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Master’s Thesis in International Law
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THE CUBICLE WARRIOR

Drones, Targeted Killings, and the Implications of Waging a “War On Terror” from a Distance Under International Law

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1. Introduction

1.1 The issue

“Dehumanization [...] acts as a psychological lubricant, dissolving our inhibitions and inflaming our destructive passions. As such, it empowers us to perform acts that would, under other circumstances, be unthinkable.”

War has traditionally been thought to exist in two forms: either as waged on the battlefield between two or more States, or as taking place between a State and rebels within its own territory. However, within hours of the September 11 2001 terrorist attacks President George Bush declared the United States (US) to be engaged in a new kind of war. A war that would “not end until every terrorist group of global reach has been found, stopped, and defeated”. With this, the understanding of what war is and between whom it can be waged was changed forever. Suddenly the international legal community witnessed the emergence of the notion that terrorists could be elevated to legitimate targets in a seemingly borderless war with the world’s only superpower. As this “global war on terror” took the world from peacetime to wartime, any alleged terrorist’s right to life and due process safeguards became subsidiary to the cornerstone of wartime rules: the soldier’s right to kill.

The definition of contemporary warfare has however changed in more ways than one. The 21st century has been described as “the cusp of a robotic revolution”. Accordingly, the modern battlefield is characterized by the incentives behind letting a machine take center stage. Remote controlled weapons systems such as drones allow combatants to be physically absent from the line of fire, and are therefore quickly becoming a fixture in the application of modern military force. However, taking the soldier out of the line of fire and delegating decisions concerning the lethal use of force from traditional combatant to computer engineer may change society far from the battlefield. The traditional concept of war involves the mobilization of entire nations, soldiers fighting and dying, victory or defeat. Recent years have proven traditional war

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1 Smith, Less Than Human: Why We Demean, Enslave, and Exterminate Others.
2 See George W. Bush, President’s September 11, 2001 Address to the Nation on the Terrorist Attacks, 37 Weekly Compilation of Presidential Documents, 1301 (Sept. 17, 2001).
to be a thing of the past: today nations enlist only as TV audiences, combatants fire hellfire missiles from computers, and instead of any definable victory or defeat the “war on terror” leaves us with only an uncertain endgame. In short: for those with the technology, war is becoming something that slowly but surely is ceasing to be real.

This master’s thesis aims to evaluate the point where these two issues meet: the targeted killings of alleged terrorists via drone strikes. Senior US officials paraphrase this practice with surgery. John Brennan, current director of the Central Intelligence Agency (CIA), has called drone warfare an “essential tool” for its ability to “with laser-like focus … eliminate the cancerous tumour called an al Qaeda terrorist while limiting damage to the tissue around it”.

While it is true that these advanced weapons have killed high ranking insurgents, studies also indicate that roughly 10 civilians perish in every drone strike. Some unlucky passers by, some unlucky friends and family of targets, and some unlucky enough to have been mistaken for terrorists by drone operators thousands of miles away. It is this very dichotomy between the clinical nature of “surgical precision” and the sheer amount of civilian casualties that makes drone warfare such an unsettling yet pressing topic. How do we evaluate this practice under international law? This thesis argues that the unique nature of targeted killings via drone strikes in the context of the “war on terror” places it outside what traditional models of international law can adequately govern. Drones place both physical and psychological distance between target and aggressor. Moreover, the realities of the “war on terror” have reduced alleged terrorists to indistinguishable members of a faceless enemy and thereby ”counterterrorism” to a game of chance. As such, traditional application of neither international human rights law (IHRL) nor international humanitarian law (IHL) can ensure that the principles that permeate either instrument can be respected: that even an alleged terrorist is first and foremost a human being. On the contrary, as will be shown, current practice allows States to manipulate international law in order to devise standards which support their own agenda. This thesis aims to present a possible solution that hopefully will mitigate international law’s current standing as pretext in this specific context.

5 John Brennan, quoted in Ross, Documenting Civilian Casualties, in Drones and Targeted Killings: Legal, Moral, and Geopolitical Issues (edited by Marjorie Cohn).
1.2 Aim and Research Questions

This master’s thesis aims to evaluate the implications of employing targeted killings via drone strikes in the context of international law. The evaluation will focus on key points of international debate, including:

- What effect may remote controlled warfare have on States’ readiness to use force, and what may the legal implications of this readiness be?
- Do the policies of States employing the use of targeted killings via drone strikes conform with international law?
- Ought the practice of targeted killings via drone strike be governed by IHRL or IHL?
- Can either IHRL or IHL stand on its own in order to prevent abuse? In other words: can traditional models of international law adequately govern targeted killings via drones in the present context?

Each and every one of these issues will be evaluated in the context of both the complexities of counterterrorism tactics and the realities of an ever-evolving battlefield.

1.3 Methodology

In this thesis applicable law is established in accordance with art 38 of the Statute of the International Court of Justice (ICJ). Art 38 of the Statute of the ICJ lists all sources of international law exclusively and without establishing any hierarchical relationship. The sources are as follows: treaty law, general principles of law, customary international law, the writings of jurists and the decisions of courts as evidence of law. Applicable law has then been examined in accordance with art 31 through 33 of the Vienna Convention Law of treaties, ie that treaty provisions have been interpreted in good faith in accordance to the ordinary meaning of the terms used in each treaty in each context and in light of each treaty’s object and purpose. The writing of this text has also used critical perspectives in order to problematize the law, offer solutions, and endeavour to explain why applicable law is construed thus.

The foundation for this thesis will be found in the United Nations Charter (UN Charter), as well as IHL, meaning the Hague Conventions of 1899 and 1907, the Geneva Conventions Additional Protocols I-II, and IHRL, in particular art 6 of the International Covenant on Civil and Political Rights (ICCPR). Doctrine will also play a vital role. In addition, this thesis will examine state policy. However, the use of and
review of drone strikes, weapons research, and targeted killings are characterized by a lack of transparency. Official statements regarding policy and use are therefore scarce, and without any guarantee that they correspond with actual use, research or intentions. Furthermore, the topic of targeted killings is strongly connected to Israel, in the context of the al-Aqsa Intifada, and to the US (albeit somewhat unofficially). The use of drones by these States may therefore dominate the analysis.

1.4 Scope and limitation

The issues regarding drones and targeted killings are not related to drones and targeted killings themselves, but rather to the context into which they are employed. The use of drones and targeted killings would not be problematic in a traditional war between States or between States and non-state actors in effective control over parts of the State’s territory. In a traditional war there are ongoing hostilities, your enemy is in uniform and there is a definable conflict zone. As will be shown, the ”war on terror” is characterized by sporadic acts of violence, an enemy who operates in the shadows, and a conflict zone without real limits. As such, this thesis will focus on the implications of using drone to target and kill alleged terrorists in the context of the ”war on terror”.

Notwithstanding the difficult legal issues, the topics of the use of drones and targeted killings in the context of the “war on terror” involve multiple moral issues. It is not within the scope of this thesis to present definite answers to these issues. However, some of them will be addressed as they are strongly related to the various legal questions tied to drones, the “war on terror”, targeted killings and the analysis of these topics. This thesis will also not discuss domestic law, as it has no bearing on legality under international law.

1.5 Definitions

A drone, or unmanned combat air vehicle (UCAV), is an unmanned aerial vehicle that is armed and does not require the physical presence of its operator when it is deployed, but rather allows the operator to activate it while faraway, actively protected from the line of fire. Drones are thereby under real-time human control, albeit the role of ‘human in the loop’ varies in accordance with the levels of autonomy of the UCAV.7

This thesis will use the term *targeted killings* when referring to attacks against specific alleged terrorists, rather than opting for terms such as “assassination” or “extrajudicial execution”. The use of the latter terms would risk the objectivity of this thesis, as they are value-laden with notions of immorality and illegality, and thus leave the reader with the impression that the debate has already been determined. An “assassination” during peacetime is often defined as “murder of a private individual or public figure for political purposes”, whereas an “assassination” during armed conflict is defined as the specific targeting of an individual through “treacherous” means.\(^8\) On the other hand, “extrajudicial execution” is commonly used when referring to domestic situations in which IHRL is *lex specialis* and to “the deliberate killing of suspects in lieu of arrest, in circumstances in which they [do] not pose an immediate threat”.\(^9\) As will be shown, which term is applicable is far from clear. Therefore, the more neutral targeted killings will be used and will refer to the intentional specific killing of an alleged terrorist or group of such individuals with explicit governmental approval when they cannot be arrested using reasonable means.

Throughout this thesis, the term targeted killings will be used in two ways. Targeted killings is the most common and most frequently used term when referring to said policies regarding the killing of certain individuals. As such, it will first be used in this generic form, encompassing killings with different motives and intentions. Second, where appropriate, targeted killings will be used as opposed to preventive killings when referring to cases where the main object and purpose is the death of the targeted individual. This death is thus intended directly, with *dolus directus* of the first degree, regardless of further motives behind the targeted killing. In contrast, preventive killings’ main object and purpose is to prevent the fulfillment of a certain deed. In these cases the death of the individual carrying out the deed may only be a necessary consequence of preventing his or her actions.

There is also need to address the use of the terms *terrorism* and *international or transnational terrorism* in this thesis. As these terms have been proven notoriously

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difficult to define, the aim of this thesis has not been to enter this debate.\textsuperscript{10} The thesis will define terrorism as the deliberate killing of, or infliction of serious injury to, civilians for political or ideological ends.\textsuperscript{11} In turn, international or transnational terrorism will be defined as terrorism carried out across international borders or directed at civilians in a country that is not the perpetrator’s country of origin.\textsuperscript{12} An organization will be deemed a terrorist group if its sole aim is terror or if it routinely employs terror in order to achieve its aims. Said aims’ legitimacy will not be discussed.

1.6 Outline

*Chapter two* will serve as a brief introduction to current technology, what a drone is capable of and how drones and the new practice of targeted killings have changed our perceptions of modern warfare. *Chapter three* will examine state policy and practice on the employment of targeted killings via drones and determine its legality; *jus ad bellum*, *jus in bello* and as a means of extraterritorial law enforcement. It will also evaluate whether international law adequately can govern drone-warfare and the challenges it poses. *Chapter four* will discuss the questions raised and conclusions drawn in chapters two and three, to ultimately attempt to present a realistic means of governing the use of drones and the practice of targeted killing. *Chapter five* will concludingly summarize the thesis.

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\textsuperscript{12} Ibid.
2. The Modern Battlefield

2.1 Remote controlled warfare: a new prospect

“Yes, there is an app for that” - MIT’s Mary Cummings, demonstrating how easily drone technology is patterned and even piloted with an iPhone.\(^\text{13}\)

The choice of tools with which mankind chooses to resolve conflict shapes the landscape of society and its battlefields. Accordingly, developments throughout history within the field of warfare, such as the crossbow, gunpowder, machine guns, tanks, airplanes, chemical and nuclear weapons, and a variety of other deadly instruments have forced the international legal community to continually revise and reevaluate the laws of armed conflict. As such, the development of drones become a natural catalyst for yet another reassessment of these laws, having seemingly overnight moved to the front lines of modern day warfare. What then is a drone and in what way do drones differentiate themselves from traditional means of war to the point that practitioners struggle with how they legally can be used?

A drone is a remote controlled weapons system, a system which main feature is that it allows combatants to be physically absent from the battlefield. In light of the wide array of other long distance weapons this feature may not sound revolutionary. Nevertheless, the employment of remote controlled drones has created a strange new world of war where military pilots fly combat missions in Iraq from their computer consoles in Syracuse, New York. Unmanned aerial systems such as drones, along with their landborne counterparts, are quickly being introduced in almost every realm of warfare. This substitution of human ‘boots on the ground’ for robotics means moving more and more soldiers out of the line of fire, and with increasing precision moving their enemies into it. This process is also changing the very experience of war, causing legal scholars to worry that missions with limited costs and casualties may portray remote controlled wars as easy, and thereby too tempting.\(^\text{14}\) The horrors of war have traditionally functioned as some sort of natural repellent against warmongers as these horrors have forced States to contemplate burdening their citizens with the costs, both human and economic, of enduring them. Today, new technology thwarts this equation: modern day “going to war” means commuting to work, firing missiles at targets

\(^{13}\) Quoted in McGurk, Lawyers: A Predator Drone’s Achilles Heel?.

\(^{14}\) Asaro, How Just Could a Robot War be?, at 7.
thousands of miles away, and still managing to make it home in time for the season finale of your favourite show.

Accordingly, the use of drones raises issues of societal character, and has even been described as threatening to distort our democratic institutions.\textsuperscript{15} Drones lay the way for the harsh reality that is asymmetrical warfare, and thereby incentivize adversaries and non-state actors to resort to less than safe knock offs of prized American technology, or perhaps be empowered by even better models of their own design. Thus, a modern battlefield largely uninfluenced by strength in human numbers or skill, as has been in ages of sword and gun dominated warfare, may have an effect on the global distribution of power. As drones become easier to operate and their ownership remains hard to trace, some scholars stress the dangers of “anonymous war”.\textsuperscript{16} A drone driven era of warfare where offence will become rule rather than defence, as perceived self-defense will become the only way of gaining the upper hand in a world where power may be centralized into few yet unseen hands.

Paraphrasing modern warfare with drone warfare is not farfetched. During the 2003 invasion of Iraq, only one drone was used to support the primary US Army combat force.\textsuperscript{17} Today, they play an integral part in US counter-terrorism tactics. Out of the over 7000 strong fleet of drones owned today by the US the most famous drone is undoubtedly the American Predator.\textsuperscript{18} At 8 metres in length, it can fly up to 24 hours at heights up to 7,924 metres enabling so called “remote-split” operations.\textsuperscript{19} While the Predator takes off from bases in war zones, the human pilot and sensor operator are 12,000 km away, operating the drone via satellite in Nevada. When asked to describe the psychological disconnect created by waging war from the office, one pilote notes, “You see Americans killed in front of your eyes and then have to go to a PTA meeting”\textsuperscript{20}

Another source of the Predator’s fame and popularity is its price. When compared to the cost of one new F-35, a manned fighter jet, buying a F-35 is equivalent of buying

\textsuperscript{16} See eg Shea, supra note 15; Suarez, The kill decision shouldn’t belong to a robot, TED Global 2013.
\textsuperscript{17} Singer, Robots at war: The new battlefield, in The Changing character of War, at 336.
\textsuperscript{19} US Air Force, Fact Sheet on MQ 1B Predator.
\textsuperscript{20} Singer, supra note 17, at 336f.
8 Predator drones. The Predator’s low price and unmanned nature allows it to be used in high-risk missions, such as slowly surveilling enemy territory at close range. These are also the kinds of missions for which the Predator was originally designed. However, in 2002, a Predator was for the first time armed with laser-guided Hellfire missiles. Today, drone strikes by Predators and its more heavily armed successor, the Reaper, have become a common occurrence.

Like all new technology, these remote controlled unmanned systems may vastly improve the situations for which they were built. The use of drones may facilitate respect for IHL in many ways, due to their vast real-time surveillance abilities and thereby their aid in determining which precautionary measures ought to be taken. Moreover, drones can help actual soldiers direct attacks against military objects with greater precision; actively reducing the risk for civilian casualties and damage to civilian objects. Again, however, drones prove to be a double edged sword. Studies show that distance between attacker and targeted adversary gives way for a psychological disconnect that makes targeting more rash and abuses more likely. They may also increase the risk of civilians and civilian objects being exposed to enemy fire, as their use would present more opportunities of attacking an adversary to choose from. Another issue lies with the method with which the targets of drone strikes are located, and said method’s inaccuracy. As famously exposed by whistleblower Edward Snowden and journalist Glenn Greenwald, the NSA tracks targets through metadata emitted from a sim card or handset, in short: “It’s really like we’re targeting a cell phone. We’re not going after people – we’re going after their phones, in the hopes that the person on the other end of that missile is the bad guy”.

The possibility of responsibly operating these systems is also put to the test in regard to the limited capacity of a single pilot’s ability to process large volumes of sometimes contradictory and simultaneous data, not to mention supervising multiple systems at once. As described in a NATO study this practice is “currently, at best, very

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21 Singer, supra note 17; Lockheed Martin, How much does a f-35 cost? Producing, Operating and Supporting a 5th Generation Fighter; Cohen, The F-35: Is the world's most expensive weapons program worth it?, CNN Politics.
22 Singer, supra note 17.
23 See Human Rights Clinic, Counting Drone Strike Deaths, Columbia Law School, at 20ff; The Bureau of Investigative Journalism, Get the Data: Drone Wars; UN SRCT Drone Inquiry.
25 Brandon Bryant quoted in: The NSA’s Secret Role in the US Assassination Program, The Intercept; see also Schiavenza, Drones and the myth of precision, The Atlantic; see also generally The Guardian’s interactive decoding of the NSA files (online).
ambitious, and, at worst, improbable to achieve”, and this is with systems that do not actively engage in the crossfire. Recent disclosures have even revealed that the US Air Force have been enlisting the help of private contractors with the analysis of live streamed feed, ie civilians with no training in IHL or IHRL and possibly with other motives than those strictly concerning national security. Nevertheless, all signs point us towards a modern day battlefield dominated by drones, and it is not hard to see its appeal. After all, robots save lives without risking them and execute missions without being burdened by human weaknesses, fears or hesitation. In the past, the same gravitational forces that knocked pilots out of fighter planes flying too ambitiously would also knock the plane out of the sky. Today, robotics and humans are past the days of comparable limits. Drones are not vexed by bad weather or subject to the dangers of biological weapons, nor do they black out when flying at amazing speeds: they keep flying.

2.2 Drones and the practice of targeted killings

“Very frankly, it's the only game in town” - Leon Panetta, Director of the CIA.

On November 3 2002, near Sanaa, Yemen, a CIA-controlled predator drone tracked an SUV containing six men suspected of being members of al-Qaeda; all of whom were subsequently killed. One of the six, Qaed Salim Sinan al-Harethi, was said to have been a former bin Laden security guard suspected of having played a vital role in the October 2000 attack on the US-destroyer Cole, where 17 sailors lost their lives. At the time, Yemen did not recognize the presence of any armed conflict within its own territory, nor was Yemen at war with the US. In fact, the last time US Congress officially declared war was in 1942, against Bulgaria, Hungary and Romania. Moreover, the institution responsible for US covert operations was not – and still is not - primarily the US Air Force, but the CIA. However, as explained by National Security Adviser

26 Quoted in Singer, supra note 17, at 337.
27 The Bureau of Investigative Journalism, Drone Warfare Revealed: The private firms tracking terror targets at heart of US drone wars (online).
28 U.S. Air Strikes in Pakistan Called ‘Very Effective,’ CNN, (online).
30 The drone strikes in Pakistan are operated by the CIA alone, whereas in Yemen and Somalia the US military and the CIA operate together: the US Air Force fly the missions and the CIA (sometimes with the help from private contractors) choose the targets, see The Bureau Investigates, Get the Data: Drone Wars, Our Complete Pakistan datasheet & Our Complete Yemen datasheet.
Condoleezza Rice, “We are in a new kind of war. And we’ve made very clear that it is important that this new kind of war be fought on different battlefields”.  

Since 2002, the US has repeatedly employed the tactics used in Yemen and Pakistan in its “Global War on Terror”. Between 2004-2008, more than 50 drone strikes were launched outside the context of armed conflict in Iraq and Afghanistan, a number that between 2009-2013 would reach a staggering 400. The total number of al-Qaeda, Taliban, and affiliate leaders and operatives killed by drones is reported to be 1438 since 2006. Alleged terrorists are however not the sole victims of drone strikes. The Brookings Institute, while maintaining that that targeted killings via drones are the US’ only option in Pakistan, have disclosed that this practice has led to 10 civilian deaths per targeted insurgent in its north-western regions. Renowned examples in other territories include the targeted killing of the leader of al-Qaeda, Abu Musab al-Zarqawi, in Iraq 2006, and the unsuccessful targeting of co-leader Ayman al-Zawahiri in Pakistan 2006; in which 18 civilians were killed. Nevertheless, the US’ policy on drones seems to be based unequivocally on the premise that armed drones are, as President Obama has put it, “a cure all for terrorism”.

The attack in Yemen and the attacks since emulate an Israeli policy adopted in 2000 concerning targeted killings of Palestinians suspected of being active members of terrorist groups in Israel and the Occupied Territories. This policy started with the killing of Hussein Abayat in the beginning of the al-Aqsa Intifada and has since then resulted in the deaths of 273 alleged terrorists and 459 civilians as of May 31, 2015. Despite the high amount of civilians killed by targeted killings the Israeli policy has been officially acknowledged and even vigorously defended by the Israeli Government before the Supreme Court of Israel. As stated by Deputy Defense Minister Sneh, for

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33 Data from The Bureau of Investigative Journalism, Investigation: Drone Strikes in Yemen.
35 Byman, supra note 6.
37 Koebler, Obama: Administration saw drone strikes as “cure-all” for terrorism, US News and World Report, 23 May.
39 See HC petition 769/02, Public Committee Against Torture in Israel v. Government of Israel, (hereinafter HC petition 769/02); HC 5872/2002, M.K. Muhammed Barake v Prime Minister and Minister of Defence.
example; “I can tell you ... what the policy is. If anyone has committed or is planning to carry out terrorist attacks, he has to be hit .... It is effective, precise and just”.  

How does the word “precise” correspond with the amount of civilian casualties? Ignatieff has described drone warfare as a “virtual war”: a reduced-risk warfare that uses technology to remove the aggressor from the perilous situation. This detachment has created the belief that war can be “clean”. Minister Sneh’s, and President Obama’s, justification for using drones are based on such beliefs – written between the lines connecting drone strikes with precision is the idea that modern day warfare can be carried out with no impact on civilian lives or property. As Cohn notes, the use of the words “precision” and “collateral damage” distorts the realities of warfare by cloaking the bloody in the clinical. As such, drone warfare and how it is portrayed does not only remove the pilot from the battlefield: years of false narrative may lead the general public to believe that terrorists and their pursuers interact in a vacuum.

Recent years have proven an increase in drone-warfare to be reality. The US’ intentions of advancing and expanding its drone program seems clear: more drone strikes were employed during President Barack Obama’s first year in office than in the entirety of George W. Bush’s presidency, and the past few years have also shown an increase in the official support of drone warfare by the Obama administration. Moreover, despite international controversy, drone strikes have remained consistently popular with the American public, with a 66 % approval rate in polls. The acceptance of drone warfare also seems to have spread globally. Although severe criticism regarding the practice of targeted killing has been expressed by many Arab and Middle Eastern States, the European Union, Russia et al; no concrete action against this practice has been taken. Additionally, in what may be interpreted as a sign of their true stance of the matter of drone strikes, there is evidence that Russia and China have employed

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40 Report Special Rapporteur, at 17 (quoting Ephraim Sneh, Israeli Deputy Defense Minister).
41 Ignatieff, Virtual War, at 162.
42 Ibid, at 164.
43 Obama, Text of President Obama’s May 23 Speech on National Security.
44 Cohn, Sex and Death in the Rational World of Defense Intellectuals, at 687-718; see also Greenwald, UK detention of Reprieve activist consistent with NSA’s view of drone opponents as ‘threats’ and ‘adversaries’, The Guardian, (online).
45 See eg, US Department of Defense, Quadrennial Defense Review viii, 10-12, 18, 22, 101, 104.; US Department of Defense, Quadrennial Roles and Missions 24-29 (Jan 2009); see generally US Department of Defense, FY 2009-2034 Unmanned Systems Integrated Roadmap 1; and eg Space War, Future of Military Aviation Lies with Drones: US Admiral, (May 14, 2009), (quoting Chairman of the Joint Chiefs, Admiral Mullen, and Secretary of Defense, Robert Gates, on the future use of UAVs in the military).
targeted killing. Russia in its conflict with Chechen rebels and China in its actions against the members of the East Turkestan Islamic movement in Xinjiang province.\(^{48}\) China has also recently placed an order with Swedish developers of drones for a total worth of 800 million SEK.\(^{49}\)

The incentives behind using drones to perform targeted killings are many. The first, and perhaps the most obvious, is the possibility to prevent terrorist acts before they are committed. Second, targeting killing may deal a heavy blow to terrorist organizations themselves, as “leadership, planning, and tactical skills are confined to relatively few individuals”.\(^{50}\) Third, the overbearing threatening presence of an unseen yet precise enemy may keep terrorists on the run, and thereby limit the time needed for these individuals to plan and perform criminal deeds.\(^{51}\) Fourth, precise targeted killings are less likely to incur the wrath of the international community than large-scale military invasions.\(^{52}\) Finally, drone strikes do not risk the lives of domestic troops, and this is not only true in regard to covert action. A perfect example of this new asymmetrical overt warfare is operation Unified protector. The Northern Atlantic Treaty Organization’s (NATO) intervention in Libya during the Arab Spring included over 26 500 sorties, employed 9 700 airstrikes and destroyed over 5 900 military targets.\(^{53}\) Yet, operation Unified protector only suffered the loss of one NATO soldier: a pilot who was killed in a car accident in Italy whilst on deployment. One could thus construct a sixth advantage of employing the use of drones: they remove death from our experience of war.\(^{54}\) However, in doing so, drone warfare also distorts the general public’s understanding of what war really is in technologically advanced societies. As such, depending on where you live, the word “war” can either be associated with the most blatant atrocities mankind can produce, or be something that slowly but surely has ceased to be real.

The US’ “war on terror” is a perfect example: it is not in its entirety carried out by the US armed forces nor does its happenings demand the traditional political and legal steps traditionally required in overt war. According to the precedent set by the US’


\(^{49}\) Dagens Nyheter, Svenska drönare till Kina för 800 miljoner, (online).

\(^{50}\) David, supra note 46, at 6-7.

\(^{51}\) Ibid, at 7.

\(^{52}\) Ibid, at 8-9.


\(^{54}\) Ignatieff, supra note 40, at 4.
contribution to NATO’s actions in Libya, the President of the US must only seek Congressional approval for operations that send US citizens into harms way. As Unified Protector only involved drones, US Congress accepted that the otherwise paramount War Powers Resolution pursuant to which Congressional notification and approval is required for any military operation exceeding 60 days was not applicable as the operation did not “involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof”.\(^{55}\) This means that the executive branch of the world’s only superpower can engage in drone warfare regardless of Congressional or public approval. In other words, drone technology and how it has redefined warfare is effectively short-circuiting the way democratic States used to deliberate and engage in what used to be the most weighty decision a State could make.

It is therefore strangely fitting that the drawbacks of targeted killings are related to the often overlooked context into which they are employed. Using an unmanned aerial vehicle to target and kill alleged terrorists in areas where the user already is seen as a modern day Goliath may only turn embers into fire - provoking retaliation through increased attacks as well as spurring the recruitment of new operatives.\(^{56}\) History has also confirmed this concern. The targeted killing of the Tanzim leader Raed al-Karmi in the West Bank enraged the populace, and an unprecedented wave of suicide bombings ensued.\(^{57}\) Additionally, the possibility of drones and targeted killings uniting previously adversarial groups against a common enemy is very real, an example being the cooperation between PFLP, Hamas, and Islamic Jihad against Israel in 2001.\(^{58}\) As such, employing targeted killings may hamper long-term objectives concerning diplomatic resolution of current conflicts by eradicating future negotiating partners. The escalation of terrorist acts and the time and money needed to employ targeted killings effectively may also divert resources from more dire threats, such as gathering information concerning development of weapons of mass destruction, etc.\(^{59}\) Drone warfare is thereby not as “costless” as western media and State omissions would like to describe it. Even the most noble cause may produce a sordid outcome. Faisal Shahzad, the man


\(^{56}\) Eisenstadt, 'Preemptive Targeted Killings' as a Counterterror Tool: An Assessment of Israel's Approach, Peacewatch, The Washington Institute, (online); Scharf, In the Cross Hairs of a Scary Idea, The Washington Post; see also Al Jazeera, America’s Dangerous Game, (online).

\(^{57}\) David, supra note 46, at 9.

\(^{58}\) Ibid, at 9, 12.

\(^{59}\) Ibid, at 10.
who attempted to blow up Times Square, was made to feel that terrorism was the only option by the very drone strikes sent to eradicate terrorism. As he said in Court:

I want to plead guilty and I'm going to plead guilty a hundred times forward because until the hour the US pulls it forces from Iraq and Afghanistan and stops the drone strikes in Somalia and Yemen and in Pakistan and stops the occupation of Muslim lands and stops killing the Muslims and stops reporting the Muslims to its government, we will be attacking US, and I plead guilty to that.60

Will the drawbacks of targeted killings stifle the eagerness to realize their incentives? Statistics gathered when examining the effects of the al-Aqsa Intifada suggest that while increases in attacks and recruitment are substantial, targeted killings’ removal of key members negatively affect terrorist organizations’ ability to conduct attacks effectively.61 In other words, terrorist attacks are more frequent and the assailants many, but fewer civilians are being killed. Thus, yet again, the use of drones prove to be a double edged sword - this time in the way targeted killings forces the user to choose between long-term and short-term objectives. As of right now short-term objectives may have the upper hand, as limiting terrorists' capabilities seem to outweigh any troubling concurrent increase in terrorist recruitment.62

To summarize: technologies which allow soldiers to engage in violence without being on the battlefield are quickly becoming the new normal in contemporary warfare. It is therefore likely that an international norm permitting targeted killing will emerge as more and more States emulate US and Israeli behavior in order to even out the playing field and to reap the fruits of war waged from a distance. It will be elaborated upon infra that the international community should recognize this development and react accordingly in order to protect the provisions prohibiting assassination and extrajudicial execution by granting any legitimate use of targeted killings a clear definition.

62 Robert Chesney, Who May be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force, at 28.
3. Drones: death from a distance

3.1 Framing the issue

The legal issues with drone-warfare do not stem from drones themselves. Relevant legal provisions and principles are indifferent to technological prowess, and as stated by the ICJ in the Nuclear Weapons Case: “[any contrary] conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future”.63 Instead, the source of widespread and at times heated debate lies with the way drones have changed the very way war is waged. More specifically, with two traits common to all drone missions: extraterritoriality and lethality.

This chapter summarizes the key points of international debate. Section 3.2 will explore the potential effects of drones, targeted killings, and thus a “war on terror” waged from a distance on ius ad bellum concepts such as the right to self defence: will drone warfare increase States’ readiness to use force? Section 3.3 will then turn to the discourse surrounding the lethality of targeted killings via drones and determine whether the issues presented are best resolved by applying either an IHRL or IHL regime. Section 3.4 will in conclusion summarize the consequences of constructing a battlefield where the enemy is located thousands of miles away.

3.2 Drones, targeted killings, and extraterritoriality: issues ius ad bellum

Even though the primary concerns of the international debate on drone warfare are issues ius in bello, ie international humanitarian law applicable to parties already immersed in an armed conflict, there are issues ius ad bellum of equal importance. In the second chapter of this thesis, the fear that the use of unmanned weapon systems would result in more trigger-happy States was lifted. It has already been established that targeted killings through the use of drones rather than human soldiers is rational from both a financial and an efficiency oriented perspective; drones are faster, cheaper and more precise. The use of drones also relieve Governments of having to weigh the value of the lives of their own soldiers against their military objectives. Gone are the ties

between the decision to engage in combat and personal and political risk. After all, you do not have to send a drone home in a body bag to its grieving parents and explain its death in a national address - you buy a new one. This section will explore the legal aspects of this fear by determining whether a targeted killing through the use of drones can constitute either aggression or an armed attack, or if it can be seen as a viable means of self-defence.

In order to tackle these issues, we must first distinguish the use of force from the more narrow terms “aggression” and “armed attack”; armed attacks grant the victim state the right to legitimate self-defence whereas aggression is one of the three conditions for a Security Council granted intervention. For a drone strike to constitute an armed attack or aggression it is not enough that it amounts to a use of force in violation of Art 2(4) of the UN Charter. Rather, there is a higher threshold for an armed attack and an act of aggression which means that all armed attacks and acts of aggression amount to a use of force, but not vice versa. This dichotomy was introduced intentionally in order to underscore that armed attacks and acts of aggression constitute particularly grave forms of use of force, and to limit the possibility to use self-defence and other means of intervention. As such, regardless of the debate on whether armed attack and aggression are interchangeable, one can dare state that they are adjacent.

Aggression is defined in art 1 of the annex of the General Assembly Resolution 3314 (XXIX) of 1974. It reads: “Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations”. As has been mentioned, there is a gravity threshold that needs to be met in order to label an attack as an act of aggression rather than merely as an illegitimate use of force. Accordingly, the ICJ has for example excluded acts that are mere “frontier incidents” from those that give rise to the right to self defence. It is this author’s opinion that the systematic employment of targeted killings through drones on foreign soil hardly can be seen as

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64 Art 51 and art 39 of the UN Charter.
66 Klamberg, International Law in the Age of Asymmetrical Warfare, Virtual Cockpits, and Autonomous Robots, at 154; Wrange, Aggressionsbrott och Internationella Brottsdomstolen, at 16.
67 UN Doc A/Res/3314.
68 Nicaragua, paras 102-104.
mere “frontier incidents”. As such, granted that the attacks are sufficiently grave, drone strikes may be seen as acts of aggression; thereby granting victim States the right to lawful self-defence and thus function as a catalyst for armed conflicts. This would prove that the fear that drone-warfare would threaten an already fragile world order is warranted, as the use of drones may escalate already raging conflicts as well as give rise to new ones.

There are however circumstances under which the use of drones would not equate to acts aggression and thereby acts of war. Pursuant to art 6 of the annex, Resolution 3314 does not affect the scope or application of the UN Charter. Accordingly, if the targeted killings were employed with Security Council authorization, as a legitimate act of self defence or with the consent of the territorial state they would not constitute aggression and not risk initiating an armed conflict. It is clear that neither the US nor Israel have sought or received Security Council authorization for their actions in various middle eastern territories. In turn, the presence of consent is often either non-existent or intensely debated. The question therefore arises whether these States have acted within their right to self-defence pursuant to art 51 of the UN Charter when targeting and killing alleged terrorists. In order to defuse this issue we must address how self defence ought to be defined. Is the right to self defence limited to acts between States? Or have the events of 9/11 through customary law rewritten the scope of this right as encompassing terrorist organisations? Klamberg summarizes the debate on these issues as consisting of three views: (1) that the US and Israeli practice is supported by customary law as well as the law on neutrality; (2) that the US’ actions post 9/11 were in fact actions against Afghanistan and not against Al-Qaeda per se and therefore legitimate; and/or (3) that the practice of targeted killings without Security Council authorization constitutes aggression.

The first approach is a source of heated debate. Despite the ICJ’s Advisory Opinion on Legal consequences of the wall, where the Court firmly held that the right to self defence only pertains to actions between States, the idea of a right to self defense

69 An opinion that is shared by, for example, Mark Klamberg, supra note 65, at 154.
70 Ibid.
71 Whether there is Pakistani consent, for example, remains unclear, see eg Schmitt, Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law, at 83; Chesney, supra note 61, at 15-19; see also Peshawar High Court, Judgement on Writ Petition No. 1551-P/2012.
72 Klamberg, supra note 65, at 155f.
against non-state actors is still vigorously defended. According to its proponents, a transnational terrorist attack or series of such attacks of sufficient scale and effects may constitute an armed attack, and thereby grant the victim state the right to self defence in accordance with art 51 of the UN Charter. Schacter defines the sufficient gravity as being able to “jeopardize the essential interest of the State in protecting its citizens and political order” as well as being “part of a pattern of attacks accompanied by credible indications that future attacks are planned”. Cassese also underscores the importance of identifying a “consistent pattern of violent terrorist action rather than just (...) isolated or sporadic attacks”. A number of dissenting judges also argued that self defence against non-state actors is supported by state practice, due to the fact that there was little opposition to the US’ actions post 9/11 from other States. In essence, the US has claimed “instant custom” in regard to the right to self defence against terrorist organizations. This author is however doubtful of whether this is enough to claim that the right to self-defence against non-state actors is now customary law. While it is true that a number of States have cooperated both diplomatically and militarily in the US’ “war on terror”, this does not in itself mean that these States accept the claims made by the US Government as customary international law.

The right to use forceful measures in response to terrorist attacks is subsequently justified by the law on neutrality. Assuming that there indeed is an international armed conflict between various terrorist organizations and eg the US, the presence of such a conflict would in itself present States with an opportunity to legally conduct extraterritorial operations. The law on neutrality obligates Neutral States to ensure that Belligerent States are hindered from using neutral territory for purposes related to the

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75 Schachter, The Lawful Use of Force by a State Against Terrorists in Another Country, at 248.

76 Cassese, supra note 73, at 596.

77 See eg, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136, 7 139 (July 9) (hereinafter Wall Advisory Opinion), paras 215, 233 (separate opinion of Judge Higgins); id paras 229-230, 235 (separate opinion of Judge Kooijmans); id paras 242-243, 6 (declaration of Judge Buergenthal); Armed Activities in the Congo (Dem Rep Congo v Uganda), 2005 ICJ 168, 146-47 (Dec 19), (hereinafter Congo) at para 337, T 11 (separate opinion of Judge Simma).
conflict. Neutral States are thus permitted to forcefully expel Belligerents from their territory, without risking that such force be interpreted as constituting an act of war against said Belligerents. Should a Neutral State fail to comply with this duty, it will instead pass to the other Belligerent State and allow it to pass into neutral territory for the sole purpose of putting an end to its adversary’s breach of neutrality. As argued by both Schmitt and Müllerson, the right to self defence against terrorist organisations thus depends on the willingness or capability of the host state to apprehend or prevent terrorists and terrorist acts. Albeit that the Neutral States first be granted an appropriate amount of time to first deal with Belligerents themselves.

If a State should fund, arm or control a terrorist group, the group’s actions may be attributed to that State. In such a case, it is clear that a right to self-defence in accordance with art 51 is at hand. This is probably also the rationale behind the second view summarized by Klamberg, that the US’ actions after 9/11 were directed against Afghanistan rather than Al-Qaeda itself. Any forceful measure against its territory and Al-Qaeda would therefore be legitimate. However, as noted by Klamberg, this argument fails to justify actions taken outside Afghanistan in the name of a “global war on terrorism”. Intervention into other States in self defence outside the context of an international armed conflict is controversial. This is especially true in the case of targeted killings of alleged terrorists via drones in foreign territories, as they involve non-state groups that are not under any State’s control and thus severely challenge the balance between the right to self defence and sovereignty. Ought we, in these cases, be convinced by view (1):s reasoning and apply the law on neutrality by analogy?

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79 Hague V, supra note 77, art. 10; Hague Air Warfare Rules, supra note 77, art. 48.
81 Schmitt, supra note 70, at 113; Müllerson, ‘Jus Ad Bellum and International Terrorism’, at 1.
82 Dinstein, supra note 72, at 198.
84 Klamberg, supra note 65, at 156.
As noted above, the ICJ does not support the notion of a right to self defence against non-state actors. In both legal consequences of the wall and armed activities in the Congo, the Court stood by the conclusions drawn in Nicaragua, namely that self defence is only legitimate when the non-state group is under the State’s control.\textsuperscript{85} In light of these judgements, ICJ jurisprudence seems to endorse the view that targeted killings against alleged terrorists in foreign territories are unlawful provided that they are not employed with the consent of the host state or with Security Council authorization. The US and the advocates of view (1) of course contest this notion.\textsuperscript{86} Rather than debating whether acts of self defence are permissible, these voices focus on when, how and where States may take action in an attempt to squeeze a right to self defence in these cases under the object and purpose of art 51. In fact, the US interprets art 51 as allowing: “(1) [s]elf-defense in the face of the real use of force or hostile actions; (2) [s]elf-defense as a preventive action in the face of immediate activities where it is anticipated that force will be used; (3) [s]elf-defense in the face of a persistent threat.”\textsuperscript{87} It should however be noted that even these proponents are cautious of extending the right to self defence to encompass the actions of poorly organized groups.\textsuperscript{88}

It is important to remember the host State’s sovereignty and right to be free from the use of force within its own borders. It is equally important to remember that because the host States in our examples are not affiliated with non-state terrorist organizations and their actions, they have not forfeited such rights. It has long been held that the sovereignty of States trumps any right to self defence held by other States.\textsuperscript{89} However, the proponents of applying the law on neutrality by analogy underscore that such an analogy would consist of a balancing of rights. Here one would balance the right of the host State to keep its sovereignty intact against the right of Belligerent States to intervene when neutral territory is being used to their detriment.\textsuperscript{90} Granted that principles of proportionality and necessity would apply in determining the nature of the

\textsuperscript{85} Wall Advisory Opinion, paras 136, 139; Congo paras 168, 146-47; Nicaragua, para 195.
\textsuperscript{86} Harold Hongju Koh, Legal Adviser, Dep’t of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law, [hereinafter Address by Harold Koh].
\textsuperscript{87} Gross, Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens, at 217.
\textsuperscript{89} Brownlie, International Law and The Use of Force by States, at 309-316.
\textsuperscript{90} Schmitt, supra note 70, p 86.
victim State’s defensive measures, this may be an acceptable approach and may be used to justify some of the US’ actions in Afghanistan. When evaluating the US’ employment of drone strikes in for example Yemen, Sudan and Pakistan, on the other hand, the question arises whether the events of 9/11 grant the US a right to self defence that is indifferent to the lapse of time and change of geographic location. Recall that the proponents of a right to self defence against terrorists, when discussing which attacks trigger this right, stress the importance of a gravity threshold and that the attacks not simply be “isolated or sporadic” in nature. Since September 11, 2001, there have not been any attacks that have met these criteria. Even if one were to accept a right to self defence based on an analogous application of the law on neutrality, it is questionable whether this right could be extended for 13 years and apply to any territory.

There are those who argue that the drafters of the UN Charter could not have foreseen a world where terrorist acts posed a more serious threat than conventional international war. This despite the fact that very wording of art 51 clearly states that self defence is only legal “if an armed attack occurs”. As such, art 51 must be interpreted as allowing States to act preemptively to thwart not only actual attacks but also threats of an attack. This would allow States to use force to prevent or deter, if the attack either has occurred or will soon occur. Should we perhaps accept this concept of anticipatory self defence, and if we do, when should a State be allowed to act and how much evidence is required? Ought the danger be imminent to justify self defence or is the situation in itself so grave that we should again be inclined to accept the lower threshold of immediate danger? The US’ stance, as made official in the White Paper, is that it is not necessary “to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future”.

Regardless of that there may be some merit to being able to defend oneself against attacks that available intelligence

91 Obama B, Remarks by the President at the National Defense University, Press Office, The Whitehouse (online).
92 When discussing the “war on terror”, the Deputy General Counsel of the Department of Defense indicated that members of al Qaeda would be targeted regardless of location, even if it be on a quiet street in Hamburg, Germany, quoted in Dworkin, Crimes of War Project, Law and The Campaign Against Terrorism: The View From The Pentagon; Obama describes the aftermath of 9/11 as the US “going to war” in Schmitt, supra note 90; see also the Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.
93 O’Brien, Just War Doctrine's Complementary Role in the International Law of War, at 198.
95 US Department of Justice, Dep’t of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a US Citizen Who is a Senior Operational Leader of Al-Qa’ida or an Associated Force, Draft, (Nov 8, 2011), at 7-8.
merely can provide will occur rather than when and where, do we want to support rewriting the laws of war so that offence rather than defence becomes rule? And, in doing so, bestow the right to legally use extraterritorial lethal force upon those whose grounds we cannot control and whose self restraint is hinged on weighing a solution that kills an enemy with little to no means of comparable retaliation with little to no economic or existential risk against the possibility that they are mistaken?

This doctrine of anticipatory self defence constructed by the US circumvents the UN Charter’s structural and substantive limits on the use of force. It allows massive military force to be used against any State. In turn, the use of this military force does not require Security Council authorization, nor does it require the presence of a previous armed attack attributable to another State in order to warrant intervention. Furthermore, the doctrine of anticipatory self defence renders principles of proportionality irrelevant as estimations of future terrorist acts that can be prevented by military force can always be described in ominous terms. As such, regardless of how convincingly an advocate of intervention may construe an exception to sovereignty, we find ourselves with the strenuous task of discerning legitimate intrusive measures from wrongful ones. This author questions whether it is worth the risk.

In conclusion, the employment of targeted killings by drones may not be excused under the parole of being an act in self defence and therefore constitute an act of aggression – an act of war. Thus, drones, along with the eagerness with which they are used, may have an inflammatory effect on the international community, its tensions and its already raging conflicts.

3.3 Drones, targeted killings, and lethality

3.3.1 The applicable framework

The starting point of human rights law is the right of the individual, including the right not to be arbitrarily killed. The international law of armed conflict, which is very much older in its origins than human

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96 See Schmitt’s construction of a right to self defence against non-state groups, supra note 70, p 87-91.
rights law, starts from totally different premises. The soldier has the right to kill another soldier.97

Giving States an unlimited right to kill alleged criminals cannot be appealing to anyone aware of human rights and wary of the use and abuse of governmental authority. However, what would be regarded as murder during peacetime may be legitimate during times of war. Many defend targeted killings by arguing that the only difference between legitimately killing enemy combatants during an armed conflict and the targeted killings of alleged terrorists lies with the identity of the unlucky combatant’s, or terrorist’s, employer.98 After all, how should we treat declarations of war from terrorist organizations against States if not as armed conflict and thus a “war on terror”? The conflicting views on the legality and morality of targeted killings thereby reveal a deeper controversy - upon which framework shall we base our judgement? States employing the use of drones argue that the laws of armed conflict must apply whereas those who dub targeted killing synonymous with extra-judicial execution contend that drones, like any other means of extraterritorial law enforcement, must be held to the standards of IHRL. As such, the determination of which side shall leave the debate victorious lies with a single question: do the actions between the US and Israel and alleged terrorists amount to either an international or non-international armed conflict? All in all: how do we categorize the measures taken by States against international terrorism? As necessary steps taken in a war which started in September, 2001, or as continuing struggle against a particularly heinous crime? As will be shown, perhaps the fault lies with too hastily separating the one from the other when dealing with a phenomenon with traits of both.

3.3.2 The law enforcement model examined

3.3.2.1 Jurisdictional issues

Fitzpatrick has described IHRL as adopting a ”legalist approach to limit the harm the powerful may inflict on the vulnerable”.99 Assuming that IHRL is the correct body of law to apply when assessing the legality of targeted killing, towards which individuals

97 Françoise Hampson quoted in Nathaniel Berman, Privileging Combat? Contemporary Conflict and the Legal Construction of War, at 3.
is a State obligated to fulfill its IHRL obligations? Leaving questions of sovereignty aside, are States obligated to respect the human rights of those outside their borders? The ICCPR obligates a State to protect the therein enshrined rights of “all individuals in its territory and subject to its jurisdiction”, whereas this duty is to all individuals under a party’s jurisdiction pursuant to both the American and European conventions.\(^{100}\) When exactly is an individual subject to a State’s jurisdiction?

The European Court of Human Rights (ECtHR) has in its Bankovic case adopted a rather narrow interpretation of the term jurisdiction, defining it as generally only exercised over a State’s own territory.\(^{101}\) Exceptions can however be made in cases where “the State exercises all or some of the public powers of government in the territory of another State with that State’s consent, invitation or acquiescence, or where it is occupying territory in which it exercises effective control”.\(^{102}\) This restrictive interpretation of jurisdiction led the Court to conclude that the civilians living in areas which were bombed by NATO during the war in the Former Yugoslavian Republic (FYR) were not under the jurisdiction of the NATO States, and therefore not protected by the European Charter of Human Rights (ECHR).\(^{103}\)

Bankovic has led to voices being raised whether international human rights norms really apply to those suspected of transnational terrorism, voices that subsequently have been endorsed as well as challenged.\(^{104}\) The Human Rights Committee have openly adopted an interpretation of jurisdiction similar to what the ECtHR rejected in its verdict: the stance that any individual directly affected by a State’s actions is subject to the same State’s jurisdiction.\(^{105}\) What this means for the application of both the ECHR and the ICCPR is unclear - are States such as Israel and the US “off the hook” as they employ the use of drones overseas? When considering the fact that human rights are meant to be universal and that this universality is the core of IHRL, the approach adopted in Bankovic becomes hard to accept. Even though a State Party’s treaty obligations are governed by the provisions in that particular treaty, many of the

\(^{100}\) ICCPR, art 2; ECHR, art, ACHR, art 1.

\(^{101}\) See Bankovic v Belgium, 11 BHRC (2000) para 435.

\(^{102}\) See Loizidou v Turkey, 23 EHRR (1996) para 513.

\(^{103}\) Supra note 100.


substantive norms in these treaties have been ratified by the majority of the international
community, and have subsequently become peremptory norms of customary
international law.\textsuperscript{106} The right to life has been acknowledged as one of these norms.\textsuperscript{107} Accordingly, a State’s duty to respect the right to life coincides with the actions of its
agents, wherever they may operate. Any contrary conclusion would imply that in the
absence of an armed conflict it would be legal for States to kill any individual outside
their own borders. Obviously, this cannot be accepted.

3.3.2.2 The right to life

The right to life is one of the cornerstones of IHRL. Art 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”. Similarly, the American Convention on
Human Rights (ACHR) and the African Charter of Human and People’s Rights
(ACHPR) prohibit arbitrary deprivation of life. As such, the determination of when the
right to life has been violated depends on the interpretation of what is “arbitrary”. The
construction of the right to life enshrined in the ECHR is somewhat different. Article
2(1) states that no one shall be deprived of his life intentionally. Under Article 2(2),
however, deprivation of life shall not be regarded as a violation of the right to life when
it results from the use of force which is no more than absolutely necessary in any of
three cases, one of which is ‘defence of any person from unlawful violence’. Albeit the
ECHR has not directly addressed the issue of targeted killing, this proportionality test
is widely accepted as providing a fair statement of when the use of lethal force be seen
as arbitrary or non-arbitrary.\textsuperscript{108} This test provides that lethal force may only be used
when there are no other alternatives and if lesser means of force cannot be deemed
effective.\textsuperscript{109} For many proponents of an IHRL approach, the practice of targeted killings
is equal to the arbitrary taking of life.

Supporters of letting IHRL govern the use of drones include: Amnesty
International; the UN Commission on Human Rights; the UN Secretary General; the
UN General Assembly; as well as a substantial portion of international legal scholars.\textsuperscript{110}

\textsuperscript{106} Legal Information Institute, Customary Law, Cornell University Law School, (online).
\textsuperscript{107} Melzer, Targeted Killing in International Law, at 16-18.
\textsuperscript{108} Rodley, The Treatment of Prisoners under International Law, at 183.
\textsuperscript{109} McCann v UK, 21 ECHR (1996) 97, para 149.
\textsuperscript{110} Amnesty et al, Joint Letter to President Obama on US Drone Strikes and Targeted Killings, written by:
American Civil Liberties Union; Amnesty International; Center for Human Rights & Global Justice,
NYU School of Law; Center for Civilians in Conflict; Center for Constitutional Rights; Global Justice
These actors maintain that any exception to the right to life must be evaluated in light of the due process principles that permeate IHRL and any law enforcement model, even if it is transnational. Accordingly, the presumption of innocence must also apply to suspected terrorists. As such, these individuals should: (1) be arrested, detained, interrogated, and with due process of law; (2) in the event that there is credible evidence of criminal acts they should be afforded a fair trial before a competent and independent court; and (3) if convicted, sentenced to a punishment provided by law. Prevention is thus to be attained through putting suspected criminals through the different steps of the criminal process, rather than by using lethal force against them. In turn, deterrence is meant to rely on the threat of legal sanctions and the enforcement of criminal law. Furthermore, the right to life is a non-derogable right. A State may not derogate from due process principles needed to protect this right, however dire the situation.

The proponents of IHRL also advocate a requirement of imminence, meaning that lethal force only be justified when it is solely the employment of lethal force that would stand between the perpetrator and the fulfillment of his or her crime. Under any other circumstances, the use of force cannot be deemed “absolutely necessary”. When commenting the Caroline incident, the then presiding US Secretary of State defined an imminent threat as being “instant, overwhelming, leaving no choice of means, and no moment for deliberation”.


112 Ibid.
113 Human Rights Committee, General Comment No 29 on Article 4 of ICCPR, 31 Aug 2001, CCPR/C/21/Rev.1/Add.11, para 15.
114 Rodley, supra note 107, p 182–188; Nolte, Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order, at 111.
115 Ibid.
We have thus established that IHRL requires that targeted killings must enforce principles of (1) absolute necessity, (2) due process and (3) imminence in order to be legal. If IHRL indeed is the correct framework to use when assessing a targeted killing’s legality, the question then arises under which circumstances, if there are any, would a targeted killing not infringe upon its target’s right to life?

Requirements (1), (2), and (3) are all based on the assumption that an arrest is a real and enforceable measure at hand. However, the issues of applying IHRL in the context of the “war on terror” lies with the very difficulty of making an arrest on the territory of another state, especially when said State is either uncooperative or simply unable to do so. Again setting issues of sovereignty aside, could we not find it convincing that the victim State in such a situation has no other choice but to use lethal force? That a targeted killing is absolutely necessary lest impunity prevail and its citizens stand unprotected? Naturally, this rationale is not without limits and could for example not be used to justify acts of retaliation or pure deterrence. However, if a State has substantial evidence of continued planning of attacks and of a high probability that without intervention these attacks will come to pass, couldn’t the use of lethal force be deemed absolutely necessary? In short; if the criterion “imminent danger” in regard to the use of lethal force is based on the premise that there are non-lethal alternatives at hand in situations not as dire, what happens to this criterion when such alternatives are unavailable?

The right to life as enshrined in art 6 of the ICCPR does not define in which cases the intentional use of lethal force does not constitute a violation of said right, the reason being that such a list could be seen as an indirect endorsement of killing.116 As such, art 6 functions as a broad shield against any attempt to arbitrarily deprive anyone of their life. How does this broad construction correspond with our problematic example? The Human Rights Committe addressed this issue as early as July 2003. However, the answer the committee provided was in this author’s opinion unsatisfactory in its ambiguity. On the one hand, the Committee seems to imply that the right to life under art 6 is jeopardized only when targeted killings are used as a means of punishment - preemptive measures are thereby left out of the equation.117 In the report’s concluding recommendations, however, the use of lethal force is discussed in the context of dealing

117 Concluding Observations of the Human Rights Committee on Report of Israel, 21/08/2003, CCPR/CO/78/ISR.
with individuals actually carrying out terrorist deeds. Thus implying, suddenly, that an attack’s imminence is a vital factor.

The issue of reconciling non-arbitrary killings with targeted killings in the context of the "war on terror" was also examined in the 2002 Inter-American Commission on Human Rights Report on Terrorism and Human Rights. When discussing the use of lethal force, it states that “in situations where a state’s population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations". The report then gives examples of these situations: protecting people from imminent threats against their lives or well-being (serious injury) and to maintain law and order “where strictly necessary and proportionate” (probably in reference to violent riots etc). When distinguishing which individuals may be subjected to the use of lethal force from those out of bounds the report, like its 2003 successor, becomes painfully unclear. The report signs off on the use of lethal force against those who threaten everyone’s security and not “civilians”, and subsequently requires States to respect this distinction. Apart from somewhat blurring the line between IHRL and IHL, as it is solely under the regime of the latter the status of the targeted individual is relevant during legal assessment whereas IHRL requires eg necessity, the report continues its avoidance of the hard issues by phrasing its limitation on the use of force as encompassing those who no longer pose a threat and have “been apprehended … surrendered … wounded”. Again, the appropriate way of dealing with those who have not surrendered and roam outside the grasp of any jurisdiction remains undefined. It cannot be enough that they “involve … great threat(s) to life”.

We are therefore left with following conclusions: the circumstance that an alleged terrorist is outside the territory of the victim state does not strip him or her from the right to life and make him or her a legitimate target. However, there may be basis for

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118 Ibid.
120 Ibid, para 87.
121 Ibid.
122 Ibid, para 90.
123 Ibid, para 91.
124 This may follow from the Commission’s statements Ibid, para 111: “state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury, or a threat of committing a particularly serious crime involving a grave threat to life, and persons who do not present such a threat, and use force only against the former” (emphasis added). As such, the requirement of imminence appears not to apply to these grave threats.
the argument that in situations where the victim state possesses substantial evidence that an individual is planning terrorist acts against it, and means to detain or arrest the individual are unavailable, the targeted killing of said individual may not be arbitrary. Whilst in these cases the threat posed by the planned terrorist acts are not in themselves imminent, the need to prevent them may be immediate as they may be impossible to deter at a later stage. One could thus understand this argument as based on an idea of a possibility for States to act in self-defense against terrorist organizations through law enforcement measures.

It is easy to see the allure of this line of reasoning. It is equally easy to see, however, why imminence is a threshold not to be taken lightly. Not only does the requirement of imminence make up for some of the concerns associated with the absence of due process methods, catching someone “red-handed” is also beneficial from a strictly evidentiary perspective. When state agents catch the individual in the act they do not need to prove the intention to carry out the act - the evidence is in front of them. Can we rely on victim States to pass judgement on the veracity of terrorist allegations without this evidence? Or would in fact such an exception prove the words of Glenn Greenwald to be true, that a “terrorist (is who) my Government tells me is a terrorist”? Would a simple requirement of absolute necessity be possible to construe in such a way that exploitation from war hungry States be avoided? Upon discussing the extent of violence that ought to be within the grasp of any Government in regard to US legislation post 9/11, Waldron points out that whilst citizens’ fear of a foreign aggressor may prove legitimate, they cannot for the sake of this fear lower their guard against the equally prominent threat of an all too powerful Government.\(^\text{125}\) With Israel as an example, relaxed provisions on the use of force during the interrogation of alleged terrorists that from the outset were intended to allow force as a last resort have quickly allowed forceful interrogation to become commonplace.\(^\text{126}\)

As such, the question of when the use of lethal force against an alleged terrorist is legitimate seems to have three alternative answers or, perhaps more accurately, three positions that can be voiced. The first is that without an imminent threat, any targeted killing of an individual ought to be regarded as arbitrary. This regardless of the strength of the evidence on which the victim state bases its suspicions. The second position


\(^{126}\) Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories, at 135-143; B’Tselem, The Interrogation of Palestinians During the Intifada: Ill-treatment, ‘Moderate Physical Pressure’ or Torture?.
advocates a narrowly construed exception from the first position, namely that the allowance of a targeted killing be seen as absolutely necessary when there are no means of detaining the suspected individual and compelling evidence that the individual is involved with the planning of terrorist activities. This approach has already been questioned, and will be revisited under Chapter 4. The final position hazards a guess that the law enforcement model in fact does not provide an adequate solution to the dangers of transnational terror, and that said dangers may be more effectively resolved under IHL. The strength of this assumption will be discussed under section 3.3.3.

It is this author’s opinion that the first view is also the most sound. No matter how elegantly one would construe an exception to the requirement of imminence, no control mechanism could ever compensate for the lack of obviousness to everybody that would ensue. It is not obvious that a Pakistani citizen driving a car in Waziristan poses a threat that warrants the use of lethal force. If this same citizen would be in the process of launching a missile, however, it would be quite a different story.

3.3.2.3 The relationship between IHRL and IHL

It was long held that IHRL governed the domestic affairs of a State, regardless of whether these affairs took place in a warlike or peaceful context. Accordingly, the right for a State to derogate from some of its IHRL obligations in times of emergency was confined to situations that took place within its own borders. Conversely, when a State’s affairs included waging war against another State, IHL governed what took place on the battlefield. This theory seems to have been abandoned through ICJ jurisprudence. In the Nuclear Weapons case, the Court established that IHRL applies even in the context of armed conflict, albeit in part superseded by IHL as lex specialis.\(^{127}\) It stated:

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\text{The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable }
\]

\(^{127}\) *Nuclear Weapons.*
in armed conflict which is designed to regulate the conduct of
hostilities. 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. 128

The implications of the Nuclear Weapons case in regard to drone-warfare seem
clear. If the practice of targeted killing takes place within an armed conflict, the legality
of this practice will be determined by IHL. If, in turn, these killings are legal under IHL,
they will not be deemed arbitrary deprivations of life under art 6 of ICCPR. This ease
with which actions that are legal under IHL are separated from issues concerning the
right to life and due process safeguards under IHRL may however not apply to all cases.
While this distinction may meet few hurdles in the context of the IHL of international
armed conflicts, it will be shown under Section 3.3.3 that in the context of the IHL of
non-international armed conflicts the situation is more complicated.

3.3.3. Targeted killing under IHL: drones ius in bello

3.3.3.1 The applicability of IHL

The term “international armed conflict” in itself implies the involvement of two or more
conflicting States. This is also how the majority of scholars would phrase its
definition. 129 Non-international armed conflicts, on the other hand, are typically defined
in IHL instruments as hostilities between authorities of a State and rebels or insurgents
in its territory. 130 As such, a conflict between a State and a terrorist organization located
outside its borders becomes hard to categorize. Ought we stretch the notion of an
international armed conflict to encompass non-state actors? Or should we allow non-
international armed conflicts to include non-state actors on foreign soil? Many advocate
the one or the other, arguing that a conclusion where the parties are not subject to IHL
must be rejected. Apparently, there is something crucial about being allowed to apply
IHL on the “war on terror”. Even though IHL is crucial when assessing the legality of

128 Nuclear Weapons, para 25.
129 See Jinks, “September 11 and the Law of War”, at 20; Tadic AC, para 84.
130 See Common art 3 of GC; Art 1(1) AP II.
measures taken on the battlefield, can we with the same vigour stress its urgency when dealing with conflicts that may not even be armed?

The ICTY has defined an armed conflict as “a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. 131 Terrorist organizations are not States; hence “a resort to armed force” is not enough to start an armed conflict. However, could one say that “protracted armed violence” exists between for example al Qaeda and the US? That these two actors are involved in a non-international armed conflict? Albeit the ICTY did not mention any specifics in defining what is “protracted armed violence”, the 1977 AP to the GC require both intensity and organized fighting in order for a conflict to be deemed “armed”. 132 Moreover, AP II applies only to conflicts that are “more than situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence”. 133 The ICJ in Nicaragua has also distinguished “minor frontier incidents” from those who give rise to an armed conflict, a distinction also made by the Eritrea Ethiopia Claims Commission in 2005 and the ILA Use of Force Committee. 134 As Greenwood puts it, even “many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts. It may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply”. 135

It has however been suggested that the global “war on terror” could be classified as an armed conflict provided that “protracted” could be made to include conflicts that are spasmodic. 136 In other words, that the 21st century suddenly could witness the emergence of wars waged sometimes and in slow motion. This concept was not accepted before 9/11, as the embassy attacks by al Qaeda in East Africa in 1998 and the US response in Sudan and Afghanistan months later was not claimed to amount to

131 Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (hereinafter Tadic Decision), para 70; see interestingly on the organization of Yemeni group AQAP: Al-Awlaki v Obama, No. 10-cv-01469 (D.D.C. 7 October 2010) (Declaration of Prof. Bernard Haykel) §7 and 11.
133 Ibid.
135 Greenwood, Scope of Application of Humanitarian Law, in The Handbook of Humanitarian Law in Armed Conflicts, at 39, 42.
Instead they were “sporadic acts of violence”. Similarly, other organizations committed to carrying out sporadic acts of violence, such as the Irish Republican Army or the Basque Liberation Organization’s ETA branch, have not been labeled as belligerents but for what they are - terrorists. As such, it is this author’s view that the concept of slow-motion wars seems forced. Setting the real wars waged in Afghanistan and Iraq aside, al Qaeda’s attacks and US’ responses have been too sporadic and of too low intensity to meet the definition of armed conflict. This is also the approach taken by other States’ that have been attacked by al Qaeda: instead of responding with military means, Kenya, Indonesia, Spain and the UK have all employed law enforcement measures. As stated by the UK: “(...) ’armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation”.

An armed conflict begins with the counterattack: there can be no armed conflict without armed exchange. In other words, an armed conflict requires “hostilities”, ie actual engagement in fighting. The one-sided attacks and minor armed exchanges that to date have characterized the al Qaeda - US controversy do not amount to such hostilities. As noted, some argue that we must treat one sided and intense armed attacks, such as the the 9/11 attacks, as armed conflicts in order to ensure the application of IHL. Why is IHL so important? The rationale seems to be that IHL ensures that
Attackers are held accountable for attacks against civilians and civilian objects.\textsuperscript{144} However, the fact remains that the “war on terror” can not without great difficulty be squeezed under the label “armed conflict”. Instead, the correct body of law to apply in this context would be criminal law: the law of peace. Criminal law does not allow any combatant’s privilege to kill civilians or fellow combatant - murder is murder no matter the situation.\textsuperscript{145} Moreover, Criminal Law offers a far better protection of human rights as it comes with due process as a safeguard. If we were to accept the notion than one attack may start an armed conflict, we will also be forced to accept the idea that organizations like al Qaeda or the Islamic State (IS) may legally employ drone warfare against military bases, weapon facilities etc. As such, targets like the Pentagon would be rendered legitimate and their destruction would be without sanction.\textsuperscript{146} In short: what would be deemed murder during peacetime would instead be lawful acts of war if we were to accept the application of wartime rules. This is also why the very core of IHL \textit{ius ad bellum} is to prevent the initiation of wars. Still, US officials and a variety of scholars advocate the application of IHL.\textsuperscript{147}

Other than intensity, duration, and exchange, armed conflicts traditionally have had a territorial limitation. As armed conflicts consist of intense, protracted, and armed exchanges, it is natural that the territory on which the conflict takes place becomes a limited and identifiable battleground. As such, international armed conflicts between States involve their sovereign territory. During the Vietnam war, for example, the war was limited to Vietnam and adjacent territories. Moreover, US and Vietnamese citizens were not at war with each other all over the globe. Territory is also an important part of the construction of an armed conflict under IHL. When delimiting its scope of application in regard to non-international armed conflicts, AP II art 1 underscores the importance of territory and territorial control: “This Protocol … shall apply to all armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this

\textsuperscript{144} See eg Jinks, \textit{supra} note 130, at 47; Ben-Naftali & Michaeli, ‘We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings, at 255-56.

\textsuperscript{145} Cf Additional Geneva Protocol I, art. 43(a) (limiting the right to participate in hostilities to combatants).

\textsuperscript{146} Additional Geneva Protocol I, art 52.

\textsuperscript{147} Jinks, \textit{supra} note 130; Kretzmer, \textit{supra} note 144.
As such, for hostilities to reach a sufficient level of intensity between sufficiently organized groups with sufficient weaponry and space to acquire sufficient training and coordination under a sufficiently hierarchal structure - territorial control is paramount. Terrorists do not need to control their surroundings in order to effectively carry out terrorist acts. In fact, a key trait of terrorist activity consists of stealthily targeted areas controlled by others. Examples include hijacking airplanes and utilizing suicide bombers in highly trafficked areas. It is questionable whether these acts are best prevented by the employment of targeted killings or by police work. After all, when reviewing British and US measures pre 9/11, it is clear that the law enforcement has been successful in taking down terrorist cells in the past. Although the employment of drones do not come with the setbacks of sending troops into foreign territories, as has been shown under Section 2.2, delivering death without warning from a deceptively clear sky does not exactly thwart terrorist propaganda and decrease recruitment rates.

WWII is the most recent example of war on a global scale. The Cold War, despite its global consequences, was but an official war in a rhetorical sense and it is therefore safe to say that we have not seen a truly worldwide conflict since 1945. With this in mind, it is easy to question whether the US’ “global war on terror”, unlike its purely rhetorical counterparts such as “the war on drugs” or “the war on organized crime”, is in fact an armed conflict. Despite the difficulties of categorizing “the war on terror” as a war, President Obama is quite clear on US policy: “We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war - a war waged proportionally, in last resort, and in self-defense”.

There is a reason behind the sparse use of the term “global war”. As noted, war indicates the loss of territorial control. By contrast, criminality and “sporadic acts of violence” do not implicate any changes in territorial control - society has not fallen. As such, and as has been shown, States usually prefer to label terrorist acts as criminal acts

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149 See Rona, Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”, at 55, 62 (2003); Cuéllar, The Untold Story of al Qaeda’s Administrative Law Dilemmas, at 90.
151 Obama, supra note 90.
rather than acts of war. The traditional reluctance to label a situation as an armed conflict may also be derived from the set of rules that come with stepping onto the battlefield. Granted that the war on terror is indeed a war, how do we geographically delimit its battlefield? As of now, advocates of applying IHL are confining its application to territories in which the US employ targeted killings; Sudan, Yemen, and Pakistan. As such, if a uniformed US soldier would kill a Yemeni civilian on the streets of Washington, he would be subjected to the criminal justice system. If the same civilian’s death would have occurred in Yemen, as a collateral result of a drone strike, the soldier would not face any sanctions. At first glance, this distinction may not seem controversial seeing as there have not been any hostilities in the US; not on 9/11 nor in the 13 years since. However, it is also this distinction that reduces some civilians to mere collateral whereas others are allowed to retain their civil rights - and it is not the US citizens who have been given the short end of the stick. If IHL cannot be applied evenly, why apply it at all? If the thought of IHL being applied within US borders seems preposterous, why does not the same absurdity apply to Yemen, or Sudan? As of now, preconceived notions of what it means to live in the US versus the Middle East seems to have an apparent effect on whom is allowed to be subjected to the laws of war.

Why then stress the application of IHL? It is true that IHL is well regarded and more aptly enforced than IHRL and international criminal law, but is this enough to prefer its application in an ill-suited context? As has been implied, there seems to be other motives behind applying IHL than those regarding the protections of civilians. If, for example, the US, would be allowed to apply IHL on its war on terror it would exclude the actions of its soldiers from being subjected to the penal system. Thus, an action that under the law of peace, ie criminal law, would be considered murder would instead become an acceptable measure against a legitimate target. As will be revisited below, alleged terrorists are not defined as combatants in contemporary application of IHL, but rather as civilians taking a direct part in hostilities. They are therefore legitimate targets when bearing arms, albeit, again as will be discussed infra, there are some that would like to widen the window of opportunity to strike these individuals down to moments before and after they take up arms. As the US wishes to treat the “war on terror” as a non-international armed conflict, the US upon detainment is not obligated to treat these individuals as prisoners of war, which has opened up for the

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152 A civilian who takes direct part in “hostilities” loses his or her civilian immunity, see Additional Geneva Protocol art 51(3).
establishment of heavily criticized detainee camps such as the one located in Guantanamo Bay. One could therefore argue that the application of IHL on the US’ (maybe not so armed) war on terror best serves, and perhaps only serves, the US’ interests. IHL, if applied in the manner the US advocates, allows the US to protect its own citizens and the actions of its soldiers, whilst submitting the lives of those the US chooses to target in their entirety to the US’ discretion.

It is evident that the US post 9/11 wanted to take advantage of the wartime privileges of killing without warning, imprisoning without trial, and trials under wartime rules rather than the due process requirements of peacetime legislation. It is equally evident that this practice is inappropriate. IHL functions as a means of discerning just war from anarchy, protecting basic human rights to the extent they can be protected in a context where the rule of law has often been replaced with the strength of arms. To then apply this set of rules during peacetime conditions would be equivalent of stripping civilians of their political and civil rights without cause. Should States be able to decide to not apply the rule of law in other States simply by pretending that society no longer is there to enforce it? To allow the US to portray its “war on terror” as a permanent emergency and to conceptualize its global campaign against terrorism as an armed conflict would risk undermining the very integrity of IHL. Moreover, the US’ manipulation of the ambiguity surrounding some of the provisions of IHL shows an indifference to humanitarian principles on the part of the world’s only superpower that is of legitimate concern to any advocate of human rights.

As such, it is questionable whether IHL really is the appropriate applicable framework in this context. However, as this thesis’ aim is to thoroughly explore the legal issues concerning the use of drones, I will in the following assume for the sake of argument that the context into which they today are employed is either: (1) an international armed conflict; or (2) a non-international armed conflict. The following sections will discuss the implications of both.

153 See Geneva Convention Relative to the Treatment of Prisoners of War, art 118; Schmitt, supra note 70, p 94, 96; Fitzpatrick, supra note 98, at 249-251.
154 The practice of imprisoning without trial has been heavily criticized by the US Supreme Court and has now been amended, see eg Hamdan v Rumsfield.
3.3.3.2 Drones and targeted killings in the context of an international armed conflict

Determining the legality of targeted killings under the IHL applicable in the context of an international armed conflict centers on that framework’s core principle: the distinction between who is a combatant and who is a civilian. Those who meet the definition of combatant are subject to attack, whereas those who do not qualify as combatants are, by negative and residual implication, given civilian status and thus considered “protected persons”. Should these civilians however decide to take a direct part in the hostilities, they would forfeit this protection and thus become legitimate targets.\(^{155}\) A combatant is someone who fulfills one of the following:

1) [a m]ember of the regular armed forces of a belligerent party;
2) [a m]ember of militia and volunteer corps fulfilling the following conditions:
   a) to be commanded by a person responsible for his subordinates;
   b) to have a fixed distinctive emblem recognizable at a distance;
   c) to carry arms openly;
   d) to conduct operations in accordance with the laws and customs of war; and e) to be linked to a party to the conflict;
3) [an inhabitant] of a non-occupied territory who, on approach of the enemy, spontaneously take[s] up arms to resist invading troops.\(^{156}\)

This is an either/or model: either you are a combatant or a civilian, one cannot be both. How then to deal with members of terrorist organizations? Transnational terrorists are generally not part of the armed forces of a given State. Moreover, even if they do in some situations fulfill the conditions in art 42(2)(a)-(c), the fact that very nature of their terrorist activities coincides with the intentional causing of death or serious injury to civilians means that they never can fulfill condition (d).\(^{157}\) As such, they do not meet the


definition of combatant and are per definition civilians. Most international legal scholars agree on this definition. Instead, the debate centers around when and to what extent terrorists, as civilians, can forfeit this protection. Assuming that there indeed are hostilities between eg. al Qaeda and the US, when should al Qaeda’s members be considered as taking direct part in these hostilities? Article 51(3) of Additional Protocol I to the Geneva Conventions articulates customary international law with respect to international armed conflict. Article 51(3) provides that “[c]ivilians shall enjoy..., protection..., unless and for such time as they take direct part in hostilities”. What does it mean to “take direct part” and how long is exactly “for such time”? One group within the international legal community interprets the exception on targeting civilians narrowly, whilst another opts for a more expansive interpretation.

For advocates of a narrow interpretation, including Cassese, the distinction under IHL between combatant and civilian is essential in order to “reduce as much as possible the adverse consequences for the civilian population”. For proponents of this approach, this can only be achieved by limiting the targeting of alleged terrorists to instances where these individuals truly are “engaging in hostile actions against enemy armed forces but not assisting in general war effort”. As such, alleged terrorists may be targeted if they are carrying arms openly preceding an attack or, for example, are concealing explosives on their bodies with the intent to harm civilians and without complying to orders to show their innocence. However, as soon as they lay down their arms, they are no longer subject to attack. According to this approach, States are

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158 Brown, supra note 72, at 24–25, n. 112; Watkin, Combatants, Unprivileged Belligerents and Conflicts in the 21st Century, at 10. Also see Dinstei, supra note 72; Cassese, Expert Opinion of Antonio Cassese on Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law on Behalf of Petitioners., at 16–18.
160 See Pub Comm Against Torture in Israel v. Israel, HCJ 769/02, 21, 60, (Israel 2005 (holding that the international law of armed conflict governs the use of targeted killing against terrorists in the Palestinian territories), at 26; Prosecutor v Strugar and others, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, Appeals Chamber, 22 November 2002, para 9-10.
161 Narrow interpretation: Cassese, supra note 158, at 10, 15-18; Proulx, supra note 109, at 884-887; Stein, supra note 109, at 129; Expansive interpretation: Supplemental Response, Supplemental Response on Behalf of the State Attorney’s Office, Pub Comm Against Torture in Israel v. Israel, HCJ 769/02, (Israel 2003), paras 48-49; Kasher & Yadlin, Assassination and Preventive Killing, at 48-49.
162 Cassese, supra note 158, at 2, 10.
163 Ibid, at 7; ICRC, Commentary on Protocol Additional, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, para 1944.
164 Cassese, supra note 158, at 5, 8-11.
165 Ibid.
not allowed to employ lethal force against terrorists that are merely planning or preparing an attack. In these cases, States are instead obligated to use due process methods - replacing launch orders with arrest warrants.\textsuperscript{166} The rationale behind this interpretation is the need to protect innocent civilians and shield them from enemy fire as well as undue persecution: if a civilian is captured while openly bearing arms he or she cannot be prosecuted for war crimes and must be granted prisoner of war status. To allow States’ to kill civilians outside of their direct participation in hostilities would allow them to circumvent this protection, \textit{ie} immunity from criminal liability for fighting, and prisoner-of-war status when apprehended.\textsuperscript{167} It would also present them with the opportunity to kill on assumption, without any oversight. Cassese states that it would be “absolutely unsound” to contend that this practice would be anything short of wartime assassination.\textsuperscript{168}

Those in favour of a broader interpretation of the exception which allows States to target alleged terrorists outside of hostilities often refer to “the revolving door problem” when explaining their position.\textsuperscript{169} Being of the opinion that the hostilities between States and various terrorist organizations are protracted, and that members of terrorist organizations tend to be multiple offenders, these proponents maintain that a narrow interpretation would allow terrorist to take advantage of IHL. Thus, the free alternation between being an unprotected and a protected civilian would create a “revolving door” and render any US or Israeli right to self-defence meaningless.\textsuperscript{170} As such, civilians who carry out, plan, and dispatch other to commit terrorist acts must fit under the exception in art 51(3).\textsuperscript{171} For support, the tradition of regarding civilians gathering intelligence and providing logistical support as taking direct part in hostilities is cited.\textsuperscript{172} This tradition is however argued by Cassese to be directly linked with the right to stand trial.\textsuperscript{173}

By adopting the narrow interpretation, alleged terrorists may only be attacked while directly engaging in combat. By adopting the expansive interpretation, alleged terrorists may be targeted long before and after they enter the battlefield. Which is the

\textsuperscript{166} Ibid, at 8-10.
\textsuperscript{167} Ibid, at 10.
\textsuperscript{168} Ibid, at 11, in reference to art 23 (b) of the Hague Regulations.
\textsuperscript{169} Supplemental Response, supra note 161, para 48; Kretzmer, supra note 159, at 192-194.
\textsuperscript{170} Ibid.
\textsuperscript{171} Kretzmer, supra note 159.
\textsuperscript{172} See eg, Supplemental Response, supra note 161, paras 49-50.
\textsuperscript{173} Cassese, supra note 158, at 11-14.
sound alternative? The distinction between civilians and combatants is paramount in order to protect innocent civilians. Limiting the right to target civilians to when they are taking a direct part in hostilities is crucial partly due to the need to thwart imminent threats, but also due to the need for imminence to act as a safeguard against lacking due process measures, as previously discussed in regard to IHRL. This speaks in favour of the narrow application of art 51(3).

There are however concerns that this narrow interpretation of art 51(3) would render any right for States to use force against terrorist organizations useless, as it would only be lawfully exercised under instances when the victim state is de facto under attack.\textsuperscript{174} We must therefore address the fact that the difficulties of applying the IHL of international armed conflicts in this context raises doubts concerning its efficiency. Various legal scholars argue that if we are to concede that there can exist an armed conflict between a State and non-state actor, we must also adopt a theory which posits all that are not part of the fighting forces as civilians: \textit{ie} that all members of for example al Qaeda be regarded as combatants.\textsuperscript{175} As one author notes: “When the armed conflict is essentially between a state and the terrorist group, the theory that the terrorists are civilians simply does not make sense. An armed conflict model of law … cannot be applicable if only one party to the conflict has combatants”.\textsuperscript{176} As such, the difficulties of applying IHL on the “war on terror” is again derived from the stubborn classification of a conflict without hostilities as a war: applying an exception that encompasses those who “take direct part in hostilities” to a context where there are no hostilities in the traditional meaning of the word, but rather a series of quick and stealthy operations, makes it hard to conduct lawful warfare. After all, one cannot resist the question: if the application of IHL indeed is warranted, should we have to bend over backwards in our attempts to apply it? Some argue that the IHL of non-international armed conflicts is better suited for dealing with the unique character of the “war on terror” as it was designed for the altercations between States and non-state actors.\textsuperscript{177} The following section will evaluate this notion.

\textsuperscript{174} Schmitt, supra note 8, at 632.
\textsuperscript{175} Ibid; Kretzmer, supra note 159, at 194.
\textsuperscript{176} Kretzmer, supra note 159, at 194.
\textsuperscript{177} Jinks, supra note 130, at 38.
3.3.3.3 Drones in the context of a non-international armed conflict

There are two weak points in the argument that “the war on terror” be regarded as a non-international armed conflict. The first is connected to the very definition of a non-international armed conflict, whereas the second again concerns the distinction between combatant and civilian.

As mentioned under Section 3.2.3.1, both Common art 3 of the Geneva Conventions and Additional Protocol II (APII) define a non-international conflict as a conflict within the territory of a State party. Thus, regardless of how much one would want to call “the war on terror” a non-international armed conflict, it is a conflict upon which the IHL of non-international armed conflicts is not formally applicable. It has however been argued that this alone cannot mean that transnational armed conflicts that do not meet the requirements of international armed conflicts are not governed by IHL, simply because the non-state group in question in not restricted to a single State’s territory. For these reasons, Kretzmer asserts that the IHL of non-international armed conflicts could very well apply to the war on terror, at least to the extent its provisions are standards of customary international law. In other words, that at least Common art 3 is applicable to conflicts between States and transnational groups and that APII is applicable to the extent that its provisions is part of customary international law.

Advocates of letting the legality of targeted killings be determined by the laws of non-international armed conflicts naturally maintain that the acts of violence between eg the US and transnational terrorists have reached the necessary scope and level so as to constitute a non-international armed conflict. The threshold for just how much violence is needed in order to label a situation as a non-international armed conflict has never been expressly defined. Proponents of this approach could however point out that the International Committee of the Red Cross (ICRC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the Inter-American Commission on Human Rights all support a low threshold. The ICTY has for example held in Tadic that a non-international armed conflict exists when there is “protracted armed violence between governmental authorities and organized armed groups” and the Inter-American Commission on Human Rights has made clear that the presence of a non-international armed conflict does not depend on “the existence of large-scale and generalized

178 Kretzmer, supra note 159, at 195.
hostilities or a situation comparable to civil war". 180 This could very well be used to argue that there is a non-international armed conflict between the US and al Qaeda on the one hand, as well as between Israel and Palestine-affiliated terrorist groups on the other. 181 However, as noted by Schmitt, recent remarks made by President Obama indicate that even the US itself recognizes that the level of intensity of the violence between al Qaeda and the US is slipping below the threshold on a non-international conflict. 182

Again assuming for the sake of argument that the interactions between the US and al Qaeda indeed is a non-international armed conflict, the next hurdle an advocate of the IHL of non-international armed conflicts encounters is the principle of distinction. It is clear that the distinction between combatants and civilians that applies in international armed conflict also applies in non-international armed conflict. 183 Art 13(2) of APII expressly exempts civilians from being object of attack, whereas art 13(3) again allows civilians to forfeit this protection “for such time as they take a direct part in hostilities”. However, while it is clear that civilian be distinguished from combatant under the IHL of non-international armed conflicts, it is not clear how this should be done. International instruments are silent as to the definition of a combatant in a non-international armed conflict. 184 The reason behind this silence is that States were, and are, unwilling to let insurgents and other non-state actors enjoy the privileges that traditionally come with being “combatants”: legitimacy, immunity from criminal responsibility while fighting and prisoner of war status when captured. 185 As such, while these privileges may apply to combatants in international armed conflicts, they have no bearing in non-international armed conflicts. 186 Who are then the combatants in a non-international armed conflict? This issue is riddled with disagreement. There is disagreement as to which specific status and conduct grants an individual the status of combatant. There is also disagreement as to whether the sheer presence of an armed conflict and with it the applicability of IHL does not grant States an uncontestable

180 Ibid.
181 Ben-Naftali & Michaeli, supra note 145, at 258-259; Kretzmer, supra note 159, at 196.
182 Schmitt, supra note 70, at 96.
183 Ben-Naftali & Michaeli, supra note 145, at 275-277.
184 Sassoli & Bouvier, supra note 157, at 208.
185 Commentary on APII, ICRC, Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, para 4441.
186 Ibid.
“license to kill” combatants, or if an obligation to use “the least harmful measure” exists as a constraint. Each of these questions will be considered below.

Who is a combatant in a non-international armed conflict? The answer to the first tier of this question lies in identifying the parties to the conflict. Pursuant to art 1 of APII non-international armed conflicts are conflict between States and “organized armed groups. As such, the combatants of these conflicts are the State’s armed forces and the organized armed groups that oppose them. This conclusion is supported by the stance taken by the ICRC, which in its commentary on APII states that: “those who belong to armed forces or armed groups may be attacked at any time”.\(^\text{187}\) This has been called the “functional combatant” model.\(^\text{188}\) As such, if a non-international armed conflict were to exist between eg the US and al Qaeda, the active members of al Qaeda would be combatants and therefore legitimate targets for lethal force. This is however not entirely unproblematic. Whilst in international armed conflict combatants must openly display their combatant status, there is no such requirement in non-international armed conflicts. Moreover, even though organizations like al Qaeda may meet the requirements of being an organized group for the purposes of the IHL of non-international armed conflicts, this does not necessarily mean that it will be easy to determine which of its members shall be treated as functional combatants. It can be assumed that terrorist organizations typically do not flaunt details concerning members and their activities. How do we in these cases distinguish between civilians, civilians taking direct part in hostilities, and active members of terror organizations? As noted above, blurring this line may weaken one of the core principles of IHL - the protection of civilians.

Kretzmer suggests that the definition of combatant for the purposes of the IHL of non-international armed conflicts be tied to Common Article 3 of the Geneva Conventions, under which persons that have not played an active part in hostilities shall be protected from violence.\(^\text{189}\) He goes on to define combatant as including both civilians who take part in hostilities during such time that they are active and active members of terrorist organizations - granted that they have been active in the hostilities during the armed conflict. As such, sheer membership in a terrorist organization does not automatically grant an individual the status of combatant and thus make him or her a

\(^{187}\) Ibid, para 4789 (emphasis added); On the debate of the existence of combatants in non-international armed conflicts, see Chesney, supra note 61, at 41-13.

\(^{188}\) Kretzmer, supra note 159, at 197-198; Melzer, Targeted killing in international law, at 316.

\(^{189}\) Kretzmer, supra note 159, at 198f.
Furthermore, it is only members of a terrorist organization’s military faction that may be deemed combatants. If a State were to target members in possession of purely political posts within these organizations, such targeting should be considered assassination. This approach is supported by both Melzer in his construction of the “continuous fighting function” (CFF) and the ICRC’s “continuous combat function” (CCF).

These CFF/CCF models are not applied by all. The US has for example adopted the approach that all “member(s), agent(s), or associate(s) of al Qaida or the Taliban” are what they call “unlawful combatants”. “Unlawful combatants” refers here to combatants in the context of a non-international armed conflict (here we see the hesitance to deem belligerent parties in non-international armed conflicts as “lawful combatants” due to the legitimacy such a label could infer). It should be noted that the US bases its definition on jurisprudence which defines an enemy combatant as “citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war”. However, the practice of automatically equating membership in organizations such as al Qaeda, which arguably consist of both strong ideological as well as military factions, with participation in hostile acts is dubious. Moreover, the fact that the majority of targeted killings are executed in the form of so called “signature strikes” only worsens the situation. A signature strike allows US soldiers and CIA operatives to target and kill individuals whom they cannot identify. Instead, decisions to employ the use of lethal force are based on “suspicious behavior”. Keeping in mind that the very nature of terrorist operations demands secrecy and stealth, this author cannot even begin to fathom the issues these signature strikes must mean in terms of respecting the principle of distinction. It is for these reasons hardly surprising that the similar US practice of

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191 Watkin, supra note 158, at 16.
192 Kretzmer, supra note 159, at 200; David, supra note 46, at 111; David, ‘If Not Combatants, Certainly Not Civilians’; at 138; Melzer, supra note 188, pp 320–321.
194 William J. Haynes II, General Counsel of the Department of Defense, Memorandum on Enemy Combatants.
195 Ibid, citing Supreme Court of the United States in Ex parte Quirin, 317 U.S. 1, 37-38 (1942).
“double-tapping”, ie the targeted killing of those coming to the rescue of those hit by a drone strike, has been called a war crime by UN special rapporteur Christof Heyns.197

It has so far been concluded that a combatant under the IHL of non-international armed conflicts ought to be defined with the application of the functional combatant model, ie membership/participation in a sufficiently organized armed group, in combination with the application of CFF/CCF, ie a requirement that the members of a sufficiently organized group actually has participated in the hostilities. Civilians who are not members in any organization but who take direct part in the hostilities are of course also considered combatants under these models. The question then arises when States are allowed to employ lethal force against these combatants – is the soldier’s right to kill without limit? It has been suggested that the use of force even under IHL must be tied to a requirement of military necessity. As famously held by Israel’s High Court of Justice in its landmark decision on targeted killing, even “a civilian taking direct part in hostilities cannot be attacked … if a less harmful means can be employed”.198 As such, there seems to be a group within the international community that locates the requirement of “least harmful measure” not solely within IHRL, but within IHL itself.

Melzer defines the requirement of “least harmful measure” under IHL as rendering a targeted killing illegal when there is “non-lethal alternative which would entail a comparable military advantage without unreasonably increasing the risk to the operating forces or the civilian population”.199 This has of course been criticized.200 Milanovic, for example, has countered that “the rule of humanitarian law is very clear; states have quite deliberately left themselves the freedom to kill combatants, or civilians engaged in hostilities, and are under no obligation to capture them and put them on trial instead”.201 The ingenuity of Melzer’s argument is however, as noted, that he constructs the obligation of “least harmful measure” as originating from IHL itself, effectively sidestepping any debate as to whether one can combine IHL and IHRL principles.

197 Quoted in: Drone strikes threaten 50 years of international law, says UN rapporteur, The Guardian (online)(2012); see also The Bureau of Investigative Journalism, CIA tactics in Pakistan include targeting rescuers and funerals.
198 HCJ 769/02, The Public Committee against Torture in Israel v. Gov’t of Israel et al, para 40.
199 Melzer, supra note 188, at 397.
200 Parks, Part IX of the ICRC ‘direct participation in hostilities’ study: no mandate, no expertise, and legally incorrect; For Melzer’s response, see 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, at 896–912.
201 Milanovic, Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings, at 391.
Melzer links this restraint to what a principle which he claims to be misconceived: the “restrictive function” of the principle of military necessity.\textsuperscript{202} While it is widely accepted that one cannot justify violations of IHL with claims of military necessity, Melzer argues that the restrictive function of military necessity, \textit{ie} the requirement “that [a] belligerent refrain from employing any kind or degree of violence which is not actually necessary for military purposes”, has mysteriously disappeared “from the radar screen of mainstream legal awareness”.\textsuperscript{203} Properly understood, this principle entails that while IHL does not expressly prohibit the use of force against combatants or civilians taking direct part in the hostilities, such use is only permitted when required by military necessity.\textsuperscript{204} In the context of targeted killings of alleged terrorists via drone strikes, this would mean that a targeted killing would be unlawful provided that it would not be unreasonably risky to capture the suspected individual instead. However, regardless of how compelled this author may be to accept Melzer’s case, the lack of consensus on the subject means that the requirement of ”least harmful measure” and thus a duty to capture over kill is a far cry from being a widely accepted principle of IHL.

The IHL of non-international armed conflicts seems so far to present a better solution to the problems lifted under \textit{Section 3.2.3.2} than the IHL of international armed conflicts. Under this regime, combatant can be more easily distinguished from civilian. This is especially true for States which choose not to apply the CFF/CCF models. Furthermore, there is no clear requirement for States to arrest individuals when their deaths are not compelled by military necessity. Moreover, the victim State does not have to go through the trouble of granting combatants prisoner of war status if apprehended nor turn a blind eye towards their actions while fighting. Needless to say, this framework would be particularly popular amongst States, as it presents them with the opportunity to target alleged terrorists without the obligation of granting them any privileges. The source of this solution’s popularity is however also the reason why it cannot stand alone. Earlier in this thesis I have lifted the dangers of granting States licenses to kill without any possibility for oversight. Are we prepared to trust that States base their operations on sufficient amounts of persuasive evidence? Or is it more likely that we face a reality where States may jump at the chance of being able to ignore the

\textsuperscript{202} Melzer, \textit{supra} note 188, at 286-289.
\textsuperscript{203} US Army Field Manual 27-10 (1956), § 3, quoted in Melzer, \textit{supra} note 188, at 283; Melzer, \textit{supra} note 188, at 283, 286-289.
\textsuperscript{204} Ibid.
due process requirements of a law enforcement model in favour of a non-international conflict model? This would place the lives of alleged enemies of States in their entirety under States’ discretion. If we are to accept that wars have been redefined to the extent that they now can be waged between transnational non-state groups and States, we must also ensure that the very framework that shields civilians from the belligerents’ conduct is neither circumvented nor taken advantage of. How this may be achieved will be revisited under chapter 4.

3.3.4 Drones, targeted killings, and the principle of proportionality

Even if a specific suspected terrorist was a truly legitimate target, with sufficient and impartial evidence that would confirm the validity of the threat he or she poses, every single use of targeted killing must be proportional. As such, to be lawful, IHL requires that targeted killings must not “be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.205 Similarly, proportionality in the context of IHRL’s right to life considers whether the “harm caused is proportionate to the sought objective”.206 While the principle of proportionality can be said to be one of the cornerstones of IHRL, IHL, and customary international law, it is difficult to apply. The act of determining whether the relation between an act’s legitimate destructive results and its collateral damage is proportionate may seem simple. However, in reality it consists of weighing unlike quantities and values against each other.207 How does one rank aims, values and statistics that are not comparable? Is it possible to determine with certainty that any single objective trumps the value of the lives of innocents? This section will discuss whether it is possible to proportionally employ targeted killings via drone strikes in the context of the “war on terror”. It will also explore the argument that current state policy has rendered all use presumptively disproportionate.

In the context of “the war on terror” the concrete and direct military advantage of employing a targeted killing against an alleged terrorist will presumably be claimed to be the prevention of terrorist acts and the subsequent saving of civilian lives. Is such a statement enough to prove the presence of a concrete and direct military advantage? In

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206 Lubell, Extraterritorial use of force against non-state actors, at 173.
207 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para 48.
other words, how often can this be used? Can every targeted killing really be said to prevent a concrete and direct attack? And even if this were true, how does one begin to weigh this advantage against the estimated ten innocent civilian lives that will be caught in the crossfire?\textsuperscript{208} Albeit there is not enough space in this thesis to even attempt to answer these questions, one conclusion is clear. Setting situations where alleged terrorists are targeted while posing real imminent danger aside, the military advantages claimed to be gained from their deaths are based largely on speculation. In order for this speculation to be elevated to just cause instead of more or less taking the shape of pretext, it seems evident that an extremely strong evidence must be presented to justify a targeted killing when its execution may or will endanger the lives of the innocent. It is true that the test of proportionality is not decided by a specific operation’s results, but rather the specific conditions at the time of the attack. Nevertheless, States must be able to adequately show that the loss of civilians lives could not have been foreseen, or, if it could, that the danger in itself was of such magnitude that they no longer had a choice but to use lethal force.

Some commentators insist that targeted killings by drones be regarded as 
\textit{presumptively} disproportionate. They argue that the way the targets of these killings are identified is neither safe nor accurate, and that the targeted killings of misidentified individuals can hardly be said to further any direct and concrete military advantage.\textsuperscript{209} When commenting on President Barack Obama’s prolific statements on the US’ use of drones in 2013, Micah Zenko, a representative of the Council of Foreign Relations and author of a 2013 study on drones, stated that the president’s speech “highlights what we’ve sort of known: that most individuals killed are not on a kill list, and the government does not know their names”.\textsuperscript{210} Following new disclosures, it is also clear that out of the eight Americans killed in drones strikes only one, Anwar al-Awlaki, was identified and deliberately targeted.\textsuperscript{211} The rest were killed by chance in attacks aimed at other alleged terrorists, in so-called signature strikes based on indications that people in the vicinity were members of al Qaeda or their affiliates.\textsuperscript{212} Normally the Obama Administration is tight-lipped when it comes to disclosing the details surrounding drone

\begin{footnotesize}
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\item[208] Byman, \textit{supra} note 6.
\item[209] Proudlx, \textit{supra} note 109, at 887-889.
\item[210] Quoted in Shane, \textit{supra} note 45; See also The Bureau of Investigative Journalism, Drone war report, January – June 2015: controversial ‘signature strikes’ hit Yemen and Pakistan; Ackerman, Inside Obama’s drone panopticon: a secret machine with no accountability, The Guardian (online).
\item[211] Shane, \textit{supra} note 45.
\item[212] Ibid.
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strikes and their results: American casualties are the exception to this practice.\textsuperscript{213} This is how we know that the very first CIA drone strike in 2002 killed an American al Qaeda member by chance. This is how we know that another American al Qaeda member, Samir Khan, was killed by chance in the 2011 targeted killing of the only previously identified American, Anwar al-Awlaki. This is also how we know that two weeks later, Anwar al-Awlaki’s 16-year-old son and his 17-year-old cousin were killed in a targeted killing of an alleged terrorist who wasn’t even present. And, what is worse, this is how we know that military and intelligence officials were not aware of the teenager’s presence at the time of the attack.\textsuperscript{214} It is true that when used correctly drones can limit damage to civilians and their property as they are more accurate than traditional weapons. However, as one writer for the New York Times put it: “without detailed, reliable, on-the-ground intelligence, experience has shown, drones make it possible to precisely kill the wrong people”.\textsuperscript{215}

The notion of “clean wars” has previously been lifted in this thesis. It again becomes relevant when discussing these signature strikes, where the US targets individuals not on the basis of any “kill list” but rather on whether they “fit the description of a terrorist”. As famously disclosed by an unnamed senior CIA official in 2012, the CIA considers “three guys doing jumping jacks” an indication of terrorist training.\textsuperscript{216} How do we in these situations trust that the conclusions drawn by those operating drones are based on intelligence that meets the requirement of evidence, rather than preconceived notions that have made almost anyone with a certain appearance a possible enemy? Three months after a drone strike killed 42 civilians in Pakistan, where a tribe meeting or “jirga” held in order to resolve a dispute concerning the local mine was mistaken for a terrorist gathering, high-up US officials made public statements that there had been no civilian casualties in the last year of strikes.\textsuperscript{217} Philip Alston, former Special Rapporteur for the UN on extrajudicial executions, concludes that the US is presumably operating on the notion that any male between the ages 16 - 40 automatically is a combatant.\textsuperscript{218} With such a broad concept of who is a combatant,

\textsuperscript{213} Ibid.
\textsuperscript{214} Ibid; see also Friedersdorf, How Team Obama Justifies the Killing of a 16-Year-Old American, The Atlantic, (online).
\textsuperscript{215} Shane, supra note 45.
\textsuperscript{216} Ackerman, supra note 210; Shane, supra note 45.
\textsuperscript{217} Shane & Becker, Secret kill list tests Obama’s Principles, The New York Times (online); Zucchino, Drone strikes in Pakistan have killed many civilians, study says, LA Times (online); The Bureau of Investigative Journalism, Obama 2011 Pakistan strikes.
\textsuperscript{218} Philip Alston, appearing in the documentary “Unmanned: America’s Drone Wars”.

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statements implying few civilian casualties must be easier to make. It seems that even the US Supreme Court is having its doubts concerning how the US distinguishes combatant from civilian. In Hamdi v Rumsfeld, the Court faced the task of ruling whether a US citizen claiming not to be a combatant was entitled to any neutral process in which to make his case.219 Justice O’Connor, in lieu of any clear official definition, provided this definition for purposes of the case: “One who takes up arms against the United States in a foreign theater of war . . . may properly be designated an enemy combatant”.220 It is deeply problematic if it is true that the US is basing attacks on the assumption that their intelligence, ie what they can gather from informants and live video feeds, automatically constitutes evidence. It is also problematic that this intelligence in most cases leads to killings rather than capture: killing ought to be the exception, not the rule. In addition, we must ask ourselves what the practice of killing rather than capturing combined with such a broad definition of the term combatant does to the general public’s understanding of how drones are used.

Advocates of labeling drone warfare as presumptively disproportionate often also underscore the link between distance and abuse. Inherent in the various condemnations of drone warfare is the idea that war waged from a distance succeeds in emotionally detaching the aggressor from the context in which he or she is being aggressive, and that this in turn increases the likelihood of civilian casualties. It has previously been stated that drone strikes often entail the death of around 10 civilians.221 Although this figure of course cannot be condoned, it is consistent with other conflicts. Out of the total number of lives claimed during the Iraq War (2003-2011) 79 % belonged to civilians, moreover, the majority of these lives were taken by guns.222 As such, it seems that we cannot automatically draw parallels between impunity and distance. There are however other factors that speak in favour of such a conjunction.

Albeit true that long-distance weaponry is no new prospect, wars waged entirely in this fashion, such as “the war on terror”, are. There is also a sense that, seeing as war traditionally has been considered “a contest of pain”, the obvious lack of reciprocity that drone warfare entails is unjust, or even immoral.223 In his TED Talk on military robots, Singer describes the hostility felt by the inhabitants of drone patrolled regions towards

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220 Ibid, para 516.
221 Byman, supra note 6.
222 Figure 1, IraqBodyCount.org (online).
the US by quoting Euripides’ Hercules: “the measure of a man’s bravery is not archery; rather he who stands fast in his rank and gazes unflinchingly at the swift gash of the spear is the brave man”. This is also how war traditionally has been depicted, as a mutual implication of risk. Kahn, in his assessment of contemporary warfare, goes so far as to assert that drones and other remote controlled weapons have stripped modern conflicts of the possibility of being regarded as legitimate wars, and should instead be seen as law enforcement measures. Keane, however, maintains that violence may be justifiable when it contributes to the building of a peaceful civil society. Although one could easily question what progress military factions such as NATO’s ISAF have had in their peacebuilding efforts in Afghanistan, we can conclude that at least in theory - if drones can be shown to add to society their use may be justified.

Whether drone warfare per se is immoral is therefore yet to be determined. However, is there merit to the argument that distance affects our eagerness to resort to violence? That drones be regarded as presumptively disproportionate due to an all too high risk of abuse? Drone pilots are often compared to frequent players of violent video games such as Counter Strike, where the objective is essentially to kill as many enemy soldiers as possible. This comparison is warranted as both player and pilot get to experience warlike situations without the risk of their own deaths and without being taken out of the context of their everyday lives. Coincidentally, 72 % of Xbox owners have also been reported to approve of more drone warfare in Pakistan. This leads us to the question: how does being a spectator of violence affect our perception of violence?

“I see mothers with children, I see fathers with children, I see fathers with mothers, I see kids playing soccer”, a drone operator tells the New York Times. However, when ordered to fire a missile into this setting he states: “I feel no emotional attachment to the enemy, I have a duty, and I execute my duty”. When describing the challenges civilian imagery analysts face, a private contractor enlisted by the US Air Force states: “Many of the younger analysts view the job as a game. It is critical to understand everything that happens, happens in real life. When you mess up, people

224 Dr. P.W. Singer on how robots are changing the realities of war, Ted Talk (online).
226 Keane, Reflections on Violence, at 91.
229 Ibid.
Can the practice of targeted killings via drones be proportional if those carrying out the attacks view the “war on terror” as a game? The latest study on the psychological effects of video games describes its results as showing “that engaging in violent video game play diminishes perceptions of our own human qualities. In addition, when other players are the targets of this violence it reduces our perceptions of their humanity also”.

The authors conclude:

> Our findings demonstrate that engaging in cyberviolence leads people to perceive themselves as less human and supports previous observations that perpetrators of violence are dehumanized by their own brutality ... That is, hitting, hurting or killing others is likely to affect how human we see them, and this is consistent with previous research showing that seeing others as dehumanized facilitates violence and aggression ... Our findings also highlight the particularly insidious nature of video game violence. We demonstrate that engaging in violence against a coplayer or simply being engaged in gratuitous violence against computer generated avatars is sufficient to affect our perceptions of our own humanity. These findings reflect those of past research, demonstrating links between video game violence and increased aggression, reduced empathy and desensitization to the pain and suffering of others ... Taken together, the effects of violent video game play appear to reflect changes in people’s behavior, emotions, and cognitions in ways that are consistent with a loss of humanity.

As such, the notion that the constant exposure to violent images serves to desensitize drone pilots’ and imagery analysts’ reactions to violence does not seem all too far-fetched. This seems to support the notion that targeted killings via drones may be seen as presumptively disproportionate due to an all too high risk of abuse. Furthermore, while a US Air Force study shows that Post Traumatic Stress Disorder (PTSD) is also present amongst drone pilots it also concludes that “combat-related

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230 The Bureau of Investigative Journalism, Drone Warfare: Reaping the awards, How the Private Sector is Cashing In on Pentagon’s ‘Insatiable Demand’ on Drone War Intelligence (online).
232 Ibid, at 489-490 (emphasis added).
stressors were not rated as top sources of stress among participants”. Combat-related stressors are determined to “include, but are not limited to, targeting and destroying enemy combatants and assets, observing live video feed and images of destruction to ensure combatants have been destroyed or neutralized, making decisions regarding the identification of enemy combatants, and observing a group or single enemy combatant for several days or weeks”. Instead, the main triggers of drone pilots’ mental distress were found to be “long hours, shift work, deployed in-garrison status, ergonomic design of the ground control station, and sustaining vigilance to large amounts of real-time visual and auditory data”. It is also noted that “the incidence of PTSD among USAF drone operators (...) was lower than rates of PTSD (10–18%) among military personnel returning from deployment”, which suggests that soldiers directly confronted by the enemy experience more emotional stress than those who see him from afar. This may in turn support the notion that targeting your enemy whilst sitting in front of a computer screen thousands of miles away may increase your readiness to “pull the trigger”, which in turn may increase the risk of abuse.

There are other indicators which show that not all drone pilots are haunted by live stream footage from Yemen, Pakistan and Sudan. Singer describes a phenomenon he chooses to call “predator porn” - video footage of drone attacks made viral by those responsible. He describes how these kinds of videos typically play out by referencing a clip sent to him by a drone pilot: “a Hellfire missile drops, goes in, and hits the target, followed by an explosion and bodies tossed into the air (...) all this was set to music, the pop song ‘I Just Want to Fly’ by the band Sugar Ray”.

We can thus assume that distance plays a vital role in the amount of empathy a soldier can feel for his or her enemy. Arendt has linked distance to dehumanization and the violence that comes with it: by distancing individuals from society, its social bonds, and legal protections, we slowly cease to see them as human. As such, we are more inclined to accept that these individuals become exposed to governmental discretion and meaningless death - power confronting bare life. It has furthermore been shown that

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233 Chappele, Salinas, & McDonald, Psychological Health Screening of Remotely Piloted Aircraft (RPA) Operators and Supporting Units, USAF School of Aerospace Medicine, at 1-2. (Online).
234 Ibid.
235 Ibid.
236 Ibid, at 1.
237 Singer, supra note 224.
238 Ibid.
239 Arendt, The Origins of Totalitarianism, at 297.
240 Agamben, Homo Sacer, at 28.
the presence of a group may make it easier for a person to rationalize their indifference towards a specific individual: effectively creating what we call “us and them”.\textsuperscript{241} In 2004, the abuse of detainees in Abu Ghraib Prison, Iraq, was put to light. The extent of the abuse and the dehumanization of the detainees is revealed by a US Government memorandum, stating that the Geneva Convention did not apply to members of al Qaeda.\textsuperscript{242} This supports the idea that humanity is granted but also taken away by the law.\textsuperscript{243}

The case of Abu Ghraib is of value when analyzing “the war on terror”. As we continue to live in a world which accepts the notion of “a war on terror” as a war, led by a valiant super power against terrorists in countries which a large number of westerners only hear about in discussions based on preconceived notions of poverty and conflict stricken States, are we not also placing more and more distance between ourselves and eg the everyday Yemenite and Pakistani? As Debrix puts it, “the war on terror” no longer has a distinguishable enemy - by blurring the distinction of “the other” through false narratives in the media we have created an environment where anyone could be “an alleged terrorist”.\textsuperscript{244} As such, we have in a way stripped the victims of drone strikes of their names, their identities, and their dreams and goals: what makes them human. Is this not similar to the practice of placing black bags over the detainees of Abu Ghraib’s heads, in order to make it easier for the military police to administer pain?\textsuperscript{245} Is it not easier to view civilians as collateral if we refuse to depict them in a context which grants them individual identity? The previous sections have shown that the application of the framework and thus the legal narrative preferred by the States advocating drone warfare would subject those suspected of terrorism to laws that grant them little to no rights. As such, the situation in Yemen and Pakistan may just be as Agamben puts it: power confronting bare life.\textsuperscript{246}

“Nobody teaches you how to react, they just teach you how to do it”, one drone pilot notes when describing his training and time in service.\textsuperscript{247} It is for similar reasons that we cannot rule out that the distance today between drone pilot, target, and innocent

\textsuperscript{241} Waytz & Epley, “Social connection enables dehumanization”, at 75.
\textsuperscript{243} Esmeir, “On Making Dehumanization Possible”, at 1544.
\textsuperscript{244} Debrix, Tabloid Terror, at 88.
\textsuperscript{245} Zizek, Violence: Six Sideways Reflections, at 36, 39.
\textsuperscript{246} Agamben, supra note 240, at 171.
\textsuperscript{247} Brandon Bryant, appearing in the documentary “Unmanned: America’s Drone Wars”.

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civilians leads to more rash decisions, greater readiness to use violence, and abuse. Studies on the effects of violent video games imply that the waging of wars from desktop consoles is taking soldiers’ understanding of war from fact to fiction. Moreover, medial and legal narratives are disassociating the general public from those forced to live under drones. Even though it is perhaps too soon to call drones presumptively disproportionate for these reasons, it is safe to say that distance may very well serve this purpose in the future if States using drones do not revise their official policy and depiction of drone warfare.

To summarize: current methods of identifying those targeted by drone strikes and the distance drones place between victim and agressor may very well lead to the conclusion that the practice of targeted killings via drone strikes ought to be seen as presumptively disproportionate. However, despite this author’s critique of how drones are used today, I concede that drones are at least possible to use proportionally. If however civilian lives are risked by such an attack, there lies a heavy burden on States’ to justify either that their deaths could not have been foreseen or that imminent danger forced their hand.

3.4 The implications of waging a “war on terror” from a distance

Section 3.1 discussed the legal consequences of drone warfare’s extraterritorial nature. It began with establishing that no matter how drones are used, they are a means of intervention. It went on and concluded that if one were to accept this author’s conclusion – that the use of drones in the ongoing “war on terror” is in fact not a legitimate means of self defence – one would also have to stomach the implications of a reality where every use of targeted killings via drones would provide legal basis for the States which territories are being compromised by drone operations to resort to violent countermeasures. Moreover, on the other hand, it concluded that if one instead would be inclined to accept that the use of drones is a means of self defence against terrorist organizations, one would also condone a practice which allows States to intervene in other States and take the lives of foreign citizens without any means of oversight. In all, it has been established that current use drone warfare places us in a difficult situation – do we choose risking the outbreak of more conflicts in an already conflict stricken world or do we instead choose to risk granting States an unlimited and unscrutinized “license to kill” in foreign territories?
As has been lifted under *Section 2.2*, the world’s leading user of drone warfare has post Libya set an enormous precedent which has blurred the lines between civilian (CIA-personnel) and military roles in war as well as more or less granted the executive branch of the world’s only superpower the freedom to act as it chooses. Furthermore, the use of drones in war has stripped the general public of any real knowledge of the risks and horrors that wars entail. And what may be worse, the precedent that has been set by the CIA drone strikes in territories which do not fit under the traditional definition of a war zone may just be followed by the steadily growing number of States that now own the same technology. Noteworthy examples includes Russia, China, and Iran.

As such, the conclusion that targeted killings via drone strikes would be seen as acts of aggression rather than acts of self defence would at least reintroduce the word “restraint” into the vocabulary of those today issuing the orders to utilize force. However, as will be revisited under Chapter 4, perhaps it is now too late to call for an appropriate application of international law. Instead, we might be forced to consider new ways of legally dealing with the practice of targeted killings via drones in this specific context.

*Section 3.3* went on to discuss the various issues concerning the lethality of drone missions and whether the legality of this use of lethal force would best be assessed under either an IHRL or IHL regime. It was concluded that while IHRL and the law enforcement model would provide the best protection of an alleged terrorist’s right to life and right to due process the complexities of counterterrorism all but rules out its application. *Section 3.3.3* explored the implications of applying an IHL regime. Whilst it was initially asserted that the “war on terror” is not much of a war but rather an extraterritorial pursuit of criminals and that States accordingly ought to err on the side of the criminal law and the laws of peace, this author also conceded that this assertion is not entirely uncontroversial. As such, the remainder of *Section 3.3.3* provided an analysis of the two IHL models at hand – the IHL of both international and non-international armed conflicts. The IHL of international armed conflicts was found to provide little to no means of discerning combatant from civilian in the context of the “war on terror”. Conversely, the IHL of non-international armed conflicts was found to provide States with far too much discretion in this area, mainly due to the dubious means used by for example the US to track, identify and target alleged terrorists. Similarly, State policy and practice led to the conclusion under *Section 3.3.4* that the
current use of drones in the "war on terror” may very well be presumptively disproportionate. The analysis under Chapter 3 of this thesis has thus left us without any tools to tackle the complex issue of targeted killings in the context of the war on terror. Chapter 4 will endeavour to relieve us of this predicament.
4. Legitimizing drones and targeted killing

The analysis so far may leave a slightly hopeless impression: the application of the law enforcement model leaves States more or less powerless before terrorist acts originating from so-called “no-capture zones” whereas both international and non-international armed conflict models either present States with no means of discerning combatant from civilian or too much discretion in that field. How do we move forward? It is clear that this author is not convinced by arguments in favour of regarding the “war on terror” as an actual war. It is also clear that the law enforcement model may not, sadly, provide a code of conduct for States so entrenched in counterterrorism tactics of the kind discussed in previous sections that has any realistic chance of being applied. Absent any truly realistic model, States may instead interpret international law to their advantage, while endlessly defending their actions with catchphrases such as “pragmatism over ideology”. As such, we are faced with the task of discerning true pragmatism from that what is mere convenience. In the midst of the tug of war between proponents of IHL and proponents of IHRL, Kretzmer proposes taking a “middle road”. In other words, he suggests that we instead should apply a “mixed model” which gives States the opportunity to defend their citizens against terrorist attacks without at the same time allowing States to neglect their obligations under either IHL or IHRL. As Kretzmer notes: “the danger of (…) lawlessness is such that however imperfect these standards may be, they are preferable to no standards at all”.

Kretzmer’s mixed model infuses traits of both law enforcement and non-international armed conflicts, as hostilities between terrorist organizations and States arguably have characteristics of both. In cases where States have a real possibility to apprehend alleged terrorists IHRL applies. In cases where alleged terrorists are out of a State’s reach the IHL of non-international armed conflicts serves to grant us a means of distinguishing civilian from combatant while any use of force must be in line with the IHRL principle of “absolute necessity”. Note that the application of the mixed model thus also requires a certain level of intensity and duration in order to rule out the application of the law enforcement model. As such, the non-international armed

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248 As advised by President Obama’s campaign national security team in a memo in 2008, see Shane, supra note 45.
249 Kretzmer, supra note 159, at 201ff.
250 Ibid, at 212.
251 Ibid, at 203.
conflict model would present States with at least the foundation for enforcing a clear distinction between civilian and combatant. Moreover, the IHRL regime may compensate for the unfair advantage a non-international conflict model would present States.

The mixed application of the IHL of non-international armed conflicts and IHRL may not be such a stretch. It is no longer the case that if an armed conflict fails to be defined as international for the purposes of IHL that its belligerents may fight as they please. Instead, Common art 3 and AP II provides that the actions of States involved in non-international armed conflicts are bound by the standards of IHRL. This means that these States are obliged to provide for due process measures and to respect the right to life. Moreover, as previously concluded under Section 3.3.2.1, the fact that alleged terrorists may not be located within a State’s border ought not affect the application and reach of IHRL. However, the difference between applying IHRL outside an armed conflict and within the context of a non-international armed conflict must be taken into account.

It has previously been established that the targeting of alleged terrorists can only be justified when done in protection of the victims of any potential terrorist attack. Furthermore, as discussed under Section 3.3.2, under the law enforcement model, any legitimate use of lethal force is dependent on whether the use of lethal force is absolutely necessary in order to stop an imminent attack. In other cases States must put their trust to their criminal justice systems. When addressing the issue of how to deal with alleged terrorist who are not within the reach of the law enforcement of the victim state or host state, Kretzmer asserts the need to reconsider the definition of absolute necessity.\textsuperscript{252} He then proceeds to link what should be regarded as absolutely necessary to the right to self defence under art 51 of the UN Charter and subsequent requirements of necessity and proportionality.\textsuperscript{253} This author would here again like to underscore that this model is intended for conflicts with the “violence of the scale and intensity required for the situation to be regarded as one of armed conflict”\textsuperscript{254} Absent the necessary level of violence States would be required to rely on the law enforcement model, as is proper.

The requirement of necessity means that a State may only use force as a last resort. Under Kretzmer’s mixed model States are thereby obligated to first determine

\textsuperscript{252} Ibid.
\textsuperscript{253} Ibid.
\textsuperscript{254} Ibid.
whether there is a reasonable possibility of apprehending potential targets and putting them on trial. It should be noted in this context that for example the US’ take on which areas are so called “no capture zones” is contested.\(^{255}\) Accordingly, any such conclusion must be based on fact rather than preconceived notions regarding the capability of foreign justice systems. Kretzmer bases his construction of whether there are reasonable alternatives to violence on the following: “on whether the victim state has effective control over the territory in which the terrorists are operating, and if it does not, on the degree of willingness or capability of the de facto force in control of that territory to arrest and try the terrorists, to extradite them, or, at the very least, to take effective steps to stop their activities”.\(^{256}\) He also stresses that any targeting of an alleged terrorist must be based on credible evidence in order to fulfill the requirement of necessity.\(^{257}\) Whether an attack is proportional is furthermore hinged on the balancing of specific criteria, thereby at least limiting the previously discussed risk that the protection of civilians be used as pretext.\(^{258}\)

Kretzmer’s model’s greatest flaw is one he himself admits: that “conceding the power of a state to target suspected terrorists, even in strictly limited circumstances, creates a real danger that States will adopt a liberal interpretation of those circumstances and will in fact use this exceptional measure as a general policy”.\(^{259}\) He does not deny this, and asserts that the risk for lawlessness calls for a model that instead of depleting this danger at least mitigates it.\(^{260}\) Instead of adopting the general rule in armed conflict, that an enemy is always a legitimate target, Kretzmer argues that States may only target terrorists out of their reach if there is real immediate danger.\(^{261}\) Note that the term terrorist is used here instead of alleged terrorist, as section … of this thesis has determined that combatants in non-international armed conflicts must be proven to have engaged in terrorist activities. This author has previously rejected the concept of immediate danger in favour of imminent danger in regard to self defence. Can immediate danger be accepted in this context?

As has been noted under Sections 3.2 and 3.3.2, imminence is paramount for two reasons. One has to do with rights, whereas the other is more or less systemic. The right

\(^{255}\) See eg Coll, The Unblinking Stare: The Drone War in Pakistan, The New Yorker (online).
\(^{256}\) Kretzmer, supra note 159, at 203.
\(^{257}\) Ibid.
\(^{258}\) Ibid, at 203f.
\(^{259}\) Ibid.
\(^{260}\) Ibid.
\(^{261}\) Ibid.
of a State to be free from attack and the right of an individual to not be arbitrarily deprived of his or her life are arguably two of the most fundamental rights in both international law and most domestic systems. The systemic reason for maintaining the superiority of a system based on imminence is that imminence provides near certainty of whether an attack is warranted, whereas the concept of immediate danger requires trust. How much trust ought we have in governmental authority? Waldron’s argument that citizens must be equally wary of both foreign and domestic oppressor has been lifted. After all, the development of IHRL and the rule of law was not solely incentivized by the need to protect people against purely hostile threats. Benevolent police states acting “for the greater good” have had an integral role in shaping how we today picture the ideal relationship between State, citizen, and his or her human rights.

As of right now, the term “terrorist” is used in a way which suggests that an individual is a terrorist first, and a human being second, if at all. It is crucial that “terrorist” not be given the meaning of being some inherent quality or personal trait. Instead, we must apply a framework and policy which acknowledges that “terrorist” only describes an individual in relation to a specific deed. If such a deed has not yet taken place, he or she cannot be named terrorist, but rather a potential terrorist. Sections 3.3.3.3 and 3.3.4 have shown that it is far from clear on what basis the US determines the identity of its targets. As such, any condonement of such practice would force us to place trust in States like the US and the legality of their actions, rather than being certain whether said actions are legal. As has been noted, trust rather than certainty in regard to a governmental authority’s power to inflict harm to civilians has historically been proven to be an ill fated pairing. Similarly, in the present context, requiring a threshold of immediate rather than imminent danger for targeted killings would reduce human beings to mere collateral to be gambled with in a bet based entirely on speculation (A looks like he could commit X. If we kill A, B may die, but C and D may also live). We would also endorse an order where different people would be entitled to different levels of personal security depending on circumstances more or less out of their control: where they live, who they are friends with, and which suspicions this might lead to. However, if the mixed model would succeed in its venture to obligate States to provide evidence that those targeted are truly combatants in the sense

262 Waldron, supra note 126.
advocated under *Section 3.3.3.3*, Kretzmer may have construed a viable exception to the classic requirement of imminence.

In conclusion, in the case of an armed conflict between a transnational terrorist organization and a State this author may be in favour of applying a model along the lines of what Kretzmer proposes. This concession is based in its entirety on the premise that States fulfill their evidentiary and humanitarian responsibilities. However, as the manner in which drones are used and the distance they physically and mentally place between the soldier and his or her target raises serious questions regarding whether their use can respect principles of proportionality and distinction, this very reservation may be what rules out the mixed model’s application.
5. Concluding remarks

Do the United States and its people really want to tell those of us who live in the rest of the world that our lives are not of the same value as yours? That President Obama can sign off on a decision to kill us with less worry about judicial scrutiny than if the target is an American? Would your Supreme Court really want to tell humankind that we, like the slave Dred Scott in the 19th century, are not as human as you are? I cannot believe it.\textsuperscript{263}

In what is probably one of the most notorious speeches of his presidency, President Barack Obama made it clear in May 2013 that the previous administration’s policy on drone warfare and targeted killings had strayed from core US values. As he stood between two star spangled banners he stressed that “from our use of drones to the detention of terrorist suspects, the decisions we are making will define the type of nation -- and world -- that we leave to our children”.\textsuperscript{264} Today, despite an additional two years spent in office amending this legacy, the urgency of this statement has not subsided. On October 3 2015 the US employed a drone strike against a Doctors Without Borders hospital in Kunduz, Afghanistan.\textsuperscript{265} As such, the international community is now forced to consider the implications of supporting the enforcement of a policy on drone warfare and counterterrorism which has made the president of the world’s only superpower the first Nobel peace prize winner to bomb another peace prize winner.

It has been concluded in this master’s thesis that taking the soldier from the trenches to the cubicle while elevating the terrorist from criminal to commander in chief has complicated the application of IHL and IHRL in more ways than one. Although drone technology is not \textit{per se} illegal under international law, it is evident that the ease with which drone wars can be waged may have a serious impact on States’ readiness to use force and resort to intrusive measures. Moreover, the present context in which drones are employed overseas is challenging the very balance between the UN Charter’s provisions on the prohibition to use force and the right to self defence. Regardless of whether one views targeted killings via drones as acts of aggression or self defence,

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both interpretations ultimately result in more intervention. While the label of self
defence in this context may stifle legal basis for more acts of war it may circumvent the
prohibition to use force by disguising wrongful acts as warranted measures. Conversely,
while the label of aggression may limit this abuse it may also escalate already budding
tensions into war. Even though this latter interpretation may compell States to act with
restraint, it is likely that years of depicting drone warfare as countermeasures in a war
which started on September 11 2001 will deplete any chance of making States abandon
the freedom this entails in respect of any new order.

It is clear that targeted killings via drone strikes are possible to employ legally. It
is however equally clear that it cannot without great difficulty be argued that current
policies on drone warfare in the context of the “war on terror” respect either IHRL or
IHL. What is more, it has been shown that applying traditional models of IHRL or IHL
on a conflict which does not fit neatly under either instrument provides for an ambiguity
which only makes it easier for States to interpret international law in ways which best
suit their current agenda. Regardless of whether one accepts the mixed model solution
constructed by Kretzmer and supported by this author, it is evident that the international
community needs to devise a concrete standard of behaviour for drone warfare. As the
conflict with IS has once again set the world’s most technologically advanced military
forces against a stateless terrorist organization it is crucial that any targeted killing of
alleged IS members be executed in accordance with standards of international law and
the fact that even an alleged terrorist is a person first, and terrorist second. Any other
order would allow States to use an “the ends justify the means” rhetoric in regard to the
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