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A Legal Analysis of the Status Quo and Future Perspectives“**

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Laura Sophie Thimm-Braun

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I. Introduction

Lethal drone strikes have concerned the public for the last few years, as drones have become a major tool in domestic counterterrorism policies. On 5 November 2002, the US targeted a suspected terrorist by using a Predator Drone, which fired a hellfire missile at a car traveling through a province of Yemen, destroying the car and killing the six people inside, one of them the country's most senior level al Qaeda operative.¹ Mostly cases in Yemen, Somalia, Pakistan and Afghanistan were known to the public involving, inter alia, the US launching such targeted lethal drone strikes against suspected terrorists. Although the drone technology has been challenging policies and laws, as well as creating public discussion on the morals and technology, little has been done to react to public concerns in understanding and in limiting the employment of drone technology under military purposes. In April 2018, the US Army announced that it is even developing the first drone that is able to spot and target vehicles acting autonomously.² Until that point, drones were constantly controlled by military personnel.

This practice of modern warfare raises several questions under international law, not only challenging international humanitarian law and human rights law, but also touching upon issues concerning access to justice. The remoteness of modern warfare makes it difficult to determine the perpetrators, particularly, because states themselves control and conduct the strikes. The victims of lethal air strikes are confronted with a lack of information on the targeted killings by drones, and cannot easily access domestic courts of the perpetrator state to assert their rights.³ The perpetrator states act from thousand kilometers away, even if victims bring cases before domestic courts, jurisdiction is denied due national security interests. As a consequence, victims are left without access to courts, a fair trial and holding the perpetrator accountable for its violations of international law. Therefore, to grant the right to access to justice is of pivotal importance when using lethal drones in warfare. In a general manner, the term “access to justice” refers to the possibility for the individual to bring a claim before a court and have a court adjudicate it.⁴ However, access to justice for the victims of lethal drone strikes,

¹ Joshua Foust, 'The Strategic Effects of a Lethal Drones Policy' *American Security Project* available at <<https://www.americansecurityproject.org/asymmetric-operations/the-strategic-effects-of-a-lethal-drones-policy/>> accessed 22 June 2019.

² Peter Lee, 'Drones will soon decide who to kill' *the conversation* (11 April 2018) available at <<http://theconversation.com/drones-will-soon-decide-who-to-kill-94548>> accessed 22 June 2019.

³ The perpetrator state will equally referred to throughout the paper as acting state, foreign state, drone state, intervening state, targeting state.

⁴ Francesco Francioni, 'The Rights to Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007) 1.

ranging from relatives to the injured, is extremely limited. It often starts with the simple circumstance, that in many cases the victims do not know who or which state is responsible. Even if they know about the identity of the perpetrator, they are confronted with the question on how to hold a state accountable.

The European Centre for Constitutional and Human Rights (ECCHR) has confirmed that the major challenge of their litigation work on armed drones is to find and contact victims.⁵ Most victims live in remote areas and cannot easily move within their country, nor can they cross the borders in order to bring a claim before the domestic court of the perpetrator state. To have the victim's claim heard before their domestic courts is difficult due to the lack of legal aid, infrastructure or due to the invocation of immunities. Neither before domestic courts of the perpetrator state, nor before the courts of their home state, can victims of drone strikes regularly file a case. As a last resort they may resort to international remedies, such as the Human Rights Committee or the European Court of Human Rights if human rights are concerned. However, on the international level very few enforcement mechanisms exist for victims of drone air strikes. General reasons for the constraint of access to justice are manifold, including the variety of actors involved, operating from a distance, new technologies exposing new challenges to existing legal frameworks, the lack of transparency, the lack of jurisdiction and the lack of accountability. One may even say that access to justice is facing a new era with regard to the development and deployment of new technologies in the battlefield. This does not only encompass the use of drones but also the potential future employment of autonomous weapons. Although they are not yet part of modern warfare, they will be developed which has already been referred to by the announcement of the US army. Therefore, their possible use gives rise to different questions on access to justice especially on who can be held accountable in case of lethal strikes. The applicability and effectiveness of existing legal frameworks and concepts in international law is being tested and must potentially be adopted to the current technological advancement.

II. Research Questions and Methodology

According to the introduced problems, the analysis will be guided by the following research questions: Is the right to access to justice able to address the issues arising from modern warfare where unmanned vehicles become the potential perpetrator of violations of international law? What are the main problems and shortcomings of asserting the right to access to justice in this context? What is necessary to cope with these issues on the international level? Subsequently, the question

⁵ David Snetselaar, 'Remote Warfare: Remote Justice?' (Utrecht University Repository 2018) 59.

arises – regarding the constant technological progress – how to deal with these aspects when autonomous weapons will be an integral part of modern warfare? The latter question will be addressed within a final chapter on future developments of modern warfare. An autonomous weapon is a computer-based weapon system capable of completing its missions, including identifying and engaging targets, without direct human control.⁶ Compared to a conventional armed drone, an autonomous weapon involved a machine that is deciding to deploy lethal force, not a person.⁷ As a result, the development of autonomous weapons must be separately addressed, apart from the status quo using drone technology in warfare.

In order to provide for a legal analysis, the first step will be to outline the various facets of (the right to) access to justice, how it can be defined, how it can be applied, which technical legal questions arise when asserting it, such as its character as procedural guarantee or free standing right, and which (quasi-) judicial bodies on the national and international level are relevant to adjudicate the respective cases. The subsequent chapter will introduce the drone technology, its employment in warfare, particularly focusing on the legal issues of targeted killing by armed drones.⁸ On that basis, the right to access to justice will be considered in the particular case of the deployment of drones in warfare analyzing the issue by means of relevant case law. Finally, there will be some thoughts on the future development of modern warfare and how they may challenge the right to access to justice.

For this paper, both primary and secondary sources will be used. Primary resources are, inter alia, the United Nations Charter (UN Charter), the Geneva Conventions of 1949 (GC 1949) and their Additional Protocols I and II (AP I, AP II), several Human Rights Conventions and relevant case law. The sources are of particular relevance as these are the legal frameworks applicable in drone air strikes: General public international law dealing with inter-state force, international humanitarian law (IHL) regulating the special circumstances in armed conflict and, in case no special regime is applicable, international human rights law (IHRL) applies. Most drone strikes are conducted in armed conflict. Therefore, IHL and IHRL are of paramount relevance. The secondary sources include textbooks, internet sources, journal, essays and articles published on the subject matter. These texts

⁶ Robin Murphy, 'Introduction to AI Robotics' (MIT Press 2000) 5.

⁷ Kelly Class, 'Autonomous Weapons and Accountability: Seeking Solutions in the Law of War' (Loyola of Los Angeles Law Review 2015) 1022.

⁸ A variety of terms has been used to describe the drone warfare. Most of them are used synonymously, for instance armed drone strikes, lethal drone strikes, drone warfare and targeted killing. Whereas targeted killings does not necessarily include the deployment of drones. However, in this paper, the term will only be used in the context of drones.

give guidance and background information on how to interpret the existing laws and the relevant case law.

III. Access to Justice as a Human Right

One may assume, that justice “should always be accessible for everyone” when someone is victim of crime or other violations of his or her rights occur. However, as seen in Franz Kafka's “The Trial”, the parable “Before the Law” points out that the access to law can be very exclusive.⁹ Kafka describes a man from the country who is seeking entry into the law, in other words he is trying to access to justice. When he arrives, his access to the law is rejected by a large gatekeeper – although the law provided that all should be able to go inside the law, at all times. After some attempts of looking inside the law, the gatekeeper says “[i]f it tempts you so much, try it in spite of my prohibition. But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other. I can't endure even one glimpse of the third”.¹⁰ The man decides to wait before the entry. He waits for years until he eventually dies waiting and without ever entering before the law. The parable is a metaphor for what it means to try to access to justice by referring to the numerous large gatekeepers preventing the man to enter. In practice, access to justice is of pivotal importance as the possession of rights is meaningless without mechanisms for their effective assertion. As pointed out by Claude, “the enforcement or procedural protection is merely another side of the content of the right”.¹¹ This chapter aims at introducing and analyzing the evolution of access to justice (1), the role of the individual in international law with particular regard to access to justice (2) an attempt to define the notion (3), pointing out the relevance and difference of domestic justice (4) and international justice (6) before approaching the negative term of denial of justice (7) and finally illustrating future challenges of the notion in a globalized world (8). Throughout this chapter reference will be made to the overall topic of drone warfare and the access to justice. The challenges of access to justice in modern warfare will be highlighted by introducing the three most important newly arising elements of access to justice in that context, namely jurisdiction, transparency and accountability.

⁹ Franz Kafka, *The Trial* (Modern Library Definitive Edition 1956) 238-240.

¹⁰ Franz Kafka, *Before the Law*, available at <<https://www.kafka-online.info/before-the-law.html>> accessed 10 August 2019.

¹¹ Richard Claude, 'Comparative Rights Research: Some Intersections Between Law and the Social Sciences' in Richard Claude (ed), *Comparative Human Rights* (John Hopkins University Press 1976) 395.

1. Evolution of Access to Justice

Cappelletti and Garth provided for a detailed and comprehensive world survey on the evolution of access to justice in Western-oriented countries after the World War II starting in 1965.¹² According to Cappelletti and Garth, access to justice evolved over three worldwide “waves” of change.¹³

The *first* wave was the emergence of legal aid which can be traced back even to the eighteenth century. However, this wave focused on providing access to legal services for those who were not financially capable to afford such assistance, introducing an equalizing aspect.¹⁴ The help of lawyers in proceedings was essential since the laws had become increasingly complex and included bringing a claim before the court. Providing legal service and representation was therefore vital for the poor who could not afford a lawyer. To give an example, reforms in Germany started in 1919-1923 establishing a system of state compensation for private attorneys for assisting persons in need. This assistance was given as a matter of right to all eligible persons.¹⁵

In the *second* wave the focus shifted to an emphasis on group and collective rights concerning reforms which aimed at providing legal representation for “diffuse” interests.¹⁶ This wave increasingly led to a rethinking of basic notions of civil procedure and of the role of the courts. Originally, civil procedures were merely a two-party affair, rights belonging to a group or to the public were not included in the scheme. This changed the civil procedural to a rather “public law” litigation involving large groups and the role of basic concepts such as the right to be heard.¹⁷ Accordingly, this wave addressed systemic problems of inequality in providing for test case and public interest litigation.

The *third* wave was called simply the “access-to-justice approach” as it includes the previous approaches, though, goes beyond them in including an attempt to attack access barriers in a more comprehensive manner.¹⁸ This last phase depicts the development of alternatives to litigation in courts

¹² See for farther reaching historical perspectives: Rhode Deborahl 'Access to Justice' (OUP 2004) 47 et seqq.

¹³ Mauro Cappelletti and Bryant Garth, 'Access to Justice: A World Survey' (1978 Giufré/Sijthoff/Noordhoff – Alphenaaandenrijn Vol I) 21 et seqq.

¹⁴ *Ibid* at 21.

¹⁵ The law in 1919 allowed the attorney to recover their actual disbursements from the state. The law in 1923 then allowed to recover their full fees from the state. Gesetz über Teuerungszuschläge zu den Gebühren der Rechtsanwälte und Gerichtsvollzieher, 18 December 1919, RGBI I 2113; Gesetz über die Erstattung von Rechtsanwaltsgebühren in Armensachen, 6 February 1923, RGBI I 103.

¹⁶ Cappelletti and Garth (n 13) 21.

¹⁷ By then every possessor of a diffuse interest, such as interest in clean air in a respective region, could bring a claim before the court, must be represented adequately and the decision must be binding for all members of the group even though not everyone was heard. Abram Chayes, 'The Role of the Judge in Public Law Litigation' (Harvard Law Review 1976) 1048.

¹⁸ Cappelletti and Garth (n 13) 21.

to settle disputes, as well as reforms that simplify the justice system and therefore facilitate the accessibility.¹⁹ Cappelletti and Garth regarded the third wave as the emergence of a fully developed access to justice approach. Evidently, each wave differs from state to state, from criminal, civil to public courts, not to mention the international dimension of access to international remedies. Nonetheless, Cappelletti and Garth aimed at making justice more accessible and more efficient, to overcome the barriers of cost, disparities in party power and lack of organization that prevents citizens from asserting their legal rights.²⁰ There has been an evolution of accessing justice of the past decades shifting from a simple legal aid notion to a comprehensive social right encompassing legal aid services for individuals and groups as well as institutional developments with regard to the judicial systems. Nowadays, domestic courts are not the only path to access justice. Even alternative dispute settlements on the international level were established for individuals, groups and states to vindicate their rights. However, back then it was not self-evident that individuals could assert rights under international law.

2. The Individual as Holder of Rights in International Law

Legal positivism, originally, did not acknowledge individuals as subject to international law. Rather, international law was regarded as governing inter-state relations, in which only states had rights and obligations, including the right to bring a claim before a court.²¹ The usual definition of international law by the defender of the positivist approach was based on a subject-based differentiation between international and domestic rules: international law sets out rules with states as its subjects, whereas domestic law was thought of as pertaining to individuals as its subjects.²² However, the subject-based theory was confronted with severe issues and challenges particularly in the twentieth century where the trials of Nazi war criminals after the Second World War demonstrated its limits. Article 6 of the Charter of the International Military Tribunal at Nuremberg explicitly stated its jurisdiction over crimes and that “there shall be individual responsibility”.²³ Nuremberg showed that international law

¹⁹ *Ibid* at 53.

²⁰ Austin Sarat, 'Book Review Access to Justice by Mauro Cappelletti, Bryant Garth, John Weisner and Klaus-Friedrich Koch' (1982 Harvard Law Review) 1916.

²¹ Francioni (n 4) 5.

²² Mark W. Janis, 'Individuals as Subjects of International Law' (Cornell International Law Journal 1984) available at <<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1133&context=cilj>> (accessed 11 July 2019) 61.

²³ Article 6 of the Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis

“The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties,agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or

must and does apply to individuals. The Tribunal held that “[c]rimes 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”.²⁴ Although, the Nuremberg Tribunal concerned the conviction and execution of individuals, the fundamental concept of making individuals subject to rules of international law, in the sense that they are obliged by these rules, can be applied vice versa to granting individuals rights under international law. The trials consequently had an important impact on the formulation and implementation of the 1950 European Convention of Human Rights and Fundamental Freedoms stipulating that the state parties shall secure to everyone within their jurisdiction certain rights and freedoms. These rights and freedoms, inter alia, include the right to a fair trial pursuant to Article 6 European Convention on Human Rights (ECHR).²⁵ The Convention did not only provide for fundamental rights granted to individuals in international law but also for enforcement institutions, most importantly the European Court of Human Rights (ECtHR), for individuals to access.²⁶

These developments demonstrate that, beyond the individual's presence and participation in the international legal order, the recognition of his or her rights, as a subject of international law, shall correspond to the procedural capacity to vindicate them on the international level. Only then, with consolidating the full international procedural capacity of individuals the protection of human rights becomes reality.²⁷ However, despite the achievements in regarding individuals as subject to international law, states and unions of states have continued to be the main actors and still “enjoy a near monopoly” when it comes to bringing claims before international dispute settlement

for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

²⁴ Trial of the Major War Criminals before the International Military Tribunal (Nuremberg 1946) 223.

²⁵ Article 6 para 1 ECHR

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

²⁶ See Article 19 ECHR.

²⁷ Antonio Augusto and Cancado Trindade, 'The Access to Individuals to International Justice' (OUP 2011) 6.

mechanisms.²⁸ The right to bring a case before an international court or tribunal is based upon the consent of the state against which the claim is directed which has been enshrined in Article 34 (1) of the ICJ Statute for the jurisdiction of the International Court of Justice (ICJ)²⁹. Although the Statute entered into force already 24 October 1945, still, recent dispute settlement mechanisms on the international level are mainly accessible to states or private persons, though, relying upon the judicial protection of their national state which can demonstrate *locus standi*.³⁰ At the domestic level, the invocation of certain principles and provisions of international law remains a challenge, however, the mere invocation of international law before domestic courts is generally possible.³¹ This being said, the progressive developments in human rights law are constantly extending the outer limits of individuals as subjects of international law and have endowed every person with the general capacity to invoke international law, customary law and treaty law against a state. In order to do so individuals are empowered with an international legal personality.³² The rise of the individual as a subject of international law is reflected in the establishment of international human rights bodies. The UN Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) are two of the most important international human rights bodies granting access to international judicial remedies. They even transfer this abstract capacity into a concrete right to access to court or to judicial remedy for supervising and enforcing human rights obligations.³³ Generally, the acknowledgment of the international legal personality of individuals as active and as passive subjects of international law, enhances the accountability under international law for abuses perpetrated against human beings. The

²⁸ Francioni (n 4) 6.

²⁹ Article 34 (1) ICJ Statute

“Only States may be parties in cases before the Court.”

³⁰ In case of the WTO Dispute Settlement Body Article 1 of the Understanding on rules and procedures governing the settlement of disputes states that the Understanding applies to 'consultations and settlement of disputes between Members concerning their rights and obligations [...]'. The members of the WTO are merely states. It similarly applies to International Tribunal for the Law of the Sea (ITLOS).

³¹ E.g., in a recent decision of the German Federal Constitutional Court, the Court ruled that according to Article 25 sentence 2 of the German Basic Law, the general rules of international law create rights and obligations directly for the inhabitants of the German territory. However, this only applies to those general rules of international law which have 'sufficient individual relevance' (hinreichender Individualbezug). Article 25 sentence 2 of German Basic Law is regarded as declaratory in its character, meaning that if general norms of international law themselves confer rights to individuals, these rights are already granted in accordance with Article 25 sentence 1 of German Basic Law. Norms which, however, neither entitle nor oblige individuals of their own accord, cannot give rise to subjective rights and obligations. However, the right to access to court was granted and the plaintiff was heard before the court. *Stationierung US-Amerikanischer Atomwaffen auf dem Fliegerhorst Büchel*, Constitutional Complaint, 2 BvR 1371/13; ILDC 2941 (DE 2018), 15 March 2018.

³² Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (OUP 2018) 167.

³³ The ICJ even recognized the right to consular assistance as 'individual right', independent of the diplomatic protection of the home state, obliging the foreign state to provide for a proper reconsideration of the affected individual's case in new criminal proceeding. *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 128.

individual bears duties and simultaneously is granted rights. As Augusto and Trindade pointed out the “[d]evelopments in international legal personality and international accountability go hand in hand, and this whole evolution bears witness to the formation of the *opinio juris communis* to the effect that the gravity of certain violations of fundamental rights of the human person directly affects the basic values of the international community as a whole”.³⁴ However, how can the individual make use of its international legal personality in the present inter-state structure of international law? and to which extent may this structure pose hurdles to the ability of the individual to assert his or her rights before national and international judicial bodies? These questions directly lead to the need and respect of the individuals' right to access to justice. Without this fundamental right at national and international level, the rights enshrined in human rights treaties would be “reduced to little more than dead letter”.³⁵ Approaching this question, it is of importance to distinguish between the access to domestic courts and to international remedies, as international law is still based upon the pattern of sovereign states, and individuals continue to be subject to state authority and national jurisdiction.³⁶

Primarily, the domestic jurisdiction of the state must be accessible where the human rights violations have occurred. By exhausting local remedies, the respective local courts are given the opportunity to correct wrongdoings within their own national judicial system. Therefore, in many procedures before international judicial bodies the exhaustion of local remedies is required for instance before the HRC and ECtHR. Habitually, on the international level there are certain restrictions posed on the access to justice, e.g. regarding *locus standi* or the *ratione personae*. As referred to earlier, the ICJ only has jurisdiction over state disputes according to Article 34 para 1 of the ICJ Statute. In these cases, only the state of origin can elevate the individual's claim before the international court. This being the case, the access to domestic courts and to international remedies are in constant interplay. Usually international remedies for individuals act like a *last resort* if the access to domestic court was not successful.

To sum up, the evolution of human rights has the effect that individuals have rights against states and against each other in case of severe human rights violations where the individual criminal responsibility comes into play. Due to the “humanization of the international law” the role of individuals increased with the codification of human rights standards for individuals. Nowadays this includes granting the right to access to justice as a human right. On the international level the right to

³⁴ Augusto and Trindade (n 27) 13.

³⁵ *Ibid* at 14

³⁶ Wouter Werner, 'State Sovereignty and International Legal Discourse' in Ige Dekker and Wouter Werner (eds) *Governance and International Legal Theory* (Springer 2004) 125.

access to justice is, inter alia, enshrined in Articles 2 (3) and 14 of the International Covenant on Civil and Political Rights (ICCPR), as well as in Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR). The core elements of these provisions are effective access to a dispute resolution body, the right of fair proceedings and the timely resolution of disputes, the right to adequate redress, and the general application of the principles of efficiency and effectiveness to the delivery of justice.³⁷

The changing role of the individual in international law is of particular relevance for victims of lethal drone strikes. First, the targeted killing by drones may violate IHL or IHRL which directly affects individuals. The perpetrator must be held accountable for its unlawful acts under international law. As the perpetrator is usually the drone state itself, it is vital that the victims have opportunity to file a lawsuit as an individual against the state. This leads to the second pressing issue, the individual must be able to assert a violation of international law before the (quasi-) judicial body. Victims of drone strikes will generally go before domestic courts. However, not before the domestic courts of the state where the violation of international law has occurred because in typical drone case this is not the perpetrator state. This leads to further complications, as the victims must go before the domestic courts of the perpetrator state as foreign nationals. Lastly, only where the local remedies are exhausted, do international remedies become relevant. If domestic courts do not suffice, international remedies, such as the HRC and ECtHR for human rights violations, must be accessible for the individual as a last resort.

3. An Attempt to Define

The individual is nowadays regarded as a subject of international law and – in order to assert his or her rights – the term access to justice must be defined. Evidently, the notion of access to justice consists of two terms, access and justice. As Cappelletti correctly states, the legal system must be equally accessible to all and it must lead to results that are just.³⁸ Both terms have to cope with different challenges, whereas the latter presumably is even more vague and subjective in its interpretation and therefore in its implementation. The focus of this paper will be on the access, bearing the justice-part always in mind.³⁹

³⁷ European Union Agency for Fundamental Rights and the Council of Europe, 'Handbook on European Law relating to access to justice' (2016) 17.

³⁸ Cappelletti and Garth (n 13) 6.

³⁹ On the justice-part, Cappelletti and Garth pointed out, a basic point of departure will be that “social justice, as sought by our modern societies, *presupposes* effective access”. The authors showed in their broad analysis of state practice that access to justice is more complex in countries with less economic resources so that ensuring the right to defense, legal representation, legal aid and the organization of tribunals, additionally there are basic questions of power and equality in society. They even went a step further in introducing the notion of “civic justice” describing the opportunity for all

It was apparent already in 1978 that the conceptual definition of access to justice would present a challenge when Cappelletti systematized and tried to define both the conceptual and the practical aspects of “access to justice”.⁴⁰ Cappelletti and Garth approached the term access as “the means by which rights are made effective” and as a central focus of modern procedural scholarship.⁴¹ Further, access to justice serves to fulfill two basic purposes of the legal system. First, legal systems must be equally accessible to all. Plaintiffs must be able to bring their case before a court. In order to do so, procedural provisions and practicalities shaping the legal system, such as standards on standing, litigation costs, availability of legal aid, or access to legal representation, have an immense impact – either positively or negatively – on the plaintiff, especially for vulnerable persons. Advancing the notion from a negative angle, access to justice cannot be guaranteed when plaintiffs are confronted with obstacles preventing them from filing their case. Second, as mentioned above, access to justice also encompasses that the legal system must lead to results that are “individually and socially just”.⁴² Having introduced the view of Cappelletti and Garth, various definitions have been derived from that stance.

Francioni defined the notion in a general and in a more qualified manner. In a general manner it is employed to signify the possibility for the individual to bring a claim before a court and have a court adjudicate it.⁴³ In a more qualified meaning access to justice is used to signify the right of an individual not only to enter a court of law, but to have his or her case heard and adjudicated in accordance with substantive standards of fairness and justice.⁴⁴

The United States Institute of Peace approached the term from a human rights based angle relying on the sources of the United Nations, particularly on reports of the United Nations Development Programme (UNDP). According to them, access to justice is regarded as more than improving an individual’s access to courts or guaranteeing legal representation. Access to justice is rather defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.⁴⁵ There is no access to justice where

citizens to participate in the life of the society they are part of. Cappelletti and Garth (n 13) 6; Carmen Luisa Roche and Jaqueline Richter, 'El acceso a la justicia' in Casal, Roche, Richter, Hansen (eds) *Derechos humanos, equidad y acceso a la justicia* (Instituto Latinoamericano de Investigaciones Sociales 2005) 46 <<https://library.fes.de/pdf-files/bueros/caracas/03831.pdf>> (accessed 13 July 2019).

⁴⁰ Cappelletti and Garth (n 13).

⁴¹ Cappelletti and Garth (n 13) 9.

⁴² Cappelletti and Garth (n 13) 9.

⁴³ Francioni (n 4) 1.

⁴⁴ *Ibid.*

⁴⁵ UNDP, 'Access to Justice' (2004) 6 available at <<https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for->

citizens fear the system, even regard it as alien, and do not access it; where the justice system is financially inaccessible, where individuals have no lawyers, where they do not have information or knowledge of rights, or where there is a weak justice system.⁴⁶ Access to justice involves certain elements such as normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.⁴⁷ Access to justice supports sustainable peace by affording the population a more attractive alternative to violence in resolving personal and political disputes.⁴⁸ By referring to sustainable peace, the link to the Sustainable Development Goal (SDG) 16 becomes evident. Target 16.3 reads “promote the rule of law at the national and international levels, and ensure equal access to justice for all”. In the guidelines on Goal 16, Lalaguna and Barrado refer again to the basic idea of Cappelletti and Bryant when it comes to defining the scope of access to justice, therewith indicates that their approach constitutes the basis for defining access to justice.⁴⁹

In the EU, the right to access to justice is considered as an important element of the rule of law and crosses civil, criminal and administrative law. Concretely, it “enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings”.⁵⁰ The ECtHR and the HRC as (quasi-) judicial human rights bodies are two of the most important for individuals to file lawsuits in case of violations of IHRL. Therefore, this paper aims at introducing these two bodies and their underlying legal basis concerning the right to access to justice in more detail as compared to other human rights regimes. Whereas, the HRC mostly relies on the ICCPR in its decision, the ECtHR refers mostly to the ECHR and the EU Charter of Fundamental Rights (ECFR). Both European human rights instruments provide for a European approach to define the notion of access to justice. It generally “enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings”.⁵¹ Within the context of European human rights, Article 6 and 13 ECHR are the central provisions for granting access to justice by encompassing several human rights, as well as

website/access-to-justice-practice-note/Justice_PN_En.pdf> accessed 14 August 2019.

⁴⁶ UNDP, 'Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice' (UNDP 2005) 4 available at <https://www.un.org/ruleoflaw/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf> accessed 14 August 2019.

⁴⁷ UNDP (n 45) 7.

⁴⁸ United States Institute for Peace, 'Necessary Condition: Access to Justice' (USIP) <<https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice>> (accessed 11 July 2019).

⁴⁹ Paloma Duran y Lalaguna, Castor Miguel Diaz Barrado, *Sustainable Development Goals Goal 16: Peace, Justice and Strong Institution* (Thomson Reuters 2018) 167.

⁵⁰ European Union Agency for Fundamental Rights and the Council of Europe (n 37) 16.

⁵¹ *Ibid.*

Article 47 of the ECFR. Core elements of these rights are the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice. Pursuant to Handbook on European law relating to access to justice, the notion of access to justice obliges states to guarantee each individual's right to go to court (or alternative dispute resolution bodies), to obtain a remedy if it is found that the individual's right has been violated.⁵² At the same time it is an enabling right that encompasses the enforcement of the judgment.⁵³

Regarding the differences between the aforementioned provisions, Article 6 ECHR is limited to criminal charges, disputes concerning civil rights and obligations recognized in domestic law. The right of access to an independent, impartial and statutory court is at the heart of the procedural safeguards in Article 6. Within the scope of the guarantee, Article 6 para 1 ECHR guarantees the right (subjektives Recht) to a decision by an independent court.⁵⁴ The Article even provides for the obligation (positive Pflicht) of the state to establish and maintain an effective judicial system in such a way that the courts can comply within a reasonable time with the guarantees given in the provision, including the decision.⁵⁵ Whereas Article 47 ECFR is broader and applies to all rights and freedoms recognized by EU law, including additional economic, social and cultural rights.⁵⁶ Further, Article 47 ECFR is not limited to rights under the Charter, it explicitly refers to access to a remedy before a “tribunal”, thus broadening the scope of protection to other dispute settlement mechanisms. However, Article 47 ECFR is merely relevant when EU Member States are applying EU law, e.g. by implementing a directive. Article 6 ECHR is not limited to these circumstances. Article 13 ECHR enshrines the right to an effective remedy before a national authority for violations of the ECHR.⁵⁷ This being introduced, certainly, the provisions have been shaped by the jurisprudence of the ECtHR.⁵⁸

⁵² *Ibid.*

⁵³ Christoph Grabenwarter and Katharina Gabel, 'Verfahrens- und Justizgarantien' in Grabenwarter/Pabel (eds) *Europäische Menschenrechtskonvention* (C.H. Beck 2016) § 24, Rn 51.

⁵⁴ *Ibid.*

⁵⁵ The Member State has the digression in how to implement its obligation. Jens Meyer-Ladewig, Stefan Harrendord, Stefan König, 'EMRK Artikel 6 Recht auf ein faires Verfahren' in Meyer-Ladewig, Nettesheim, von Raumer (eds) *Europäische Menschenrechtskonvention* (C.H. Beck 2017) para 33.

⁵⁶ European Union Agency for Fundamental Rights and the Council of Europe (n 37) 21.

⁵⁷ *Ibid* at 22.

⁵⁸ “Wegen der besonderen Bedeutung, die dem Recht auf ein faires Verfahren in einer demokratischen Gesellschaft zukommt, betont der EGMR gerade im Zusammenhang mit dem Recht auf Zugang zu Gericht, dass dieses nicht nur theoretisch und illusorisch, sondern effektiv gewährleistet werden muss. Aus diesem Anspruch leitet der Gerichtshof eine Pflicht der Mitgliedstaaten ab, ein Rechtsschutzsystem zu errichten, das dem Einzelnen den Zugang zu Gericht auch tatsächlich möglich macht. Dabei ist insbesondere die Möglichkeit der ggf. kostenlosen Inanspruchnahme eines

The ICCPR enshrined the right to access to justice in its Article 2 para 3 ICCPR.⁵⁹ It has a broad understanding of this right, including in letter (c) the aim to enforce the remedies. The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain such a provision. However, how these two covenants are interrelated and what it means for the obligations of the state parties to provide for access to justice will be introduced in more depth in the next sub chapter.

Not surprisingly, the precise definition and use of terms varies from legal instrument to legal instrument, even differing from the domestic, to the European to the international level. Although there is a – more or less – basic common understanding of access to justice, the international human rights instruments use different terms in granting it. The Universal Declaration and the ECHR enshrine the right to access to justice as “effective remedy”, whereas the American Convention speaks of “prompt recourse” and “effective recourse”. The ICCPR uses “effective remedy”, “to take proceedings before a court” and “to a fair and public hearing”. Due to the different formulations, the right to access to justice is not granted to the same extent, some provisions only grant one aspect of the right, others grant the full scope of access to justice.

Notwithstanding the differences, the most important common elements of granting access to justice are in theory the possibility to bring a case before a court, legal awareness of her or his rights in form of access to information, legal aid and representation, adjudication, enforcement of the decision to the extent the respective legal framework allows it, as well as the general application of the principle of effectiveness. States enjoy a wide discretion in the organization of their domestic system of legal remedies, however, for the purpose of the right to access to justice, most important is that remedies are effective and that they provide fair and impartial justice in a way that is equivalent to that provided by remedies that are *stricto sensu* judicial.⁶⁰

This being said on the status quo, these elements apply to the particular issue of access to justice and drone warfare as well. However, due to the new employment of technologies and remoteness of the

Anwalts vorzusehen, wobei den Mitgliedstaaten insofern ein weiter Gestaltungsspielraum zusteht.“ Grabenwarter and Gabel (n 53).

⁵⁹ Article 2 para 3 ICCPR

“(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

⁶⁰ Francioni (n 4) 4.

acts, additional elements of access to justice become relevant. Within the context of drone strikes and individuals seeking access to justice, three distinct elements must be considered. First, the domestic court of the perpetrator state shall have jurisdiction over the case. Second, the relevant transparent information must be provided on the drone conduct. Third, the perpetrator state must be held accountable for unlawful acts. These elements will further impact the notion of access to justice in the particular case of lethal drone airstrikes.

Due to the still existing differences in terminology, the definitions of the charters or conventions will be used when referring to the respective treaty rather than using one single definition. As the notion of denial of justice provides a clearer outline of cases of violating the right to access to justice as opposed to granting access to justice, it will be introduced later in this paper to present a holistic vision of the notion.

4. Implementation and Enforcement of Access to Justice as a Human Right

In a next step, after having approached the notion of access to justice in the human rights context, it must be analyzed what mechanisms guarantee its implementation and enforcement. This, in turn, is of practical relevance, first in order to assert it before courts, second, because not all human rights are enforceable through judicial means.⁶¹ Therefore, the theoretical question, which is also of practical importance, arises whether access to justice is a self-standing individual right or rather a procedural guarantee depending on a substantive right. Due to the previously introduced various formulations of access to justice, it is not always clear which exact scope is granted to the applicants, whether reference is made to the right to bring a claim before a competent court, or whether it refers to the right to have a measure or remedy provided in connection to an injury suffered by the claimant.⁶² The latter approach implies a broad understanding of the right to access to justice, including the right to obtain reparations as a consequence of a certain harm suffered in conjunction with the violation of a right or a legally protected interest.⁶³ Mainly the ICCPR and the ICESCR will serve as examples for that question as they reflect the different approaches.

One must distinguish between those rights imposing negative obligations upon states, such as the classic civil and political rights, and the one imposing positive obligations to implement these rights

⁶¹ Harald Koh, 'How Is International Human Rights Law Enforced?' (Indiana Law Journal 1999) 1387 et seq.

⁶² Particularly on the right to a hearing and the question whether it can be regarded as freestanding right. Larry Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (Law and Philosophy 1998) 32 et seqq.

⁶³ Francioni (n 4) 30.

at a policy, not a judicial level, such as economic, social and cultural rights.⁶⁴ This was the reason for the separate adoption of the ICCPR and the other on social, economic and cultural rights (ICESCR) which has consequences on their implementation and enforcement. The former rights can be realized through good governance and non-interference of human liberty, the latter cannot be fulfilled in the absence of resources.⁶⁵ Unlike the ICCPR, the ICESCR does not particularly provide for an effective remedy provision. Accordingly, Francioni refers to the rights enshrined in the ICESCR as “relative rights”.⁶⁶ However, it does not mean that these rights, not explicitly providing for judicial protection, may never be accessible. Rather, non-compliance mechanisms and remedial processes were found necessary. Concerning the ICESCR a Committee was established, relating to the model of the HRC, ensuring the compliance with these relative obligations.⁶⁷ Although, this was an important step for granting access to justice, its shortcoming was the lack of an individual complaints mechanism which made it difficult to maintain a full right of access to justice. The role of individual complaints may constitute an essential path towards providing for broader access to justice. The victims themselves are competent to file a complaint and bring it before the compliance mechanisms, without having to rely on the states' support or overcome other obstacles. Interestingly, the distinction between the two Covenants cannot be strictly applied to the ICESCR being relative rights, and the ICCPR granting absolute rights. The General Comment 3 clarified that violations of some rights of the Covenant on Economic Social and Cultural Rights⁶⁸ required an effective remedy in domestic law indicating that they are not excluded of their justiciability.⁶⁹ The Optional Protocol, which entered into force on 5 May 2013, plays a crucial role in reaffirming that the rights enshrined in the ICESCR are legally enforceable or justifiable. It created an individual complaint mechanisms and an inter-state complaint mechanism that leads to increased access to justice, accountability and remedies for violations of IESCR and enables the Committee on Economic, Social and Cultural Rights to conduct inquiries into grave or systematic violations.⁷⁰ Individuals must exhaust local remedies before bringing a case

⁶⁴ Olivier De Schutter, 'Economic, Social and Cultural Rights as Human Rights: An Introduction' (Cellule de Recherche Interdisciplinaire en Droits de l'Homme 2013) 4 available at <<https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO-WP2013-2-ODeSchutterESCRights.pdf>> accessed 24 August 2019.

⁶⁵ Francioni (n 4) 30.

⁶⁶ *Ibid.*

⁶⁷ See further Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (first published CUP 2000).

⁶⁸ E.g. Article 3, 7 (a) (i), 8, 10 (2) and 15(3) of the Covenant on Economic Social and Cultural Rights.

⁶⁹ UN Committee on Economic, Social and Cultural Rights, General Comment No 3: The Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23, Annex III.

⁷⁰ Bret Thiele, 'Optional Protocol to the ICESCR: An Opportunity for Strategic Litigation to Shape the Human Rights Framework' (The Global Initiative for Economic, Social and Cultural Rights) available at <<https://www.gi-escr.org/latest-news/optional-protocol-to-the-icescr-an-opportunity-for-strategic-litigation-to-shape-the-human-rights->

before the complaint mechanism. Additionally, the Optional Protocol reflected the potential misuse of this requirement on the domestic level and included in Article 3 para 1 sentence 2 that “[t]his shall not be the rule where the application of such remedies is unreasonably prolonged”.

Certainly, not every legal interest and individual right may amount to an individual right to access to court. Certain categories seem reasonable in order to prevent from “flood of complaints” keeping the procedural economy in mind.

For instance, Article 8 of the UDHR states that an individual right is merely recognized for “acts violating the fundamental rights granted him by the constitution and by law”. Although, the shift from international to national norms blurs the contour of the provision, it shows the relevance of domestic law, particularly rights granted under the respective constitutions. Article 13 ECHR stipulates in a clearer manner, that effective remedy covers the “rights and freedoms as set forth in this Convention”, not transferring the originally international character of the human rights standard to a national. Although, the Convention with its additional protocols includes various rights, judicial protection of human rights which may be guaranteed under customary international law, but not under the Convention, are not within the scope of Article 13 ECHR.⁷¹ Furthermore, Article 47 ECFR, Article 26 ICCPR, Article 8 of the American Convention on Human Rights and the Article 7 para 2 of the African Charter on Human and Peoples' Rights exemplify that, although access to justice certainly constitutes a legitimate interest worthy of legal protection, it is “rather construed as a procedural guarantee dependent on other substantive rights and freedoms, which are protected by the same treaty and sometimes by *renvoi* to the constitution and the law of the state parties”.⁷² However, this is merely the outcome of a normative approach, the jurisdiction of international judicial or quasi-judicial bodies do not strictly abide to these categories.

Interestingly, the Inter-American Court of Human Rights dealt with the question of access to justice as *jus cogens*. In its *La Cantuta v Peru* judgment it held that “[a]ccess to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States' *erga omnes* obligation to adopt all such measures as are necessary to prevent such violations from going unpunished”.⁷³ The ECtHR took over the view that the right to access to court is guaranteed by *jus cogens* in the *Kadi v*

framework> (accessed 25 August 2019).

⁷¹ Francioni (n 4) 32.

⁷² For further details on the other human rights conventions see *ibid*.

⁷³ *La Cantuta v Peru* (Judgment) Inter-American Court of Human Rights Series C No 162 (29 November 2006), para 160.

Council case and Yusuf v Council case.⁷⁴ However, the decision was set aside in the Kadi v Council and Commission case abstaining from examining the *jus cogens* question.⁷⁵ The Special Tribunal for Lebanon picked up this question and stated in the El Sayed case that the rule of the right to access to justice is of general application and, although subject to restrictions, it belongs to *jus cogens* arguing that *jus cogens* does not necessarily need full support of state practice.⁷⁶ This development must be noted for future cases as it could strengthen and solidify efforts to implement and enforce the right to access to justice.

The previous analysis mostly focuses on the ICCPR, ICESCR and the European human rights law as examples for international and regional frameworks. Where appropriate, a broad overview is provided introducing certain provisions of other human rights frameworks. The implementation and enforcement of access to justice as a human right is of practical relevance for the victims of drone air strikes. They depend on the character of the rights enshrined in international conventions in order to assert them before courts or use individual complaint mechanisms after having exhausted local remedies. Even the *jus cogens* discussion may become a central argument in drone cases to prevent violations of international law from going unpunished and holding the responsible state accountable. As an *erga omnes* obligation to adapt all measures to grant access to justice, the perpetrator state should have jurisdiction over the case, provide transparent information on the conduct of the drone strike and finally be held accountable if responsible for the violation of international law.

5. Access to Domestic Justice

As mentioned earlier, it is important to distinguish between access to domestic justice and access to international justice. In most cases, however, access to domestic justice, in the form of exhausting local remedies, is a pre-requirement to access international justice.⁷⁷ Another distinction must be made in the person of the plaintiff. Citizens of a domestic legal system can usually access it without significant obstacles, in contrast to foreigners, who often face additional hurdles. Therefore, the special role of foreigners before domestic courts, their rights and the obligations of the respective state will be introduced subsequently.

⁷⁴ Case T306/01 *Kadi v Council* [2005] ECR II-3649, para 282; case T306/01 *Yusuf v Council* [2005] ECR II-3533, para 343.

⁷⁵ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

⁷⁶ *El Sayed (Order Assigning Matter to Pre-Trial Judge)* Case No CH/PRES/2010/01 (Special Tribunal for Lebanon, 15 April 2010), para 20-36.

⁷⁷ E.g. Article 35 para 1 ECHR and Article 74 of the Rules of Procedure of the Human Rights Committee.

a. Foreigners before Domestic Courts

In most drone cases, the drone state is different from the home state of the victims. For instance, the victims are Yemeni nationals and the drone air strike occurred on Yemen territory but conducted by US agencies. The victims from Yemen are confronted with acts of the US and must therefore seek access to justice before US domestic courts. There, they are not familiar with the judicial system, nor do they know about their rights as foreigners and the obligations of the US as a state. Foreigners before domestic courts have concerned international law for decades and therefore certain protection standards have been developed.

aa. Development of Diplomatic Protection and Minimum Standards

In ancient times hospitality was considered as a sacred duty including the right to grant foreigners, as guests, legal capacity as well as far-reaching protection and judicial assistance. This customary legal status of foreigners was peu à peu interpreted as a legal position, however, differing from region to region.⁷⁸ Although in the 16th and 17th century, the rights of individuals were acknowledged as a common gift of nature according to the natural law theory,⁷⁹ the rights of the foreigners were not properly taken into account as they were regarded as opposing the principle of national sovereignty. The French Revolution and the US American constitutional developments further promoted the internal standard for the treatment of aliens endorsing human rights as distinguished category from civil rights which were merely granted to citizens.⁸⁰ The evolution of the legal status of foreigners finally led to diplomatic protection and minimum standards for the treatment of aliens.

The question of the foreigners' right to access to court arose mainly in the context of the law of state responsibility for injuries to foreigners. One way to deal with this issue was the diplomatic protection of the individual by his or her home state. In case of wrongdoings abroad the person concerned could invoke the customary rules on the treatment of aliens and seek adequate redress before local courts or judicial bodies.⁸¹ In case of a denial of justice, the foreigner could seek the protection of his or her national state, which in turn could espouse the individuals claim and assert diplomatic protection of

⁷⁸ E.g. in France foreigners were originally protected by the seigneurs, nevertheless, over time foreigners were treated comparable to servants resulting, i. a., in restrictions on land acquisitions and other infringements of their legal status. Whereas in Germany Gastgerichte (guest courts) were established granting foreigners prompt legal assistance and facilities for their complaints.

⁷⁹ According to Greek and Roman philosophy which generally had a significant effect upon international law, see further Kay Hailbronner and Jana Gogolin, 'Aliens' (MPEPIL 2013) para 10.

⁸⁰ *Ibid.*

⁸¹ Francioni (n 4) 9.

its national.⁸² Applying diplomatic protection the domestic and international level of access to justice becomes blurred. The individual's claim is transformed into a state claim, reducing or even nullifying the role of the individual in the international remedial process.⁸³ Under the law of diplomatic protection, the individual would always depend on the will of its state to resort to diplomatic protection.

In drone cases, diplomatic protection could theoretically be applied to grant the victims access to justice when it has been denied before domestic courts. Due to the political character of such a protection and the fact that IHRL and IHL are usually involved, it is unlikely that the victim states get involved. This can equally be applied to procedures before the ICJ. It is more likely that individuals seek access before international human rights bodies without having to rely on the support of the home state.

Apart from diplomatic protection it has become evident over the past decades that minimum standards under international law, reflected in domestic law, were required for the treatment of foreigners. It was neither sufficient nor adequate for the individual to rely on the willingness of the home state to have his or her be heard. With regard to the obligations of the deciding state to adjudicate upon a case brought by a foreigner, certain views have developed. The narrower was inspired by the Calvo Doctrine. Many Latin American countries adopted the Doctrine in their constitutions and domestic law. The Calvo Doctrine was based upon one main idea: Aliens should not be entitled to any rights or privileges which have not been accorded to nationals. Consequently, aliens should be entitled to seek redress for their grievances before local authorities or other authorities.⁸⁴ The Inter-American Juridical Committee referred to the Doctrine in 1961 as follows: “The obligation of the State regarding judicial protection shall be considered as having been fulfilled when it places at the disposal of foreigners the national courts and the legal remedies essential for implementing their rights. The State cannot initiate diplomatic claims for the protection of its nationals nor bring an action before an international tribunal for this purpose when the means of resorting to the competent courts of the respective State have been made available”.⁸⁵ The Calvo Doctrine was regarded as too narrow, since

⁸² Notably, in the context of access to domestic justice, the term of denial of justice is more frequently used than the positive term of access to justice. Assumably, it facilitates the determination of this notion, as a breach of access to justice in form of denial of justice is easier acknowledged or decided upon than positively granting access to justice.

⁸³ This is exemplified in the *Mavrommatis Palestine Concessions* case where the Permanent Court of International Justice (PCIJ) held that by resorting to diplomatic protection the “State is in reality asserting its own right – the right to ensure in the person of its subjects, respect for the rules of international law“. *Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Judgment) PCIJ Rep Series A No 2 12.

⁸⁴ For further readings see Patrick Juillard, 'Calvo Doctrine/Calvo Clause' (MPEPIL 2007).

⁸⁵ Report of the Inter-American Juridical Committee in M Whitman, 'Digest International Law' (1973) 727.

it could be easily jeopardized through discrimination, intentional delay or other deficiency in due process.⁸⁶ Therefore, the Institut de Droit international and the Harvard Law School drafted resolutions to with concrete proposals under which circumstances access to justice would have been denied to foreigners⁸⁷. Conversely, where these cases were not at issue, access to justice was granted. It became clear that access to justice is not simply access to court, rather further guarantees must be included, inter alia, the availability of a system of fair and impartial justice whose effectiveness and legitimacy must be reviewed by international instruments.⁸⁸ Accordingly, the effectiveness of remedies could not merely be granted by domestic law, moreover it must be determined by reference to international standards of fair and effective administration of justice which ultimately depends on international norms and principles of the treatment of aliens. The national treatment standard proposed by the Latin American states could not prevail in international law. Rather, the proceeding state must ensure the adjudication is in line with the rule of law and provide effective remedies to the persons concerned. The very basic requirements are that the procedure and the adjudication comply with domestic law, with the state's treaty obligations under international law or with customary international law, meaning that there is no deliberate delay of justice, no manifest discrimination of the foreigner, no arbitrary control of the adjudication by the executive or corruption.⁸⁹ Furthermore, financial requirements, such as security for cost or any other judicial costs can create obstacles to foreigners, could *de facto* nullify the foreigners right to access to justice in cases where the payment was unreasonable. Evidently, there were various forms of limiting or denying justice to foreigners before domestic courts.

Therefore, minimum standards consisting of certain fundamental rights were required which could be extended to domestic and international law. Meanwhile, generally accepted standards are the recognition of juridical personality and legal capacity, standards of humane treatment, law-abiding procedures in cases of detention, the right to unobstructed access to courts, the protection of life and

⁸⁶ Juillard (n 84) para 7 et seqq.

⁸⁷ In 1927 the Institut de Droit international adopted the resolution 'Responsabilité internationale des États à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers' (International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners; 'IDI Resolution'). Two years later the Harvard Law School drafted a private codification entitled "Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners". The latter resulted in the Draft Convention on Denial of Access to a Tribunal or an Administrative Authority in 1961.

⁸⁸ Francioni (n 4) 11.

⁸⁹ Two jurisdictions have been relevant, for foreigners, the one of the forum state on foreign territory and the one of the foreigner's state. Generally, foreigners are subject to the jurisdiction of the forum state as long as no exceptions apply, such as to the special treatment of diplomats as heads of state or military personnel resulting from the rules on immunities. *Ibid* at 12.

liberty against criminal actions and the prohibition of confiscation.⁹⁰ Nowadays, human rights regimes regulate certain rights of individuals regardless of their status as a foreigner. Equal access to courts is enshrined in Article 14 of the ICCPR and Article 47 ECHR. To sum up, the role of the foreigner before domestic courts has a long history and reflects the obstacles he or she was and partially is still facing when trying to access domestic courts in a state, which is not the state of origin. These minimum standards – now implemented in many human rights frameworks – are still essential for acts committed abroad such as in the case of lethal drone air strikes. The victims, often nationals of a different than the drone state, must claim their rights before the respective domestic courts. For them the rules of the ICCPR, the European human rights regimes or other regional human rights frameworks are of pivotal importance.

bb. Scope of Rights of Foreigners when Accessing Justice Before Domestic Courts

The standards on access to justice outlined above provide for guarantees for foreigners in order to file cases against the respective state. Due to the numerous possibilities of how access to justice can be granted or denied, a few of them will be introduced in order to provide an overview of relevant areas where the scope of access to justice of foreigners matters. This, in turn, is of importance for the victims trying to access the domestic courts of the drone states. In particular regarding the element of jurisdiction the foreigner must be granted access to justice at an early stage. This case, and others will be introduced as they are relevant for the victims of drone air strikes.

On the domestic level it is questionable at which point access to justice must be granted. It may start where the mere lack of jurisdiction does not absolve the territorial state from its international obligation to provide a remedy, particularly where there is no alternative settlement mechanisms for the foreigner to lodge a complaint⁹¹ or where domestic law is strictly applied and leaves the victim without any remedy. The individual concerned would be left *de facto* without any remedy simply because each state is applying its local laws restrictively. It is important to keep this in mind, particularly for the cases where no state considers itself to have jurisdiction, especially where several

⁹⁰ Hailbronner and Gogolin (n 79) para 26.

⁹¹ Providing for alternative dispute settlement mechanisms is particularly relevant in cases concerning immunities of the defendant. The ECtHR dealt with the question of access to justice and the potential requirement of alternative dispute settlement mechanism in its *Waite and Kennedy v Germany* case, *Waite and Kennedy v Germany* App no 26083/94 (ECtHR, 18 February 1999).

international actors are involved. This, in turn, may violate provisions of international law for not protecting foreigners and their human rights.⁹²

Furthermore, the question arises, with respect to foreign victims in the criminal procedure, whether the right to access to justice also encompasses the right of the victims of serious crimes to see the perpetrators being prosecuted and punished for their committed crimes if found guilty. The right to access to justice does not only contain the availability of judicial remedies but also the right to see effective criminal prosecution against persons who have committed crimes against the foreigners.⁹³ This includes the obligation of the forum state to ensure that its competent authorities prosecute those responsible before the court or competent authorities. Francioni derives from this obligation, *argumentum a fortiori*, that such rights must entail a corresponding duty on the forum state to refrain from implementing positive measures which prevent or shield the liability of persons or authorities who have committed a crime against a foreigner.⁹⁴ These acts were declared to constitute a denial of justice. This has been largely accepted in international law, particularly seen in the preparatory documents of the Conference on the Codification of International Law in 1930.⁹⁵ Nowadays, there is an obligation of states to prosecute and punish gross human rights violations which tends towards extending the prohibition of ad hoc amnesties in the field of citizens' rights and human rights, rather than in the field of treatment of aliens.⁹⁶

Foreigners are generally more vulnerable in the forum state, they must therefore be granted certain rights in order to access domestic courts equally as citizens. It is difficult to overcome the distinction between citizens and foreigners, therefore, domestic law has to take these special circumstances into account and needs to regulate the arising legal problems. This means that the forum state must grant rights to foreigners to ensure that they can hold the forum state itself accountable for certain unlawful acts. Consequently, it is understandable that the respective states are hesitating to implement such rules. Nonetheless, the access to domestic courts is the most crucial to make the individual's claim public. In cases where obstacles arise when trying to access domestic courts, international judicial or quasi-judicial bodies, such as the ECtHR or the HRC, may help when the access to domestic courts is without reach.

⁹² Depending on which legal framework applies in the respective case, e.g. Art. 14 ICCPR, Art. 8 American Convention on Human Rights (ACHR) and Art. 6 ECHR would be violated.

⁹³ Francioni (n 4) 13.

⁹⁴ *Ibid* at 15.

⁹⁵ League of Nations, Acts of Conference on the Codification of International Law (19 August 1930) available at <https://biblio-archiv.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf> (accessed 20 July 2019).

⁹⁶ Christiane Bakker, 'A Full Stop to Amnesty in Argentina, The Simon Case' (JICJ 2005) 1106.

b. Foreigners Injured Through a Violation of International Law

In cases where foreigners are the victims of a violation of a rule of international law, that act constitutes an internationally wrongful act according to the Articles on Responsibility of States for Internationally Wrongful Acts (ARS). Although the injured party is the foreigner the injured international legal person is the state of which the injured party is a citizen, as the ARS merely apply to states. Therefore, the state of origin can exercise diplomatic protection for its nationals. Generally, the foreigner cannot bring a claim before an international court without the involvement of its state. The important exception is the individual right of access to the ECtHR pursuant to Art. 34 ECHR. The HRC also offers access to remedies for an injured alien.

6. Access to International Remedies - before the UN Human Rights Committee and the European Court of Human Rights

For foreigners it may be important to have recourse to international remedies for violating of human rights law, when the access to justice has been denied on the domestic level. It is important to keep in mind the differences between access to national and international remedies. It is primarily on the domestic courts to adjudicate over human rights violations. Where access to justice is denied the individual may seek access to international human rights bodies. The HRC and the ECtHR produce the most relevant decisions and case law on the right to access to justice. As their legal frameworks have been introduced throughout the paper, accordingly, the relevant decision-making bodies and the most important decisions will be outlined.

In order to assert the rights enshrined in the ICCPR and the ECHR supervisory bodies were necessary thus, the HRC and the ECtHR were established. Both are of paramount importance for granting access to justice on the international level for human rights violations and both have the same interpretative function regarding the respective treaties and establish the law through institutionalized practices of interpretation.⁹⁷

Although these two bodies have several similarities, they vary in many respects. The ECtHR is a fully judicial body, it conducts hearings and provides for legal aid for the complainants. The judgments of the ECtHR are legally binding pursuant to Article 46 ECHR, whereas the HRC operates as a quasi-

⁹⁷ Gabriella Citroni, 'The Human Rights Committee and its Role in Interpreting the International Covenant on Civil and Political Rights vis-à-vis States Parties' EJIL:Talk (28 August 2015) available at <<https://www.ejiltalk.org/the-human-rights-committee-and-its-role-in-interpreting-the-international-covenant-on-civil-and-political-rights-vis-a-vis-states-parties/>> accessed 24 July 2019. Jukka Viljanen, 'The Role of the European Court of Human Rights as a Developer of International Human Rights Law' (University of Tampere 2003) available at <<http://www.corteidh.or.cr/tablas/r26759.pdf>> accessed 24 July 2019.

judicial body in respect of individual claims and as a body for administrative review regarding the periodic reports by states.⁹⁸ The HRC Views merely represent an authoritative interpretation as to the substance of the legally binding treaty obligations but its “judgment” is not legally binding. The outcome of the two distinct procedures plays a decisive role for the complainants: the ECtHR provides for a legally binding order to pay just satisfaction, whereas in even successful cases before the HRC the complainant may have to claim his or her rights before domestic courts in order to receive compensation.⁹⁹ If these efforts fail, the only outcome for the claimant will be that there is a public opinion on the fact that there has been a human rights violation which, generally, does not seem satisfactory.

Although the HRC seems like a less effective mechanism compared to the ECtHR, the mandatory monitoring mechanism of periodic implementation reports by state parties according to Article 40 ICCPR contributes to effective access to justice. The aim of this monitoring mechanism is to provide for a systematic and comprehensive review that addresses the negative as well as the positive state obligations and therewith does not suffer from the “somewhat coincidental nature of complaints-driven jurisprudence”.¹⁰⁰ It is also argued that a comparative advantage of the HRC is that it is not a victim of its own success like the ECtHR. The European Court is suffering from a great amount of complaints which has resulted in delays in the consideration of complaints. This development led the ECtHR to restrict its admissibility criteria. The HRC, in turn, has a relatively small number of complaints which has led to a comparatively liberal approach to the interpretation of formal admissibility requirements.¹⁰¹ Although the HRC does not produce legally binding decisions, it is still an authoritative decision based on the application of treaty obligations and its interpretation, which ultimately forms a redress to the claimant. Accordingly, the ECtHR provides for important tools with clear advantages compared to the HRC when it comes to granting effective access to justice on the level of international adjudication, however, the HRC is also of pivotal importance. They can work in a complementary way to the extent that each body has the discretion – where the legal basis so allows – to refer to the other bodies' decision in order to interpret human rights in a coherent and consistent manner.

⁹⁸ UN OHCHR, 'Fact Sheet No.7/Rev.1, Complaints Procedure' (OHCHR 2002) available at <<https://www.ohchr.org/Documents/Publications/FactSheet7Rev.1en.pdf>> accessed 25 July 2019.

⁹⁹ European Union Agency for Fundamental Rights and the Council of Europe (n 37) 12.

¹⁰⁰ Martin Scheinin, 'Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights' in Francesco Francioni (ed) *Access to Justice as a Human Right* (OUP 2007) 136.

¹⁰¹ *Ibid.*

As mentioned earlier, domestic courts still play an important role in the procedures before international judicial or quasi-judicial bodies. Most frequently, the exhaustion of local remedies is required which itself is a requirement that must be defined and upheld in a manner which does not result in denying the access to justice on the international level. In October 2005 the HRC had to decide on the access to domestic courts and international bodies by a victim of a human rights violation. The *KL v Peru* case concerned a 17-year-old Peruvian who became pregnant in 2001.¹⁰² It was discovered during her pregnancy that the fetus was anencephalic, a condition that can cause risks to health and life of the mother and most definitely being fatal for the fetus. Although abortion laws existed for cases where the life or health of the mother is in danger, the claimant was denied abortion due to a lack of clear regulations. She was even forced to breastfeed her baby for the four days it survived and suffered from severe depression after the birth. The HRC ruled that Peru violated, inter alia, Art 7, 17 and 24 of the ICCPR. With respect to the exhaustion of local remedies the HRC noted that “according to the author, the same matter has not been submitted under any other procedure of international investigation. The Committee also takes note of her arguments to the effect that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. The Committee recalls its jurisprudence to the effect that a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol. In the absence of a reply from the State party, due weight must be given to the author’s allegations.”¹⁰³ Although the HRC argued reasonably, this case showed that the availability and effectiveness of access to justice mostly depends on the state party and its judicial system on exhausting local remedies. In that case Peru did not respond to the case. Hence, the application of the requirement of domestic remedies is considered as one of the most unpredictable issues in international human rights obligations and in the end frequently depends on the reactions of the state party. This constrains the right to access to justice enormously as there is no guarantee for the individuals concerned. The problem can be observed in the *Galina Vedenyeva v the Russian Federation* case which was declared inadmissible by the HRC in March 2005.¹⁰⁴ The state party argued in this case that the complainant should have taken

¹⁰² *KL v Peru* Communication No 1153/2003 (HRC Views of 24 October 2005).

¹⁰³ *Ibid* at para 5.2.

¹⁰⁴ *Galina Vedenyeva v the Russian Federation* Communication No 918/2000 (HRC Inadmissibility Decision, 29 March 2005).

the case to the General Procurator of the Russian Federation and further to the Supreme Court, although these remedies were not considered to be effective in this case. The HRC argued that the person concerned “did not exhaust available domestic remedies, as she did not take her complaints about the alleged mistreatment of her son to the General Procurator of the Russian Federation and subsequently to the Supreme Court. Whilst the author contends that these bodies would not provide an effective remedy in the present case, no explanation has been provided by her in support of this contention. The Committee considers that, whilst the author of a communication does not bear the sole burden of proof for a contention that a particular domestic remedy is ineffective, an author must at least present a *prima facie* argument in support of such a proposition, and substantiate his or her reasons for believing that the remedy in question is or would be ineffective. In the present case, the author had not done this”.¹⁰⁵ With regard to granting access to justice before the HRC there is still an ambiguity and insecurity concerning the requirement of exhausting local remedies which ultimately restricts the right on the international level. Not even a coherent decision practice of the HRC has brought consistency to that issue. These are major differences to the jurisdiction of the ECtHR. Although as mentioned earlier, the ECtHR generally follows a more restrictive approach when it comes to admissibility requirements of exhausting domestic remedies, the ECtHR has developed a clear position as formulated in the *Akdivar v Turkey* case: “there is [...] no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the ‘generally recognised rules of international law’ there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal. [...] The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective [...]”.¹⁰⁶

In comparison to the decision of the HRC it becomes evident that the rationale of the domestic remedy requirement is to resort to the court or committee, however, only when effective remedy is not granted on the domestic level. Lastly, these (quasi-) judicial bodies must be independent in their decision-making process and having “courage to rule against the state party”.¹⁰⁷ The exhaustion of local remedies plays a pivotal role for the victims of drone air strikes. Typically, cases concerning drone

¹⁰⁵ *Ibid* at para 7.3.

¹⁰⁶ *Akdivar v Turkey* App no 21893/93 (ECtHR, 30 August 1996) para 67. Further decisions on the requirement of effective domestic remedies, see *Kudla v Polen* App no 30210/96 (ECtHR, 26 October 2000) para 152; *Selmouni v France* App no 25803/94 (ECtHR, 28 July 1999) para 74.

¹⁰⁷ Scheinin (n 100) 141.

conduct involve foreigners before local courts and most of the drone lawsuits are dismissed due to a lack of jurisdiction. This in turn can be led back to the lack of transparency as the drone states to not provide any information on the strikes. The dismissal of the lawsuits leaves the victims international remedies as their only option. Only with a clear jurisdiction and decision practice of the relevant (quasi-) judicial bodies on the requirements of exhausting local remedies, the victims can adhere to the respective criteria and can be granted access to international remedies that way. This is the last resort for victims to hold the perpetrator state accountable.

7. Access to Justice and Denial of Justice

The notion of denial of justice is frequently used in the same context as access to justice. To provide a holistic vision of access to justice, it must be examined alongside the denial of justice. As access to justice in drone warfare is complex, already due to the special circumstances of conducting drone strikes, the denial of justice may provide for clearer guidance on cases where a denial is evident.

It is questionable whether denial of justice is simply the negative determination of access to justice (i.e. not granting the right to access justice), or whether it contains further elements. Denial of justice is traditionally defined as any gross miscarriage of justice by domestic courts resulting from the ill-functioning of the state's judicial system.¹⁰⁸ This generally applies to citizens and foreigners. As the drone cases mainly affect foreigners seeking access before courts of the drone state, the focus will be the denial of justice of foreigners before domestic courts.

The denial may arise due to acts of the executive and legislature affecting the administration of justice. Whereas the obligation of states to ensure effective administration of justice for foreigners falls within the scope of the general obligation to protect aliens and their property according to customary international law.¹⁰⁹ Apart from the respective treaty law the state is obliged to protect foreigners, in case a denial of justice occurs the state concerned is violating international obligations and must be held internationally responsible.

This being said, a range of case law has been developed associating these cases to certain categories which facilitate to give the notion of denial of justice a contour. The cases mainly concern international remedies, not only on human rights but also coming from investment law because the latter field also provides for relevant cases.

¹⁰⁸ Carlo Focarelli, 'Denial of Justice' (MPEPIL 2013) para 1.

¹⁰⁹ *Ibid.*

First, the Barcelona Traction case was a landmark decision by the ICJ when introducing that “human rights [...] also include protection against denial of justice”.¹¹⁰ Although this judgment refers to an investment dispute, it had an impact on the human rights monitoring bodies when applying and developing the right to fair trial embodied in most human rights treaties.¹¹¹ This, in turn, led to the novelty that private citizens could directly raise grievances before human rights bodies or in the case of investment disputes before investment tribunals.

The Salem case then approached the nebulous term of justice, pointing out possible cases of denial of justice, as not any kind of injustice may amount to denial of justice.¹¹² As a rule, the foreigners residing in the respective state must acknowledge the kind of justice instituted in that state including all deficiencies of such jurisdiction.¹¹³ The Salem Case made clear that mere misinterpretation or misapplication of domestic law does not *per se* amount to a denial of justice, nor can international judicial or quasi-judicial bodies be regarded as empowered to constantly observe domestic courts and *de facto* act as a court of appeal.¹¹⁴ Only gross or manifest instances of injustice are regarded as denial of justice, for instance as mentioned in the Salem case “only exorbitant cases of judicial injustice”, namely “[a]bsolute denial of justice; inexcusable delay of proceedings; obvious discrimination of foreigners against natives; palpable and malicious iniquity of a judgment”.¹¹⁵

Furthermore, as one form of denial of access to justice the refusal of access to justice and the refusal of courts to decide upon the case is mentioned as another category of denial of justice, though, as the least controversial. The ECtHR developed its case law over the past decades starting in 1975 with the *Golder v United Kingdom* case where the court held that although the right to access a court is not explicitly expressed in the ECHR, it is implied in the procedural rights pursuant to Article 6 (1) ECtHR: “Article 6 (1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or

¹¹⁰ *Barcelona Traction, Light and Power Company, Limited (New Application) (Belgium v. Spain)* (Second Phase) [1970] ICJ Rep 3, para 81.

¹¹¹ Focarelli (n 108) para 10.

¹¹² *Salem Case (Egypt v United States)* (1949) 2 RIAA 1161.

¹¹³ *Ibid* at para 1202; Focarelli (n 108) para 11.

¹¹⁴ *Salem Case* (n 112).

¹¹⁵ *Salem Case* (n 112) para 1202. Other decisions dealt with the emanations of denial of justice, such as *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15, para 127 stating that the “[t]est is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial property of the outcome”.

aspect of this right [...]. The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles [...]. It follows that the right of access constitutes an element which is inherent in the right stated by Article 6(1)."¹¹⁶ This case demonstrated that the right of access to justice is admitted under Article 6 (1) ECHR provided that the very essence of the respective substantive right is not impaired and is subject to reasonable limitations proportionally pursuing a legitimate aim, as in the case of jurisdictional immunity under international law applying to foreign states and their officials.¹¹⁷ With regard to immunities, although a comprehensive analysis of the interplay of immunities and denial of justice would go beyond the scope of this paper, it is worth mentioning that in the *Waite and Kennedy v Germany* case and *Beer and Regan v Germany* case, the ECtHR stated that there is no violation of the right to access to justice when jurisdictional immunity is applied as long as an equivalent protection by alternative means of dispute settlement is made available.¹¹⁸

Unreasonable delay of proceeding is considered as another category of denial of justice. In investment cases the inexcusable delay of proceedings was considered as a traditional form of denial of justice.¹¹⁹ The ECtHR has also developed extensive case law on that issue when interpreting Article 6 (1) ECHR mainly sanctioning violations of the right to a fair trial in civil and criminal proceedings with a particular focus on the complexity of the case, the conduct of the applicant and the relevant authorities and what is at stake for the applicant in the dispute.¹²⁰

¹¹⁶ *Golder v The United Kingdom* App no 4451/70 (ECtHR, 21 February 1975) para 28 and 35.

¹¹⁷ Immunity of state officials from civil proceeding does not meet with much controversy, unlike the immunity from criminal proceedings. The immunity for criminal acts goes back the Article 7 of the Charter of the Nuremberg Tribunal according to which an individual acting as Head of State or government official does not relieve him/her from international responsibility. Further, the rise of human rights law introduced the debate on whether heads of state and former heads of state should enjoy immunity from international crime covering human rights violations. Furthermore, state or sovereign immunity plays an important role in cases of claims concerning acts of states or state entities. Claiming state immunity has the effect that the domestic court has no jurisdiction over the case or prevents enforcement of an award or judgment against any of the foreign state's assets. See on the debates in detail Paschal Oguno, 'The concept of state immunity under international law: An overview' (IJL 2016) 14. In the *Fogarty v United Kingdom* case the judges found a denial of justice contrary to Art. 6 ECHR, however, concluded that jurisdictional immunity pursued a legitimate aim when complying with international law to promote comity and good relations between states, in a reasonably proportional manner. See *Fogarty v United Kingdom* App no 37112/97 (ECtHR, 21 November 2001) para 34 and 36; Focarelli (n 108) para 15.

¹¹⁸ On the question whether the application of immunity is conditional upon the existence of alternative dispute settlement mechanisms see Leonardo Díaz-González, Special Rapporteur, 'Fourth report on relations between States and international organizations (second part of the topic)', 24 April 1989, UN Doc. A/CN.4/424, para 59.

¹¹⁹ Focarelli (n 108) para 16.

¹²⁰ For further analysis on unreasonable length of criminal proceedings with the respective case law of the ECtHR, see Marc Henzelin and Héloïse Rordorf, 'When Does the Length of the Criminal Proceeding Become Unreasonable According to the European Court of Human Rights?' (New Journal of European Criminal Law 2014).

The court's deference to legislative and executive interference or even excessive public pressure is an additional category where denial of justice is relevant. Domestic courts are supposed to be independent from the executive and the legislature according to the idea of separation of powers. Therefore, many arbitral tribunals found a denial of justice in cases where this separation is not upheld, for instance when legislation aims at voiding the authority of an arbitral award which is unfavorable to the government¹²¹ and even when taking the case out of the court's hands proceeding in a non-judicial manner¹²². Excessive public pressure on courts may also give rise to denial of justice.¹²³

Moreover, the failure to execute final judgments may amount to denial of justice. With regard to this category, the ECtHR plausibly ruled that it “would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party”. The judges made clear that the execution of a judgment must be regarded as “an integral part of the “trial” for the purposes of Article 6”.¹²⁴

A denial of justice may constitute a breach of due process, particularly in the denial of fair trial guarantees. This mostly affects investment disputes referring to the adherence to minimum standards of international law and fair and equitable treatment, without the need for bad faith or a malicious intention.¹²⁵ Moreover, corruption, discrimination and prejudice, self-evidently, form a denial of justice.¹²⁶

Finally, the introduced cases and categories have mostly been developed before international tribunal or (quasi-) judicial bodies. It becomes evident in these cases that the international and national level are interrelated because the exhaustion of local remedies is always required. The idea is that when local remedies are still efficient and available to the – usually – foreign victim, the judicial ill-treatment may still be corrected by the higher court.¹²⁷ Denial of justice implies that in case of failings of a judicial body, the overall judicial system is given a chance to correct itself. Interestingly, there has been a development within the human rights monitoring bodies to respond to systemic deficits

¹²¹ *Stan Greek Refineries and Stratis Andreadis v Greece* App no 13427/87 (ECtHR, 9 December 1994) para 50.

¹²² *Jacob Idler (United States v Venezuela)* (Opinion of Commissioner Little) 4 Moore International Arbitrations 349, para 3516 et seq.

¹²³ E.g. in the *Solomon Case (United States v. Panama)* (1955) 6 RIAA 370, para 372 et seq.

¹²⁴ *Timofeyev v Russia* App no 58263/00 (ECtHR, 23 October 2003) para 40.

¹²⁵ See for further details, Focarelli (n 108) para 25.

¹²⁶ E.g. a decision is considered a manifest injustice according to international law which is in breach of domestic law and is discriminatory against the foreign litigant. See *Loewen Group Inc v United States of America* (Award of 26 June 2003) ICSID Case No ARB(AF)/98/3, para 135.

¹²⁷ Focarelli (n 108) para 29.

within States Parties' legal systems which repeatedly generates structural and systemic human rights violations in indicating general measures of a legislative or administrative nature which the parties concerned would have to adapt in order to adhere to the treaty.¹²⁸ These human rights monitoring bodies, as well as the ECtHR, suggested enabling a retrial or reopening of the case when a breach of the right to fair trial was found and the claimant requested it.¹²⁹

Further, it is worth mentioning that in the foreign investment disputes, it was suggested to implement external supervision of national courts by international bodies in order to ensure the prohibition of denial of justice, especially in Canada and USA. Both states criticized this supervision as an infringement of the sovereignty principle and a “secret” threat to democracy as this international body would not be elected and interfere with the national judicial system.¹³⁰ If this is causing a discussion in investment disputes, it might be more harshly criticized when it comes to human rights violations and the duty of exhausting local remedies.

With regard to the notion of access to justice there are many overlapping discussions. In some areas denial of justice can be regarded as merely the negative formulation of access of justice. Nevertheless, the term denial of justice appears more definable and tangible. Most likely, a violation of a right can be more easily decided upon when looking at case law and the resulting different categories. As there is no consistent distinction between access to justice and denial of justice, the term access to justice will be preferably used throughout the paper with reference to the specific categories developed for the denial of justice where relevant.

To bridge the notion of denial of justice to the drone warfare, the three elements must be kept in mind, namely jurisdiction, transparency and accountability. The three criteria are most problematic when victims of drone strikes try to access the courts of the perpetrator state. As foreigners they are facing additional hurdles, in many cases the courts dismiss their claim for not having jurisdiction over the case. In order to demonstrate and prove the responsibility of the perpetrator state transparent information on the conduct of the targeted drone strike must be provided or demanded before the court. Where there is a violation of international law, be it IHL or IHRL, the perpetrator must be held accountable and provide compensation to the victims. These elements play a crucial role and will

¹²⁸ E.g. the ECtHR stated that “a denial of justice [...] undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself” and further suggesting a retrial or reopening of the case as an appropriate way of redressing the human rights violation. *Sejdovic v Italy* App no 56581/00 (ECtHR, 1 March 2006) para 82 and 126.

¹²⁹ *Ibid.*

¹³⁰ Focarelli (n 108) para 33.

guide the subsequent analysis of targeted killings in drone warfare and granting access to justice for victims. The previously introduced proposals on how to systematically address the issue of denial of justice may be relevant for the drone cases, where the lawsuits brought by the victims are dismissed by the domestic courts due to the courts' deference to the executive branch. This happens frequently because the conduct of drone strikes belongs to the executive and is closely linked to national security concerns because the targets of lethal drone strikes are primarily alleged terrorists. This also explains why the US started its targeted drone strikes after 2001. However, it does not justify that first and foremost the US is applying to so-called political question doctrine in order to reject having jurisdiction over the case and generally denying access to justice for the victims.

8. Access to Justice in a Globalized World

The concept of access to justice has changed over the last decades. The origins of access to justice mainly focused on legal assistance before courts and financial aid. It started off as a justification developed in treaties and in customary international law for unilateral action, it is nowadays often enshrined in treaties, either explicitly or implicitly by way of interpretation, and is ascertained by international human rights bodies, such as the HRC, or even by arbitral tribunal in investor state cases. Individuals in their private capacity are now capable of invoking the right to access of justice according to the respective treaties before domestic courts or monitoring bodies, international arbitration bodies or other judicial bodies against States. This, in turn, makes the individuals not dependent on the will of their home states to espouse their claims under diplomatic protection. Most developments took place in the field of human rights law, particularly with respect to the right to a fair trial whose progressive evolution can be seen in the case law of the ECtHR. Accordingly, it implies that access of justice has emerged to an international standard to which states must abide to vis-a-vis their own nationals and foreigners.¹³¹ As mentioned by Focarelli, cases concerning denial of justice may also affect the admissibility of issues before the ICC pursuant to Art. 17 of the Rome Statute if a state is unwilling or unable genuinely to carry out investigations or prosecutions.¹³² One can say that the notion of access to justice has developed to justify international control over possible abuse of power by domestic courts and state authorities in order to protect individuals, either nationals or foreigners.

¹³¹ *Ibid* at 35.

¹³² *Ibid*.

Nowadays, this focus has shifted as borders play a less important role, crimes or breaches of contracts happen transnationally in a globalized environment. This sets back the process of the past decades as victims of crimes cannot go before the court as they themselves may not be able to cross borders in order to assert their rights before foreign courts, however, the perpetrator has crossed borders in order to commit the crime. Modern technologies where states can act from a distance, even from the territory of foreign states, challenge the access of justice and the previously implemented monitoring and judicial bodies. The decision of the German Higher Administrative Court in Münster serves as a symbol for challenges of access to justice in respect of modern technologies in the special case of drone warfare. Three Yemeni nationals brought a case before the German Higher Administrative Court calling on Germany to take legal and political responsibility for the US drone warfare in Yemen conducted from German territory. In 2012, three members of the plaintiffs' family were killed in a drone strike in Yemen. The US military base in Ramstein played a key role in this attack by providing relevant information and by granting broad permissions for US military bases on German territory.¹³³ The court decided upon numerous contentious questions which arise in the context of the employment of armed drones and the access to justice. This included inter alia whether domestic law is applicable on foreign territory and whether domestic law can be applied to foreigners on foreign territory if their human rights are violated; whether the court has jurisdiction over acts conducted by the executive branch or whether the political question doctrine is applicable; if and how IHL and IHRL are applied in drone warfare in non-international armed conflict particularly whether IHL provides a basis for a so-called war against international terrorism and whether the right to preventive self-defense raised by the perpetrator state violates the principle of distinction and the prohibition of targeting civilians.¹³⁴

To what extent the notion of access of justice can respond to these challenges will be outlined and analyzed in the following chapter.

IV. Drones and Targeted Killings

The right of access to justice faces special challenges during war time. This is particularly evident in the cases where unmanned aerial vehicles (UAVs), more commonly known as drones, are employed for a military purpose, allows states to act from a far distance. More concretely, this affects individuals

¹³³ ECCHR, 'Important Judgment: Germany Obligated to Scrutinize US Drone Strikes via Ramstein', available at <<https://www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/>> accessed 8 August 2019.

¹³⁴ Oberwaltungsgericht Münster, Case Number 4 A 1361/15 (19 March 2019)

residing in a civil war country, such as Yemen, being civilian casualties of a drone attack conducted by the US. In these cases, the US uses drones for a military purpose to target and kill alleged terrorists. The drone technology facilitates the participation of drone states in drone warfare because no personnel is involved. The targeted killings are controlled and conducted from a far distance. This, in turn, makes it extremely difficult for victims to go before the court of the drone state to file a case. Additionally, the drone state collects all the relevant data on the case which they usually do not make public in a transparent manner. This further complicates attempts to hold the drone state accountable for violations of international law. These incidents demonstrate that the three elements, justice, transparency and accountability, play a crucial role in adjudicating over drone cases.

The term targeted killings is frequently used in this context. It has become a policy strategy for states fighting enemies, mainly alleged terrorists, outside their borders. The governments argue that this strategy minimizes risk to their own military personnel and causes less collateral damage to civilians.¹³⁵ Evidently, targeted killing from a distance raises multiple legal and moral questions some of which will be addressed below. Although, targeted killings are not only conducted by drones, however, this paper will merely focus on the killings using drones.

Furthermore, the remoteness of these weaponized vehicles means that they can be lighter and smaller than conventional weapons and they can overfly isolated, risky areas which is key to their success.¹³⁶ It was not until Afghanistan that missiles were fired from armed drones.¹³⁷ From then onwards, drone technology developed rapidly. For instance, the number of drones possessed by the US rose from 50 in 2000, to 19,000 in 2012.¹³⁸ Many of these drones are controlled by the Central Intelligence Agency (CIA) and not the US air force, an issue which has caused controversy. The CIA has been actively employing drones in Pakistan, Somalia and Yemen in recent years. In the latter state, the US launched an air strike in 2002 causing the death of six people, even though it has been argued that at that time there was no armed conflict in Yemen.¹³⁹ This issue and other legal questions on the use of drones

¹³⁵ Targeted killing operates through three mechanisms: “it disrupts terrorist organizations by forcing them to run for cover and replace leaders instead of plot against their enemies, it degrades them by destroying their top talent, and it deters them from plotting additional attacks by raising the perceived costs of doing so.” Rachel Tecott, 'Targeted Killing: Thinking Through the Logic' *War on the Rocks* (28 September 2016) available at <<https://warontherocks.com/2016/09/targeted-killing-thinking-through-the-logic/>> accessed 25 August 2019.

¹³⁶ Jim Garamone, 'Unmanned Aerial Vehicles Proving Their Worth Over Afghanistan' *American Forces Press Service* (16 April 2002) available at <<https://archive.defense.gov/news/newsarticle.aspx?id=44165>> accessed 11 August 2019.

¹³⁷ Keith Somerville, 'US Drones take Combat Role' *BBC* (5 November 2002) available at <http://news.bbc.co.uk/2/hi/in_depth/2404425.stm> accessed 4 August 2019.

¹³⁸ Michael Hastings, 'The Rise of Killer Drones: How America goes to War in Secret' *Rolling Stone* (16 April 2012) available at <<https://www.rollingstone.com/politics/politics-news/the-rise-of-the-killer-drones-how-america-goes-to-war-in-secret-231297/>> accessed 4 August 2019.

¹³⁹ *Ibid.*

and their compatibility with international law will be discussed in this chapter before addressing the question of access to justice in these cases.

1. What are Drones?

Drones have a long history, even starting in the First World War, then being employed in various conflicts, such as in Korea, Vietnam and the Arab/Israeli Conflict in 1973, as well as in the conflict in Former Yugoslavia.¹⁴⁰ However, they were used for reconnaissance rather than guided bombs. The latter was introduced in the Kosovo conflict where the Predator Drone was equipped with weapons for conducting lethal strikes but, as mentioned above, it was not until Afghanistan that the first rocket was fired.

a. Drones – A Definition

Drone technology was originally developed for military activities and is now widely used for commercial, professional, industrial and private purposes.¹⁴¹ According to the Global Air Traffic Management Operational Concept “[a]n unmanned aerial vehicle is a pilotless aircraft, in the sense of Article 8 of the Convention on International Civil Aviation of 1944 (CICA), which is flown without a pilot-in-command on-board and is either remotely and fully controlled from another place (ground, another aircraft, space) or programmed and fully autonomous”.¹⁴² This understanding of UAVs was endorsed by the 35th Session of the International Civil Aviation Organization (ICAO) Assembly.¹⁴³ UAVs are categorized on the basis of different criteria, such as their speed, endurance, range, the altitude they can reach during takeoff, their takeoff mode and for this paper most important their use.¹⁴⁴ Therefore, two main categories must be distinguished: UAVs used for civil purposes and those

¹⁴⁰ International Bar Association's Human Rights Institute, 'The Legality of Armed Drones Under International Law' (IBAHRI 2017) 7.

¹⁴¹ Furthermore, the public sector has increasingly been using drones such as in police departments for monitoring and observing, for example Brazilian Environmental Police uses drones to monitor deforestation in the Amazon, deter poachers and discover illegal mining operation. However, the paper will not focus the developing role of public sector when using drones. Alessia Vacca, 'Drones: military weapons, surveillance or mapping tools for environmental monitoring? The need for legal framework is required' (Elsevier B.V. 2017) 52. Haula Kitonsa and Sergey Kruglikov, 'Significance of drone technology for achievement of the United Nations sustainable development goals' (Re-economy 2016) 115.

¹⁴² International Civil Aviation Organization, 'Unmanned Aircraft Systems (UAS)' (2011) Cir 328 AN/190.

¹⁴³ Although there exists no universally accepted definition of UAVs, the following elements appear in most descriptions: (a) it is a mobile engine, (b) without a crew on board, (c) remotely piloted or guided entirely autonomously through programming, (d) equipped with systems to collect information and/or weapon systems, (e) used for military or civil purposes. Mélanie De Groof, 'Death from the Sky: International Legal and Practical Issues on the Use of Armed Drones' in Ales Zavrsnik (ed) *Drones and Unmanned Aerial Systems* (Springer 2016).

¹⁴⁴ *Ibid* at 133.

used for military purposes. The latter is the most relevant for targeted killings because they are typically conducted in armed conflict.

b. Legal Basis

The expansion of UAVs is not balanced by an exhaustive regulation on the military and civil use of UAVs.¹⁴⁵ There is no harmonized single international instrument addressing it. Different legal frameworks and consequences apply depending on the purpose UAVs are used for.¹⁴⁶ This may additionally complicate the question of legality in cases where the line between civil and military use is blurred. The main focus of this paper is the military use of drones.

Combat drones or unmanned combat aerial vehicles (UCAVs) are usually used for military purposes, as they are equipped with weapons or information-gathering systems.¹⁴⁷ Either one is being employed in targeted killing operations. Information must be gathered over a longer period in order to identify the suspected individual. Then the weaponized drone, controlled from a different territory, targets the individual and conducts the killing.

There are two different types of UCAVs, those that are armed and those that are not armed.

Non-armed UCAVs are habitually employed for surveillance, intelligence-gathering and observations for military purposes, both in peace time and in armed conflict. Armed UCAVs are different as they are military aircrafts that are operated by one or more persons from a distance and are situated in a position to conduct air strikes by delivering missiles or other explosives.¹⁴⁸ They can carry a range of explosive ordnance and be armed with precision-guided munitions able to injure or kill people and to damage or destroy objects.¹⁴⁹ It is important to note, that a drone itself is not a weapon in the strict sense, is it primarily a system of weapon transmission. Accordingly, the drone itself does not pose a threat to the proper and legal application of IHRL, IHL, the prohibition of the use of force and the non intervention principle under public international law.¹⁵⁰ What causes the main problems is the misuse or abuse of this new technology that can generate illegal situations. Consequently, when a

¹⁴⁵ Vacca (n 141) 53.

¹⁴⁶ For the technical differences between drone, system, involvement of the pilot etc. see Benjamyn Scott, 'Key Provisions in Current Aviation Law' in Bart Custers (ed) *The Future of Drone Use* (Asser Press 2016) 242 et seqq.

¹⁴⁷ They are not necessarily used for armed purposes, CICDE, 'Emploi des systèmes de Drones aériens, Réflexion doctrinale interarmées' (2012) 136 available at <http://www.cicde.defense.gouv.fr/IMG/pdf/20120606_np_cicde_rdia-2012-010-esda.pdf> (accessed 30 June 2019).

¹⁴⁸ Jean-Baptiste Jeangène Vilmer, 'Légalité et légitimité des Drones armés, Revue politique étrangère' (2013) 119.

¹⁴⁹ Nathalie Weizmann, 'Remotely Piloted Aircraft and International Law' (ICRC 2013) 34 available at <<https://www.icrc.org/en/doc/assets/files/2013/remotely-piloted-aircraft-ihl-weizmann.pdf>> accessed 20 June 2019.

¹⁵⁰ De Groof (n 143) 133.

state considers using an armed UCAVs it must comply with its obligations under international law. Binding rules on the use of force, on IHL and IHRL then apply. An armed UCAV, for instance under IHL, must meet the demands of the respective conventions, namely comply with the principles of necessity, distinction, proportionality, precaution and the prohibition of causing unnecessary suffering.¹⁵¹ These principles are contained in the four Geneva Conventions of 1949 and the Additional Protocols of 1977 relating to the protection of victims of armed conflicts. Article 36 AP I already prepared for new weapons by requiring that each State Party determines whether the employment of any new weapon, method or means of warfare would be prohibited by international law. Accordingly, every state should ensure that the new weapons it develops and uses are in accordance with international law, including the longstanding rules of IHL.¹⁵² Although there are various contexts which have not been codified by specific rules addressing the employment of UCAVs in warfare, the provision of IHL nevertheless governs their use.¹⁵³ These rules can respond to some of the common concerns about the deployment of UAVs, however, many grey areas remain, inter alia, when it comes to targeted killings conducted by state authorities. Armed and non-armed UCAVs are currently used by many states, and there is evidence that these vehicles have been used by non-state actors, such as the Hamas or Hezbollah.¹⁵⁴ The uncontrolled use of combat drones poses another instrumental risk when using UCAVs in armed conflict, but that issue would go beyond the scope of this paper.¹⁵⁵

To sum up, the military use of drones is central for targeted killing operations. The employment of the drone technology itself creates several legal and practical questions which poses additional hurdles for victims of drone strikes to seek access to justice. Not only the remoteness of the drone strikes and the lack of transparent information but also the lack of a clear legal basis for using drones under military purpose complicates further the procedure to bring a case before a court. For the specific case of targeted killing there must be a clear legal basis as far as this is possible in areas of conflict.

¹⁵¹ For an analysis and questions about the legality of the use of armed drones under international law, De Groof (n 143) and Vilmer (n 148).

¹⁵² Weizmann (n 149).

¹⁵³ An overview on which provisions of IHL apply to UAVs, see *ibid* 36.

¹⁵⁴ This can lead to extremely problematic situations as more risky operations will be likely to happen. 'Israel fears future Drone attacks', *Aljazeera* (2014) available at <<http://www.aljazeera.com/news/middle-east/2014/03/israel-fears-future-drone-attacks-2014310145427998548.html>> (accessed 30 June 2019).

¹⁵⁵ See on the debate: *ibid*.

2. Targeted Killings

When the first so called targeted killings took place by Russian¹⁵⁶, US¹⁵⁷ and Israeli¹⁵⁸ forces there had not been a clear definition of the lethal strikes which took place in Russia, Yemen and Dubai. In recent years the involved states have adopted policies on the matter seeking a legitimate response to terrorist threats and a necessary response to the challenges of the asymmetric warfare.¹⁵⁹ New technologies, mainly drones, have contributed to efficiently conduct the targeted killings. As mentioned earlier, drones were originally developed to gather intelligence and conduct surveillance for military purposes. Now they have the capability to shoot laser-guided missiles which, in turn, facilitates targeted killings with no, or very little, risk to the state personnel carrying out the operations.¹⁶⁰ As a result, the term itself is not clearly defined under international law, nor is the applicable legal framework – either IHRL, IHL, the law to the use of inter-state force and even domestic law – set.¹⁶¹ Not only the technological development but also the mixing of different potentially applicable legal framework pose more hurdles for the victims of such targeted killings. The civilians cannot trust the involved actors that they obey existing rules because it can be argued that the less restrictive framework applies, in this case IHL. This further complicates the path to seek justice before domestic courts for the civilian casualties. There is a striking knowledge divide between the acting state and the victim which may prevent the persons concerned going before the court and aggravate a fair procedure to hold accountable the perpetrator state. These issues, again, can be linked to the previously introduced elements of jurisdiction, transparency and accountability. To further bridge the topic of access to justice and targeted killing, the latter must be introduced in more detail. The following chapter will identify the term “targeted killing” and the areas of law which apply in cases of targeted killings by drones and address the main legal issues.

¹⁵⁶ 'Russia 'Kills' Chechen Warlord', *BBC* (25 April 2002) available at <<http://news.bbc.co.uk/2/hi/europe/1950679.stm>> accessed 14 August 2019.

¹⁵⁷ Jane Mayer, 'The Predator War', *The New Yorker* (26 October 2009) available at <<https://www.newyorker.com/magazine/2009/10/26/the-predator-war>> accessed 14 August 2019.

¹⁵⁸ 'Targeted Killing in Dubai: A Mossad Operation Gone Awry?', *Der Spiegel* (23 February 2010) available at <<https://www.spiegel.de/international/world/targeted-killing-in-dubai-a-mossad-operation-gone-awry-a-679764.html>> accessed 14 August 2019.

¹⁵⁹ UNGA, Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston (28 May 2010) UN Docs A/HRC/14/24/Add.6 para 2.

¹⁶⁰ IBAHRI (n 140) 7.

¹⁶¹ Report of the Special Rapporteur Alston (n 159) para 28 et seq.

a. A Definition

The term “targeted killing” is not a legal term defined under international law. When this new phenomenon appeared, the international community had to come up with an approach on how to capture the action done by the states.

It is agreed that lethal force is internationally and deliberately used with a degree of pre-meditation, against an individual or more individuals, specifically identified in advance by the perpetrator.¹⁶² It is important to distinguish targeted killings from unintentional or accidental killings and law enforcement operations, for instance against a suspected suicide bomber. The latter may allow the use of lethal force based on the imminence of the threat, however, the significant difference is that the goal of the operation would not be to kill.¹⁶³ Consequently, one can say “a targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under color of law, or by an organized armed group in armed conflict against a specific individual who is not in the physical custody of the perpetrator”.¹⁶⁴ Although this definition does include the most important aspects, targeted killing takes place in a variety of contexts, it can be committed by governments, their agents or by organized armed groups, in times of peace as well as in armed conflicts crossing borders and staying within the territory of one state.¹⁶⁵

Notably, other terms had been used for the same action, such as “extrajudicial execution”, “summary execution” and “assassination”, however, all these terms describe an illegal conduct under international law.¹⁶⁶ Therefore, the states consented to using the term of “targeted killings” as it does not describe an illegal act *per se*.

Referring to the victims of such targeted killing, the definition which makes it more difficult for victims to seek access to justice as the term does not appear contrary to international law *per se*. As a layperson this may have an immense impact on the personal attitude towards trying to access justice and file a lawsuit against the perpetrator. Whereas the extrajudicial execution or assassination implies the unlawfulness of the act.

¹⁶² Nils Melzer, *Targeted Killing in International Law* (OUP 2008) 4 et seq.

¹⁶³ Martin Senn and Jodok Troy, 'The transformation of targeted killing and international order' (Taylor & Francis 2017) available at <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5632895/>> accessed 16 August 2019.

¹⁶⁴ Report of the Special Rapporteur Alston (n 159) para 1.

¹⁶⁵ Philip Alston, 'The CIA and Targeted Killings Beyond Borders' (Harvard National Security Journal 2011) 11.

¹⁶⁶ Kenneth Anderson, 'Targeted Killing in U.S. Counterterrorism Strategy and Law' (American University Washington College of Law 2009) 13; Report of the Special Rapporteur Alston (n 159) para 10.

b. Applicable Legal Frameworks

As the term targeted killing is not clearly limited to a certain act, the line between targeted killings and extrajudicial executions or assassinations is blurred, which makes it challenging to apply only one legal framework. Targeted killing does not only fit in IHRL, IHL or general public international law.¹⁶⁷ Therefore, the applicable rules must be analyzed on a case-by-case basis, depending on the concrete circumstances.

The human rights framework controls law enforcement operations generally and is very restricted in permitting intentional killings. Whereas IHL is part of the law of war that enforces minimum standards of humane treatment of individuals¹⁶⁸ providing other, less strict requirements to legitimize targeted killings under certain circumstances.¹⁶⁹ The applicable law then mainly depends on the existence of an armed conflict in the respective area of conduct. As targeted killings usually take place outside the operator's territory the prohibition of the use of force, the principle of sovereignty, consent and self-defense under general public international law play an important role.¹⁷⁰ Generally, in the case of targeted killing two situations must be distinguished. First, whether the acting state violates the sovereignty of the forum state is determined by the law regulating the use of inter-state force (such as the UN Charter). Second, the legality of the specific killing of the suspected person is regulated by IHL and/or IHRL.¹⁷¹ The applicable legal framework is evidently of pivotal importance for the victims and the courts deciding upon possible violations of international law. All different regimes and their applicability in cases of targeted killings will be introduced below.

aa. Targeted Killings and the Use of Inter-State Force

Targeted killings by armed drones do not only challenge IHL and IHRL, as soon as the act crosses borders conducting the killing on foreign territory, the sovereignty of the forum state is concerned. Pursuant to Article 2 para 4 UN Charter all states refrain from the threat or use of force against the territorial integrity or political independence of any state. Self-evidently, the use of drones in targeted killings by the operating state in a foreign state breaches the prohibition of the use of force according

¹⁶⁷ Melzer (n 162) 4 et seqq; Report of the Special Rapporteur Alston (n 159) para 28 et seqq.

¹⁶⁸ Commonly, IHL is equated with the laws of war or *jus ad bellum*. However, Nils Melzer characterizes IHL as "those rules that establish minimum standards of humanity which must be respected in any armed conflict". This characterization excludes from IHL those portions of the laws of war that govern relations among sovereigns rather than protection of individuals. Given that this Article focuses on the nature of legal protections for individuals against targeted killing, it is more concerned with IHL. Melzer (n 162) 244.

¹⁶⁹ *Ibid* at 55 et seqq.

¹⁷⁰ Rosa Brooks, 'Drones and the International Rule of Law' (Ethics & International Affairs 2013) 93.

¹⁷¹ Report of the Special Rapporteur Alston (n 159) para 34.

to Article 2 para 4 UN Charter. Nonetheless, there are only two possibilities for the operating state not to violate international law, either the foreign state consents or the operating state has the right to use force in self-defense according to Article 51 UN Charter. Consent is governed by Article 20 of the ARS setting out a framework for its validity and limits and resulting in precluding the wrongfulness of the act of the acting state.¹⁷² However, it must be borne in mind that consent is unable to preclude the wrongfulness of acts in breach of IHL and IHRL. Both states, the one intervening and the one consenting, are still obliged to ensure that the use of force by consent does not breach other areas of law.¹⁷³ Still, consent is a key strand justifying the lawfulness of several drone operations where legitimacy by other means, like resorting to self-defense, is not applicable or limited.¹⁷⁴ In the absence of consent, or where it does not seem sufficient, states have justified their actions by invoking self-defense according to Article 51 UN Charter. The US has justified the resort to drones for the delivery of extraterritorial lethal force on the ground of self-defense in response to the armed attacks carried out on 11 September 2001.¹⁷⁵ However, as the practice of the US shows, the concept of self-defense must be properly and thoroughly assessed before invoking it in accordance with international law. It seems more feasible for states to resort to self-defense with the effect that normalizes and even expands the interpretation of this restrictive law.¹⁷⁶ Although, states make use of consent and self-defense under general public international law, the lawfulness of targeted drone air strikes does not only depend on these rules, they must also “satisfy the legal requirements under all applicable international law regimes”.¹⁷⁷ The use of inter-state force is less relevant for the individuals affected by the attacks, as these rules directly apply between the sovereign states. However, as inter alia Heyn and Akande pointed out, the acting state must abide to all applicable international rules.¹⁷⁸ This

¹⁷² Article 20 ARS reads “Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.” On the specific requirements, in particular on “legitimate government” and “given by an authorised official” see IBAHRI (n 140) 11 et seqq.

¹⁷³ *Ibid* at 10.

¹⁷⁴ In Pakistan, consent was given to US drone operations, however, withdrawn publicly afterwards. In other cases, e.g. Afghanistan, Iraq, Somalia and Yemen, the consent by these states was not able to provide a waterproof justification for US targeted killings wherefore the US had invoked self-defense as well. Michael Lewis, 'Guest Post: Pakistan's official withdrawal of consent for drone strikes' *Opinio Juris* (10 June 2013) available at <<http://opiniojuris.org/2013/06/10/guest-post-pakistans-official-withdrawal-of-consent-for-drone-strikes/>> accessed 26 August 2019.

¹⁷⁵ Harald Koh, 'The Obama Administration and International Law' *US Department of State* (25 March 2010) available at <<https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>> accessed 1 August 2019.

¹⁷⁶ IBAHRI (n 140) 14.

¹⁷⁷ Christof Heyn, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta, 'The International Law Framework Regulating The Use of Armed Drones' (*International and Comparative Law Quarterly* 2016) 795.

¹⁷⁸ *Ibid*

includes IHRL and IHL which are decisive for the victims and the respective courts or (quasi-) judicial bodies concerned with cases brought by victims.

bb. Targeted Killings in Armed Conflict

In armed conflict, generally, both, IHL and IHRL applies. However, according to the ICJ, IHL is considered as *lex specialis* in armed conflict.¹⁷⁹ Where IHL does not provide a rule or the provision is unclear and its meaning cannot be ascertained from IHL principles, it is appropriate to refer to IHRL.¹⁸⁰

First of all, it is important to distinguish between armed conflict and non-armed conflict, as well as international and non-international armed conflict and finally to take into account the principles of IHL.

aaa. Armed Conflict

The existence of an armed conflict is based upon objective criteria. According to Common Article 2 GC 1949, an international armed conflict occurs when one or more states have recourse to armed force against another state, regardless of the reasons or the intensity of this confrontation. The commentary of the Geneva Conventions of 1949 confirms that “any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place”.¹⁸¹

bbb. International or Non-International Armed Conflict

This being said, there is a difference between international and non-international armed conflict. International armed conflicts are governed by the four Geneva Conventions of 1949, the Additional Protocol I of 1977 and customary international law.¹⁸² This type of armed conflict involves two or more opposing states. Whereas non-international armed conflicts are protracted armed confrontations

¹⁷⁹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 25.

¹⁸⁰ *Ibid.*

¹⁸¹ Jean Pictet, 'Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (ICRC 1951) 32. For further details on the scope of armed conflict including jurisprudence by the ICTY and secondary sources see ICRC, 'How is the Term “Armed Conflict” Defined in International Humanitarian Law?' (ICRC 2008) available at <<https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 1 August 2019.

¹⁸² The Geneva Conventions of 1949 enjoy universal application as they have been ratified, whereas the AP I has not received universal ratification, however, many rules constitute customary international law nowadays, such as the conduct of hostilities. See Jean-Marie Henckaerts and Louise Doswald-Beck, 'Customary International Humanitarian Law' (CUP 2005).

occurring between governmental armed forces and the forces of non-governmental armed groups, or between such groups only.¹⁸³ The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum level of organization.¹⁸⁴ The requirement of organization has been developed within international jurisprudence, mainly by the ICTY in the *Boškoski* case asserting that “the degree of organisation required to engage in protracted violence is lower than the degree of organization required to carry out sustained and concerted military operations”.¹⁸⁵ As most targeted drone strikes affect alleged terrorists, it may be possible that the terrorist groups, such as al-Qaeda or ISIS, meet the threshold individually and regionally, whereas it is very unlikely that they meet the requirement as a single global entity.¹⁸⁶ The threshold of certain intensity serves the purpose of excluding the application of IHL in internal disturbances such as “riots, isolated and sporadic acts of violence” according to Article 1 AP II. The level of intensity is scrutinized on a case-by-case basis.¹⁸⁷ A distinction of non-international armed conflict is further made in the common Article 3 GC 1949 and the more restrictive definition of Article 1 AP II.¹⁸⁸ The requirement of all these factors makes it difficult for states involved in targeted killings to justify the existence of an non-international armed conflict against “al Qaeda, the Taliban, and other associated forces”, particularly concerning the groups constituting a “party” under IHL and the level of certain intensity and violence required to qualify for an armed conflict.¹⁸⁹

Most cases involving targeted killing – allegedly¹⁹⁰ – take place in non-international armed conflicts. Although, in both cases, international or non-international, the standards of IHL apply, the provisions on non-international armed conflict are not as well developed as those applicable to international

¹⁸³ ICRC, 'How is the Term “Armed Conflict” Defined in International Humanitarian Law?' (ICRC 2008) 5, available at <<https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 1 August 2019.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Prosecutor v Boškoski and Tarčulovski* (Trial Chamber Judgment) IT-04-82-T (10 July 2008) 197.

¹⁸⁶ IBAHRI (n 140) 22.

¹⁸⁷ The ICTY outlined a number of criteria for identifying the level of intensity: “The seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed.” *Prosecutor v Limaj Bala and Musliu* (Judgment) IT-03-66-T (30 November 2005) 90.

¹⁸⁸ AP II is not regarded as customary international law, therefore, it is not of relevance for this paper. However, for more details on Common Article 3 GC 1949 and Article 1 AP II see ICRC (n 183).

¹⁸⁹ Except for Pakistan, none of the states involved in a fighting al-Qaeda consider themselves as being part of an armed conflict against al-Qaeda. Although several states were hit by terrorist attacks of al-Qaeda or affiliated groups, the intensity of the attacks has not risen to the level of an armed conflict. Report of the Special Rapporteur Alston (n 159) para 54; Koh (n 175).

¹⁹⁰ Inter alia, the US has invoked the existence of an armed conflict against alleged terrorists, as non-state armed groups. *Ibid.*

armed conflict.¹⁹¹ Most important is that states approach the rules with good faith intending to apply the rules as they exist without expanding them beyond the limits of its meaning.¹⁹² Treaty law and customary international law outline the scope and elements of a non-international armed conflict against a non-state armed group. Accordingly, drone strikes must be carried out as part of fighting of a sufficient intensity, against an organized non-state armed group.¹⁹³

Two examples can be mentioned regarding the use of drones in ostensible non-international armed conflict to demonstrate the problematic nature of the classification of non-international armed conflict and the blurred limits of state consent. The examples focus on actions of the US, as the state provides for a high number of relevant cases. With respect to the extent of consent, the actions in Somalia conducted by the US must be taken into account. Since at least 2007, the government has fought al-Shabaab with an intensity that may amount to a non-international armed conflict. The US and the Somali government agreed upon the employment of drones only including lethal strikes against non-Somali fighters.¹⁹⁴ Nonetheless, numerous strikes were reported targeting Somali fighters by the US exceeding the scope of the given consent.¹⁹⁵ In 2002 the US launched their first drone strikes in Yemen, at that time outside of an non-international armed conflict. Whereas, since 2011, violence with great intensity has occurred between the government and al-Qaeda amounting to a non-international armed conflict. The changing nature of the conflict does however not change the unlawful intervention by US drone strikes outside a non-international armed conflict. These examples demonstrate how difficult it is to precisely draw the line between lawful and unlawful drone operations. Having outlined the theoretical point of view, in practice it is even more problematic. One can imagine, how laypersons and victims feel and know about the legality of such state conduct.

¹⁹¹ Report of the Special Rapporteur Alston (n 159) para 30.

¹⁹² *Ibid* at para 49.

¹⁹³ When using drones against alleged terrorists, it has been even argued that a separate non-international armed conflict between the intervening state and the non-state armed group arises. However, it was seen in the case of the US targeting al-Shabaab in Somalia that there was insufficient intensity to amount to an armed conflict. Al-Shabaab did not carry out any form of attack against the US whether on US territory or on foreign territory. It has been further argued that the intervening state has been invited to the pre-existing non-international armed conflict between the host state and the non-state armed groups. Others argue that without the consent of the host state that an armed conflict arises between the intervening state and the host state. These approaches depict the interrelation between consent and the existence of a non-international armed conflict, however, this concept is bound to the limits and extent of the consent given by the host state. See IBAHRI (n 140) 21.

¹⁹⁴ Max Byrne, 'Consent and the use of force: an examination of "intervention by invitation" as a basis for US drone strikes in Pakistan, Somalia and Yemen' (Journal of the Use of Force and International Law 2016) 117.

¹⁹⁵ 'Somalia: Reported US Covert Actions 2001-2016' *The Bureau of Investigative Journalism* (22 February 2016) available at <<https://www.thebureauinvestigates.com/drone-war/data/somalia-reported-us-covert-actions-2001-2017>> accessed 5 August 2019.

ccc. Principles of International Humanitarian Law

Apart from the distinction between international and non-international armed conflict the basic principles guiding IHL are to be outlined in order to decide upon the legality of targeted killings when employing drones. It is essential to keep in mind that drones as a means of combat are not specifically prohibited under international law, meaning they are not necessarily unlawful, however, as a method of combat they can be employed contrary to the respective legal frameworks in armed conflict.¹⁹⁶

First, the principle of distinction is of utmost importance when identifying targets in an armed conflict. According to Article 48 AP I, this principle stipulates that states must distinguish between combatants and the civilian population as well as between civilian objects and military objectives.¹⁹⁷ This distinction is similarly enshrined in Article 51 para 1 AP I and Article 13 para 1 AP II and is regarded as customary international law. Consequently, it is binding upon all states employing drones in non-international armed conflict although not party to the APs.¹⁹⁸

Further, the targeted drone strikes must be proportionate.¹⁹⁹ The operations must balance the anticipated military advantage with the harm to civilians. In the case of drone strikes, it has been asserted that certain strikes have resulted in a disproportionate level of civilian casualties in respect to the military advantage anticipated.²⁰⁰

Moreover, parties to the conflict must undertake precautions, meaning that everything feasible must be done to prevent mistakes and minimize harm to civilians.²⁰¹ Both the proportionality principle and

¹⁹⁶ IBAHRI (n 140) 24.

¹⁹⁷ Basically, this principle tries to balance two main, however, conflicting ideas, namely states wanting to prosecute their military endeavors effectively and simultaneously being able to protect their own citizens, as Schmitt phrases it "States have an interest in protecting civilians, especially their own [...] states have an equally compelling interest in being able to effectively prosecute military operations [...] as a result, IHL represents the synthesis in a dialectical process involving the balancing of two seemingly contradictory concerns: military necessity and humanity. The purpose of IHL is not solely to extend protections to civilians and their property. It is instead to find a rational equipoise between that goal and the equally valid objective of conducting effectual military operations in pursuit of national interests". Michael Schmitt, 'Discriminate Warfare: The Military Necessity-Humanity Dialectic of International Humanitarian Law', in David Lovell and Igor Primoratz (eds) *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Ashgate 2012) 87 et seq.

¹⁹⁸ This mainly applies to the US and Israel as they are not party to the APs.

¹⁹⁹ Proportionality requires an assessment whether an action that is expected to cause incidental loss of civilians or cause injuries to them would be excessive in relation to the anticipated concrete and direct military advantage. See Article 51 (5) (b) and 57 AP I.

²⁰⁰ This particularly affected the discussion on the drone strike that killed Baitullah Mesud and around 11 others, see with further references IBAHRI (n 140) 26.

²⁰¹ This falls under the precautionary principle. It requires that before any attack, armed forces must do everything feasible to verify the target is legitimate, determine what the collateral damage would be and assess necessity and proportionality, and minimize the collateral loss of lives and property according to Article 57 AP I. Melzer (n 162) 365.

the principle of precaution are also regarded as customary international law, and so, binding on all parties of the conflict.

Finally, the targeted killing must be necessary.²⁰² Military necessity is an underlying principle of IHL, referred to in Article 52 para 2 and 54 para 5 AP I and Article 17 AP II. Relating thereto, the principle of humanity is generally based in IHL and is regarded as “essential counterbalance to the principle of military necessity and serves as as central principle of constraint”.²⁰³

To summarize, IHL provides for a legal framework which is applicable in the cases concerning targeted killings by employing drones in armed conflict. As indicated above, it is widely accepted that the drone technology itself does not violate international treaties, however, the methods how this technology has been used is subject to IHL, complemented by IHRL, and certainly outlines that by ignoring these rules the object and purpose of IHL and its safeguards would be undermined. If states invoke provisions of IHL to expand to notion of non-international armed conflict to drug dealers and criminal gangs – which should be dealt with under law enforcement and human rights – indeed challenges and even damages IHL and to a certain extent IHRL. These consequences will presumably affect the victims of such drone strikes most of all. IHL and IHRL are the relevant legal frameworks applicable to individuals. Such damage will make it easier for the acting states to deny jurisdiction and uphold their impunity.

cc. Targeted Killings Outside Armed Conflict

According to the advisory opinion of the ICJ, where targeted killings take place outside of an armed conflict, human rights standards apply instead of IHL, particularly those regulating the use of lethal force. These standards are frequently referred to as law enforcement, although they do not only apply to police forces or in times of peace.²⁰⁴ The respective persons falling under the law enforcement provisions include all officials who exercise police powers, for example state military and security forces, as soon as violence exists which does not amount to an armed conflict.²⁰⁵

²⁰² The principle of military necessity permits measures which are necessary to accomplish a legitimate military purpose, and which are not prohibited under IHL. In an armed conflict, the only legitimate purpose is to weaken the military capacity of the other party. ICRC, 'Military Necessity' available at <<https://casebook.icrc.org/glossary/military-necessity>> (accessed 29 July 2019).

²⁰³ Laurie Blank and Gregory Noone, 'International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War' (Wolters Kluwer 2013) 129.

²⁰⁴ Report of the Special Rapporteur Alston (n 159) para 31.

²⁰⁵ UNGA Res 34/169 (17 December 1979) UN Docs A/RES/34/169, Article 1 commentary (a) and (b).

Human rights standards on the use of force are derived from the idea that “the irreversibility of death justifies stringent safeguards for the right to life, especially in relation to due process”.²⁰⁶ Therefore, killing is only lawful to protect the right to life, making lethal force proportionate, and when no other non-lethal means are available, making lethal force necessary.²⁰⁷ Proportionality deals with the question of how much force is permissible in the respective situation. It concerns the proportionality between the force used and the legitimate objective for which force is used, requiring that the escalation of force be stopped when the consequence for the suspect of applying a higher level of force would prevail the value of the objective.²⁰⁸ The necessity requirement, in turn, imposes an obligation to minimize the level of force applied irrespective of the level of force that would be proportionate through, for instance, warnings or capture.²⁰⁹ This being said, it means targeted killings, as intentional, premeditated and deliberate killing by law enforcement officials, cannot be legal as the mere killing would be the sole objective of the action, which is not allowed under IHRL. Some argue that, consequently, law enforcement would not be capable to deal with alleged terrorists, in particular with the threats posed by suicide bombers. However, these arguments are based on a misunderstanding of IHRL as these norms generally prevent states from having a license to kill. In order to do so IHRL includes the obligation of the states to respect and to ensure the right to life which, again, entails a duty to exercise due diligence to protect the life of individuals from attacks by criminals, including terrorists.²¹⁰ In the context of targeted killings the right to life is, apart from the right not to be subjected to cruel, inhuman or degrading treatment,²¹¹ the most important human right. According to binding Article 6 ICCPR, no one can be arbitrarily deprived of their life. During an armed conflict, the term “arbitrary” is interpreted in light of the rules of IHL. If an individual were to be deprived of his or her life in a manner that was lawful under IHL, this would not constitute an arbitrary killing.²¹² Outside an armed conflict, the requirements of proportionality and necessity according to human rights standards must be fulfilled. The use of drones for targeted killings will therefore be likely unlawful under IHRL. The prior identification of an individual on the basis of acts previously performed, or their position in an organization, is contrary to the requirements of necessity

²⁰⁶ UNGA, 'Note by the Secretary General Extrajudicial, summary or arbitrary executions' (5 September 2006) Sixty-first Session UN Docs A/61/311 para 36 et seqq.

²⁰⁷ *Ibid* at para 36 et seqq.

²⁰⁸ Kai Möller, 'Proportionality: Challenging the critics' (International Journal of Constitutional Law 2012) 711.

²⁰⁹ *Ibid* at 713; Note by the Secretary General (n 206) para 41.

²¹⁰ Report of the Special Rapporteur Alston (n 159) para 33.

²¹¹ Article 7 ICCPR enshrines the right not to be subjected to cruel, inhuman or degrading treatment. Further details on the importance of this right in the context of drone strikes, see IBAHRI (n 140)

37.

²¹² *Ibid* at 36.

and proportionality.²¹³ Summing up, lethal force under IHRL is allowed under very restricted conditions, namely if it is directly necessary to save life and proportional. Linking this subchapter back to granting access to justice, the access to international remedies may become relevant. As referred to Article 6 ICCPR, the HRC may be competent to decide upon cases involving lethal drone air strikes and a violation of the right to life. However, access to international justice serves as the last resort when domestic remedies have been exhausted.

dd. International Humanitarian Law, Human Rights and Inter-State Force – An Interplay

The different legal frameworks and their provisions are manifold and each one has a different angle on the question of legality of targeted killings using armed drones. Whereas the application of law on inter-state force is comparatively clear, the main issue focuses on the relationship and application of IHL and IHRL. This interplay is of pivotal importance for the victims of drone strikes aiming to claim their rights before domestic courts or international (quasi-) judicial bodies. As mentioned earlier, law on inter-state force affects the states, not the individuals directly. The individuals rely upon the applicability of IHL and IHRL. The two legal frameworks pose different legal obligations on the states, provide for rights for victims and different mechanisms on how to apply and assert them before courts. This, in turn, is relevant for domestic courts having jurisdiction over the case. In order to reduce the obstacles for the affected individuals, the lawfulness of drone air strikes under international law should be analyzed holistically. Otherwise, the strict distinction between the applicable legal framework constitutes a basis for the relevant judicial bodies to dismiss cases due to a lack of jurisdiction.

Generally, IHL and IHRL share a common fundament, namely “the recognition of the dignity of the person”.²¹⁴ The dignity, irrespective of times of armed conflict or peace, of all persons – civilians or combatants – is still the foundation for both legal frameworks. Whereas IHL only applies during armed conflict, IHRL applies in the period from peace time to armed conflict and in cases where the precise scope of the regimes is blurred. Nowadays, most scholars share the opinion that IHRL

²¹³ This has been argued in the case of the US drone strike in Yemen in 2002. In the absence of a new imminent threat posed by the alleged terrorist, the strike would have been solely a response to the bombing in 2000, which is not in accordance with the principle of necessity. Danya Greenfield and Stefanie A. Hausheer, 'Do Drone Strikes in Yemen Undermine US Security Objectives?' (Atlantic Council 2014) available at <https://www.atlanticcouncil.org/images/publications/Drone_Strikes_in_Yemen.pdf> accessed 20 August 2019; IBAHRI (n 140) 37.

²¹⁴ José Luis Rodríguez-Villasante, 'Terrorist acts, armed conflicts and international humanitarian law' in Pablo Antonio Fernández-Sánchez (ed) *The new challenges of humanitarian law in armed conflicts: In honour of Professor Antonio Carrillo-Salcedo* (Brill Nijhoff 2005) 44 et seq.

continues to apply in armed conflict.²¹⁵ Although derogations from IHRL can occur in specific areas, however, certain rights can never be derogated from, leaving the human rights applicable at all time. The ICJ stated in its Advisory Opinion that, while IHRL continues to apply even in time of war, IHL would prevail as *lex specialis* whether a violation has actually occurred, determined on a case-by-case basis.²¹⁶ Other scholars have identified the reconciliation of IHL and IHRL as merely a mutual application or derogation.²¹⁷ Particularly difficult cases emerge when drones are employed for targeted killings, for instance in situations where the US is targeting individuals in a jeep driving through Yemen. Whether or not IHL applies depends on the existence of an armed conflict which in Yemen was not clear. Assuming there was an armed conflict at that time, the targeting must have been legitimate, the individual must have been a combat or a civilian who lost its protection. Then, pursuant to the ICJ, the deprivation of life during armed conflict is regulated by IHL as *lex specialis*. Accordingly, if IHL rules were adhered to, these killings could be lawful based on the Geneva Conventions and its Protocols. Notwithstanding the applicability of IHL in that case, for some this conclusion sat very uneasily having the approach in mind that IHRL was also applicable. This especially can be traced back to the legitimate expectation that under IHRL this type of direct recourse of lethal force would not be lawful.²¹⁸

The US has invoked the existence of an armed conflict against alleged terrorists in order to apply IHL, which at first glance has more permissible rules for killing than HRL or domestic laws.²¹⁹ Indeed, for example, IHL includes fewer due process safeguards and the acting states regard it beneficial to avoid compliance with the more burdensome requirements for capture, arrest, detention or extradition on alleged terrorists in another state.²²⁰ Nonetheless, under IHL lethal force must still be in accordance with the principles which pose a high threshold for states employing drone technology.

The complexity of the interplay between IHL and IHRL is even reflected in court rulings and reports of the UN. For instance, the Supreme Court of Israel in its *Public Committee v Government of Israel*

²¹⁵ Support can be found in positions of the Security Council and various judicial and quasi-judicial bodies, such as the ICJ and UN Human Rights Committee. UNSC Res 237 (14 June 1967) UN Docs S/RES/ 237; UN HRC, 'CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11; ICJ 1996 (n 179) para 25.

²¹⁶ ICJ 1996 (n 179); Noam Lubell, 'Concurrent Applicability of International Humanitarian Law and International Human Rights Law' in Noam Lubell (ed) *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 239.

²¹⁷ See on these approaches Lawrence Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (International and Comparative Law Quarterly 2015) and Lubell (n 216) 238 et seqq.

²¹⁸ Lubell (n 216) 242 et seq.

²¹⁹ Report of the Special Rapporteur Alston (n 159) para 47.

²²⁰ *Ibid.*

decision stated it could not determine the overall legality of targeted killings but introduced criteria to be applied in order to assess it.²²¹ The court did not consider the targeted individuals as either combatants or protected civilians, it rather required the acting state to comply with four criteria which seem to constitute a mixture of IHL and IHRL.²²² Similarly, the Report of the UN General Assembly assesses Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in one report without further distinguishing between the two frameworks.²²³

These issues are to be decided by judicial or quasi-judicial bodies which may be limited to monitoring violations of certain treaties. However, there are also bodies such as the ICJ and domestic courts which are not restricted to one of the frameworks.²²⁴ Each case must be decided upon individually and leaves room for digression. This further indicates that the lawfulness of drone air strikes under international law must be analyzed holistically. It reduces the obstacles for victims of such strikes when accessing justice to address the jurisdiction of the competent state or seek remedy before a judicial body without having to fear that the respective body cannot adjudicate over its claim. Ultimately, this may not only influence the element of jurisdiction but may also lead to holding the perpetrator accountable.

To sum up, IHL and IHRL go hand in hand and cannot be distinguished categorically in the case of drone warfare, particularly targeted killings. Warfare has changed from the date of the codification of IHL, as the law of the war, until today. Targeted killings must be scrutinized holistically, they must be considered on a facts-based approach rather than the strict application of legal regimes which might not be adequate. As mentioned above, this may affect the newly arising elements of access to justice for victims of drone strikes. It is more likely that the domestic courts and (quasi-) judicial bodies have jurisdiction over the case because there are not limited to a certain legal framework. Following the holistic approach, the hurdles of the victims to access justice could be reduced.

²²¹ The four criteria are: The decision to kill has to be based on reliable evidence; the measure of targeted killing has to be proportionate; the attack must be followed by a thorough investigation; and Collateral damage must be proportionate. *The Public Committee Against Torture in Israel and others v The Government of Israel and others*, Judgment, Case No HCJ 769/02, Supreme Court of Israel (11 December 2006) para 40.

²²² R Heinisch and S Pouloupoulou, 'Difficulties in Prosecuting Drone Strikes as a War Crime Under International Criminal Law: An International Humanitarian Law Perspective' (ECCHR 2017) 75.

²²³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147 (21 March 2006) UN Doc A/RES/60/147.

²²⁴ Lubell (n 216) 242.

c. Employing Drones in Targeted Killings – Legal Issues

Technology has shaped modern warfare. This has led to the waging of wars remotely, removed from the actual battlefield. Ramstein Air Force base in Germany is just one example of the US conducting remote drone strikes. The legal basis for the conduct of drone air strikes has been outlined above, already touching upon numerous legal issues arising in that context. However, the most important issues deal with questions on who can be targeted, when, on what basis and by whom.

It is important to keep in mind that these are the major questions concerning civilian casualties. The cases of conducting targeted killing in accordance with international law are very limited. Conversely, the majority of cases will rather be contrary to international law. The legal issues must be elaborated on precisely so that the victims can claim their rights or the violation of legal obligations by the conducting state before a domestic court. Transparent information must not only be provided on the concrete conduct of the drone strike but also on the legal basis. Otherwise victims do not know about their rights.

aa. Against whom, when and how can targeted killings be conducted

First of all, it must be clarified “against whom” the targeted killing may be lawfully conducted. The current conduct of lethal drone air strikes mainly takes place in extraterritorial non-international armed conflict targeting members of non-state armed groups. As mentioned earlier, the rules governing non-international armed conflicts do not include a combatant status, but do provide for targeting certain types of persons.²²⁵ Common Article 3 GC 1949 stipulates that “[p]ersons taking no active part in the hostilities” shall be protected, *argumentum e contrario*, meaning that civilians lose their protection when taking part in direct hostilities. This is also reflected in Article 51 para 3 AP I and Article 13 para 3 AP II and has been recognized as being customary international law.²²⁶ It does not mean that they are no longer regarded as part of the civilian population, rather their protection against direct attacks is temporarily suspended.²²⁷

The main controversy takes place around the civilians who “directly participate in hostilities” (DPH) as states are permitted to directly attack those civilians and at the same time may be targeted themselves when civilian agencies are themselves directly participating in hostilities. Two major

²²⁵ IBAHRI (n 140) 29.

²²⁶ Henckaerts and Doswald-Beck (n 182) Rule 6.

²²⁷ Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under Humanitarian Law (ICRC 2009) 70, available at <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>> accessed 2 August 2019.

issues arise in the context of targeted killings of alleged terrorists and DPH, first, what conduct constitutes DPH, and to which extent can “membership” in an organized armed group be used for determining whether a person is directly participating in hostilities.²²⁸ Due to the limited scope of this paper, the issues will be outlined briefly, focusing on the acts of the US.

First, DPH depends upon a determination of what type of conduct falls under direct participation. There is no clear definition of DPH, however, the ICRC Interpretative Guidance developed a three-step test to determine the existence of DPH. The ICRC requires that the civilian’s acts meet the cumulative criteria of threshold of harm, direct causation and belligerent nexus.²²⁹ Each part must be satisfied for the individual to lose its protection. Applying these criteria to targeted killings means that a civilians who engages in fighting in an non-international armed conflict, “may only be targeted when they have carried out an act that either does harm to their adversary, who is a party to the conflict, or that hampers some aspect of their military operations. This harm or adverse effect must have been directly caused by their act”.²³⁰

Second, the loss of protection of civilians in armed conflict generally arises due to DPH, but also from being a certain member of armed groups, as the latter is intrinsically linked to the concept of DPH.²³¹ Again, ICRC's Interpretative Guidance provides an approach on how to identify targetable members of such groups. They are only targetable when they carry out a “continuous combat function” and only for “the duration of their membership”.²³² With regard to the duration, ICRC proposes a limitation of DPH to each single act, the earliest starting point would be participating in concrete preparatory measures in the particular act and ends when the activity is completed.²³³ It means that members of such group, who are generally considered as non-combats, would retain their civilian protection (and would not be targetable).²³⁴ This applies unless these civilian members of the group do not directly participate in hostilities. In this case, in turn, the previously mentioned rules would be effective and make the individual participating in hostilities a valid target. In order to

²²⁸ Report of the Special Rapporteur Alston (n 159) para 59.

²²⁹ Melzer (n 227). However, the ICTY introduced the Strugar test in order to define DPH whose approach includes a lower-end threshold of transmittal of military information for the immediate use of a belligerent, to the higher end of bearing, using, or taking up arms. *Prosecutor v. Pavle Strugar* (Judgment) IT-01-42-T, T Ch II (31 January 2005) para 177.

²³⁰ For instance, merely providing financial support or advocacy does not amount to DPH. Further details on which precise actions are encompassed, see IBAHRI (n 140) 30.

²³¹ Melzer (n 227).

²³² On the question whether continuous combatant function applies as function or status, see Report of the Special Rapporteur Alston (n 159) para 65 et seqq.

²³³ Melzer (n 227).

²³⁴ IBAHRI (n 140) 29.

comply with international standards, before conducting the drone air strike it is necessary that reliable intelligence as to an individual's function within any organized armed group is provided. Although al-Qaeda qualifies as an organized armed group and their members carrying out continuous combat functions may be targeted, it does not mean that other groups who share its ideology are *ipso facto* part of that armed group as they lack the required level of organization.²³⁵

The question of “when” refers to another question of DPH, namely what is the time period in which such participation makes the civilian targetable. The ICRC follows the approach that DPH encompasses the time during which the individual is preparing for and returning from the combat. As soon as the individual has “physically separated from an operation” the participation ends.²³⁶ In cases of targeting members of organized armed groups, the aforementioned explanations are applicable.

Lastly, when assessing the lawfulness of lethal drone air strikes, the method of the conduct is of pivotal importance. Therefore, two different types of strikes must be distinguished. Usually, individuals directly participating in hostilities are targeted by drones in so-called “signature strikes”, meaning that the person is targeted because his or her behavior is assessed to be similar enough to those of terrorists.²³⁷ The other type is called “personality strike”, in which an individual is targeted based on information of their function within the group and the individual's behavior.²³⁸ For the legality of such strikes, sufficient information must be provided for identifying DPH, clearly outlining when the individual's participation has ended and, accordingly, its protection under IHL must be ensured.²³⁹

Summarizing, drone strikes in non-international armed conflict may be lawfully undertaken against members of armed groups carrying out a continuous combat function for the duration of their

²³⁵ *Ibid* at 30.

²³⁶ It is argued that the ICRC's approach is too narrow. Rather civilians directly participating in hostilities are targetable at all times and potentially until they opt out of the hostilities in an unambiguous manner. On that approach see Michael Schmitt, 'The Status of Opposition Fighters in Non-International Armed Conflict' (International Law Studies 2012) 136.

²³⁷ Spencer Ackermann, 'US to continue 'signature strikes' on people suspected of terrorist links' *The Guardian* (1 July 2016) available at <<https://www.theguardian.com/us-news/2016/jul/01/obama-continue-signature-strikes-drones-civilian-deaths>> accessed 5 August 2019.

²³⁸ Naureen Shah, 'The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions' (Center for Civilians in Conflict 2012) 8 available at <<https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf>> accessed 5 August 2019.

²³⁹ Criteria were developed to identify the signature of an individual directly participating in hostilities. Experts deduced criteria of the US from statements made by officials. Doubts were raised on their compatibility with IHL, some were even clearly violating IHL. See for examples International Bar Association's Human Rights Institute, 'The Legality of Armed Drones Under International Law' (IBAHRI 2017) 32; Naureen Shah, 'The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions' (Center for Civilians in Conflict 2012) 8 et seqq, available at <<https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf>> accessed 5 August 2019.

membership or against unknown individuals who do not have a pre-identified link to a non-state armed group but directly participate in hostilities.²⁴⁰ Illegal activities such as terrorist attacks may cause harm, however, if they do not fulfill the criteria of DHP, the persons concerned are still protected under IHL and states must conform with the lethal force standards applicable to self-defense, consent and law enforcement.²⁴¹ Although there is a clear rule on which laws apply in this case, domestic laws may depart from the criteria laid out by ICRC. Many states fail to disclose their criteria for DPH which results in no transparency or clarity about what conduct may subject a civilian to killing.²⁴² Furthermore, it is likely that states expand the concept of DPH unilaterally. This is exemplified in the policy and conduct of the US in Afghanistan, where the US stated that drug dealers in the battlefield who have links to the insurgency may be targeted and killed.²⁴³ As such, the employment of drones and their conduct of signature strikes must be subject to scrutiny at all times in order to prevent further unlawful targeted killings.

bb. Who conducts targeted killings

Given the legal framework of signature strikes, the actors conducting the drone strikes create interesting questions on their role within the non-international armed conflict, particularly in the case of the CIA.

The CIA plays a crucial role in the conduct of targeted killings. It is a civilian independent agency and its employees are *prima facie* civilians; it is not part of the armed forces.²⁴⁴ Although at the beginning of the drone programs of the US, it was stated that the US Air Force (USAF) controlled the attacks in Pakistan, it has now been confirmed that “a regular US air force unit based in the Nevada desert is responsible for flying the CIA’s drone strike programme in Pakistan [...] the unit conducting CIA strikes in Pakistan’s tribal areas [is] the 17th Reconnaissance Squadron, which operates from a secure compound in a corner of Creech air force base”.²⁴⁵ Consequently, the question arises whether the civilian CIA employees conducting the drone air strikes are to be considered as civilians directly

²⁴⁰ IBAHRI (n 140) 32.

²⁴¹ Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities (NYU Journal of International Law and Politics 2010) 861.

²⁴² Report of the Special Rapporteur Alston (n 159) para 68.

²⁴³ US Senate Foreign Relations Committee, Report of the Senate Committee on Foreign Relations 'Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents' (2009) 16 available at <https://fas.org/irp/congress/2009_rpt/afghan.pdf> accessed 2 August 2019.

²⁴⁴ Emily Crawford, 'Remote Warfare' in Emily Crawford (ed) *Identifying the Enemy* (OUP 2015) 130.

²⁴⁵ Chris Woods, 'CIA's Pakistan Drone Strikes Carried Out by Regular US Air Force Personnel' *Guardian* (14 April 2014) available at <<https://www.theguardian.com/world/2014/apr/14/cia-drones-pakistan-us-air-force-documentary>> accessed 30 July 2019.

participating in hostilities. As introduced the ICRC defines DPH restrictively but even according to their narrow approach the CIA drone operators could be defined as civilians with a continuous combat function whose acts meet the cumulative criteria of threshold of harm, direct causation and belligerent nexus.²⁴⁶ The CIA seems to be involved in all stages of the drone strikes which make it likely that it qualifies as civilian directly participating in hostilities.²⁴⁷ This being said, CIA operatives, as civilians, have no combatant privilege and are not immune from prosecution under domestic law from their war-like acts under the Geneva Conventions and their Additional Protocols.²⁴⁸ By participating in these hostilities they render themselves targetable for the duration of their participation.²⁴⁹ This further means that CIA personnel could be prosecuted for murder under domestic law of any country in which they conduct targeted killings by using drones and could be prosecuted for violations of applicable US law.²⁵⁰ Referring to the latter, the US criminalizes DPH by civilians according to 10 USC §§ 948a-950w.²⁵¹ Lewis and Crawford pointed out precisely that “[t]he controversial prosecution before military commissions of the offense of “murder in violation of the law of war” effectively narrows the legal options regarding CIA drone operators. By prosecuting murders, as Alston's assessment indicates [...] the United States is taking the position that crimes committed by unprivileged belligerents rise to the level of war crimes. If that is the case, then it is arguable that the Geneva Conventions *require* the United States to prosecute CIA drone operators that have used lethal force if those operators are civilians engaged in direct participation in hostilities”.²⁵²

Although Lewis and Crawford emphasize that such a prosecution would be unlikely, as the CIA operatives are acting under state order, the US still needs to provide some legal justification for failing to prosecute individuals that it regards as having committed grave breaches of the laws of war.²⁵³

²⁴⁶ The CIA is the responsible agency for employing the drones in that manner which seems to apply to the criteria laid out in the Strugar test. See for details on the Strugar test, *Prosecutor v. Pavle Strugar* (n 229) and for its applicability to the CIA see Crawford (n 244) 130.

²⁴⁷ The former Acting Legal Council of the CIA, John Rizzo, indicated in an interview that it was him authorizing to attack the particular target. See Tara McKelvey, 'Inside the Killing Machine', *Newsweek* (13 February 2011) available at <<https://www.newsweek.com/inside-killing-machine-68771>> accessed 30 July 2019.

²⁴⁸ Crawford (n 244) 131.

²⁴⁹ Further on the issue of the CIA being targeted and killed when directly participating in hostilities, see Michael Lewis and Emily Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones' (*Georgetown Journal of International Law* 2013) 1160 et seqq.

²⁵⁰ Report of the Special Rapporteur Alston (n 159) para 22.

²⁵¹ Even under liberal reading of Article 4 GC 1949, the CIA would not meet the requirements of lawful belligerency as a militia or volunteer corps because, while they do report to a responsible chain of command as a group they do not wear uniforms or can be otherwise distinguished, nor do they carry their arms openly. See for further details Ryan J. Vogel, 'Drone Warfare and the Law of Armed Conflict' (*Denver Journal of International Law and Policy* 2010) 134 et seqq.

²⁵² Lewis and Crawford (n 249) 1158 et seq.

²⁵³ Lewis and Crawford (n 249) 1158 et seq.

Additionally, since the targeted killing is an action which crosses borders, other states are entitled to take action in response. Spain and Italy attempted to indict US service members for their acts before domestic courts. Nonetheless, both attempts ended with a dismissal due to the lack of jurisdiction.²⁵⁴ Although the previous attempts have failed, it is not unreasonable to think that future attempts may be successful, either against the state directly conducting the drone air strike or the one providing for the respective territory to control the strikes.

The involvement of the CIA as a civilian agency raises many more questions with regard to participating in hostilities stretching the limits of IHL and IHRL.²⁵⁵ Remarkably, turning around the situation, conducting drone air strikes against US citizens on US territory would constitute an untenable act and be condemned by the international community. Whereas this is conducted by the US – more or less in secret – it is “made legal” just by not sufficiently addressing it, not providing transparent information and consequently denying jurisdiction over cases brought by victims of drone strikes.

d. Conclusion

Still the main concern is that drone technology makes it easier to kill. The expansion of the concept of non-international armed conflict between a state and a non-state armed group as a basis for targeted drone attacks against alleged terrorist provides a very vague development stretching the limits of IHL and serving as basis for potential abuse by states. Although it is not possible to elaborate on all relevant questions and legal issues with respect to the deployment of drones in cases of targeted killings, it becomes evident that the legality of intentional killings conducted by states on foreign territory is problematic and questionable in each case. Most cases are considered unlawful.²⁵⁶ However, due to the lack of information and evidence not being provided by the actors involved it will always be a challenge to submit a complaint before a competent court or (quasi-) judicial body. Presumably, the reasons for keeping the information is secret is to prevent the acting state of being held accountable. To make transparent information available could help civilian casualties of targeted

²⁵⁴ Before the Italian court it was held that the court did have jurisdiction over US servicemen serving in Iraq who were accused of having killed an Italian intelligence officer. Only the US would have jurisdiction over their nationals as the sending state. See 'Italian Bid to Indict US Soldier' *BBC News* (19 June 2006) available at <<http://news.bbc.co.uk/2/hi/europe/5095510.stm>> accessed 31 July 2019. In the case before the Spanish court, three US soldiers were indicted to have killed a Spanish cameraman in Iraq. See Al Goodman, '3 US Soldiers Indicted in Death of Spanish Journalist' *CNN* (5 October 2011) available at <<https://edition.cnn.com/2011/10/05/world/europe/spain-us-troops/index.html>> accessed 31 July 2019.

²⁵⁵ Regarding other issues, see Crawford (n 244) 134 et seqq.

²⁵⁶ See Alston (n 165).

killings bring their claim before the respective domestic court. Otherwise, allowing a manifestation of abusive international legal standards may result in denial of justice as the function of domestic courts to correct misapplication or misinterpretation of laws is not fulfilled anymore. Depending on the case, it would then be for the international (quasi-) judicial bodies to adjudicate the wrongdoing.

3. Targeted Drone Strikes and the Access to Justice

There is a strong need for states operating in drone air strikes to comply with the respective norms under IHL, IHRL and law enforcement. Over the past number of years, states have failed to specify the legal justification for the action within their policies, for instance to disclose safeguards or to provide accountability mechanisms for violations of international law. Neither have the respective states disclosed information on who has been killed, for what reason and with what collateral damages.²⁵⁷ How can access to justice for all civilian casualties of potentially illegal killings be granted if the information is not shared transparently and none of the states involved regard themselves as having jurisdiction to conduct a legal procedure before domestic courts? The resistance of the states involved further leads to the displacement of legal standards with a “vaguely defined license to kill, and the creation of a major accountability vacuum”.²⁵⁸ Three elements shape the access to justice in targeted drone strikes which could, if fulfilled, facilitate the access of the victims and prevent a state's license to kill. These are jurisdiction, transparency and accountability. The jurisdiction of domestic courts is often problematic because they tend to dismiss cases of victims due to their deference to the executive branch which is usually conducting the drone strikes. The transparency element is important to provide information and spread the knowledge on the legal basis of the conduct, as well as to oblige the drone state to publish details on the actual conduct of the operation to produce evidence before the court. Where there is a violation of law, the perpetrator must be held accountable. Accountability is therefore of pivotal importance for the victim themselves, but also for the general adherence to international law. If states could violate international law permanently without being held accountable, it could serve as a problematic and dangerous precedent.

²⁵⁷ Report of the Special Rapporteur Alston (n 159) para 3.

²⁵⁸ *Ibid.*

aa. Jurisdiction

To counter the growing accountability vacuum, a first step is to determine if a state conducting lethal drone air strikes has the obligation to consider whether the affected individual is within the jurisdiction of that intervening state in order to access domestic courts.²⁵⁹

Most cases of drone air strikes are conducted extraterritorially which makes the situation even more precarious for the persons concerned and more complex for granting access before a competent judicial body. Generally, the domestic courts of the drone state decide on the legality of the targeted killing as they are the perpetrator. If access to justice is denied before national courts, the international (quasi-) judicial bodies become relevant. Until that point, it is evident, that the domestic courts of the drone state deciding on the legal questions relating to their own extraterritorial conduct may facilitate the dismissal of the claim.

First of all, in order for the domestic courts to decide upon a case, the contentious issue of extraterritorial application of IHRL becomes relevant. Article 2 ICCPR reads that each party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. It does not link the territory to the jurisdiction of the state, it is rather regarded separately when inserting “and” creating two distinct requirements for Article 2 ICCPR. Although some argued that it restricts its application to only those acts occurring in a state's territory²⁶⁰, the view of the majority applies ICCPR to extraterritorial uses of force with jurisdiction.²⁶¹ However, as indicated, this is not undisputed and merely applies to the ICCPR. It is within the discretion of the domestic court to scrutinize and decide on the extraterritorial application of IHRL in the specific case.

In the context of lethal drone strikes, the distance of the operator is an essential element which further complicates the determination of jurisdiction of the involved states. Drones are controlled remotely, the pilot in charge may be sitting in Ramstein, Germany, thousand kilometers away from the battlefield. This leads to the question of whether drone strikes bring targeted individuals within the

²⁵⁹ The term jurisdiction refers to the inherent authority of a court to hear a case and to declare a judgment. When the plaintiff seeks to initiate a suit, it must make sure that the court has jurisdiction over the case, otherwise it will be dismissed. Available at <<https://legal-dictionary.thefreedictionary.com/jurisdiction>> accessed 11 August 2019.

²⁶⁰ See critical comment by Michael Dennis, 'Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?' (ILSA Journal of International and Comparative Law 2006) 466 et seq.

²⁶¹ Noam Lubell, 'Extraterritorial Applicability of Human Rights Law' in Noam Lubell (ed) *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 195 et seqq.

jurisdiction of the drone state. This issue has been interpreted and developed by several judicial or quasi-judicial bodies.²⁶²

The first approach on whether a state is obliged to exercise its jurisdiction outside its territory introduces the criteria of effective control of the respective state over a geographical area within the host state.²⁶³ This has been recognized for the case of an occupying power.²⁶⁴ In the case of the Occupied Palestinian Territory, only the extraterritorial jurisdiction of Israel would apply. Other states engaged, equally responsible for targeted killings, would not fall within the scope of that approach.

Therefore, the second approach focuses on the personal control according to which the acting state must exercise control over an individual for instance an individual who has been detained by state agents.²⁶⁵ The international (quasi-) judicial bodies corrected the domestic courts in several cases on that matter and guided the overall tendency toward obliging the respective states to adjudicate the claim. Less restrictively, the ECtHR in the *Al-Skeini v UK* case found that UK's human rights obligations are not limited to the territorial UK but can exceptionally extend overseas to situations in which British officials exercise “control and authority” over foreign nationals.²⁶⁶ In the *Hassan v UK* case, the ECtHR even held that jurisdiction exists prior to the use of armed force having “assumed responsibility for the maintenance of security” of a certain area.²⁶⁷ The HRC also follows this approach. In *Delia Saldias de Lopez v Uruguay*, the Committee outlined its understanding of and the rationale for the need to apply the personal approach when stating that “it would be unconscionable to so interpret the responsibility under Article 2 [of the ICCPR] as to permit a state party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory”.²⁶⁸ Furthermore, Lubell has introduced a test that helps to determine the jurisdiction of the targeting state when “the exercise of authority or control over the individual [is conducted] in such a way that the individual's rights are in the hands of the state”.²⁶⁹ The personal approach has been increasingly referred to before (quasi-) judicial bodies and bears the potential to bring cases of doubtful drone air strikes killing innocents before the domestic courts of the targeting state. These cases demonstrate the role international remedies have in the targeted killing cases.

²⁶² IBAHRI (n 140) 34.

²⁶³ *Ibid.*

²⁶⁴ Human Rights Committee 'Concluding observations of the Human Rights Committee: Israel' (18 August 1998) UN Docs CCPR/C/79/Add.93, 10.

²⁶⁵ IBAHRI (n 140) 34.

²⁶⁶ *Al-Skeini v United Kingdom* App no 55721/07 (ECtHR, 2011) 77 et seqq.

²⁶⁷ *Hassan v United Kingdom* App no 29750/09 (ECtHR, 2014) 75.

²⁶⁸ *Delia Saldias de Lopez v Uruguay* Communication No 52/1979 (HRC Views of 29 July 1981) 10.

²⁶⁹ Lubell (n 261) 223.

Where the domestic judiciary is not able to correct its wrongdoings, it is upon the international (quasi-) judicial bodies to interpret and decide upon human rights issues – in order to ultimately grant the victim access to justice.

Given that the issues of extraterritorial application of IHRL and the resulting approaches on jurisdiction is not the same for IHL, as Article 2 para 1 ICCPR refers to “rights recognized in the present Covenant”, the question arises how IHL deals with jurisdiction and, generally, bringing cases on alleged violations of IHL before domestic courts. Under IHL the jurisdiction of the acting state may be derived from the duty to investigate under IHL. Article 83 AP I contains the obligation for military commanders to “report to competent authorities breaches of the Conventions and of this Protocol”. The Geneva Conventions enshrined the obligation for the parties to search for persons who may have committed or ordered the grave breach of IHL and bring these persons before their own courts, regardless of their nationality.²⁷⁰ According to the Emmersons's Report this applies to all breaches of IHL amounting to war crimes.²⁷¹ Additionally, the prosecution of war crimes has been held to constitute customary international law which binds all parties irrespective of international or non-international armed conflict.²⁷² Derived from this approach, all states using drones have to duty to investigate potential war crimes. Concurrently, this means the respective states must have jurisdiction to fulfill their obligations under IHL.

Finally, it is important to mention that in cases of invitation or consent given by the host state IHRL will apply to the targeting state.²⁷³ Most strikes were based on the consent of the host state, for instance in Afghanistan, Iraq, Pakistan, Somalia and Yemen. In these cases the jurisdiction of the targeting state will be applicable more rapidly and evidently. In conclusion, the applicability of jurisdiction to the targeting state is of utmost importance in cases of targeted drone strikes for victims seeking access to justice. According to the introduced legal basis, the lack of jurisdiction of domestic courts should not be a legitimate ground to deny the access to justice for the victims when consent is given by the host state. Nonetheless, if the local courts deny the access to justice, international remedies come into play. This was seen earlier where the ECtHR and the HRC explicitly corrected decisions of domestic courts. This depicts the different role of national and international remedies,

²⁷⁰ IBAHRI (n 140) 41.

²⁷¹ UNGA, Note by the Secretary-General, 'Promotion and protection of human rights and fundamental freedoms while countering terrorism' (13 September 2016) UN Docs A/71/384, 78.

²⁷² *Ibid* at 39 et seqq.

²⁷³ IBAHRI (n 140) 36.

where the national courts do not grant the access to justice, the international remedies may act as last resort to grant access to justice.

Overall, the jurisdiction of the drone state can be regarded as the first element in order to granting access to justice to the victims. Particularly in cases of inherent remoteness of the drone control, states tend to be reserved when it comes to being responsible to adjudicate cases for the reason that they make themselves vulnerable for their illegal acts. Domestic courts deciding on the cases, however, is key for upholding the obligations under international law.

Although, states employing drones are either obliged by IHRL or by IHL to provide jurisdiction to decide upon cases brought before their courts, in practice, victims of drone strikes are often impoverished or geographically displaced.²⁷⁴ This creates an additional burden to file a complaint against the drone state which most likely has limitless resources for its defense.²⁷⁵ The support of NGOs is of vital importance in these cases. They are able to compensate for the shortcomings: they provide legal aid, financial aid, legal representation, raise legal awareness, demand transparent information and can thus make the court adjudicate over the claim.²⁷⁶ Furthermore, the victim is confronted with deciding on where to lodge the complaint, either before the foreign court for an act committed extraterritorially, or before his or her own state's courts for an international crime which may not be covered by the domestic law.²⁷⁷ Where the national courts deny jurisdiction, the victim may resort to the ECtHR or the HRC. Legal paths are provided, but jurisdiction must be “enforceable” for victims of drone strikes to access domestic courts.

bb. Transparency

Transparency plays a crucial role in cases where victims of drone strikes try to access justice. It encompasses providing transparent information on the rights of the victims and legal bases of the targeted killings as well as producing evidence for the legal procedure before the domestic court and demanding relevant information from the drone state.

A great number of civilians have been killed or injured by drone strikes, however, the data on the civilian casualties varies depending on the sources. Little information is made public which further aggravates the process. Although the US has started a policy of releasing statistics on civilian

²⁷⁴ Hammond (n 274) 681.

²⁷⁵ *Ibid.*

²⁷⁶ E.g. the ECCHR, see for further details on their work <<https://www.ecchr.eu/en/institute-legal-intervention/>> accessed 26 August 2019.

²⁷⁷ Hammond (n 274) 682.

casualties caused by drone strikes “outside areas of active hostilities”, the data does not correspond to the information gathered by NGOs.²⁷⁸ The drone technology itself is the reason for the difficulties in investigating civilian casualties: they are able to operate in remote rural areas which are difficult to access. This being known, the operators of drone strikes carry them out in secret and do not disclose data on the operations.

Two imperatives exist towards states when conducting drone strikes regarding transparency requirements. First, transparency is the only way to ensure that targeted killings carried out by armed drones are in accordance with the laws that govern the states' conduct of the use of force.²⁷⁹ This can be derived from the obligations under IHL, IHRL and domestic law. Without transparent information it is impossible to verify whether a drone strike was in accordance or in breach of the respective legal framework. Understandably, voices express that “a lack of disclosure gives States a virtual and impermissible license to kill”.²⁸⁰ With regard to the obligation of the state to investigate and provide information, the ECtHR has even argued that the failure to investigate, punish and provide compensation for breaches of life may in itself constitute a violation of that right.²⁸¹ This, in turn, requires access to the information to provide evidence in the proceedings. Certainly, a full access to this information cannot be granted in an absolute manner, it must still be balanced with the national security interests of the governments. There have been successful transparency lawsuits in the US seeking legal and policy memoranda, intelligence records, statistics, and other information on the governments' targeted killing program.²⁸² Although the US government always rejects the requests to provide information on the grounds of compromising national security, two of the three major transparency lawsuits initiated by the American Civil Liberties Union (ACLU) and other NGOs succeeded before the respective courts and obliged the governmental agencies to release documents and reports on the targeted killing policies.²⁸³ These outcomes indicate that there are certain legal frameworks that oblige the drone state to provide information on the respective policies. Nonetheless,

²⁷⁸ 'FACT SHEET: Executive Order on the US Policy on Pre & Post-Strike Measures to Address Civilian Casualties in the US Operations Involving the Use of Force & the DNI Release of Aggregate Data on Strike Outside Area of Active Hostilities' the WHITE HOUSE (1 July 2016) available at <<https://obamawhitehouse.archives.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address>> accessed 6 August 2019.

²⁷⁹ IBAHRI (n 140) 43.

²⁸⁰ Report of the Special Rapporteur Alston (n 159) para 88.

²⁸¹ *Kaya v Turkey* App no 158/1996/777/978 (ECtHR, 19 February 1998).

²⁸² Brett Kaufmann and Anna Diakun, 'United States Targeted Killing Litigation Report' (ECCHR 2017) 126 et seqq.

²⁸³ *ACLU v. CIA*, 640 f. App'x 9 (D.C. Cir. 2016); *ACLU v. DOJ*, 915 f. Supp. 2d 508 (S.D.N.Y. 2013); *ACLU v. DOJ*, 756 f.3d 97 (2d Cir. 2014).

it requires an additional lawsuit merely to gather the information necessary for the actual proceedings of the victims of these drone strikes.

The second imperative is related to the interests of casualties and their families. Transparency is necessary in order to know whether and how civilians have been affected, whether they have been able to secure an effective investigation or remedy and whether and how failures have been made and if there is a chance for lessons learned. Progressively, the Supreme Court of Israel has ruled that in order to declare targeted killings as lawful, there must be sufficient accountability and transparency.²⁸⁴ The judgement included the requirement of certain criteria such as carrying out a retrospective investigation by an independent commission.²⁸⁵ However, the secrecy of the operations was still upheld contrary to such approaches of the courts and contrary to the obligations of the drone states under international law. Transparency and, associated therewith, the access to information can be regarded as the second element which is key for granting access to justice in lethal drone strikes.

cc. Accountability

Already touched upon under the transparency requirement, accountability plays a major role in drone warfare. As Hammond pointed out, “[a]ccountability is essential in international law to deter and prevent violations and thus to protect potential victims of human rights abuses, war crimes, and the like”.²⁸⁶ In the context of war in particular, a fundamental condition of engaging in a just war is the ability to attribute moral and legal responsibility to someone who commits a war crime.²⁸⁷

On the one hand, there is the individual criminal responsibility of the perpetrators who could be prosecuted before the ICC or other international tribunals and domestic courts.²⁸⁸ On the other hand, more important in drone warfare, states themselves are responsible for the acts of their organs and individuals acting under their directions according to Chapter II of the ARS. Article 2 ARS contains the elements for an internationally wrongful act of a state, namely when the conduct is attributable to the state and constitutes a breach of an international obligation of the state. In the context of drone strikes, the targeted killing is in most cases clearly attributable to the employer of the armed drone

²⁸⁴ *The Public Committee Against Torture in Israel and others v The Government of Israel and others*, Judgment, Case No H CJ 769/02, Supreme Court of Israel (11 December 2006) para 18.

²⁸⁵ *The Public Committee Against Torture in Israel and others v The Government of Israel and others*, Judgment, Case No H CJ 769/02, Supreme Court of Israel (11 December 2006) para 18.

²⁸⁶ Hammond (n 274) 659.

²⁸⁷ *Ibid.*

²⁸⁸ Serious violations of IHL may constitute war crimes under Article 8 of the Rome Statute or even an act of aggression under Article 8b ICC Statute. IBAHRI (n 140) 43.

which is usually piloted by the state's armed forces or intelligence agency.²⁸⁹ Whereas the second requirement meets more difficulties within the context of drone use. As analyzed above, in the context of IHRL and the application of jurisdiction the drone state must have control over a certain area or the individual. States enjoy digression towards which position they abide to which may cause barriers to accountability for drone strikes breaching IHRL.²⁹⁰ Nonetheless, a state can be held accountable for breaches under IHL or general public international law.

It is highly problematic that states attempt to escape judicial review by declaring the matter as purely political and therefore not open for judicial review. The UK government is of the opinion that investigations in lethal drone strikes should be political only, without recourse to judiciary.²⁹¹ The US Supreme Court has based its decision in the *Al-Aulaqi v. Obama* case on the political question doctrine, stating that certain types of complex policy questions are deemed unfit for judicial review and must be left for decision by the political branches of government.²⁹² The US has dismissed several accountability lawsuits on this ground.²⁹³ This argumentation constitutes a paradigm for the denial of justice in particular with regard to the lack of accountability.

According to Article 16 ARS a state which aids or assists in the commission of an internationally wrongful act is also responsible or doing so. In cases where the drone state is found to be in violation of international law, it must provide for reparations pursuant to Articles 30 et seqq. ARS, including cessation and guarantees of non-repetition, compensation and restitution.

Recently, the German Higher Administrative Court of Münster has issued a landmark decision in the context of drone warfare and the role of the US and Germany acting in Yemen. Three Yemeni nationals brought a case before the German Higher Administrative Court calling on Germany to take legal and political responsibility for the US drone warfare in Yemen conducted from German territory. In 2012, three members of the plaintiff's family were killed in a drone strike in Yemen. The US military base in Ramstein played a key role in this attack especially by granting broad permissions

²⁸⁹ *Ibid* at 45.

²⁹⁰ *Ibid*.

²⁹¹ House of Commons, House of Lords Joint Committee on Human Rights 'The Government's Policy on the Use of Drones for Targeted Killing' (Second Report of Session 2015-16) HL Paper 141, HC 574, para 5.33 et seq available at <<https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/747.pdf>> accessed 6 August 2019.

²⁹² *Al-Aulaqi v. Obama*, 727 f. Supp. 2d 1 (D.D.C. 2010) available at <<https://www.law.upenn.edu/live/files/1928-baileynasir-al-alawki-v--obama--court-orderpdf>> accessed 6 August 2019.

²⁹³ On the accountability lawsuits see Kaufmann and Diakun (n 282) 124.

for US military bases on German territory.²⁹⁴ The court decided upon numerous contentious questions which arise in the context of the employment of armed drones and, generally, access to justice which have been touched upon throughout this paper: German Basic Law is applicable on foreign territory if there is sufficient nexus to the German state which may also be considered for foreigners affected abroad; an obligation to protect according to Article 2 para 2 sentence 2 German Basic Law may also be applied to foreigners if their human rights are violated or endangered to be violated in a manner contrary to international law – in this case the plaintiff's life was endangered due to the employment of drones by the US in violation of international law using the facilities at Ramstein Air Base; due to Articles 20 para 3 and 19 para 4 German Basic Law, the executive branch has no non-justifiable margin of judgment on the assessment of the respective facts (in other words, the court has jurisdiction over the acts of the executive branch in this case)²⁹⁵; IHL provides no basis for a global non-international armed conflict, nor in form of a so-called war against international terrorism; the assumptions of a global war against terrorism as well as the right to preventive self-defense in situations where there is ambiguity about the time and place of a potential attack in a non-international armed conflict, bear a risk of violations of the principle of distinction and the prohibition of targeting civilians; in an armed conflict IHRL is applied in addition to the special provisions of IHL; the prohibition of arbitrary killings under international law requires that effective official investigations be carried out when persons are killed by the use of force, in particular by representatives of the state; finally, the court rejected the political question doctrine^{296, 297}.

This case is a major step in the direction of holding states accountable for their actions potentially breaching international law. It even opens another accountability dimension, namely that Germany

²⁹⁴ ECCHR, 'Important Judgment: Germany Obligated to Scrutinize US Drone Strikes via Ramstein', available at <<https://www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/>> accessed 8 August 2019.

²⁹⁵ “Die innerstaatliche Geltung des Völkerrechts, das den Richter gemäß Art.20 Abs.3 GG bindet, wie auch die Garantie effektiven Rechtsschutzes nach Art.19 Abs.4 Satz 1 GG stehen der Zubilligung nicht justiziabler Beurteilungsspielräume der Exekutive grundsätzlich entgegen. Vor allem aus dem Gebot effektiven Rechtsschutzes folgt regelmäßig eine Pflicht der Gerichte, angefochtene staatliche Maßnahmen in tatsächlicher und rechtlicher Hinsicht vollständig nachzuprüfen; das schließt eine Bindung der rechtsprechenden Gewalt an tatsächliche oder rechtliche Feststellungen und Wertungen seitens anderer Gewalten hinsichtlich dessen, was im Einzelfall rechtens ist, im Grundsatz aus.“ Oberwaltungsgericht Münster, Case Number 4 A 1361/15 (19 March 2019).

²⁹⁶ “Die Qualifizierung einer Person oder eines Objekts als legitimes militärisches Ziel im Rahmen eines bewaffneten Konflikts oder in Wahrnehmung des Selbstverteidigungsrechts ist keine politische Entscheidung, die einer gerichtlichen Kontrolle von vornherein entzogen wäre, sondern eine Frage des Völkerrechts. Es ist auch nicht ersichtlich, dass die Rechtsprechung durch die Klärung dieser Frage an ihre Funktionsgrenzen stoßen würde. Die hier in Rede stehenden völkerrechtlichen Regelungen verwenden zwar unbestimmte Rechtsbegriffe zur Beschreibung dessen, was ein legitimes militärisches Ziel sein kann. Deren Auslegung und Anwendung ist aber anhand objektiver Kriterien durchaus überprüfbar“. *Ibid* at 132.

²⁹⁷ *Ibid*.

was declared responsible for providing territory to conduct unlawful strikes, although it was not the conducting drone state. It must be highlighted that the judgment implicitly decided upon the lawfulness of the US drone strikes when holding the German state accountable for the mere assistance. It further clearly rejected the political question doctrine which led to the dismissal of claims on many cases before US and UK courts. This judgment can be regarded as a milestone within drone warfare addressing the question of jurisdiction and accountability and finally opposing the narrative of the war against international terrorism and the questionable state practice of the US.

In conclusion, accountability can be regarded as the third element in the context of drone strikes and the access to justice. In order to make the acting states accountable for their actions they must have jurisdiction and provide for transparent information. This can be seen in the above introduced German case where the court had to argue to have jurisdiction over the case, it elaborated on the information gathered by official requests of the political parties and finally analyzed to what extent the German state must be held accountable for its assistance in the US lethal drone strikes.

dd. Conclusion

Jurisdiction, transparency and accountability are the three elements which are of paramount importance for granting access to justice for victims of targeted drone strikes. It starts with domestic courts deciding whether they have jurisdiction over the case. It has been observed that domestic courts tend to dismiss cases based on the political question doctrine or more generally due to deference to the executive which is conducting the strikes. Transparent information is not often provided by the drone states which leaves the victims with empty hands for the application of a case and, if successful, within the proceeding. Most victims live in remote areas and do not know about their rights and how to assert them before national courts or where to seek for legal aid. Finally, where a violation of international law occurs, there must be an actor responsible for the act. Due to the obscure proceeding of national intelligence services, for instance of the US and Germany, there is not a lot of information available to hold the perpetrator state accountable. In most cases, the victims must go before the domestic courts of the perpetrator country. Certainly, that state ensures that it provides for arguments, like the political question doctrine, or even infrastructure, conducting the drone strikes from foreign territory, for not being held accountable.

Due to these newly arising elements which characterize the challenges for victims of drones strikes to access justice, it may be questioned whether the third wave introduced by Cappelletti and Garth is still valid in this context.

4. The Fourth Wave of Access to Justice?

Regarding the three waves, introduced by Cappelletti and Garth, the question arises whether these standards of access to justice are still applicable or whether the new elements arising in the context of targeted drone strikes form a fourth wave of access to justice. Recalling Cappelletti and Garth, the third wave, so-called access-to-justice approach, depicts the development of alternatives to litigation in courts to settle disputes, as well as reforms that simplify the justice system and therewith facilitate the accessibility.²⁹⁸ Cappelletti and Garth aimed at making justice more accessible and more efficient, to overcome the barriers of cost, disparities in party power and lack of organization that prevents citizens from asserting their legal rights.²⁹⁹ Although, the access-to-justice approach is very broad and intends to take into account the role and importance of the different factors and barriers involved in order to design effective machineries and institutions, it becomes evident that the third wave was not able to consider the impact of modern technologies on the access to justice.

The access-to-justice approach encouraged “the exploration of a wide variety of reforms, including changes in forms of procedure, changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms”³⁰⁰. The approach was described by Cappelletti and Garth as not being “afraid of comprehensive, radical innovations, which go much beyond the sphere of legal representation”.³⁰¹ Applying it to the drone warfare, it seems not to fully reflect the more recent challenges that access to justice is facing when states breach international law by acting remotely and using robotized vehicles as weapons. Never has the person responsible been so far away from the actual battlefield, which makes the proceedings even more complex and obscure. Due to the variety of actors involved in such drone operations, the victims are confronted with a lack of jurisdiction, a lack of transparency and a lack of accountability.

These drone cases do not directly indicate the need to change the structure of the courts, to design new laws to avoid disputes or create new informal dispute resolution mechanisms. The issues start earlier in the proceedings when not even investigation is possible due to the remoteness of the

²⁹⁸ Cappelletti and Garth (n 13) 53.

²⁹⁹ Austin Sarat, 'Book Review Access to Justice by Mauro Cappelletti, Bryant Garth, John Weisner and Klaus-Friedrich Koch' (1982 Harvard Law Review) pp. 1911-1924, 1916.

³⁰⁰ Cappelletti and Garth (n 13) 225.

³⁰¹ Bryant Garth and Mauro Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (Articles by Maurer Faculty 1978) 225.

operation and the secrecy of the intelligence. Certainly, overcoming barriers such as cost and the lack of organization does also play a role in cases of targeted killings, however, it is not the most pressing issue. It is rather the lack of transparency in the process of accessing information and intelligence to be able to provide evidence to file a claim before a court.

Due to the increased interconnected nature of global warfare, the territory of the killing does not necessarily indicate the nationality of the perpetrator state, nor the nationality of the victims, nor which court has jurisdiction over the case. In many cases, foreigners bring cases before domestic courts which certainly constitutes another obstacle for holding the implicated state accountable. It can be regarded as quite common phenomenon in drone cases that domestic courts of the perpetrator state deny having jurisdiction.

Moreover, the individual conducting the strike is not in focus. The cases primarily concern the state accountability, rather than individual responsibility. Only on the victim's side the role of individuals before domestic courts or before international remedies matters. This explains why accessing justice in these cases focuses on the jurisdiction and providing transparent information, as there is a major knowledge divide.³⁰² The state on the defendant side gathers all the information on the preparation and the conduct of the drone strike, whereas the victim cannot provide any evidence in the procedure.³⁰³

With the increasing use of modern technologies in warfare, the introduced new elements tend to play more of a key role in accessing justice when possibly unlawful lethal drone strikes were conducted. As Cappelletti and Garth mentioned when they introduced the third wave, the “method is not to abandon the techniques of the first two waves of reform, but rather to treat those reforms as only several of a number of possibilities for improving access”.³⁰⁴ The same applies to the fourth wave focusing on the new technologies which impact and shape the previous waves according to newly arising needs. For instance, legal aid still plays a crucial role in the drone litigation. With increased strategic litigation many NGOs throughout the world help to bring cases on behalf of the victims before the court. Just to mention one example, the ECCHR was the driving force behind the successful

³⁰² Even on the digital divide and access to justice, see Vivian Rivera, 'Digital Divide and Access to Justice' (SELA 2015) available at <https://law.yale.edu/sites/default/files/documents/pdf/SELA15_Neptune_CV_Eng.pdf> accessed 24 August 2019.

³⁰³ On the importance of gathering accurate and reliable information and the lack of transparency, see Amnesty International, *Deadly Assistance: The Role of European States in US Drone Strikes* (first published Amnesty International Ltd 2018) available at

<<https://www.amnesty.org/download/Documents/ACT3081512018ENGLISH.PDF>> accessed 24 August 2019.

³⁰⁴ Garth and Cappelletti (n 301) 223.

complaint before the German Higher Administrative Court. The new elements of the fourth wave are jurisdiction, transparency and accountability. Although the elements have played a role in recent waves, they have gained importance when granting access to justice in drone warfare. If these elements are fulfilled in drone litigation it is likely that the victims of such strike can access justice. In order to take into account the challenges the employment of armed drones pose upon the access to justice, new investigation mechanisms are necessary, rather than informal dispute settlement mechanisms. They may provide information transparently in order to prove the jurisdiction of the respective domestic court. The information gathered, in turn, to realize the necessity of legal review of possible violations of international law in order to counter the political question doctrine. This would be the proper basis to hold the responsible state accountable for the violations under international law.

Finally, it can also be observed that the previous common elements of access to justice introduced in Chapter III are all linked to the newly arising elements. The possibility of bringing a case before the court largely depends on the jurisdiction of the perpetrator state over the case. Legal awareness is influenced by providing relevant information on the legality of the strikes and how far the civilians can trust that applicable is adhered to by the drone states. Only where there is transparent information on the rights of the victims, can access to justice be granted. Legal aid and legal representation are related to transparency and accountability. As the perpetrator state usually argues that it cannot make public the information due to national security reasons, legal aid is required for transparency lawsuits in order to receive relevant information on the case. Legal aid and legal representation are essential to hold the perpetrator state accountable. The individuals are regularly foreigners before domestic courts, they even rely more on legal aid and representation as they are not familiar with the foreign judicial system. Adjudication is heavily influenced by the domestic courts having jurisdiction, otherwise no adjudication can be granted. Enforcement of a successful lawsuit is dependent on the jurisdiction of the perpetrator state, the availability of transparent information and the accountability of the drone state. Ultimately, the principle of effectiveness can be granted, if jurisdiction and transparent information is provided to make the perpetrator state accountable for its breaches of international law. The link to the other elements indicates that the newly arising elements of jurisdiction, transparency and accountability have gained importance in drone warfare. They have existed in the context of access to justice before, however, have a different standing due to the employment of modern technologies in warfare. Now, they can be regarded as equivalent elements of access to justice and constitute the driving elements of the fourth wave of access to justice.

To sum up, the employment of new lethal technologies in warfare has challenged and influenced the elements of the third wave. The prior objective of the previously introduced approach is to point out that the three new elements enjoy a different standing within the context of drone warfare. Access to justice will have to solve even more questions than with modern technologies outside drone warfare, either with the digitalization of court proceeding or the increasing role of artificial intelligence in privacy. Another further challenge may be created through the future deployment of autonomous weapons in warfare. According to the fourth wave, the jurisdiction, transparency and accountability will be the propulsive elements on how access to justice may be granted.

V. Future Developments of Modern Warfare and Access to Justice

As introduced in the previous chapter on the status quo, the priority of the elements on access to justice has shifted from the time when Cappelletti and Garth published their world survey. This is due to the development of new technologies and their employment, in this case in warfare. One of the reasons for this shift in drone warfare is the remoteness of their actions and the difficulties in holding the perpetrator state accountable because of the lack of jurisdiction and the lack of transparency. This chapter aims at providing a brief overview on how future development in warfare may affect the access to justice. It will focus on the contentious potential employment of autonomous weapons and the question whether there is a similar tendency like in current drone warfare that the three elements of jurisdiction, transparency and accountability will be of major concern for the possible victims to access justice.

Autonomous weapons are a computer-based weapon system capable of completing its missions, including identifying and engaging targets, without direct human control.³⁰⁵ They mark a significant departure from the current automated drones, as human input is required after its activation to select a target or deliver force.³⁰⁶ This would not be required for fully autonomous weapons to conduct targeted killings.

³⁰⁵ Murphy (n 6) 5.

³⁰⁶ Human Rights Watch has classified autonomous weapons system as “human-out-of-the-loop-weapons” because they are capable to make decisions without the involvement of humans after activation. Whereas, current unmanned vehicles, such as drones, are called “human-in-the-loop-weapons” as the machine cannot make a decision without a human command. Consequently, the key distinction of fully autonomous weapons and remotely operated armed drones is that the fully autonomous weapon decides completely on its own what actions it takes while the other is still subject to varying levels of human oversight. Human Rights Watch, 'Losing Humanity' (19 November 2012) 2, available at <https://www.hrw.org/sites/default/files/reports/arms1112_ForUpload.pdf> accessed 8 August 2019; Hammond (n 274) 659.

Given that the employment of autonomous weapons – although not yet existent – is mainly concerning situations of armed conflicts, the applicability of the rules of IHL and IHRL to the new military technology are under debate. Focusing on the rules of IHL, the four principles governing the law of war, military necessity, distinction, proportionality and humanity, are considered as the “measuring stick for determining the legality” of the actions of autonomous weapons.³⁰⁷ It is certain that when being employed as a weapon in armed conflict, the new technology must comply with these principles of IHL. Already in theory these weapons create many issues challenging the existing legal frameworks, although it is not clear whether the employment of such weapons clearly violate IHL, the converse has yet to be proven.³⁰⁸

In a similar vein to lethal drone attacks, civilian casualties are an inevitable aspect of armed conflict. Given that such a robot could identify, target, kill and cause injury to humans, someone must be held accountable for these acts. There are numerous approaches on how to determine the individual responsibility of actors involved in the entire process of developing and employing autonomous weapons, from the military commander that deployed it, to the programmer, to the manufacturer and even to the robot itself.³⁰⁹ Interestingly, not being proposed by many scholars, Hammond argues for holding the weapon state accountable and bringing cases before the international remedies or domestic courts. This, in turn, can lead to similar issues as demonstrated arising in the context of drone warfare and the access to justice. Regarding international remedies, between the individuals and the state, the HRC and the ECtHR, as well as the ICJ between the states involved may play a role.³¹⁰ With respect to bringing cases before domestic courts, the victim would either bring the case as an alien before a domestic court or would have to sue the foreign drone state in his or her own state for an act committed extraterritorially. In the latter case, the victim would most likely be confronted with the invocation of sovereign immunity. Despite the arising problems, this approach seems most

³⁰⁷ The most problematic IHL principle in this context is that of distinction. On the current state of development, as Sharkey stated, autonomous weapons “can just about tell the difference between a human and a car”. Additionally, the lack of a clear definition of a civilian creates further obstacles. Although it is defined in Article 50 para 1 AP I, it would not provide a constructive framework for the programmer. It would lead to ambiguous instructions, such as “IF not a combatant, THEN do not trigger”. This is not enough information to feed the autonomous weapon in order to determine that an individual is a civilian and to not use force. Class (n 7); Noel Sharkey, 'Automating Warfare: Lessons Learned from the Drones' (Journal of Law, Information and Science 2012) 143; Nidhi Subbaraman, 'Activists, UN put 'killer robot' in the crosshairs' *NBC* (30 April 2013) available at <<https://www.nbcnews.com/tech/tech-news/activists-un-put-killer-robots-crosshairs-flna6C9633925>> accessed 9 August 2019.

³⁰⁸ Class (n 7) 1041.

³⁰⁹ Problems arise similarly to current drone strikes concerning the compulsory jurisdiction of the ICJ which depends on the consent of the states involved and lacks an enforcement mechanism to ensure compliance with its decision. For the access to HRC and ECtHR local remedies must be exhausted. Human Rights Watch (n 306).

³¹⁰ Hammond (n 274) 685.

satisfactory as the state would be the most culpable actor of all, because in the first place, it is the state to decide to employ these weapons in an armed conflict.³¹¹

Presumably, the elements of the fourth wave may play a similar role in the context of the employment of autonomous weapons in warfare. Therefore, the possible cases of violations of international law when deploying fully autonomous weapons must be bridged to the earlier developed elements of access to justice, namely, jurisdiction, transparency and accountability. As described above, it becomes evident that the issue of holding the actors accountable for violations of international law would arise as to the most concerning element. Already problematic in the context of remote drone warfare, all the options debated on accountability would fail to deter violations of IHL and provide victims retributive justice.³¹² In case of state accountability, similar issues would arise as in the context of drone attacks. Jurisdiction will continue to play an essential role. In order to access justice, the domestic court must have jurisdiction. Before domestic courts the foreigner faces additional obstacles, or the invocation of state immunity prevents the court from adjudicating over the case. If jurisdiction is rejected, the international remedies come into play, most likely (quasi-) judicial bodies such as the HRC and the ECtHR as soon as human rights violations are concerned. With regard to the ICJ, the consent of both state parties would be required. Transparency will be of pivotal importance during the procedures and in the investigation phase. Due to the increasing complexity of technologies, the lay persons face difficulties in evaluating the data and intelligence. The programmer will program concrete guidelines which will be remote from the crime scene. It will be difficult to access as the data is stored in the responsible state's intelligence system and will most likely constitute of codes in the respective programming language. This will ultimately challenge the fact-finding and the investigation process in cases where autonomous weapons are employed.

To sum up, the three elements of the fourth wave will play an increasingly important role when victims of lethal autonomous weapons strikes want to access courts to seek a just trial. This indicates that there will be a shift from the third wave indicators to a potential fourth wave of access to justice regarding the development of new technologies and their deployment in armed conflict.

VI. Concluding Remarks

The development of new weapons deployed in warfare has an impact on the access to justice for civilian casualties in cases of unlawful acts committed by states. The elements shaping the access to

³¹¹ This certainly is the case in international armed conflict. Concurrently, the state is the primary beneficiary of the weapon's usage, it enjoys the tactical and resource advantages that victims will not experience. Hammond (n 274) 671.

³¹² Human Rights Watch (n 306).

justice in the previous waves shifted from a focus on legal aid and representation to having to grant jurisdiction of courts, providing transparent information on the case and holding a state accountable if a violation has occurred. One can even speak of an internationalization of access to justice in the context of remote warfare. The carved-out elements mainly occur due to the remoteness of the armed unmanned vehicles which cross borders and make it easier for foreign states to get involved, either by operating through a state agency or providing the territory in control the semi or fully autonomous flying weapons. And, it is easy to withdraw the drones once the strike is conducted. This development indicates that there is or will be a fourth wave of access to justice regarding the development of new technologies and their deployment in armed conflict. This being said on the theoretical point of view, there is a need to address the lack of jurisdiction, transparency and accountability in practice.

In the first place, as already mentioned, investigation mechanisms will be of utmost importance to provide some evidence before a judicial body and start a proceeding. This mechanism must be independent from domestic courts. Due to the remoteness of acts and the involvement of states, it is almost impossible for an individual to gather information him or herself to present before a domestic court. At best, this mechanism is capable of requesting information from the respective drone state and oblige it to make information available and transparent. The Joint Investigation Mechanism of the UN and the Organisation for the Prohibition of Chemical Weapons (OPCW) could serve as an example. However, this would require a resolution of the Security Council where a veto of the US is likely to be raised.

Another proposal to address difficulties arising for individuals in drone cases is the supervision of national courts by international bodies in order to ensure the prohibition of denial of justice. This has been suggested for investment disputes, as denial of justice is of major concern in these cases. It could be equally applied in cases concerning human rights violations due to targeted killing by drones or other future autonomous weapons. However, the proposal concerning investment disputes has been criticized by Canada and the US with regard to the principle of sovereignty. For cases concerning human rights violation it may be even more disputed. As the US is one of the main actors in drone warfare, it will be difficult to establish such a supervision of national courts by international bodies.

Furthermore, in case of systemic shortcomings in the states' legal system establishing a basis for human rights violations, human rights monitoring bodies suggested enabling a retrial or reopening of the case when a breach of the right to fair trial was found and the claimant submitted a request.³¹³ For

³¹³ Focarelli (n 108) para 32.

human rights violations in the context of drone warfare, this may be a lighter version to control that access to justice is granted.

Apart from the aforementioned issues, one of the major challenges to address the violations of international law is the commingling of policy language and legal wording.³¹⁴ In many countries any opponent is easily described as terrorist posing threats to national security which usually provides for justification of illegal actions conducted by the acting state.³¹⁵ In fact, the distinction must be made between combatant and civilian, rather than terrorist or non-terrorist. This mixing of political and legal language can also be observed in the highly problematic political question doctrine. This theory states that certain acts of the executive branch are not subject to legal review. However, when introducing cases of denial of justice, the courts deference to legislative and executive interference or even excessive public pressure was regarded as another category of denial to justice. Fortunately, on the domestic level the decision of the Higher Administrative Court of Germany gives hope for providing incentives to abandon the political question doctrines which have been responsible for the lack of jurisdiction before domestic courts.

In conclusion, on the international as well as the domestic level there is potential to “enforce” the elements of the fourth wave in order to grant access to justice, be it the decision of the German Higher Administrative Court and its potential impacts on other judgments or the mechanisms on the international level to facilitate court proceedings. As time is running and the new technologies are developing rapidly, the major challenge of the international community is to actually address the issues of the fourth wave before the fifth wave approaches.

³¹⁴ On the moral basis and the importance of policy language in order to justify targeted killings, see Melzer (n 162) 433 et seqq.

³¹⁵ *Ibid* at 430.

Bibliography

Primary Sources

International, European and Domestic Laws

Additional Protocols to the Geneva Conventions of 12 August 1949

American Convention on Human Rights

Articles on the Responsibility of States for Internationally Wrongful Acts

Charter of the United Nations 1945

Convention on International Civil Aviation of 1944

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002

Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009

European Convention on Human Rights

Geneva Conventions of 12 August 1949

German Basic Law

Gesetz über die Erstattung von Rechtsanwaltsgebühren in Armensachen, 6 February 1923, RGBI I 103

Gesetz über Teuerungszuschläge zu den Gebühren der Rechtsanwälte und Gerichtsvollzieher, 18 December 1919, RGBI I 2113

International Covenant on Civil and Political Rights

International Covenant on Economic Social and Cultural Rights

Regulation 216/2008/EC of the European Parliament and of the Council of 20 February 2008

Rome Statute of the International Criminal Court

Rules of Procedure of the Human Rights Committee

Statute of the Court of the International Justice

Understanding on rules and procedures governing the settlement of disputes states, Annex 2 of the WTO Agreement

UN Documents

Human Rights Committee 'CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.1

Human Rights Committee 'Concluding observations of the Human Rights Committee: Israel' (18 August 1998) UN Docs CCPR/C/79/Add.93

Human Rights Council 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (28 May 2010) UN Docs A/HRC/14/24/Add.6

UN Committee on Economic, Social and Cultural Rights 'General Comment No 3: The Nature of States Parties' Obligations' (14 December 1990) UN Doc E/1991/23

UN OHCHR, 'Fact Sheet No.7/Rev.1, Complaints Procedure' (OHCHR 2002) available at <<https://www.ohchr.org/Documents/Publications/FactSheet7Rev.1en.pdf>> accessed 25 July 2019

UNDP, 'Access to Justice' (2004) 6 available at <https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf> accessed 14 August 2019

UNGA 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) UN Doc A/RES/60/147

UNGA 'Note by the Secretary General Extrajudicial, summary or arbitrary executions' (5 September 2006) Sixty-first Session UN Docs A/61/311

UNGA Res 34/169 (17 December 1979)
<<https://www.un.org/documents/ga/res/34/ares34.htm>>

UNGA, Note by the Secretary-General, 'Promotion and protection of human rights and fundamental freedoms while countering terrorism' (13 September 2016) UN Docs A/71/384, 78

UNSC Res 237 (14 June 1967)
<<https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IP%20S%20RES%20237.pdf>>

Case Law

PICJ

Mavrommatis Palestine Concessions (Greece v United Kingdom) (Judgment) PCIJ Rep Series A No

International Military Tribunal (Nuremberg)

Trial of the Major War Criminals before the International Military Tribunal (Nuremberg 1946)

ICJ

Barcelona Traction, Light and Power Company, Limited (New Application) (Belgium v. Spain) (Second Phase) [1970] ICJ Rep 3

Elettronica Sicula SpA (ELSI) (United States of America v Italy) [1989] ICJ Rep 15

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226

Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Judgment) [2004] ICJ Rep 128

Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion) 2004 ICJ Rep 62

HRC

Delia Saldias de Lopez v Uruguay Communication No 52/1979 (HRC Views of 29 July 1981)

Galina Vedeneyeva v the Russian Federation Communication No 918/2000 (HRC Inadmissibility Decision, 29 March 2005)

KL v Peru Communication No 1153/2003 (HRC Views of 24 October 2005)

ECtHR

Golder v The United Kingdom App no 4451/70 (ECtHR, 21 February 1975)

Stan Greek Refineries and Stratis Andreadis v Greece App no 13427/87 (ECtHR, 9 December 1994)

Akdivar v Turkey App no 21893/93 (ECtHR, 30 August 1996)

Kaya v Turkey App no 158/1996/777/978 (ECtHR, 19 February 1998)

Waite and Kennedy v. Germany App no 26083/94 (ECtHR, 18 February 1999)

Selmouni v France App no 25803/94 (ECtHR, 28 July 1999)

Kudla v Polen App no 30210/96 (ECtHR, 26 October 2000)

Fogarty v United Kingdom App no 37112/97 (ECtHR, 21 November 2001)

Timofeyev v Russia App no 58263/00 (ECtHR, 23 October 2003)

Sejdovic v Italy App no 56581/00 (ECtHR, 1 March 2006)

Al-Skeini v United Kingdom App no 55721/07 (ECtHR, 7 Juli 2011)

Hassan v United Kingdom App no 29750/09 (ECtHR, 16 September 2014)

ECR

Case T306/01 *Kadi v Council* [2005] ECR II-3649

Case T306/01 *Yusuf v Council* [2005] ECR II-3533

Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351

Inter-American Court of Human Rights

La Cantuta v Peru (Judgment) Inter-American Court of Human Rights Series C No 162 (29 November 2006)

Special Tribunal for Lebanon

El Sayed (Order Assigning Matter to Pre-Trial Judge) Special Tribunal for Lebanon Case No CH/PRES/2010/01 (15 April 2010)

ICTY

Prosecutor v. Pavle Strugar (Judgment) IT-01-42-T, T Ch II (31 January 2005)

Prosecutor v Limaj Bala and Musliu (Judgment) IT-03-66-T (30 November 2005)

Prosecutor v Boškoski and Tarčulovski (Trial Chamber Judgment) IT-04-82-T (10 July 2008)

Other International Tribunals

Jacob Idler (United States v Venezuela) Opinion of Commissioner Little (1898) 4 Moore International Arbitrations 349

Loewen Groudp Inc v United States of America (Award of 26 June 2003) ICSID Case No ARB(AF)/98/3

Salem Case (Egypt v United States) (1949) 2 RIAA 1161

Solomon Case (United States v. Panama) (1955) 6 RIAA 370

German Courts

Oberwaltungsgericht Münster, Case Number 4 A 1361/15 (19 March 2019)

Stationierung US-Amerikanischer Atomwaffen auf dem Fliegerhorst Büchel, Constitutional Complaint, Case Number 2 BvR 1371/13, Bundesverfassungsgericht (15 March 2018); ILDC 2941 (DE 2018)

Israeli Courts

The Public Committee Against Torture in Israel and others v The Government of Israel and others, Judgment, Case No HCJ 769/02, Supreme Court of Israel (11 December 2006)

US Courts

ACLU v. CIA (2016) United States District of Columbia Circuit 640 f. App'x 9

ACLU v. DOJ (2013) United States Southern District Court New York 915 f. Supp. 2d 508

ACLU v. DOJ (2014) United States Court of Appeal 2nd Cir 756 f.3d 97

Al-Aulaqi v. Obama (2010) United States District Court of Columbia 2010 727 f. Supp. 2d 1 available at <<https://www.law.upenn.edu/live/files/1928-baileynasir-al-alawki-v--obama--court-orderpdf>> accessed 6 August 2019

Other

International Civil Aviation Organization, 'Unmanned Aircraft Systems (UAS)' (2011) Cir 328 AN/190

House of Commons, House of Lords Joint Committee on Human Rights 'The Government's Policy on the Use of Drones for Targeted Killing' (Second Report of Session 2015-16) HL Paper 141, HC 574, para 5.33 et seq available at <<https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/747.pdf>> accessed 6 August 2019

League of Nations, Acts of Conference on the Codification of International Law (19 August 1930)

available at <https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-351-M-145-1930-V_EN.pdf> (accessed 20 July 2019)

Report of the Inter-American Juridicial Committee in M Whitman, 'Digest International Law' (1973)

US Senate Foreign Relations Committee, Report of the Senate Committee on Foreign Relations 'Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents' (2009) 16 available at <https://fas.org/irp/congress/2009_rpt/afghan.pdf> accessed 2 August 2019

Secondary Sources

Ackermann, S, 'US to continue 'signature strikes' on people suspected of terrorist links' *The Guardian* (1 July 2016) available at <<https://www.theguardian.com/us-news/2016/jul/01/obama-continue-signature-strikes-drones-civilian-deaths>> accessed 5 August 2019

Alexander, L, 'Are Procedural Rights Derivative Substantive Rights?' (Law and Philosophy 1998)
Alston, P and Crawford, J, *The Future of UN Human Rights Treaty Monitoring* (first published CUP 2000)

Alston, P, 'The CIA and Targeted Killings Beyond Borders' (Harvard National Security Journal 2011)

Amnesty International, *Deadly Assistance: The Role of European States in US Drone Strikes* (first published Amnesty International Ltd 2018) available at <<https://www.amnesty.org/download/Documents/ACT3081512018ENGLISH.PDF>> accessed 24 August 2019

Anderson, K, 'Targeted Killing in U.S. Counterterrorism Strategy and Law' (American University Washington College of Law 2009)

Augusto, A and Trindade, C, 'The Access to Individuals to International Justice' (OUP 2011)

Bakker, C, 'A Full Stop to Amnesty in Argentina, The Simon Case' (JICJ 2005)

Blank, L and Noone, G, 'International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War' (Wolters Kluwer 2013)

Brooks, R, 'Drones and the International Rule of Law' (Ethics & International Affairs 2013)

Byrne, M, 'Consent and the use of force: an examination of “intervention by invitation” as a basis for US drone strikes in Pakistan, Somalia and Yemen' (Journal of the Use of Force and International Law 2016)

Cappelletti, M and Garth, B, *Access to Justice: A World Survey* (Vol I, 1978 Giufré/Sijthoff/Noordhoff – Alphenaaandenrijn)

Chayes, A, 'The Role of the Judge in Public Law Litigation' (Harvard Law Review 1976)

CICDE, 'Emploi des systèmes de Drones aériens, Réflexion doctrinale interarmées' (2012) 136 available at <http://www.cicde.defense.gouv.fr/IMG/pdf/20120606_np_cicde_rdia-2012-010-esda.pdf> (accessed 30 June 2019)

Citroni, G, 'The Human Rights Committee and its Role in Interpreting the International Covenant on Civil and Political Rights vis-à-vis States Parties' *EJIL:Talk* (28 August 2015) available at <<https://www.ejiltalk.org/the-human-rights-committee-and-its-role-in-interpreting-the-international-covenant-on-civil-and-political-rights-vis-a-vis-states-parties/>> accessed 24 July 2019

Class, K, 'Autonomous Weapons and Accountability: Seeking Solutions in the Law of War' (Loyola of Los Angeles Law Review 2015)

Claude, R, 'Comparative Rights Research: Some Intersections Between Law and the Social Sciences' in Richard Claude (ed), *Comparative Human Rights* (John Hopkins University Press 1976)

Crawford, E, 'Remote Warfare' in E. Crawford (ed) *Identifying the Enemy* (OUP 2015)

De Groof, M, 'Death from the Sky: International Legal and Practical Issues on the Use of Armed Drones' in Ales Zavrsnik (ed) *Drones and Unmanned Aerial Systems* (Springer 2016)

De Schutter, O, 'Economic, Social and Cultural Rights as Human Rights: An Introduction' (Cellule de Recherche Interdisciplinaire en Droits de l'Homme 2013) 4 available at <<https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO-WP2013-2-ODESchutterESCRights.pdf>>

Deborah, R, 'Access to Justice' (OUP 2004)

Dennis, M, 'Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?' (ILSA Journal of International and Comparative Law 2006)

ECCHR, 'Important Judgment: Germany Obligated to Scrutinize US Drone Strikes via Ramstein', available at <<https://www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/>> accessed 8 August 2019

ECCHR, 'Important Judgment: Germany Obligated to Scrutinize US Drone Strikes via Ramstein', available at <<https://www.ecchr.eu/en/case/important-judgment-germany-obliged-to-scrutinize-us-drone-strikes-via-ramstein/>> accessed 8 August 2019

European Union Agency for Fundamental Rights and the Council of Europe, 'Handbook on European Law relating to access to justice' (2016)

Focarelli, C, 'Denial of Justice' (MPEPIL 2013)

Foust, J, 'The Strategic Effects of a Lethal Drones Policy' *American Security Project* available at <<https://www.americansecurityproject.org/asymmetric-operations/the-strategic-effects-of-a-lethal-drones-policy/>> accessed 22 June 2019

Francioni, F 'The Rights to Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007)

Garamone, J, 'Unmanned Aerial Vehicles Proving Their Worth Over Afghanistan' *American Forces Press Service* (16 April 2002) available at <<https://archive.defense.gov/news/newsarticle.aspx?id=44165>> accessed 11 August 2019

Garth, B and Cappelletti, M, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (Articles by Maurer Faculty 1978)

Goodman, A, '3 US Soldiers Indicted in Death of Spanish Journalist' *CNN* (5 October 2011) available at <<https://edition.cnn.com/2011/10/05/world/europe/spain-us-troops/index.html>> accessed 31 July 2019

Grabewarter, X and Gabel, K, 'Verfahrens- und Justizgarantien' in Grabewarter/Pabel (eds) *Europäische Menschenrechtskonvention* (C.H. Beck 2016)

Greenfield, D and Hausheer, S, 'Do Drone Strikes in Yemen Undermine US Security Objectives?' (Atlantic Council 2014) available at <https://www.atlanticcouncil.org/images/publications/Drone_Strikes_in_Yemen.pdf> accessed 20 August 2019

H Kitonsa and S Kruglikov, 'Significance of drone technology for achievement of the United Nations sustainable development goals' (Re-economy 2016)

Hailbronner, K and Gogolin, J, 'Aliens' (MPEPIL 2013)

Hammond, D, 'Autonomous Weapons and the Problem of State Accountability' (Chicago Journal of International Law 2015)

Hastings, M, 'The Rise of Killer Drones: How America goes to War in Secret' *Rolling Stone* (16 April 2012) available at <<https://www.rollingstone.com/politics/politics-news/the-rise-of-the-killer-drones-how-america-goes-to-war-in-secret-231297/>> accessed 4 August 2019

Heinisch, R and Pouloupoulou, S, 'Difficulties in Prosecuting Drone Strikes as a War Crime Under International Criminal Law: An International Humanitarian Law Perspective' (ECCHR 2017)

Henckaerts, J and Doswald-Beck, L, *Customary International Humanitarian Law* (CUP 2005)

Henzelin, M and Rordorf, H, 'When Does the Length of the Criminal Proceeding Beome Unreasonable According to the European Court of Human Rights?' (New Journal of European Criminal Law 2014)

Heyn, C and others, 'The International Law Framework Regulating The Use of Armed Drones' (International and Comparative Law Quarterly 2016)

Hill-Cawthorne, L, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict'

(International and Comparative Law Quarterly 2015)

Human Rights Watch, 'Losing Humanity' (19 November 2012) 2, available at <https://www.hrw.org/sites/default/files/reports/arms1112_ForUpload.pdf> accessed 8 August 2019

ICRC, 'How is the Term “Armed Conflict” Defined in International Humanitarian Law?' (ICRC 2008) available at <<https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 1 August 2019

ICRC, 'Military Necessity' available at <<https://casebook.icrc.org/glossary/military-necessity>> accessed 29 July 2019

International Bar Association's Human Rights Institute, 'The Legality of Armed Drones Under International Law' (IBAHRI 2017)

Janis, M, 'Individuals as Subjects of International Law' (Cornell International Law Journal 1984) available at <<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1133&context=cilj>> accessed 11 July 2019

Juillard, P, 'Calvo Doctrine/Calvo Clause' (MPEPIL 2007)

Kafka, F, *Before the Law*, available at <<https://www.kafka-online.info/before-the-law.html>> accessed 10 August 2019

Kafka, F, *The Trial* (Modern Library Definitive Edition 1956)

Kaufmann, B and Diakun, A, 'United States Targeted Killing Litigation Report' (ECCHR 2017)

Kjeldgaard-Pedersen, A, *The International Legal Personality of the Individual* (OUP 2018)

Koh, H, 'How Is International Human Rights Law Enforced?' (Indiana Law Journal 1999)

Koh, H, 'The Obama Administration and International Law' *US Department of State* (25 March 2010) available at <<https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>> accessed 1 August 2019

Lalaguna, P and Barrado, C, *Sustainable Development Goals Goal 16: Peace, Justice and Strong Institutions* (Thomson Reuters 2018)

Lee, P, 'Drones will soon decide who to kill' *the conversation* (11 April 2018) available at <<http://theconversation.com/drones-will-soon-decide-who-to-kill-94548>> accessed 22 June 2019
Legal Dictionary, available at <<https://legal-dictionary.thefreedictionary.com/jurisdiction>> accessed 11 August 2019

Lewis M and Crawford, E, 'Drones and Distinction: How IHL Encouraged the Rise of Drones' (Georgetown Journal of International Law 2013)

Lewis, M, 'Guest Post: Pakistan's official withdrawal of consent for drone strikes' *Opinio Juris* (10

June 2013) available at <<http://opiniojuris.org/2013/06/10/guest-post-pakistans-official-withdrawal-of-consent-for-drone-strikes/>> accessed 26 August 2019

Lubell, N, 'Concurrent Applicability of International Humanitarian Law and International Human Rights Law' in N Lubell (ed) *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010)

Lubell, N, 'Extraterritorial Applicability of Human Rights Law' in N Lubell (ed) *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010)

Mayer, J, 'The Predator War', *The New Yorker* (26 October 2009) available at <<https://www.newyorker.com/magazine/2009/10/26/the-predator-war>> accessed 14 August 2019

McKelvey, T, 'Inside the Killing Machine', *Newsweek* (13 February 2011) available at <<https://www.newsweek.com/inside-killing-machine-68771>> accessed 30 July 2019

Melzer, N, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under Humanitarian Law (ICRC 2009) 70, available at <<https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>> accessed 2 August 2019

Melzer, N, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities (NYU Journal of International Law and Politics 2010)

Melzer, N, *Targeted Killing in International Law* (OUP 2008)

Meyer-Ladewig, J and others, 'EMRK Artikel 6 Recht auf ein faires Verfahren' in Meyer-Ladewig, Nettesheim, von Raumer (eds) *Europäische Menschenrechtskonvention* (C.H. Beck 2017)

Möller, K, 'Proportionality: Challenging the critics' (International Journal of Constitutional Law 2012)

Murphy, R, *Introduction to AI Robotics* (MIT Press 2000)

Oguno, P, 'The concept of state immunity under international law: An overview' (IJL 2016)

Pictet, J, 'Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (ICRC 1951)

Rivera, V, 'Digital Divide and Access to Justice' (SELA 2015) available at <https://law.yale.edu/sites/default/files/documents/pdf/SELA15_Neptune_CV_Eng.pdf> accessed 24 August 2019

Roche, C and Richter, J, 'El acceso a la justicia' in Casal, Roche, Richter, Hansen (eds) *Derechos humanos, equidad y acceso a la justicia* (Instituto Latinoamericano de Investigaciones Sociales 2005) 46 <<https://library.fes.de/pdf-files/bueros/caracas/03831.pdf>> accessed 13 July 2019

Rodriguez-Villasante, J, 'Terrorist acts, armed conflicts and international humanitarian law' in P A Fernández-Sánchez (ed) *The new challenges of humanitarian law in armed conflicts: In honour of*

Professor Antonio Carrillo-Salcedo (Brill Nijhoff 2005)

Sarat, A, 'Book Review Access to Justice by Mauro Cappelletti, Bryant Garth, John Weisner and Klaus-Friedrich Koch' (1982 Harvard Law Review)

Scheinin, M, 'Access to Justice before International Human Rights Bodies: Reflections on the Practice of the UN Human Rights Committee and the European Court of Human Rights' in Francesco Francioni (ed) *Access to Justice as a Human Right* (OUP 2007)

Schmitt, M, 'Discriminate Warfare: The Military Necessity-Humanity Dialectic of International Humanitarian Law', in David Lovell and Igor Primoratz (eds) *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Ashgate 2012)

Scott, B, 'Key Provisions in Current Aviation Law' in Bart Custers (ed) *The Future of Drone Use* (Asser Press 2016)

Senn, M and Troy, J, 'The transformation of targeted killing and international order' (Taylor & Francis 2017) available at <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5632895/>> accessed 16 August 2019

Shah, N, 'The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions' (Center for Civilians in Conflict 2012) 8 available at <<https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf>> accessed 5 August 2019

Sharkey, N, 'Automating Warfare: Lessons Learned from the Drones' (Journal of Law, Information and Science 2012)

Snetselaar, D, 'Remote Warfare: Remote Justice?' (Utrecht University Repository 2018) 59.

Somerville, K, 'US Drones take Combat Role' *BBC* (5 November 2002) available at <http://news.bbc.co.uk/2/hi/in_depth/2404425.stm> accessed 4 August 2019

Subbaraman, N, 'Activists, UN put 'killer robot' in the crosshairs' *NBC* (30 April 2013) available at <<https://www.nbcnews.com/tech/tech-news/activists-un-put-killer-robots-crosshairs-flna6C9633925>> accessed 9 August 2019

Tecott, R, 'Targeted Killing: Thinking Through the Logic' *War on the Rocks* (28 September 2016) available at <<https://warontherocks.com/2016/09/targeted-killing-thinking-through-the-logic/>> accessed 25 August 2019

Thiele, B, 'Optional Protocol to the ICESCR: An Opportunity for Strategic Litigation to Shape the Human Rights Framework' (The Global Initiative for Economic, Social and Cultural Rights) available at <<https://www.gi-escr.org/latest-news/optional-protocol-to-the-icescr-an-opportunity-for-strategic-litigation-to-shape-the-human-rights-framework>> accessed 25 August 2019

United States Institute for Peace, 'Necessary Condition: Access to Justice' (USIP) <<https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice>> accessed 11 July 2019

Vacca, A, 'Drones: military weapons, surveillance or mapping tools for environmental monitoring? The need for legal framework is required' (Elsevier B.V. 2017)

Viljanen, J, 'The Role of the European Court of Human Rights as a Developer of International Human Rights Law' (University of Tampere 2003) available at <<http://www.corteidh.or.cr/tablas/r26759.pdf>> accessed 24 July 2019

Vilmer, J, 'Légalité et légitimité des Drones armés, Revue politique étrangère' (2013)

Vogel, R, 'Drone Warfare and the Law of Armed Conflict' (Denver Journal of International Law and Policy 2010)

Weizmann, N, 'Remotely Piloted Aircraft and International Law' (ICRC 2013) 34 available at <<https://www.icrc.org/en/doc/assets/files/2013/remotely-piloted-aircraft-ihl-weizmann.pdf>> accessed 20 June 2019

Werner, W, 'State Sovereignty and International Legal Discourse' in Ige Dekker and Wouter Werner (eds) *Governance and International Legal Theory* (Springer 2004)

Woods, C, 'CIA's Pakistan Drone Strikes Carried Out by Regular US Air Force Personnel' *Guardian* (14 April 2014) available at <<https://www.theguardian.com/world/2014/apr/14/cia-drones-pakistan-us-air-force-documentary>> accessed 30 July 2019

'FACT SHEET: Executive Order on the US Policy on Pre & Post-Strike Measures to Address Civilian Casualties in the US Operations Involving the Use of Force & the DNI Release of Aggregate Data on Strike Outside Area of Active Hostilities' the WHITE HOUSE (1 July 2016) available at <<https://obamawhitehouse.archives.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address>> accessed 6 August 2019

'Israel fears future Drone attacks', *Aljazeera* (2014) available at <<http://www.aljazeera.com/news/middle-east/2014/03/israel-fears-future-drone-attacks-2014310145427998548.html>> accessed 30 June 2019

'Italian Bid to Indict US Soldier' *BBC News* (19 June 2006) available at <<http://news.bbc.co.uk/2/hi/europe/5095510.stm>> accessed 31 July 2019

'Legality of Targeted Killing Program under International Law' (Lawfare) available at <<https://www.lawfareblog.com/legality-targeted-killing-program-under-international-law>> accessed 28 August 2019

'Russia 'Kills' Chechen Warlord', *BBC* (25 April 2002) available at <<http://news.bbc.co.uk/2/hi/europe/1950679.stm>> accessed 14 August 2019

'Somalia: Reported US Covert Actions 2001-2016' *The Bureau of Investigative Journalism* (22 February 2016) available at <<https://www.thebureauinvestigates.com/drone-war/data/somalia-reported-us-covert-actions-2001-2017>> accessed 5 August 2019

'Targeted Killing in Dubai: A Mossad Operation Gone Awry?', Der Spiegel (23 February 2010)
available at <<https://www.spiegel.de/international/world/targeted-killing-in-dubai-a-mossad-operation-gone-awry-a-679764.html>> accessed 14 August 2019
accessed 24 August 2019