives. No matter how well planned and executed, signature strikes do have the potential to erode the threshold of distinction. The design, planning, and execution of signature policies are in themselves exercises fraught with considerable complexity and difficulty from a strategic, military and technical point of view. There are also political considerations and legal obstacles which require addressing as a pre-requisite to the successful execution of signature policies, not least the political and diplomatic ramifications which could ensue from a perceived act of sovereign trespass in the airspace of another country.

There is a widely held view (especially amongst human rights lawyers and humanitarian organizations) that signature strikes are tantamount to illegal targeting, with civilian deaths being the inevitable consequence of such signature policies. This argument is partly founded on the occasionally erroneous assumptions which can be made in the course of executing signature policies, especially when targeting is based on flawed military intelligence. There is also the problem relating to the technical limitations of drone operations concerning the

correct identification of legitimate military targets or objectives.[26] A combination of these two factors and their contribution towards erroneous targeting of civilians thus raises the question as to whether signature strikes are potentially a breach of one of the most fundamental principles of IHL, the principle of distinction. As already noted the principle of distinction requires belligerents to distinguish between military targets and civilian objects. Article 3 (which is common to the Geneva Conventions[27]) is considered to be a miniature convention in itself. This article provides basic protections for civilians and individuals who are '*hors de combat'*; it applies to all forms of armed conflicts. The principle is of vital importance and relevance when considering the legality or otherwise of signature strikes by armed Reaper drones.

Notwithstanding the arguments outlined above, there are nonetheless circumstances in which an individual may be lawfully targeted under a signature policy on grounds of exhibiting DPH behavioral traits. This is in light of the fact that there seems to be have been a shift in position by IHL from status-based to conduct or activity-based targeting. This means that in principle signature policies can be said to be broadly in line with IHL. However, the failure of IHL to address issues regarding the amount or quantum/quality of information required for distinguishing targets means that even when individuals are targeted, the determination of whether the decision was reasonable does not rest on a precise or determinable amount of evidence. This, in turn, dilutes the process of ascertaining whether there was sufficient evidence to relinquish any civilian protection for the purpose of certifying that the target is either exclusively (or at the time of targeting) was engaged in direct military activity and therefore legally subject to attack. As already seen the position of the US government, for example, is that Al-Qaeda and its associated groups are exclusively military organizations by nature – i.e. all of its operatives and facilities fall into the CCF category. Such a broad assumption creates the potential for eroding the threshold of distinction especially in cases which could be more appropriately classified under the DPH category.[28] This is in view of that fact that the latter status combines within it the character of both a combatant and a civilian depending on what the individual is doing at any given moment in time. In other words, being a hybrid status, it provides the flexibility required in situations where there is a dearth of compelling evidence required for the establishment of a CCF status. Where the individual returns to their civilian status they ought to be immune from attack under the principle of distinction, with arrest and prosecution rather than an armed attack being the appropriate legal measure to take against them.

Signature policies are manifestly founded on the profiling of suspects, based as they are on factors such as gender, age and geographical location coupled with the exhibition of certain behavioral traits and characteristics that are associated with terrorist activity or conduct. When assessing the legality of such policies there are two questions to ask: first, was the particular signature policy sufficient from a legal (IHL) perspective to establish an acceptable object or target? Secondly, was the evidence sufficient to verify that the individual or object targeted was engaging in signature behavior? Once satisfied that the policy is legal the next step must thus be to consider the factual question. The factual question requires that verification must be attained and the commanding officer must ensure that the action taken is against a military objective. These two questions are also subject to precautionary measures, presumptions, and protections afforded to civilians and civilian objects. Failure to prove the legality of the first question, or the evidentiary burden of the second, would render the signature-based attack illegal.

### *A. Potentially Illegal 'Signature Policies'.*

In his comprehensive study, Kevin J. Heller reviewed 14 types of signature policies which US government officials believe are in accordance with IHL and the principle of distinction.[29] The policies can be grouped into three types: legal, potentially illegal and hybrid categories. Amongst the legal policies are strikes or attacks aimed at known combatants (CCFs). In the second and third categories are strikes aimed at individuals who are in the process of carrying out an attack (DPHs). Also included in these categories strikes against persons transporting weaponry (classed as a legitimate military target under Article 52(2) of API); individuals handling explosives and IEDs; and attacks against terrorist/ insurgent compounds and military facilities, including training camps.

But as seen above there are also signature policies which can have a potentially erosive impact on the threshold of distinction. Most prominent amongst these is the MAM (military aged male) signature policy. Based on profiling criteria combining both gender and geographical location any male of military age (20-40 years who is present in an area of known terrorist or insurgency activity (i.e. combat theater) can be targeted by armed drones. Thus under the MAM signature policy, all men of military or combat age who happen to be inside a strike zone area are presumed to be combatants and are therefore targetable (unless intelligence proves otherwise). The rationale for this signature policy is based on the questionable logic that men of military age in an area under the control of militants are '…probably up to no good.'[30]

However, the premise for this logic is suspect in as much as it founded on an evidence-free presumption. Therefore it is not surprising that commentators have been highly critical of such a signature policy.[31] The status of an individual cannot, and should not, be inferred simply due to their geographical location at any particular point in time. This argument applies *a fortiori* in asymmetric warfare where there is no defined battlefield. Under the MAM signature policy vast areas of Afghanistan such as Helmand province, northern Iraq, north-eastern Nigeria, Pakistan, Syria and much of Somalia could all be considered battlefield zones.

Consequently, any male within the age range of 20-40 years could thus be subject to attack by armed drones simply by being in the area. This is notwithstanding the fact that they may not even be conscious of the fact that the zone forms part of a combat theatre. Even where the area in question is subject to martial law or is under a state of emergency, the appropriate measure to take would be arrest and prosecution rather than armed targeting. And what about MAMs whose homes are actually located within designated combat area? The prejudicial nature of the MAM policy is also highlighted by the fact that it appears to be based on a presumption of guilt rather than innocence.

Other criteria used for the 'MAM' signature policy such as the gender, age or any other abstract affiliations of the targeted individual appear to be both arbitrary and subjective. There is also the technical problem relating to a drone operator's ability to accurately determine the age group of a target simply from the video streaming of images relayed to the base station by an armed drone. It could thus be argued that such a policy is inconsistent with the IHL principle of distinction which requires that status-based targeting of an individual should be based on clear evidence which identifies the target as having either a CCF or DPH status. In principle, the MAM status seems far removed from the legal requirements of belligerent nexus or connection. It is, therefore, for this reason that a status-based signature policy which relies exclusively on criteria such as geographical location, gender, and age of the target (without further evidence to show that the individual in question is a CCF or DPH) can be considered to be unlawful. This is because it has the undesired and potentially dangerous effect of blurring the vital distinction between a civilian and a combatant.

Other potentially illegal policies include the targeting of consorts and known associates of combatants and terrorists. There is a parallel to be drawn here with exactions carried out against civilian populations as part of counter-insurgency operations on the basis that the targeted community is suspected of providing financial, material or moral support to the insurgents, or otherwise shielding the latter from capture. From a legal point of view, it can be argued that there is no causal link between consorting or association and promoting the war effort of insurgents and militants. Furthermore, consorting/ association is not specifically intended or designed to have any adverse impact on one belligerent against another, nor does it qualify as a DPH activity. Association with known terrorist or consorting, even if it amounts to sympathizing with the terrorists' cause, does not make an individual targetable although they could be the subject of a prosecution under relevant national laws. The UN has confirmed that as long a person does not participate directly in combat, they maintain their civilian status and protections.[32] In the *Fofana and Kondewa* case, the *Special Court for Sierra Leone* ruled that collaborating with an armed group does not deprive an individual of their civilian status in order to render them targetable. Likewise, indirectly supporting or failing to resist an invading force does not make someone a participant in hostilities.[33] It is on these grounds that a signature policy which targets associates and consorts of terrorist would be considered to be illegal and a breach of IHL principles.

Also questionable is the signature policy which involves the targeting of armed convoys of men traveling in the war zone (similar to the MAM). It was held by the *International Criminal Court* in the *Simić* case[34] that the possession of weapons does not *per se* establish reasonable doubt as to the civilian status of the possessor, until such a time that they become a DPH. The men could well be armed for self-protection or self-defence. However, if the armed group is traveling towards an active combat zone, they could be targeted under the DPH category if it can be proven that they are heading towards a particular destination for the purpose of engaging in a specific belligerent or hostile act.

Other signature policies which may raise cause for concern include the following:

- targeting of suspected trainers of insurgents/ terrorists (outside the time frame of the training activities);
- persons suspected of undergoing training for the purpose of joining an insurgent or terrorist group;
- the targeting of suspicious militant camps or facilities; the targeting of known or suspected facilitators and sponsors; and,
- the targeting of locations classified as 'rest areas' for combatants or terrorists.

The operational aspects of armed drone warfare have raised further concerns about their possible impact on the threshold of distinction. The tediousness and boredom which can result from a drone operator sitting and staring at a screen for long periods of time watching live video footage as the UAV sends back images from the theater of conflict can have a debilitating psychological effect which in turn could impair the mental judgment of the operator. Alternatively, the excitement and expectation of registering a 'first (or a fresh) kill' could implant into the mind of the drone operator a 'video game' syndrome, with consequentially adverse impacts for the threshold of distinction. In the next section of the paper some recommendations are proffered as a prelude to the concluding remarks.

## VII. A WAR CRIME IN THE MAKING? '*JUS IN BELLO*' IN THE CONTEXT OF NUCLEAR WARFARE

Unlike other WMDs such as biological and chemical weapons, positive international law does not expressly prohibit the use of nuclear weapons in war. This acknowledgement seemingly puts to the test the proposition made in this paper that the mere possession of WMDs, including nuclear weapons, could be deemed to constitute the *mens rea* for a putative war crime. However, the proposition is grounded on the premise that the use, or threat of use, of

nuclear weapons would amount to a breach of IHL norms such as the principles of distinction, proportionality, military necessity and humanity.

The use of nuclear weapons in any context would amount to a palpable breach of the principle of distinction by virtue of the widespread, devastating and indiscriminate effect which the detonation of a nuclear device would have on the human population. The impact of the use of nuclear weapons is remove the civilian protections conferred by IHL while calling into question the validity of any justifications for their use based on military necessity. It is on this basis that the mere possession and stockpiling of nuclear weapons is deemed to constitute the requisite mental element for the future commission of a war crime. It is this recognition which *a priori* renders the use of nuclear weapons unlawful under the customary international law norms of *jus in bello*. This in turn provides an *ipso facto* rationale for validating long-standing arguments advocating global nuclear disarmament or denuclearization.

The '*mens rea'* proposition is further reinforced by the IHL prohibition against attacks on adversaries (e.g. the wounded[35]) who are '*hors de combat'* at the time of the attack; further support for the proposition can also be drawn from the prohibition against the use of weapons which inflict unnecessary and inhumane suffering. Moreover, the principle of proportionality implies that the use of force in self-defense pursuant to Article 51 of the UN Charter should be restricted to repelling acts of aggression, and should thus be conditioned by self-restraint. However, it could be argued that such an intuitive and measured sense of proportionality would be impossible to attain in the event that nuclear weapons are used as an instrument of self-defense. As *per* Judge Weeramantry's *dictum* in a dissenting opinion rendered in a case before the ICJ:

> *"... [with] nuclear war, the quality of measurability ceases. Total devastation admits of no scales or measurement. We are in a territory where the principle of proportionality becomes devoid of meaning*."[36]

The cumulative effect of these arguments is to further call into question the validity of nuclear deterrence theory as a rationale for the acquisition or retention of nuclear weapons armory.[37] This is by virtue of the inherent paradox which is implicit in nuclear deterrence strategy – to wit, the threat of the use of nuclear weapons as a deterrent against any 'first strike' aggressor; and the impossibility of attaining proportionality in the event of a retaliatory nuclear strike in pursuit of this self-defense posture. Furthermore, a probing examination of nuclear deterrence theory reveals two strategic layers of defense policy. The first of these is the expressly stated policy aspiration of discouraging a nuclear first strike by a potential adversary – i.e. dissuasion, or the use of nuclear threat, as a preventative measure. Beyond this first layer lies a second which is represented by the implicit logic of a retaliatory nuclear strike in the event of an actual nuclear first strike by an aggressor (i.e. in the event of the failure of the first layer policy of deterrence).

However, the end result of the actual use of nuclear weapons in a retaliatory strike would not be limited to repelling the act of aggression, but would rather entail the 'mutually assured destruction' or annihilation of both belligerents. Viewed from this perspective, a self-defense strategy founded on nuclear deterrence theory engenders the genuine prospect of a nuclear apocalypse. Nuclear deterrence strategy thus implies in reality a security strategy which is ultimately grounded on vengeful retaliation or retribution; moreover, it could even lead to a pre-emptive nuclear first strike in an atmosphere of escalating political tensions. The political language of nuclear disputes such as that pitting the United States against North Korea, both in terms of the tone and lexicon employed by both parties, would seem to validate this viewpoint; this has particularly been the case with the incendiary and vengeful language often employed by the North Korean government of Kim Jong-un as part of its declared nuclear deterrence posture. Incidentally, the use of excessively belligerent language and gestures (for example, the firing of test missiles over the air space of neighboring countries or resort to apocalyptic threats such as the sabre-rattling rhetoric employed by former Iranian President Mahmoud Ahmadinejad against the State of Israel), could *per se* constitute the basis of a war crime charge under the ICC Statute - to wit, "declaring that no quarter will be given"[38] - if subsequently consummated by the *actus reus* element of an actual nuclear strike.

It could thus be argued that nuclear deterrence theory is ultimately premised on a punitive expedition (in the form of either a pre-emptive strike or retaliatory response to a first strike), as opposed to a war strategy founded on principled self-defense. It could further be argued that embedded in nuclear deterrence theory is thus the seed for the *mens rea* of a putative war crime. It is this perspective which *a fortiori* lends credence to arguments in favor of nuclear disarmament, thus representing a further validation of the advocacy for nuclear non-proliferation and global denuclearization.

Compliance with IHL principles and '*jus in bello*' restrictions imposed on the conduct of armed conflict are self-evidently far more attainable with the use of conventional weapons than WMDs, including nuclear weapons. Following our exploration of the theoretical basis for a potential breach of IHL principles in the context of the possession or use of nuclear weapons, the discussion in this section concludes with an examination of the residual question relating to the formulation of a war crime charge and the evidentiary burden of proof required for this prosecutorial exercise in the context of nuclear weapons.

### A. *Nuclear weapons and the 'war crime' categorization: specific elements of the crime.*

Having already posited arguments on the question regarding the *mens rea* component for a putative war crime, it is necessary to point out that the complementary *actus reus* element for establishing the commission of the crime would stem from an actual detonation of a nuclear device. Exercising the evidentiary burden of proof would require applying the Common Article 3 of the Geneva Conventions [39] in combination with Article 5 (jurisdiction of the ICC) of the Rome Statute.[40] It would further require identifying and establishing a specific element of the alleged war crime under Article 8 of the Rome Statute. Discharging the burden of proof would require the war crimes prosecutor to establish a direct or causal link between the catastrophic, widespread and indiscriminate impacts of the detonation of a nuclear device to one or more of the specific war crime charges under Article 8. The following constitute an illustrative (as opposed to an exhaustive) list of possible offences under Article 8, perceived in the context of nuclear warfare:

- wilful killing or wilfully causing great suffering, or serious injury to the body and health of persons protected under the Geneva Conventions;[41]
- extensive destruction of property … not justified by military necessity;[42]
- intentionally directing attacks against civilians or against individual civilians who were not exercising a DPH function at the time of the attack, or intentionally directing attacks against civilian objects; [43] (i.e. breach of the IHL principle of distinction).
- intentionally directing attacks against personnel, material or facilities involved in humanitarian assistance or peace keeping missions;[44]
- intentionally launching an attack in the knowledge that such (a nuclear) attack would cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long term and severe damage to the natural environment in disproportion to the overall military advantage to be gained from such an attack; [45] (i.e. breach of the IHL principle of proportionality).
- attacking or bombarding … settlements or buildings and habitations which are undefended and are not military objects;[46] and,
- the use of poison or poisoned weapons[47] (war crimes liability in this case would arise from the associated radioactive fallout which follows the detonation of a nuclear bomb and its harmful effects on the human and natural environments).

The perceptible synergy between the specific components of a war crime charge enshrined in Article 8 and the indiscriminate and disproportionate impacts stemming from the use of nuclear weapons in warfare would even seem to suggest that a war crime in the context of nuclear war could *per se* take the form of a strict liability offence. This would by virtue of the element of foreseeability associated with these various elements of the crime under Article 8 if nuclear weapons or other WMDs were to be employed in warfare. It is therefore posited that the following would comprise the defining components of a war crime categorization founded on the concept of strict liability:

(a) the inevitability of the types of harm that would ensue from the use of a nuclear weapon; and
(b) foreseeability of the legal consequences (under Article 8 of the Rome Statute of the ICC) emanating from such an internationally proscribed harm.

In the absence of strict liability, a fault-based prosecution would entail a combination of the foreseeability criterion together with the possession and stockpiling of nuclear weapons. This combination would make a strong case in establishing the required *mens rea*, with the actual launching and detonation of the nuclear device providing the *actus reus* element which consummates the war crime

## VIII. Recommendations

The discourse in this paper has highlighted the strategic and tactical challenges faced by regular forces when confronted with asymmetric and hybrid forms of warfare. The focus of the discussion centered on the IHL implications of strategic and tactical responses by regular forces to these challenges, most notably in the form of counter-insurgency and covert operations including the use of signature policies to combat terror suspects and presumed combatants. Based on the discussion the following recommendations can be posited:

- There is a need for more clarity on the classification and use of signature policies, both regarding their legality and the manner of their implementation. In all cases of doubt, the presumption of civilian status should take precedence, together with the non-lethal alternative of arrest and prosecution of the suspect. Hybrid status and potentially illegal policies need re-examining and redefining. It is also essential to address the problem relating to the quantum and quality of information required for targeting.

- There should be an embedded process permitting the standardisation of civil claims for compensation in all prosecutions relating to war crimes, such that civil litigation becomes a common feature of IHL - thus expanding the remit of IHL beyond its current

narrow focus on criminal proceedings. In this regard the reparations to victims award of 24 March 2017 by the *International Criminal Court* in the case of *The Prosecutor v Germain Katanga*[48] represents a ground breaking precedent which is to be commended. There is increasingly trend pointing towards an appreciable convergence between the criminal (punitive) and civil (reparations) aspects in the progressive development of the jurisprudence of the ICC, as evidenced by the subsequent case of *The Prosecutor v Ahmad al Faqi Al Mahdi.*[49] Futher progress in this direction will require the creation of a more enabling and permissive judicial environment through the removal of all procedural obstacles and substantive barriers to the institution of civil claims by war victims, most notably through the adoption of less rigid requirements for *locus standi* in both national courts and international tribunals.

- There should be a proscription under IHL of all forms of warfare which by their very nature involve indiscriminate targeting of civilians and civilian objects, such that such wars become illegal by virtue of being unjustified under *jus ad bellum* and also by virtue of the nature in which they are conducted (*jus in bello*). This ban should equally extend to the perfidious use of civilians and civilian objects by combatants as human shields.

## IX. CONCLUSION

The nature of warfare as conceived by both Clausewitz and Rousseau (and largely informed by the positivist, structuralist Westphalian construct) has undergone significant change over time. It now presents diverse evolutionary traits in the form of asymmetric and hybrid armed conflicts. It has even been argued that Clausewitz's concept of war suffer from three main limitations in the modern era: these are in the form of nuclear warfare; transnational constabulary warfare (i.e. asymmetric and hybrid conflicts which challenges the notion of war as a state activity); and, the changing nature of statecraft itself which may render symmetry unachievable even in State-on-State warfare[50] due to increasing inequalities is state power. Concerning nuclear warfare, it is axiomatically the case that the peculiar conflict environment of the 21st century presents complex (if not entirely new) challenges for IHL. Society-changing weapons (or weapons of mass destruction – WMDs) have the potential to seriously undermine the principle of distinction. It is thus submitted (given their inherently indiscriminate impacts) that the mere production, possession or stockpiling of such weapons (i.e. nuclear, biological and chemical weapons) ought to be construed as constituting the *mens rea*, or *animus belligerendi*, of preparation for the possible future commission of a war crime.

It was with remarkable foresight that Clausewitz, when articulating the principles which he believed should govern the conduct of warfare, concluded his *précis* with the following observation: "*Every age has its own kind of war, its own limiting conditions, and its own peculiar preconceptions*"[51]. However, the evolutionary trends witnessed in the nature and character of armed conflicts over the ages do not appear to have been matched by corresponding developments in IHL which has remained apparently unresponsive to the challenges of the new war environment - with its norms seemingly embalmed and entombed in customary international law, and in the Geneva conventions. These, norms, conceived as they were for what could be described as 'gentlemen's wars' are now tested to the limit by the new breed of warfare. The very advent of signature strike policies, conceived and implemented on the basis of unilateralism, raises serious questions concerning the dynamism and efficacy of IHL norms in responding to the challenges of the new type of modern warfare.

It could well be argued that, notwithstanding their increasing numbers and frequency, asymmetric and hybrid warfare are not a completely new or unknown phenomenon to IHL. Such an argument would be further grounded on the premise that foundational norms of *jus in bello* such as "elementary considerations of humanity" together with the principle of distinction provide the yardstick for the conduct of all types of armed conflicts. As Clausewitz himself observed war is after all, and by necessity, a continuation of politics (or policy) by other means.

In concluding, an indelible feature of modern armed conflicts is that allegations concerning serious violations of IHL, including the possible commission of war crimes, abound as a consequence of belligerent activities conducted in the *'fog of war'*. This fact underlines, more than ever, the necessity to attain greater clarity in the conception, articulation and battlefield implementation of the rules of engagement.

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