# UNMASKING THE 'ADMIXTURE' WAR PARADIGM: AN ANALYSIS OF 'INVISIBLE' VIOLATIONS OF *JUS IN BELLO* WITHIN SIGNATURE DRONE STRIKES

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*This commentary explores how violations of jus in bello within drone strike campaigns have now become undetectable, under the current banner of sophisticated state narratives, allowing customary international law to evolve to accommodate 'invisible' crimes to international humanitarian law. The commentary posits this claim by evaluating the current 'admixture' framework of jus in bello and jus ad bellum principles of warfare and analyzing how powerful states are utilizing this confusing framework to shift the legal narrative away from their violations in bello and towards the justifications ad bellum, in order to conduct their warfare through the lens of perceived legality.*

*This 'admixture' analysis—which consists of a hybrid paradigm of both jus ad bellum and jus in bello arguments—is appraised through evaluating how this new war paradigm operates within the U.S. drone strike campaigns in the Middle East. This commentary tests this 'admixture' framework through the 'suspected gathering' criterion within the Continuous Combat Function (CCF) to critically study how this new framework has widened the principle of distinction to an indefensible point, allowing powerful states to hide 'invisible' humanitarian violations within their signature drone strikes. By studying the cases of the targeted killings of Anwar al-Alwaki, Adam Gadahn, and Ahmed Farouq, this commentary examines how this framework intentionally allows states to dilute international humanitarian law principles to further their own political motives and continues to engage in warfare practices of questionable legality.*

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## I. Introduction: How Visibility has Become 'Undetectable' Within *Jus in Bello* Drone Strike Violations

Contemporarily, drone strikes present a unique legal landscape to test the operation of *jus in bello* and *jus ad bellum* within the framework of International Humanitarian Law (IHL). This commentary was adapted from a larger dissertation investigating the evidentiary boundaries of this phenomenon, focusing specifically on how expanded legal justifications, like the Continuous Combat Function (CCF)[1] currently used by states to justify armed attacks, result in 'invisible' violations of the principle of distinction; these violations arguably stem from a latent gap between official state narrative of a strike and the discoverable truth of what has occurred. The first part of this commentary

1. For a detailed discussion on the CCF Framework, see Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law 34 (Int'l Comm. of the Red Cross 2009) (referencing Chapter II. The Concept of Civilian in Non-International Armed Conflict; Chapter VII. Temporal Scope of the Loss of Protection; and Chapter X. Consequences of Regaining Civilian Protection).

investigates how complicated state narratives, which now embody an 'admixture' of *ad bellum* and *in bello* justifications to warfare, have effectively obfuscated the distinction between both corpora of norms. The second part positions this evaluation within its implications towards drone strike narratives by showcasing how the 'admixture' narrative, predominately centered on the *ad bellum* components, rationalizes what constitutes *in bello* violations, allowing powerful states to obscure their transgressions of IHL. The commentary concludes by calling for a need to refocus our attention towards *jus in bello* violations and uncover the 'invisible' transgressions hidden by intricate state narratives.

This section aims to introduce the wider analysis of how the blended state narratives of *jus ad bellum* and *jus in bello* result in the 'invisible' violations of *in-bello* warfare. The purpose of this section is not to propose the ideal *lex feranda* of how states should conduct their warfare, but rather to describe, in practical terms, the current *lex lata* of how states do conduct their lawfare operations and the issues it poses toward contemporary drone strikes. Most academic discussions on the topic have focused on evaluating the multiplicity of issues present in the principle of self-defense and drone technology itself, such as appraising the expansion of geographical 'infinite warfare.'[2] However, these appraisals do not offer a unique perspective on the current conflict. Instead, this commentary provides a novel contribution by redirecting attention to the intricate legal narratives of states to unveil the concealed *in bello* violations. Throughout this commentary, 'invisible'[3] violations of *in bello* are conceptualized as being (il)legal drone strikes and analogized to an "expansion of state power"[4] blanketed and justified

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2. *See* Derek Gregory, *The Everywhere War*, 177 The Geo. J., no. 3, 238, 238 (2011) (discussing how geographical warfare has expanded to encompass an "everywhere war", further risking the concept of peace); *see also* Derek Gregory, *From a View to a Kill: Drones and Late Modern War*, 28 Theory, Culture & Society 188, 215 (2011) (analyzing how drones and war by anticipation have further expanded warfare).

3. *See* Rebecca Mignot-Mahdavi, Drones and International Law: A Techno-Legal Machinery 176 (Cambridge Univ. Press 2023) (highlighting that "[t]he unique effects that drone programs have on sovereignty have been neglected and underestimated. This neglect can be explained by the fact that the technicalities of drone programs make the expansion of state power that it allows almost invisible.").

4. *Id.*

by a synthesis of *ad bellum* and *in bello* justifications, which justify what are actually (il)legal drone strikes, by creating a nuanced amalgamation of both corpus of norms.

## II. Current 'Admixture' Framework of *Jus in bello* and *Jus ad bellum* Within International Humanitarian Law

This commentary primarily focuses on *jus in bello* violations, which Yoram Dinstein describes as the "law of hostilities, resulting in the conduct of armed conflict",[5] as opposed to *ad bellum* violations.[6] The commentary will first examine the broader context of how state narratives have shifted focus away from *in bello* and towards *ad bellum*; understanding how these corpora of norms intricately interact can help us appreciate the implications the narratives have on making the *in bello* violations 'invisible' in the context of drone strikes.

The *ad bellum* aspect focuses on the legality of using force in self-defense against non-state actors in a Non-International Armed Conflict (NIAC). Specifically, the exterritorial use of force is a prima facie violation of the U.N. prohibition of force under Article 2(4) of the U.N. Charter.[7] The rhetoric of the United States has shaped customary international law of *jus ad bellum* post-9/11, distorting the meaning of such violations. This commentary draws particular attention to the United

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5. Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 1 (3rd ed., Cambridge Univ. Press 2016).

6. *See* Christine Gray, International Law and the Use of Force 9 (4th ed., Oxford Univ. Press 2018) (describing *ad bellum* as the law governing the use of force).

7. Article 2(4) of the U.N. Charter provides that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, ¶ 4; *see also* alternative primary sources in the Kellogg-Briand Pact of 1928. This principle was also confirmed as customary international law within I.C.J jurisprudence in Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J Rep. 14; *see also* Oils Platforms (Islamic Republic of Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 76 (Nov. 6) (noting that "[t]he conditions for the exercise of the right of self-defence are well settled"), and Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) Judgment, 2005 I.C.J Rep. 168 ¶ 148 (Dec. 19) (noting that "the prohibition against the use of force is a cornerstone of the United Nations Charter.").

States' employment of "anticipatory self-defense" in the context of the war on terror, which has been used to justify drone strikes against individuals who pose what Daniel Bethlehem terms, a "continuous" and "imminent" threat.[8] The United States example demonstrates an evolved interpretation of the right to self-defense under Article 51 of the U.N. Charter, which allows an expansion of justifications for utilizing force against "anticipating" attacks from NIACs, as previously proposed by Greenwood,[9] Steenberghe,[10] and Dinstein.[11] This evolutionary framework is present within the U.S. counterterrorism framework specifically laid out in the U.S. Department of Justice White Paper (2011)[12] and the Bethlehem Principles.[13] The U.S. used the doctrine of 'anticipatory'[14] *ad bellum* principles to

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8. Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors,* 106 Am. J. Int'l L. 770, 777 (2012).

9. *See* Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq,* 4 San Diego Int'l L. J. 7, 17 (2003) (noting that it would be "a strange formalism that regarded the right to take military action against those who caused or threatened such actions as dependent upon whether or not their acts could be imputed to a state.").

10. *See* Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?*, 23 Leiden J. Int'l L. 183, 183–184 (2010) (noting recent state practice, evidenced by the 2001 US operation "Enduring Freedom" in Afghanistan, reveals a tendency that allows states to respond in self-defense to attacks committed by non-state actors).

11. *See* Yoram Dinstein, War, Aggression and Self-Defence 241–248 (6th ed., Cambridge Univ. Press 2017) (discussing self-defense in response to an armed attack by non-state actors under international law).

12. *See generally* U.S. Dep't of just., Lawfulness of a Lethal Operation Directed Against a U.S. Citizen who is a Senior Operational Leader of Al-Qa'ida or an Associate Force (2011), https://irp.fas.org/eprint/doj-lethal.pdf (describing when a U.S. operation using lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force would be lawful).

13. *See generally* Bethlehem, *supra* note 8, *passim.*

14. *See* Greenwood, *supra* note 9, at 8, 12–13 (writing that the International Military Tribunals at Nuremberg and Tokyo applied the "Caroline" test, suggesting that a right to anticipatory self-defense against imminent threats of armed attacks was part of the customary law preserved under Article 51's Right to Self Defense in the UN Charter). Greenwood further writes on the contemporary use of the doctrine of anticipatory self-defense by the National Security Strategy document by President Bush in 2002, citing: "The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves."

justify the war on terror, as replicated in Yemen,[15] Syria,[16] and Afghanistan,[17] and to justify the use of lethal force, which Mansell and Openshaw critique.[18]

## III. Sophisticated 'Admixture' Paradigm has Shifted Focus of Warfare Away From *In bello* Violations Towards *Ad Bellum* Justifications

This legal justification, as illustrated above as depending heavily on an 'admixture' of *ad bellum* and *in bello* narratives

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15. In 2015, Senator Richard Burr commented: "But when you look around the world, whether it's in Yemen, whether its Syria, whether it's in Iraq, whether it's in Afghanistan or North Africa with Boko Haram, we've got terrorist elements that are carrying out terrorist acts and if you put that collection together, what you've got is a war on Western civilization. It really doesn't matter which terrorist group we insert into the blank." *See Sen. Burr: Terror Threat a 'War on Western Civilization'*, Grabien (Jan. 12, 2015), https://grabien.com/story.php?id=20231; *see also Current Terrorist Threat to the U.S., Hearing Before the Select Comm. on Intel. of the U.S. Sen.*, 114th Cong. 1 (2015) (statement of Sen. Richard Burr, Chair of the Sen. Select Comm. on Intel); *see also* Tore Refslund Hamming & Pieter van Ostaeyen, *The True Story of al-Qaeda's Demise and Resurgence in Syria*, Lawfare (Apr. 8, 2018, 10:00 AM), https://www.lawfareblog.com/true-story-al-qaedas-demise-and-resurgence-Syria (noting that while much of analysts' discussion concerns al-Qaeda's relationship with its affiliate organizations "in Yemen, the Maghreb, and other areas, the most important of these organizations is, or was, its affiliate in Syria.").

16. Hamming & van Ostaeyen, *supra* note 15.

17. Burr, *supra* note 15; for information regarding investigations on U.S. Drone Strikes in 2020 in Afghanistan, *see generally U.S. Drone Warfare*, The Bureau of Investigative Journalism, https://www.thebureauinvestigates.com/projects/drone-war/ (highlighting that "[b]etween 2010 and 2020 the Bureau tracked U.S. drone strikes and other covert actions in Pakistan, Afghanistan, Yemen and Somalia. The comprehensive reporting on civilian deaths helped lead to greater official transparency on targeted killing, and provided the data needed to hold the White House to account.").

18. *See* Wade Mansell & Karen Openshaw, International Law 26 (Bloomsbury Publishing 2nd ed. 2019) (describing the contemporary events in Syria, Iraq, and Afghanistan) (describing contemporary events in Syria, Iraq and Afghanistan); *See also* Center for Civilians in Conflict & Colum. L. Sch. Hum. Rts. Inst., In Search of Answers: U.S. Military Investigations and Civil Harm 32 (2020) (noting that "in current campaigns, often characterized by the use of air strikes and partnered operations . . . the known channels for civilians to directly report harm to the U.S. military have been largely closed off. Publicized avenues for direct engagement between civilians and the military are limited in Iraq and Syria . . . greatly reduced in Afghanistan, and are effectively nonexistent in Yemen and Somalia . . . .").

(but focused more on the *ad bellum* aspect), reached a critical point during the Obama administration. Its Legal Adviser Harold Koh described this legal exposition for using armed drones against Al-Qaeda and associated forces, including the Taliban,[19] as "consisting of a hybrid paradigm composed of both *in bello* and *ad bellum* arguments."[20] The Obama administration post-2013 drew particular attention to how the admixture evolved, by implying that its drone policy would now almost exclusively focus on the right to self-defense under the Presidential Policy Guidance (PPG). The PPG has "thus entrenched a mixed *jus ad bellum/jus in bello* legal narrative for the extraterritorial use of drones against non-state actors."[21] This substantiates a claim that currently, according to the *jus ad bellum* element of "continuing and imminent threat"[22] articulated in the PPG, the law on self-defense has evolved into "a paradigm to target individuals continuously having a hostile intent"[23] under the law of *jus in bello*. By examining this interplay of the current expansive scope of *jus ad bellum* in complex state narratives, this commentary posits this 'admixture' narrative allows states to frame customary international law discourse on drone strikes under predominantly *ad bellum* justifications and justify their violent actions under the IHL theory of *jus in bello*. Under this new war paradigm, violent actions hide behind the *ad bellum* rhetoric and become 'invisible.'

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19. *See* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Speech at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) ("As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."); *see also* Mignot-Mahdavi, *supra* note 3, at 28, 38.

20. Mignot-Mahdavi, *supra* note 3, at 36

21. Mignot-Mahdavi, *supra* note 3, at 38.

22. *See* Spencer Ackerman, *US to continue 'signature strikes' on people suspected of terrorist links*, The Guardian (July 1, 2016), https://www.theguardian.com/us-news/2016/jul/01/obama-continue-signature-strikes-drones-civilian-deaths (quoting a senior U.S. military official: "We continue to reserve the right to take action not just against individual terrorist targets but when we believe we have, for instance, a force protection issue or information to suggest a *continued imminent threat*") (emphasis added).

23. Mignot-Mahdavi, *supra* note 3, at 38.

Contemporary academic commentary like Walzer's[24] suggests that the *jus in bello* conduct should be understood within the ambit of the original justification to resort to force (*jus ad bellum*). Recently, there has been increased academic support for this notion; Gabriella Blum argues that the expansion of the rules governing *in bello* has a potential ramification of indirectly expanding the grounds for states to resort to continuous armed force under *ad bellum*.[25] In line with the current academic trend, this commentary argues that a complete separation of the two norms is unassailable and suggests that *jus in bello* cannot be effectively evaluated without orienting it within the previous context of *jus ad bellum*. As detailed in the next section, this 'admixture' narrative has the (perhaps intentional) consequence of shifting the academic focus away from *in bello* violations towards *ad bellum* justifications for engaging in warfare, thus, hiding and creating 'invisible' IHL violations in the war paradigm.

## IV. Novel 'Admixture' War Paradigm Results in 'Invisible' International Humanitarian Violations Within Personality Drone Strikes

From the above evaluation of the 'admixture' war paradigm, two observations merit particular attention. First, because customary drone warfare has now transformed into a framework of warfare that utilizes a combined justification of *ad bellum* and *in bello*, meaningful analysis of IHL violations should interrogate both components concurrently, and second, although the two elements must be examined side-by-side, in order to unveil

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24. *See* Michael Walzer, Just And Unjust Wars: A Moral Argument With Historical Illustrations 33-44 (Basic Books 4th ed. 2006) (presenting an authoritative discussion of the "jus in bello" principles of warfare in Chapter 3: The War Convention).

25. Gabriella Blum, *The Paradox of Power: The Changing Norms of the Modern Battlefield*, 56 Hous. L. Rev. 745–747, 784 (2019) (writing "whether or not our campaigns is considered successful and legitimate under a jus ad bellum review hinges, in part, on whether we can prove this rhetorical commitment in practice. On the Jus in bello front, the same values that demand more other-regarding definitions of what a successful military campaign is designed to achieve also constrain how that campaign can be prosecuted." Blum further comments that "in this sense, the jus in bello might end up being a more effective jus ad bellum than the jus ad bellum itself.")

the violations obscured under this warfare narrative, emphasis should be placed on understanding how this evolved paradigm implicates IHL.

Concerning the first proposition, engaging in this debate has been described by scholars as paradoxical. The debate on how the law is shaped by nations is not novel and has been critiqued as a circular argument. However, this paper contends that the issue lies not in resolving the perplexing circularity of customary warfare, but rather, in choosing critically which tensions to engage with, to better inform our practical discussion of how the *lex feranda* operates and what is needed to shift the asymmetry and invisibility. Following that line of thought, this commentary proposes an analogy to better understand how both these rational concepts operate; notably, the *ad bellum* and *in bello* 'admixture' can be analogized to a spider web in which the reasons why states fight (*ad bellum*) ultimately affect how states conduct their warfare practices (*in bello*). Considering this metaphor, what draws our attention is the way the intricate state narratives, as exemplified by the expansion of *ad bellum* anticipatory self-defense, rationalize their (il)legal yet sustained engagement in warfare.

This commentary focuses on evaluating the premise under the principle of distinction specifically. This is defined in Rule 106 of the International Committee of the Red Cross's Conditions for Prisoners of War Status [26] as customary law, which imposes an obligation on "combatants to distinguish themselves from the civilian population while they are engaged in an attack."[27] Customary law aside, the same rule is also encapsulated within Articles 44 and 48 of the Additional Protocol I to the General Conventions.[28] Recently, the increased reliance

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26. Rule 106, Conditions for Prisoners-of-War Status, Int'l Comm. of the Red Cross (Rule 106 states that "[c]ombatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status.")

27. *See* Oppenheim's International Law 346 (Robert Jennings and Arthur Watts eds., 9th ed. 1992) (noting the rule of distinction was present as early as the 18th century).

28. *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, arts. 44, 48 (article 44, Combatants and Prisoners of War, para. 3, states that "[i]n order to promote the protection of the civilian population from the effects of hostilities,

on Unnamed Aerial Vehicles (UAV) technology to gather intelligence and conduct targeted killings (evidenced by the never-ending war on terror)[29] highlights how necessary this analysis is for the broader exploration on how these weapons are "compliance with IHL," as raised by Philip Alston, former U.N. Special Rapporteur.[30] Delving deeper into his evaluation, many academics have also argued the current framework of distinction between combatants and non-combatants, as employed by powerful states, is outdated when perceived in the context of UAVs; leading academics[31] argue that "drones could be used to directly attack civilian or civilians objects in violation of the principle of distinction."[32] In other words, the existing IHL framework is rather inadequate to address the challenges posed by the continuous evolution of drone technology.

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combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."). Article 48 further requires that "the Parties to the conflict shall at all times distinguish between the civilian population and combatants."

29. *See generally* Alex Lubin, Never-Ending War on Terror (1st ed., Univ. of Cal. Press 2021) (defining and explaining the term "never-ending war"). For an example of the term's usage in the journalistic context, see Samuel Moyn, *How the U.S. Created a World of Endless War*, The Guardian, (Aug. 31, 2021), https://www.theguardian.com/us-news/2021/aug/31/how-the-us-created-a-world-of-endless-war.

30. Philip Alston, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, A/HRC/12/24/add. 6, ¶ 73 (May 28, 2010).

31. *See* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 2 (2003) (identifying the central difficulty as being how to best define the scope and content of international humanitarian rules applicable in non-international armed conflicts); Ryan Goodman, *Why the Laws of War Apply to Drone Strikes Outside "Areas of Active Hostilities" (A Memo to the Human Rights Community)*, Just Security (Oct. 4, 2017) (tackling how the previous DOD policy restrictions on drone strikes and other lethal operations should be reformed so the laws of war apply in areas outside of zones of active hostilities); Geoffrey S. Corn, *Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, al Qaida, and the Limits of Associated Militia Concept*, 85 Int'l L. Stud. 181, 210 (2009) (alluding to the same phenomenon as producing an "illogical outcome disconnected from the underlying purpose of the LOAC.").

32. Michael N. Schmitt, *Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law'*, 13 Y.B. of Int'l Humanitarian L. 311, 313, 321 (2010).

## V. Hidden Asymmetries Presented Within the Expansion of Warfare Justifications Within Signature Targeted Killings

This section examines in greater detail the asymmetry present in the discursive analysis above, as well as the various ways in which asymmetries are made deliberately invisible by powerful states. To fully engage with this point, this commentary assesses the proposition within the context of the UAV's function of evidence collection capabilities,[33] focusing on the notion of "Direct Participation in hostilities"[34] (DPH) and its operation within the CCF function. The CCF criterion is currently used to determine whether an individual is "directly participating in hostilities,"[35] and thus can be targeted under IHL, as explained by Melzer.[36] As academics like Mignot-Mahdavi highlight, currently "two versions co-exist in the legal landscape."[37]

Moving away from a strictly traditional view of direct participation, the current DPH formulation of "technology and zero-risk strategy of drone programs" helpfully exploits this idea of "suspicious behavior".[38] Blank explains that "this high degree

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33. *See* Atkinson, S., et al., *Drone Forensics: The Impact and* Challenges, *in* Digital Forensic Investigation of Internet of Things (IoT) Devices, Advanced Sciences and Technologies for Security Applications, 65–124 (Reza Montasari et al. eds., 2020) (attempting to ascertain what data can be extracted from UAV devices (drones), and how that data is translated in the targeting process for state actors.)

34. *See* Melzer, *supra* note 1, at 5–6.

35. This concept was first expounded by the 2009 ICRC Interpretative Guidance; *see* Melzer, *supra* note 1, at 5.

36. *Id.*

37. *See* Mignot-Mahdavi, *supra* note 3, at 122 (clarifying that "[u]nder the traditional version of DPH, non-state actors can only be targeted *during* the direct participation in harmful belligerent activities, whereas DPH as a continuous combat function opens the door to targeting suspicious behavior, other than the witnessed participation in hostilities.")

38. Cora Currier & Justin Elliott, *The Drone War Doctrine We Still Know Nothing About*, Propublica (Feb. 26, 2013), https://www.propublica.org/article/drone-war-doctrine-we-know-nothing-about (noting that "[i]n these attacks, known as 'signature strikes,' drone operators fire on people whose identifies they do not know based on evidence of suspicious behaviour or other 'signatures'"); *see also* Alston, *supra* note 30, at 28 (opining that "targeted killings should never be based solely on "suspicious" conduct or unverified – or unverifiable – information"); *see generally* Jeremy Scahill & The Staff of the Intercept, The Assassination Complex: Inside the Government's Secret Drone Warfare Program (2017) (citing examples where deaths by drone strikes have included women and children and exceed the number of actual legal

of amity [impacts] the ability to analyze compliance with LOAC norms."[39] Adopting this standpoint, Mignot-Mahdavi argues that targeting has, therefore, "moved away from responding to material acts of hostilities"[40] and redirects legal attention to "personal and behavior characteristics of the target."[41] As mentioned above, the strictly traditional view of the DPH, with its reliance on an act-by-act[42] framework, allows for targeting based on the conduct of specific hostile acts. This boundary becomes increasingly obscured when considering how the CCF derives a "status-based mode of targeting" legal criteria of targeting from actors that meet a specific criterion of behavior, even though these actors would normally fall outside the scope of ongoing hostilities.

## VI. Conclusion: Expansion of the Principle of Distinction has Resulted in 'Invisible' International Humanitarian Violations Within Signature Personality Drone Strikes

The final section will test the aforementioned application of the principle of distinction to real-life cases of drone warfare within the CCF function. Testing this principle, this commentary now focuses on how this principle is continually jeopardized, by utilizing the CCF behavioral criterion to highlight specific instances where drone strikes have led to mass civilian casualties.

This section tests this indicator of the CCF for "suspicious gathering" in light of the 2010 drone strike of Al-Majala in

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combatants assassinated, particularly in the section titled "Strikes often kill many more than the intended target").

39. *See* Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 33 Univ. Pa. J. Int'l L. 675, 688 (2012) (noting that "[d]isputes regarding facts on the ground, numbers of persons killed, identities of those killed, and other key information do impact the ability to analyse compliance with LOAC norms.").

40. Mignot-Mahdavi, *supra* note 3, at 152.

41. *Id. at* 141; *see also* Alston, *supra* note 30, at 28 (presenting the view that targeting should never be based on "suspicious conduct" and "unverifiable" information).

42. *See* Peter Bergen & Katherine Tiedemann, *The Year of the Drone: An Analysis of US Drone Strikes in Pakistan, 2004–2010*, Foreign Policy (Apr. 23, 2010 9:39pm), https://foreignpolicy.com/2010/04/23/the-year-of-the-drone/ (concluding that many of the strikes in Pakistan were not aimed at specific, known individuals, as they were signature strikes).

Yemen, which resulted in the deaths of 41 civilians (including women and children) in a "signature strike" operation. The former Legal Adviser of the U.S. Department of State Harold Koh legitimatized the strikes by stating that the operations were "[consistent] with the law of wars" including the "principle of distinction."[43] However, there are issues with this justification; if the legal community were to accept this conclusion, there could only be one of two specific outcomes that can be drawn from the Legal Adviser's re-statement: (i) the current permissive CCF intentionally widens the principle of distinction enough for the targeting of civilians under this flexible interpretation of distinction, or (ii) the current form of CCF is ineffective and flawed in determining who qualifies as a legitimate target for signature strikes. While both outcomes pose significant challenges to IHL, this commentary hopes to elucidate that the CCF has disconcertingly evolved in line with the former conclusion, by utilizing the following case studies.

Regarding the strike of Anwar al-Awlaki, the U.S. justified its signature strike by asserting that he was an "imminent threat."[44] However, scholars contend that he did not meet the standard to be considered a 'direct participant in hostilities' at the time of the strike. Jaffer's work posits that "an individual's

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43. Harold Hongju Koh, The Obama Administration and International Law, Testimony before the Senate Committee on Foreign Relations (Mar. 11, 2010).

44. Alston, *supra* note 30 at 15 (referencing "the more permissive view that more accurately reflects State practice and the weight of scholarship, self-defence also includes the right to use force against a real and imminent threat."); *see also* Scahill, *supra* note 38, (in the section 'Strikes often kill many more than the intended target', Schill comments that "during one dive month period of the operation, according to the document, nearly 90 percent of the people killed in airstrikes were not the intended targets."); *see* Stig Abell, *Kill Lists: Clive Stafford Smith on state-sponsored assassination.*, TIMES LITERARY SUPPLEMENT, no. 5961 (June 30, 2017), https://luna.gale.com/periodical (asserting that "moral certainty around 'kill lists' is spreading and growing . . . people killed without due process, in the name of all of us."); D. Parvaz, *Journalists allege threat of drone execution by US*, ALJAZEERA (Apr. 2, 2017), https://www.aljazeera.com/news/2017/4/2/journalists-allege-threat-of-drone-execution-by-us (noting "[t]he complaint filed on Thursday stated: 'Neither Zaidan nor Kareem pose a continuing, imminent threat to US persons or national security. Neither Zaidan nor Kareem is a member or supporter of any terrorist group. Inclusion of Zaidan and Kareem on the kill list under these circumstance[s] was arbitrary and capricious, and an abuse of discretion.").

senior operational leader"[45] of Al-Qaeda or an associated force would be considered a "hostile, imminent force,"; compare this to the legal reasoning the U.S. relied on when targeting a U.S. citizen, who was also a senior operational leader, as Chesney[46] agrees with. From this, a conclusion is drawn that an individual's involvement in "planning, authorizing, or preparing for terrorist attacks"[47] would justify a targeted killing of that individual, thus meeting the 'lasting integration' criteria. This warped material element of "suspicious gathering" as an indicator of 'membership' in terrorist groups is seen once again in the 2015 signature strikes on Adam Gadahn and Ahmed Farouq in the Pakistan Drone Strikes. Here, targeted drone personality strikes were justified once again, on the basis that both figures provide a posteriori to be "important Al Qaeda Figures," demonstrating again the role of "suspicious gathering" and membership within the CCF framework.

This commentary argues that the CCF widens the principle of distinction by anchoring seemingly harmless representations of behavior, such as "suspicious gathering" with "membership" of a specific group. The CCF can target civilians methodically and by justifying its legality under the color of international law. Complex state narratives based on the 'admixture' justifications of warfare are not flawed by coincidence. Instead, this contemporary framework is a deliberate and meticulously crafted legal exercise that allows for an intentional widening of the scope of who is classified as combatants against the principle of distinction in *jus in bello*. The current practice promotes an administrative legal policy that defeats the protection that the principle supposedly guarantees, through the curation of sophisticated legal narratives under customary law, which allows for violations of the principle of distinction 'invisible' to the public and academic gaze.

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45. *See* JAMEEL JAFFER, THE DRONE MEMOS: TARGETED KILLING, SECRECY, AND THE LAW 86–89 (The New Press 2016) (quoting Memorandum from the U.S. Dept. of Just. Off. of Legal Couns. to the U.S. Att'y Gen.).

46. *See* Robert Chesney, *Who May be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, *in* 13 Y.B. OF INT'L HUMANITARIAN L. 3, 3–60 (2010) (explaining that the U.S. government's categorization of al-Awlaki as an imminent threat would extend so far as to encompass those traveling with him to either meet the same criterion, or would be part of a suspicious gathering).

47. *Id.*