



KU LEUVEN
FACULTY OF LAW
Academic year 2013-2014

RISE OF THE DRONES
A study on the legality of drone targeted killings
of suspected terrorists.

Promoter: Prof. Mr. K. LEMMENS
Co-promoter: K. DE MEESTER

Master's Thesis submitted by
Olivia HERMAN
at the final examination for the degree of
MASTER OF LAWS



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"What was reasonable on the morning of September 11, 2001
was different than what was reasonable in the afternoon."

Michael Hayden,

Principal at Chertoff Group and Former Director of the NSA and CIA

www.cnbc.com/id/100854854.

SYNOPSIS

Armed drones as means of warfare have raised legal, moral, philosophical, and political debates regarding its use. They are changing the way wars are being fought and take shape. Drones are increasingly being used to conduct targeted killings of suspected terrorists. This practice raises a lot of legal concerns. Not only whether the States conducting these targeting killings are doing so in compliance with international human rights and humanitarian law, but moreover how certain key principles of international law should be interpreted and applied. There has always existed disagreement on certain key legal concepts, but the use of drones has made the need to reach an international consensus on these issues more pressing. This can, for example, be shown by the recent presentation by Ben Emmerson, the U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, of his annual report during the 2014 March session of the United Nations Human Rights Council. He stressed the need for a consensus within the international community on certain key concepts within international human rights and humanitarian law, with as ultimate goal sparing civilian casualties. This was reinforced by a resolution on armed drones which was adopted during the same Human Rights Council session. This Master Thesis does not focus on the practice of a particular State. The author tries to draw the lines of the two main legal frameworks that govern drone targeted killings, namely international human rights and humanitarian law from the perspective of the right to life. The author tries to determine when the two legal frameworks apply to drone strikes, if there is an interaction between both, and which legal requirements need to be fulfilled for a drone strike to be legal. The author also discusses the rising idea of an armed conflict between a State and a terrorist group and the practice of targeting on the basis of 'suspicion'. A lot of legal ambiguities, uncertainties, and controversies will be shown and the author will try to provide an answer for these issues. However, when considering the application of these legal norms and principles to a case assessment another issue arises, that is the issue of lack of transparency by the States who are conducting these drone targeted killings of suspected terrorists.

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CHAPTER OUTLINE

ABBREVIATIONS	iv
CHAPTER 1 INTRODUCTION	1
1.1 Background	1
1.2 Statement of the Problem	4
1.3 Research Questions and Objectives	4
1.4 Methodology and Significance of the Research	6
1.5 Definition of Terms	6
1.5.1 Drone	6
1.5.2 Targeted Killing	7
1.5.3 Terrorism	8
CHAPTER 2 DRONE TARGETED KILLINGS OF SUSPECTED TERRORISTS	11
2.1 Introduction	11
2.2 The Legality of Drones as a Weapon	14
2.3 The Legality of Drone Targeted Killings of Suspected Terrorists	17
CHAPTER 3 DRONE TARGETING AND THE LAW ENFORCEMENT MODEL	18
3.1 Introduction	18
3.2 The Right to Life	20
3.3 Drone Targeting	23
3.4 Conclusion	26
CHAPTER 4 DRONE TARGETING AND THE ARMED CONFLICT MODEL	27
4.1 Introduction	27
4.2 The Right to Life	32
4.3 Drone Targeting	35
4.3.1 Introduction	35
4.3.2 The Principle of Humanity	36

4.3.3 The Principle of Distinction	37
4.3.3.1 Introduction	37
4.3.3.2 Criteria of Distinction	40
4.3.3.3 Targeting on the Basis of Direct Participation in Hostilities	40
4.3.3.4 Targeting on the Basis of Continuous Combat Function	44
4.3.3.5 Targeting on the Basis of Suspicion	46
4.3.3.6 Drone Targeting of Suspected Terrorists and the Principle of Distinction	48
4.3.4 The Principle of Proportionality	50
4.3.4.1 Introduction	50
4.3.4.2 Drone Targeting of Suspected Terrorists and the Principle of Proportionality	52
4.3.5 Principle of Military Necessity	54
4.4 Conclusion on the Principles of IHL	55
CHAPTER 5 CONCLUSIONS AND RECOMMENDATIONS	58
5.1 Conclusions	58
5.2 Recommendations	60
CHAPTER 6 BIBLIOGRAPHY	62

ABBREVIATIONS

AP.....	Additional Protocol
CIA.....	Central Intelligence Agency
ECHR.....	European Court of Human Rights
GC.....	Geneva Convention
HC.....	Hague Convention
IAC.....	International armed conflict
IACHR.....	Inter-American Commission on Human Rights
ICC.....	International Criminal Court
ICCPR.....	International Covenant on Civil and Political Rights
ICJ.....	International Court of Justice
ICRC.....	International Committee of the Red Cross
ICTR.....	International Criminal Tribunal of Rwanda
ICTY.....	International Criminal Tribunal of the Former Yugoslavia
IHL.....	International Humanitarian Law
IHRL.....	International Human Rights Law
NIAC.....	Non-International armed conflict
U.N.....	United Nations
U.S.....	United States of America

CHAPTER 1

INTRODUCTION

“These preventative strikes, with all the military importance they entail, must be made within the framework of the law. The saying "when the cannons roar, the muses are silent" is well known. A similar idea was expressed by Cicero, who said: "during war, the laws are silent" (*silent enim legis inter arma*). Those sayings are regrettable. They reflect neither the existing law nor the desirable law [...] It is when the cannons roar that we especially need the law [...] Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no "black holes."¹

- Israeli Supreme Court

1.1 Background

1. Means of warfare are evolving rapidly. Currently drones are increasingly used in countering terrorism. Drones are remotely controlled by humans without risk of retaliation. The drone operator responsible for the target selection and for making the decision to use lethal force is located far away from its target. The novel and hi-tech nature of these drones has raised legal, moral, philosophical, and political debates regarding their use.²

2. At present, due to the fight against terrorism, warfare has shifted from armed conflicts between States to armed conflicts between States and non-State actors. This has triggered disputes about the classification of conflicts with non-State actors under International Humanitarian Law (IHL), the status of non-State actors, in particular terrorists, under IHL, the application of IHL and International Human Rights Law (IHRL) with regard to this type of conflict, etc. Prior to 9/11, many of these questions did not arise because traditionally States dealt with terrorists under domestic criminal law. 9/11

¹ Landmark ruling on targeted killings by the Israeli Supreme Court sitting as the High Court of Justice: HCJ, *Pub. Comm. Against Torture in Isr. v. Gov't of Isr.*, No. 769/02 (11 December 2005), para. 61.

² L. R. BLANK, "After 'Top Gun': How Drone Strikes Impact The Law of War", *U. Pa. J. Int'l L.* 2012, Vol. 33, 715-716.

changed all this. A war on terror was proclaimed and certain States saw the advantages of applying the armed conflict model, instead of the enforcement model, to counter-terrorism operations.³ IHL and IHRL have to adapt to these contemporary conflicts. Some argue that IHL cannot be applied to this kind of conflicts.⁴ Others argue that IHL is still relevant, but needs new treaties or protocols.⁵ Finally, there are others that argue that IHL is capable of regulating these new types of conflicts.⁶

3. Suspected terrorists are increasingly targeted with the use of drones. This new technology makes it easier for States to conduct targeted killings instead of using normal fighter planes or boots on the ground. One of the complaints often raised by commentators is that drones make it too easy for States to use force instead of, for example, trying first to apprehend the suspect.⁷

4. IHL and IHRL put limits on weapons that can be used during an armed conflict. In a certain sense, a missile fired from a drone is not much different from any other weapon that is used during armed hostilities. Nonetheless, some commentators suggest that drones are often not used in compliance with IHL and IHRL.⁸ One of the difficulties in assessing the legality of drone strikes is the lack of transparency on the part of States. Special Rapporteur Ben Emmerson noted this by stating that “[t]he single and greatest obstacle to an evaluation of the civilian impact of drone strikes is lack of transparency, which makes it extremely difficult to assess claims of precision targeting objectively.”⁹

³ R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 342-344. See Chapter 3 for the Law Enforcement Model and Chapter 4 for the Armed Conflict Model.

⁴ G. RONA, “International Law Under Fire: Interesting Times For International Humanitarian Law: Challenges from the War on Terror”, *Fletcher F. World Aff.* 2003, Vol. 27, Issue 2, 69-70; R. E. BROOKS, “War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror”, *U. Pa. L. Rev.* 2004, Vol. 153, 706; R. J. DELAHUNTY AND J. C. YOO, “Rewriting the Laws of War for a New Enemy”, *L.A. Times* 1 February 2005, <http://articles.latimes.com/2005/feb/01/opinion/oe-yoo1>.

⁵ M. J. BREGER AND M. D. STERN, “Symposium on Reexamining the Law of War: Introduction to the Symposium on Reexamining the Law of War”, *Cath. U. L. Rev.* 2007, 757; P. WALLSTEN, “Geneva Convention Overhaul Considered”, *L.A. Times* 7 January 2005, <http://articles.latimes.com/2005/jan/07/nation/na-geneva7>.

⁶ L. BLANK AND A. GUIORA, “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflicts in New Warfare”, *Harv. Nat’l Sec. J.* 2010, Vol. 1, 47-48.

⁷ J. D. OHLIN, “Is Jus in Bello in Crisis?”, *JICJ* 2013, 27-28. For further information on the question whether IHL requires the capture of a suspected terrorist under certain circumstances rather than the use of lethal force see Chapter 4, Section 4.2.

⁸ AMNESTY INTERNATIONAL, “Will I be Next? US Drone Strikes in Pakistan”, October 2013, www.amnestyusa.org/sites/default/files/asa330132013en.pdf, 74 p; HUMAN RIGHTS WATCH, “Between a Drone and Al-Qaeda”, 22 October 2013, <http://www.hrw.org/reports/2013/10/22/between-drone-and-al-qaeda-0>, 98 p.

⁹ B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counter-terrorism Operations, *UN Doc. A/68/389* (2013), 11.

So far, States that conduct targeted killings have refused to provide transparency about their targeted killings policies, even though both IHL and IHRL require this.¹⁰

5. One of the reasons why the use of drones has generated significant controversy is that they allegedly make it easier for States 'to kill' and also tempt States to interpret the legal limitations on targeted killings too expansively. There is a great risk of creating a so-called 'Playstation mentality' by operating these drones thousand miles away from the battlefield¹¹ However, drones offer a greater potential of complying with core humanitarian principles, like the principle of distinction and proportionality, because of their capability to provide greater situational awareness. Nonetheless, serious questions have been raised to the great number of civilian casualties that have occurred during drone attacks.¹² It is important to note that these questions relate to the procedures for selecting targets and for deciding to use force, and not to the nature and capabilities of drones themselves.¹³

6. During the 25th session of the Human Rights Council held in Geneva in March 2014, Ben Emmerson, the United Nations (U.N.) Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, presented his latest report on armed drones.¹⁴ Ben Emmerson has been investigating the use of armed drones over the past 14 months.¹⁵ At the end of the Human Rights Council March session, the Council adopted a resolution on armed drones urging States to comply with their obligations under international law. These current events show the concern of the international community on the legality of drone strikes and the need to reach a consensus on some critical legal issues.

¹⁰ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 26.

¹¹ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 21-22.

¹² AMNESTY INTERNATIONAL, "Will I be Next? US Drone Strikes in Pakistan", October 2013, www.amnestyusa.org/sites/default/files/asa330132013en.pdf, 74 p; HUMAN RIGHTS WATCH, "Between a Drone and Al-Qaeda", 22 October 2013, <http://www.hrw.org/reports/2013/10/22/between-drone-and-al-qaeda-0>, 98 p.

¹³ L. R. BLANK, "After 'Top Gun': How Drone Strikes Impact The Law of War", *U. Pa. J. Int'l L.* 2012, Vol. 33, 717.

¹⁴ B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), 20 p.

¹⁵ J. SERLE, "Countries Must Investigate Civilian Drone Deaths Claims, Says UN Investigator Ben Emmerson", *The Bureau of Investigative Journalism* 12 March 2014, www.thebureauinvestigates.com/2014/03/12/countries-must-investigate-civilian-drone-death-claims-says-un-investigator-ben-emmerson/.

1.2 Statement of the Problem

7. The use of drones as a method of conducting targeted killings of suspected terrorists has triggered much debate about the legality of these strikes and the legal framework under which these strikes should be assessed. This debate is taking place not only amongst legal experts but also within the media and civil society all over the world. The reason for this being that this new technology has changed our way of conducting warfare and of determining what an armed conflict is. It has, for example, led to blurring the boundaries of armed conflicts. Increasingly, drones are used to conduct targeted killings outside the scope of an armed conflict. In order to guarantee the rights of people under human rights and humanitarian law it is important to determine the rules that have to be followed when conducting drone strikes.

8. Drones technology is moving forward at a fast pace. The newest kind of weapon being developed, but not yet on the market, is the so-called 'Killer Robot'. This is a fully autonomous robot weapon. Differently from drones, there is no person controlling the 'robot' from a distance. These weapons would be able to select and engage targets without human intervention. The use of drones already raise serious legal and ethical concerns, but these killer robots take the stakes even further. The mistake the international community made with regard to drones was to fail to regulate their use before they began to be employed on an extensive scale. This is what the international community now tries to avoid by agreeing to start international discussions on these killer robots in May 2014 in order to draft a convention and regulate their use before they are developed.¹⁶

1.3 Research Questions and Objectives

9. The author intends to determine the legality of targeted killings of suspected terrorists conducted with the use of drones. The focus is on targeted killings conducted by a State against non-State actors. The author will conduct her research from the perspective of two different models: from a human rights/law enforcement model and from an armed conflict model, more specifically from the perspective of *jus in bello* (law of war), leaving the *jus ad bellum* (right to war) questions aside.

¹⁶ HUMAN RIGHTS WATCH, "UN: Nations Agree to Address 'Killer Robots'", 15 November 2013, www.hrw.org/news/2013/11/15/un-nations-agree-address-killer-robots; For further information on killer robots see the report of Human Rights Watch: "Losing Humanity", 19 November 2012, www.hrw.org/reports/2012/11/19/losing-humanity-0, 49 p.

10. The author intends to conduct her research by addressing the following research questions:

Main research questions:

- Are drones consistent with international law?
- Can drone targeted killings be consistent with international human rights law?
- Can drone targeted killings be consistent with principles of international humanitarian law?
- Is targeting on the basis of suspicion, i.e. alleged membership to a terrorist group, a legitimate targeting criterion?

Subsidiary questions:

- Can international human rights and humanitarian law interrelate?
- How should an armed conflict between a State and a group of non-State actors be defined?
- What is the status of suspected terrorist under international humanitarian law?

11. The objectives of the research are:

- To determine the legality of drone targeted killings of suspected terrorist.
- To outline the existing disputes concerning non-State actors in international humanitarian law.
- To attempt to find answers or at least to come to some conclusions regarding these disputes.
- To show how this new technology impacts the present way of conducting warfare.
- To explore the way international human rights and humanitarian law can interrelate.
- To analyse the rules that govern drone targeting without focusing on the practice of one specific State. However, because of the lack of transparency and lack of information on drone strikes, most of the examples used are about the United States of America's drone policies on which most scholars focus.

- To show the existing legal uncertainty about the interpretation and application of core rules and principles that govern lethal counter-terrorism operations.

1.4 Methodology and Significance of the Research

12. The research is primarily based on literature review. The author also attended several conferences and events concerning drone warfare.

13. The significance of this research lies in providing a legal framework under which the legality of drone targeted killings can be assessed. Two legal frameworks are provided, a human rights framework and an armed conflict one. The author tries to connect these two frameworks and advocates for the application of human rights at all times, also during armed conflicts. The researcher tries to answer the question of legality of drone targeting by focusing on these two different frameworks in which drones are used instead of focusing on the drone technology itself.

14. The researcher will show the existing legal uncertainty regarding core principles and rules that govern lethal counter-terrorism operations that are conducted with the use of drones within the context of asymmetrical warfare. This legal uncertainty endangers the adequate protection of the right to life, as it leaves dangerous latitude for different practices on the part of States.¹⁷

1.5 Definition of Terms

1.5.1 Drone

15. A drone is an aerial vehicle that is unmanned. It can fly autonomously or be piloted remotely and can carry lethal or nonlethal payload.¹⁸ Most drones used in conflict situations carry hell-fire missiles, are remote controlled by a pilot located thousand miles away and fly for hours or days in the sky to detect and keep their target under surveil-

¹⁷ B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), 18, para. 70.

¹⁸ U.S. DEPARTMENT OF DEFENSE, *Dictionary of Military and Associated Terms*, 2001, www.fas.org/irp/doddir/dod/jp1_02-april2010.pdf, 179 and 563.

lance, and eventually conduct a targeted killing. These drones look similar to normal fighter planes.¹⁹

16. There is a long list of definitions and names to describe drones. Remotely piloted weapons, unmanned aerial combat vehicles and unmanned aerial vehicles are only a few examples. Drones are often defined as being ‘unmanned’. This is not entirely correct. They are remotely piloted, meaning that they are controlled from a great distance. In fact, in order to operate a drone more people are needed than for normal fighter planes. In this thesis the term drone will be used, as it is the most commonly used term.²⁰

17. Drones do not only carry lethal payload and are not only used within the context of armed conflicts. Drones with nonlethal payload are used for a variety of civilian purposes, for example, the United States of America (U.S.) uses drones for surveillance of the Mexican border, Costa Rica uses drones to study volcanoes, emergency workers in Japan used a drone to survey the damage at Fukushima, etc.²¹ However, in this thesis the focus will be on armed drones.

1.5.2 Targeted Killing

18. Philip Alston, the Special Rapporteur on extrajudicial, summary or arbitrary executions for the U.N., defines a ‘targeted killing’ as:

“the intentional, premeditated and deliberate use of lethal force by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator”.²²

19. The term ‘targeted killing’ is a recent term that has only come into common usage since 2000, when Israel made public their policy of targeted killings in the occupied Palestinian territories.²³ From the year 2000 on, more legal writing started on this topic.²⁴

¹⁹ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 6.

²⁰ L. R. BLANK, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 677.

²¹ L. GROSSMAN, “Drone Home: The Fight and Spy for America Abroad. But What Happens When Drones Return Home?”, *Time* 11 February 2013, <http://content.time.com/time/magazine/article/0,9171,2135132-1,00.html>, 3-4; L. R. BLANK, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 679.

²² P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 3.

²³ O. BEN-NAFTALI AND K. MICHAELI, “We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings”, *Cornell Int’l L.J.* 2003, Vol. 36, 234-235.

However, the term is still not clearly defined within international law.²⁵ This implies that a certain killing can be considered a ‘targeted killing’ depending on the definition given to the latter. For the purposes of this research, the definition by Philip Alston will be used with a slight modification on the basis of the research questions of this thesis:

“A targeted killing is the intentional, premeditated and deliberate use of lethal force by States or their agents acting under colour of law²⁶ in peace time or armed conflict, against a specific individual who is qualified as a suspected terrorist and who is not in the physical custody of the perpetrator.”

20. It follows from the definition given above that targeted killings can take place in different kinds of contexts with different legal implications. Thus, they can take place in peacetime and during armed conflict, international and non-international. The common element in all these different contexts is that the individual who is targeted is *identified in advance by the perpetrator* and that the perpetrator *intentionally uses lethal force against this individual*. The intentional use of lethal force makes the distinction very clear with regards to lethal force used in law enforcement operations. In these kinds of operations lethal force can only be used if it is necessary to protect life, but killing in itself can never be the goal of the operation.²⁷ The aspect of intentionality has to be understood in the sense that the death of an individual is the goal of the operation, irrespective of the reasons or motives of the targeting.²⁸

1.5.3 Terrorism

21. Currently, there is not an internationally accepted definition of ‘terrorism’. Over the past 80 years, the international community has tried to come to a definition, but so far it has not been able to agree upon one. This indicates the importance of arriving at a general definition of terrorism.

²⁴ R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 29-32.

²⁵ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 4.

²⁶ Even if the targeted killing would be based on national law the question of the legality of this killing under international law remains unanswered.

²⁷ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 4-5.

²⁸ R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 16.

22. In 1996, the U.N. General Assembly established an Ad Hoc Committee to draft a convention on international terrorism.²⁹ The draft preamble condemns “all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed.” Draft article 2 contains a definition of terrorism, stating that an act of terrorism takes place when a person unlawfully and intentionally causes (a) death or serious bodily injury to any person, (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment, (c) damage to property, places, facilities, or systems [...] resulting or likely to result in major economic loss. The purpose of the conduct has to be, by its nature or context, to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act. This means that the act does not have to be motivated by political objectives, it has to be motivated by purposes of intimidation or compulsion. There is still disagreement on exceptions to the definition. The discussion is more based on ideological concerns than substantive ones.³⁰

23. Most recent anti-terrorist conventions do not apply in times of armed conflict. Examples are the 1997 International Convention for the Suppression of Terrorist Bombings³¹ and the 2002 EU Framework Decision on Combating Terrorism³². The U.N. draft convention is based on the 1997 Terrorist Bombings Convention, but there is a remaining dispute about the application during an armed conflict and to armed forces.³³

24. Terrorism aims at the destruction of human rights. It has especially a direct impact on certain rights, namely the right to life, liberty and physical integrity. States have the obligation to protect individuals within their jurisdiction against terrorist acts. This obligation is part of States’ obligations to ensure and protect the right to life and security. States have the duty to take counter-terrorist measures. However, challenges arise con-

²⁹ Measures to Eliminate International Terrorism, Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, www.un.org/law/terrorism/.

³⁰ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Human Rights, Terrorism and Counterterrorism, Fact Sheet No. 32, www.ohchr.org/Documents/Publications/Factsheet32EN.pdf, 6; B. SAUL, “Attempts to Define ‘Terrorism’ in International Law”, *NILR* 2005, Vol. 52, Issue 1, 76-77 and 82-83.

³¹ International Convention for the Suppression of Terrorist Bombings of 12 January 1998, www.un.org/en/sc/ctc/docs/conventions/Conv11.pdf.

³² THE COUNCIL OF THE EUROPEAN UNION, Council Framework Decision of 13 June 2002 on Combating Terrorism, 2002/475/JHA, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002F0475:20081209:EN:PDF>, 8 p.

³³ B. SAUL, “Attempts to Define ‘Terrorism’ in International Law”, *NILR* 2005, Vol. 52, Issue 1, 78-79.

cerning the application of these measures. Measures taken by States in order to combat terrorism must themselves comply with international law, in particular international human rights law.³⁴

25. Acts of terrorism are specifically prohibited within IHL, both in international armed conflicts (IAC) as in non-international ones (NIAC).³⁵ These acts are in particular attacks against civilians, indiscriminate acts³⁶ and acts which have the purpose of spreading terror among the civilian population.³⁷

26. The Special Tribunal for Lebanon, established to try those responsible for the 2005 bombing that killed, among others, the former Lebanese Prime Minister Rafik Hariri, is the first international court with jurisdiction over the crime of terrorism.³⁸ The interlocutory decision of the Appeals Chamber of 16 February 2011³⁹ is considered a landmark ruling with regard to the definition of terrorism. The Tribunal stated that there is a general *opinion iuris* and state practice that have led to the emergence of a widely accepted definition of terrorism, at least in times of peace.⁴⁰ The Tribunal held that the customary rule requires three elements: the perpetration or threatening of a criminal act, the intent to spread fear among the population or directly or indirectly coerce a national or international authority to take some action or to refrain from taking it, and the act has to involve a transnational element.⁴¹ Time will tell if this decision will be followed.

³⁴ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Human Rights, Terrorism and Counterterrorism, Fact Sheet No. 32, www.ohchr.org/Documents/Publications/Factsheet32EN.pdf, 7-9.

³⁵ Art. 33 GC IV; Art. 51 (2) and 13 (2) AP I; Art. 4 (2) AP II.

³⁶ Art. 51 (4) and (5) AP I; Rules 11-14 of J. HENCHAERTS AND L. DOSWALD-BECK, *Customary International Humanitarian Law: Volume I: Rules*, Cambridge, Cambridge University Press, 2005, 37-50.

³⁷ Art. 51 (2) AP I; Art. 13 (2) AP II; Rules 1-2 of J. HENCHAERTS AND L. DOSWALD-BECK, *Customary International Humanitarian Law: Volume I: Rules*, Cambridge, Cambridge University Press, 2005, 3-11.

³⁸ E. VAN SLIEDREGT AND L. VAN DEN HERIK, "Introduction: The STL Interlocutory Decision on the Definition of Terrorism – Judicial Ingenuity or Radicalism?", *LJIL* 2011, Vol. 24, Issue 3, 651.

³⁹ Special Tribunal for Lebanon, Case No. STL-11-01/1 (16 February 2011).

⁴⁰ Special Tribunal for Lebanon, Case No. STL-11-01/1 (16 February 2011), para. 83.

⁴¹ Special Tribunal for Lebanon, Case No. STL-11-01/1 (16 February 2011), para. 85; M. J. VENTURA, "Terrorism According to the STL's Interlocutory Decision on the Applicable Law", *JICJ* 2011, Vol. 9, 1024-1026.

CHAPTER 2

DRONE TARGETED KILLINGS OF SUSPECTED TERRORISTS

2.1 Introduction

27. Targeted killings have been conducted throughout history. Normally States would deny the existence of such a policy and conduct it in secrecy. This has recently changed. Some States have openly admitted to having a policy on targeted killings that allows these kinds of killings.⁴² The two main countries that have admitted to engaging in targeted killings are Israel⁴³ and the U.S. The U.S. made public its engagement in targeted killings in 2002. Qaed Salim Sinan al-Harethi, a suspected member of Al Qaeda, was targeted in Yemen by the U.S. Central Intelligence Agency (CIA) with the use of a drone. He was put by the Bush administration on a list of targets with high value that had to be eliminated, by death or capture.⁴⁴

28. Reportedly, after 9/11 the U.S. adopted a secret policy on targeted killings.⁴⁵ After 9/11, President Bush started broadening the list of suspected terrorists that could be targeted if their capture was impractical.⁴⁶ For example, on the 10th of August 2009 a Senate Foreign Relations Committee Report made it clear that even drug lords who were suspected of financing the Taliban were put on the list as possible targets. The report stated that “[t]he military places no restrictions on the use of force with these selected targets, which means they can be killed or captured on the battlefield [. . .] standards for getting on the list require two verifiable human sources and substantial additional evidence.”⁴⁷

⁴² P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 5.

⁴³ For further information see: O. BEN-NAFTALI AND K. MICHAELI, “We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings”, *Cornell Int’l L.J.* 2003, Vol. 36, 234-292.

⁴⁴ G. D. SOLIS, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, Cambridge University Press, 2010, 539-540.

⁴⁵ G. MILLER, “Feinstein Comment on U.S. Drones Likely to Embarrass Pakistan”, *L.A. Times* 13 February 2009, <http://articles.latimes.com/2009/feb/13/world/fg-uspakistan13>.

⁴⁶ G. D. SOLIS, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, Cambridge University Press, 2010, 541; J. RISEN AND D. JOHNSTON, “Bush Has Widened Authority of C.I.A. to Kill Terrorists”, *N.Y. Times* 15 December 2002, www.nytimes.com/2002/12/15/world/threats-responses-hunt-for-al-qaeda-bush-has-widened-authority-cia-kill.html.

⁴⁷ U.S. COMMITTEE ON FOREIGN RELATIONS, *Afghanistan’s Narco War: Breaking the Link Between Drug Traffickers and Insurgents*, 111th Congress, First Session, S. Prt. 111-29, 2009, 15-16.

29. Targeted killings have become tolerated to a great extent in the U.S. Their use has increasingly been expanding over the years.⁴⁸ During the Obama administration the number of targeted killings conducted with the use of drones peaked in 2010 in Pakistan⁴⁹ and in 2012 in Yemen. According to an article in the *New York Times* of May 2013, drone strikes have been declining ever since.⁵⁰ However, Special Rapporteur Ben Emmerson pointed out, in his latest report on armed drones to the Human Rights Council in March 2014, that the escalation in reported drone strikes in Yemen is cause for concern. He also highlighted that there was a three-fold increase in civilian deaths from drone strikes in Afghanistan last year.⁵¹

30. The majority of the targeted killings conducted with the use of drones by the U.S. have happened within an armed conflict framework. But the U.S. has also conducted many drone strikes outside the active battlefield. This has generated controversy and has created great legal challenges for international law.⁵²

31. The call for transparency with regard to these targeted killings and the U.S. drone policy has been increasing over the years. Efforts are being made by the White House to answer these calls, but much remains secret. A most recent notable effort is the speech that President Obama gave in May 2013 at the National Defense University.⁵³ In this speech, Obama discussed ‘a comprehensive counter-terrorist strategy’ and gave a justification for the targeted killings with the use of drones: “In some of these places – such as parts of Somalia and Yemen – the state has only the most tenuous reach into the territory. In other cases, the state lacks the capacity or will to take action. It is also not possible for America to simply deploy a team of Special Forces to capture every terrorist. And

⁴⁸ G. D. SOLIS, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, Cambridge University Press, 2010, 541.

⁴⁹ B. ROGGIO AND A. MAYER, Charting the Data for U.S. Airstrikes in Pakistan 2004-2014, *The Long War Journal*, www.longwarjournal.org/pakistan-strikes.php.

⁵⁰ S. SHANE, “Debate Aside, Number of Drone Strikes Drops Sharply”, *N.Y. Times* 21 May 2013, www.nytimes.com/2013/05/22/us/debate-aside-drone-strikes-drop-sharply.html?_r=0.

⁵¹ B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), 6-7; J. SERLE, “Countries Must Investigate Civilian Drone Deaths Claims, Says UN Investigator Ben Emmerson”, *The Bureau of Investigative Journalism* 12 March 2014, www.thebureauinvestigates.com/2014/03/12/countries-must-investigate-civilian-drone-death-claims-says-un-investigator-ben-emmerson/.

⁵² B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), 17, para. 59.

⁵³ Full text of the speech: www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama.

even when such an approach may be possible, there are places where it would pose profound risks to our troops and local civilians— where a terrorist compound cannot be breached without triggering a firefight with surrounding tribal communities that pose no threat to us, or when putting U.S. boots on the ground may trigger a major international crisis.” On the other hand, he admitted that these operations cannot be the norm and he also addressed certain legal questions that arise from these kinds of operations, for example who can be targeted, or whether these strikes are legal under U.S. and international law. Along with the speech, a fact sheet⁵⁴ was released which summarized a classified Presidential Policy Guidance on targeted killings that President Obama had signed a day earlier. From the speech and the factsheet it seems that that the U.S. government applies the higher threshold of IHRL instead of the threshold of IHL for the use of lethal force. Although this could indicate that there is a shift from an armed conflict model⁵⁵ to the enforcement model⁵⁶, the U.S. administration spoke in terms of policy guidelines and not in terms of adhering to human rights law. Consequently, one could dispute the value of these guidelines. Two other important side notes are, first, that the administration refused to release the Presidential Policy Guidance, which is the document on which the fact sheet was based. Second, that it is not clear which policies discussed in the speech and in the factsheet had already been implemented and which will be implemented in the future.⁵⁷ All of this shows that the majority of questions being raised about the targeted killing and drone policy of the U.S. are not yet answered.

32. Governments like the United Kingdom and Russia have also expressly or implicitly admitted to being engaged in targeted killings in order to fight terrorism. This evolution gives the method of targeted killing, as a counter-terrorist measure, more legitimacy, or some might say *seems* to give it more legitimacy.⁵⁸

⁵⁴ THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY, Fact Sheet: US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, 23 May 2013, www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism.

⁵⁵ See Chapter 3.

⁵⁶ See Chapter 4.

⁵⁷ HUMAN RIGHTS WATCH, “Between a Drone and Al-Qaeda”, 22 October 2013, <http://www.hrw.org/reports/2013/10/22/between-drone-and-al-qaeda-0>, 90.

⁵⁸ G.D. SOLIS, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, Cambridge University Press, 2010, 541.

33. A recent notable event was the adoption of a resolution on armed drones by the Human Rights Council during its 25th session held in March 2014.⁵⁹ The resolution urges States to ensure that the use of armed drones complies with international law, in particular the principles of precaution, distinction, and proportionality. The text of the resolution also expresses concern at civilian casualties from the use of drones. The resolution was adopted by a vote of 27 States in favour to six against and 47 abstentions. The U.S., the United Kingdom and France voted against.⁶⁰

2.2 The Legality of Drones as a Weapon

“From time to time in the history of international law, various weapons have been thought to be so cruel as to be beyond the pale of human tolerance. I think, cluster bombs and land mines are the most recent examples. It may be – I am not expressing a view - that unmanned drones that fall on a house full of civilians is a weapon the international community should decide not be used.”⁶¹

- Lord Bingham

34. U.N. Special Rapporteur Philip Alston stated in his 2010 report to the Human Rights Council that “a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.”⁶² It is correct to state that the question of legality of drone killings does not stem from *a drone as a weapon* or its weapon system. The issues that are being raised are not drone-specific, but rather focus on the way drones are being used.⁶³

35. States are not free in their choice of means and methods of warfare.⁶⁴ International law prohibits two categories of weapons: those that cause unnecessary suffering and

⁵⁹ HUMAN RIGHTS COUNCIL, *UN Doc. A/HRC/25/L.32* (2014), www.un.org/ga/search/view_doc.asp?symbol=A/HRC/25/L.32.

⁶⁰ S. NEBEHAY, “U.N. Rights Forum Calls for Use of Armed Drones to Comply with Law”, *Reuters* 28 March 2014, www.reuters.com/article/2014/03/28/us-un-rights-drones-idUSBREA2R0WW20140328.

⁶¹ Interview with British Lord Bingham by the British Institute of International and Comparative Law: M. WARDROP, “Unmanned Drones could be Banned, Says Senior Judge”, *The Telegraph* 6 July 2009, www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html.

⁶² P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 24, para. 79.

⁶³ L. R. BLANK, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 679.

⁶⁴ Art. 22 Hague Convention IV.

indiscriminate weapons.⁶⁵ The International Court of Justice (ICJ) found in its Nuclear Weapons Opinion that these two limitations were the ‘cardinal principles’ of IHL and binding on all States as customary law.⁶⁶ According to the prohibition, weapons that cause unnecessary suffering are unlawful. The ICJ explained that “it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice in the weapons they use.”⁶⁷ Two factors will be taken into account when assessing if a weapon causes unnecessary suffering. First, it will depend on whether there is an alternative weapon available that causes less injury or suffering. Second, the effects produced by this alternative weapon have to be sufficiently effective in order to neutralize the enemy.⁶⁸ The prohibition bans also indiscriminate weapons⁶⁹, meaning weapons that are “incapable of being targeted at a military objective only, even if collateral harm occurs.”⁷⁰ Parties to a conflict may not “use weapons that are incapable of distinguishing between civilians and military targets.”⁷¹ It is important to stress that any weapon can be used in an indiscriminate way, but such illegal use does not make the weapon in itself unlawful. A State must also only foresee the normal or expected use of a drone and not all possible misuses.⁷²

36. Drones fire missiles and other similar munitions. They are not explicitly banned by any international agreement.⁷³ The missiles fired by drones can easily be aimed at only military targets. This is because of their ability to survey targets for days before conducting a killing. The drone operators can in this way choose the time and place to target

⁶⁵ HPCR, *HPCR Manual on International Law Applicable to Air and missile Warfare*, Program on Humanitarian Policy and Conflict Research, Harvard University, 2009, www.ihlresearch.org/amw/manual/, 7-9; M. HAGGER AND T. MCCORMACK, “Regulating the Use of Unmanned Combat Vehicles: Are General Principles of International Humanitarian Law Sufficient”, *JLIS* 2011, Vol. 21, Issue 2, 80.

⁶⁶ S. WUSCHKA, “Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem”, *GoJIL* 2011, Vol. 3, Issue 3, 894-895.

⁶⁷ ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, paras. 74-87.

⁶⁸ L. R. BLANK, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 687; Y. DINSTEIN, *The Conduct Of Hostilities Under The Law Of International Armed Conflict*, Cambridge, Cambridge University Press, 2004, 60.

⁶⁹ Art. 51 (4) AP I.

⁷⁰ ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, paras. 588-589.

⁷¹ ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, para. 257.

⁷² L. R. BLANK, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 683-684 and 687.

⁷³ M. HAGGER AND T. MCCORMACK, “Regulating the Use of Unmanned Combat Vehicles: Are General Principles of International Humanitarian Law Sufficient”, *JLIS* 2011, Vol. 21, Issue 2, 84.

the individual and limit the civilian casualties.⁷⁴ Even though drones have greater surveillance capability and precision than other weapons, a fact that should enable them to prevent civilian casualties more easily⁷⁵, this doesn't always seem to be the case.⁷⁶ According to Philip Alston, it all depends on the human intelligence upon which the decision is based. His mission to Afghanistan made it clear that too often targeted killings were based on faulty intelligence and that international forces were too often uninformed about local practices, etc. The fact that drone operators are located thousand miles away may also be a greater human intelligence disadvantage.⁷⁷

37. Drones make it possible to conduct killings without putting one's own forces at risk. Great concerns have been expressed as this characteristic will tempt policy makers and State's forces to interpret more broadly the legal limitations on who can be targeted and under which circumstances.⁷⁸ This is also reinforced by the fact that operators are located thousands miles away from the battlefield and conduct killings through computer screens, creating the risk of developing the so-called 'Playstation mentality'. All of this makes drone killings problematic. It is necessary to analyse their lawful application and to clearly establish criteria that would determine under which conditions drone targeted killings can be lawfully conducted.⁷⁹

38. In concluding it can be said that armed drones are by nature neither discriminatory nor do they cause unnecessary suffering.⁸⁰ It is only specific drone strikes that can raise legal issues.⁸¹ Thus, the legal analysis in this thesis will not be focusing on the legality of

⁷⁴ L. R. BLANK, "After 'Top Gun': How Drone Strikes Impact The Law of War", *U. Pa. J. Int'l L.* 2012, Vol. 33, 687.

⁷⁵ S. WUSCHKA, "Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem", *GoJIL* 2011, Vol. 3, Issue 3, 896.

⁷⁶ See for example: HUMAN RIGHTS WATCH, "A Wedding That Became a Funeral", 20 February 2014, www.hrw.org/reports/2014/02/19/wedding-became-funeral-0, 28 p; AMNESTY INTERNATIONAL, "Will I be Next? US Drone Strikes in Pakistan", October 2013, www.amnestyusa.org/sites/default/files/asa330132013en.pdf, 74 p.

⁷⁷ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 24-25, paras. 81-83.

⁷⁸ M. E. O'CONNELL, "Seductive Drones: Learning from a Decade of Lethal Operations", *JLIS* 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912635, 27 p. (she argues that drones have made the use of force more likely due to lower political and psychological barriers).

⁷⁹ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 24, paras. 80 and 84.

⁸⁰ M. HAGGER AND T. MCCORMACK, "Regulating the Use of Unmanned Combat Vehicles: Are General Principles of International Humanitarian Law Sufficient", *JLIS* 2011, Vol. 21, Issue 2, 86.

⁸¹ S. WUSCHKA, "Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem", *GoJIL* 2011, Vol. 3, Issue 3, 897.

drones as a weapon system, but rather on the conditions and circumstances under which drone targeted killings can be conducted.⁸²

2.3 The Legality of Drone Targeted Killings of Suspected Terrorists

39. The legality of a targeted killing of a suspected terrorist depends on the context in which it is conducted, i.e. during peacetime or an armed conflict. The context will determine which legal framework applies. The conditions under which lethal force can be used and the way in which the right to life is being dealt with differ within each legal framework.

40. There are different possibilities. First, (i) the legality of targeted killings can be assessed under the law enforcement model. This would mean that the use of deadly force would be assessed under human rights law. A second option (ii) is to assess it within the armed conflict model. In this model international humanitarian law would apply. A third possibility (iii) would be to use a framework where human rights law and international humanitarian law would both apply.⁸³ In this thesis the three different possibilities will be explored.

41. It is important to note that, in order to determine the legality of targeted killing a case-by-case evaluation is always needed. What is discussed in this thesis is only a general legal assessment. It is therefore possible that the analysis and argumentation used do not apply to all situations of terrorism.

⁸² A. C. ORR, "Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law", *Cornell Int'l L.J.* 2011, Vol. 44, 746; R. J. VOGEL, "Droning On: Controversy Surrounding Drone Warfare Is Not Really About Drones", *Brown J. World Aff.* 2013, Vol. 19, Issue 2, 111-112; S. WUSCHKA, "Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem", *GoJIL* 2011, Vol. 3, Issue 3, 905.

⁸³ L. MAY, "Targeted Killings and Proportionality in Law: Two Models", *JICJ* 2013, 47-48.

CHAPTER 3

DRONE TARGETING AND THE LAW ENFORCEMENT MODEL

3.1 Introduction

42. ‘The law enforcement model’ refers to the human rights standards that apply during peacetime.⁸⁴ Peacetime does not necessarily mean that there is peace. There can be internal tensions and disturbances, but the level of violence is not enough to constitute an armed conflict.⁸⁵

43. Traditionally IHRL and IHL apply within different situations. The latter applies during an armed conflict and the former in peacetime. This traditional distinction has been the focus of much debate.

44. The applicability of IHRL in armed conflicts is now a well-established principle of international law.⁸⁶ Recent international instruments take both IHRL and IHL into account and no longer make the traditional distinction.⁸⁷ The interplay between both is slowly being tested in practice. State practice shows that most States apply IHRL during an armed conflict. The U.S.⁸⁸ and Israel have long been skeptical about this issue.⁸⁹ In an advisory opinion on *the Israeli Wall case* of 2004, the International Court of Justice stat-

⁸⁴ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 10.

⁸⁵ R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 407.

⁸⁶ C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 9, para. 40; ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, paras. 24-25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, paras. 104-106; F. J. HAMPSON, “Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law”, *Int’l L. Stud. Ser. US Naval War Col.* 2011, Vol. 87, 188.

⁸⁷ C. DROEGE, “Elective Affinities? Human Rights and Humanitarian Law”, *Int’l Rev. of the Red Cross* 2008, Vol. 90, No. 871, 505. For Example: Art. 38 Convention on the Rights of the Child of 20 November 1989; Rome Statute of the International Criminal Court; The 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 adopted by GA Res. 61/106, *UN Doc. A/RES/61/106* (2006).

⁸⁸ J. D. OHLIN, “Is Jus in Bello in Crisis?”, *JICJ* 2013, 34-35.

⁸⁹ F. J. HAMPSON, “The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body”, *Int’l Rev. Of the red Cross* 2008, Vol. 90, No. 871, 550.

ed that “The protection offered by human rights conventions does not cease in case of armed conflict...”.⁹⁰

45. In general the interplay of both regimes functions according to the complementarity approach⁹¹ and, if necessary, according to the *lex specialis*⁹² principle.⁹³ In situations of conduct of hostilities IHRL will be most of the time the *lex specialis*.⁹⁴ However, there is disagreement between legal experts about how both regimes can interrelate when they are applied at the same time.⁹⁵ Marco Sassòli, for example, argues that the more detailed rule has to be applied depending on the situation and the problem that is addressed.⁹⁶ There is not only disagreement between experts but also between the International Court of Justice and the various human rights courts. The International Court of Justice stated in *the Wall case* that certain rights are exclusively matters of IHL, others of IHRL, and others of both branches of law.⁹⁷ In the latter situation, IHRL will function as *lex specialis* when it is more detailed and precise. The European Court of Human Rights (ECHR) has a dissenting opinion. The Court simply applies the European Convention on Human Rights. In the *Al-Skeini* and *Al-Jedda cases*, for example, the Court made no reference to IHL.⁹⁸ In turn, The Inter-American Court of Human Rights (IACHR) stated in the Third Report on the Human Rights Situation in Colombia that “the Commission has found it necessary at times either to directly apply rules of international humanitarian law, i.e. the law of armed conflict, or to inform its interpretations of relevant provisions

⁹⁰ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, para. 106; A. ORAKHELASHVILI, “The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?”, *EJIL* 2008, Vol. 19, 163.

⁹¹ ‘Complementarity’ meaning: “human rights and humanitarian law do not contradict each other but, being based on the same principles and values, can influence and reinforce each other mutually. In this sense, complementarity reflects a method of interpretation”, (cf. Art. 31 (3) (c) Vienna Convention on the Law of Treaties), C. DROEGE, “Elective Affinities? Human Rights and Humanitarian Law”, *Int’l Rev. of the Red Cross* 2008, Vol. 90, No. 871, 521; An example of application: ICTY, *Prosecutor v. Kunarac et al*, Case No. IT-96-23-T (22 February 2001), para. 467.

⁹² ICTY, *Prosecutor v. Kunarac et al*, Case No. IT-96-23-T (22 February 2001), para. 471.

⁹³ See following articles for different methods of interaction between IHL and IHRL with regard to the right to life: A. ORAKHELASHVILI, “The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?”, *EJIL* 2008, Vol. 19, 168-174; O. A. HATHAWAY, R. CROTOF, P. LEVITZ AND H. NIX, “Which Law Governs During Armed Conflict – The Relationship between International Humanitarian Law and Human Rights Law”, *Minn. L. Rev.* 2012, Vol. 96, Issue 6, 1883-1943.

⁹⁴ C. DROEGE, “The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”, *Isr. L. Rev.* 2007, Vol. 40, No. 2, 310-355.

⁹⁵ J. D. OHLIN, “Is Jus in Bello in Crisis?”, *JICJ* 2013, 32-34.

⁹⁶ M. SASSÒLI, *International Humanitarian Law and International Human Rights Law*, Oxford, Oxford University Press, 2011, 70.

⁹⁷ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, para. 106.

⁹⁸ ECHR, *Al-Jedda v. The United Kingdom*, 2011; ECHR, *Al-Skeini and others v. The United Kingdom*, 2011.

of the American Convention by reference to these rules.”⁹⁹ This means that the Court applies IHL as *lex specialis* during an armed conflict. Lastly, the U.N. Human Rights Committee stated that “[T]he more effective the control over persons or territory, the more applicable human rights will become.”¹⁰⁰

46. In drawing a good conclusion from the debate, Cordula Droege states that “there is today no question that human rights law comes to complement humanitarian law in situations of armed conflict [...] *How* human rights and humanitarian law can apply coherently in situations of armed conflict is still a matter of discussion.”¹⁰¹

47. In this chapter the legality of drone targeted killings will be examined in the light of international human rights norms. Targeted killings have an effect on the right to life. This chapter will therefore explore the scope of the right to life and whether drone targeted killings violate this right.

3.2 The Right to Life

48. The right to life, which can be found in different international,¹⁰² regional¹⁰³ and national¹⁰⁴ instruments, is considered ‘the supreme human right’.¹⁰⁵ The greatest protection of the right to life can be found within IHRL. The IHRL framework forms the default legal regime, which determines when exceptions to the right to life are possible.¹⁰⁶

49. The right to life is based on the concept of human dignity, which is seen as the core concept of human rights. It is also seen as the right from which all human rights

⁹⁹ IACHR, Third Report on the Human Rights Situation in Colombia, *IACHR Doc. OEA/Ser.L/V/II.102 Doc. 9 Rev. 1* (26 February 1999), Chapter IV, para. 8.

¹⁰⁰ OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, Annual Report: Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict, *UN Doc. A/HRC/11/31* (2009), para. 14.

¹⁰¹ C. DROEGE, “Elective Affinities? Human Rights and Humanitarian Law”, *Int’l Rev. of the Red Cross* 2008, Vol. 90, No. 871, 501-502.

¹⁰² Art. 3 Universal Declaration of Human Rights; Art. 6 International Covenant on Civil and Political Rights.

¹⁰³ Art. 4 African Charter on Human and Peoples’ Rights; Art. 4 American Convention on Human Rights; Art. 2 Charter of Fundamental Rights of The European Union.

¹⁰⁴ The right to life can be found in almost all constitutions of every civilized nation.

¹⁰⁵ HUMAN RIGHTS COMMITTEE, General Comment No. 6 on The Right to Life, *UN Doc. HRI/GEN/1/Rev.6* (1982).

¹⁰⁶ C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 6, para. 22.

spring.¹⁰⁷ Without the right to life all other rights are void. It is also considered a rule of customary international law.¹⁰⁸ Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), to which almost every State is a party, suggests this by using the words ‘inherent right to life’. It is less certain whether the right to life is a rule of *jus cogens*.¹⁰⁹ It is also considered as a general principle of international law.¹¹⁰ Most human rights treaties include a provision that allows the derogation of certain human rights during armed conflicts or public emergencies.¹¹¹ However, under most treaties the right to life is considered a non-derogable right.¹¹² Thus, this right is considered to be a fundamental right that is protected in times of peace and war.

50. Article 6 (1) of the ICCPR states, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The keyword within this article is ‘arbitrary’. Arbitrary does not only refer to a deprivation of life that goes against the law. It also includes elements of inappropriateness, injustice and lack of predictability. IHRL requires also that an individual is allowed due process before his/her right to life is interfered with. With regard to drone targeting this means that, in order for drone targeted killings to be lawful, they should be appropriate, just and predictable, and respect due process.¹¹³ The element of arbitrariness can also be found in the American Convention on Human Rights and the African Charter of Human and People’s Rights.¹¹⁴ The European Convention for the Protection of Human Rights and Fundamental Freedoms is formulated differently. Article 2 (1) states that no one shall be deprived of his life intentionally. However, article 2 (2) makes an exception to this general rule by stating that the deprivation of life is lawful if the use of force is abso-

¹⁰⁷ D. MOECKLI, S. SHAH, S. SIVAKUMARAN AND D. HARRIS, *International Human Rights Law*, Oxford, Oxford University Press, 2010, 220; R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 47-48.

¹⁰⁸ D. KRETZMER, “Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?”, *EJIL* 2005, 185; R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 190; T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 28.

¹⁰⁹ D. MOECKLI, S. SHAH, S. SIVAKUMARAN AND D. HARRIS, *International Human Rights Law*, Oxford, Oxford University Press, 2010, 221; R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 197-198.

¹¹⁰ HUMAN RIGHTS COMMITTEE, General Comment No. 24 on Issues Relating to the Reservations Made Upon Ratification or Accession to the International Covenant on Civil and Political Rights, *UN Doc. CCPR/C/21/Rev.1/Add.6* (1994), para. 10.

¹¹¹ For example: Art. 15 ECHR; Art. 27 ACHR.

¹¹² An exception to this general rule can be found in the ECHR, which permits derogation from the right to life within the limits of lawful acts of war; C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 9, para. 41.

¹¹³ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 28-29.

¹¹⁴ Art. 4 African Charter of Human and Peoples’ Rights; Art. 4 American Convention on Human Rights.

lutely necessary in three cases, one of them being the defense of a person against unlawful violence (article 2 (2) (a)).¹¹⁵

51. The right to life as a general principle of international law and as customary norm means that States are bound to ensure this right, irrespective of the applicability of any treaty provision and whether this is inside or outside their borders. However, with regard to human rights treaties, the provisions are only applicable to the individuals under the jurisdiction of the State parties. Different opinions can be noted with regard to what should be understood under 'jurisdiction'.¹¹⁶

52. Under the ICCPR, the rights within the Covenant have to be respected and ensured to all individuals within the territory of a State and to individuals who fall within the jurisdiction of the State.¹¹⁷ According to the European and American Conventions, the scope of application is the State's jurisdiction.¹¹⁸

53. The ECHR took a narrow view of what should be understood under 'jurisdiction' in the *Bankovic case*.¹¹⁹ The Court interpreted jurisdiction as the territory of the State. Exceptions to this general rule would be: (1) when a State exercises effective control over an area in another State's territory,¹²⁰ and (2) when a State exercises control and authority over persons.¹²¹ In these two extraterritorial situations, the State would also be bound by its obligations under IHRL. However, the ECHR judgment in *Al-Skeini and Others v. United Kingdom* in 2011 seems to add a third exception,¹²² in which a State exercising public power that is normally exercised by a sovereign government is bound by its human rights obligations.¹²³ The ECHR interpretation, applied to drone targeted killings outside the State that is conducting the killings, may seem not to imply any jurisdiction

¹¹⁵ D. KRETZMER, "Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?", *EJIL* 2005, 177.

¹¹⁶ B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), 10, No. 42-44.

¹¹⁷ Art. 2 (1) ICCPR.

¹¹⁸ Art. 1 European Convention on Human Rights; Art. 1 American Convention on Human Rights.

¹¹⁹ ECHR, *Bankovic v. Belgium*, 2000.

¹²⁰ ECHR, *Issa v. Turkey*, 2004.

¹²¹ IACHR, *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republic of Cuba*, Report No. 89/99, Case 11.589 (29 September 1999); ECHR, *Al-saadoon and Mufdhi v. UK*, 2009.

¹²² ECHR, *Al-Skeini and Others v. United Kingdom*, 2011. This case is a landmark ruling that is set to replace the *Bankovic case* as the leading case on extraterritorial jurisdiction. However, important questions remain unanswered and further interpretation by the ECHR is required.

¹²³ S. MIKO, "Al-Skeini v. United Kingdom and Extraterritorial Jurisdiction under the European Convention for Human Rights", *B.C. Int'l & Comp. L. Rev.* 2012, Vol. 35, Issue 3, Article 5, 63-79.

because of the fact that States can conduct these killings without exercising effective control over the territory and persons. This would consequentially mean that the obligations of a State under IHRL and its responsibilities to those under that jurisdiction would not apply. The existing case law on this matter is very limited. In the *Bankovic case* the ECHR held, for example, that persons killed during aerial bombings did not fall within the jurisdiction of the State.¹²⁴ On the other hand, Roland Otto argues that the conduct of a targeted killing is proof of a high standard of control by the targeting State, because by targeting an individual person you decide on life and death. This would mean that IHRL would apply.¹²⁵

54. In the *Brothers to the Rescue* report by the Inter-American Commission on Human Rights, the Commission took the position that jurisdiction was established by the fact that Cuba shot down two airplanes in international airspace. The Commission argued that this situation created effective control over persons and considered this sufficient to establish jurisdiction.¹²⁶

55. The U.N. Human Rights Committee adopted a different interpretation than the ECHR. The Committee argued that anybody who is directly affected by the actions of a State falls within the jurisdiction of that State and his/her rights are safeguarded under the Covenant.¹²⁷

3.3 Drone Targeting

56. IHRL is based on a 'due process' premise. This means that everyone is presumed innocent until proven guilty and that suspected criminals should be arrested, given a fair

¹²⁴ C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 10, No. 47-48; Another example: IACHR, *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republic of Cuba*, Report No. 89/99, case 11.589 (29 September 1999), paras. 23-25.

¹²⁵ R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 395. See also: N. MELTZER, *Targeted Killings in International Law*, Oxford, Oxford University Press, 2008, 524 p.

¹²⁶ IACHR, *Armando Alejandro Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republic of Cuba*, Report No. 89/99, case 11.589 (29 September 1999), paras. 23-25; R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 399-400.

¹²⁷ HUMAN RIGHTS COMMITTEE, *Lopez Burgos v. Uruguay*, Communication No. 52/1979, *UN Doc. CCPR/C/OP/1* (1984); HUMAN RIGHTS COMMITTEE, General Comment No. 31: The Nature of the General Legal Obligation Imposed On State Parties to the Covenant, *UN Doc. CCPR/C/21/Rev.1/Add.13* (2004); D. KRETZMER, "Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?", *EJIL* 2005, 184.

trial and convicted by a punishment provided by law or set free if innocent.¹²⁸ Consequently, there can only be interference with the right to life of an individual if this individual is allowed due process.¹²⁹ However, there are situations in which due process cannot be met, for instance, when a suspected terrorist is about to detonate a bomb and the police can only neutralize this threat by killing the suspected terrorist. In this kind of situations there are still some requirements that have to be met in order for the killings to be lawful under IHRL.¹³⁰ This will be discussed below.

57. In situations where due process cannot be met, government officials can use deadly force when it is necessary to protect the life of others.¹³¹ In this case two requirements have to be met in order for the killing to be lawful under IHRL. First, the use of lethal force has to be *absolutely necessary*¹³² in order to neutralize the threat to the life of others. In order to meet this requirement the threat should be ‘instant, overwhelming, and leaving no choice of means, and no moment of deliberation’.¹³³ Second, the amount of use of lethal force has to be *proportionate*¹³⁴ to the threat.¹³⁵

58. The requirements mentioned above apply to all government officials who exercise police powers, including the military and security forces operating in contexts where there is violence but the intensity of this violence does not reach the required threshold for the existence of an armed conflict.¹³⁶ It is also fundamental to note that according to the U.N. Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary

¹²⁸ D. KRETZMER, “Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?”, *EJIL* 2005, 178.

¹²⁹ HUMAN RIGHTS COMMITTEE, General Comment No. 29 on States of Emergency, *UN Doc. CCPR/C/21/Rev1/Add11* (2001), para. 15.

¹³⁰ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 29-30.

¹³¹ D. MOECKLI, S. SHAH, S. SIVAKUMARAN AND D. HARRIS, *International Human Rights Law*, Oxford, Oxford University Press, 2010, 223; P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 11.

¹³² For Example: HUMAN RIGHTS COMMITTEE, Communication No. 45/1979, *UN Doc. CCPR/C/15/D/45/1979* (1982).

¹³³ HUMAN RIGHTS COMMITTEE, General Comment No. 6 on The Right to Life, *UN Doc. HRI/GEN/1/Rev.6* (1982), para. 3; IACHR, Report on Terrorism and Human Rights, *IACHR Doc. OEA/Ser.L/V/II.116, Doc. 5 Rev 1 Corr.* (22 October 2002); P. ALSTON, Interim Report to the General Assembly on the Worldwide Situation in regard to Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/61/311* (2006), paras. 33-45.

¹³⁴ For Example: ECHR, *Nachova and others v. Bulgaria*, 2005, paras. 71-74.

¹³⁵ B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), para. 60; T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 30-31. For example: ECHR, *McCann and others v. The United Kingdom*, 1995, paras. 192-194.

¹³⁶ Art. 1 Commentary (a) and (b), Code of Conduct for Law Enforcement Officials adopted by General Assembly Resolution 34/169 of 17 December 1979; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

trary and Summary Executions, the existence of a state or threat of war, internal political instability or any other public emergency cannot be invoked as the sole justification for such targeted killings.¹³⁷

59. It is a clear violation of the right of due process when individuals are targeted on the sole basis of suspicion of terrorism. Such targeting does not meet the requirements of appropriateness, being just, and predictability and would amount to an arbitrary deprivation of life under article 6 ICCPR. Such individuals are in the impossibility to find out that, because of their behavior, they could lose their life,¹³⁸ a fact that makes these targeted killings highly arbitrary and inconsistent with IHRL. The suspected terrorist finds himself/herself in ashes before being able to say anything in his/her defense.¹³⁹ Too often these 'suspected terrorists' have turned out to be innocent civilians. In the past missiles have been launched by drones on weddings and innocent civilians in gardens.¹⁴⁰ The fact that the individuals that are being targeted *could* be terrorists does not mean that they lose their rights under IHRL. They remain human beings, no matter what they have done or are suspected to have done.

60. Certain challenges arise in this context. What if a suspected terrorist is hiding in another State and that State is not capable of making an arrest or not willing to make an arrest? What if the suspected terrorist is in a part of the State where the State cannot exercise control? In these kinds of situations can deadly force be considered as absolutely necessary, meaning that the use of deadly force is the only way of protecting a person who is in danger? If one would allow the enactment of such a scenario, this emergency exception could easily threaten the human rights prohibition against arbitrary deprivation of life¹⁴¹ and easily become an implicit rule instead of an exception.

¹³⁷ U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, para. 1, www.unrol.org/files/PRINCI~2.PDF.

¹³⁸ N. LUBELL, *Extraterritorial Use of Force Against Non-State Actors*, Oxford, Oxford University Press, 2010, 171.

¹³⁹ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 33-34.

¹⁴⁰ CREECH 14, "Drone: Resisting Sanitized Remote-control Death", available at <http://vcnv.org/drone-resisting-sanitized-remote-control-death>.

¹⁴¹ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 25, para. 86

3.4 Conclusion

61. We can conclude that drone targeted killings conducted in situations where due process cannot be met can only be lawful under IHRL when the targeted killing is absolutely necessary and proportionate in order to protect life. However, a drone targeted killing with the sole objective of killing a certain individual will likely never meet these requirements and consequently will be in almost all cases unlawful under the human rights standards of the enforcement model.¹⁴² Special Rapporteur Ben Emmerson stated this clearly in his interim report to the U.N. General Assembly: “It follows that lethal remotely piloted aircraft attacks will rarely be lawful outside a situation of armed conflict, because only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the sole or primary objective of an operation.”¹⁴³

¹⁴² C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 8, para. 35.

¹⁴³ B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), para. 60.

CHAPTER 4

DRONE TARGETING AND THE ARMED CONFLICT MODEL

4.1 Introduction

62. ‘The armed conflict model’ refers to the rules governing situations of armed conflict. These rules are known as international humanitarian law, the law of armed conflict, or the law of war. IHL regulates the conduct of hostilities and seeks to minimize suffering by restricting the means of warfare and by protecting persons not participating in hostilities.¹⁴⁴ The cornerstones of IHL are the Geneva Conventions (GC) and their additional Protocols (AP).¹⁴⁵

63. Traditionally States refuse to qualify the use of force between a State and a terrorist group as an armed conflict. There are different reasons for this, for example the fact that States do not want to recognize terrorist groups as belligerents in order to keep them within the status of criminals under domestic law. Contrary to this traditional approach, the U.S.¹⁴⁶ and Israel have acknowledged the existence of an armed conflict against terrorists. The appeal to qualify this kind of conflict as an armed conflict as well as the potential for abuse are obvious.¹⁴⁷ In comparison to IHRL, IHL has much more lenient rules with regard to the use of lethal force and has also less due process safeguards. It is important to note that States that unilaterally qualify a conflict as an armed conflict undermine the frameworks that exist within international law, and that opens the door to arbitrary killings.¹⁴⁸

¹⁴⁴ L. BLANK AND A. GUIORA, “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflicts in New Warfare”, *Harv. Nat’l Sec. J.* 2010, Vol. 1, 46.

¹⁴⁵ ICRC, “War and Humanitarian Law”, 29 October 2010, www.icrc.org/eng/war-and-law/overview-war-and-law.htm.

¹⁴⁶ “[W]e continue to fight a war of self-defense against an enemy that attacked us on September 11, 2001, and before, and that continues to undertake armed attacks against the United States”, H. H. KOH, Legal Adviser, U.S. Department of State, Keynote Speech at the Annual Meeting of the American Society of International Law on 25 March 2010, www.state.gov/s/l/releases/remarks/139119.htm.

¹⁴⁷ S. WUSCHKA, “Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem”, *GoJIL* 2011, Vol. 3, Issue 3, 903.

¹⁴⁸ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 15-16.

64. There are two kinds of armed conflicts, namely international armed conflicts and non-international armed conflicts. In order for a conflict to be qualified as an armed conflict, an armed attack that reaches the required threshold has to occur.

65. An international armed conflict refers to a situation of inter-state use of force, regardless of intensity, duration or scale.¹⁴⁹ The rules of an IAC apply also in cases of total or partial occupation of territory of a High Contracting Party.¹⁵⁰ The prevailing view is that an IAC can only exist between States.¹⁵¹ Article 2 to the Geneva Conventions I-IV stipulates this by stating that, “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” A non-State actor cannot be a party to one of the Geneva Conventions, only States can. This means that a conflict between a terrorist group and a State cannot be qualified as an IAC. In some cases it is possible that the law of IAC will be applied in a transnational conflict with a non-State actor. One such case is when a State uses force against a terrorist group within the territory of another State without its consent.¹⁵² Another case is when a State uses force against a transnational terrorist group that is acting under the direction or control of the State where the terrorist group is located.¹⁵³ However, this would amount to an IAC between two States and not between a State and the non-State actor. This makes it clear that it is very hard to qualify complex conflicts as solely international or non-international.¹⁵⁴ Often conflicts will consist of different components with different qualifications. The Bush administration argued, for example, that the war against Al Qaeda was not an NIAC, but an IAC.¹⁵⁵ The United States Supreme Court, though, did not follow the administration in this and stated in *Hamdan v.*

¹⁴⁹ Common Art. 2 (1) GC I-IV; P. PICTET, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary: Volume I*, Geneva, ICRC, 1952, 32.

¹⁵⁰ Common Art. 2 (2) GC I-IV; Art. 1 (4) AP I.

¹⁵¹ ICTY, *Prosecutor v. Tadić*, Decision on Jurisdiction, Case No. IT-94-1-AR 72 (2 October 1995), para. 84.

¹⁵² C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 11-12, para. 54.

¹⁵³ ICTY, *Prosecutor v. Tadić*, Judgement, Case No. IT-94-1-A, (15 July 1999), paras. 116-144; M. SASSÒLI, “Transnational Armed Groups and International Humanitarian Law”, Occasional Paper Series, Program on Humanitarian Policy and Conflict Research, Harvard University 2006, Number 6, www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf, 4-5.

¹⁵⁴ D. AKANDE, “Classification of Conflicts: Relevant Legal Concepts”, in E. WILMSHURST (ed.), *International Law and the Classification of Conflicts*, Oxford, Oxford University Press, 2012, Chapter 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132573, 45-46.

¹⁵⁵ THE WHITE HOUSE, Memorandum of 7 February 2002, Appendix C to the Final Report of the Independent Panel to Review DOD Detention Operations, 24 August 2004, www.defense.gov/news/Aug2004/d20040824finalreport.pdf, 2.

Rumsfeld that every armed conflict that does not involve “a clash between nations” is not of an international character.¹⁵⁶

66. A non-international armed conflict pursuant to common article 3 to the Geneva Conventions I-IV and article 1 Additional Protocol II to the Geneva Conventions, occurs *within* the territory of a High Contracting State, between a State and an organized armed group or between different organized armed groups. In order for a NIAC to occur two requirements must be fulfilled.¹⁵⁷

67. The first requirement is that the conflict has to have a certain intensity and protraction. The minimal threshold with regard to the intensity and protraction of the violence is expressed in article 1 (2) AP II: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”¹⁵⁸ According to the Inter-American Commission on Human Rights there should be a high degree of intensity and organization on the part of the non-State actor in case of an isolated event.¹⁵⁹ There is still much vagueness around the level and scope of violence that is required. Given the lack of clarity, there is room for disagreement on whether a conflict amounts to a NIAC.¹⁶⁰ It is also important to note that terrorist attacks often do not reach the required threshold because the required intensity and duration of the attack are lacking.¹⁶¹ If so, the attacks do not constitute an armed conflict and, consequently, the enforcement model should be applied.¹⁶² For instance, it is argued that with respect to the U.S. and Al Qaeda the requirement concerning intensity of hostilities is not met anymore because of

¹⁵⁶ U.S. Supreme Court, *Hamdan v. Rumsfeld*, 2008, 548 U.S. 557 (2006), 65-68.

¹⁵⁷ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 17-18; ICTY, *Prosecutor v. Tadić*, Decision on Jurisdiction, Case No. IT-94-1-AR 72 (2 October 1995), para. 70; P. PICTET, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary: Volume I*, Geneva, ICRC, 1952, 49-50.

¹⁵⁸ ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-A (27 January 2000), para. 248; M. SASSÒLI, “Transnational Armed Groups and International Humanitarian Law”, Occasional Paper Series, Program on Humanitarian Policy and Conflict Research, Harvard University 2006, Number 6, www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf, 6.

¹⁵⁹ IACHR, *Juan Carlos Abella v. Argentina*, Report No. 55/97, OESA/Ser.L./V./II.95 Doc. 7 Rev. 271 (18 November 1997), para. 151.

¹⁶⁰ D. KRETZMER, “Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?”, *EJIL* 2005, 195-196.

¹⁶¹ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 18.

¹⁶² C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 12, paras. 55-58.

the temporal distance from the terrorist attacks of 9/11 and the infrequent organized armed attacks against the U.S.¹⁶³

68. The second requirement is that the terrorist group must have a certain level of organization in order for the principle of distinction to be properly met.¹⁶⁴ According to IHL, the term ‘organized armed group’ refers to the armed forces of non-State parties to an armed conflict.¹⁶⁵ The requirement of organization implies at least a common command structure,¹⁶⁶ adequate communications, joint mission planning and execution, and cooperation in the acquisition and distribution of weaponry.¹⁶⁷ According to the Interpretive Guidance of the International Committee of the Red Cross (ICRC), organized armed groups primarily recruit their members from the civilian population. They develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, but not always with the same means, intensity, and level of sophistication as State armed forces.¹⁶⁸ One of the problematic issues is that terrorist attacks are often conducted by armed groups that associate themselves with other organized groups. They take inspiration from these groups without actually being part of their organizational structure and without forming together an organized armed group to the conflict.¹⁶⁹ These loosely linked individuals should be considered as having protected civilian status and may only be targeted with deadly force when ‘directly participating in hostilities’, which means they would lose their civilian protection for ‘such time’ as they are participating in hostilities (see section 4.3.3.3).¹⁷⁰ Examples of this are the 2004 and 2005 terrorist attacks in Madrid and London. These attacks were not considered as be-

¹⁶³ B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), 20, para. 68; T. M. McDONNELL, “Sow What You Reap: Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists”, *The Geo. Wash. Int’l L. Rev.* 2012, Vol. 44, Issue 2, 271-273.

¹⁶⁴ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 36; T. M. McDONNELL, “Sow What You Reap: Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists”, *The Geo. Wash. Int’l L. Rev.* 2012, Vol. 44, Issue 2, 273.

¹⁶⁵ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 27.

¹⁶⁶ J. D. OHLIN, “Is Jus in Bello in Crisis?”, *JICJ* 2013, 32.

¹⁶⁷ Common Art. 3 GC I-IV; Art. 1 (1) AP II. It should be noted that AP II only applies to States who are party to it (see Art. 1(1)); B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), 19, para. 66.

¹⁶⁸ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 32.

¹⁶⁹ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 19.

¹⁷⁰ B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), 21, para. 70.

ing conducted within the context of an armed conflict by the British and Spanish governments. One of the reasons was that the terrorists who conducted these attacks were not linked to Al Qaeda by anything other than having the same hate against the West and consulting the same websites.¹⁷¹ Thus, if individuals are not part of the same command, control, and hierarchical structures of an organized armed group, they cannot be regarded as belonging to the same organized armed group, even if there are close ties between the individuals and the groups.¹⁷² This problem of fragmentation of terrorist groups, as is at the moment the case with Al Qaeda, makes it more difficult to identify who is party to the conflict, and this, in its turn, makes it harder to determine the status of persons according to the principle of distinction (see section 4.3.3).¹⁷³

69. If these two requirements are not met, it means that the violence does not reach the required threshold in order to constitute a NIAC under IHL, leaving IHRL to govern the situation.¹⁷⁴ It has been argued that the armed attacks perpetrated by Al Qaeda and various affiliated organizations in different parts of the world no longer meet these two requirements in order for the conflict to be qualified as an armed conflict under IHL.¹⁷⁵ This is one of the legal issues that Special Rapporteur Ben Emmerson addressed in his annual report to the Human Rights Council in March 2014, urging States to reach a consensus on the issue.¹⁷⁶

¹⁷¹ M. SASSÒLI, "Transnational Armed Groups and International Humanitarian Law", Occasional Paper Series, Program on Humanitarian Policy and Conflict Research, Harvard University 2006, Number 6, www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf, 10.

¹⁷² B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), 19, para. 66; T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 17-19.

¹⁷³ R. M. CHESNEY, "Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism", *Mich. L. Rev.* 2013, Vol. 112, Issue 2, 185-201.

¹⁷⁴ B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), 12, para. 58.

¹⁷⁵ B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), paras. 66 and 68; Fifteenth report of the Analytical Support and Sanctions Monitoring Team established pursuant to Security Council resolution 1526 (2004), S/2014/41 (up-to-date assessment of the threat of armed attack by Al-Qaeda and its various affiliated organizations).

¹⁷⁶ B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), 19, para. 71 (e). See also: B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), paras. 66-69; C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), paras. 55-63.

70. As stated above, there can be an IAC alongside a NIAC between a State and a terrorist group.¹⁷⁷ For example, the U.S. attacked Afghanistan after 9/11 on the grounds that the Taliban, the former government of Afghanistan, was supporting Al Qaeda. This does not mean that the separate conflict between the U.S. and Al Qaeda did not exist anymore and was ‘swallowed up’ by the conflict with the Taliban. It means that there was a conflict with both the features of a NIAC and of an IAC.¹⁷⁸

71. Targeted killings within an IAC and a NIAC are governed by different rules of IHL. The main applicable laws in an IAC are Geneva Conventions I-IV, AP I, and customary law. In a NIAC Common Article 3 to the Geneva Conventions I-IV, AP II, and customary law apply. It should also not be forgotten that, as stated above, the applicability of IHRL during armed conflicts is now a well-established principle of international law.

72. In this chapter the legality of drone targeted killings in the light of international humanitarian law will be examined. This will be done within the framework of a NIAC, as an IAC can only occur between States. The rules governing drone targeted killings relating to the right to life during a NIAC will be analysed.

4.2 The Right to Life

73. The right to life guaranteed under IHRL continues to apply in times of armed conflict. As stated above, this is now a well-established principle of international law. However, IHL allows a far wider use of lethal force than IHRL. The core tensions between IHRL and IHL concern the type of threat that an individual has to pose in order to be lawfully targeted, whether a State has the duty to try to arrest the individual first before resorting to lethal force, and the degree to which the attack can lead to harming innocent civilians. In this thesis the author argues that during an armed conflict IHL would constitute *lex specialis* and IHRL *lex generalis*. This interpretation was also adopted by the ICJ in the Nuclear Weapons Advisory Opinion. The ICJ argued that the right to life and the prohibition against arbitrary deprivation of life under article 6 ICCPR should be interpreted in

¹⁷⁷ ICJ, *Nicaragua v. United States of America*, ICJ Reports 1986, para. 219; ICTY, *Prosecutor v. Tadić*, Judgement, Case No. IT-94-1-A, (15 July 1999), para. 84.

¹⁷⁸ D. KRETZMER, “Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?”, *EJIL* 2005, 196.

terms of IHL.¹⁷⁹ As the Court puts it: “the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”¹⁸⁰ U.N. Special Rapporteur on Human Rights in the Occupied Palestinian Territories John Dugard further clarified the interaction between both bodies of law in relation to the right to life. He stated that IHL complements article 6 ICCPR by regulating in more detail the distinction between civilians and combatants. By doing so IHL regulates who can be lawfully targeted. Thus, IHL elaborates further on the parameters of the right to life during an armed conflict, and defines when a non-arbitrary deprivation of life can take place.¹⁸¹

74. Drones enable States to conduct targeted killings in another State’s territory. This does not mean that States are allowed to commit, on the territory of another State, violations of the right to life which they could not commit on their own territory.¹⁸² The right to life is a principle of international law and a customary norm, which means that it applies irrespective of the applicability of treaty provisions and inside and outside their borders.¹⁸³ The question of jurisdiction has already been discussed above.¹⁸⁴

75. In recent debates the question has been raised whether IHL requires the capture of a suspected terrorist under certain circumstances rather than the use of lethal force.¹⁸⁵ The fact that targeted killings are not unlawful under IHL (see section 4.3 on the legality

¹⁷⁹ C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 9, para. 40; ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, paras. 24-25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, para. 104-106; O.A. HATHAWAY, R. CROTOF, P. LEVITZ, H. NIX, W. PERDUE, C. PURVIS AND J. SPIEGEL, “The Relationship Between International Humanitarian law and Human Rights Law in Armed Conflict”, *Minn. L. Rev.* 2012, 1926-1930.

¹⁸⁰ ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, para. 25.

¹⁸¹ A. ORAKHELASHVILI, “The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?”, *EJIL* 2008, Vol. 19, 169.

¹⁸² C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 9, para. 51; ECHR, *Issa v. Turkey*, 2004, para. 71.

¹⁸³ C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 9, para. 43.

¹⁸⁴ See Chapter 3, Section 3.2.

¹⁸⁵ B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), 19, para. 71.

of drone targeted killings under IHL) does not mean that there are no rules within IHL that envisage the use of less-than-lethal means. IHL provides limiting principles, such as the principle of military necessity, that stipulates that States can only use a certain amount of force that is consistent with the underlying legitimate military objectives,¹⁸⁶ and the principle of humanity.¹⁸⁷ This means that IHL does not create a legal framework where there is an unrestrained right to kill.¹⁸⁸ According to the ICRC, “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.” This means that even if a suspected terrorist is not protected against direct attack, the degree of force is still limited to what is actually necessary to accomplish the legitimate military purpose.¹⁸⁹ This interpretation of the ICRC is not without controversy.¹⁹⁰ However, President Obama formulated the ICRC approach in terms of policy guidelines in his speech in May 2013 at the National Defense University¹⁹¹ by stating that the U.S. will not use force when it is feasible to capture a suspected terrorist.¹⁹² The Israeli Supreme Court suggested, in its *Targeted Killings* ruling, that targeted killings are only permissible when capture and trial are impossible.¹⁹³ Special Rapporteur Ben Emmerson also addressed this issue in his annual report to the Human Rights Council in March 2014. He posed the following question and urged States to reach a consensus on the issue: “In the context of non-international armed conflict, when (and under what circumstances) does international humanitarian law impose an obligation to capture rather than kill a legitimate military target where this feasible?”¹⁹⁴

¹⁸⁶ ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, para. 78.

¹⁸⁷ Art. 142 GC III; Art. 158 GC IV; Preamble of the Hague Convention IV; Art. 1 (2) AP I.

¹⁸⁸ Art. 22 Hague Convention IV .

¹⁸⁹ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 82.

¹⁹⁰ J. D. OHLIN, “Duty to Capture”, *Minn. L. Rev.* 2013, 1296-1302; R. S. TAYLOR, “Capture versus Kill Debate: Is the Principle of Humanity Now Part of the Targeting Analysis When Attacking Civilians Who are Directly Participating in Hostilities”, *Army Law*. 2010, 103-111.

¹⁹¹ Link to the full text of the speech given by U.S. President Obama in May 2013 at the National Defense University, www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama.

¹⁹² C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 16-17, paras. 77-79.

¹⁹³ HCJ, *Pub. Comm. Against Torture in Isr. v. Gov't of Isr.*, No. 769/02 (11 December 2005); J. D. OHLIN, “Is Jus in Bello in Crisis?”, *JICJ* 2013, 33.

¹⁹⁴ B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), 19, para. 71 (h).

4.3 Drone Targeting

4.3.1 Introduction

76. Assessing targeted drone killings within the context of a NIAC implies that the legality of the targeted killings must be assessed under IHL. Within this section, the legality of drone killings will be evaluated under IHL core principles that were developed both in IAC and NIAC. This is mainly because most of these principles have acquired the status of customary international law.¹⁹⁵

77. IHL is based on several core principles: the principle of humanity, distinction, proportionality, precaution, and military necessity. These principles form the legal framework that guides targeting decisions.¹⁹⁶ There is much disagreement on the content and scope of these principles. The disagreements predate the use of armed drones, but the debates on the use of drones have shown that they are much wider than previously thought.¹⁹⁷ Contemporary conflicts between a State and a terrorist armed group pose dilemmas especially for two of these principles: the principle of distinction and the principle of proportionality.¹⁹⁸ These two core principles bring us to the fundamental issue of who can be lawfully targeted and how it can be done within these contemporary conflicts.¹⁹⁹ Many armed forces develop a targeting process in order to prevent violations of these fundamental IHL principles that limit the use of force. After a targeting operation is completed, a post operational assessment of the military advantage achieved and the compliance with standards of international law is normally done.²⁰⁰

¹⁹⁵ ICTY, *Prosecutor v. Tadić*, Decision on Jurisdiction, Case No. IT-94-1-AR 72 (2 October 1995), para. 98; ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, para. 74-87; IACHR, *Juan Carlos Abella v. Argentina*, Report No. 55/97, OESA/Ser.L./V./II.95 Doc. 7 Rev. 271 (18 November 1997), para. 177; T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 43.

¹⁹⁶ R. J. VOGEL, "Drone Warfare and the Law of Armed Conflict", *Denv. J. Int'l L. & Pol'y* 2010, 114.

¹⁹⁷ J. D. OHLIN, "Is Jus in Bello in Crisis?", *JICJ* 2013, 28.

¹⁹⁸ R. BRUST, "Uneasy Targets: How Justifying the Killing of Terrorists Has Become a Major Policy Debate", *A.B.A. J.* 2012, Vol. 98, Issue 4, 53.

¹⁹⁹ L. BLANK AND A. GUIORA, "Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflicts in New Warfare", *Harv. Nat'l Sec. J.* 2010, Vol. 1, 46.

²⁰⁰ S. BACHMANN AND U. HAEUSSLER, "Targeted Killing as a Means of Asymmetrical Warfare: A Provocative View and Invitation to Debate", *Law, Crime & History* 2011, Vol. 1, Issue 1, 12.

78. Few courts have dealt with the issue of drone killings under IHL and more specifically under *jus in bello*.²⁰¹ The main reason is that there is little publicly known information on drone programs. The problem of this 'lack of transparency' has also been addressed by Special Rapporteurs Ben Emmerson and Philip Alston.²⁰² The lack of information makes it impossible to conduct a proper *jus in bello* analysis of a particular strike. It is also this secrecy around drone programs that reinforces the sense of illegitimacy of drone targeted killings.²⁰³ John Harwood argues, in contrast to Ben Emmerson and Philip Alston, that IHL does *not* require States to publish their policies and the criteria used to carry out drone targeted killings. Nevertheless, he argues that the government should provide enough information in order for the public to know that the government is fulfilling its international obligations.²⁰⁴

79. In the following, the mentioned IHL core principles will be further explained and the author will analyse in what way these principles regulate and restrict drone targeting of suspected terrorists. Through this examination, the impact of the use of armed drones for the purpose of targeted killings on the traditional IHL concepts and categories will be shown.

4.3.2 The Principle of Humanity

80. The principle of humanity, also commonly referred to as the principle of unnecessary suffering, is the core principle from which all other principles flow.²⁰⁵ It entails that parties to a conflict should choose means and methods of warfare that are humane. Weapons that cause unnecessary suffering and indiscriminate death are prohibited.²⁰⁶ This means that, once the military purpose has been achieved, no further infliction of suffer-

²⁰¹ R. M. CHESNEY, "Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism", *Mich. L. Rev.* 2013, Vol. 112, Issue 2, 216.

²⁰² B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), para. 75; P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 26-27.

²⁰³ M. STERIO, "The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings under International Law", *Case W. Res. J. Int'l.* 2012, Vol. 45, 211-212.

²⁰⁴ J. C. HARWOOD, "Knock, Knock; Who's There? Announcing Targeted Killings Procedures and the Law of Armed Conflict", *Syracuse J. Int'l L. & Com.* 2012, Vol. 40, Issue 1, 23-26.

²⁰⁵ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 43.

²⁰⁶ M. STERIO "The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings under International Law", *Case W. Res. J. Int'l.* 2012, Vol. 45, 210; T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 46.

ing is necessary. Weapons that by nature cause unnecessary suffering are unlawful under this principle.²⁰⁷

81. Under the section ‘The Legality of Drones as a Weapon’ it was already explained that drones *can* be used in accordance with this principle.²⁰⁸ However, concerns have been raised about the possible development of a ‘Playstation mentality’ towards killing. Drone operators are emotionally and physically removed from their targets and this raises the question as to whether they can be emotionally touched by a humanitarian sense. Humanity also obliges the drone operator to refrain from killing his target when the latter would surrender. But how can one surrender to a drone?²⁰⁹ In contrast to this, pilots who have flown drones and fighter jets explain that drone pilots have a significantly greater engagement with the battlefield than other pilots. One drone operator said: “A lot of people downplay it, say ‘You’re 8,000 miles away. What’s the big deal?’ But it’s not really 8,000 miles away, it’s 18 inches away [. . .] We’re closer in a majority of ways than we’ve ever been as a service.” “There’s no detachment [. . .] Those employing the system are very involved at a personal level in combat. You hear the AK-47 going off, the intensity of the voice on the radio calling for help. You’re looking at him, 18 inches away from him, trying everything in your capability to get that person out of trouble.”²¹⁰

4.3.3 The Principle of Distinction

4.3.3.1 Introduction

82. The principle of distinction entails that the parties to an armed conflict should at all times make a distinction between civilians and combatants, and should only direct attacks to the latter.²¹¹ It is one of the core principles of humanitarian law.²¹² Regarding

²⁰⁷ Art. 35 (2) AP I; L. R. Blank, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 682-683.

²⁰⁸ See Chapter 2, Section 2.2.

²⁰⁹ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 82; T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 46.

²¹⁰ M. McCLOSKEY, “The War Room: Daily Transition Between Battle, Home Takes a Toll on Drone Operators”, *Stars & Stripes* 9 October 2009, www.stripes.com/news/the-war-room-daily-transition-between-battle-home-takes-a-toll-on-drone-operators-1.95949#.Uzfc6Nzlfw; N. SHARKY, “Automating Warfare: Lessons Learned from the Drones”, *J.L. Inf. & Sci.* 2011, Vol. 21, Issue 2, 145-146.

²¹¹ Art. 48 AP I.

²¹² ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, paras. 74-87.

the legality of drone targeting, this principle is fundamental as it determines who can be lawfully targeted during an armed conflict.²¹³

83. Article 48 of AP I formulates the principle of distinction, “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

84. One of the goals of IHL is to protect innocent civilians. The principle of distinction lies at the heart of this goal. Article 51 AP I emphasizes the purpose of the principle of distinction, by stating that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.” The principle is part of customary international law.²¹⁴ Consequently, all parties to the conflict are bound by this principle.²¹⁵ The Statute of the International Criminal Court (ICC) criminalizes attacks on civilians and other persons *hors combat*.²¹⁶ The jurisprudence of the *ad hoc* international criminal tribunals also considers this principle as a central one and emphasizes that it is part of customary international law.²¹⁷

85. In traditional conflicts one could quite easily distinguish between the two categories of persons. Combatants would wear uniforms and civilians would typically not come near the battlefield. This has changed with regard to contemporary conflicts between States and non-State actors. To determine who is a lawful target becomes much more complex. Nevertheless, the legal obligation of distinguishing between the two categories remains the same. This demands a greater intelligence-gathering and surveillance than

²¹³ R. Otto, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 217-219.

²¹⁴ ICTY, *Prosecutor v. Tadić*, Decision on Jurisdiction, Case No. IT-94-1-AR 72 (2 October 1995), para. 98; ICJ, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, paras. 74-87.

²¹⁵ L. R. Blank, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 689 and 689-690.

²¹⁶ Art. 8 Rome Statute of the International Criminal Court.

²¹⁷ ICTY, *Prosecutor v. Tadić*, Decision on Jurisdiction, Case No. IT-94-1-AR 72 (2 October 1995), para. 98; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-94-4-T (2 September 1998), para. 616; ICTY, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T (14 January 2000), para. 524; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T (5 December 2003), para. 45 (“The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives.”).

in traditional conflicts.²¹⁸ The following abstract of a news article reporting on the conflict in Afghanistan gives a good example of the blurring of the lines between military forces, civilians, and legitimate targets: “[t]he elusive insurgents blend easily into the population, invisible to Marines until they pick up a weapon. They use villagers to spot and warn of U.S. troop movements, take up positions in farmers' homes and fields, and attack Marines from spots with ready escape routes. The Marines, under strict rules to protect civilians, must wait for insurgents to attack and then attempt to ensnare them. Limited in their use of airstrikes and artillery — because of the danger to civilians and because aircraft often frighten the Taliban away — Marine riflemen must use themselves as bait and then engage in the riskier task of pursuing insurgents on foot.”²¹⁹ The blurring of the lines between innocent civilians and civilians who are actively participating make it a key issue to determine when a civilian becomes a military target pursuant to the principle of distinction.²²⁰

86. Contemporary conflicts are often asymmetrical, with State versus non-State actors/terrorists showing an unbalance between their respective military capabilities. Frequently, these terrorists groups do not have any territorial nexus. This has raised the question of the existence of a ‘global battlefield’. A few weeks after 9/11, President George W. Bush introduced this notion of a global battlefield by stating that: “our war on terror will be much broader than the battlefields and beachheads of the past. This war will be fought wherever terrorists hide, or run, or plan.”²²¹ The Obama administration has not used the same language, but has expanded the use of armed drones outside of Afghanistan.²²² The discussion of a global battlefield brings us outside the scope of this thesis. However, it is still important to mention this issue because if there would indeed be a global battlefield this would mean that suspected terrorists could also be considered legitimate targets outside the actual battlefield and drones could be used anywhere

²¹⁸ L. Blank and A. Guiora, “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflicts in New Warfare”, *Harv. Nat’l Sec. J.* 2010, Vol. 1, 45-48; L. R. Blank, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 689 and 692.

²¹⁹ A. S. TYSON, “Afghan Strategy Poses Tactical Tests for Marines”, *Wash. Post* 13 August 2009, www.washingtonpost.com/wp-dyn/content/article/2009/08/12/AR2009081203198.html.

²²⁰ L. Blank and A. Guiora, “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflicts in New Warfare”, *Harv. Nat’l Sec. J.* 2010, Vol. 1, 53-54.

²²¹ PRESIDENT G. W. BUSH, Radio Address of the U.S. President to the Nation, 29 September 2001, <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010929.html>.

²²² L. EPATKO, “Controversy Surrounds Increased Use of U.S. Drone Strikes”, *PBS NewsHour* 10 October 2011, www.pbs.org/newshour/rundown/2011/10/drone-strikes-1.html; L. R. Blank, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 697-712.

in the world. This would blur the lines between the IHRL and IHL framework even more, and pose a bigger threat to preventing injure and killing of innocent civilians.

4.3.3.2 Criteria of Distinction

87. In order for a targeted killing to be lawful it must be directed to a legitimate target. An innocent civilian is a person who takes no part in hostilities and, therefore, cannot be a legitimate target of attack. In a NIAC, a civilian is a person who is not a member of the armed forces or of an armed group. When there is doubt about the status of a person, he/she is to be considered a civilian.²²³ A legitimate target is either a combatant of the armed forces of a State, a civilian who is directly participating in hostilities, or a member of an organized armed group who has a continuous combat function. This means that civilians can lose their immunity from attack in the second and third situation. A suspected terrorist who is engaging in hostilities against a State within an armed conflict falls within the category of civilian, as he/she cannot be considered being a combatant of State armed forces. This means that a suspected terrorist can only be targeted for such time as he/she is directly participating in hostilities or at all times when he/she has a continuous combat function.²²⁴ Often these individuals fight on their own or through proxy groups. By doing so, they gain a measure of protection that they normally would not have.²²⁵

4.3.3.3 Targeting on the Basis of Direct Participation in Hostilities

88. Suspected terrorists who directly participate in hostilities can be targeted for such time as they participate in hostilities. The concept of direct participation is not free from controversy.²²⁶ There is no common accepted definition. States can give their own inter-

²²³ Art. 50 AP I; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T (5 December 2003), para. 50 (“A person shall be considered to be a civilian for as long as there is a doubt as to his or her real status.”); L. Blank and A. Guiora, “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflicts in New Warfare”, *Harv. Nat’l Sec. J.* 2010, Vol. 1, 63.

²²⁴ C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 14, paras. 68-69; J. D. OHLIN, “Is Jus in Bello in Crisis?”, *JICJ* 2013, 37.

²²⁵ L. Blank and A. Guiora, “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflicts in New Warfare”, *Harv. Nat’l Sec. J.* 2010, Vol. 1, 64.

²²⁶ There is a lot of uncertainty about what exactly constitutes direct participation in hostilities. A good starting point is the Interpretive Guidance on Direct Participation in Hostilities issued by the ICRC (ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 85 p.). The ICRC Guidance is not free from criticism. The interpretation given by the ICRC to the notion of ‘a continuous combat function’ is seen by some as problematic from a human rights point of view, because pursuant to this interpretation civilians with a continuous combat function can be targeted at anytime and anywhere. The three listed conditions for direct participation are based on the ICRC Guidance. Recent State practice regarding drone attacks shows that the ICRC

pretation. Many States do not wish to make their definition public.²²⁷ This is problematic because it leaves unclear what kind of conduct can make a civilian a legitimate target. Furthermore, a State can unilaterally decide to expand this concept beyond what is permissible without any external control. The U.S., for example, stated that drug traffickers on the battlefield in Afghanistan who have ties with terrorists form lawful targets. This is inconsistent with what is traditionally understood under direct participation. Traditionally, drug trafficking is considered to be a criminal conduct that would fall under domestic criminal law. It would not be considered an act that would amount to direct participation in hostilities and thus would lawfully subject someone to a targeted killing.²²⁸

89. In order to determine if a suspected terrorist is directly participating, three cumulative conditions have to be met.²²⁹ The first condition relates to the *hostilities*. The acts that are committed by the suspected terrorist have to be by nature and objective damaging to the State armed forces or to other civilians. The harm that is likely to result from the act must reach a certain threshold. This threshold can be reached by, for example, causing death, destroying objects that are protected from attack, using weapons against armed forces, etc. It is not necessary for the act to reach the threshold in reality. It is enough that it *can* cause such harm.²³⁰ The second condition relates to *direct* participa-

concepts of ‘members of organized armed groups’ and ‘direct participation in hostilities’ have been followed (see: C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 15, para. 70). See also: A. P. V. ROGERS, “Direct Participation in Hostilities: Some personal Reflections”, *Mil. L. & L. War Rev.* 2009, Vol. 48, Issues 1 and 2, 143-164; M. N. SCHMITT, “The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard NSJ* 2010, Vol. 1, 6; N. MELZER, “Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *N.Y.U. J. Int’L L. & Pol.* 2010, Vol. 42, Issue 3, 831-916; R. GOODMAN AND D. JINKS, “ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Introduction to the Forum”, *N.Y.U. J. Int’L L. & Pol.* 2010, Vol. 42, Issue 3, 637-640.

²²⁷ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 19.

²²⁸ P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 21; U.S. COMMITTEE ON FOREIGN RELATIONS, Afghanistan’s Narco War: Breaking the Link Between Drug Traffickers and Insurgents, 111th Congress, First Session, S. Prt. 111-29, 2009, 16.

²²⁹ Common Art. 3 to the GC I-IV; Art. 51 AP I; Art. 13 AP II; P. ALSTON, Study on Targeted Killings, *UN Doc. A/HRC/14/24/Add.6* (2010), 20-21; HPCR, *HPCR Manual on International Law Applicable to Air and missile Warfare*, Program on Humanitarian Policy and Conflict Research, Harvard University, 2009, www.ihlresearch.org/amw/manual/, 14-16; ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 43.

²³⁰ HPCR, *HPCR Manual on International Law Applicable to Air and missile Warfare*, Program on Humanitarian Policy and Conflict Research, Harvard University, 2009, www.ihlresearch.org/amw/manual/, 120; ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 47-50; R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 273-276.

tion. For acts to qualify as direct participation in contrast to indirect participation, there must be a direct causal relation between the act and the resulting harm. The act has to constitute an integral part of the armed confrontations. The unlawfulness of the act under international or domestic law in itself is not at issue. There has to be one causal step between the act and the harmful effect. The production of weapons, for example, does not fall within the notion of 'direct'. However, this notion also can include acts that cause harm only in conjunction with other acts, as for example providing information on a certain target within a specific operation.²³¹ Examples of acts that are not included because they are seen as clearly indirect are:²³² financial support, propaganda distribution, food and medicine distribution.²³³ The third condition relates to *belligerent nexus*. The act must have the objective of causing harm in support of a belligerent party and to the detriment of the other party. It revolves around the objective of the act as part of the committed hostilities in support of one of the parties or in order to harm the other party.²³⁴

90. Direct participation in hostilities is based on the individual acts of a person and not on the fact that a person is a member of a specific group, i.e. on his/her status. Consequently a State cannot target members of a terrorist group because they are members, but has to focus on targeting specific terrorists.²³⁵ This relates also to the practice of targeting on the basis of suspicion of being a member of a terrorist group, which is an unacceptable policy under IHRL and IHL.²³⁶

91. Persons taking direct part in hostilities can only be targeted *for such time* as they are taking part in hostilities. Here arises the problem of 'the revolving door', also known by the expression 'farmer by day, fighter by night'.²³⁷ This refers to the situation where ci-

²³¹ R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 280.

²³² R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 281-182.

²³³ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 51-58; HPCR, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Harvard University, 2010, <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>, 120; R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 276-280.

²³⁴ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 58-64; HPCR, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 2010, <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>, 120-121.

²³⁵ D. KRETZMER, "Targeted Killing of Suspected Terrorists: Extra-judicial Executions or Legitimate Means of Defence?", *EJIL* 2005, 192.

²³⁶ See Chapter 4, Section 4.3.3.5.

²³⁷ HPCR, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, Harvard University, 2010, <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>, 119,

vilians go in and out of the protection given by the right to life. For example, during the day a person takes direct part in hostilities and can be lawfully targeted but in the evening he/she goes home and falls consequently within the protection of the right to life. This is in contrast to combatants, who can be targeted at all times. The U.S.²³⁸ and Israel²³⁹ disagree with this. They argue that if a person has deep ties to a terrorist organization and commits a chain of hostilities with short time in between, he/she is always taking direct part in hostilities, and can be targeted at all times even if he/she is not actively doing anything. The criterion used here is that of 'membership' to an armed group. Regardless that this tactic is sometimes used, it is important to come to a framework where the vast majority of civilians are protected. In order to reach that goal, only a conduct that is close to that of a fighter or that directly supports combat should be included.

92. The conclusion that a person is taking direct part in hostilities has to be funded in well-based information. Given the fact that drones have a greater ability of gathering information due to extended surveillance capacities, there is a greater responsibility regarding this condition.²⁴⁰ Also the targeting has to be consistent with the principle of military necessity. Possible collateral damage as result of the targeting has to be proportionate to the military advantage. This involves a case-by-case assessment.²⁴¹ According to the Israel Supreme Court, no other non-deadly means, such as arrest, should be available, and after each attack an independent investigation should take place.²⁴²

93. As mentioned, there is disagreement among scholars as to what constitutes direct participation and could justify drone targeted killings. On the one hand, some scholars argue in favour of a broad interpretation.²⁴³ On the other hand, others opt for a restric-

para. 5; K. WATKIN, "Opportunity Lost: Organized Armed Groups and The ICRC "Direct Participation In Hostilities" Interpretive Guidance", *N.Y.U. J. Int'l L. & Pol.* 2010, Vol. 42, 686-690; R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 291-292; W. HAYS PARKS, "Air War and the Law of War", *A.F. L. Rev.* 1990, 188.

²³⁸ R. OTTO, *Targeted Killings and International Law*, Heidelberg, Springer, 2012, 239-241; T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 17.

²³⁹ HCJ, *Pub. Comm. Against Torture in Isr. v. Gov't of Isr.*, No. 769/02 (11 December 2005), para. 39.

²⁴⁰ C. HEYNS, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *UN Doc. A/68/382* (2013), 15, para. 71.

²⁴¹ Art. 51 (5) (b) AP I; Arti. 57 AP I; ICRC, Study on Customary International Humanitarian Law, 2005, www.icrc.org/customary-ihl/eng/docs/v1, Rules 14 -21.

²⁴² HCJ, *Pub. Comm. Against Torture in Isr. v. Gov't of Isr.*, No. 769/02 (11 December 2005), para. 18; ICRC, Study on Customary International Humanitarian Law, 2005, www.icrc.org/customary-ihl/eng/docs/v1, Rules 14-21.

²⁴³ COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, "Targeting Operations with Drone Technology: Humanitarian Law Implications", A Background Note for the American Society of International Law Annual Meeting, 25 March

tive interpretation arguing that a broad interpretation minimizes the protection of civilians.²⁴⁴ The existing disagreement between scholars on this notion can also be shown by the following question that the Special Rapporteur Ben Emmerson posed in his annual report to the Human Rights Council in March 2014 and by his call for consensus on this issue: “Does the guidance promulgated by the International Committee of the Red Cross for “direct participation in hostilities” reflect customary international law? In particular, does an individual who has participated in hostilities cease to be targetable during a pause in his or her active involvement? Does providing accommodation, food, financing, recruitment or logistical support amount to “direct participation in hostilities” for targeting purposes?”²⁴⁵ The author takes the view that what constitutes direct participation should be interpreted in a restrictive way in order to uphold the highest possible protection of civilians. Direct participation should be limited to clear-cut and immediate involvement in hostilities. Drone targeting should also not be based only on suspicion that one is directly participating in hostilities.²⁴⁶

4.3.3.4 Targeting on the Basis of Continuous Combat Function

94. The doctrine of continuous combat function emerged to counter the problem of ‘the revolving door’. Under this doctrine, civilians who engage in hostilities on a regular basis will no longer enjoy immunity but will assume a continuous combat function. Consequently, they can be targeted at all times.²⁴⁷ They can be compared with regular combatants, who can be targeted at anytime and anywhere.

95. In this thesis, the author takes as a starting point the definition of a continuous combat function given by the ICRC.²⁴⁸ However, this is only one point of view, and there are

2009, www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColumbia.pdf, 19; K. WATKIN, “Opportunity Lost: Organized Armed Groups and The ICRC “Direct Participation In Hostilities” Interpretive Guidance”, *N.Y.U. J. Int’L L. & Pol.* 2010, Vol. 42, 692; R. GOODMAN AND D. JINKS, “ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Introduction to the Forum”, *N.Y.U. J. Int’L L. & Pol.* 2010, Vol. 42, Issue 3, 640.

²⁴⁴ E. CHRISTENSEN, “The dilemma of direct participation in hostilities”, *J. of Transnational Law & Policy* 2010, 308-309; R. GEHRING, “Loss of civilian protections under the Fourth Geneva Convention and Protocol I”, *Mil. L. & L. War Rev.* 1980, 19.

²⁴⁵ B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), 19, para. 71 (g).

²⁴⁶ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 50-51.

²⁴⁷ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 52.

²⁴⁸ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 85 p.

many commentaries on these guidelines.²⁴⁹ This controversy can be shown by the following question that was posed by the Special Rapporteur Ben Emmerson in his annual report to the Human Rights Council in March 2014 and by his call for consensus on the issue: “Assuming that a non-international armed conflict exists, does the test of “continuous combat function”, as elaborated by the International Committee of the Red Cross for determining whether a “member” of an armed group (such that that person may be targeted with lethal force at any time) reflect customary international law? If not, what is the correct test?”²⁵⁰

96. According to the Interpretive Guidance of the ICRC, a continuous combat function does not depend on an abstract affiliation, but rather on the functional criteria of conduct of hostilities on behalf of a non-State party to the conflict.²⁵¹ Suspected terrorists with a continuous combat function are those who are permanent members of the military wing of the party to the conflict. Being member of the opposing party is not sufficient. He/she must at least be a member of the armed forces of that group. It implies a lasting integration into an armed group. Continuous function can entail the preparation, execution, or command of operations. It concerns also individuals who repeatedly participate in hostilities, which indicates that the conduct is more than just a sporadic or temporary role in the hostilities.²⁵²

97. This doctrine is not without controversy.²⁵³ One could disapprove of this doctrine because it diminishes civilian protection and goes against the treaty language that limits targeting to ‘such time’.²⁵⁴

²⁴⁹ See for example: M. N. SCHMITT, “The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard NSJ* 2010, Vol. 1, 21-24; W. H. БООТНВУ, “Direct Participation in Hostilities – A Discussion of the ICRC Interpretative Guidance”, *JIHLS* 2010, 153-156.

²⁵⁰ B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), 19, para. 71 (f).

²⁵¹ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 33-35; N. MELZER, “Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *N.Y.U. J. Int’L L. & Pol.* 2010, Vol. 42, Issue 3, 846.

²⁵² B. EMMERSON, Interim Report to the General Assembly on the Use of Remotely Piloted Aircraft in Counterterrorism Operations, *UN Doc. A/68/389* (2013), 20-21, para. 69; ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 24.

²⁵³ K. WATKIN, “Opportunity Lost: Organized Armed Groups and The ICRC “Direct Participation In Hostilities” Interpretive Guidance”, *N.Y.U. J. Int’L L. & Pol.* 2010, Vol. 42, 655-660; M. N. SCHMITT, “The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard NSJ* 2010, Vol. 1, 22-24.

²⁵⁴ Art. 13 (3) AP II.

98. This category is problematic within the context of counter-terrorist operations. Often the identification of the individuals responsible for terrorist attacks is based on suspicion because the information that has led to the identification of the person is marred. To determine that a person has a continuous combat function it is very important to rely on accurate and correct information and not on the suspicion of responsibility for an attack.²⁵⁵ It is also very important to base this qualification on the conduct and not on the status of a person, such as the status of ‘suspected terrorist’ without the individual having shown behavior that could amount to a continuous combat function.

4.3.3.5 Targeting on the Basis of Suspicion

99. Targeting on the basis of suspicion, meaning on the basis of alleged membership in a terrorist group, is a very dangerous targeting practice. According to the Interpretive Guidance of the ICRC, membership in an organized armed group, i.e. a terrorist group, is defined functionally rather than formally. Thus, for an individual to be considered as a member, he/she should *de facto* exercise a continuous combat function.²⁵⁶

100. A drone policy that targets on the basis of alleged membership to a terrorist group and associated groups can include almost all persons supporting the concerned terrorist ideology. It is not restricted to armed terrorists and not to situations of violence, rather it is grounded on the assumption that the person has a continuous combat function and consequently can be targeted at any time and anywhere. There are various degrees of affiliation with terrorist groups, but not all amount to membership.²⁵⁷ Such a policy is very dangerous, too broad, too arbitrary, and too prone to error and abuse. If a terrorist would revoke his/her membership to a terrorist group, will the drone operator be able to know this? It is very likely that once you are listed by the authorities as a terrorist,

²⁵⁵ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 53.

²⁵⁶ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 27-36; N. MELZER, “Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *N.Y.U. J. Int’L L. & Pol.* 2010, Vol. 42, Issue 3, 839.

²⁵⁷ N. MELZER, “Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *N.Y.U. J. Int’L L. & Pol.* 2010, Vol. 42, Issue 3, 845-846.

you will remain on that list until you are dead.²⁵⁸ For these reasons such a policy should be condemned and considered as not being in accordance with IHRL and IHL. Instead, the decision whether a person has a continuous combat function should depend on a person's behavior and not on the person's status.²⁵⁹ A person who does not have a lasting integration into an organized armed terrorist group, but rather continuously supports or accompanies this armed group, is not involved in direct participation in hostilities and cannot be considered as a member of that group. These persons remain civilians and are protected against direct attacks.²⁶⁰ The U.S., on the contrary, argues that all members of Al Qaeda and associated forces have a continuous combat function and can therefore be targeted anytime and anywhere. This means that a person who, for example, works as a cook for Al Qaeda can be lawfully targeted.²⁶¹

101. As mentioned above, one of the problematic issues that has a significant impact on the principle of distinction is that terrorist attacks are often conducted by armed groups that associate themselves with other terrorist groups. They take inspiration from these groups without actually being part of their organizational structure and without forming together an organized armed group to the conflict. This makes it more difficult to identify who is party to the conflict and consequently makes it more difficult to determine the status of persons according to the principle of distinction, which on its turn determines who can be lawfully targeted and who cannot. This problem of fragmentation is what is currently happening with the terrorist group Al Qaeda.²⁶² According to the author of this thesis, these loosely linked individuals should be considered as having protected civilian status and might only be targeted with deadly force when directly participating in hostilities, which means they would lose their civilian protection for 'such time' as they are participating in hostilities, this in order to uphold the highest possible protection of innocent civilians.

²⁵⁸ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 53-54.

²⁵⁹ L. MAY, "Targeted Killings and Proportionality in Law: Two Models", *JICJ* 2013, 62.

²⁶⁰ ICRC, *Interpretive Guidance on the Notion Of Direct Participation in Hostilities under International Humanitarian Law*, May 2009, available at www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf, 33-35.

²⁶¹ J. D. OHLIN, "Is Jus in Bello in Crisis?", *JICJ* 2013, 38.

²⁶² R. M. CHESNEY, "Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism", *Mich. L. Rev.* 2013, Vol. 112, Issue 2, 185-201.

102. With regard to the discussion on targeting on the basis of suspicion, it is also worth noting the difference between ‘signature strikes’²⁶³ and ‘personality strikes’.²⁶⁴ Personality strikes are strikes conducted with a high degree of confidence about knowing the identity of the target. Signature strikes, on the other hand, are drone attacks that target “groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t known.”²⁶⁵ With regard to signature strikes, it is also necessary to go further than just establishing that a person is acting in a suspicious way. The possible target should act in the manner required by the signature such as handling explosives or transporting weapons, which qualify as situations of direct participation in hostilities. The U.S., for example, considers males of military age in areas of known terrorist activity as combatants and thus targetable. This is an example of a legally inadequate signature as it is inconsistent with the principle of distinction. Being a male of military age present in an area of known terrorist activity does not make you a member of a terrorist group nor does it mean that the individual is participating in hostilities. This is a criterion that is prone to error, abuse, and arbitrariness.²⁶⁶

4.3.3.6 Drone Targeting of Suspected Terrorists and the Principle of Distinction

103. Armed drones have features that can enable the operator to better adhere to the obligations set forth by the principle of distinction. Still, like any other weapon an armed drone can be used to conduct indiscriminate attacks against civilians.²⁶⁷ The informal structure of terrorist groups makes it also more difficult to take a well-based targeting decision that is in accordance to the principle of distinction.

104. Drones have extensive capabilities with regard to intelligence-gathering and surveillance. This makes it easier to identify legitimate targets. However, the identification of suspected terrorists is more complex than in traditional conflicts.²⁶⁸ These individu-

²⁶³ See following article for further information on signature strikes under IHL and IHRL: K. J. HELLER, “One Hell of a Killing machine: Signature Strikes and International Law”, *JICJ* 2013, 92-106 and 114-117.

²⁶⁴ L. MAY, “Targeted Killings and Proportionality in Law: Two Models”, *JICJ* 2013, 48.

²⁶⁵ K. J. HELLER, “One Hell of a Killing machine: Signature Strikes and International Law”, *JICJ* 2013, 90.

²⁶⁶ K. J. HELLER, “One Hell of a Killing machine: Signature Strikes and International Law”, *JICJ* 2013, 94-103.

²⁶⁷ L. R. BLANK, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 691; S. GORDON, “Civilian Protection- What’s Left of the Norm”, in S. PERRIGO & J. WHITMAN (eds), *The Geneva Conventions under Assault*, London, Pluto Press, 2010, 77 and 79.

²⁶⁸ S. GORDON, “Civilian Protection- What’s Left of the Norm”, in S. PERRIGO & J. WHITMAN (eds), *The Geneva Conventions under Assault*, London, Pluto Press, 2010, 77 and 79.

als, for example, normally do not wear a uniform that would make it easy to distinguish them from innocent civilians, or do not wear their weapons openly, precisely in order to appear as innocent civilians. The key to accurate and discriminatory targeting of such individuals is intelligence information, extensive surveillance, and reconnaissance capabilities. If armed forces would use force against individuals who are simply *suspected* of planning or having planned terrorist attacks, the basic foundations of IHL would be seriously undermined.²⁶⁹ The principle of distinction demands more than just suspicion.²⁷⁰ This implies that someone who appears to be a civilian is in fact a civilian and will be protected.²⁷¹ Drones have the ability to track and analyse the daily activities of suspected terrorists. This makes it possible to distinguish them more easily from innocent civilians. Drone attacks rely on high-resolution imagery that is normally transmitted to the operator in real time. In comparison to manned aircrafts and ground-based systems this reduces the risk of wrongly identifying the target.²⁷² However, recent reports of Amnesty International and Human Rights Watch have shown that during many drone strikes innocent civilians have been killed and that the principle of distinction has not been respected, which constitutes a breach of IHL.²⁷³ Even though contemporary conflicts put IHL to the 'test', it must be remembered that IHL "was not drafted to rule on war, but rather to protect victims of war, in particular civilians."²⁷⁴

105. One of the legal concerns is the amount of information that is needed to make a sufficient evaluation of a drone strike regarding the principles of distinction and proportionality (see also section 4.3.4). The International Criminal Tribunal of the Former Yugoslavia (ICTY) stated that the question is "whether a reasonable well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information

²⁶⁹ L. BLANK AND A. GUIORA, "Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflicts in New Warfare", *Harv. Nat'l Sec. J.* 2010, Vol. 1, 68-69.

²⁷⁰ F. HAMPSON, "The Principle of Proportionality in the Law of Armed Conflict", in S. PERRIGO & J. WHITMAN (eds), *The Geneva Conventions under Assault*, London, Pluto Press, 2010, 46.

²⁷¹ Art. 50 (1) AP I.

²⁷² L. R. BLANK, "After 'Top Gun': How Drone Strikes Impact The Law of War", *U. Pa. J. Int'l L.* 2012, Vol. 33, 693; M. N. SCHMITT, "Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law'", *Y.B. Int'l Humanitarian L.* 2010, 320; P. W. SINGER, "Military Robots and the Laws of War", *The New Atlantis* 2009, www.thenewatlantis.com/publications/military-robots-and-the-laws-of-war, Section 'Up, Up, and Away'.

²⁷³ AMNESTY INTERNATIONAL, "Will I be Next? US Drone Strikes in Pakistan", October 2013, www.amnestyusa.org/sites/default/files/asa330132013en.pdf, 74 p; HUMAN RIGHTS WATCH, "Between a Drone and Al-Qaeda", 22 October 2013, <http://www.hrw.org/reports/2013/10/22/between-drone-and-al-qaeda-0>, 98 p. See also: B. EMMERSON, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *UN Doc. A/HRC/25/59* (2014), 20 p.

²⁷⁴ A. VAN ENGELAND, *Civilian or Combatant? : A Challenge for the 21st Century*, Oxford, Oxford University Press, 2011, 245.

available to him or her, could have expected excessive civilian casualties to the result from the attack.”²⁷⁵ One could argue that because of the information capabilities of drones, the use of drones establishes a higher standard for use of information regarding the targets, potential collateral damage, and other relevant IHL considerations. Jack M. Beard claims, in these regards, that the analysis must include “an assessment of the key methods, procedures, and systems necessary to support the effective use of the virtual technologies to be deployed, including a careful evaluation of whether appropriate efforts are being made to ensure the databases are sufficiently accurate to catch mistakes by human operators.”²⁷⁶

4.3.4 The Principle of Proportionality

4.3.4.1 Introduction

106. Once a legitimate target is identified on the basis of the principle of distinction, the drone operator must assess if the attack would be in conformity with the principle of proportionality.²⁷⁷ It is a fundamental principle in making the decision on whether to target or not. The principle prohibits disproportionate attacks. This means that the expected loss of civilian life resulting from an attack cannot be ‘excessive’ but must be in relation, i.e. proportionate, to the ‘anticipated’ military advantage gained from the attack.²⁷⁸ This implies that the means and methods of warfare are not unlimited,²⁷⁹ a basic principle that dates back to at least the 1907 Hague Convention (HC).²⁸⁰ A breach of this principle constitutes a war crime under the Statute of the International Criminal Court.²⁸¹ The principle of proportionality is also part of customary international law.²⁸² In contrast to the principle of distinction, it does not determine ‘who’ may be attacked but ‘how’ a target may be attacked. The principle of proportionality could also be per-

²⁷⁵ ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T (5 December 2003), para. 58.

²⁷⁶ J. M. BEARD, “Law and War in the Virtual Era”, *Am. J. Int’l L.* 2009, 441.

²⁷⁷ S. WUSCHKA, “Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem”, *GoJIL* 2011, Vol. 3, Issue 3, 896-897.

²⁷⁸ Art. 51 (5) AP I; M. WAGNER, “Taking Humans out of the Loop: Implications for International Humanitarian Law”, *J.L. Inf. & Sci.* 2011, Vol. 21, Issue 2, 162-164; T. M. McDONNELL, “Sow What You Reap: Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists”, *The Geo. Wash. Int’l L. Rev.* 2012, Vol. 44, Issue 2, 275-276.

²⁷⁹ Art. 35 (1) AP I.

²⁸⁰ Art. 22 Hague Convention IV; L. R. BLANK, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 694-395.

²⁸¹ Art. 8 (2) (b) (iv) Rome Statute of the International Criminal Court; M. N. SCHMITT, “Precision Attack and International Humanitarian Law”, *Int’l Rev. Red Cross* 2005, Vol. 87, No. 859, 456.

²⁸² J. HENCKAERTS AND L. DOSWALD-BECK, *Customary International Humanitarian Law: Volume I: Rules*, Cambridge, Cambridge University Press, 2005, Rules 11-14.

ceived as meaning that the killing of the terrorist should be proportionate to the military advantage achieved by the death of the concerned terrorist.²⁸³

107. The principle of proportionality aims at minimizing ‘collateral damage’. This term refers to the civilians who are killed during an attack on a military target. It is important to note that with regard to civilian casualties there is a fundamental distinction between IHRL and IHL. Both legal frameworks prohibit the deliberate killing of innocent civilians.²⁸⁴ Importantly, however, IHL does not prohibit all civilian casualties. The attacking party can anticipate that some civilians will suffer harm or die when conducting the drone killing of the legitimate military target. They can be, for example, civilians who are in the same building as the person who is being targeted. Collateral damage can also result from errors and accidents, such as a technical malfunction. At any rate, the principle of proportionality seeks to minimize these civilian casualties by requiring that the amount of casualties is not ‘excessive’ in relation to the military advantage. In this way the concerned principle tries to balance the principles of humanity and military necessity.²⁸⁵

108. The ‘expected’ civilian casualties and ‘anticipated’ military advantage must be evaluated on the basis of the information available and the circumstances at the time of the attack, thus not in hindsight.²⁸⁶ The principle of proportionality obliges the attacking party to gather and assess information about the target and the persons in the proximity of the target.²⁸⁷ This relates also to another principle of IHL, the principle of precaution, which entails that military operation have to take the precaution of sparing the civilian population from harm. It obliges drone operators to gather sufficient and reliable information on whose basis to decide whether to target an individual. This will avoid wrongful targeting and disproportionate impact of drone strikes. Failing to meet the principle

²⁸³ L. MAY, “Targeted Killings and Proportionality in Law: Two Models”, *JICJ* 2013, 62; M. HAGGER AND T. MCCORMACK, “Regulating the Use of Unmanned Combat Vehicles: Are General Principles of International Humanitarian Law Sufficient”, *JLIS* 2011, Vol. 21, Issue 2, 87-88; H. E. SHAMASH, “How Much is Too Much - An Examination of the Principle of Jus in Bello Proportionality”, *IDF L.R.* 2005-2006, 104-109.

²⁸⁴ Art. 2 ECHR; Art. 6 ICCPR; Art. 51 (2) AP I.

²⁸⁵ L. R. BLANK, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 694-695.

²⁸⁶ Art. 51 (5) AP I.

²⁸⁷ L. R. BLANK, “After ‘Top Gun’: How Drone Strikes Impact The Law of War”, *U. Pa. J. Int’l L.* 2012, Vol. 33, 696-697.

of precaution will also imply a violation of the principle of distinction and proportionality.²⁸⁸

4.3.4.2 Drone Targeting of Suspected Terrorists and the Principle of Proportionality

109. Drones offer great opportunities for compliance with the principle of proportionality.²⁸⁹ As stated above, drones are capable of collecting real-time information about the target, the civilian population in the area around the target, and the potential for civilian casualties. By allowing to observe the target and the possible strike location(s) for long periods of time, they offer the opportunity to strike when the possibility of minimizing collateral damage is at its height.²⁹⁰ In most cases this should significantly improve the accuracy of the attack.²⁹¹

110. Even though drones should make it possible to adhere more effectively to the principle of proportionality, they also raise serious legal concerns in this context. First, the use of armed drones poses challenges to the interpretation of the principle of proportionality. What should be understood, for example, under 'expected' collateral damage? How 'military' should the advantage be? How should one compare civilian harm to military advantage in different combat situations, for example with regard to terrorism, and across cultures? The new precision capabilities of drones influence these issues.²⁹² The heightening capabilities of drones also seem to alter the interpretation of civilian casualties.²⁹³ There is a growing perception that proportionality requires, instead of no excessive casualties, no casualties at all. Such a zero casualty standard would be impossible to reach, unless all persons in the combat zone would be considered to be legitimate tar-

²⁸⁸ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 62.

²⁸⁹ A. C. ORR, "Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law", *Cornell Int'l L.J.* 2011, Vol. 44, 747-749; B. J. STRAWSER, "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles", *J. of Military Ethics* 2010, 352; K. BENSON, "Kill 'em and Sort It out Later: Signature Drone Strikes and International Humanitarian Law", *Pac. McGeorge Global Bus. & Dev. L.J.* 2014, Vol. 27, Issue 1, 43-44; M. L. LEWIS, "Drones and the Boundaries of the Battlefield", *Tex. Int'l L.J.* 2012, 297-298.

²⁹⁰ L. R. BLANK, "After 'Top Gun': How Drone Strikes Impact The Law of War", *U. Pa. J. Int'l L.* 2012, Vol. 33, 697-398; M. N. SCHMITT, "Drone Attacks Under the Jus ad Bellum and Jus in Bello: Clearing the 'Fog of Law'", *Y.B. Int'l Humanitarian L.* 2010, 314.

²⁹¹ T. M. McDONNELL, "Sow What You Reap: Using Predator and Reaper Drones to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists", *The Geo. Wash. Int'l L. Rev.* 2012, Vol. 44, Issue 2, 276.

²⁹² M. N. SCHMITT, "Precision Attack and International Humanitarian Law", *Int'l Rev. Red Cross* 2005, Vol. 87, No. 859, 457.

²⁹³ J. D. OHLIN, "Is Jus in Bello in Crisis?", *JICJ* 2013, 42-44; N. SHARKEY, "Death Strikes from the Sky: The Calculus of Proportionality", *IEEE Technology and Society Magazine* 2009, 18-19.

gets, which would be a very dangerous and unacceptable conclusion.²⁹⁴ It could also lead to considering the law as entirely unreasonable or to refraining from any military operation out of fear for legal violations. Second, one of the legal concerns already raised with regard to the principle of distinction, i.e. regarding the amount of information needed to make a sufficient evaluation of a drone strike, can also be raised with regard to the principle of proportionality. Drones may create a higher standard because of the possibilities of more precise targeting. However, it is important to recognize also the limits of data analysis. The information gathered by drones can sometimes be overwhelming and may even impede the drone operator to conduct the attack in a precise and correct way because of the flood of information. Reaper drones (a specific type of drone), for example, are able to record video in over thirty directions at once.²⁹⁵ Investigations into an attack in February 2010 in Afghanistan showed that information overload was the reason for the mistaken targeting of 23 innocent Afghan civilians.²⁹⁶ Another problem relating to data gathering is that drone strikes' protocols often seem to be unable to take the cultural context into account. This can lead to disproportionate attacks. For example, the U.S. conducted a drone strike on a heavily armed group that included men connected to Al Qaeda and persons acting in a manner consistent with Al Qaeda linked militants. However, after the attack it became clear that this was a type of meeting held to resolve local disputes. It turned out that members of the Taliban had to be present in order for the resolution of the dispute to be binding. Thirty-eight civilians and four Taliban were killed, these last were the only Taliban members present.²⁹⁷ Third, the heightening of the IHL standards and obligations may have the effect that parties opt for less precise weapons in order to avoid these standards. This would be at the expense of innocent civilians.²⁹⁸

²⁹⁴ L. R. BLANK, "Drone Strike Casualties and the Laws of War", *Jurist* 22 August 2011, <http://jurist.org/forum/2011/08/laurie-blank-drone-strikes.php>.

²⁹⁵ C. DREW, "Military Is Awash in Data from Drones", *N.Y. Times* 5 January 2010, www.nytimes.com/2010/01/11/business/11drone.html?pagewanted=all&_r=0.

²⁹⁶ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 57-58; T. SHANKER AND M. RICHTEL, "In New Military, Data Overload Can Be Deadly", *N.Y. Times* 16 January 2011, www.nytimes.com/2011/01/17/technology/17brain.html?pagewanted=all.

²⁹⁷ K. BENSON, "Kill 'em and Sort It out Later: Signature Drone Strikes and International Humanitarian Law", *Pac. McGeorge Global Bus. & Dev. L.J.* 2014, Vol. 27, Issue 1, 37-38; S. SHANE, "Contrasting Reports of Drone Strikes", *N.Y. Times* 11 August 2011, www.nytimes.com/2011/08/12/world/asia/12droneside.html?_r=0.

²⁹⁸ L. R. BLANK, "After 'Top Gun': How Drone Strikes Impact The Law of War", *U. Pa. J. Int'l L.* 2012, Vol. 33, 697-715.

4.3.5 Principle of Military Necessity

111. The principle of military necessity entails that only a certain amount of force and only certain actions that are needed to accomplish a reasonable military objective can be used, and that these have to offer a definite military advantage.²⁹⁹ The principle is generally considered to constitute international customary law.³⁰⁰ Article 8 of the Rome Statute defines the breach of this principle as a war crime by defining as a war crime attacks against civilian objects and “[d]estroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.”

112. Ryan J. Vogel, foreign affairs specialist for the U.S. Office of the Secretary of Defense, argues that drone targeting offers a definite military advantage in the war on terror between the U.S. and terrorist groups, because of its ability to find and identify terrorists and to enter into territories that are not reachable for ground forces. He notes as well that the evaluation of the military necessity of a drone strike still requires a case-by-case assessment, just like it is the case with the use of any other weapon. The operator must assess if the drone attack would offer a military advantage to the accomplishment of the military goal.³⁰¹ However, other scholars state the opposite by arguing that drone targeting does not offer a definite military advantage. One of the arguments is, for example, that drone strikes often result in a high number of civilian casualties. This leaves families and friends of the persons killed with a desire for revenge and leads to more recruits for militant movements.³⁰² An example taken from *Living Under Drones*, a report by Stanford Law School and NYU School of Law, shows what kind of impact drone strikes have on people that are constantly living with the fear of a drone strike and the way they see the U.S. because of this: “We did not know that America existed. We did not know what its geographical location was, how its government operated, what its government was like, until America invaded Iraq and Afghanistan. We do know that Americans supported the Taliban in our area, North Waziristan, to fight off the Soviets. But [now with] the Soviets divided and broken [. . .] we have become victims of Americans. We don’t know how they treat their citizens or anything about them. All we know is that they used to support us, and now they don’t [. . .] [W]e didn’t know how they treated a com-

²⁹⁹ Art. 52 (2) AP I.

³⁰⁰ R. J. VOGEL, “Drone Warfare and the Law of Armed Conflict”, *Denv. J. Int’l L. & Pol’y* 2010, 115.

³⁰¹ R. J. VOGEL, “Drone Warfare and the Law of Armed Conflict”, *Denv. J. Int’l L. & Pol’y* 2010, 115-116.

³⁰² S. G. JONES AND C. LIBICKI, “How Terrorist Groups End: Lessons for Countering al Qa’ida”, *RAND Corporation* 2008, www.rand.org/pubs/monographs/MG741-1.html, 137.

mon man. Now we know how they treat a common man, what they're doing to us."³⁰³ According to Noam Chomsky, "the Obama administration is dedicated to increasing terrorism [...] Obama is running the biggest terrorist operation that exists, maybe in history: the drone assassination campaigns, which are just part of it [. . .] All of these operations, they are terror operations [...] People hate the country that's just terrorizing them. That's not a surprise. Just consider the way we react to acts of terror. That's the way other people react to acts of terror."³⁰⁴

113. Keeping the balance between military necessity and humanity is a very difficult task, particularly in contemporary asymmetrical warfare. As mentioned, these conflicts are marked by an increased civilian involvement. This has led to a continued blurring of the traditional distinctions and categories under IHL which determine who is a legitimate military target and who is protected against direct attack. Consequently, on the one hand civilians are more likely to be arbitrarily and erroneously targeted, on the other hand armed forces bear an increased risk of being targeted by persons because they are not able to distinguish them from the civilian population.³⁰⁵ The 'capture rather than kill' debate mentioned above relates also to the principle of military necessity. One could pose the question whether it is necessary from a military standpoint to target a person with lethal force when it is possible to capture him/her alive, and if equipping drones with hell-fire missiles is militarily unnecessary to reach the military objective. Burning a person to death is not the same as shooting a person.³⁰⁶

4.4 Conclusion on the Principles of IHL

114. The increased use of drones for counter-terrorist operations over the past decade has led to legal questions and concerns regarding the interpretation and application of the IHL principles of distinction, proportionality, humanity, and military necessity.³⁰⁷

³⁰³ STANFORD LAW SCHOOL AND NYU SCHOOL OF LAW, "Living Under Drones", September 2012, www.livingunderdrones.org/victim-stories/.

³⁰⁴ Interview with Noam Chomsky by Laura Flanders, available at www.mediaite.com/tv/noam-chomsky-obama-is-running-biggest-terrorist-operation-that-exists/.

³⁰⁵ N. MELZER, "Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities", *N.Y.U. J. Int'l L. & Pol.* 2010, Vol. 42, Issue 3, 833.

³⁰⁶ T. CHENGETA, *Are U.S. Drone Targeted Killings Within The Confines of The Law?*, Dissertation University of Pretoria, 2011, 61-62.

³⁰⁷ M. HAGGER AND T. MCCORMACK, "Regulating the Use of Unmanned Combat Vehicles: Are General Principles of International Humanitarian Law Sufficient", *JLIS* 2011, Vol. 21, Issue 2, 90.

Drone technology, which is more developed than the technology of other weapons, makes it possible to monitor potential targets for a long period of time and make well-founded decisions before targeting an individual. As stated multiple times, this should allow for better adherence to the IHL obligations.³⁰⁸ However, despite these enhanced technical capabilities, case studies have shown, for example, that many civilians have been killed during drone strikes, which makes it difficult to claim that drones are inherently more likely to adhere to IHL obligations than other weapons. In October 2010, for instance, sixty-nine children were killed when the headmaster, who was allegedly a known militant, was targeted by the CIA with the use of a drone. It is still not clear why the school was targeted when so many children were inside.³⁰⁹

115. Legal concerns have been raised regarding the possible development of a 'Playstation mentality' towards killing of drone operators and whether these operators can still be emotionally touched by a humanitarian sense. However, there is no consensus on this issue as shown by the statement of a drone operator who claimed that when employing drones the operator is involved on a very personal level as the operator is '18 inches away' from its target. Regarding the principle of distinction, the asymmetrical aspect of contemporary armed conflicts poses difficulties for its correct application. To determine who is a lawful target becomes much more complex. Besides this, the author has shown that there also exists much disagreement on key legal concepts relating to the principle of distinction, such as the concept of direct participation in hostilities, which makes the correct application of the concerning principle even harder. The author also argued that a drone policy that targets on the basis of alleged membership to a terrorist group is a very dangerous targeting practice as it can include almost all persons supporting the concerned terrorist ideology. Thus, such a policy is too broad, too arbitrary, and too prone to error and abuse. The extensive capabilities with regard to intelligence-gathering and surveillance of drones have raised the question whether drones raise the standard of information that is needed to make a sufficient evaluation of a drone strike

³⁰⁸ K. BENSON, "Kill 'em and Sort It out Later: Signature Drone Strikes and International Humanitarian Law", *Pac. McGeorge Global Bus. & Dev. L.J.* 2014, Vol. 27, Issue 1, 46; R. J. VOGEL, "Drone Warfare and the Law of Armed Conflict", *Denv. J. Int'l L. & Pol'y* 2010, 102; X, "Flight of the Drones: Why the Future of Air Power Belongs to Unmanned Systems", *The Economist* 8 October 2011, www.economist.com/node/21531433; X, "NOVA: Rise Of The Drones", *KPBS* 15 March 2013, www.kpbs.org/news/2013/jan/22/nova-rise-drones/.

³⁰⁹ C. WOODS, "The Day 69 Children Died", *The Express Tribune (with the International N.Y. Times)* 12 August 2011, <http://tribune.com.pk/story/229844/the-day-69-children-died/>; K. BENSON, "Kill 'em and Sort It out Later: Signature Drone Strikes and International Humanitarian Law", *Pac. McGeorge Global Bus. & Dev. L.J.* 2014, Vol. 27, Issue 1, 45.

in accordance to the principle of distinction and proportionality. Contrary to this, it has been noted that the amount of information gathered by drones can also be overwhelming and impede correct adherence to the IHL principles. The heightened capabilities of drones also seem to alter the interpretation of civilian casualties to zero casualties. The author argued that this is not correct, as IHL does not prohibit all civilian casualties but requires that the amount is not excessive in relation to the military advantage. Regarding the principle of military necessity, the author raised the issue of whether it is military necessary to equip drones with hell-fire missiles, and whether drone targeted killings are necessary to reach the military objective when it is possible to capture the suspected terrorist alive. Different opinions can also be noted with regard to the military advantage of a targeted killing policy.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

116. Drones do not raise legal issues for the fact of being weapons. A targeted killing conducted with the use of a drone is no different from one done with any other weapon. Armed drones are by nature neither discriminatory nor do they cause unnecessary suffering. However, specific drone strikes can raise legal concerns and questions with regard to the legal rules that have to be followed under international human rights and humanitarian law when conducting a drone targeted killings of a suspected terrorist. These legal issues will depend on which legal model applies to the specific drone strike, i.e. the law enforcement or the armed conflict model. Thus, a case-by-case assessment will always have to be made.

117. Under IHRL, drone targeted killings will most likely never be lawful and justifiable. The reasons for this are that if due process cannot be met, the use of deadly force can only be legal if it is absolutely necessary to protect the life of others while the amount of deadly force has to be proportionate to the threat. However, according to the definition of targeted killing the use of deadly force is premeditated and intentional. Only in the most exceptional of circumstances will the killing of a person as the sole objective of an operation be justifiable under IHRL. For counter-terrorist operations the default legal framework is the law enforcement model, i.e. IHRL. It is only in the exceptional case when violence between a State and a terrorist group fulfills the necessary requirements for a conflict to amount to an armed conflict that, consequently, IHL will apply as *lex specialis* and IHRL as *lex generalis*.

118. Under IHL, the legality of drone targeted killings will depend on a number of issues. First, when the violence reaches the threshold of an armed conflict one should determine whether this conflict should be qualified as an IAC or a NIAC. In this thesis, the author argued that an armed conflict between a State and a terrorist group should be qualified as a NIAC. Thus, IHL of NIAC would apply. Second, one of the most essential ques-

tions should be answered, i.e. who can be targeted. This question revolves around the status of the targeted person under IHL, namely whether the person is a combatant, a civilian, a civilian taking direct part in hostilities, or a civilian who has a continuous combat function. The author has shown that the asymmetrical aspect of contemporary conflicts and the existing legal disagreements on core concepts make it more difficult to determine who is a lawful target. It was also argued that targeting on the sole basis of alleged membership to a terrorist group is not a sufficient targeting criterion as it is too broad, and too prone to error and abuse. The author concluded that suspected terrorists should be considered as civilians, and therefore can only be targeted for such time as they are directly participating in hostilities and at anytime and anywhere when they have a continuous combat function. For the interpretation of these concepts the author followed the interpretation given by the ICRC, which tries to uphold the highest protection of civilians during armed hostilities. When the status of the concerned person is determined, it will be important to analyse how and why the concerned person is targeted. This analysis revolves around the other fundamental IHL principles of proportionality, humanity, precaution, and military necessity. The main concerns raised with regard to these principles are the fear of the possible development of a 'Playstation mentality', the influence that the extensive capabilities of drones have on the interpretation and application of these principles, whether the equipping of drones with hell-fire missiles is military necessary, and whether the IHRL capture-rather-than-kill rule should also apply under IHL. As discussed, these legal ambiguities, uncertainties and controversies with regard to the core IHL principles are not new questions. The use of drones makes the need to reach a consensus on these legal issues more pressing in order to regulate drone targeted killings in a more transparent way and to limit civilian casualties. By clarifying these legal concepts it will be easier and more transparent to conduct case-by-case assessments and determine their legality. Clarifying IHL is not only important for the reasons stated above, but also to ensure that IHL is not abused, as the use of drones has an element of attraction for States.³¹⁰ This makes it clear that even though it is important for States to reach a consensus on certain critical concepts within IHL, eventually the most important question will be how States will comply with these legal regulations.

³¹⁰ P. ALSTON, "Lethal Robotic Technologies: The Implications for Human Rights and International Humanitarian Law", *J.L. Inf. & Sci.* 2011, Vol. 21, Issue 2, 50.

119. To conclude I wish to stress that one cannot determine in advance if a targeted drone killing of a suspected terrorist is legal or illegal. This has to be judged under international law on a case-by-case assessment.³¹¹

“The question is not whether it is possible to defend ourselves against terrorism. Of course it is possible to do so, and at times it is even a duty to do so. The question is how we respond. On that issue, a balance is needed between security needs and individual rights. That balancing casts a heavy load upon those whose job is to provide security. Not every efficient means is also legal. The ends do not justify the means. The army must instruct itself according to the rules of the law. That balancing casts a heavy load upon the judges, who must determine – according to the existing law – what is permitted, and what forbidden.”³¹²

5.2 Recommendations

120. The following recommendations are made:

- Provide more transparency and clear information on the part of States that conduct drone targeted killings. This will make it possible to conduct correct case-by-case assessments, to conclude whether the drone strikes are in compliance with IHL and IHRL, and to understand what definitions and interpretations regarding IHL and IHRL States use. This includes:
 - States should make public their legal position on the raised concepts and questions.
 - States should provide information on the procedure they have in place to make sure that drone targeted killings are in compliance with IHL and IHRL and what measures they have in place to ensure, after the strike has occurred, that the legal analysis was correct.
 - States should make public the amount of civilian killed during drone targeted killings as collateral damage, their procedures to determine whether

³¹¹ HCJ, *Pub. Comm. Against Torture in Isr. v. Gov't of Isr.*, No. 769/02 (11 December 2005), para. 60.

³¹² HCJ, *Pub. Comm. Against Torture in Isr. v. Gov't of Isr.*, No. 769/02 (11 December 2005), para. 63.

- the collateral damage would be excessive, and whether they have measures in place to prevent casualties.
- States should clarify their decisions on using lethal force when the capture of the suspected terrorist is feasible.
- The international community should come to a broad international consensus on the identified core legal concepts and questions. The U.N. could be a good framework to start negotiations on these issues, as the U.N. Human Rights Council recently adopted a resolution on armed drones that shows the willingness of States and the need to act on the matter.
 - “Direct participation in hostilities” is one of the key concepts on which a broad international consensus is needed. As the Guidance of the ICRC is one of the leading documents on this concept, the ICRC should be involved in this process.
 - Adopt an international convention on armed drones and ensure that the key States participate in this process.
 - The international community and civil society should condemn targeting policies that target on the basis of suspicion. States should ensure that targeting decisions are based on adequate and sufficient intelligence with regard to the target and the possible presence of civilians in the targeted area.

CHAPTER 6

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