

**Discrimination in the Age of Drone Warfare**

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Abstract

Identifying legitimate targets in conflict was once relatively straightforward; all soldiers were legitimate targets, civilians were illegitimate targets, and fighting would take place on battlefields away from densely populated areas. The *jus in bello* discrimination criterion was interpreted as being based on membership where all combatants are legitimate targets. Yet, the realities of contemporary asymmetrical warfare make the identification of legitimate targets challenging, especially with the rising importance of ‘part-time fighters’ or ‘farmer-soldiers’. Revisionist just war theory suggests moving away from membership-based liability, focusing more on individual responsibility in order to identify legitimate targets. However, many of these approaches lack applicability and cannot overcome the ‘real-world objection’. The starting point of this thesis is the observation that there is a gap between theory and practice regarding target selection in contemporary drone warfare.

This thesis asks if the *jus in bello* discrimination criterion can be upheld in modern drone warfare. This discussion is crucial because there is a need for a more updated and comprehensive interpretation of discrimination adapted to the realities where drones are being deployed – namely in counterinsurgency and asymmetrical warfare. This thesis argues that to bridge the gap between theory and practice, there should be two principles of discrimination and two ways to identify legitimate targets in contemporary conflict instead of only one. Firstly, *individual discrimination* identifies legitimate targets as individuals who are morally responsible for threats in the conflict. Secondly, *situational discrimination* identifies legitimate targets as immediate threats, bringing greater applicability to the criterion. The findings of this thesis inform the argument that discrimination ought to be understood as being constituted of two principles, not only one in order to be upheld in contemporary drone warfare.

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Introduction

Targeted killing using drones has become part of the American way of war.

- Michael V. Hayden, former CIA Director[[1]](#footnote-1)

Airpower has played a key role in contemporary warfare since the First World War’s ‘battle in the skies’. Nowadays, the use of airpower is a key component of the deployment of conventional military forces. One of the most recent innovations in the world of aviation is the development of ‘drones’ or UAVs [unmanned aerial vehicles] which are remotely piloted aircrafts.[[2]](#footnote-2) Although unmanned aircrafts were used as early as the Second World War with the German “Buzzbomb”,[[3]](#footnote-3) remotely-piloted unmanned aircrafts, as currently understood, only emerged in the 1960s where over 3400 reconnaissance drones were deployed in Southeast Asia during the Vietnam War.[[4]](#footnote-4) Similar reconnaissance drones were used in the 1982 Lebanon War (Operation Peace for Galilee).[[5]](#footnote-5) In Operation Desert Storm and Operation Desert Shield, drones were used to gather-intelligence and emit ‘dummy’ signals.[[6]](#footnote-6) However, it is only since October 2001 that military interventions have increasingly relied on increased use of offensive (as opposed to reconnaissance) drones, starting with the *MQ-1 Predator* UAVs being loaded will *Hellfire* missiles to conduct offensive actions.[[7]](#footnote-7)

The fact that drones flying over the Middle East are operated by pilots based in the American desert marks a break from the conventional manned aircraft the world has grown accustom to. As drone use expanded in the 2000s, so did the concern that the distance between the operators and the battlefields would lead to an increase in the use of lethal force. It was thought that the distance would bring a relaxing of the rules of war and that the operators would become desensitised to the realities of conflict. For example, a 2010 UNHRC report raised the concern about the development of a ‘PlayStation mentality’ where the distance between drone operators and the battlefield would make them more willing to use force because fighting would be akin to a video game[[8]](#footnote-8): “Young military personnel raised on a diet of video games now kill real people remotely using joysticks. Far removed from the human consequences of their actions, how will this generation of fighters value the right to life? How will commanders and policy makers keep themselves from the deceptively antiseptic nature of drone killings?”[[9]](#footnote-9) Yet, it is important to recognise that the much-discussed distance between the battlefield and the drone operators is not new nor revolutionary. Distance killing has been around in different forms for a long time, from the use of catapults to intercontinental ballistic missiles. Technological advances have made distance easier to manage, allowing for an increase in targeting accuracy and greater distances between the point of launch and the target. Moreover, distance killing is not new or unique to the development of weaponized drones. Thus, the revolutionary aspect of drone warfare is not so much the fact that they are unmanned and controlled from a distance, but rather the ways in which drones are being deployed, with the tactics used. Indeed, drones are seen as a strategic game-changer since they offer the possibility to search large areas and track potential targets for extended periods of time. This shift towards unmanned aircrafts has allowed for significant changes in the way counterterrorism is approached since drones allow for precision targeting from a distance, without needing to be on the battlefields as in the case of snipers for example. Essentially, drone technology brings the targeting precision and flexibility of snipers without the risks faced by having troops on the ground. Drones are like snipers equipped with *Hellfire* missiles but without any of the risk. It is worth noting that the desire to minimize risk is not exclusive to the use of UAVs and has been a feature of warfare since the invention of long-range projectiles. The high-altitude-only deployments of (manned) NATO aircrafts in Kosovo, where pilots were instructed to fly above certain altitudes in order to “put themselves out of range of Serb anti-aircraft fire”[[10]](#footnote-10) exemplifies the desire to use force whilst also limiting the human cost. However, an important consequence of the high-altitude deployment has been the diminished targeting accuracy.[[11]](#footnote-11) Drones carrying precision-guided missiles are seen as an alternative to such deployment since targeting accuracy remains high whilst making the risk to the pilots nearly nonexistent.

The use of drones lowers the human costs of deployments since they lower the number of battlefield casualties since operators are not killed or injured if a drone is attacked. In addition to limiting risk, the use of drones also lowers the costs of deploying force. For example, a 2012 study examining the costs of the US Air Force’s aircraft has found that drones are considerably cheaper than conventional aircrafts.[[12]](#footnote-12) The study states that in 2012, a MQ-9 Reaper drone costs $3,250 per flying hour (including ground support and maintenance staff) whereas a F-22 fighter costs $36,780 per flying hour and an Apache costs $11,980 per flying hour.[[13]](#footnote-13)

Broadly, the low financial and human cost of drone warfare has allowed the use of UAVs in contemporary warfare to be seen as favourable compared to costlier ‘boots on the ground’ deployments. Moreover, the use of drones can bring a more discriminate use of force thanks to the quasi-surgical precision of UAVs. Ultimately, the use of drones is seen as ethically beneficial. In 2012, then-White House Counterterrorism adviser and former CIA director, John Brennan, argued that the use of drones to target terrorists is both “ethical and just.”[[14]](#footnote-14) He stated:

compared against other options, a pilot operating the aircraft remotely, with the benefit of technology and with the safety of distance, might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision - the ability with laser-like focus to eliminate the cancerous tumor called an al-Qaida terrorist, while limiting damage to the tissue around it. That makes this counterterrorism tool so essential.[[15]](#footnote-15)

Further, President Obama has stated that “conventional airpower or missiles are far less precise than drones, and are likely to cause more civilian casualties and more local outrage.  […]  So it is false to assert that putting boots on the ground is less likely to result in civilian deaths.”[[16]](#footnote-16) Avery Plaw examined the use of drone strikes in Pakistan between 2004 and 2011 and found that the civilian death ratio ranged between 3.86% and 23.85% depending on the database used.[[17]](#footnote-17) This is compared to a 37.5% of civilian death in other non-UAV US operations in FATA and an “estimated world combat average for the 1990s” of 88.89%.[[18]](#footnote-18) This efficacy allowed drones to become “the only game in town.”[[19]](#footnote-19) Further, the use of drones has reshaped counterterrorism because the marriage between intelligence-gathering and targeting from a distance has made the use of force more ethically and financially agreeable.

In regard to the decision to use unmanned aircrafts (UA) instead of manned aircrafts, the *UAS Roadmap* states:

The familiar saying [is] that UA are better suited for ‘dull, dirty, or dangerous’ missions than manned aircraft presupposes that man is or should be the limiting factor in performing certain airborne roles. […] The attributes that make the use of unmanned preferable to manned aircraft in the above three roles are, in the case of the dull, the better sustained alertness of machines over that of humans and, for the dirty and the dangerous, the lower political and human cost if the mission is lost, and greater probability that the mission will be successful. Lower downside risk and higher confidence in mission success are two strong motivators for continued expansion of unmanned aircraft systems.[[20]](#footnote-20)

Since the start of the War on Terror, UAVs have become an integral part of military operations. As Michael Walzer argues: “Drones make it possible to get at enemies who hide in countries whose governments are probably unwilling and possibly unable to repress or restrain them. This is a war without a front, where the use of ground troops, even commandos, is difficult, sometimes impossible—so drones have been called ‘the only game in town.’”[[21]](#footnote-21)

In 2005, the US Department of Defense’s *Unmanned Aircraft Systems Roadmap 2005-2030* stated:

In the wake of September 11, 2001, FY03 [fiscal year 2003: 1 October 2002 to 30 September 2003] was the first billion-dollar year in UAS history and FY05 [fiscal year 2005] will be the first two billion-dollar year […]. The U.S. UAS inventory is expected to grow from 250 today to 675 by 2010 and 1400 by 2015 (not including micro and mini UA) and to support a range of missions – e.g. signal intelligence (SIGINT), cargo, communication relay, and Suppression of Enemy Air Defenses (SEAD).[[22]](#footnote-22)

More recently, the 2017 budget, presented on 9 February 2016 by President Obama, marked an important moment in drone spending reflecting a transition from large acquisition programs to new research and procurement.[[23]](#footnote-23) Indeed “the military plans on spending significantly less to purchase new unmanned in FY17 [fiscal year 2017] than in previous years. This is because most of the current major acquisition programs have already met their aircraft totals or have gone over budget.”[[24]](#footnote-24) This transition is also visible in the fact that of the 587.2 billion dollars allocated for military spending in FY17, 4.457 billion is drone-related, which is 1.16 billion dollars less than for FY16.[[25]](#footnote-25)

Nevertheless, the use of drones is not without concerns. Ethical worries regarding the implementation of the *jus in bello*  discrimination criterion in contemporary warfare arise when the current strategies of UAV use are examined. This criterion states that force can only be aimed at legitimate targets and that illegitimate targets ought to be protected. In other words, the discrimination criterion calls for the need to distinguish between legitimate and illegitimate targets when using force. Drone warfare has the potential to be one of the most humane forms of warfare by allowing for great discrimination. This is possible thanks in part to UAVs' ability to track targets for extended and uninterrupted periods of time, especially with the development of in-flight aerial refuelling, in order to find the most appropriate and discriminate moment to launch an attack. Additionally, the use of drones offers great intelligence-gathering opportunities. As John Williams states:

That drones enable acquisition of more and better information about targets than most alternative tactics seems quite clear. Alternatives, such as ground surveillance teams, which could be superior, carry considerable costs in terms of logistical challenges and increased risk to team members operating in hostile environments. […] The much-touted ‘long loiter’ capability of drones means they can sustain surveillance of possible targets for extended period of time, potentially days or even weeks.[[26]](#footnote-26)

In the context of contemporary warfare, with the increasing importance of asymmetrical and unconventional conflict, the use of drones has led to the development of targeting strategies to facilitate the identification of legitimate targets outside of conventional battlefields:

in asymmetric armed conflicts, it can be difficult to identify a combatant according to the traditional distinction between combatant and civilians. In some countries where targeted killings are carried out, potential victims may change ‘costumes’. One day they are combatants, while the next day they may blend into the civilian population. They usually do not wear uniforms, which was the technique used in past war conflicts as an identification sign for combatants. Also, whether or not person is armed is not necessarily the distinguishing factors between civilian and non-uniformed combatants.[[27]](#footnote-27)

The main source of the concern comes from a discrepancy between the rules of war as established in the aftermath of the Second World War and the realities of contemporary conflict. The expectation is that the use of drones will lead to a highly discriminate use of force, often described as ‘surgical’. Yet, the reality of contemporary UAV use does not correspond to these assumptions. An examination of the targeting strategies used in drone warfare highlights the difficulty in applying the *jus in bello* discrimination criterion in contemporary contexts. To overcome these practical issues, targeting strategies have been developed to assign combatant status when the identity and status of the targets on the ground are unknown. The first approach to targeting is closely linked to the traditional conception of targeted killing and is aimed at known individuals who are named on a ‘kill list’. The second targeting strategy is used when the identity of the targets is unknown therefore ‘signatures’ are used to assign combatant status and thus identify legitimate targets. “A ‘signature strike’ – [is] a drone attack that targets ‘groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t known’. The vast majority of drone strikes conducted by the CIA have been signature strikes, not ‘personality strikes’.”[[28]](#footnote-28) Signature strikes developed as a mean to bridge the gap between the conventional understanding of discrimination and the realities of contemporary asymmetrical warfare. The ‘signatures’ are targeting ‘shortcuts’ that use patterns of behaviour to identify legitimate targets, which leads to mis-discriminate strikes where discrimination is wrongly applied. Finally, double tap strikes occur when two or more missiles are launched at the same target and where the secondary strike is aimed at survivors and rescuers because they are also considered to be legitimate targets (combatants). Double tap strikes are also problematic in regard to discrimination as they assign combatant status on questionable and problematic grounds such as guilt by association and physical proximity. Broadly, as a consequence of these strategies, an ever-increasing number of individuals are assimilated to the ‘soldier’ category, from active soldiers to all men of military age in a designated geographical area or travelling in a specific direction, which, it will be argued, leads to drone strikes that cannot be considered discriminate. This makes the identification of the truly legitimate targets and the implementation of the discrimination criterion difficult and leads to the use of generalisations, as will be explored in the case study chapters. Essentially, these strategies have ethically problematic implications for the *jus in bello* discrimination criterion. Moreover, the strategies used in drone warfare do not necessarily live up to UAVs’ characteristic potential for highly discriminate fighting and quasi-surgical strike precision.

Considering this, the use of drones and the realities of contemporary conflict bring a need for targeting strategies that go beyond the old soldier-civilian line of discrimination since this is difficult to apply. Indeed, there is a need for a more updated and comprehensive interpretation of discrimination, which would be adapted to the realities of the situations in which drones are being deployed, namely counter-insurgency and asymmetrical warfare. Targeting strategies based on an updated interpretation of discrimination would make the widening of the ‘soldier class’ unnecessary as it will be able to draw the line between legitimate and illegitimate targets without having to rely on generalizations.

A. Research Questions

The central research question of this thesis asks: can the just war criterion of discrimination be upheld in modern drone warfare? To answer this, the understanding of the discrimination between legitimate and illegitimate targets will be explored and redeveloped. Further, the reinterpreted criterion will be applied to the realities of the modern battlefields in drone warfare.

Concern for target selection brings into play the *jus in bello* discrimination criterion. Essentially, this requirement calls for the distinction between legitimate and illegitimate targets in the use of force. Only the former can be targeted justly in conflict. In dominant legal canons, soldiers (regular forces) are legitimate targets and civilians are illegitimate targets. This approach makes the distinctions between the two groups relatively easy since there could be a clear line between legitimate and illegitimate targets in conflict.[[29]](#footnote-29) However, the realities of contemporary conflict are more complicated than this soldier-civilian line of distinction, especially with the increasing importance of non-state actors, highlighting the need for a re-examination of the principle of discrimination. The changing forms of conflict, moving away from the more traditional international armed conflict involving state armed forces, and the introduction of non-uniformed and irregular actors such as terrorists, brings difficulties in the identification of legitimate targets as well as the identification of battlefields. Many irregular enemy fighters look like civilian illegitimate targets and hide amongst them, making their identification difficult and problematic. They are often described as being ‘farmer-fighters’ or part-time combatants. This difficulty in finding and identifying legitimate targets becomes especially important when it comes to the targeting strategies used in combat as it makes the line between legitimate and illegitimate targets increasingly difficult to draw. This difficulty then leads to a change in the tactics used to identify targets in contemporary warfare: the ‘old’ rules become increasingly difficult to apply because they are based on assumptions regarding the ability to identify combatants and members of organised armed forces by their uniforms on the battlefields, which is not common in contemporary conflict, especially in counterterrorism and counterinsurgency operations. Counterterrorism and drones are inextricably linked. Increasing needs and desires to targets terrorists and insurgents has led to an increase in drone strikes and the difficulty in identifying these targets has led to the development of new targeting strategies. Indeed, to overcome the challenge of applying the old rule identifying legitimate targets, tactics are used to reshape the classic ‘soldier’ or ‘combatant’ category to make it fit with the realities of contemporary warfare. This then leads to the elaboration and use of new targeting tactics. Further, the use of UAVs is seen as bringing the potential for highly discriminate targeting, especially in the context of asymmetrical warfare. This is because these weapons give military personnel the opportunity and the luxury to hold off a strike if more intelligence is necessary to verify the status or identity of a potential target. It also allows collaborative and improved decision-making since “data can be assessed free from pressures, risks, and stresses affecting members of a ground surveillance team or a pilot engaging a target. Furthermore, drone operators share data with colleagues and commanders, in real time, enabling collaborative decision-making properly informed by a range of expertise.”[[30]](#footnote-30) When faced with a suspicious target, the UAVs can continue to track the target until it can be identified as a legitimate target prior to using lethal force.

However, drone warfare, in its current form, does not live up to its potential in regard to discrimination. This is because of the interconnections of three key elements: the understandings of the discrimination criterion, irregular asymmetrical warfare, and the use of drones. The interplay of these elements makes legitimate targets increasingly difficult to identify. They hide amongst illegitimate targets and are not regular ‘combatants’. This then leads to targeting strategies that apply the conventional approach to discrimination to the new context of irregular warfare and drone strikes. However, these targeting strategies cannot be considered just applications of discrimination. They are problematic because an ever-increasing number of individuals are assimilated to the ‘combatant’ category, from active soldiers to all men of military age in a designated geographical area, making the identification of the truly legitimate targets and the upholding of the discrimination criterion a serious challenge. This broadening of the ‘combatant’ category stems from attempts to apply conventional understandings of discrimination to the contemporary realities of irregular warfare. In other words, the targeting strategies used in drone warfare are a mis-application or an incorrect application of the discrimination criterion (based on understandings of ‘legitimate target’ that are too broad to be considered just and discriminate), which leads to an ethically problematic use of force. Fundamentally, this is problematic because it leads to what this thesis calls *mis-discriminate strikes*. This type of strike cannot be considered indiscriminate because the targets are not chosen at random. Yet, it cannot be considered discriminate for two reasons. First, the targeting criterion on which the strike is based are unjust and too broad to be considered discriminate meaning that it cannot be seen as attempting to distinguish between legitimate and illegitimate targets. Second, the strike cannot be considered discriminate because it is a mis-application of the discrimination criterion that wrongly identifies targets as legitimate. This thesis therefore argues that there is a gap between the realities of contemporary drone warfare and the way discrimination is interpreted in international humanitarian law and in the just war literature. Because of this, targeting strategies developed in the use of drones raises many challenges for the implementation of the *jus in bello* discrimination criterion. To overcome these issues, this thesis argues that discrimination ought to be reinterpreted in a way that brings applicability in the context of asymmetrical and irregular warfare. Ultimately, the reimagined discrimination criterion will be applied to drone warfare to identify two broad approaches to targeting that can be legitimate, discriminate, and just.

To answer the central question on discrimination in drone warfare, a series of sub-questions will be explored. Firstly, the focus will be on the way the discrimination criterion is currently interpreted in the just war literature. This issue is important since there is no unitary or uniform interpretation of the just war tradition and thus there are many interpretations of what the discrimination requirement means and who the legitimate targets are. However, the different approaches can be generalised and summarised into three different interpretations of where and how to draw the line. First, there is Michael Walzer’s and the traditionalists’ classic soldier-civilian discrimination. This is a membership-based liability with a strict line between combatants and non-combatants. Second, ‘moderate traditionalist’ who reject the moral equality of combatants while accepting the independence of *jus ad bellum* and *jus in bello* and who present a harm-based liability where legitimate targets are identified as such because they are engaged in harming. Third, revisionist conceptions of liability founded on individual rights and proportionate moral responsibility for the war will be explored. The evaluation and review of these three broad approaches to discrimination highlights the different elements according to which the line between legitimate and illegitimate targets can be drawn as well as the limitations and problems brought by each approach. In the case of the discrimination criterion, revisionist interpretations of the requirement are seen as too complicated to be implemented in everyday combat activity. The consequence of this is a reinforcement of the status quo. This is commonly known as the ‘real-world objection’. Opposed to this, traditionalist approaches focus on applicability, but in doing so, they rely on generalisations to identify legitimate targets that lead to an excessive number of individuals to be considered legitimate targets. This is the ‘total war objection’. Instead of falling into one camp or the other, this thesis will present an interpretation of discrimination that is both aspirational and applicable. A middle ground overcoming both the total war objection and the real-world objection will be introduced. In order to achieve this, a dual approach to the *jus in bello* discrimination requirement will be presented. The double approach combines applicability with aspiration. Explicitly, legitimate targets will be identified by either *individual discrimination*, based on responsibility, or *situational discrimination*, based on threats. The former embodying the moral requirements of revisionist philosophical interpretations whilst the latter builds on the ‘moderate traditionalist’ approaches to bring a more discriminate yet applicable understanding of the criterion.

Building on this reinterpretation of discrimination, the focus of this thesis will shift to the way UAVs are currently being used and the targeting strategies that are being implemented. This will then lead to reflexions and a discussion on the way the strategies used in drone warfare challenge the discrimination criterion. This thesis will explore what targeting strategies are best adapted to uphold discrimination in contemporary conflict. It will be argued that the implementation of the dual approach interpretation of discrimination will lead to more discriminate targeting in contemporary warfare as it will make the identification of legitimate targets easier in the broad context of asymmetrical warfare.

B. Contribution

The targeting strategies used in contemporary drone warfare blur the line between legitimate and illegitimate targets by attempting to identify characteristics indicative of combatant status and basing the identification of targets on these. There is a discrepancy between the conventional approach to discrimination, drawing the line between soldiers and civilians, and the realities of contemporary asymmetrical warfare. The classic framework does not fit the new situations. The ultimate aim of this research is to find a solution to this problem. The review of target selection in drone warfare this thesis undertakes brings an important contribution to the literature on the *jus in bello* principle of discrimination and its interpretation. This thesis will present a reinterpretation of the criterion that bridges the gap between applicable approaches and philosophical conceptualisations, overcoming the ‘real-world objection’. The chief advantage of this is that it brings more applicability to revisionist just war theory, which ultimately means that the criteria have a greater impact in combat, making the use of force more just and discriminate. However, the contribution of this research will not be limited to this reinterpretation. Following the review of the interpretation of discrimination in personality strikes, signature strikes, and double tap strikes in drone warfare, alternative targeting strategies will be presented. For example, this thesis will suggest that instead of relying on ‘signatures’ to identify legitimate targets whose identities are unknown, legitimate targets should be identified as such because they pose an immediate threat (*situational discrimination*). Following this, an approach to target selection in drone warfare that will uphold the principle of discrimination will be presented. For example, Chapter Five will set the framework within which secondary strikes can be proportionate and discriminate.

Moreover, technological advances in the military world will continue to change the way war is fought, and thus, the way combatants and civilians are involved in conflict. Another important change in warfare is the types of combatants that are involved, form traditional armed forces to insurgents, rebellions, and terrorist organisations for example. These changes raise important issues for the identification of legitimate targets. Moreover, this research is significant because the just war tradition will benefit from being brought back to the battlefields so to speak. This means that too often the theory discusses highly moral considerations or implies demanding and complicated calculations, which make its application too difficult, bringing the danger of being brushed to the side as unrealistic or inapplicable. This has the consequence of creating an ethical gap between theory and practice where the established approach to target selection reflects out-dated realities of conflict and have applicability problems in contemporary conflicts. The most serious problem has to do with the reliance on combatant status and the expected ability to identify and differentiate soldiers from civilians on the battlefields. In the context of counterterrorism, targeting practices are problematic since there is no terrorist uniform and the enemy looks like the civilians amongst which they are hiding. Therefore, there is a need for targeting strategies that move beyond status and group membership. To overcome this gap between theory and practice, this thesis suggests an interpretation of discrimination that rejects membership-based liability in favour of an action-based approach, which remains applicable in conflict and allows for rapid identification of legitimate targets. By bridging the gap between the theory and the practice in contemporary warfare, this research provides an applicable morality that will give just war a greater scope of application as well as a broadened understanding. In addition to being significant for the just war tradition, this thesis and the applicable morality it presents will also contribute to policy and international humanitarian law since it presents alternatives to the problematic targeting strategies, especially when it comes to signature and double tap strikes.

Secondly, this thesis also contributes to the literature on the use of drones. The study of double tap strikes and the unique typology presented in Chapter Five is unlike other discussions on targeting in drone strikes since double tap are usually considered as a type of signature strike. More broadly, the extensive review of targeting this thesis undertakes contributes to the academic literature on UAV use by providing a clear account, supported by real-life examples, of the different types of targeting strategies used in drone warfare.

Thirdly, the work this thesis undertakes contributes to moral philosophy and military ethics insofar as it provides a straightforward and applicable framework for the targeting of non-morally (or innocent) threats such as child soldiers. This framework, which will be set out in Chapter Two, bridges the gap between moral philosophy and military practice as set by rules of engagement. Indeed, the interpretation of discrimination presented in this thesis can easily be implemented by military forces and can lead to an integration of revisionist just war theory in rules of engagement regulating targeting in combat. Moreover, the framework of *individual discrimination* set guidance for the targeting of individuals ‘auxiliary’ to the enemy forces, such as recruiters or ‘motivators’, who would not necessarily be considered legitimate targets in the current framework.

C. Methodology and Cases

Inductive reasoning is the main methodology used throughout this thesis. The starting point of this research is an observation of contemporary drone warfare, with special attention given to target selection. Following this, a pattern is established which then leads to the formulation of a hypothesis. Finally, general conclusions are formulated to lead to the development of theory. For this thesis, the observation of targeting in drone warfare leads to the identification of a pattern where an increasingly large number of individuals are considered legitimate targets. This then leads to the formulation of the argument that the issues come from the way the discrimination criterion is interpreted and thus, a reinterpretation of the criterion is necessary. Finally, this thesis presents *individual discrimination* and *situational discrimination* as reinterpretations of the *jus in bello* discrimination principle that bring more applicability to the requirement.

There is a considerable amount of secrecy that surrounds the use of UAVs. Therefore, data availability is a serious issue in the study of drone warfare. Instead of relying on information from official sources, this thesis follows an established trend in drone research and relies on the work of data aggregators that list all known strikes. For example, Avery Play, Matthew S. Fricker and Carlos Colon rely on data aggregators for their work on the civilian death ratio in drone strikes.[[31]](#footnote-31) They state: “Due to this lack of transparency, the public has been forced to rely on media reports and investigative journalism in order to get a glimpse into the actual impact of the drone programs.”[[32]](#footnote-32) Therefore, this thesis will use a combination of information sources based on media reports and data bases as well as hypothetical scenarios in order to discuss different aspect of target selection in drone warfare in a way that overcomes the issues related to the classified nature of the information.

An essential source of information comes from *The Bureau of Investigative Journalism* (*TBIJ* hereafter) which compiles datasets comprising of “narrative accounts of each reported [drone strike] action, a casualty count of the number of individuals reported killed or wounded in that action, and all sources used in researching each action.”[[33]](#footnote-33) In regards to information sources, *TBIJ* states: “The most comprehensive public information on casualties generally lies in the thousands of press reports filed by reputable national and international media outlets.”[[34]](#footnote-34) In addition to media sources, *TBIJ* uses reports from varied reliable sources such as *Amnesty International*, *WikiLeaks*, *Reprieve*, *Human Rights Watch*, *The* *New America Foundation*, the *UN*, and *Jihadology*.[[35]](#footnote-35) The narrative information on each strike presented by *TBIJ* data is essential to the identification of the targeting strategies used in drone warfare and this thesis would not be possible without this information. Indeed, it is these narrative accounts and the sources listed for each strike that make the identification of the three different case studies possible since they provide information on the targets and timings of strike. Another important source of information on drones strikes comes from the *Long War Journal* published by the nonprofit *Public Multimedia Inc.* and which is a project of the *Foundation for Defense of Democracies*.[[36]](#footnote-36) The *Long War Journal*’s mission is “dedicated to providing original and accurate reporting and analysis *of the Long War* (also known as the Global War on Terror). This is accomplished through its programs of embedded reporters, news and news aggregation, maps, podcasts, and other multimedia formats.”[[37]](#footnote-37) Using information from press and wire reports, US airstrikes data is charted in graphs illustrating the chronological use of airstrikes. Finally, *The* *New America* foundation’s *Drone Wars* database seeks to provide “as much information as possible about the covert U.S. drone program in Pakistan, Yemen, and Somalia in the absence of any such transparency on the part of the American government.”[[38]](#footnote-38) Much like the two other data aggregators, *The* *New America* project relies on media reporting and seeks to use a minimum of four credible sources corroborating each strike.[[39]](#footnote-39) These data aggregators are helpful in providing information on the number, frequency, geography, and casualties of drone strikes overcoming the limits imposed by the classified nature of the topic and allowing for discussions on targeting strategies to be held in the public sphere.

As was mentioned previously, the use of drones has the potential to be one of the most humane forms of warfare because of their ability to reduce risk, track targets, and reduce collateral damage by allowing for great discrimination. This is because UAVs offer the ability to track targets uninterruptedly for extended periods of time in order to find the most appropriate moment to launch a highly discriminate strike. On the other hand, drone warfare in its current form does not provide advantages in regard to upholding discrimination. It is important to note that the focus of this thesis is on discrimination and drones are used as a case study to highlight ethical issues with target selection in contemporary asymmetrical conflict. Thus, the discussion on the problematic targeting strategies is applicable regardless of the weapons used and is not limited to drones. Further, it is also important to note that the ethical and moral issues with drone warfare are not related to the UAV technology in itself but rather to the strategies behind UAV uses, which are directly influenced by the new opportunities the new technology creates. These methods are problematic since they pose a direct challenge to the principle of discrimination, as it is generally understood. Therefore, to study the implementation of the discrimination criterion in drone warfare, case studies will be deduced from the available information. The combination of strike information from the data aggregators and academic research on targeting strategies and drone warfare makes it possible to extrapolate three separate case studies: personality strikes, signature strikes, and double tap strikes. Although these targeting strategies are not necessarily exclusive to the use of drones, their current use in the context of the war against al-Qaeda and its associate forces provides the information required to review the implications of the targeting strategy in regard to the implementation of the discrimination criterion. Moreover, since these strategies are not limited to the use of drones, the findings can be extrapolated beyond UAV warfare to be applicable in all use of force. Each one of the three cases build on both actual examples taken from *TBIJ*’s databases and hypothetical scenarios to introduce the ethical issues linked to target selection and discrimination in drone warfare. In addition to this, cases are also used to illustrate how the implementation of a reinterpreted discrimination criterion can lead to a more discriminate use of force. These cases will focus on the targeting strategies used since this is the central cause for ethical concern in the use of drones. Since cases are used as exploratory tools, this overcomes the important limitation caused by secrecy and the lack of available information on the use of UAVs. Moreover, using cases as introductory tools means that the discussion on the ethical implications for discrimination can be extrapolated to other weapons since it is not specific to drones.

D. Outline

This thesis comprises of three mains sections. Firstly, Part One will explore the theoretical framework of discrimination and the just war tradition. Chapter One presents a rapid review of different interpretations of discrimination found in the just war literature. It focuses on three key approaches: traditionalist (or orthodox), ‘moderate traditionalist’, and revisionist. This literature review chapter serves as the foundation for the discussion on the reinterpretation of the discrimination criterion. Chapter Two presents a twofold reinterpretation of the discrimination requirement that will be the theoretical foundation for the case studies. This chapter explores the issues associated with the traditional-revisionist divide in the literature. Both the real-world objection and the total war objection are reviewed and this chapter suggests a twofold approach to discrimination. This allows for a theory to be implemented in combat whilst keeping the aspirational level of revisionist approaches since practice should always strive to be as discriminate as possible, without using ‘shortcuts’.

In Part Two, the discussion moves away from theory in order to focus on targeting strategies in drone warfare through the use of case studies. Chapter Three explores personality strikes where targets are known and placed on a ‘kill list’. It is argued that this approach to targeting will only be discriminate and legitimate if the targets are identified following *individual discrimination* where legitimate targets bear an individual moral responsibility in the conflict. This chapter sets the framework within which individual strikes can be used in a discriminate manner. Chapter Four looks at signature strikes and argues that instead of relying of ‘signatures’, which are ethically problematic targeting shortcuts, targets should be identified as legitimate if they pose an immediate threat. These are situational strikes and targets are identified according to the situations in which they are engaged. This second interpretation of discrimination is important as it allows for greater applicability during operations as well as for rapid decision-making in battle. Chapter Five reviews the use of double tap strikes. This targeting strategy is the most ethically troubling for discrimination and it is argued that this strategy should not be used. Instead, secondary strikes, if necessary, need to take the form of a repeated individual strike or situational strike where the discrimination criterion is re-applied following the guidelines set in Chapters Three and Four. Broadly, each of these case study chapters discuss both the ethical implications of the targeting strategy for the implementation of the discrimination criterion and explore the extent to which the use of the re-interpreted discrimination criterion can be beneficial.

Finally, Part Three of this thesis sets out uses the reinterpreted discrimination criterion to interpret the legal concept of ‘direct participation in hostilities’ before moving on to the closing remarks.

PART 1: Framework

Chapter 1 – Drawing the Line

The responsibility to distinguish between innocent civilians and legitimate target is, arguably, the most difficult burden the nation-state must face.

- Amos Guiora[[40]](#footnote-40)

This thesis is concerned with the identification of legitimate targets in contemporary drone warfare. Thus, the *jus in bello* discrimination criterion is a key concept for this research. Needless to say that the understanding of who and what constitutes a legitimate target in warfare is a complex issue. There are two key sources of information when exploring the distinction between legitimate and illegitimate targets: philosophy and law. Therefore, both the philosophical just war tradition and International Humanitarian Law (IHL, also called ‘law of armed conflict’ or ‘LOAC’) are to be explored to identify the different ways in which the line between legitimate and illegitimate targets is currently drawn. This is necessary to then be able to present an understanding of discrimination that will be applicable in contemporary drone warfare, which is the aim of this thesis.

Philosophical discussions on warfare often fall within the realm of the just war tradition. It is a *juste milieu* between political realism or militarism and pacifism that seeks to limit the violence, use of force, and destruction of war. [[41]](#footnote-41) It is important to understand that there is not a single universal set of requirements and that different doctrines within the just war tradition will include some criteria that others ignore or that are considered implied in others.[[42]](#footnote-42) As Ian Clark states: “It is not possible to speak of a single doctrine of just war; nor can we point to the lineal development of a single idea; nor can we talk of the doctrine having a continuous history.”[[43]](#footnote-43) Further, James Turner Johnson argues that the just war “is not a *doctrine*, as it is often called, especially in religious circles, but a *tradition* including many individual doctrines from various sources within the culture and various periods of historical development and representing variations in content.”[[44]](#footnote-44)

This chapter will explore key understandings of the discrimination between legitimate and illegitimate targets found in the just war tradition and in IHL in light of drone technology and contemporary asymmetrical warfare. The lack of consensus in the interpretation of this requirement will be highlighted and the impact of this will be presented.

A. Current Understandings

Firstly, different understandings of discrimination found in the just war tradition will be explored. The just war tradition offers a double evaluation of the morality of war. Firstly, the ‘why’ (the reasons behind the war) is reviewed and secondly, the ‘how’ (the way the war is fought).[[45]](#footnote-45) This double evaluation is a reflection of just war theory’s two main elements: the right *to* war (*jus ad bellum*) and the right conduct *in* war (*jus in bello*).[[46]](#footnote-46) In addition to this double evaluation, an increasing number of authors, notably Brian Orend, include a third element, *jus post bellum*, which refers to justice after the conflict (peace process and conclusion of the war).[[47]](#footnote-47) In recent years, the concept of *jus ad vim*, which represents a just use of force, short of war, as an alternative to *jus ad bellum* in contexts of counterterrorism and counterinsurgency has gained in popularity.[[48]](#footnote-48) For example, in the 2006 preface to the fourth edition of *Just and Unjust Wars*, Michael Walzer states “the Iraqi case invites us to think about the use of force-short-of-war […] Despite the French argument at the UN in 2002 and 2003 that force must always come as a last resort, force-short-of-war obviously comes before war itself. The argument about *jus ad bellum* needs to be extended, therefore, to *jus ad vim*. We urgently need a theory of just and unjust uses of force.”[[49]](#footnote-49)

In regard to *jus in bello*, the two fundamental rules are the protection of non-combatants or discrimination, and proportionality (of means).[[50]](#footnote-50) Some scholars add other criteria to their interpretation of *jus in bello*. For example, Jeff McMahan’s list also includes “necessity or minimal force”[[51]](#footnote-51). Yet, this requirement is sometimes incorporated in the proportionality criterion, which can be formulated as calling for “proportionality in the use of force to secure the just objectives.”[[52]](#footnote-52) Moreover, the respect for international conventions is often considered as rule of *jus in bello*[[53]](#footnote-53) but it can also be seen as a ‘given’ insofar as states are bound to respect the international agreements they ratified regardless of whether it is a just war criterion or not.

A key point of contention in the just war tradition is the relationship between *jus in bello* and *jus ad bellum.* This relationship has a direct impact on the way the discrimination criterion is understood because accepting the independence between the two allows for all fighters in a conflict to be considered equals, regardless of whether they are involved in a just war according to *jus ad bellum*. The key implication of this is that fighters on both sides, irrespective of the *jus ad bellum* criteria, can be legitimate targets. Conversely, if the independence is rejected, fighters on an unjust side, the ‘invaders’ in a war of aggression, are not justified in fighting because they do not have a just case. Thus, this means that the conception of legitimate targets in fighting is linked to the *jus ad bellum* criteria since the only legitimate targets are the invaders and the victims of the invasion have not lost their immunity (the victims can use force in self-defence against the aggressors). This distinction becomes relevant in contemporary drone warfare because views on the relationship between *jus ad bellum* and *jus in bello* have a key impact on the interpretation of discrimination, which then impacts the identification of legitimate targets, which then has an impact on the targeting strategies used.

The aim of this chapter is not to review all the differences between revisionist and traditionalist just war theory. Rather, it will focus on different ways the discrimination criterion is interpreted in both traditions in order to set the ground for the upcoming discussion on discrimination in contemporary drone warfare. Three broad approaches to the criterion were identified when reviewing the literature: membership-based liability, harm-based approaches, and responsibility-based liability.

1. Michael Walzer, Class Membership, and Traditional Just War

The articulation of traditionalist just war theory is generally associated with the work of Michael Walzer. *[[54]](#footnote-54)* His 1977 *Just and Unjust Wars* was prompted by the Vietnam War: “In those years of angry controversy, I promised myself that one day I would try to set out the moral argument about war in a quiet and reflective way.”[[55]](#footnote-55) Walzer set out to discuss warfare and morality in a way “simple citizens (and sometimes soldiers)”[[56]](#footnote-56) would understand in order to “recapture the just war for political and moral theory.”[[57]](#footnote-57) This book is often seen as the *de facto* starting point for a study of contemporary just war theory and it is the foundation of many discussions on the ethics and morality in warfare. Indeed, “analytical philosophers have overturned almost all the traditionalist conclusions.”[[58]](#footnote-58) Considering the impact and legacy of Walzer’s work[[59]](#footnote-59), it appears to be the logical starting point for the review of the interpretations of the discrimination criterion found in the just war literature. In regard to the *jus in bello* discrimination criterion more specifically, Walzer’s reflections are twofold: “The first principle of the war convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured).”[[60]](#footnote-60) In addition to this, “the second principle of the war convention is that noncombatants cannot be attacked at any time. They can never be the objects or targets of military activity.”[[61]](#footnote-61) For Walzer, the first war convention refers to the moral equality of soldiers. This is the traditionalist view that *jus ad bellum* and *jus in bello* are independent one from the other, allowing for unjust wars to be fought justly and for just wars to be fought unjustly.[[62]](#footnote-62) The moral equality of combatants, or “battlefield equality”,[[63]](#footnote-63) means that in fighting all soldiers are equal regardless of whether their state is the aggressor or the defender.[[64]](#footnote-64) Furthermore, the soldier class (or ‘group’) is the only class of individuals who can legitimately be targeted in war. Walzer argues “simply by fighting, whatever their private hopes and intentions, they [soldiers] have lost their title to life and liberty, and they have lost it even though, unlike aggressor states, they have committed no crime.”[[65]](#footnote-65) This surrender of rights comes ‘simply by fighting’ insofar as all members of the soldier ‘class’ are legitimate targets and fighting is the activity of their class: “‘Soldiers are made to be killed’ as Napoleon once said.”[[66]](#footnote-66) Further, the surrender of rights is seen as being voluntary and individuals who have not lost or surrendered their rights are not to be targets in war.[[67]](#footnote-67) Therefore, in regards to conscript soldiers, Walzer believes that they are ‘political instruments’ who still pose a threat to innocent civilians even if their activity is involuntary because they remain members of the soldier class engaged in fighting.[[68]](#footnote-68) Conversely, when a state engages in an unjust war, its population of innocent bystanders (civilians not in the armed forces) do not forfeit their rights to life and liberty if their state engages in a war of aggression because they are not engaged in the fighting and because of the separation of *jus ad bellum* and *jus in bello*:

Soldiers fighting for an aggressor state are not themselves criminals: hence their war rights are the same as those of their opponents. Soldiers fighting against an aggressor state have no licence to become criminals: hence they are subject to the same restraints as their opponents. […] An army warring against aggression can violate the territorial integrity and political sovereignty of the aggressor state, but its soldiers cannot violate the life and liberty of enemy civilians.[[69]](#footnote-69)

The key implication of this is that combatant status only depends on group or class membership. This means that the question of whether someone is legitimate target can be rapidly answered with a general yes or no.

The main objection to the moral equality of combatants is that it puts all soldiers in the same class regardless of their real implication in the war-related activities, like military cooks who might not take part in the fighting for example. To solve this problem, Walzer uses the case of the ‘naked soldier’: “it is not against the rules of war as we currently understand them to kill soldiers who look funny, who are taking a bath, holding up their pants, revelling in the sun, smoking a cigarette.”[[70]](#footnote-70) Walzer maintains that although a soldier might not actively be engaged in fighting, by working in the kitchens for example, he remains a fully trained member of an armed force engaged in the collective activity of war.[[71]](#footnote-71) Walzer also states three other arguments defending the moral equality of combatants: Firstly, self-defence is always justifiable, regardless of combatant status because “the domestic analogy is of little help here. War as an activity […] has no equivalent in a settled civil society.”[[72]](#footnote-72) In Walzer’s words: “They can try to kill me, and I can try to kill them.”[[73]](#footnote-73) Secondly, combatants are equally subject to external forces motivating their participation in war (they can be compelled).[[74]](#footnote-74) This means that once a war has started, it becomes a patriotic and legal duty: soldiers “can no longer moderate their battles; the battles are no longer theirs. They are political instruments, they obey orders, and the practice of war is shaped at a high level.”[[75]](#footnote-75) This links to the third and final element, that combatants are morally equal because of the hierarchical and institutional chain of command they ought to obey.[[76]](#footnote-76) This essentially means that soldiers on all sides are morally equal because they are not responsible for the decisions to go to war and therefore they cannot be held accountable for the wars their country instigate. Broadly, this demonstrates that combatant status does not change depending on whether a soldier is on duty or actively engaged in fighting, taking temporal considerations out of the application of the discrimination criterion. In that sense, combatant status is constant and the soldier class is always liable to legitimate attack in conflict. The key implication of this is that liability to harm is a virtue of group membership (the ‘soldier class’) and not actions or threats. This bears many similarities with the interpretation for discrimination found in IHL where legitimate targets are combatants.[[77]](#footnote-77)

The biggest issue with this approach to discrimination is that it is difficult to apply in contemporary contexts. Indeed, asymmetrical wars are characterised by the involvement of non-traditional forces such as terrorist or insurgent groups which then make the application of the discrimination criterion problematic. Indeed, the identification of ‘soldiers’ when the enemy is not an organised army is difficult and has direct implications for the implementation of the discrimination criterion. The case study chapters of this thesis will demonstrate the limits of membership-based liability in contemporary asymmetric drone warfare where fighters are not uniformed members of the regular forces (and therefore can difficultly be identified as legitimate targets). In short, Walzer sees the entire soldier class, because of the moral equality of combatants as legitimate targets. In addition to this, civilian workers involved in the manufacturing of what armies need to fight are also legitimate targets in war. Although soldiers at rest are not actively involved in combat they remain soldiers and war is the activity of their class, thus, they remain a legitimate target, even if it might go against the personal moral judgement of the one taking aim.

The general principle of discrimination that non-combatants must not be attacked in war is Walzer’s second war convention.[[78]](#footnote-78) He argues: “‘reason of war’ can only justify the killing of people we already have a reason to think are liable to be killed.”[[79]](#footnote-79) Thus, civilians generally have immunity in war because they are not engaged in the fighting and they are not part of the soldier class, therefore they have not forfeited their rights. Yet, this immunity is not absolute. Indeed, Walzer ‘extends’ combatant status to individuals outside of the soldier class.[[80]](#footnote-80) This means that some non-combatants *can* be attacked justly even if they are not on the front lines. This is such because soldiers rely on a constant supply flow and that civilians are highly involved in this process.[[81]](#footnote-81) Walzer argues:

The relevant distinction is not between who works for the war effort and those who do not, but between those who make what soldiers need to fight and those who make what they need to live, like the rest of us. When it is militarily necessary, workers in a tank factory can be stacked and killed, but not workers in a food processing plant.[[82]](#footnote-82)

Here, the munitions factory workers are partially assimilated to the soldier class because they are contributing to the war effort, but this assimilation is limited to the times where they are in the factory and they return to being innocent civilians outside of their work in the factory.[[83]](#footnote-83) Workers in the food industry are not to be assimilated to the soldier class because their activities are not directly related to the war effort, and would be needed in times of peace as well. “They are assimilated to the rest of the civilian population. We call them *innocent* people, a term of art which means that they have done nothing, and are doing nothing, that entails the loss of their rights.”[[84]](#footnote-84) This need to assimilate some civilians to the soldier class is an acknowledgement that some individuals should be considered legitimate targets because of their actions. However, since places such as a munitions factory can be considered as military objectives because their activities and purposes are directly related to the war effort, Walzer’s assimilation is an unnecessary step. Munitions factories are legitimate military targets in war and therefore, killing civilian workers whilst bombing said factories can be acceptable collateral damaged according to the Doctrine of Double Effect as it is unlikely that the primary aim was to kill civilian workers (bearing in mind that the use of force must remain proportional). Indeed, the Doctrine of Double Effect (DDE hereafter) makes acts with ‘evil’ consequences morally acceptable if the act itself is aimed at a ‘good’ objective and the foreseeable evil is minimised.[[85]](#footnote-85) The key element here is not only the absence of *intentional* killing but the commitment to limit the damage. Walzer’s DDE has four requirements: The act is neutral or good in itself; the direct consequences of the act are morally acceptable; the intentions behind the act are good, and an attempt is made to minimize the known evil consequences; and finally, the good consequences outweigh the bad.[[86]](#footnote-86) In other words, the DDE allows “unintended but foreseeable deaths”[[87]](#footnote-87) where commanders know that civilian deaths will occur but they are not part of the military objective they aim to reach. Walzer goes further and states that simply not having any intentions to harm civilians is not sufficient (too easy) and calls for a “positive commitment to save civilian lives.”[[88]](#footnote-88) If it is necessary to endanger soldiers’ lives to do this, due care is necessary and the risk ought to be taken.[[89]](#footnote-89) Finally, Walzer argues that this doctrine is highly necessary since international humanitarian law is silent on the issue of collateral damage.[[90]](#footnote-90) He states:

soldiers could probably not fight at all, except in the desert and at sea, without endangering nearby civilians. And yet, it is not proximity but only some contribution to the fighting that makes civilians liable to attack. Double effect is a way of reconciling the absolute prohibition against attacking noncombatants with the legitimate conduct of military activity.[[91]](#footnote-91)

Thus, the DDE is a way to reconcile non-combatant immunity with the realities of warfare and fighting. Consequently, membership-based interpretations fail to account for the fact that some non-soldier (individuals not part of the traditional soldier-class) should be liable to attack because of their involvement in the combat activities outside of military objectives such as munitions factories, as is often the case in modern warfare. This is especially problematic in contemporary conflict since asymmetrical warfare is characterised by the involvement of civilians beyond factories. In that sense, many individuals involved in asymmetric warfare are part-time combatants, sometimes described as being farmers by day and fighters by night. This means that they would fall outside of the ‘soldier class’ even if they are directly involved in the conflict. To overcome this difficulty, targeting strategy based on the soldier-civilian (traditional) line of discrimination find ways to include ‘part-time fighters’ in the soldier class by seeing all military-aged men as combatants for example. Therefore, the current state of discrimination brought by the implementation of an interpretation similar to the one suggested by Walzer is not appropriate for the reality of contemporary conflict because it leads to too many individuals being considered legitimate targets because of a widening of the soldier or combatant class. At the same time, some civilians (that are not part of the ‘soldier class’) are not considered legitimate targets and yet their actions contribute directly to the conflict whilst being outside of a munition factory, such as an at-home bomb maker or a key facilitator for example. Importantly, this understanding of discrimination ignores the importance of actions, threats, and responsibility in liability.

In addition to collateral damage and the DDE, Walzer also recognises supreme emergency as an exception to non-combatant immunity. This refers to situations of national defence. Walzer borrows the ‘supreme emergency’ terminology from Winston Churchill’s description of the situation of Britain in 1939 and it refers to cases where the rules of war can be overridden because of severity of the threat.[[92]](#footnote-92) Walzer argues that the danger ought to be imminent and serious in its nature (a great evil that must be stopped) in order to justify such measures.[[93]](#footnote-93) This idea refers to the acknowledgement that “it is possible to live in a world where individuals are sometimes murdered, but a world where entire peoples are enslaved or massacred is literally unbearable. For the survival and freedom of political communities […] are the highest values of international society.”[[94]](#footnote-94) The supreme emergency exception can be summarised as: “Utilitarian calculations [that] can force us to violate the rules of war only when we are face to face not merely with defeat but with defeat likely to bring disaster to a political community.”[[95]](#footnote-95)

Briefly, Walzer’s traditionalist interpretation of the discrimination principle can be summarized as follows:

1. Only the soldier class is liable to attack in warfare.
2. All combatants in are equal, and all combatants are legitimate targets.
3. ‘Naked soldiers’ are legitimate targets because they remain members of the soldier class.
4. Some civilians may be assimilated to the soldier class and thus become legitimate targets in war because of their implication in the war effort, e.g. workers in a tank factory. However, this assimilation is limited to the time the workers are at the factory, they return to the civilian class once they leave their workplace.
5. Some harm may be done to the civilian population within the limits of the DDE or in cases of supreme emergency.

In short, the moral equality of combatants makes discrimination fairly straightforward since all combatants are legitimate targets. In addition to this, civilians involved in making what soldiers need to fight (such as munitions for example) are assimilated to the soldier class whilst they are at the factory.

Assessments of Walzer’s work, extensive or rudimentary, are plentiful but the point here is not to highlight the strengths and weaknesses of his argumentation[[96]](#footnote-96), but rather to review the contribution of the discrimination criteria he establishes in the context of this research on discrimination in contemporary drone warfare. There are two main points of criticism for Walzer’s interpretation of the discrimination criterion: the notion of membership-based liability and the battlefield equality. These two concepts are closely linked since the latter makes the former possible.

The chief advantage of Walzer’s approach is its simplicity. This is not to say that it is a simplistic approach, but assigning liability to attack (or immunity) solely as a function of group membership has the non-negligible advantage of being straightforward in addition to having the potential to be implemented rapidly. In that sense, it does not get lost in calculations of individual involvement in the war effort, as is the case with some other approaches that will be presented later in this chapter. Considering all combatants and non-combatants as two separate groups within which all members are moral equals and thus looking at ‘classes’, as opposed to individuals, to see who can be targeted facilitates the decision-making process. Indeed, the identification of legitimate targets becomes easy: combatants are, and non-combatants are not; always bearing in mind that some non-combatants can sometimes be assimilated to the combatant class and thus become legitimate targets, meaning that membership to these classes is not entirely fixed.

Much like with everything in life, an element’s advantage is also its disadvantage. One of the most important objections to Walzer’s membership-based liability comes from its reliance on group affiliation. This focus on membership is criticised on two fronts. Firstly, it is criticised because no difference is made between voluntary and coerced membership. This can be perceived as morally problematic because it ignores the importance of responsibility. The Nazis and World War II are often used to highlight the dangers of relying entirely on membership to make literal life-or-death decisions.[[97]](#footnote-97) Jeff McMahan encapsulates this objection as follows: “The idea that people can be liable to attack, or immune from attack, merely by virtue of their membership in a group, particularly when membership is involuntary, or largely involuntary, is both false and morally repugnant.”[[98]](#footnote-98) Seeing conscripts and volunteers as equals might appear ethically and morally problematic. Nevertheless, in practice, this distinction is almost impossible to make since a multitude of factors and pressures are always involved in the decision to volunteer and there is no way of evaluating individual motivations behind involvement in the conflict on the battlefields. For example, in situations of counterterrorism or counterinsurgency, identifying the motivations of the insurgents or terrorists would require considerable insight on the individual circumstances and incentives that lead the individuals to becoming involved in the conflict. Even the use of drones, with their advance intelligence-gathering capabilities, cannot gain insight on psychological factors explaining the motivations behind involvement in the conflict. Moreover, since identifying legitimate targets is already a considerable challenge, without accounting for their motivations, distinguishing between conscripts and volunteers is nearly impossible. Further, collective responsibility and the hierarchical chain of command characteristic of the armed forces neglects the impact of individual motivations. As Larry May argues: “because soldiers are acting on behalf of the society, or the State, the society should also take a special interest in trying to protect them from the worst effects of being a soldier, for harm to soldiers is also the collective responsibility of that society.”[[99]](#footnote-99) This means that the way soldiers became members of the armed forces (voluntarily or through conscription) has less importance than anticipated seeing as even the enthusiastic volunteer soldier does not have control over what he is commanded to do in war.[[100]](#footnote-100) Interestingly, Brian Orend raises the issue of conscription in his internal *jus in bello* which “essentially boils down to the need for a state, even though it’s involved in a war, nevertheless *to still respect the human rights of its own citizens as best it can during the crisis*. The following issues arise: is it just to impose conscription, or press censorship?”[[101]](#footnote-101) Orend holds that these internal *jus in bello* requirements are necessary seeing as some of the worst war-time atrocities have occurred within States rather than between belligerents.[[102]](#footnote-102) Moreover, Orend argues: “a just, rights-respecting society ought, on the basis of the human right to freedom of conscience, to abide by the good-faith claims of conscientious objectors, and/or pacifists, to be exempt from military service. […] So, a state ought to meet its military needs through voluntary enlistments, where possible.”[[103]](#footnote-103) States can ask for some assistance and promote voluntary enrolment but “as most military experts agree, very rarely is there a credible military – as opposed to political – case for universal conscription.”[[104]](#footnote-104) This implies that membership-based liability might be less ethically problematic than anticipated. In regard to the implementation of discrimination in drone warfare, since information on the motivations of fighters on the ground is difficult to obtain and because of collective liability, it is not clear how differentiating between conscripts and volunteers would contribute to a more discriminate targeting in warfare since the actions of both groups follow a relatively hierarchical chain of command.

The second point of criticism for Walzer’s membership-based liability is that it places great faith in the ability to identify members of the soldier class. This concern is especially important and relevant in contemporary contexts of asymmetrical or non-traditional conflicts where combatants and legitimate targets are difficult to identify because they are not part of a state’s army. Although the Vietnam War prompted Walzer’s reflections, his discussions are better suited to the wars of past centuries where an army dressed in blue would fight an army dressed in red on a field in broad daylight. This is problematic given that a simple look at the events of the past years, decades even, demonstrates that wars no longer take this form. In modern warfare, identification of legitimate targets is one of the most problematic elements soldiers face on a daily basis and the simple civilian-soldier discrimination found in IHL and in traditional just war thinking is not as straightforward as it once was. Indeed, soldiers and combatants are increasingly difficult to identify with the rise of irregular warfare and non-traditional warfare (guerrillas, insurgencies, terrorism, etc.). Indeed, a fundamental issue surfaces here since involvement in a conflict is no longer limited to members of the soldier class. For example, drones are currently deployed in the context of counterterrorism and counterinsurgency where the enemy looks just like the civilian population they hide amongst. In addition to this, terrorist or insurgent groups are not uniformed in the same way as conventional armies (or regular forces), which increases identification difficulties. These issues are important because targeting strategies that seek to apply the soldier-civilian line of discrimination in contemporary drone warfare raise many ethical issues, as will be explored in the case studies section. Broadly, the identification of legitimate targets is a recurring problem when discussing the implementation of discrimination in conflict.

Another key aspect of Walzer’s understanding of discrimination is the inclusion of the DDE and the supreme emergency as exceptions to the rule. His interpretation of the DDE as a reconciliation between legitimate acts of war and discrimination is interesting since it points towards an underlying belief that military necessity is ultimately more important than discrimination and the DDE is the way to make otherwise unjust attacks morally justifiable. This is even more important when looking at the supreme emergency exception to non-combatant immunity: since winning the war is ultimately the most important consideration and it can justify overruling other rights and limitations. These two exceptions may seem limited in scope and impact but that is far from being the case. Although it is stated that the first two war conventions are concerned with non-combatant immunity and discrimination, these moral requirements almost become optional if they can be pushed aside whenever necessary. Accepting both the DDE and the supreme emergency exceptions sends the message that discrimination is only important when the stakes of the fight are not too high. After all, Walzer does say that the rules of war can only be overridden if defeat has disastrous consequences. Yet, if the fight is not considered important and necessary, then recourse to force in general can be questioned. This amounts to saying that the use of war has to be limited (following the *jus ad bellum* criteria) and the conduct of war needs to follow the *jus in bello* rules but only if defeat would not bring disastrous consequences. Otherwise, these rules can be overridden. Moreover, the DDE tolerates killing non-combatants whilst simultaneously brushing away the guilt associated with such act on the basis that although unintended, the non-combatants’ lives could not be spared. In other words, it is too easy to excuse the killing of non-combatants under the umbrella of supreme emergency and this hinders the impact and importance conferred to the discrimination criteria. This is similar to Uwe Steinhoff’s opposition to the DDE: “Innocent civilians are no less innocent when they are citizens of the country engaged in an unjust war. Accordingly, they are not liable to be attacked and killed (whether in the form of concomitant slaughter or not). If they are, they are wronged.”[[105]](#footnote-105) This concern is relevant in the context of drone warfare because UAVs are seen as limiting the risk of collateral damage thanks to their tracking capabilities because drones can track targets and abstain from using lethal force until collateral damage is no longer foreseeable. Therefore, the use of UAVs can make DDE and supreme emergency exceptions less important in the application of the discrimination criterion.

The issues and limitations of Walzer’s traditional understanding of discrimination are not to be neglected because they represent issues currently faced by practitioners and thus reiterate the necessity for the reflections on the understandings of discrimination this thesis undertakes. The most important limit of Walzer’s interpretation of discrimination in drone warfare is its assumption regarding the ability to identify an individual’s group membership or affiliations. Yet, in the context of contemporary asymmetrical conflict where UAVs are being used, identifying the affiliation of potential targets is extremely challenging since there is no insurgent or terrorist uniform, which makes the application of this understanding of discrimination difficult. Nevertheless, Walzer’s approach is relevant here for two key reasons. First, it is the starting point of a large majority of the other approaches to discrimination. Second, it is a (albeit involuntary) mirror of the current state of affairs in warfare as well as in IHL, meaning that it sets the stage for the review of the use of drones in contemporary warfare this thesis undertakes.

2. Brian Orend, Threats, and ‘Moderate Traditionalists’

Building on Walzer’s traditionalist interpretation of just war theory, a ‘moderate traditionalist’ view has been developed. It rejects the moral equality of combatants, but it is not centred on individual rights to the same extent as revisionist just war theory. Brian Orend would fit this category. He writes: “I wish to reiterate my conviction that the so-called ‘separation’ between *jus ad bellum* and *jus in bello* is mainly for focussing attention on different issues. It does not denote a complete split between the two.”[[106]](#footnote-106) Yet, he recognizes the need to separate *jus ad bellum* considerations from *jus in bello* to a certain extent in order to avoid blaming soldiers for wars they did not initiate.[[107]](#footnote-107) However, this is not to say that all combatants are moral equals because although soldiers from the aggressor side are not to blame for the aggression, they still maintain a certain level of responsibility:

[They] are not mainly to blame for the aggression but they still *are* to blame, in a smaller material sense. Soldiers are not automatons. [… They] must inform their belief regarding the justice of the wars they are ordered to fight. Exceptional ones, upon seeing injustice, will refuse service, or else surrender to the other (just) side at the first non-life-threatening opportunity. Ordinary soldiers, when confronted to the fact that the war they fight is unjust, will probably still go along with the crowd of their buddies and fight – the pressures to do so are very strong. For them, we reserve the moral right to criticize and castigate them at war’s end.[[108]](#footnote-108)

Orend’s approach to just war theory is interesting in the context of examining discrimination in drone warfare for two reasons. Firstly, he offers a detailed account of the rules of just war and secondly, because he acknowledges the challenges brought by non-classical wars:

The classical account of *jus ad bellum* […] cannot be considered complete. For it deals solely with standard inter-state conflicts like World War II or the Persian Gulf War, leaving out such important intrastate conflicts as civil wars. Furthermore, what happens when the aggressor is not another state, nor even a rival internal group striving to establish its own state but is, rather, something like a terrorist group? Finally, how is the so-called ‘aggression paradigm’ consistent with such things as anticipatory attack and humanitarian intervention? To respond meaningfully to such important issues, we must amend the standard account of *jus ad bellum*. But we must stress, crucially, that *all the forthcoming amendments have to do with the just cause requirement.* All the other rules for the justified resort for force […] still hold straightforwardly [[109]](#footnote-109)

Interestingly, Orend recognizes the use of guerrilla warfare, other non-standard tactics and the growing importance of non-state actors in war have a direct impact on the way just war theory is applied but this influence is seen as limited to the ‘just cause’ criterion.[[110]](#footnote-110) Orend appears to underestimate the impact non-traditional warfare has on the implementation of the discrimination criterion.

In regard to *jus in bello*, Orend divides his rules in two categories: external and internal: “The external rules concern how a state, in the midst of war, should conduct itself regarding the enemy state and its civilians (and/or the enemy non-state actor). The internal rules, by contrast, concern how a state, in the midst of war, should treat its own citizens, be they soldiers or civilians.”[[111]](#footnote-111) Orend lists eight external rules: “1) discrimination and non-combatant immunity; 2) benevolent quarantine for POWs [prisoners of war]; 3) due care for civilians; 4) the DDE; 5) proportionality; 6) no meals *mala in se*; 7) no reprisals; and 8) adhere to all international treaties regarding *jus in bello*.”[[112]](#footnote-112) In addition to this, Orend identifies two key internal *jus in bello* rules: the respect of domestic human rights and adherence to external rules of *jus in bello*.[[113]](#footnote-113) Internal *jus in bello* raises many questions on the justice of an imposed conscription, censorship, the limitation of civil liberties and other practices under the umbrella of ‘war measures’.[[114]](#footnote-114) Orend’s inclusion of internal *jus in bello* requirements is both innovative and necessary since states ought to be aware that being engaged in war does not give a ‘free-pass’ to suspend the rights of their citizens or to use the opportunity to fulfil other elements of their political agenda.

When it comes to evaluating the interpretation of the discrimination criterion in the context of drone warfare, Orend’s approach is of great interest since he integrates the notion of harm when assigning liability: “*A legitimate target in wartime is anyone or anything engaged in harming.* All non-harming persons, or institutions, are thus ethically and legally immune from direct and intentional attack by soldiers and their weapon systems.”[[115]](#footnote-115) In that sense, harm is the foundation of the distinction between legitimate and illegitimate targets: “Since the soldiers of the enemy nation, for instance, are clearly engaged in harming, they may be directly targeted, as may their equipment, their supply routes and even some of their civilian suppliers. Civilians not engaged in the military effort of their nation may not be targeted with lethal force.”[[116]](#footnote-116) In short, active soldiers pose an external threat to harm and therefore are legitimate targets,[[117]](#footnote-117) and since civilians are not externally threatening, they are not legitimate targets in warfare. A key part of this harm criteria is the distinction between internal and external threats, which is an acknowledgement that some civilians may bear some responsibility for the war, making them internally threatening. However, Orend argues: “Civilians, whatever their *internal* attitude, are not in any *external* sense dangerous people. So they may not be made the direct and intentional objects of military attack.” [[118]](#footnote-118) This is a rejection of the argument that civilians are causally involved in the external threat by financing the war through taxes for example. Indeed, Orend refutes this point on the basis that the link between warfare and taxes is coerced and indirect.[[119]](#footnote-119) Moreover, Orend also rejects liability by nationality or because of the totalizing nature of modern warfare and arguments along the lines of “if you’re at all in the enemy country, you’re fair game”[[120]](#footnote-120) on the basis that there is “little evidence that modern warfare is intrinsically totalizing [...] what seems more the recipe for ever-increasing slaughter is the idea that civilians may be targeted as readily as soldiers.”[[121]](#footnote-121) This then raises the recurring question of munitions factory workers and other individuals who are both civilians and involved in the harm. Orend supports Walzer’s attitude towards the munitions factory workers. He argues: “In general, anyone or anything not demonstrably engaged in military supply or military activity is immune from direct attack. […] While it is true that soldiers cannot fight well without food, water, medicine and electricity, those are things they – and everyone else in their society, including innocents – require as human beings.”[[122]](#footnote-122) However, Orend disagrees with Walzer on the fate of the ‘naked soldier’ and argues that since it is not posing an external threat, it is not liable to being attacked.[[123]](#footnote-123) Broadly, this harm criterion has two key implications. Firstly, “soldiers, whether for just or unjust reasons, remain among the most serious and standard external threats to life and vital interests.”[[124]](#footnote-124) In other words, since soldiers pose threats, they are engaged in harm and thus become legitimate targets. Secondly, and conversely, when soldiers are not posing threats (such as the ‘naked soldier’), they are no longer legitimate targets because they are not engaged in harm. As Orend argues: “when soldiers no longer pose serious external threats – notably by laying down their weapons and surrendering – they may no longer be targeted with force.”[[125]](#footnote-125)

Orend is critical of the DDE: “The *only* justification sufficient, in my mind, for the collateral civilian causalities would be that the target is materially connected to the victory in an otherwise *just war*. This suggests, importantly, that aggressors not only violate *jus ad bellum*, but *in doing so* face grave difficulties meeting the requirement of *jus in bello*.”[[126]](#footnote-126) Orend expands by recalling that all four DDE requirements[[127]](#footnote-127) ought to be fulfilled in order to satisfy the *jus in bello* discrimination criterion.[[128]](#footnote-128) This strict understanding of the DDE is important in the context of drone warfare because it implies that for collateral damage to be justified it needs to be closely connected to the aim (victory). Considering the surveillance and targeting capabilities of drones, the use of such weapons in asymmetrical warfare is expected to bring low collateral damage since a drone could continuously track a target before launching a strike in order to do so when no illegitimate targets are in harm’s way.

It is interesting to note that for Orend, immunity from attack is not the only rule protecting non-combatants in war. Indeed, as mentioned earlier, there is an internal *jus in bello* requirement for states to respect the human rights of all citizens, even combatants.[[129]](#footnote-129) This means that although there may be an important temptation to use all available resources to help the war effort, states ought to protect their own population.[[130]](#footnote-130) Additionally, Orend says: “In fact, this consideration of rights protection on the domestic front is an *especially important aspect* of just war thinking, since some of the most gruesome human rights violations (e.g. The Holocaust and the Rwandan genocide) have occurred *within, and not between*, national borders.”[[131]](#footnote-131)

In short, Orend’s interpretation of the discrimination principle can be encapsulated in one key element: Legitimate targets pose an external threat at that moment in time: “We distinguish combatants from non-combatants ‘on the basis of their immediate threat or harmfulness’”[[132]](#footnote-132) Nevertheless, there are some additional considerations to bear in mind:

1. “those who are not ‘engaged in harm’ cannot be legitimate targets during wartime. *This is the clearest sense of who is ‘innocent’ in wartime: all those not engaged in creating harm.*”[[133]](#footnote-133)
2. Threats can be either internal or external and only the latter form can make one liable to attack.
3. The DDE is only applicable if the war is just according to *jus ad bellum.*
4. In addition to the classic (external) *jus in bello* considerations, states need to respect internal rules in regard to all their citizens.

Orend’s interpretation of discrimination is flexible in time and space allowing for a soldier to be a legitimate target one hour and immune from legitimate lethal harm the next depending on whether the soldier in question is posing an external threat. This understanding of discrimination does not explicitly follow the combatant–non-combatant line or group membership to determine who is liable to attack in war. Legitimate targets will only be combatants engaged in harm. Since non-combatants do not pose external harm, they are not legitimate targets. Broadly, Orend’s harm criteria is interesting and the flexibility it brings is necessary in contemporary drone warfare. Indeed, it would allow for the targeting of ‘targets of opportunity’ posing an external threat but whose membership (‘class’) is unknown, meaning that a traditional understanding of discrimination cannot be applied. Additionally, the harm criterion allows for flexibility in identifying legitimate targets. This flexibility is essential in contemporary conflicts since legitimate and illegitimate targets can be highly difficult to differentiate. Moreover, the chief advantage and contribution of this is that it can lead to a more discriminate approach to targeting in drone warfare. This is because individuals who were once legitimate targets cannot be legitimately targeted when they are no longer engaged in harm.

Orend defines innocence in terms of not *creating* harm: “those who are not ‘engaged in harm’ cannot be legitimate targets during wartime. *This is the clearest sense of who is ‘innocent’ in wartime: all those not engaged in creating harm.*”[[134]](#footnote-134) Therefore, the harm criterion can be understood in two ways: legitimate targets are engaged in harm and illegitimate targets do not create harm. Although similar, ‘engaged in harm’ and ‘creating harm’ are not synonymous. The former is more restrictive in the identification of legitimate targets. Indeed, individuals who are not actively engaged in harm, like a ‘naked soldier’ for example, are not legitimate targets because they are not engaged in harm (an individual fabricating explosives is engaged in *creating* harm, and therefore is not innocent). Yet, questions arise when in the context of contemporary asymmetrical warfare and insurgency where the ‘munitions factory’ is also the bomb-maker’s kitchen. It seems odd to consider bomb-makers innocent when they are asleep if they are likely to resume the bomb-making the next day. It could be argued that although the fabrication of explosives might show an intention to cause harm in the future, the true motivations are unknown. In that sense, Orend states: “in the midst of war, we cannot peer into the hearts of every civilian; we can only look sweepingly at external behaviour.”[[135]](#footnote-135) This explains why the sleeping bomb-maker or ‘naked soldiers’ are not legitimate targets. Orend argues: “we notice a large and obvious difference between those engaged in harm (i.e., those in the war machine) and those not.”[[136]](#footnote-136) Yet, this distinction is not always clear. Although it is important to stay away from uninformed assumptions on the individual motivations behind the acts of certain individuals, a person who repeatedly creates harm should be considered a legitimate target even when they are not engaging in their threatening activities, such as a sleeping bomb-maker for example. One might argue that the use of UVAs solves this problem as the operators can wait until the bomb-maker resumes its activities before launching a strike. However, this might not always be possible. Perhaps the bomb-maker’s ‘factory’ is in an apartment building or a densely populated area and targeting it would bring a large number of innocent deaths. The bomb-maker might leave his apartment on his own. Drone operators could target the bomb-maker outside of his ‘factory’ (therefore not engaged in harm), limiting collateral damage and making the use of force discriminate and proportional. Many revisionist just war theorists like Jeff McMahan overcome this issue by assigning liability in terms on individual responsibility, as will be explored in the following section.

Finally, considering that Orend recognises the use of non-classical methods and tactics in modern warfare, it is almost surprising that Orend only sees this as having an impact on the *jus ad bellum* ‘just cause’ criterion. Whilst it is true that the *jus ad bellum* is challenged in modern warfare, so is *jus in bello*. Yet, there is a gap in the just war literature in regard to the challenges modern drone warfare poses to *jus in bello*.

3. Jeff McMahan, Individualism, and the Revisionists

Jeff McMahan is a prolific and important name in the world of moral philosophy and applied ethics, especially in regard to killing, war, and the use of force. His contributions to the just war tradition are considerable, ongoing, and greatly varied. He is one of the key revisionists who oppose Walzer’s orthodoxy. McMahan rejects the notion that all combatants in a conflict are moral equals and supports that “it is virtually impossible”[[137]](#footnote-137) to fight in an unjust war (which does not have a just cause) without violating other *jus in bello* criteria since the use of force is not justified and therefore the fighting cannot be just in an unjust war. Fundamentally, the key difference is that if *jus ad bellum* and *jus in bello* are independent, then the implementation of the discrimination criterion is not tied to any other considerations beyond the distinction between legitimate and illegitimate targets. Conversely, if this independence is rejected then the implementation of the discrimination criterion is linked to *jus ad bellum* considerations, especially the ‘just cause’ requirement. In that sense, McMahan argues that unjust combatants (combatants taking part in a war that does not fulfil the *jus ad bellum* requirements) cannot fight in accordance to *jus in bello*: “it is morally wrong to fight in a war that is unjust because it lacks a just cause.”[[138]](#footnote-138) Moreover, McMahan also rejects the reasoning that unjust combatants can fulfil the discrimination criteria in cases where all parties are unjust: “In a war in which all are in the wrong, none are justified in fighting.”[[139]](#footnote-139) In short, McMahan’s argument is summarized as follows: “if just combatants were always to fight according to the moral constraints that govern their conduct in war, they would never be liable to attack and unjust combatants would never have legitimate targets at all and thus would never satisfy the requirement of discrimination.”[[140]](#footnote-140) Further, McMahan adds that unjust wars can only take place if people take part in the fighting and that war, even if unjust, has historically been seen as a honourable and heroic endeavour.[[141]](#footnote-141) He states: “It would of course be absurdly utopian to expect that people would refuse to fight in unjust wars (or wars they believed were unjust) if they came to believe that participation in an unjust war is wrong. But it would also be naïve to doubt that the widespread acceptance of the moral equality of combatants has facilitated the ability of governments to fight unjust wars.”[[142]](#footnote-142) McMahan therefore argues that a move beyond the moral equality of combatants would have significant implications for warfare insofar as it would lead active-duty soldiers to question their involvement in unjust wars: “And the prospects of resistance, particularly from within the military, and the consequent risks of humiliation and failure, could deter at least some attempts to initiate unjust wars that might at present seem positively appealing and advantageous even for domestic political reasons.”[[143]](#footnote-143) Briefly, McMahan criticizes the moral equality of combatants and the blind trust in the validity of this principle by accusing it of facilitating the start of unjust wars.[[144]](#footnote-144)

In addition to this, McMahan also rejects the moral equality of combatants because it is, he argues, incompatible with reality outside of war.[[145]](#footnote-145) McMahan believes that in times of peace, the combatants always show an asymmetry in regard to the right to use force: an attack victim can use self-defence, but the attacker is not entitled to self-defence in face of the threat posed by the victim. However, the moral equality of combatants says the opposite seeing as it supports that both the attacker and the victim (both those who create the wrong in war and those who do not) share the same right to attack in face of a threat.[[146]](#footnote-146) This objection is refuted by claiming that the morality of war is different from what is applicable in the other areas of life. McMahan responds that if this is true, then some set criteria to what constitutes a war ought to be available in order to determine what set of moral requirements is applicable.[[147]](#footnote-147) Without these, the morality of war should not be seen as distinct. “Reductive individualistic approach to war”[[148]](#footnote-148), such as the one presented by Helen Frowe, also fit in the revisionist tradition. She describes her approach to war as:

Reductivist because it holds that the moral rules of war are reducible to the moral rules of ordinary life. It is individualist because it holds that it is individuals, not collectives, such as states – who are the proper focus of moral evaluation. […]

Furthermore, the reductivist view does not support any intrinsic moral distinction between combatants and non-combatants: what matters is what an individual does – whether she’s morally responsible for unjust threats – rather than which group she belongs to.[[149]](#footnote-149)

The revisionist rejection of the moral equality of combatants has important implications in contemporary warfare because current strategies in drone warfare rely on the battlefield equality and group membership to identify legitimate targets. However, the case studies will illustrate the ethical issues related to this application of the soldier-civilian line of discrimination in contemporary contexts. Thus, for drone warfare to be discriminate, it will be argued that it is important to move beyond group membership and the moral equality of combatants in order to understand discrimination in a way that represents a morality adapted to contemporary warfare.

In regard to the identification of combatants, McMahan highlights the existence of two different notions: the moral one and the legal one.[[150]](#footnote-150) The latter refers to combatant status and to the lists of criteria codified in international humanitarian law, principally in the Geneva Conventions. He argues that combatants in the legal sense can all be assumed to pose a threat. However, not all threats in war come from legal combatants, “but all those who pose a threat in war are – by definition, it seems – combatants in the moral sense: that is, in the sense of being morally legitimate targets of attack.”[[151]](#footnote-151) This distinction McMahan draws between the different approaches to combatant status is highly interesting and relevant for this thesis. Indeed, the reinterpretation of the discrimination criterion that will be presented in the following chapter aims to bridge the gap between the legal conceptions of legitimate targets (current *status quo*), moral philosophy, and the realities of contemporary drone warfare. In doing this, a reinterpretation of discrimination will be presented, reconciling the moral and legal conceptions of combatant status in order to have one interpretation of the criterion that is relevant in both practice and in moral philosophy.

McMahan draws attention to a contradiction in Walzer’s argument: group (or ‘class’ in Walzer’s terminology) membership is used to endorse liability for soldier whilst it is also used to deny it for civilians.[[152]](#footnote-152) However, for McMahan, “liability and immunity are different sides of the same coin. To be morally immune to attack is just to be not morally liable to attack. [...] In short, if liability is a function of an action and not a membership, immunity must be a function of the absence of action and not of membership.”[[153]](#footnote-153) McMahan is of the opinion that liability to attack rests in moral responsibility. In that sense, the only legitimate targets in war are the ones who are responsible for the threat posed.[[154]](#footnote-154) This means that “a person may be morally liable to having such force used against him simply by virtue of being morally responsible for the existence of an unjust threat, even if he does not himself *pose* the threat.”[[155]](#footnote-155) This is where the just war criterion of discrimination lies. In regard to counterterrorism and counterinsurgency, this interpretation of discrimination sees known and identified terrorists and insurgents as legitimate targets because they are morally responsible for the threat. Yet, this approach has considerable limitations because of the difficulty to access the information necessary to evaluate moral responsibility and assign liability on the battlefields.

McMahan’s identification of legitimate targets is based on moral responsibility, which requires the attribution of responsibility for the war: “While the classical just war theorists focussed on guilt, I think we should suppose that noninnocence in the sense of moral responsibility. It is, I think, a mistake to suppose that noninnocence in the sense of moral guilt or culpability is necessary for liability to attack in war. Something less is sufficient: namely, moral responsibility for a wrong, particularly an objectively unjustified threat of harm.”[[156]](#footnote-156) Following the moral inequality of combatants, not only are all non-combatants immune to attack in war but so are combatants who are not morally responsible for the threat they pose. Whereas the traditional just war theory approach to liability can be paraphrased as “those who pose no threat to others are immune, while those who pose a threat are morally liable to attack.”[[157]](#footnote-157) McMahan is firmly opposed to doctrines of collective liability and believes that immunity from or liability to attacks does not stem from membership. Rather, McMahan suggests a different approach: instead of defining innocence in terms of guilt, he supports that innocence should be defined as the absence of *moral responsibility*.[[158]](#footnote-158) This means that the implementation of the discrimination criterion should move beyond the identification of groups to focus on individual identification of morally responsible targets.

McMahan’s work inspired many other just war theorists. David Rodin states: “Building on McMahan’s account of proportionality, I argue that liability to defensive harm is in essence an issue of proportionality.”[[159]](#footnote-159) In *Justifying Harm*, Rodin identifies “fourteen normative factors that determine whether a person is liable to defensive harm”[[160]](#footnote-160), which is central to his rights-based account of individual self-defence. Moreover, Victor Tadros states: “McMahan develops an account of liability that is related to the loss of rights. […] In contrast with McMahan, I don’t believe that the idea of liability is importantly connected to the idea of loss of a right, and so I don’t think that it is a necessary condition of liability to be harmed that a person has forfeited their rights.”[[161]](#footnote-161) Further, Tadros argues that McMahan’s view of liability is incomplete and suggests that liability comes from both responsibility and duty.[[162]](#footnote-162) Cécile Fabre, who is described as one of the leading revisionist just war theorist along Rodin and McMahan by Seth Lazar, offers a cosmopolitan interpretation of the just war.[[163]](#footnote-163) She endorses “a variant of the so-called interest theory of rights […], whereby rights protect some interest(s) of their holders.”[[164]](#footnote-164) Indeed, Fabre “argues that individual human beings are the only unit of moral concern, and that we all have a right, held against everyone else, to the conditions necessary for a minimally decent life. […] Fabre appeals both to individual causal responsibility, and to a somewhat thin account of complicity”[[165]](#footnote-165) when assigning liability to be killed in war. Frowe’s ‘reductive individualistic approach to war’ also puts the emphasis on moral responsibility.[[166]](#footnote-166) Doing so, Frowe rejects the classic definition of combatant as being limited the individuals directly involved in the hostilities.[[167]](#footnote-167) Moreover, Frowe finds the use of the term ‘hostilities’ in reference to elements of the war directly linked to the ‘war effort’ as highly problematic because it is limited to the front line fighting.[[168]](#footnote-168) This is significant because contributions to the war are far greater than only what happens on the front lines, and thus, the definition of ‘hostilities’ ought to encompass war activities such as intelligence gathering and training only to name two, in order to involve all combatants in the ‘hostilities’. Then, as Frowe states: “it seems arbitrary to exclude the non-combatants playing comparable roles.”[[169]](#footnote-169) This is an important issue that arises in drone warfare and asymmetrical conflict where many of the enemies faced are ‘part-time’ combatants.

Considering this, the identification of ‘combatant’ can appear to become difficult. Instead of focusing on the semantics of the issue, Frowe supports that the key to liability to attack in war is not status, but responsibility for a threat. The idea that it is essential to move beyond labels in the implementation of the *jus in bello* discrimination criterion is an important contribution. In the context of drone warfare and asymmetrical conflict, the use of labels such as soldier or combatant used in IHL and traditional just war theory, leads to ethically and morally problematic targeting, as will be demonstrated in the case study chapters. Therefore, it is necessary to move beyond such labels in the interpretation of the discrimination criterion, as will be suggested by this thesis.

Moving away from labels, Frowe bases her understanding of discrimination on self-defence:

My view of defensive killing in war endorses four main claims. The first is that the rules of self-defence underpin the rules of killing in war. The second is that people who pose what I call *indirect threats* can be liable to defensive killing. The third is that non-combatants often pose indirect threats in war. The fourth is that non-combatants are often liable to defensive killing in war.[[170]](#footnote-170)

Frowe defines ‘direct threat’ as a person that will cause direct lethal harm (“a person who is going to kill you”[[171]](#footnote-171)), which is the classic common-sense understanding of lethal threat.[[172]](#footnote-172) Also, direct threats are ‘agents’ in the sense that they *are* what cause the harm: “the term ‘agent’ does not imply moral agency, but rather refers to ‘being the thing that harms you’. So disease or starvation can be the agent of a person’s death.”[[173]](#footnote-173) Building on this, ‘indirect threat’ is used to refer to someone “who isn’t going to inflict harm upon you, but rather endangers you in some other war. For example, a person who blocks an escape route of which you need to avail yourself.”[[174]](#footnote-174) Further, Frowe defines ‘unjust threat’ as “someone who is not liable to bear harm.”[[175]](#footnote-175) Moreover, Frowe states: “A person is not liable to bear a harm if she has not consented to bear it, and is not party to some relevant wrongdoing.”[[176]](#footnote-176) Also, unjust threats cannot legitimately defend themselves against the harm they are liable to.[[177]](#footnote-177)

In regard to civilians, they are not generally thought as being responsible for the wars their nations take part in and that, consequently, they are not responsible for the war.[[178]](#footnote-178) However, McMahan disagrees and states: “civilians can be related to unjust combatants [...]. They can be instigators of unjust wars, or aiders and abettors who share responsibility for unjust acts of war perpetrated by unjust combatants.”[[179]](#footnote-179) Further, McMahan is of the opinion that civilians can be morally responsible for wars by authorising them: “civilians can abet the prosecution of an unjust war. And they can be complicit in instigating it.”[[180]](#footnote-180) Civilians can become morally responsible for a war by intentionally working to stimulate popular support (through publications, public speeches, lobbying, etc.) or they can support the fighting unintentionally because of one’s employment.[[181]](#footnote-181) Additionally, responsibility can come from omission and McMahan believes that civilians have the duty to oppose their government if it wishes to engage in an unjust war. However, the responsibility to oppose unjust wars is not limited to wars instigated by one’s own government: foreigners can also share responsibility if they are unable to prevent the state’s unjust war.[[182]](#footnote-182) McMahan goes further when examining the case of an unjust war prompted by a totalitarian state by arguing that since citizens lack the opportunities to protest the war due to the authoritarian nature of their government, citizens of democratic states who are allied or economic partners of the totalitarian state ought to oppose the war: “In these circumstances, it seems reasonable to say that the citizens of the foreign democracy bear greater responsibility for the unjust war fought by the totalitarian state than that state’s own civilian citizens do.”[[183]](#footnote-183) Therefore, only the non-morally responsible individuals have immunity because they have done nothing to lose their rights. They are ‘non-responsible threats’ and have “done nothing to lose any rights to make herself morally liable to attack.”[[184]](#footnote-184) This means that in the context of a fight against terrorism and insurgency, facilitators, individuals involved in the planning of attacks, in the promotion of the terrorist group, etc. are also morally responsible for the threat and therefore can be legitimate targets. Further, this also implies a broader responsibility to oppose unjust uses of force by both one’s country of residence and even other states, especially if they are totalitarian regimes. This could then be extrapolated to the argument that there is a responsibility to oppose all unjust uses of force, including terrorism and insurgencies. This widens the ‘pool’ of individuals who can be considered legitimate targets beyond individuals actively engaged in combat, which will be important when it comes to the reinterpretation of the discrimination criterion that will be presented in the following chapter. This responsibility to oppose unjust uses of force illustrates the disconnect that can happen between moral philosophy and the realities of human life.

Further, McMahan supports that the threats posed by civilians are not sufficient to fulfil the proportionality requirement and therefore they cannot be targeted:

Most unjust civilians are at most responsible to only a low degree for their country’s unjust war, that attacks against civilians generally involve the opportunistic use of people as mere means, that they are virtually always of highly uncertain effectiveness because their relevant effects are not immediate but must come indirectly through the wills of others, that responsible civilians are virtually intermingled with wholly innocent civilians – it is these factors together that explain why civilians are almost never liable to intentional military attack and why even when some are liable it is still generally impermissible to attack them. These factors together constitute the real basis of the *moral* immunity of civilians, which has nothing to do with mere civilian status.[[185]](#footnote-185)

Frowe disagrees with McMahan’s argument that killing non-combatants generally yields so little military advantage that it does not fulfil the requirement of providing a considerable military advantage.[[186]](#footnote-186) Frowe contests this by saying “I suspect that actually, there will be comparatively few cases in which killing a person who poses a non-military, indirect threat will meet this condition [of necessity].”[[187]](#footnote-187) She argues that instead of being rooted in proportionality, non-combatant immunity comes from the difficulty to target liable non-combatants:

any immunity from attack that is enjoyed by non-combatants comes from the difficulty of identifying liable non-combatants and the difficulty of attacking liable non-combatant without causing impermissible amounts of collateral harm. These difficulties provide considerable protection for non-combatants. But we ought not to mistake these contingent sources of immunity for a morally significant feature of non-combatants themselves.[[188]](#footnote-188)

Moreover, she considers that “whether a person is liable to defensive harm rest upon facts about them, not on external facts about necessity.”[[189]](#footnote-189) In Frowe’s words again: “Liability is based on facts about what a person has done, and these facts are not changed by variations in the usefulness of killing them.”[[190]](#footnote-190) Moreover, “When we permit collateral harming of non-combatants, we usually do so only because we grant the importance of the mission – of the military objective that helps to win the war. We do not often do so because we grant the importance of the combatant themselves”[[191]](#footnote-191) Broadly, this is a rejection of McMahan’s view that liability is limited to the harm that is necessary to achieve the goal (minimal force). Instead, Frowe supports that liability is limited to “harms that are a *proportionate means* of achieving the goal [averting a threat].”[[192]](#footnote-192)

Here, the concept of liability is much more important than combatant status. There are two conceptions of liability: “A person is *narrowly* liable to be harmed if she is liable to be harmed only to avert the particular unjust threat for which she is responsible. A person is *broadly* liable to be harmed if, once she is morally responsible for posing an unjust threat, she is liable to harm to avert any unjust threat.”[[193]](#footnote-193) Importantly, “permissibility and liability are not two sides of the same coin.”[[194]](#footnote-194) This means that although one might be liable to be killed, this does not automatically imply that the use of lethal force would be permissible: “it is possible to concede non-combatant liability, […] without granting a permission to intentionally kill non-combatants.”[[195]](#footnote-195) Frowe defends the ‘narrow account’ of liability, meaning that liability to harm only comes from responsible threats: “a person can be liable only to harms that avert the particular threat for which she is responsible.”[[196]](#footnote-196) A key implication of narrow liability is that a number of non-combatants can therefore be liable to defensive harm. Indeed, Frowe rejects the idea of a ‘blanket’ principle of non-combatant immunity. This “is at odds with how we normally think of the restrictions on intentionally harming non-combatants (stands in opposition to, for example, the ‘Walzerian’ view that non-combatants may not be attacked because they have done nothing to forfeit their usual rights).”[[197]](#footnote-197) Frowe’s argument is that non-combatants often pose threats in war and, therefore, are often liable to defensive killing.[[198]](#footnote-198) Indeed:

Since many non-combatants responsibly contribute to the threats posed by their country’s combatants in unjust wars, it looks like many non-combatants on the unjust side are candidates for liability to defensive harm. But whereas the broad account to liability would permit one to kill an otherwise liable non-combatant to avert *any* proportionate threat, the narrow account will limit this to the averting of the particular threats for which the non-combatant is responsible.[[199]](#footnote-199)

Frowe highlights four ways non-combatants contribute to their State’s war effort: Politically (by virtue of voting, by writing pro-war editorials, organizing rallies, etc); materially (with the production of war-related equipment but also by providing provisions for the army); technologically (with new inventions in weaponry); and financially (by paying taxes, which both combatants and non-combatants do).[[200]](#footnote-200) Some, like Fabre, argue that the levels of moral responsibility associated to non-combatants are too low to make them liable to attack arguing that they do not know how their contribution will be used.[[201]](#footnote-201) Frowe refutes this argument by saying: “Non-combatants who opt to contribute to wars without knowing whether they will be posing just or unjust threats cannot plead ignorance in order to escape liability.”[[202]](#footnote-202) Further, she adds that “what makes killing non-combatants disproportionate, then, is not that they are only weakly morally responsible for their contribution, but they don’t contribute *enough*.”[[203]](#footnote-203) However, Frowe also argues: “One of the characteristics of a war is that the specific micro-threats posed in combat are simply a means to bringing about the larger ends of the war. So, when unjust combatants fight, their offensives promote the macro-threat that justified the waging of the war in the first place.”[[204]](#footnote-204) In regard to the justness of the threat, Frowe discusses the example of non-combatants who are indirect threats because they voted in favour of the war:

If it is a just war of defence against aggression that these people support, they do not act wrongly and as innocent indirect threats they are not legitimate targets. Nor are their frontline combatants legitimate targets. Endangering a person or group that is liable to be killed does not render one a permissible defensive target.

But if a country is engaged in an unjust war of aggression, contribution to the war effort might well render a civilian a legitimate target if her support lessens the survival chances of innocent combatant and civilians in another country.[[205]](#footnote-205)

It is here that the element of *moral responsibility* comes into play. Indeed, would individuals who are coerced into taking part in the war effort also liable for defensive harm? Whilst examining this issue, Frowe, like McMahan, refers to the Nazi example to highlight the problems of focusing on groups. However, she holds a more nuanced position and argues that allowing for a ‘soft line’ is very demanding, reiterating that the focus is not blame but rather liability to defensive killing.[[206]](#footnote-206)

Nevertheless, liability is not absolute and the proportionality criterion remains. Indeed, Frowe acknowledges the fact that “non-combatants typically enjoy moral immunity from attack, which means that attacking them would be all-things considered impermissible.”[[207]](#footnote-207) This immunity comes from two places. Firstly, the ‘identification problem’ which refers to the issues linked to identifying which non-combatants have contributed and which ones did not is problematic.[[208]](#footnote-208) Secondly, and more importantly, the proportionality of collateral damage to non-liable individuals is particularly challenging. Indeed, proportionality calls for the positive outcomes of the harm to outweigh the negative collateral damage in addition to being a lesser-evil.[[209]](#footnote-209) Frowe argues that the proportionality criterion is unlikely to be reached for collateral damage brought by the targeting of non-combatants.[[210]](#footnote-210)

Finally, McMahan rejects the ‘justness’ of all type of collateral damage or supreme emergency.[[211]](#footnote-211) This is because unjust combatants are not pursuing just means, thus there is no ‘good effect’ to outweigh the negative effects (illegitimate deaths) of their actions.[[212]](#footnote-212) McMahan also sees an issue with the proportionality criteria seeing as no ‘good effects’ can be generated by actions committed in the pursuit of an unjust war.[[213]](#footnote-213) Likewise, since liability is based on moral responsibility, only civilians who are responsible for the war can be attacked whilst exceptions to non-combatant immunity, like collateral damage and the DDE, allows for civilians to be killed because of their proximity to military objectives. McMahan argues that being a ‘bystander’ does not stem from engagement or responsibility but rather comes from causal physical position.[[214]](#footnote-214) As presented previously, civilians can make themselves liable to some harm, such as economic sanctions or reparations payments after the war, but McMahan clearly states:

Most civilians have, on their own, no capacity at all to affect the actions of their government. [… Thus,] military attack exceeds what a person may ordinarily be liable to on the basis of these comparatively trivial sources of responsibility. This is to say, in effect, that most international attack on civilians violates the narrow proportionality requirement that is internal to the notion of liability.[[215]](#footnote-215)

Nevertheless, McMahan’s position is not absolutist and he recognizes that situations may arise in which an immunity against attack ought to be overruled.[[216]](#footnote-216) These actions cannot be considered just, but they are *justified*. McMahan discusses ‘justified threats’ as being actions that will wrongfully harm the victim as well as infringing of their right against attack.[[217]](#footnote-217) Justified threats include foreseen but unintended harm (such as with the DDE).[[218]](#footnote-218) This latter point refers to situations where killing one innocent would save an important number of lives, rather than the ‘anything goes’ attitude often found in the supreme emergency doctrine. Although McMahan doesn’t embrace the DDE, he is unable to ignore cases where killing one would save the many: “These are cases in which the innocent person’s rights are straightforwardly overridden by more important countervailing considerations.”[[219]](#footnote-219) However, such cases could only be considered justified, not just. This is an acknowledgement that the morality of warfare is not always compatible with the realities of conflict, such as the risk of unintended collateral damage. This gap between the morality of war (where the use of force is just) and the reality of conflict (where the use of force can only be justified) will be a key element in the reinterpretation of the discrimination criterion this thesis presents.

Finally, Helen Frowe’s revisionist ‘reductive individualistic’ approach to liability is individual since it comes from one’s actions rather than being brought by external factors. This is directly opposed to any argument allowing attacks because of military necessity and supreme emergency, which uses external considerations to justify attack. This means that Frowe’s interpretation is partly flexible: individuals could go from having no liability to being legitimate targets because of their actions, by supporting the war effort for example, but the loss of liability is not possible. It is important to note that, as Frowe states, “a person who is liable to eliminative defensive harming can be liable to be usefully harmed to avert a threat for which she is responsible. Such merely opportunistic harming does not exploit a person, but merely restores or maintains the *status quo*.”[[220]](#footnote-220) Additionally, an unneglectable contribution from Frowe’s approach is the clear description of how civilians can be involved in the war effort and thus become morally responsible for the war.

In short, McMahan’s interpretation of the discrimination criteria can be summed in five points:

1. There is no battlefield equality.
2. ‘Combatant’ can be interpreted both legally or morally.
3. Moral combatants bear a moral responsibility for the unjust threat, which renders them liable to being legitimately targeted. Thus, innocence is not the absence of guilt but rather the absence of moral responsibility.
4. Civilians can be morally responsible for a war (threat), but their implication is rarely sufficient to render them liable to lethal force according to proportionality considerations.
5. Attacks following the DDE or supreme emergency cannot be just, only justified.

McMahan’s approach is highly interesting in the current context of examining discrimination in drone warfare since it is a clear rejection of the traditional approach to just war presented previously and McMahan’s background as a philosopher transpires in his discussions of moral and philosophical considerations. In addition to being a key revisionist interpretation of just war theory, McMahan’s approach is an illustration of how things could be in ideal situations. Unfortunately, such idealism is often discarded in discussion about application in war because of its demandingness. As Lazar states: “Philosophers’ cases usually presuppose omniscience, for example, rather than condescending to the radical uncertainty that bedevils all decisions about and within war.”[[221]](#footnote-221)

In an interesting debate in the *Philosophia* journal (volume 34(1), January 2006), McMahan and Walzer discussed discrimination, but particularly the moral equality of soldiers. Although, McMahan agreed with Walzer’s claim that his arguments are difficult to apply in reality[[222]](#footnote-222), he states that he is concerned with the ‘deep morality of war’, unlike Walzer who is concerned with the laws of war and everyday morality.[[223]](#footnote-223) Walzer recognises the perceptiveness of McMahan’s argument, but he also states: “What he [McMahan] actually provides, I think, is a careful and precise account of what individual responsibility in war would be like if war were a peacetime activity.”[[224]](#footnote-224) The same argument can be made for Frowe’s ‘defensive killing’ and other revisionists because of their tendency to rely on high levels of abstraction in their discussions. Walzer’s criticism of McMahan is accurate and it hints to perhaps one of the most considerable issues with revisionist just war theory: the lack of applicability in ‘real-life’ combat. The implication of this in drone warfare as well as the ‘real-world objection’ will be explored in the following chapter.

McMahan’s discussions on the ways civilians can be involved in the threat of the war is interesting since, as was mentioned previously, this is a considerable challenge in contemporary asymmetrical warfare. Further, in the discussion on responsibility by omission or mobilization, McMahan is aware of issues related to collective action and individual involvement. He discusses the variety of causes which request mobilisation and the limited capabilities of individuals to conclude that if an individual is already involved in preventing another wrong (climate change is used as an example in this case) then the person is not responsible by omission.[[225]](#footnote-225) In addition to this, McMahan’s review of whether liability can come from voting, in a referendum on the state’s implication in a war for example,[[226]](#footnote-226) is also an interesting contribution in the current context since it highlights the importance the *jus in bello* proportionality requirements plays in the identification of legitimate targets. Indeed, it is not sufficient to be morally liable to legitimise lethal strikes since the responsibility ought to be proportionate to the force used. In the case of voting for example, this responsibility is not sufficient to legitimise the use of lethal force. Thus, liability lies in the causal contribution actions have on the war, which means that only acts yielding a direct influence on the incidence of the war (causal contribution) bring liability. Further, even if one is identified as a legitimate target, it does not necessarily mean they can be targeted with lethal force. Nevertheless, identification remains an important issue in the distinction between legitimate and illegitimate targets, especially when liability is based on responsibility since this information is difficult if not impossible to obtain in many cases. Membership-based approaches to liability offer the considerable advantage of being applicable in the everyday realities of conflict. Responsibility-based accounts of liability are more problematic in terms of application because of the identification issue. Indeed, assigning liability following individual responsibility assumes the ability to identify individuals. This is especially relevant in the context of drone warfare and the increasingly blurred line between combatants and civilians. Identification remains a great limitation for approaches to liability that move beyond membership even with the use of drone technology. This identification issue will be of great importance in the reinterpretation of the discrimination criterion. Indeed, it is necessary to move beyond membership-based liability whilst also overcoming the identification issues linked to responsibility-based approaches.

This is also somewhat linked to another element of McMahan’s approach that is interesting to review in the current context that is the differentiation established between the *moral* and the *legal* interpretations of ‘combatants’. This is a relevant contribution considering that the legal definition of combatant is ill-adapted to the contemporary context of asymmetrical conflict, which reiterates the need for a moral definition. This alternative interpretation is more flexible since it is not codified. The moral definition may look like wasted words in day-to-day combat because it is not the law and because it might be considered too idealistic. Nevertheless, it is with moral discussions that reinterpretations of the discrimination criterion are possible, which could then lead to an understanding of discrimination that is applicable on the modern battlefields.

In order to move beyond labels and group membership in the application of the discrimination criterion, the interpretation of this requirement needs to be centred on the actions of the intended targets, as suggested by Frowe. Indeed, the reinterpretation of the discrimination criterion that will be presented in the following chapter will move away from labels and group membership to identify legitimate targets. However, this shift away from group membership raises issues regarding the ways to identify legitimate targets, especially in context of counterterrorism and counterinsurgency where information can be difficult to obtain. When examining discrimination in drone warfare, Frowe’s rejection of a blanket civilian protection is interesting to consider. Contemporary experiences have shown civilians are increasingly involved in warfare, but their implications are often too limited to allow the use of lethal force. However, this is changing with the rising occurence of asymmetrical conflict. Also, Frowe’s focus on internal consideration as opposed to external factors is interesting but brings up issues of identification and of intelligence gathering. Indeed, it is not clear how this approach to discrimination can be implemented in drone warfare without omniscience. Another important question regards applicability and the possibility for soldiers to identify and distinguish liable individuals from non-liable ones whilst on the battlefields. The problem of identifying legitimate targets highlighted earlier remains present. Although drones offer great intelligence-gathering capabilities, they do not bring omniscience. In other words, the review of Frowe’s interpretation of discrimination highlights the importance of applicability when interpreting the criterion. In that sense, it is essential for theory to bear in mind the realities of conflict for the theory to be applicable. The importance of this will be explored further in the next chapter when the discrimination criterion will be reinterpreted.

Understandably, this is not an exhaustive list of all the revisionist approaches to liability and discrimination but rather a sample of key positions in order to proceed with a discussion on the reconciliation of traditionalist and revisionist approaches to discrimination in the following chapter. Broadly, revisionist interpretations, with their focus on individual responsibilities, bring a serious identification problem, even with the intelligence-gathering capabilities of drones. This then casts considerable doubts on the applicability of these approaches to contemporary drone warfare and adds to the importance of the reinterpretation this thesis presents.

4. International Humanitarian Law

Although the laws of war are not the main focus here, IHL represents a reflection of the current international *status quo* in terms of practice since these laws derive from the customary practice that has been in place for centuries in the international arena. Certain laws have been codified, although many are still customary. Moreover, IHL is relevant because it is a manifestation of ethical and moral criteria in application. One of the most important codifications of IHL has to do with non-combatant immunity and the distinction between civilians and combatants. For example, the 1977 the *Additional Protocol I to the 1949 Geneva Convention* states:

Art 48. Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

[…]

Art 51. - Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.[[227]](#footnote-227)

Additionally, the prohibition against attacking civilians is also reiterated in many international treaties and conventions such as the Ottawa Treaty (Anti-Personnel Mine Ban Convention) which states in its Preamble that “a distinction must be made between civilians and combatants.”[[228]](#footnote-228) Further, the importance of the distinction between civilian and military targets can be seen with the *Rome Statute of the International Criminal Court*’s recognition that attacks on civilians constitute a war crime and a crime against humanity.[[229]](#footnote-229) Broadly, the need to distinguish between civilians and combatants is seen as the first rule of IHL according to the International Committee of the Red Cross [ICRC].[[230]](#footnote-230) In IHL, discrimination is understood as seeing combatants as legitimate targets and non-combatants are illegitimate targets.

Challenges arise, however, when it comes to the definition of ‘combatants’. Firstly, the ICRC states that “all members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.”[[231]](#footnote-231) However, this understanding becomes difficult to apply in non-traditional contexts with non-international armed conflicts, for example:

While State armed forces may be considered combatants for purposes of the principle of distinction (see Rule 1), practice is not clear as to the situation of members of armed opposition groups. Practice does indicate, however, that persons do not enjoy the protection against attack accorded to civilians when they take a direct part in hostilities.[[232]](#footnote-232)

To adapt to the realities of contemporary asymmetrical conflict such as the situations in which drones are currently being deployed, different national laws establish the legality of the implication actors beyond national armed forces. For example, a 2006 Chadian Instructor’s Manual reads: “Members of the armed forces and security forces of a country in conflict, members of militia, voluntary corps and resistance groups in a country in conflict, civilians who spontaneously take up arms during mass uprising are generally considered to be combatants.”[[233]](#footnote-233) In Spain, “members of other militias and other units subject to military discipline, like the Guardia Civil,”[[234]](#footnote-234) are also combatants. These other groups of combatants ought to be easily identifiable as such and ought to carry arms openly.[[235]](#footnote-235) The 2007 American Manual of Military Commissions offers a concise definition of who is a lawful enemy combatant:

(A) A member of the regular forces of a state party engages in hostilities against the United States;

(B) A member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) A member of a regular armed forces who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.[[236]](#footnote-236)

Finally, the Rwandan Minister of Defence “stated that government troops may only target enemies who carry arms and/or kill people. Hence, […] in an internal conflict, combatants are defined as persons who carry arms and/or commit inhumane acts against the population in relation to the hostilities and that the wearing or not of a uniform has no significance in this respect.”[[237]](#footnote-237) These four examples illustrate the inadequacy and shortcomings of the current IHL framework in the face of non-traditional asymmetrical warfare, counterterrorism, and counterinsurgency.

The most important limitation to these interpretations of combatant status is that they do not include individuals who might be involved in the conflict whilst not necessarily being member of armed groups or involved in the killing. For example, following these legal interpretations of combatant status, a munitions factory worker or key facilitators would not be a legitimate target. However, the context in which drones are being deployed, part-time fighters and individuals who pose threats whilst falling out of the categories above are a common occurrence. To overcome this challenge, IHL relies on the concept of ‘direct participation in hostilities’ (DPH).

According to IHL, civilians must be protected against direct attack, ‘unless and for such time as they take a direct part in hostilities’. However, neither the Geneva Conventions nor their Additional Protocols provide a definition of what conduct amounts to direct participation in hostilities. The contemporary challenge, therefore, is to provide clear criteria for the distinction not just between civilians and the armed forces, but also between peaceful civilians and civilians who directly participate in hostilities.

The ICRC believes three key questions need clarification: (1) Who is considered a civilian for the purposes of conducting hostilities? (2) What conduct amounts to direct participation in hostilities? (3) What are the precise modalities according to which civilians directly participating in hostilities lose their protection against direct attack?[[238]](#footnote-238)

The concept of DPH remains obscure and unclear, even after the ICRC’s attempts to provide interpretative guidance.[[239]](#footnote-239) Therefore, in addition to contributing to the understanding of discrimination in the just war literature, the re-evaluation this thesis undertakes will also contribute to the understanding of the concept of DPH, as will be explored later in this thesis.

B. Summary

In short, this chapter has identified three key approaches to discrimination in the just war literature. First, the traditionalist interpretation which sees all soldiers as equal and they are legitimate targets in war. Additionally, civilian workers in factories directly related to the war effort are assimilated to the soldier class but only when at they are working. Secondly, a ‘moderate traditionalist’ approach rejects the moral equality of combatants but maintains the independence of *jus ad bellum* and *jus in bello*. This interpretation assigns liability on the basis of engagement in harm. Thirdly, revisionist interpretations reject the moral equality of combatants as well as the independence of *jus as bellum* and *jus in bello*. They assign liability on an individual basis according to responsibility. These rather different interpretations demonstrate an apparent lack of consensus. In order to be able to uphold the discrimination criterion in drone warfare, a clear definition is necessary. The review of these approaches also highlighted a recurring challenge in the discrimination literature: the identification problem. Even when authors like Walzer see the entire soldier class as a legitimate target, the problem of identifying the soldiers remains, especially in contemporary asymmetrical warfare. Another problem linked to the identification of legitimate targets is the issue of calculations: how much harm is necessary to become a threat and thus a legitimate target? These issues are left unresolved, making discrimination a very difficult task.

Nevertheless, the main element to keep in mind from the discussion of this chapter is the importance of discrimination. It is an essential criterion for wars to be fought justly and morally. Discrimination matters and it is not to be discarded due to its complexity. To the contrary, the challenges of modern warfare and the use of non-traditional tactics such as guerrilla and insurgencies blur the line between legitimate and illegitimate targets, reiterating the importance of discrimination. In traditional wars, legitimate targets were combatants and non-combatants were illegitimate targets; discrimination and identification were straightforward tasks. However nowadays, discrimination cannot be simplified to the soldier-civilian dichotomy found in traditional just war approaches and international humanitarian law. A more comprehensive approach to discrimination is necessary. It is with this in mind that the following chapter examine the way the line between legitimate and illegitimate targets ought to be drawn in contemporary drone warfare.

Chapter 2: Drones and Discrimination

They’re the worst form of war, except for all the others.

- William Saletan[[240]](#footnote-240)

Strategic innovation in warfare is driven by a transformation in one of the three key components of war: a change in the enemy’s identity, a change in the definition of success (what constitutes the end of the war or end-of-state), or a change in the methods of warfare.[[241]](#footnote-241) Transformation of any of these three factors will drive strategic innovations because new strategies will be required to face the new realities of the war. In the case of drone warfare, these weapon systems are often seen as being an important driver of strategic innovation making force easier to deploy since it becomes less costly, which is one of the main sources of ethical unease that surrounds these weapons.[[242]](#footnote-242) Nevertheless, it is important to remember that UAVs are not as different as one might think, and they use the same precision-guided missiles as conventional combat aircrafts. Further,

The distancing of weapon system operators from their targets is nothing new. From ancient weapons, such as spears, slings, bows, and catapults, through firearms and artillery, to intercontinental ballistic missiles, military technology has made it possible for attackers to be increasingly distant from their targets. In this sense, a drone is no different from other long-range missile systems, except that it is not destroyed in the attack and can return to base for reuse.[[243]](#footnote-243)

The novelty of drones is twofold. Firstly, drones are different because the pilot is removed from the aircraft. However, the pilot and operators are not entirely eliminated, they are simply relocated somewhere on the ground, distanced from the battlefield. Secondly, the use of drone technology brings a new form of targeting made possible by the greater intelligence-gathering capabilities, extended loitering abilities, and flexibility in targeting of unmanned aircrafts. Therefore, the driving factor of strategic innovation is a combination of the new weapons (new technology) with the changing context (type of war) in which force is being used. Indeed, the War on Terror as well as other counterterrorism and counterinsurgency campaigns mark a considerable change in the enemy’s identity since it no longer takes the form of traditional state armies. The change in the enemy’s identity is significant because there is a discrepancy between the ways in which the discrimination requirement is understood in theory (and in the law of armed conflict) and the realities of contemporary asymmetrical warfare, leading to considerable ethical problems. To ensure that the discrimination criterion is implemented in a way that will be true to the just war tradition’s aim, this requirement ought to be understood and interpreted in a manner that overcomes the applicability issues of revisionist interpretations (the ‘real-world objection’). Moreover, the traditionalist interpretations of discrimination are also problematic as they lower the liability threshold too much. Thus, the aim of this chapter is to overcome the real-world objection by making the morality of warfare more applicable in modern combat, especially in UAV warfare. To do this, two principles of discrimination will be presented. Firstly, *individual discrimination* identifies legitimate targets by their moral responsibility in the conflict. Secondly, *situational discrimination* identifies legitimate targets as individuals who pose an immediate threat.

A. Theoretical Challenges

The application of the soldier-civilian line in modern warfare raises many questions for the interpretation of discrimination in conflict. Traditionally, the ‘soldier’ group of legitimate target is limited to the uniformed enemy combatants that are part of an organized group. This means that non-uniformed combatants do not fit the classic ‘soldier’ group, thus cannot exist as a category. This makes it difficult for many insurgents and terrorists to be legitimately identified and targeted because they do not fall in the ‘combatant’ category according to IHL. Indeed, the International Committee of the Red Cross states that, “All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.”[[244]](#footnote-244) Moreover, the third Geneva Convention of 1949 reiterates the importance of wearing distinctive emblems, even for militia and resistance groups.[[245]](#footnote-245)

Since terrorists and insurgents do not fit the traditional requirements of the ‘soldier’ category, this classification becomes widened in practice in order to include other non-uniformed individuals taking part in hostilities who should be considered legitimate targets because of their actions. Broad criteria upon which to identify legitimate targets beyond uniforms are established and the ‘soldier’ category is expanded in contemporary conflict to encompass all potential enemies. Because the targeting becomes based on generalisations and guilt by association, innocent illegitimate targets are wrongly identified as legitimate targets. This is problematic and raises important issues in regard to the implementation of the discrimination criterion in war. Indeed, this expansion of the ‘soldier’ or ‘combatant’ category leads UAV strikes to become indiscriminate (where no attempt is made to distinguish between legitimate and illegitimate targets) or mis-discriminate. This latter type is especially important because although an attempt to distinguish between legitimate and illegitimate targets is made, the strike cannot be considered discriminate because it wrongly identifies illegitimate targets as legitimate. Although mis-discriminate strikes are not entirely indiscriminate, they are based on interpretations that are unjust or too broad to be considered discriminate. Mis-discriminate strikes illustrate the need for the morality of war to be more adapted and applicable to the realities of contemporary drone warfare since mis-discriminate strikes would not happen if the discrimination criteria was easily applicable in the context of drone warfare.

Broadly, because the line between legitimate and illegitimate targets is increasingly difficult to draw, the targeting strategies used in drone warfare (personality strikes, signature strikes, and double tap strikes) rely on the old and out-dated soldier-civilian line where the ‘soldier’ category is excessively widened by using broad generalisations and guilt-by association. Since uniforms cannot be used to identify legitimate targets (as is the case when using the classic soldier-civilian line of discrimination), all military-aged men in strike zones are considered enemy fighters and therefore legitimate targets.[[246]](#footnote-246) This approach is seen as the logical progression of uniforms on battlefields. According to Jo Becker and Scott Shane of *The New York Times*, this approach to targeting follows a ‘simple logic’: “people in an area of known terrorist activity, or found with a top Qaeda operative, are probably up to no good. ‘Al Qaeda is an insular, paranoid organization — innocent neighbors don’t hitchhike rides in the back of trucks headed for the border with guns and bombs,’ said one official, who requested anonymity to speak about what is still a classified program.”[[247]](#footnote-247) This approach to targeting is troubling because it is mis-discriminate (the interpretation of the discrimination criterion is too broad to be considered just and discriminate). Even in regions with mandatory military service, only a portion of the military-aged population is part of the armed forces. This becomes clear when looking at countries with high military-civilian ratios, such as Israel for example. Out of its general population of about 8,174,000, nearly 3,600,00 are of military age, of which 3,000,000 are considered fit-for-service.[[248]](#footnote-248) Yet, Israel’s total military personnel (combining reserves and active personnel) is only around 718,000.[[249]](#footnote-249) Assuming a 1:1 sex ratio for simplicity, Israel has about 1,800,000 military-aged men, which is considerably larger than its force of 718,000 (even ignoring that about 34% of Israeli forces are women).[[250]](#footnote-250) This over-simplified example shows that considering all military-age men leads to an excessive widening of who can be considered a legitimate target. The ‘military-age men’ (or MAM) approach is only one of the ways in which the targeting strategies used in drone warfare widen the soldier group. Yet, this approach to targeting is not entirely indiscriminate since some attempt to distinguish between legitimate and illegitimate targets is made. Nevertheless, this targeting strategy leads to mis-discriminate strikes because being of ‘military age’ cannot be considered as a just and discriminate way to identify legitimate targets. It is important to note that the MAM approach to targeting is not entirely new and pre-dates the use of drones. It was developed because of a difficulty in identifying legitimate targets in an asymmetrical context. However, the use of UAVs in asymmetrical warfare has made this type of strategy the rule rather than the exception. This is because the loitering capabilities unique to drones allow for the targeting of more ‘targets of opportunity’ where operators can stay in certain areas and target all military-aged men in their area. Thus, although not new, targeting strategies such as the MAM approach are facilitated by the use of drones, which has ultimately led to a new type of warfare combining the targeting of long-range technology with the loitering of conventional on-the-ground deployments.

Essentially, there is an incongruity between a drone’s potential for discriminate warfare and the current realities of drone warfare. The targeting strategies do not live up to the expectations for a highly discriminate use of force. Although drones offer the potential for a proportionate and discriminate use of force relying on high levels of intelligence, the targeting strategies developed in contemporary asymmetrical warfare are ethically problematic because they lead to the use of generalisations and mis-discriminate strikes. For the discrimination criterion to be implemented and upheld in drone warfare, it ought to be understood in a way that can be applicable during operations. The way discrimination is interpreted impacts directly on the targeting strategies used in war. With UAVs specifically, the most important strategic aspect behind strikes is the targeting principle on which attacks are based. This is ultimately founded on the interpretation of discrimination. However, this applicable understanding ought to move away from the classic soldier-civilian line. Indeed, for the discrimination criterion to be implemented in a way that remains true to its original purpose of limiting suffering by calling for harm to only be inflicted on legitimate targets, a more comprehensive interpretation of this discrimination criterion is necessary. An updated twofold understanding ought to replace the classic and out-dated civilian-soldier line of discrimination. In order to proceed with this reinterpretation, it is essential to begin with a review of the limits of revisionist and traditional just war tradition in the context of drone warfare. On the one hand, revisionist interpretations of discrimination are interesting as they discuss the criterion as it ought to be. As such, they set a goal which all should strive to achieve. However, the morally demanding requirements of these interpretations make them difficult if not impossible to be implemented in combat, thus running the risk of being discarded and considered simply as philosophical discussions on morality and ethics rather than a perhaps more applicable approach, maintaining the status quo. On the other hand, the current state of affairs is also problematic as it leads to mis-discriminate strikes, especially in the context of UAV warfare. Since ‘combatants’ are difficult to identify, profiling and generalizations are used to identify would-be ‘soldiers’ as legitimate targets, which often leads to indiscriminate or mis-discriminate strikes. In order to make war and more specifically the military use of UAVs appropriately discriminate, a moderate revisionist interpretation of discrimination will be presented whereby legitimate targets are identified as such by either being morally responsible for a threat or by posing an immediate threat. This will bring a new understanding of discrimination with greater applicability to revisionist just war theory in the context of drone warfare.

The discussion bellow will explore the issues related to the traditional-revisionist division in the Just War literature. It will be argued that the moral equality of combatants ought to be rejected. Moreover, it will also be argued that the revisionists’ accounts of discrimination ought to be made more applicable if they are to have an impact in drone warfare. An applicable revisionist account of discrimination will be presented, overcoming the ‘real-world objection’.

1. Traditionalist Interpretations

Firstly and as discussed previously, traditional just war theory’s interpretation of discrimination is the closest one to the current *status quo* in war. IHL and contemporary Just War Theory developed in parallel, explaining the many similarities they share. Additionally, “since the publication of Michael Walzer’s *Just and Unjust Wars*, in 1977, a ‘traditionalist’ stance has dominated thinking about the morality of war in universities, military academies, and international legal circles.”[[251]](#footnote-251) As was presented in the previous chapter, Walzer’s approach is a formulation of the traditional or orthodox view that all combatants are legitimate targets and all non-combatants are illegitimate targets, which is also what the rules of war dictate[[252]](#footnote-252): “the victims of war fall into two classes-combatants and noncombatants. Combatants may be killed almost without constraint. Noncombatants enjoy substantial protections.”[[253]](#footnote-253) Membership-centric approaches to liability are based on the independence *jus ad bellum* and *jus in bello*: “Both international law and traditionalist just war theory assume that any combatant who adhered to these three principles [of *jus in bello* discrimination, proportionality, and necessity] fights permissibly, regardless of what she is fighting for. This is the ‘moral equality of combatants, also known as the ‘symmetry thesis’.”[[254]](#footnote-254) In short, all combatants are equal and they are all legitimate targets. The line between legitimate and illegitimate targets is the same as the one between combatants and non-combatants.

This understanding of discrimination is easily applicable in combat and does not change what was historically required in war and it reflects the lines drawn by the Geneva Conventions. In the midst of battle, soldiers have one question to ask before attacking: civilian or soldier? This has the considerable advantage of being highly practical as well as offering great operational clarity. Indeed, the chief advantage of traditionalist membership-based approaches remains that they can be applied and implemented. After all, the aim of just war theory is to make war more just, not solely on paper but on the battlefields. For military forces, instructing soldiers that an entire class is immune to attack is both realistic and can be practical depending on the type of groups involved in the conflict. Indeed, they can say that soldiers (who ought to be in uniform, as dictated by the laws of war) are always liable to attack and civilians are not. However, this requirement is not sufficient for drone warfare to be discriminate and just. In modern conflict and as events of last decades have shown, inter-state wars in their classic format are increasingly rare and they are replaced by asymmetrical conflict where the identification of combatants is difficult, especially in cases of insurgencies, or in the context of the War on Terror or the War on al-Qaeda for example. Indeed, contemporary conflict is characterised by the difficulty to identify enemy targets, especially since these routinely hide amongst the civilian populations who are generally illegitimate targets. The legitimate targets are difficult to differentiate from the illegitimate targets since they are not identifiable by uniforms as is the case with traditional armies.

In addition to this, rebel or terrorist groups or individuals are technically non-combatants in the classical sense of the word since they are not part of a state’s army or an organised militia, even if they should be considered legitimate targets because of their actions. IHL has tried to overcome this issue with the concept of ‘direct participation in hostilities’[[255]](#footnote-255) but without providing a clear definition to those terms. In practice, to overcome the difficulty stemming from the need to target individuals who are not identified as legitimate targets, a terrorist wearing civilian clothing for example, the targeting strategies used in contemporary drone warfare have developed ways to widen to ‘soldier class’ moving away from visible uniforms as a key identification factor. Therefore, even in the face of these difficulties, the strategies used in drone warfare rely on the soldier-civilian line of discrimination. However, in order to accommodate this existing interpretation of discrimination to the new forms of warfare, the ‘combatant class’ is determined by the use of ‘signatures’, profiling, and generalisations to overcome the difficulty to identify legitimate targets. Ultimately, this leads to mis-discriminate drone strikes. This has the consequence of making the use of force less discriminate, as will be demonstrated in the case study section of this thesis. Hence, the traditionalist membership-based understanding of discrimination is insufficient in contemporary drone warfare. This is also the central problem with the current state of discrimination in drone warfare and the reason why a reinterpretation of the just war discrimination criterion is necessary. The idea that combatants are legitimate targets and that civilians are illegitimate targets is not inherently flawed or problematic. However, issues arise when it is implemented in contemporary asymmetrical context where civilians take part in the hostilities and where the intelligence-gathering capabilities of drones are expected to overcome these issues by being able to find and eliminate legitimate targets with quasi-surgical precision, with ‘find, fix, finish’ missions for example. In other words, the use of drones is expected to be a solution to the problem of identifying legitimate targets in contemporary asymmetrical warfare but this is not the case. Drones are not an omniscient panacea that will resolve the problems related to the identification of legitimate targets. Instead of focussing on group membership, liability should come from actions and the moral equality of combatant ought to be rejected, as suggested by revisionists.

2. Revisionist Interpretations

As was presented in the literature review, revisionist just war theorists, championed by Jeff McMahan, reject the moral equality of combatants and the independence of *jus ad bellum* and *jus in bello*. Instead, they focus on individual liability and proportionate individual moral responsibility*.* Liability-based approaches to discrimination, such as the one presented by McMahan, appear extremely difficult, if not impossible, to implement in combat chiefly because of the complicated evaluations they require. Arguably, soldiers cannot be expected to assess the moral responsibility of every individual they face (soldier or not) to determine if they are liable to be attacked or not. The idea of liability based on individual moral responsibility is interesting, but applicability issues cannot be ignored. Because of the difficulty in identifying morally responsible individuals, revisionist interpretations can be seen as being rather utopian. Yet, they are not entirely impossible to implement, as the example of the ‘Personality Identification Playing Cards’, also known as the ‘most-wanted playing cards’ produced by the US military in the 2003 War in Iraq.[[256]](#footnote-256) Yet, these cards were prepared by specialists outside of the battlefields and only represented a small fraction of the overall ‘enemy’ casualties. Importantly, soldiers were not required to evaluate individual moral responsibility of each individual potential target they face in the heat of combat.

More generally, the revisionist just war tradition rejects the moral equality of combatants on the basis that unjust combatants (fighting in unjust wars) can never be justified because they lack just cause (*jus ad bellum*). For example, “when ISIL attacks Syrian and Iraqi towns, their intended goals cannot justify *any* unintended harm to noncombatants.”[[257]](#footnote-257) Legitimate targets are responsible for wrongful (unjust) threats. Since just combatants do not pose wrongful threats, they are not liable to be killed. This is a rejection of the traditionalist idea that there can be a clear line between combatants and non-combatants (if soldiers are not equal, then civilians are not equal either). This opens the door for an individual-centric approach to targeting. Essentially, rather than accepting the moral equality of combatants as a key element in discrimination, the revisionists focus on individual moral responsibility:

The revisionist account usually begins from a simple but powerful basis: the individual rights of all people. These revisionists argue that our moral understanding of war must respect and take seriously people’s rights, including the right to not be killed unjustly, just as those rights demand respect in any context other than war. They conclude that in order to do this some of the central vestments of the classic just war tradition must be discarded.[[258]](#footnote-258)

Considering this central focus on individual rights, the key factor in determining liability stems from individual moral responsibility for the war, moving away from the traditional soldier-civilian line, which is considered crude and overly simplistic. This approach to discrimination becomes important and relevant in asymmetrical warfare because there are situations where certain individuals should be considered legitimate targets because of their involvement, but who are not considered legitimate targets following the traditionalist interpretations of discrimination (not members of the soldier class or not actively engaged in harming for example). In the context of drone warfare, the central issue with the revisionist interpretations of discriminations is their lack of applicability. Indeed, as was highlighted in Chapter One, the criteria upon which they assign liability are difficult to apply in everyday combat strategy, although it is not entirely impossible. The direct consequence of this is a reinforcement of the status quo. Because of their limited scope of applicability, revisionist interpretations of discrimination are disregarded in policy-making and in the elaboration of targeting strategies. What remains, therefore, is the traditional understanding of discrimination, which is the out-dated soldier-civilian line discussed earlier. In short, without impact to their theoretical and intellectual value, the revisionist interpretations of discriminations fail to offer a viable alternative that can be implemented in contemporary conflict, especially drone warfare.

3. The Real-World Objection

As was discussed previously, various degrees of responsibility for the war or for threats are difficult to find and especially assign in the midst of battle. Thus, the implementation of interpretations of discrimination based on individual liability criteria (revisionist approaches) can be seen as so difficult to implement that it undermines achieving the desired objective. Because of the unrealistic principle and unworkable requirement set out by revisionist interpretations, the membership-focussed traditionalist status quo is maintained, even if it is not the most just way to interpret and implement discrimination in contemporary drone warfare. This type of objection to revisionist approaches is often referred to as the ‘real-world objection’. Bradley Jay Strawser phrases this objection as follows: “I may grant that the revisionist objections to the traditional just war theory’s tenets (such as the rejection of the MEC [moral equality of combatants]) are technically correct, and I grant that the revisionist account for liability to be killed in war is morally superior. But that as it may, there’s just no way to implement the revisionist in the real world, so it must be rejected.”[[259]](#footnote-259) This objection is reflected in Seth Lazar’s critique of the revisionist approaches to just war theory. He rightly states that a rejection of the moral equality of combatants brings a collapse of both the ‘combatant’ and ‘non-combatant’ categories.[[260]](#footnote-260) Lazar argues that revisionists face a crucial dilemma: “by arguing that liability is grounded in responsibility for unjustified threats, not the fact that one poses the threat, McMahan opens the floodgates to total war.”[[261]](#footnote-261) This leads to an important dilemma: “If we raise the liability threshold too high, then many who we think ought to be legitimate targets in war will be excluded. On the other hand, if we lower the liability threshold in response to this problem, then it invites its own problem: far too many people will fall into the category of being legitimate targets than is plausible for a just war.”[[262]](#footnote-262) This liability threshold issue is key when it comes to discrimination in UAV use and asymmetrical warfare.

Considering the different and conflicting approaches to liability in war as well as their implications, questions remain regarding the best way to interpret discrimination in the contemporary context of asymmetrical conflict and drone warfare. The fundamental obstacle to overcome is the real-world objection. On this issue, Strawser rightly argues that the implementation of a revisionist account of the just war tradition would require substantial changes to the way war is being conducted as well as the way the requirements are implemented.[[263]](#footnote-263) “Indeed, *jus in bello* principles would have to be reformulated anew in many ways in order to align with the rights respecting changes proposed by the revisionists. Many have responded that, in actual practice, such changes are unworkable; that the revisionist account cannot be applied in a just way to the real world of warfare.”[[264]](#footnote-264) Strawser attempts to overcome these difficulties by suggesting: “tying combatant status directly to the degreed nature of liability; to re-envision combatant-hood away from an all-or-nothing condition to one of degrees.”[[265]](#footnote-265) Thus, a conflict-by-conflict examination would replace the classic binary combatant—non-combatant categories and one’s status would be determined according to degrees ‘reasonable perceived liability’ (RPL), and not on whether one is posing a threat.[[266]](#footnote-266) RPL would account for all factors of one’s engagement, from coercion to confusion.[[267]](#footnote-267) “Once broad levels of RPL were determined for a population, correlating categories of degreed combatant and noncombatant statuses could then be applied accordingly. Specialized rules of engagement (ROE) could then be created which best allow a military to achieve victory yet come as close as possible to matching the correct level of response to the RPL for each derived category.”[[268]](#footnote-268) Strawser claims that “by developing complex levels of enemy status we could adequately cover the vast majority of cases that just soldiers could engage an enemy with minimized moral risk.”[[269]](#footnote-269)

Although compelling, this project to offer a revisionist answer to the real-world objection is problematic. Adding a multitude of different types of legitimates targets, with different rules of engagement for each, would make the application of the discrimination criterion in combat more problematic and difficult than it already is for three key reasons. Firstly, increasing the types of combatants does nothing to address a key issue in asymmetrical warfare where combatants and non-combatants are difficult to distinguish (identification and calculation issues of revisionist interpretations remain present in the identification of the RPL of individuals). Secondly, integrating a degreed approach to liability increases the chances of errors as well as increasing the chances for dis-proportionate uses of force. For example, if an individual can be identified as liable to a certain limited degree of harm which is not sufficient to make the use of lethal force proportionate and legitimate, then the use of lethal drone strikes against the individual would be dis-proportional. Rules of engagement are already multi-levelled (tiered) and complicated. They can easily be misunderstood. Therefore, adding different rules of engagement for the different degrees of combatants that might be encountered increases the risk for confusion and error in regard to the ROE in application at various moments. Thirdly, the complexity brought by the additional rules of engagement increases the potential for error (operating under the wrong ROE). This can lead to the reinforcement of the status quo because the difficulty to determine under which ROE to operate, leading commanders to use the more permissive ROE. In that sense, revisionist interpretations of discrimination are already charged with being too difficult to implement and this approach does not overcome these issues. Strawser’s RPL is interesting but does not present a convincing answer to the real-world objection. Additionally, Strawser believes that technological advances in military weaponry, especially with the use of UAVs, will allow for a more discriminate warfare because of their intelligence-gathering abilities.[[270]](#footnote-270) However, the reality of UAV warfare is rather different from this portrayal. Even considering the quality and volume of information that is available thanks to the use of drones, the strategies behind the offensive deployment of drones bring an arguably *less* discriminate warfare. This is because of the targeting principles and strategies used. Because of the way the discrimination criterion is understood, the current state of UAV warfare is considerably close to the situation feared by the total-war objection instead of overcoming the real-world objection. Indeed, because discrimination is interpreted in a way that relies on two ‘all or nothing’ categories, crude generalizations and profiling are used to make liability fit these categories, such as considering all military aged men as legitimate combatants for example.[[271]](#footnote-271) Instead of leading to multiple well-defined categories of legitimate and illegitimate targets, as Strawser suggests is possible, the use of UAV brings a widening of a single ‘combatant’ category (legitimate targets), and consequentially, the group of illegitimate targets is shrinking. Thus, the real-world objection to revisionist just war theory remains.

Briefly, the current state of affairs is one where the line between legitimate and illegitimate targets is assimilated to the soldier-civilian line. Yet, this is not the way to interpret discrimination if the criterion is to be upheld and for modern warfare to become more just. This is especially true in contemporary asymmetrical warfare where the line is increasingly blurred between combatants and non-combatants. The status quo lowers the liability threshold necessary to be considered a legitimate target, widening the ‘combatant’ category, with drone strikes targeting all military-aged men for example. The total war objection to revisionist just war theory is true in regard to the current state of affairs since too many individuals are considered legitimate targets for the use of force to be considered just. The next section of this chapter will present an alternative interpretation of discrimination which aims to overcome both the real-world objection and the total war objection. To achieve this, a readily applicable and moderate account of revisionist just war theory will be presented.

B. Reinterpreting the Criterion

For the just war criterion of discrimination to be upheld in the context of modern drone warfare, the requirement ought to be interpreted in a way that overcomes the issues highlighted in the real-world objection. More importantly, discrimination must also to be understood in a way that will overcome the total war objection, which is becoming dangerously true in UAV warfare. The realities of contemporary asymmetrical warfare show that discrimination between legitimate and illegitimate targets is not as straightforward as it once was. War is no longer set in battlefields away from civilian populations where the only parties affected and involved in the conflict are the states’ armed forces wearing colourful and distinguishable uniforms. Considering this, discrimination ought to be interpreted in a way that can have a direct impact in contemporary drone warfare in order to ensure that the criterion is upheld and has an impact. This section will present a moderate approach to revisionist just war theory in order to overcome some of its main sources of criticism, being the lack of applicability. This more ‘realistic’ responsibility-based account of liability is unique because it includes two principles of discrimination instead of only one. The two principles of discrimination presented in this thesis are *individual discrimination* and *situational discrimination*. The direct implication of this dual approach is that it brings a greater scope for applicability to the criterion.

Firstly, discrimination is understood on an individual level where legitimate targets are identified as such because they bear moral responsibility for threats. This is *individual discrimination* and it is based on individual moral responsibility, as presented in much of revisionist just war theory. When targets are identified as legitimate following *individual discrimination*, they are liable until there is strong evidence for the end of their implication in the conflict. Thus, identified legitimate targets for personality strikes can be targeted at all times, even when they are not currently engaged in the conflict at the moment of the strike (if they are ‘off-duty’ for example). This means that *individual discrimination* allows for the targeting of the ‘naked soldier’ if it has been identified as a legitimate target. In drone warfare, the use of these weapons make it possible to verify moral responsibility prior to launching attacks, which addressed the ‘real-world objection’ to revisionist theory. In other words, the use of drones makes responsibility-based approaches to liability possible and applicable on the battlefields in a way that is not possible with more conventional deployments such as boots-on-the-ground.

When applying *individual discrimination*, being the commander or leader of a group of fighters, being a known recruiter for the enemy organisation, or being a key facilitator are all actions considered in evaluating an individual’s moral responsibility for the conflict. These last two categories are especially important in the context of asymmetrical warfare where the line between civilians and combatants is increasingly blurred and many individuals who would traditionally be considered non-combatants contribute to the creation of threats in a way that ought to make them legitimate targets, by being involved in the fabrication of explosives for example. These categories were identified because they constitute direct contributions generating moral responsibility to a point where without their actions, the fighting would not be possible. In practice, *individual discrimination* is the understanding of discrimination behind elaboration of targeting lists, which are then used in UAV personality strikes.

Secondly, *situational discrimination* places a greater emphasis on threats instead of responsibility. Here, liability comes from immediate threats. *Situational discrimination* is an essential addition to *individual discrimination* because it allows for the identification of legitimate targets whose level of individual responsibility is unknown (*individual discrimination* cannot be implemented). Coerced threats would fall in this category since they cannot be considered as morally responsible. An example of coerced threat is the ‘human bombs’ used by Boko Haram in Nigeria. The children are often drugged before being forced to carry out suicide bombing in public spaces such as markets.[[272]](#footnote-272) According to UNICEF, between January and August 2017, 83 children have been used to carry out this type of coerced suicide attacks.[[273]](#footnote-273) In the case of coerced threats, legitimate targets are identified as such because of the threats they pose, and the situations they are involved in. This second discrimination principle might not appear revolutionary since it bears many similarities with the principle of self-defence but it is essential nonetheless. Indeed, it needs to be integrated in a moderate revisionist account of discrimination because it sets a clear framework for the targeting of innocent threats.

In *situational* *discrimination*, it is essential to clarify and delimit the meaning of ‘imminent threat’. Much like with the excessive expansion of the combatant class, the use of the term ‘imminent’ can lead to a widening of acts considered threatening enough to legitimatize the use of lethal force. This raises a series of questions on the scope of pre-emption and prevention in the face of upcoming threats. ‘Imminent’ ought to be understood as referring to an immediate threat and where the use of lethal force is the *only* option to avoid the harm in a short period of time. Imminence and pre-emption ought to be interpreted following a temporal approach where force can be used if an attack is imminent. This fits with the customary international law precedent set by the *Caroline* case of 1837 which states that a threat needs to be “instant, overwhelming, and leaving no choice of means, and no moment of deliberation”[[274]](#footnote-274) to justify a pre-emptive use of force. *Situational discrimination* exists to add more applicability to *individual discrimination*. This is especially important in cases of non-morally responsible threats (or innocent threats). An example of such innocent threat would be a child picking up a loaded rocket-propelled grenade (RPG) launcher and placing it in launch position, as was portrayed in the 2014 film *American Sniper*. Following *individual discrimination*, this child would not be considered a legitimate target because it is not individually morally responsible in the conflict. More broadly, child soldiers are in a complex situation where they are agents of the threats without the moral responsibility for their acts.[[275]](#footnote-275) On that topic, McMahan states: “There is certainly a case to be made for the claim that in many or most child soldiers, the capacity for moral agency is absent or has been systematically subverted.”[[276]](#footnote-276) Furthermore, McMahan argues: “What seems most reasonable is to view child soldiers, in general, as people who have a diminished capacity for morally responsible agency and who act in conditions that further diminish their personal responsibility for action in war. […Thus] child soldiers are liable to attack but to a diminished degree.”[[277]](#footnote-277) *Situational discrimination* provides a framework within which the targeting of innocent threats or child soldiers would be legitimate: if they are posing an immediate threat and the use of force is they only way to end the threat. When an attack is imminent but *individual discrimination* cannot be implemented because the source of the threat is not on a targeting list or because they are not morally responsible, then *situational discrimination* can be used to justify the targeting of an immediate threat when no other means are available to prevent the imminent attack.

Grey areas will always remain in war, but the aim is to minimize them with a clear and applicable interpretation of discrimination, which will make the criterion easier to implement and uphold in modern warfare. Moreover, the use of drones more specifically offers a unique opportunity to hold-off on strikes when there are doubts on the status of the intented target and to continue to gather information. This flexibility is unique to drones as a weapon system and should be used as much as necessary in order to make the use of force as discriminate as possible. Broadly, this twofold interpretation of the discrimination criterion offers a great advantage: it is practically clear and applicable in addition of offering greater moral clarity, which has the potential for a more discriminate use of drones in contemporary asymmetrical warfare. Part Two of this thesis will review in detail the impact of such interpretation on the way the discrimination criterion can be upheld in modern drone warfare. This alternative dual approach to discrimination bears certain similarities with Larry May’s twofold interpretation. Firstly, May argues that the classic civilian-soldier classification must be examined and applied as a first level of discrimination.[[278]](#footnote-278) This is what May calls the “rough-grained”[[279]](#footnote-279) determination and such interpretation should only be used when “no other information available, other than the person one confronts is a civilian or a soldier or where there is insufficient time to get more information, due to an emergency, even though such information does exist.”[[280]](#footnote-280) Secondly, the “fine-grained” determination of whether a person is a legitimate target in war is contingent on if the person in question poses a threat or is in a vulnerable position and ought to be used whenever more information is available and the situation is not an emergency.[[281]](#footnote-281) May’s interpretation is an acknowledgement that discrimination can and should be multi-levelled. Nevertheless, his ‘rough-grained’ interpretation remains reliant on the problematic status quo based on combatant status and does not overcome the identification issues presented earlier. Secondly, May’s ‘fine-grained’ interpretation of discrimination does not go far enough to make targeting in drone warfare more just. This is because it only sets guidance for non-emergency situations, ignoring the importance and frequency of ‘emergency situations’ (involving targets of opportunity) in warfare. Moreover, situations where a ‘fine-grained’ approach to discrimination would be applied (because a person is posing a threat) are likely to be emergency situations, with individuals preparing attacks or making explosives for example, and thus would not fall in the ‘not an emergency’ category, thus returning to the problematic ‘rough-grained’ interpretation. Instead, the use of *situational discrimination* allows for the targeting of individuals who become legitimate targets by posing an imminent threat.

In summary, for the discrimination criterion to be upheld and implemented in drone warfare, it must have a double interpretation. Firstly, *individual discrimination* identifies legitimate targets in regard to moral responsibility for threats. Although difficult to implement in real-life situations, they are not entirely unworkable, as the example of the ‘most-wanted’ cards shows.[[282]](#footnote-282) Secondly, when the personal identity of targets is not available, legitimate targets are differentiated from illegitimate targets by their direct implication in the combat activities, when the threat is immediate and responsibility is unknown or lacking. This is the type of flexibility that is missing from Strawser’s RPL. This additional level is *situational discrimination* providing some much-needed flexibility in the face of changing contexts and bears similarities with Orend’s threat-based liability discussed in the previous chapter.

C. Proportionality

Discrimination is not the only limit to the way war is fought since *jus in bello* also includes a proportionality or necessity requirement.[[283]](#footnote-283) Therefore, proportionality can be seen as the ‘other’ *jus in bello*. This requirement calls for restraint in the use of force, in the means of war.[[284]](#footnote-284) Proportionality can allow for some harm to illegitimate targets, in cases of the Doctrine of Double Effect or in Supreme Emergencies for example, as discussed in the previous chapter. Briefly, “the principle of proportionality requires a balancing of aims that are at times contradictory: the protection of civilians and the achievement of military advantage.”[[285]](#footnote-285)

The first mention of proportionality in the just war tradition comes in the form of a *jus ad bellum* criterion where, the proportionality requirement calls for a balancing of the costs of war with its benefits. [[286]](#footnote-286) “A state must, prior to initiating a war, weigh the *universal* goods expected to result from it, such as securing the just cause, against the *universal* evils expected with to result, notably casualties. Only if the benefits are proportionate to, or ‘worth’, the costs may the war action proceed.”[[287]](#footnote-287) The *jus in bello* proportionality requirement has many similarities with the one found in *jus ad bellum* since they both focus on limiting the use of force and the harm caused. Therefore, it is important to bear in mind that *jus in bello* proportionality “is not about equality of death of civilian suffering, or even about firepower returned being equal in sophistication or lethality to firepower received. Proportionality weighs the necessity of a military action against suffering that the action might cause to enemy civilians in the vicinity.”[[288]](#footnote-288) This requirement is important because proportionality acts as a form of balance to discrimination: not all identified legitimate targets are justly liable to being attacked or killed. Even with identified legitimate targets, the use of force ought to be proportionate to their level of individual responsibility as well as being proportionate to the advantage sought. In other words, simply drawing the line between legitimate and illegitimate targets is not sufficient to make lethal strikes just, the force used needs to be proportionate to the level of involvement in the conflict. As Frowe states: “Proportionality must be internal to liability because one cannot simply ‘be liable’, but rather be liable *to something* – namely, to suffer a certain amount of harm. Stipulating the amount of harm one is liable to seems to be the work of the proportionality requirement.”[[289]](#footnote-289)

Returning to the double interpretations of discrimination discussed previously, proportionality is of high importance, especially with *individual discrimination*, seeing as it calls for attention to be placed on the degree of individual responsibility. “Ordinarily, defenders are only permitted to use the minimum force necessary to repel the impending threat.”[[290]](#footnote-290) This implies that although non-combatants or civilians can often bear some moral responsibility for threats (by supporting the war effort and contributing to the micro-threats, as discussed in Chapter One), their implication is not necessarily sufficient to make them liable to be killed even if they are considered legitimate targets. Therefore, there is what Seth Lazar calls a ‘liability bar’ that goes along with determining whether a person is a legitimate target in war. This bar is set high in the case of non-combatants.[[291]](#footnote-291) This means that a large degree of individual moral responsibility is necessary to make the use of lethal force proportional.

Building on this, Orend’s interpretation of *jus in bello* includes a due care requirement, which works in conjunction with proportionality and discrimination. He argues:

The due care principle might also mean moving more closely on the military target to increase the likelihood of hitting it, and avoiding collateral civilian damage. […] Although this might sound silly at first, the due care principle might also, under certain conditions, require some kind of advance warning to nearby civilians. […] What the due care principle implies, above all else, is this: offensive tactics and manoeuvres must be carefully planned, in advance, with a keen eye towards minimizing civilian casualties.[[292]](#footnote-292)

This due care requirement will be of great importance in the application of discrimination in real-life situations. This issue will be discussed further in the case study chapters of Part Two. Essentially, the *jus in bello* proportionality requirement means that discriminating between legitimate and illegitimate targets is not sufficient for the targeting strategies used to be just. Targeting and target selection must also account for proportionality in both the use of force and in the means used.

Special care must be given in the selection of weapon systems to ensure that the damage brought by the use of force is not excessive compared to the military objective sought. Further, a liability threshold ought to be established in order to determine whether the use of lethal force is proportionate or not. However, UAV warfare poses a direct challenged to the respect of such a threshold because drones can only launch a strike or abstain from using lethal force. Drones do not offer the possibility for other non-lethal offensive actions, such as capture. Thus, the case of UAV warfare (and other forms of long-range targeting) differs from ‘boots on the ground’ warfare because it limits the possibility for proportionality in the use of force since drones are limited to either the use of lethal force or abstaining from the use of force altogether. It is essential to remain aware of the technical limitation of drones in their use of force. This therefore implies that discrimination needs to move beyond simply differentiating legitimate from illegitimate targets in drone warfare to also identify who is liable to the use of *lethal* force and who is not, seeing as other types of actions and interventions are not possible with drones. Proportionality calculations are assimilated to the application of the discrimination criterion in UAV warfare. In *individual* *discrimination*, proportionality (which amounts to the degree of harm one is liable to) is calculated with the establishment of UAV ‘kill lists’. Only legitimate targets whose individual moral responsibility for the conflict is sufficient to make them liable to be killed can be placed on a ‘kill list’. In *situational discrimination*, strikes will be both proportionate and discriminate if they are the only way to neutralize an immediate threat. This will be particularly important in the case of signature strikes and double tap strikes, as will be presented in the case studies of Part Two.

D. Summary

In summary, to be upheld in contemporary warfare, the just war criterion of discrimination ought to be interpreted in a ‘moderate revisionist’ dual way, overcoming both the ‘real-world objection’ and the ‘total war objection’. Firstly, *individual discrimination* states that legitimate targets are differentiated from innocent illegitimate targets by their moral responsibility for threats in the conflict. Secondly, another interpretation is necessary for cases where information on responsibility is not available but there is an immediate threat to be addressed. Here, *situational discrimination* is to be based on whether a person is posing an immediate and imminent threat. Finally, it is important to bear in mind that discrimination is not the only *jus in bello* rule, and that proportionality requirement always remains. This means that identifying a potential target as legitimate is not sufficient to make the use of lethal force just. Both the means of war and the use of force ought to be proportionate to the harm or threat posed by the legitimate targets. For UAV warfare to be just, the discrimination between legitimate and illegitimate targets ought to draw the line between the targets who can be killed legitimately and those who cannot. This does not mean that illegitimate targets in drone warfare are completely immune from any attack but rather that they are not liable to be killed because of the proportionality requirement. UAV warfare partly assimilates calculations of proportionality in the use of force in the review of the discrimination between legitimate and illegitimate targets.

This concludes Part One. Now that the theoretical context has been set for the discussion on how to uphold the just war criterion of discrimination in contemporary conflict, Part Two will present three case studies looking at different targeting strategies used in UAV strikes. These cases will illustrate the issues with the current status of discrimination. They will also illustrate the extent to which the proposed dual interpretation of discrimination is applicable in the context of asymmetrical warfare and UAV use. Further, the cases will also present how the implementation of this re-interpreted discrimination criterion will lead to a more discriminate use of force in contemporary asymmetrical warfare.

PART 2: Case Studies

In Pakistan, things fall out of the sky all the time.

- Pervez Musharraf
(President of Pakistan 2001-2008)[[293]](#footnote-293)

The use of UAVs provides an excellent context in which to ground this review of the discrimination criterion for three key reasons. Firstly, they are a fairly new technology that has been rapidly embraced. Secondly, their use is becoming increasingly common. Thirdly, there are limited binding international document concerning their use.[[294]](#footnote-294) Arguably, UAVs are one of the most important technological advances in warfare of the past decades and, in addition to being a new technology, they are changing the way war is fought insofar as they provide the possibility to remove soldiers from the frontlines, which challenges the classic notions and conceptualisations of whom and what are threats in war. Broadly, discrimination becomes challenging because the strategies used in drone warfare blur the line between legitimate and illegitimate targets. This challenge comes from the difficulty to find and identify legitimate targets in the context of asymmetrical warfare where drones are being deployed. There is a discrepancy between the realities of contemporary drone warfare and the assumptions made by the classic interpretations of discrimination in regard to the ability to identify legitimate targets. The focus on discrimination in UAV warfare is relevant and important because the use of these weapons has the potential to be one of the most humane forms of warfare by allowing for greater discrimination. This is because drones offer the ability to track targets uninterruptedly for days or even weeks in order to find the most appropriate moment to launch a highly discriminate strike. Yet, drone warfare in its current form does not live up to this potential to uphold discrimination. This problem is rooted in the targeting strategies behind UAV strikes.

The following three chapters will explore targeting strategies used in drone strikes. First, Chapter Three will look at ‘personality strikes’, the strategy most usually associated with UAV warfare where the target’s name is on a ‘kill list’ and drones are used to find the target, identify it, track its whereabouts, and then conduct the lethal strike. Chapter Four will then explore ‘signature strikes’ where the identity of the target is not known and targets are chosen because of ‘signatures’. They are identified as combatants worth targeting according to “patterns of behaviour”[[295]](#footnote-295) or “patterns of life.”[[296]](#footnote-296) In other words, “a ‘signature strike’ – [is] a drone attack that targets ‘groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t known’. The vast majority of drone strikes conducted by the CIA have been signature strikes, not ‘personality strikes’.”[[297]](#footnote-297) Finally, Chapter Five will examine ‘double tap’ strikes. This is possibly the most controversial although lesser-known targeting strategy and occurs when “the drone operator fires at an intended target, and then at rescuers offering assistance to any survivors.”[[298]](#footnote-298) It is important to note that the present discussion refers to combat UAVs (or CUAVs) such as the General Atomics MQ-9 Reaper[[299]](#footnote-299) and the General Atomics MQ-1 Predator[[300]](#footnote-300), which are unmanned but remotely controlled by humans. ‘UAV’ does not refer to fully automated vehicles. Throughout the three case studies, the discussion will focus on the central research question asking how the *jus in bello* discrimination criterion can be upheld to make contemporary asymmetric warfare and the use of drones more discriminate and just.

Chapter 3: Case Study 1 – Personality Strikes

 ‘Terrorist', noun: 1. Someone my government tells me is a terrorist;
2. Someone my President decides to kill.

- Glenn Grennwald[[301]](#footnote-301)

The use of targeted killing is not exclusive to drone strikes, contrary to how it is often portrayed.[[302]](#footnote-302) The latter is a type of weapon system whilst the former is a strategy, a way to use weapons that is not limited to drones. Targeted killings are generally defined as the “intentional, premeditated and deliberate use of lethal force by a state or their agents acting under colour of law, or by an organized armed group in armed conflict against a specific individual who is not in the physical custody of the perpetrator.”[[303]](#footnote-303) As the Council on Foreign Relations highlights: “‘targeted killing’ is not a term distinctly defined under international law, but gained in currency in 2000 after Israel made public a policy of targeting alleged terrorists in the Palestinian territories.”[[304]](#footnote-304) Methods used include sniper fire, missiles from helicopter, and poison, to name a few.[[305]](#footnote-305) All the methods of targeted killings share one common factor: they do not “give the targeted victim a realistic opportunity for surrender.”[[306]](#footnote-306) However, although the use of targeted killings in war is nothing new,[[307]](#footnote-307) UAVs have made it an increasingly feasible and accessible option. Thus, the development drone technology and the increasing use of targeting killings are intractably intertwined.[[308]](#footnote-308) Considering this, the way the discrimination criterion is understood and implemented in drone warfare has a considerable impact since it relates to the way targets are identified. More broadly, the discussions on discrimination that this thesis undertakes are relevant in all targeted killing without being limited to drones exclusively.

A. Defining Personality Strikes

1. Description and Use

The focus of this first case study chapter will be on the most widely known example of targeted killing in drone warfare: personality strikes. This targeting strategy is characterized by the use of the individual’s identity as the parameter for initiating the attack.[[309]](#footnote-309) “A personality strike refers to when a drone is targeted at ‘known individuals’ by US officials who have ‘a high degree of confidence’ about the suspect’s location and identification.”[[310]](#footnote-310) These ‘known individuals’ and other high value targets are placed on a ‘kill list’. One of the most famous examples of a ‘kill list’ is the 2003 Personality Identification Playing Cards issued by the US Department of Defense: “Coalition forces in Iraq are using a specially created deck of 55 playing cards to identify the ‘most wanted’ members of Saddam Hussein’s regime. […] Coalition officials have identified a list of 55 regime leaders they intend to pursue, kill or capture.”[[311]](#footnote-311) Such lists are established with the collaboration of various intelligence and security agencies, and using various sources of information. For example, in January 2015, the trial of Khaled al-Fawwaz, an alleged al-Qaeda operative, revealed that FBI Agent Jennifer Hale Keenan seized a ‘charter list’[[312]](#footnote-312) of 170 al-Qaeda members in a Kandahar building in December 2001.[[313]](#footnote-313) More recently, the US compiled a list of the top leaders from ISIS, which has been used to guide airstrikes. Indeed, in January 2015 “the U.S. Ambassador in Bagdad was quoted as saying U.S.-led airstrikes have killed ‘more than half’ of the terror group’s leadership.”[[314]](#footnote-314)

The first US-led lethal UAV strike occurred in 2002 in Yemen[[315]](#footnote-315) where a CIA-led strike in north-eastern Yemen killed Salim Sinan al Harethi, a known al-Qaeda member “who was suspected of masterminding the 2000 USS *Cole* bombing in Aden.”[[316]](#footnote-316) This marked the start of what came to be known as the first phase of the evolution of drone use outside of identified war zones.[[317]](#footnote-317) During this phase, between 2002 and 2004, the number of strikes was limited and they were focused on high-value targets.[[318]](#footnote-318) “The next attack, in 2004, targeted Nek Mohammad, a former *mujahed* [mujahideen] who became an influential member of the Taliban and fled to Pakistan after the 2001 U.S. invasion of Afghanistan.”[[319]](#footnote-319) Details on this strike will be presented later in this chapter. Drones were used because of their ability to find and identify legitimate targets in the complex context of asymmetrical warfare. This marks the beginning of the development of a new approach to targeting that is facilitated and made possible by the deployment of drones.

The second phase in the use of weaponized drones by the United States, between 2005 and 2007, was characterized by an increase in the number of strikes. Nevertheless, the targets remained high-value individuals, and the strikes were limited to the Pakistani territory.[[320]](#footnote-320) Indeed, both *The Bureau of Investigative Journalism* (*TBIJ* hereafter) and the *FDD’s Long War Journal* report no UAV strikes in Yemen between 2003 and 2008 inclusively.[[321]](#footnote-321) Further, *TBIJ* reported three UAV strikes in 2005, four in 2006, and six in 2007, all of which in Pakistan.[[322]](#footnote-322) The limited number of strikes demonstrates that the use of drones remained restricted to highly discriminate personality strikes, targeting identified high-value targets.

The end of the Bush administration, between 2008 and 2010, brought the third phase of drone warfare, which was marked by an important acceleration of strikes. In Pakistan, the number of strikes increased from 35 in 2008 to 53 in 2009, and 117 in 2010.[[323]](#footnote-323) Moreover, there were two UAV strikes in Yemen in 2009 and four in 2010.[[324]](#footnote-324) This increase in the number of strikes is indicative of a certain shift in the targeting principles used, moving away from only striking high value targets. This increase in the number of strikes and the broadening of targeting lists indicates a tendency towards a change in the targeting strategies used to include targets whose identities are not known.

Finally, the post-2011 era marks the last phase of the evolution of drone use. It is characterised by an important increase in the number of strikes as well as “an expansion of the target list to include targets of opportunity and unidentified militants of dubious ranks – and funerals. […] This suggests that the drone target list now includes targets of opportunity, […] This development has now decreased the effectiveness of the program when assessed in terms of the ratio of high-value to accidental kills.[[325]](#footnote-325) Although President Barack Obama called for a reduction in the use of unmanned aerial strikes in a speech in May 2013[[326]](#footnote-326), UAVs remain a weapon of choice[[327]](#footnote-327) and *TBIJ* reports that the total number of UAV strikes in Pakistan alone has reached 429 at the end of 2017.[[328]](#footnote-328) *TBIJ* also reports that there has been a minimum of 4715 US strikes between January 2002 and December 2017 across Yemen, Pakistan, Somalia, and Afghanistan.[[329]](#footnote-329) Moreover, the offensive use of UAVs is expanding as such weapons proliferate outside of the United States. This final development in drone warfare marks the embrace of new targeting strategies developed because of the identification difficulties in asymmetrical warfare and made possible with the use of drones.

In broad terms, the final phase of UAV warfare, illustrates a shift in the targeting strategies behind the strikes. Initially, drone strikes were aimed at identified high-value targets. This was a rather straightforward application of the traditional approach to discrimination where legitimate targets are identified as being soldiers (al-Qaeda members or Afghan Taliban operatives for example). However, 2011 marked an increase in the use of signature strikes, where the identity of the target is not known before the strike is launched. Ergo, these targets can difficultly be identified as being of high-value if their identity is unknown. This demonstrates a difficulty in assigning combatant status to individuals in order to identify legitimate targets. The implications of signature strikes for discrimination will be discussed in detail in the following chapter whilst this chapter will focus on the challenges the use of personality strikes pose on the interpretation and implementation of the discrimination criterion in contemporary drone warfare.

B. Challenges for Discrimination

As was presented above, a personality strike is a form of targeted killing where the targets’ identities are known and they are included in a ‘targeting list’. Personality strikes do not include targets of opportunity, which will be discussed in Chapter Four. Rather, a personality strike is a direct interpretation and application of the discrimination criterion as it draws the line between legitimate and illegitimate targets with the establishment of targeting lists. Understandably, this application does not happen without raising ethical issues at each stage of the decision-making and actualising process. There are three key challenges for discrimination that arise with the use of UAV personality strikes. Firstly, the way targets are selected, which is a direct implementation of discrimination, can be a cause for concern because the secrecy surrounding drone strike can lead to a confirmation bias in the identification of legitimate targets. Secondly, issues related to double effect are raised since drones are expected to minimise collateral damage. Thirdly, concerns in regard to drones’ lack of capture capabilities are addressed.

1. Target Selection

The first set of ethical concerns and challenges with UAV personality strikes comes from the way targets are selected. This is of great importance as it is a clear application of the discrimination criterion in real-life situations. The issue here surrounds the question of *who* is on the ‘kill list’. Semantically, these are often ‘kill or capture’ lists, but the opportunities for capture are greatly limited or non-existent when UAVs are the only form of force deployed since these weapons have no capture capabilities. The term ‘targeting list’ will be used to refer to the lists on which personality strikes are based.

The legitimacy of personality strikes conducted by UAVs, or any other type of weapon for that matter, relies on the identification of the target. In that sense, a personality strike will only be legitimate if its target is identified as being liable to be killed legitimately, following both the *jus in bello* discrimination and proportionality criteria. Therefore, the appropriate identification of the potential target is fundamental for the discrimination criterion to be implemented and upheld and for the use of force to be just according to *jus in bello*. Thus, the key question is not limited to asking *who* is liable to be targeted, but also *why* can lethal force against them be justified, making them legitimate targets for a UAV strike. In short, individuals are placed on a targeting list if they are identified as liable to be killed.

In the context of counterterrorism and the war on al-Qaeda, the US establishes what it calls a ‘disposition matrix’[[330]](#footnote-330) to identify potential targets for personality strikes:

The matrix contains the names of terrorism suspects arrayed against an accounting of the resources being marshalled to track them down, including sealed indictments and clandestine operations. U.S. officials said the database is designed to go beyond existing kill lists, mapping plans for the ‘disposition’ of suspects beyond the reach of American drones.[[331]](#footnote-331)

Since there is more than one drone program in the USA, there are multiple targeting lists. In 2011, PBS’s *Frontline* reported that there are at least three different lists.[[332]](#footnote-332) Firstly, the US military has its own set of lists.[[333]](#footnote-333) There is more than one military list since the special operations troops of the Joint Special Operations Command (JSOC) was reported to have its own list.[[334]](#footnote-334) Another list is created by the National Security Council (NSC), which is reviewed on a weekly basis in the ‘Terror Tuesday meetings’ attended by both the president and vice president of the USA.[[335]](#footnote-335) Finally, the CIA also has its own lists which is established without any input from either the NSC or the USDoD.[[336]](#footnote-336) Although there is no coordination between the different list-making agencies, some crossovers occur meaning that some names are found on multiple lists.[[337]](#footnote-337) Further, “the military and the CIA each had its own set of targeters developing the time and location of the strike. Each had its own pilots, command centers, budget process, and long logistics and personnel pipeline to maintain its own fleet of UAVs.”[[338]](#footnote-338)

Considering the highly sensitive nature of the information concerned, it comes as no surprise that the criteria used by American authorities to place individuals on a list are secret.[[339]](#footnote-339) Even with the most publicised and well-known targeting list (established by the NSC) the most information available are speculative flowcharts describing the decision on whether to strike or not rather than how names are placed on the list in the first place.[[340]](#footnote-340) This secrecy is problematic when it comes to evaluating the way the *jus in bello* discrimination criterion is implemented as it leads to speculations on the targeting criteria. On a methodological level, the secrecy leads to a reversal of the application process for discrimination for observers: Targets of a UAV strike are examined *ex post facto* in order to determine why they were identified as liable to be killed. Additionally, the fact that multiple lists are used increases the difficulty of establishing an understanding of the targeting principle behind strikes. This has considerable implication as it can lead to a guilty bias or a confirmation bias where the default assumption is that the victims of UAV strikes were indeed legitimate targets and that the task is to identify on what basis they were identified as terrorists. The main danger here is guilt by association where if one of the targets is an identified terrorist, it is then assumed that the individuals that were with the target were also legitimately liable to be killed because they must be co-conspirators. This is important for both observers as well as for operators who are not involved in the establishment of the targeting lists. This is one of the reasons why the review of UAV targeting principles behind UAV strikes of this thesis is necessary since it will review targeting from a ‘top-down’ approach, rather than looking at the reverse process. The focus here, therefore, is not to dive into the administrative details of the establishment of targeting lists but rather to discuss on what basis one *should* be placed on such lists using the reinterpretation of the discrimination criterion outlined in Chapter Two.

This thesis argues that there should be two principles of discrimination and thus, two ways to identify legitimate targets in war. First, *individual discrimination* identifies individuals who have a moral responsibility for threats as legitimate targets. This is an understanding of discrimination inspired by the revisionist approach to just war theory. Second, discrimination is also understood at a more ‘applicable’ level, where liability to be killed in war comes from posing an immediate threat (*situational discrimination*). Personality strikes are an application of *individual* *discrimination* insofar as individuals whose direct implication in the conflict is known and proven can be named on a targeting list. In other words, only individuals for whom the answer is ‘yes’ when asked ‘are they liable to be killed?’ can be targeted in personality strikes. *Individual discrimination* moves away from membership-based discrimination and instead of coming from group or class affiliation, liability to be killed comes from responsible actions. More precisely, liability comes from *ongoing* responsibility. This means that a terrorist leader, for example, might not be actively engaged in the planning of attacks at the moment of the strike but remains engaged in the broader campaign of fighting (threats), thus being liable to be killed by a personality strike. Once the involvement in the war effort has ended, then individuals are no longer legitimate targets for personality strikes. For example, an ex-terrorist leader that has cut ties with the organisation they were once a member cannot be identified as a legitimate target because of their past actions. Although they still bear some moral responsibility for the threat they posed in the conflict, their engagement is no longer ongoing and they are not an active or ongoing threat, law-enforcement methods ought to be used to apprehend the former terrorist leader rather than lethal military means, such as lethal drone strikes.

Broadly, in UAV personality strikes, the central question is whether an individual is liable to be *killed*. This bears many similarities with the argument presented by Walzer when he states that the ‘naked soldier’ is always a legitimate target, even when off-duty because they remain engaged in the broad campaign. Without resorting to membership-based liability, it is important to acknowledge that the waging of a war is a constant endeavour. Soldiers are not expected to only fire when their enemies are actively firing at them. They can also fire when the enemies are reloading the weapons for example. This logic can be expanded to include ‘naked soldiers’ who are still legitimate targets even if they are not currently engaged in the fighting. The naked soldier would not necessarily be a legitimate target in *situational discrimination* where liability comes from imminent threats, as will be explored in the next chapter. Since *individual discrimination* is based on responsibility, liability remains unchanged if the target is contributing to the conflict or resting at the time of the strike. To be considered just, personality strikes should be limited to the application of *individual discrimination* where legitimate targets can be killed even at times where they are not actively engaged in the conflict. It would be unrealistic to expect fighters to wait until an identified legitimate target is sat at a table planning an offensive attack before to launch a strike, for example. Further, it is important to bear in mind that the *jus in bello* proportionality criterion remains applicable at all times. This means that although a target might be identified as liable to some degree of harm, not all means will be legitimate. As discussed in the final section of Chapter Two, *jus in bello* proportionality calculations are assimilated to the application of the discrimination criterion in drone warfare because these weapons are limited to the use of lethal force. Only individuals whose moral responsibility for the conflict is sufficient to make them liable to be killed can be placed on a targeting list following *individual discrimination.*

The discrimination framework presented in Chapter Two distinguishing between *situational* and *individual* discrimination might appear too restrictive for the use of force. However, considering the unequalled intelligence gathering and tracking capabilities of UAVs, the implication of individuals in the conflict can be observed and confirmed, and *individual discrimination* can be used, thus eliminating the need for generalisations such as the out-dated soldier-civilian line and membership-based approaches to liability. Ultimately, this would make the use of UAVs more just and discriminate insofar as the targeting adheres more closely to the intent behind the principle of discrimination. Indeed, generalisations and guilt by association can be seen as targeting ‘shortcuts’ that are used when there are some gaps in the intelligence available regarding the status of potential targets. The use of UAVs has the potential to change this drastically by allowing drone operators to track individuals whose status and implication in the conflict is uncertain until the potential target can be identified as legitimate with *individual discrimination* or *situational discrimination*, which can ultimately lead to a better implementation of the discrimination criterion in contemporary asymmetrical warfare. The importance of this confirmation will be explored in the following section. After a potential target has been identified as legitimate with *individual discrimination* (because of its moral responsibility for threats in the conflict), placed on a targeting list, and found, UAV operators now have to identify the most appropriate moment to launch a strike. It is here that the use of UAVs has a considerable impact on the way discrimination is implemented in combat compared to the use of other weapon-systems. This is because drones offer the possibility to uninterruptedly track and gather intelligence on potential targets for extensive periods of time. Consequently, the use of drones as opposed to a long-range missile or a sniper brings the opportunity to gather enough information on potential targets to confirm their implication and moral responsibility for the conflict prior to launching an attack. In other words, if the status of a potential target is uncertain, the UAV operators can limit the use of lethal force and place the suspected target on ‘standby’. This would give time that allows for the implication of would-be targets to be verified in cases where there are doubts on the individual moral responsibility of the target. This ability for operators to verify the moral responsibility of targets prior to attacks brought by the use of drones ultimately allows *individual discrimination* to overcome the real-world objection. This applies in personality strikes where legitimate targets bear an individual moral responsibility for the conflict (*individual discrimination*). Cases where the potential target is not known (therefore cannot be placed on a targeting list) but they are actively posing a threat can also lead to justified strikes with *situational discrimination*, which will be discussed at length in Chapter Four. This distinction is important because with UAV personality strikes, the nature of these strikes is such that legitimate targets can only be the ones bearing an individual moral responsibility for the conflict regardless of whether or not they are actively threatening at the moment of the strike. Thus, in personality strikes, only individual discrimination needs to be fulfilled in order for a strike to be considered discriminate.

Ultimately, this ability to hold off attacks whist still tracking potential targets gives the opportunity to confirm without doubts that the potential target fulfils the criteria set by *individual discrimination*, bringing the risk of targeting mistakes and mis-identification to a minimum. It is important to remember that since UAVs can only use lethal force: “drone technology locks the aggressor into a killing scenario.”[[341]](#footnote-341) Thus, identified legitimate targets ought to be liable to be killed, reiterating the importance of the *jus in bello* proportionality criterion. Indeed, the implementation of *individual discrimination* ought to take into account proportionality calculations. Practically, this means that the degree of implication and moral responsibility for the conflict ought to be sufficient to make the personality strike a legitimate use of lethal force. Thus, in establishing targeting lists, the degree of involvement of potential targets ought to be taken into account in order to determine whether they are liable to be killed. As presented in Chapter Two, determining that an individual has some degree of responsibility for the conflict is not sufficient to make him or her liable to be killed. The use of force needs to be proportionate to the degree of responsibility. In other words, the degree of response (use of force) depends on the degree of involvement. In the specific case of drone warfare, since these weapons are limited to lethal force, legitimate targets in personality strikes are the ones who are identified as bearing enough individual responsibility for the conflict to be killed. For example, the proportionality criterion comes into play in regard to minor implications in the conflict such as citizens paying taxes or working in a factory supplying food to armies for example. In these two cases, the individual responsibility of each taxpayer or factory worker is not sufficient to render them liable to be killed by personality strike. Further, when the liability of a potential target is still uncertain, UAVs’ ability to place potential targets on ‘standby’ whilst their status is confirmed makes the use of generalisation and group-based liability unnecessary. This will be especially relevant when discussing signature strikes in the next chapter.

2. Collateral Damage, and the Doctrine of Double Effect

Another implication of the use of UAVs as opposed to other type of weapons to conduct personality strikes is that it brings the possibility to track and follow targets until they are isolated, minimizing the risk of collateral damage and making UAV warfare more discriminate and proportionate than other weapons. Indeed,

Even more unfavourable estimates of drone casualties reveal that the ratio of civilian to militant deaths – about one to three, according to the Bureau of Investigative Journalism – is lower than it would be for other forms of strikes. Bombing by F-16s or Tomahawk cruise missile salvos, for example, pack a much more deadly payload. In December 2009, the United States fired Tomahawks at a suspected terrorist training camp in Yemen, and over 30 people were killed in the blast, most of them women and children.[[342]](#footnote-342)

Nevertheless, collateral damage still occurs in UAV personality strikes. The ethical issue with these collateral deaths is rooted in the proportionality calculations as well as the DDE. As argued in Chapter Two, legitimate targets are liable to be killed by a personality strike because they bear an individual moral responsibility. Thus, DDE and collateral damage ought to be practically non-existent since targets are individuals. Indeed, UAVs ought to track legitimate targets and only launch lethal strikes when the target is isolated so there is limited risk of collateral damage. Yet, it is important to recognize that targeting in war is not a perfect science and that some errors and honest mistakes will still occur, and some illegitimate targets will be killed. Theoretically, collateral damage should be nil in UAV warfare. Yet, in reality, it cannot be entirely eradicated. Nevertheless, compared to other forms of bombings, from ballistic missiles to the use of fighter jets, even with ‘look-down/shoot-down’ capabilities, the use of UAVs can lower collateral damage. However, this is only possible if they are selected following a just implementation of the discrimination criterion. Looking at the record of UAV strikes in Yemen and Pakistan tallied by *TBIJ*, many of the illegitimate target casualties occurred when they were traveling in the same vehicle as the intended target. This then raises the question of whether it is justifiable to use a drone to target a vehicle carrying a legitimate target as well as an illegitimate target. Ohlin argues: “Under the Doctrine of Double Effect, one might argue that it is morally permissible to attack the truck because one’s purpose is to kill the terrorist and the death of the civilian is a mere side effect (though a knowing one).”[[343]](#footnote-343) However, one of the key differentiating characteristic of UAVs as opposed to other forms of aerial bombings or sniper strikes is that drones can track targets uninterruptedly. UAV operators have the opportunity and the luxury to wait prior to launching an attack in order to find a moment when the target is isolated, limiting collateral damage and the need for DDE calculations at the same time. Yet, there is a limit to this argument. There will be situations where time is of the essence and operators no longer have the luxury to wait. An identified liable legitimate target might be heading out of the geographical boundaries where UAVs strikes can be used, or they become immediate threats. In the latter case, *situational discrimination* comes into play and the implications of ‘emergency’ situation-based targeting will be discussed in Chapter Four. In regard to the former situation, the mobility of targets can become problematic and UAV operators can be justified to launch a strike if they know the target will be out of reach if they wait any longer, because they are heading towards the border into a neighbouring country for example.

Another important element to bear in mind is that the moral responsibility to protect innocent population from attack does not rest solely on the side of the attackers. In that sense, the ‘attacked’ also have some responsibility not to place innocent illegitimate targets in harm’s way, by using human shields for example. In the context of the War on al-Qaeda and counterterrorism, known terrorists or al-Qaeda operatives hiding in areas populated by innocent civilians are intentionally and consciously putting illegitimate targets at risk. Therefore, the collateral damage that can come from personality strikes aimed at vehicles transporting both legitimate and illegitimate targets would fall into the ‘foreseen but unintended’ negative consequence of an act under the DDE. In this particular situation, the legitimate target has a moral responsibility for threats, thus is likely to have some awareness that they might be targeted by a UAV strike. They might know they are on a targeting list. This therefore implies that whenever they enter vehicles, they knowingly potentially endanger the other passengers with them. Briefly, although the use of UAVs can contribute greatly to the minimization of collateral damage, the responsibility and burden of limiting the risk of harm to innocent illegitimate targets rests on all sides involved in the conflict and not only when *individual discrimination* is applied. In the specific case of strikes targeting vehicles transporting an identified legitimate target, the collateral damage (death of illegitimate targets) is acceptable insofar as it is proportionate to the military objective sought by the strike. Collateral damage is foreseen but unintended. Additionally, the responsibility for the collateral damage also lies with the targets themselves as they consciously endangered illegitimate targets by hiding amongst them or traveling with them.

Finally, there is another situation where collateral damage can be justified in personality strikes: when the legitimate target, in addition to being morally responsible for threats in the conflict (*individual discrimination*), is actively engaged in harming or is an imminent threat and the only way to neutralise the threat or harm is to launch a strike (*situational* *discrimination*). Here, the death of illegitimate targets can be justified through the DDE. In this case, the target is liable to be killed in both *individual* and *situational discrimination*. The imminence of the situation allows for greater scope in collateral damage to be considered justified since it is a ‘necessary evil’ to end the harm. When a target fulfils both *individual* and *situational discrimination*, the latter takes precedence over the former because of the imminence and emergency of the situation. Liability and collateral damage in cases of direct engagement in the conflict will be examined in the next chapter.

In short, the first two ethical concerns for discrimination in personality strikes have to do with the selection of targets. Only individuals whose individual moral responsibility in the conflict is known and proven can be placed on a targeting list. Moreover, the moral responsibility not to inflict harm on illegitimate targets does not rest exclusively on the side of the attackers. Rather, all parties to the conflict have a duty not to endanger innocent illegitimate targets. For the *jus in bello* discriminationcriterion to be implemented and upheld in contemporary drone warfare, legitimate targets ought to be identified as such because of their individual moral responsibility for threats in the conflict. Applied, this takes the form of personality strikes when legitimate targets are placed on a ‘targeting list’.

3. Asymmetry

UAVs are limited to the delivery of explosive or intelligence gathering. Their lack of capture capabilities has an impact on the application of the *jus in bello* discrimination criterion because strikes will only be legitimate if the targets are legitimate. In personality strikes, the burden rests on the identification of the legitimate targets on the targeting list. When there are doubts on the status of a potential legitimate target, UAV can either strike or hold-off, thus drone operators ought to use restraint when in doubt. It could be argued that the use of capture mission instead or in conjunction to the deployment of drones would give the opportunity to attempt capture of individuals whose moral responsibility is uncertain. Whilst special forces raids have the potential to be more discriminate than a UAV strikes in order to eliminate the identified target, the use of drones would allow operators to track the target in order to identify a moment where it can be targeted for a personality strike without any collateral damage. The default assumption would be that special operation raids allow for greater discrimination than the use of UAV personality strike. Yet, this is not the case. As Mark Bowden of *The Atlantic* argues:

As aerial attacks go, drones are far more precise than manned bombers or missiles. That narrows the choice to drone strikes or ground assaults.

Sometimes ground assaults go smoothly. Take the one that killed Osama bin Laden. It was executed by the best-trained, most-experienced soldiers in the world. Killed were bin Laden; his adult son Khalid; his primary protectors, the brothers Abu Ahmed al-Kuwaiti and Abrar al-Kuwaiti; and Abrar’s wife Bushra. Assuming Bushra qualifies as a civilian, even though she was helping to shelter the world’s most notorious terrorist, civilian deaths in the raid amounted to 20 percent of the casualties. In other words, even a near-perfect special-ops raid produced only a slight improvement over the worst estimates of those counting drone casualties. Many assaults are not that clean.[[344]](#footnote-344)

Further, Bowden rightly argues that ground combat often causes more non-combatant deaths than the use of UAVs.[[345]](#footnote-345) Similarly, Avery Plaw of the University of Massachusetts has found that in the ground fights against Pakistani militants in tribal areas, non-combatants, thus illegitimate targets, represented 46 percent of casualties.[[346]](#footnote-346) Plaw also found that the estimated illegitimate death in UAV warfare ranged between 4 and 20 percent.[[347]](#footnote-347) Another example of a special operation that generated a large number of non-combatant causalities is the 1993 Delta Force raid in Mogadishu, popularized in the book and its film adaptation *Black Hawk Down*. In this case, “the ensuing firefight left 18 Americans dead and killed an estimated 500 to 1,000 Somalis—a number comparable to the total civilian deaths from all drone strikes in Pakistan from 2004 through the first half of 2013, according to the Bureau of Investigative Journalists’ estimates.”[[348]](#footnote-348) This adds perspective on the efficacy and discriminate nature of both raids and UAV strikes.

In addition to this, the declassified U.S. Senate Select Committee on Intelligence on the CIA’s use of torture[[349]](#footnote-349) revealed that the CIA misrepresented both the effectiveness and violence of its interrogations.[[350]](#footnote-350) Indeed the report has two central conclusions: “#1: The CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees.”[[351]](#footnote-351) To support these claims, the report’s Appendix 3 titled ‘Examples of Inaccurate CIA Testimony to the Committee’ consists of a 37 pages-long table of examples of misleading claims.[[352]](#footnote-352) Further, the Report states: “This Committee Study documents the abuses and countless mistakes made between late 2001 and early 2009.”[[353]](#footnote-353) The Report also concludes: “#2: The CIA's justification for the use of its enhanced interrogation techniques rested on inaccurate claims of their effectiveness.”[[354]](#footnote-354) It argues: “While being subjected to the CIA's enhanced interrogation techniques and afterwards, multiple CIA detainees fabricated information, resulting in faulty intelligence. Detainees provided fabricated information on critical intelligence issues, including the terrorist threats which the CIA identified as its highest priorities.”[[355]](#footnote-355) Thus, serious doubts and reservations on the positive outcome that would follow capture missions are not unfounded and the use of UAV personality strikes might well be the lesser evil in these cases.

Returning to the application of the discrimination criterion in UAV personality strikes, the lack of capture capabilities of these weapons implies that the legitimacy of a strike relies on the targeting principles used. In cases where there are doubts on the individual responsibility of a potential target, the preferable approach would be to follow the individual with UAVs in order to confirm or repudiate the individual’s moral responsibility for the war instead of launching a potentially illegitimate lethal strike or a capture mission which might also be lethal or yield questionable results. UAVs’ limitation to only using lethal force in addition to their lack of capture capabilities places a great burden on the distinction between legitimate and illegitimate targets in the initial phase of the strike where the target is identified. This reiterates the need for a comprehensive approach to the discrimination criterion that avoids the use of generalisations such as the old soldier-civilian line, thus the need for the twofold interpretation presented in Chapter Two. In the specific case of personality strikes, the only legitimate targets are the ones who bear a sufficient moral responsibility for the war in order to make them liable to the use of lethal force, following *individual discrimination*.

In summary, the lack of capture or surrender capabilities stems from the fact that the only offensive actions UAVs can carry out are lethal strikes. These refer to broader concerns that the use UAV personal strikes, and targeted killing in general in the context of counterterrorism operations denies due process to the victims, which goes against key principles in American and British Constitutional law. However, the United States considers itself to be engaged in a war against al-Qaeda, the Afghan Taliban, as well as all their associated forces.[[356]](#footnote-356) This means that the laws of war apply and therefore “American citizens who have enlisted with enemy forces and reside in the United States or abroad are not immune from conventional attack in war time.”[[357]](#footnote-357) Further, the potential targets are involved in military activities, which makes them a legitimate target, regardless of nationality.[[358]](#footnote-358) This means that the interpretation of the discrimination criterion presented in Chapter Two applies universally to everyone involved in conflict, regardless of nationality. Ultimately, the fact that UAVs can only use lethal force places a great burden on the establishment of the targeting list and the implementation of the discrimination criterion. This is where the need for a clear understanding of discrimination such as the one this thesis presents takes its importance.

C. Application

This final section will explore the applications and implications of the use of drones to conduct personality strikes in practice with the use of cases studies. These cases will come from U.S. drones strikes in both Yemen and Pakistan. These two countries were chosen because they represent two of the most publicised and intense deployment of UAVs. Further, *TBIJ* holds a detailed list of each strike in both countries based on reports by US, Pakistani and Yemeni governments, “military and intelligence officials, and by credible media, academic and other sources, including on occasion Bureau researchers.”[[359]](#footnote-359)

The key factor in the legitimacy of strikes is the implementation of the discrimination criteria done through the establishment of targeting lists. It is here that the way the discrimination criterion is understood comes into play as the decision to place someone on a targeting list represents an interpretation and implementation of discrimination in practice. Indeed, targeting lists explicitly draw the line between legitimate and illegitimate targets; albeit some individuals not on a targeting list might also be legitimate targets because of immediate threats, but these cases will be discussed in the following chapter. Further, Adam Bodnar and Irmina Pacho argue: “In asymmetric warfare, putting certain names on a target list serves the same function as traditional uniforms or insignias which allowed soldiers to identify one another. Therefore, such a list replaces the traditional way of determining affiliation, allowing the identification and tagging of named, listed persons as combatants.”[[360]](#footnote-360) The focus then becomes centred on the criteria used to establish the lists. Considering the technical particularity of drone warfare where only lethal force can be used, individuals identified as legitimate targets and placed on a targeting list ought to fulfil both the discrimination and the proportionality requirements, since the latter is partly assimilated in the former in the case of UAV strike.

In counterterrorism, such as in the War on al-Qaeda, only morally responsible terrorist are legitimate targets for personality strikes. These individuals can be identified by various ways such as having claimed responsibility for past terrorist attacks or being named on a charter list such as the one found in Kandahar in 2001. Being a suspected terrorist or having a suspected responsibility for attacks is not sufficient. In less abstract terms, four sets of actions bring moral responsibility according to the *individual discrimination* framework presented in Chapter Two. Individuals falling in each of these four categories are all liable to be killed by a personality strike. Examples will be used bellow to demonstrates how such interpretation can be implemented in conflict.

1. Being the commander of a group of fighters;
2. Being the leader of a group of enemy fighters;
3. Being a known and identified recruiter for enemy organisations;
4. Direct contribution to the war effort (key facilitator).

Firstly, individuals can be a legitimate target according to *individual discrimination* by being the commander of a group of fighters. In this first case, commanders are liable to be killed because their actions leading groups of fighters makes them morally responsible for the conflict. In addition to being a direct involvement in the conflict, being a commander entails a position of power, leadership, and control over other fighters bringing increased responsibility. This also implies that without their involvement, the opponent’s ability to continue the conflict would be disrupted. This bears many similarities with the traditional approach to discrimination that sees all soldiers as legitimate targets in war.

This was the justification behind the targeting of Nek Mohammad, a local Taliban commander, by the C.I.A.. [[361]](#footnote-361) The 17 June 2004 strike was the C.I.A.’s first lethal use of a UAV in Pakistan. [[362]](#footnote-362) In 2013, The New York Times reported: “Mr Muhhamad and his followers had been killed by the C.I.A., the first time it had deployed a Predator drone in Pakistan to carry out a ‘targeted killing’. […] In a secret deal, the C.I.A. had agreed to kill him [Nek Mohammad] in exchange for access to airspace it had long sought so it could use drones to hunt down its own enemies.”[[363]](#footnote-363) Since Nek Mohammed was sub-commander of a group of Talibans near Kabul reportedly commanding 3000 men by the by the end of the 1990s,[[364]](#footnote-364) it could be argued that he was liable to be killed by a personality strike because his command responsibility fulfilling *individual discrimination*. Another example of the command aspect of *individual discrimination* being used to justify the launch of a personality strike is the 2 February 2015 ‘YEM181’ strike where a UAV launched two missiles at a vehicle transporting at least three AQAP (Al-Qaeda in the Arabian Peninsula) members, including Saif al Humaiquani, who is “a commander in charge of a group of 40 fighters”[[365]](#footnote-365) according to AQAP sources cited by *TBIJ*.[[366]](#footnote-366)

Secondly, individual moral responsibility for threats can come from being the leader of a group of enemy fighters. Much like with the case of the commander of a group of fighters, being the leader of such groups can make one liable to be killed by a personality strike. This is so because, again, the position of leadership underlines a direct implication in the conflict to such a degree that the fighting would be of lesser proportions without their involvement. The addition of this category to the ‘commander’ one is necessary to include *de facto* leaders in informal settings. Moreover, leaders are often prominent figures in the enemy organisations that have influential and motivational roles on enemy fighters while having a limited ‘commanding’ role in terms of operations planning. An example of a UAV personality strike targeting being the leader of a group of enemy fighters is the 11 October 2014 strike that killed Mohammad Mustafa, who was considered to be a local leader of the Hafiz Gul Bahadur group (a Taliban faction).[[367]](#footnote-367) This was the 400th UAV strike in Pakistan according to *TBIJ’s* data.[[368]](#footnote-368)

These two sources of individual moral responsibility in *individual discrimination* raise questions on the differentiation between political and military leaders in targeting. Traditionally, “political figures who are members of the armed forces, or who are involved in the command and control of the armed forces, generally speaking, may also be legitimate targets of attacks. This includes heads of state and other high-ranking government officials involved in the military operations such as ministers of defence.”[[369]](#footnote-369) Yet, international law differentiates between the use of targeted killings against military leaders as opposed to political leaders: the former are legitimate targets whereas the latter are not.[[370]](#footnote-370) This distinction is based on the moral and legal value that is placed on peace since, traditionally, the political leaders are the ones who will negotiate the peace treaties at the end of the war.[[371]](#footnote-371) Further, Walzer states: “There are radical limits on political assassinations. In democracies, they can never be justified; it is only the blood of tyrants that waters the tree of liberty. And even with tyrants, a trial is preferable to an assassination whenever it is possible to bring down the tyrannical regime without killing its leader.”[[372]](#footnote-372) This distinction can come from the higher centralisation of power in dictatorships or tyrannies as opposed to the division of power of democracies. Yet, many political figures were included in the ‘most wanted’ deck of cards of the 2003 war in Iraq. Political leaders can be directly involved in the conflict by giving the final authorisation for strikes for example. A key consideration when it comes to the targeting of political leaders doesn’t have to do with whether it *can* be done but rather whether it *should* be done. In that sense, military leaders and commanders usually ask three questions in the decision-making process: ‘Can I?’ (asking if the planned course of action is legal), ‘Should I?’ (Asking if it is the ‘right’ thing to do ethically, morally, or strategically), and ‘If I?’ (asking about the consequences that would be generated). With the targeting of political leaders involved in the decision to use force, although the answer is affirmative to the first question, it might not be for second question. Thus, the issue with the targeting of political leaders has to do with whether it should be done and not whether they are legitimate targets (since they can fulfil the *individual discrimination* criterion). The decision has to do with judgement rather than with the interpretation of the discrimination criterion. Considering the focus of this thesis on the identification of legitimate targets (interpretation of the principle of discrimination) in drone warfare, it will not explore the efficacy or value of targeted killings as a strategic approach in a context of counterterrorism or counterinsurgency.[[373]](#footnote-373)

The third source of *individual discrimination* comes from recruitment. Indeed, recruiters can be seen as morally responsible for the war seeing as without their involvement the number of terrorists or insurgents involved in conflict would be considerably lower. More importantly, recruiters are a key factor in the materialisation of threats in the sense that they are the reason why otherwise non-involved individuals become threats by taking part in the conflict. Being a ‘recruiter’ also encompasses wider recruitment actions such as being in charge of the propaganda publications for a terrorist organisation. Without recruiters, the leaders and commanders would have a very limited sphere of influence and the conflict would be greatly restricted as there would be no new individuals to generate new and continued threats. Thus, recruiters can bear a sufficient level of individual responsibility to become liable to be killed. To be identified as a recruiter, there must be evidence of the individual’s recruitment work. Recruiters must also be placed on a targeting list. Potential targets cannot be labelled as ‘recruiters’ in order to become a legitimate target by mere association with other legitimate targets. For example, on 30 September 2011, “Anwar al Awlaki, the US-born cleric, apparently became the first US citizen to be deliberately killed by the CIA in a drone strike, part of Operation Troy. The attack – assisted by JSOC – also killed US citizen Samir Khan, editor of AQAP’s Inspire magazine”.[[374]](#footnote-374) Indeed, *The New York Times* describes al-Awlaki as an “American-born cleric whose fiery sermons made him a larger-than-life figure in the shadowy world of jihad.”[[375]](#footnote-375) Following traditional IHL, clerics are protected, even if they are members of the armed forces. Yet, their role, especially in terms of ‘motivators’ and recruiters, brings a clear moral responsibility for threats in the conflict that can bring liability to be killed following *individual discrimination*. In this example, both al-Awlaki and Khan were legitimate targets because they were identified recruiters for al-Qaeda. Further, they were liable to be killed by a personality strike because their recruitment actions bring an individual moral responsibility for the conflict. Personality strikes applying *individual discrimination* rely on high degrees of intelligence and exclude targets of opportunity, generalisations, guilt by association, and other mis-discriminate targeting shortcuts. Further, the use of UAVs gives the opportunity to track potential recruiters in order to verify both their personal identity as well as their implication in the conflict, or lack thereof, prior to the use of lethal force. This ensures that *individual discrimination* answers the concerned raised by the real-world objection to revisionist theory.

The final form of *individual discrimination* is facilitation. This case is slightly more complicated because of the lack of clear definition associated with the term. Key facilitators can only be considered legitimate targets when they are directly involved in the conflict, proving what fighters need to take part in the conflict (as opposed to what they might needs as humans). For example, an individual supplying weapons to terrorist or insurgent fighters can be considered a legitimate target because their implication provides what the fighters need to continue their combat. Indeed, the individual is a legitimate target because it provides essential elements to the fighting (necessary elements for the conflict to take place). They are facilitating the war and thus, they bear some moral responsibility for threats. Further, as in the case of recruiters, the identity and responsibility of key facilitators ought to be confirmed and proven with appropriate intelligence prior to the launch of an attack. Further, there are limits to the contributions that lead to individual responsibility. For example, the wife of a known terrorist, could be considered a facilitator because she feeds and cares for a legitimate target. Yet, her implication in the conflict is not sufficient to make her liable to be killed. Here, the wife is not a facilitator in the sense of helping the conflict and contributing to the war effort directly but rather simply by providing the fighters what they need to survive as human beings. With facilitators, liability to be killed comes from actions that contribute directly to the waging of the conflict, even if the facilitator themselves are not directly engaged in the fighting. Fabricating ammunitions and bombs or being in charge of the financing of the combat operations, can make one liable to be killed by a personality strike. However, the manufacture of clothes that are worn by fighters is not because this type of action does not contribute directly to the conflict and the fighters would be clothes even outside of the conflict. The central question in determining whether one is a key facilitator in the conflict is to ask if their actions would take place if the conflict had never occurred. Therefore, making clothes, preparing food or treating wounds is not sufficient to make one liable to be killed in a personality strike because their actions would also take place outside of conflict. However, building explosives or funnelling the finances that fund combat operations are key facilitating actions that can make the facilitator legitimate targets. It is important to reiterate that in the application of personality strikes, targets are known, which means that the degree and scope of the target’s facilitation can be evaluated. If the facilitators pose a low level of threat and does not pass the liability bar to become liable to be killed (because they facilitation actions are too far removed from the conflict for example), drones can be used to continue to monitor the facilitator to gather more intelligence.

An example of a personality strike where legitimate targets were identified because of their direct contribution to the war effort is strike ‘YEM157’ of 12 March 2014 where a UAV strike “destroyed a vehicle, killing Moajab Aziz Hadban and Ali Hassan Mohammed Hadban. Local media reported Mojab Aziz was a local Al-Qaeda commander and Hassan Mohammed his bodyguard.”[[376]](#footnote-376) In this case, both victims of the strike were legitimate targets. Mojab Aziz was a legitimate target because he bears a moral responsibly for the conflict with his role as commander. Additionally, Ali Hassan Mohammed Hadban was also a legitimate target. He bears individual moral responsibility by facilitating the conflict because of his work as personal bodyguard to a military commander. This contributes directly to the war effort as it protects the commander (facilitation). Additionally, as mentioned earlier, bomb-makers are also to be considered as key facilitators as they are the equivalent of munitions factory workers and they make what the fighters need to take part in the conflict. For example, the strike that killed both al-Awlaki and Khan also targeted Ibrahim Hassan al Asiri, a bomb maker who is credited with the manufacturing of the bomb for the December 2009 ‘underwear bomber’.[[377]](#footnote-377) This example shows that in the al-Awalki strike, what could have initially been considered as collateral damage was actually another legitimate target liable to be killed according to *individual discrimination*.

Broadly, a review of personality strikes in Yemen and Pakistan shows that it is possible to identify and track ‘high value targets’ with drones. Also, it demonstrates that it is possible to implement aspects of revisionist just war theory in contemporary conflict, addressing the real-world objection. This is achieved by using *individual discrimination* based on moral responsibility for threats in personality strikes, moving away from group-based membership. Nevertheless, strikes that only lead to one casualty are a rarity and there is a tendency for victims to also be identified as jihadists in order to justify and legitimatize their death. As *The New York Times* reports: “Mr. Obama embraced a disputed method for counting civilian casualties that did little to box him in. It in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.”[[378]](#footnote-378) There is an important risk here of guilt by association being used to legitimise the killing of victims that were not on a targeting list.[[379]](#footnote-379) This is why there is a need for a clear and comprehensive interpretation of the discrimination criterion as it would eliminate the need for targeting shortcuts. Further, the examples presented above demonstrate that the interpretation of discrimination presented in Chapter Two is not only applicable in the reality of UAV strikes but could also lead to a more discriminate use of drones.

In addition to the identification of legitimate targets with *individual discrimination*, UAV operators ought to take full advantage of the intelligence-gathering capabilities of these weapons in order to ensure that when a strike is finally launched, a limited amount of collateral damage is foreseen. They ought to show restraint in the use of force and only strike when the status of the target is confirmed, taking care to limit the level of harm caused by choosing both the target and timing of the strike wisely. It is in this context that statements such as the following from former Legal Adviser of the Department of State Harold Koh become valid:

Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.[[380]](#footnote-380)

On the topic of bystander casualties in UAV personality strikes, Walzer rightly argues that the targeting in a personality strike “will have to meet very strict standards of proportionality; given that the target is a single person, it will be difficult to justify any injury to innocent bystanders.”[[381]](#footnote-381) The use of drones brings a low tolerance for collateral damage because of their loitering capabilities (possibility to hold off a strike until no bystanders are in the way). Nevertheless, complete elimination of collateral damage and unintentional harm to illegitimate targets in personality strikes is unrealistic, as targeting is not an exact science and honest mistakes will always happen. There are limits to the elimination of collateral damage in UAV warfare. Indeed, whether these deaths of illegitimate targets because of mistaken identity or unreliable intelligence. Even in cases where operators have the right intentions, mistakes can happen. For example, on 12 December 2013, a UAV strike targeted Shawqi Ali Ahmed al Badani, an AQAP leader linked to multiple terrorist attacks according to the US Department of State.[[382]](#footnote-382) However, rather that eliminating a legitimate target, the personality strike hit a wedding procession traveling from the groom’s home to the wife’s home.[[383]](#footnote-383) There are conflicting reports as to whether Badani was part of the wedding procession: it was believed that he was in the fourth vehicle but escaped before the missile hit.[[384]](#footnote-384) Conversely, local villagers stated that there was “no sign that Badani was anywhere near the village, noting that he was from another region of Yemen, and, as a ‘stranger’ to the area, was unlikely to have been invited to a gathering celebrating the wedding between a groom and bride in two neighboring villages.”[[385]](#footnote-385) According to *TBIJ*, four or five of the eleven vehicles of the procession were hit, killing at least 12.[[386]](#footnote-386) Further, *Al-Jazeera* reported: “The US officials said between nine and 12 other fighters were killed in the December drone strike, and that there were no civilian casualties. Initial reports from Yemen, however, had said that 13 civilians were killed in the drone strike, as their wedding party in the south of Yemen was mistaken for an al-Qaeda convoy.” Both *TBIJ* and *NBC News* reported the victims as being civilians, shepherds and khat farmers aged 20 to 65.[[387]](#footnote-387)

Essentially, issues of collateral damage and double effect in personality strike emphasise the importance of a clear and discriminate approach to the identification of legitimate targets. Without an understanding of discrimination that is suitable for the realities of asymmetrical warfare, then mis-discriminate strikes occur and generalisations are used. This highlights the importance and validity of the reinterpretation of the discrimination criterion as well as the new twofold approach presented in Chapter Two.

D. Summary

Briefly, there are three central ethical issues with the use of personality strikes in drone warfare: the way the targets are selected, the side effects of strikes, and finally the asymmetry of drone use. For a personality strike to be just and to overcome these issues, it ought to target individuals who are identified as a legitimate target according to *individual discrimination* only since *situational discrimination* does not apply in personality strikes. Moreover, drone operators ought to show restraint in the use of lethal force by only targeting individuals who fall above the liability threshold making the use of lethal force justified. This is so because of the partial assimilation of proportionality calculations into the application of the discrimination criterion. In addition to this, the timing of the strike is of great importance and UAV personality strikes need to follow Orend’s due care requirement in an effort to minimize collateral harm.

Looking back at the central research question of this thesis, the discrimination criterion can indeed be upheld in modern drone warfare with the use of personality strikes as a targeting strategy. Still, these strikes ought to be aimed at legitimate targets who are identified as such because of their individual moral responsibility for the conflict following *individual discrimination*, as argued earlier in this chapter.

Personality strikes are perhaps the least ethically problematic targeting strategy in drone warfare. Chapters Four and Five, which will examine signature strikes and double tap strikes respectively, will show situations and strategies where the challenges for discrimination are much more serious.

Chapter 4: Case Study 2 – Signature Strikes

My feeling is one man’s combatant is another man’s—well, a chump who went to a meeting.[[388]](#footnote-388)

- Cameron Munter

U.S. Ambassador to Pakistan, 2010-2012

A. Defining Signature Strikes

1. Description and Use

This second case study chapter focuses on signature strikes, one aspect of drone campaigns that has come under increased criticism.[[389]](#footnote-389) This approach to targeting is fundamentally different from personality strikes since the identity of the target is not known prior to the strike. Rather, targets are identified by patterns of lifestyle or behaviour that are considered to be indicative of terrorist activity. A 2012 report by the Columbia University Law School Human Rights Clinic report titled *The Civilian Impact of Dron*es defines signature strikes as follows: “A signature strike is one in which the US conducts targeting without knowing the precise identity of the individual targeted. Instead, the individuals match a pre-identified ‘signature’ or behavior that the US links to militant activity or association. US officials have generally disclosed fewer details about signature strike processes than about personality strikes, even in leaks to media.”[[390]](#footnote-390) For example, signature strikes target “groups of men who bear certain signatures, or defining characteristics associated with terrorist activity but whose identities aren’t known.”[[391]](#footnote-391) Additionally, signature strikes also target physical locations such as training camps and “suspicious compounds in areas controlled by militants.”[[392]](#footnote-392)

Between 2002 and 2007, UAV use has mainly been aimed at high value targets with personality strikes and it is under the Obama administration that signature strikes gained in popularity.[[393]](#footnote-393) The first CIA signature strike occurred on 4 February 2002 when a hellfire missile was fired from a Predator drone targeting a group of three men at Zhawar Kili, a former mujahedeen base in the Paktia province of Afghanistan.[[394]](#footnote-394) Two men appeared to be acting with reverence towards the third and the CIA hoped that the tallest of the three men was Osama Bin Laden.[[395]](#footnote-395) However, the victims were civilians with no proven ties to al-Qaeda.[[396]](#footnote-396) Following the strike, Pentagon spokesperson Victoria Clark, stated, “We’re convinced that it was an appropriate target. […] We do not know exactly who it was.”[[397]](#footnote-397) John Stufflebeem, also a Pentagon spokesperson, stated that the victims were not illegitimate targets because there was “no initial indication that these were innocent locals.”[[398]](#footnote-398) This is an example of the problematic guilty-bias that arises in the identification of the targets and victims of UAV strikes, as discussed in the previous chapter. This type of bias and guilt-by association plays a major role in the ethical evaluation of signature strikes, as will be discussed later in this chapter.

In 2012, *The Civilian Impact of Drones* report stated that signature strikes now accounted for the majority of UAV strikes in Pakistan.[[399]](#footnote-399) Additionally, in 2011, an unnamed US counterterrorist official claimed that signature strikes have killed twice as many terrorists as personality strikes.[[400]](#footnote-400) Moreover, President Obama stated, in a 2013 speech at the National Defense University in Washington D.C.: “over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists – insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance that I signed yesterday.”[[401]](#footnote-401) The speech also touched on the importance of establishing guidelines and a framework for the use of drones in a move towards a more restricted use of militarized UAVs.[[402]](#footnote-402) Further, in a telephone debrief with reporters, an unnamed senior Obama administration official was asked if “signature strikes explicitly be prohibited now?”[[403]](#footnote-403) and replied: “I don’t want to get into the details of any specific strike. […] Given the two principal changing circumstances in our effort against terrorism -- the winding down of the war in Afghanistan and the demise of al Qaeda core -- the need for the types of strikes that we’ve taken generally over the course of the last several years will be reduced over time.”[[404]](#footnote-404) These statements from President Obama and his administration were often interpreted as meaning that the use of signature strikes would end. Yet, this was not explicitly stated and has not been the case. On 1 July 2015, *TBIJ* published a report on UAV warfare titled ‘Drone War Report, January-June 2015: Controversial ‘signature strikes’ hit Yemen and Pakistan’ in which it stated that signature strikes were still in use.[[405]](#footnote-405) One of the most publicised signature strikes was the 15 January 2015 UAV strike that killed two al-Qaeda hostages in Shawal, Pakistan.[[406]](#footnote-406) The strike was targeting what *The Washington Post* describes as “a suspected al-Qaeda compound.”[[407]](#footnote-407) Following the strike, President Obama issued a public apology for the killing of two hostages, American Warren Weinstein and Italian Giovanni LoPorto, and argued that the strike was nevertheless “fully consistent with the guidelines.”[[408]](#footnote-408) Moreover, in June 2015, Greg Miller of *The Washington Post* stated that “the reliance on signature strikes would help explain an increase in the pace of drone operations in Yemen over the past six months.”[[409]](#footnote-409)

2. Types of Signature

It is important to note that there is no official list of ‘signatures’ that have been made public. As the 2012 *Living Under Drones* report states: “According to US authorities, these strikes target groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t known. Just what those ‘defining characteristics’ are has never been made public.”[[410]](#footnote-410) Yet, some information is available. A key document on the different types of signatures is Kevin Jon Heller’s 2013 article discussing the legality of fourteen different signatures used to justify and legitimize UAV strikes.[[411]](#footnote-411) This list will be used as a source of information on the different signatures that are being employed. Additionally, ‘funeral strikes’ will be added to this list since these are also to be considered ‘signatures’ on which strikes are based.

1. Planning attacks: Perhaps the closest to an active implication in the fighting, this refers to the act of planning and plotting attacks.
2. Transporting weapons: Such as a ‘pickup’ truck with a cargo bed full of firearms for example. The legal foundation for this strike is that both the weapons and the vehicle transporting them are military objectives, which can be targeted.
3. Handling explosives: This signature targets the individuals loading or unloading the explosives from the ‘pickup’ truck for example or the process of fabricating explosives, such as IEDs.
4. Al-Qaeda compound: Building(s) with or without an enclosure that serve as an al-Qaeda command centre or a base for their operations.
5. Al-Qaeda training camp: Area where al-Qaeda train their members and recruits.
6. Operating an Al-Qaeda training camp: The individuals in charge of the operations of the training camp of signature 5.
7. Suspicious camp in Al-Qaeda-controlled area: Considering the difficulty of identifying al-Qaeda objectives, this signature targets compounds that are suspected to be training grounds for al-Qaeda members.
8. Rest Areas: The facilities where the enemy fighters rest (outside of compounds).
9. Military-age male in area of known terrorist activity: Males roughly aged 16 to 40.
10. Consorting with known militants: This signature targets individuals who associate with known al-Qaeda member.
11. Group of armed men travelling towards conflict
12. Armed men traveling in trucks in Al-Qaeda-controlled areas
13. Training to join Al-Qaeda: Individuals outside of training camps or compounds that are training to join the enemy’s combat activities.
14. Facilitators: This refers to a wide range of activities that ‘facilitate’ the activities of al-Qaeda and its associates, including the recruiting fighters, propaganda, financing operations, or the supply of food, shelter, weapons, etc. to fighters.
15. Funeral strikes: This final signature targets the attendees of the funeral of a known militant.

B. Challenges for Discrimination

The ethical issues related to the side effects of strikes and collateral damage presented in Chapter Three are also applicable in signature strikes, therefore these discussions will not be repeated here. There are also additional ethical concerns with the way signature strikes identify legitimate targets. Firstly, some signature strikes are based on profiling in a narrow sense where it is assumed that all individuals who fit certain vague and broad patterns of behaviour (“surrogate characteristic”[[412]](#footnote-412)) that are associated with combatant status and soldier activity, and thus with being legitimate targets. Secondly, signature strikes are also problematic because they rely on guilt by association to identify legitimate targets even if the actions are secondary to the conflict and not a direct implication. The signatures based on profiling or guilt by association are used to apply the classic understanding of discrimination following the soldier-civilian line. However, this is ethically problematic because the criteria identifying legitimate targets are too broad and vague to be considered just and discriminate. In addition to profiling and guilt by association, the preventive and pre-emptive aspect of signature strikes is also problematic. Looking at the fifteen signatures presented earlier, many target individuals before they become actively involved in the conflict, as is the case with the ‘training to join al-Qaeda’ signature for example. This preventive approach to target selection raises questions in regard to *jus in bello*. The spectrum between prevention and pre-emption is too broad and undefined. Pre-emptive strikes will only be legitimate and just if they occur as a last resort. The use of *situational discrimination*, which states that individuals engaged in harming or who pose an immediate threat can be legitimate targets if there are no other means to neutralize the threat. For example, the preventive targeting of all individuals exercising outdoors because they might be training to join al-Qaeda is too broad to be considered discriminate. These individuals would not be identified as legitimate targets if *situational discrimination* was used, although drones could be used to monitor the activities of the potential targets.

Signature strikes are aimed at eliminating future ‘combatants’ before they become involved in the fighting, which can be unjust in regard to the *jus in bello* criteria. Yet, in cases where the threats are not imminent or immediate, such as with individuals potentially training to join al-Qaeda for example, lethal force should not be used. Restraint is necessary. Lethal force should be limited to cases where *individual* or *situational discrimination* can be implemented proportionally. In that sense, this chapter will argue that signature strikes need to be replaced with situational strikes, which implement *situational discrimination*. This is necessary in order to make discrimination applicable to situations where a target’s responsibility for the threat is unknown, but they are actively engaged in the conflict, which should make them legitimate targets. In their current form, signature strikes are an attempt to overcome the difficulty of identifying legitimate targets outside of the scope of personality strikes by identifying characteristics and actions that are seen indicative of combatant status (that fit the broad ‘combatant’ or ‘soldier’ profile) in order to apply the classic soldier-civilian line of discrimination. However, this approach to target selection is highly ethically problematic.

As discussed previously, the benefit of drones is that they make responsibility-based approaches possible. In addition to this, *situational discrimination* acts as a complement to revisionist interpretations of the criterion by allowing for the targeting immediate threats when responsibility is unknown or absent. The key contribution of *situational discrimination* is that it provides a framework for the targeting of non-morally responsible or innocent threats. These can take multiple forms such including Boko Haram’s coerced suicide bombers. Another example might be the driver who is unaware that he is transporting weapons or explosives.

1. Group Profiling

Firstly, signature strikes are ethically problematic because they are a narrow form of profiling using non-distributive group profiles. This type of profiling “identifies a certain number of people who do not share all the attributes of the group’s profile. […] one person may be identified as a member of this group without having the same attributes and without sharing all the attributes. This kind of profiling has a higher probability of mistakenly identifing people as members.”[[413]](#footnote-413) For example, hooligans can be profiled as being football fans but not all football fans are hooligans. Thus, the ‘hooligan’ profile does not apply to all members of the ‘football fan’ group. Profiling all football fans as hooligans is mis-discriminate and unjust.[[414]](#footnote-414) This distinction is of high importance when it comes to the application of the discrimination criterion because strikes will only be discriminate if they rely on distributive group profiles. Indeed, the use of a distributive group profile can be discriminate since all the members of the group share the same defining characteristic, such as group membership of a terrorist organisation or being football fans for example. The targeting of uniformed soldiers can be interpreted as being based on a distributive group profile. This can be discriminate if all soldiers are identified as legitimate targets in the context of a traditional conflict for example. The unique characteristics of asymmetric warfare and counterterrorism means that distributive group profiles are difficult to identify and apply since unifying characteristic that are discernible for all enemy fighters are rare. This helps to explain the current reliance on the old soldier-civilian line of discrimination.

In their current form, signature strikes interpret the profiles (signatures) identified as indicative of soldier status as being distributive group profiles. However, this is not the case. Indeed, many signatures presented previously cannot be understood as belonging to every enemy fighter individually. The signatures are not individual profiles. Rather, they are non-distributive group profiles in the sense that some signatures apply to *some* would-be legitimate targets, without applying universally. In less abstract terms, this means that signature strikes assume that all the members of al-Qaeda, the Afghan Taliban or their associate forces share the same characteristics that can be identified as a pattern of behaviour. However, this is not the case. Aside from group membership, which is a distributive group profile, nothing indicates that all the enemy fighters share identical patterns of behaviour. Since the patterns of lifestyle or behaviour identified as signatures are non-distributive group profiles, using these as if they were distributive leads to an excessive widening of who is considered an enemy soldier a legitimate target. Indeed, signature strikes assume that anyone fitting any of the identified patterns, such as being a military-age man in an area of terrorist activity, automatically means that the individual in question is an enemy fighter. To quote the *Huffington Post*: “Warning: Avoid Military-Age Men in Muslim Countries.”[[415]](#footnote-415) In that sense, former U.S. Ambassador to Pakistan Cameron Munter stated, in response to a question on who is a target in UAV strikes: “The definition is a male between the ages of 20 and 40.”[[416]](#footnote-416) Targeting shortcuts will be discussed in greater details later in this chapter. However, the use of the ‘military-age-men’, approach to identifying legitimate targets represents an attempt to apply the old soldier-civilian approach to discrimination to the contemporary context of counterterrorism and asymmetrical warfare. However, these signatures cannot be seen as being distributive. It is wrong to assume that simply because a male is of military age, he is a terrorist or an enemy soldier and thus should be considered a legitimate target. Moreover, the use of profiles to apply discrimination leads to the use of targeting ‘shortcuts’ insofar as the decisions to strike is based on generalisations instead of known and verified facts. The key ethical issue with the use of signature strikes and non-distributive group profiles is that the signatures are based on vague parameters such as age or geographical areas that have no limits. For example, travel ‘towards conflict’ is used as the foundation for a signature, but these geographical factors are incredibly vague and broad – everything is in direction of conflict, it simply depends how large the perimeter is. Ergo, the profiles used in signature strikes are vague and broad in scope which means that they can easily be abused and stretched to fit the situations operators are facing. This can then lead to a mis-discriminate use of force. This strike cannot be considered discriminate without being outright indiscriminate since some attempt was made to identify legitimate targets. To overcome this, signature strikes need to be replaced by an application of *situational* *discrimination* to identify legitimate targets. Instead of relying on patterns of behaviour, *situational discrimination* should be used to identify legitimate targets in cases where lethal force can be justly used against immediate threats. Instead of pre-determined profiles, targets should be identified because of their immediate threats, following *situational discrimination*. For example, a coerced suicide bomber used by Boko Haram could be identified as a legitimate target following *situational discrimination*.

2. Guilt by Association

The second key ethical issue for the discrimination criterion with the use of signature strikes is their reliance on guilt by association to identify legitimate targets. Issues arise because these strikes stretch the targeting principle to include individuals who *might* show *some* association with legitimate targets in an effort to apply and implement the soldier-civilian approach to discrimination in the context of contemporary asymmetrical warfare. The use of guilt by association as the foundation for targeting strategies is highly problematic in regard to discrimination and *jus in bello* as it leads to mis-discriminate strikes.

The reasoning behind the use of profiling based on guilt by association to legitimise signature strikes is the idea that through their associations, the targets are contributing to the war effort to a sufficient extent to be considered ‘soldiers’ (in the context where discrimination is understood as differentiating between soldiers and civilians). The targets are considered to be accomplices and thus guilty. This reasoning is often used to justify the targeting of civilian munitions factory workers. They are differentiated from individuals working in a factory making military uniforms for example because although they are contributing to the war effort, their contribution is marginal, and the fighting would still happen without their work, thus they should not be considered accomplices and legitimate targets liable to be killed. A boot maker is not complicit to the wrongdoing of the conflict to the same extent as a bomb maker or munitions factory workers. Chiara Lepora and Robert Goodin’s *On Complicity and Compromise* presents a detailed exploration of ‘complicity’ where the authors identify a series of acts that make the agents ‘cousins’ of the principle actors.[[417]](#footnote-417) Amongst these actions is a sub-category of acts which involve non-contributors: “Complicity necessarily involves acting in a way that could contribute causally to the principle wrongdoing of another. In the case of four of the ‘cousins’ – conniving, condoning, consorting or contiguity – that is not the case.”[[418]](#footnote-418) These ‘cousins’ are important in target identification in regards to guilt by association as they are secondary to the principle wrongdoing insofar as they “accompany the wrong without ever, in any possible world, being essential to it – in which case they would not count as potential causal contributions, or hence complicity at all.”[[419]](#footnote-419) In other words, even if these actions can contribute to a certain extent to the war effort, the contributions are not sufficient to make the actors ‘contributors’ analogous to the ‘soldier’ category to become legitimate targets. This is where the fundamental ethical issues with guilt by association in signature strikes arise.

Guilt by association in signature strikes can take three broad forms: contiguity, consorting, or contribution. Firstly, contiguity is used as a justification for signature strikes by assuming that individuals in physical proximity of conflict or legitimate targets are also involved in the conflict. This is a form of geographical profiling as it identifies anyone within a certain physical area or within a certain perimeter as a legitimate target. This is highly problematic on an ethical level as it does not appear to be an appropriate way to apply the discrimination criterion because it widens what can be considered indicative of combatant status. In that sense, since signature strikes are an attempt to profile would-be combatants in order to apply the soldier-civilian line of discrimination, the use of contiguity, proximity or geographical location is not sufficient to assign combatant status in a discriminate manner. For example, by standing near a soldier, one does not automatically become a soldier too. Signature strikes using this type of assumption ought to be replaced by an implementation of *situational discrimination* in order to identify legitimate targets on the grounds of immediate threats instead of contiguity. Similarly, being in a geographical area controlled by a certain group is not an indication of group membership. For example, living in a constituency governed by a certain political party does not mean that all people in that area at any given time are active members of the party in question. Moreover, being in a physical area controlled by al-Qaeda or ISIS cannot be considered as an indication of membership to one of the groups. Using this reasoning to identify legitimate targets with guilt by association and geographical profiling leads to unjust and mis-discriminate signature strikes. Further, ‘contiguity’ simply refers to physical proximity and “does not per se contribute to a specific wrongdoing and should thus be distinguished by complicity.”[[420]](#footnote-420) Therefore, the use of contiguity to identify targets and legitimise strikes is a broad form of guilt by association where interaction or connection with legitimate targets is not necessary and physical proximity is sufficient. This amounts to geographical profiling. Nevertheless, simply being near legitimate targets or areas of conflict is not sufficient to become a legitimate target. This is valid for both individuals and infrastructures such as training camps. Thus, signatures that are grounded on contiguity cannot be considered discriminate or just.

Secondly, and similar to contiguity, consorting is used to legitimise signature strikes. Strikes following this reasoning assume that individuals who socialise or interact with identified legitimate targets are also legitimate targets. However, the mere act of “‘hanging out’ with principal wrongdoers”[[421]](#footnote-421), who are legitimate targets, even if identified with *individual discrimination*, does not imply contribution to the wrongdoing, even if the secondary actors approve of the conflict. Consorting does not contribute to the wrongdoing (threats) and it is for this reason that it cannot be seen as bringing complicity. Consorting does not automatically imply co-conspiracy. To consort simply means to associate or fraternize with someone. It might be argued that consorting can bring support and involvement in the actions of legitimate targets, but if *individual discrimination* cannot be applied to identify key facilitators, *situational discrimination* limits the identification of legitimate targets to individuals posing an immediate threat. Mere association with identified legitimate targets is not sufficient to justify and legitimise the use of lethal force on the secondary actors since it does not constitute an immediate threat or engagement in harm. The act of consorting with known militants is not sufficient to make the secondary actor a legitimate target for a signature strike. This use of guilt by association in its most literal interpretation is unjust and mis-discriminate. One does not automatically become a drug load simply by having a conversation with a drug trafficker. Even having a close friendship or patterns of interaction with such individuals does not bring involvement in the drug trade. Assuming it is the case because of the individual’s association with the drug trafficker is unjust. In regard to discrimination more specifically, combatant status is not contagious, and it is not automatically transferred to any secondary actor by mere association with a known combatant. There will be cases where the secondary actors consort with legitimate targets to the extent where they become involved in the conflict, they can become key facilitators and the use of lethal force can be justified on this basis with *individual discrimination*, as discussed in Chapter Three for example. Briefly, simply by interacting in some way with known militants, individuals do not become combatants. Here again, the use of guilt by association leads to mis-discriminate and unjust generalisations. Instead of guilt by association, legitimate targets should be identified as such if they pose an immediate threat fulfilling *situational discrimination*. If there are some suspicions in regard to whether an individual is a conspirator (facilitator), then UAVs can be used to continue to track the whereabouts of the suspect in order to gather more intelligence to verify its involvement.

Thirdly, signature strikes are a form of guilt by association because they are founded on an excessive widening of what constitutes secondary actions. ‘Secondary’ acts can refer to a wide array of activities “ranging from winking at it, making it happen, working for it, elaborating and extending it, forgiving it and abetting it, all the way to jointly performing it.”[[422]](#footnote-422) In the broad profiling of signature strikes, it is assumed that the contact in itself is a sign of complicity, which “is commonly recognized as a legal status that draws individual responsibility.”[[423]](#footnote-423) Mark Sanders argues that complicity is “not washing one’s hands but actively affirming a complicity, or a potential complicity, in the ‘outrageous deeds’ of others.”[[424]](#footnote-424) In regards to discrimination, complicity can only justify strikes when the complicit actions are *essential* to the conflict. Such essential acts become facilitation as they are essential or constitutive of the fighting. In those cases, only key facilitators can be liable to be killed by lethal UAV strike. The following example illustrates how causally inessential acts do not contribute to the wrongdoing: “Consider for example the otherwise uninvolved hotelier who merely offers a comfortable bed to the bank robbers after they rob the bank. Suppose the hotelier’s offer of a bed would be utterly inessential to the robbery […] the hotelier cannot be said to be complicit with the robbery if what he does could never, under any possible scenario, have contributed causally to the robbery.”[[425]](#footnote-425) In regard to signature strikes, this means that only actions that contribute essentially (causally) to the conflict can make the perpetrator a legitimate target. Therefore, individuals whose secondary actions would contribute to the conflict in a way that can make them liable to be killed are ‘complicity simpliciter’ insofar as they “contribute to *another’s* wrongdoing.”[[426]](#footnote-426) In these cases, the facilitator or complicity simpliciter acts with some knowledge of the aim or scope of the legitimate target’s involvement in the conflict such as tank makers who have at least some level of awareness that the product of their work is used in the fighting. This type of contribution was discussed in Chapter Three where it was argued that only key facilitators can be identified as legitimate targets if they are directly involved in the conflict following *individual discrimination*. Additionally, the key facilitators ought to be sufficiently involved to make them liable to be killed by a personality strike. The hotelier in the example presented above or the wife of a known militant who feeds him and cares after him are not key facilitators and their actions do not contribute causally to the conflict. Considering these two individuals as complicity simpliciter is an excessive expansion of what counts as a secondary action to the principal wrongdoing. In addition to this, it has been argued that the secondary non-causal contributions of enablers should bring some liability.[[427]](#footnote-427) Here, “an enabling event is a necessary, but not sufficient, condition.”[[428]](#footnote-428) It is compared to the placing of a domino in a long series: “there is a difference in the causal role played by a genuine cause of a remote effect such as the first domino’s going over, and an enabler, such as the placing of the thirteenth domino in the proper position (so that when it falls it falls into the fourteenth).”[[429]](#footnote-429) Nevertheless, it is important to remember that in the current situation of applying discrimination in UAV warfare, assigning *some* liability is not sufficient since discrimination ought to differentiate between targets liable to be killed and those who are liable to some harm short of lethal force, following both *situational discrimination* and proportionality criterion. Signature strikes targeting secondary acts that are not essential to the conflict under the label ‘facilitation’ overly stretch the scope of secondary actions seen to make the perpetrator a legitimate target. Indeed, being a facilitator will only make one liable to be killed by personality strike as argued previously. Instead of using signature strikes targeting ‘facilitators’, these should be identified as legitimate targets with *individual discrimination*, as discussed in Chapter Three. In short, the types of facilitation that signature strikes target are too far removed from the conflict (form the principle wrongdoing) to legitimise a strike. Moreover, signature strikes targeting secondary actions are formulated in broad terms, such as ‘facilitators’ for example, which leave room for excessive widening and broadening of what counts as facilitation, which then leads to unjust and mis-discriminate strikes.

Broadly the use of signature strikes poses a direct problem for the implementation of the discrimination criterion because it relies on guilt by association and profiling to justify strikes. These two approaches to target selection are highly mis-discriminate and are an excessive widening of who can be considered a legitimate target. This is so because they are attempts to transpose the classic and out-dated soldier-civilian line of discrimination to the context of asymmetrical warfare, as exemplified in the MAM or ‘rest area’ signatures for example, resulting in an excessive widening of the ‘soldier’ category. This broadening of the ‘pool’ of legitimate target leads to highly mis-discriminate strikes.

C. Application

1. Review of Signatures

Before moving on to explore the way in which a reinterpretation of the discrimination criterion would impact the implementation of the requirement in contemporary conflict, the fifteen signatures identified above will be revisited. The ethical issues with signature strikes will be discussed.

The following six signatures are ethically problematic because they rely on guilt by association.

a) Signature 6: Operating an al-Qaeda training camp

In a 2011 *The New Yorker* article, Dexter Filkins reported that ‘operating a training camp’ was one of the profiles used to justify signature strikes.[[430]](#footnote-430) An example of this is strike ‘OB308’ of 6 January 2013 that targeted “an alleged militant training camp run by Hakimullah Mehsud, leader of the Pakistani Taliban (TTP)” in Babar Ghar, South Waziristan.[[431]](#footnote-431)

Strikes based on the ‘operating an al-Qaeda training camp’ signature are a case of guilt by association although it might not appear obvious. If individuals are *known* to be operating an al-Qaeda training camp, then they can be placed on a targeting lists and identified as legitimate targets for personality strike because of their individual moral responsibility for threats by being a key facilitator, as argued in Chapter Three. Indeed, their actions make them legitimate targets following *individual discrimination*. However, with signature strikes, the identity of the target is not necessarily known which can be problematic in determining whether a potential target is indeed operating an enemy training camp or merely near one, or near a suspected camp. The central issue with this signature is that it is too broad which leaves place for a wide range of potential legitimate targets. Indeed, this signature uses guilt by association (contiguity) to identify targets since it assumes that individuals in the proximity of an enemy training camp ought to be its operator and thus legitimate targets. Moreover, strikes targeting al-Qaeda training camps and compounds can be legitimate because they are military objectives. These physical locations are legitimate targets (military objectives) and can be targeted proportionally (considering both material and human costs), as will be explored in further detail later in this chapter. Moreover, this signature is redundant since individuals that are known to be training camp operators, can be targeted by personality strike if they are identified with *individual discrimination*.

b) Signature 7: Suspicious camp in al-Qaeda-controlled area

In 2012, Pakistan’s Dawn newspaper reported that signature strikes targeted both training camps and ‘suspicious compounds in areas controlled by militants.’[[432]](#footnote-432) An example of a suspicious camp being targeted is the 7 October 2015 ‘OB344’ strike which hit a house in Kundghar, South Waziristann, that was suspected to double as a training area and that belonged to a suspected Taliban commander known as Mustaqueem.[[433]](#footnote-433)

Signature strikes aimed at ‘suspicious camps in al-Qaeda controlled area’ are ethically problematic for two reasons. Firstly, this signature involves an element of geographical profiling. If the suspicious camp was located in an area outside of al-Qaeda control, it would not be a legitimate target. Perhaps it would be placed on a ‘watch list’ because it is suspicious, but a strike would not be legitimate. However, if the alleged camp is in an al-Qaeda-controlled area, then the doubts and suspicions on whether it is actually an enemy camp disappear, and it becomes a legitimate target because of geographical profiling. Any ‘suspicious camp’ automatically become a legitimate target if it is located in an al-Qaeda-controlled area because it is assumed that these locations are the equivalents of military installations/bases, which are military objectives and thus can be legitimately targeted. In addition to being profiled as being a legitimate target because of its geographical location, the camp is victim of guilt by association (by contiguity) as it assumes that any ‘camp’ is a legitimate target if it is located in an al-Qaeda-controlled area. If there are doubts on the status of the suspicious camp, then the intelligence-gathering capabilities of UAVs ought to be used to gain more information on the use and nature of the camp, in order to ultimately determine if it can be considered a military objective or not. In other words, if a camp is suspected to belong to al-Qaeda or any other enemy group, it ought to be watched, until its status is confirmed regardless of its geographical location. A training camp will be a legitimate target if there is irrefutable evidence that it contributes directly to the conflict.

c) Signature 8: Rest Areas

Traditionally, military bases and garrisons can be legitimate targets, as they are military objectives. In 2010, the *CNN* *Afghanistan*’s *‘*Crossroads’ blog reported that facilities where the enemy prepares and rests are legitimate targets.[[434]](#footnote-434) The targeting of residential areas suspected to double as ‘compounds’ is a visible trend in UAV signature strikes. For example, strike ‘OB365’ of 16 May 2015 targeted a “domestic compound reportedly being used by the Pakistan Taliban”.[[435]](#footnote-435) Additionally, “CIA drones reportedly destroyed a residential compound in the Shawal area [hours after the Pakistan government condemned](http://tribune.com.pk/story/888466/fresh-drone-strike-kills-four-in-north-wazirstan/) the last drone strike in that area”[[436]](#footnote-436) on 18 may 2015 (strike ‘OB366’).

In the context of asymmetrical warfare, many rest areas will serve a double function by providing shelter for both legitimate and illegitimate targets simultaneously. In an attempt to apply the old and out-dated soldier-civilian line of discrimination to asymmetrical warfare, ‘rest areas’ are seen as the equivalent of military installations. However, in counterterrorism and counterinsurgency, many rest areas will serve double objectives by being both residential and combat compounds, strikes aimed at rest areas are unlikely to be legitimate and justified. Signature strikes aimed at rest areas are likely to bring the deaths of illegitimate targets. Such harm could be legitimised as collateral damage using the doctrine of double effect to justify harm to illegitimate targets, but these principles are difficult to apply to the case of rest areas since this signature *assumes* that the rest areas also contains legitimate targets. Yet, the targeting of rest areas by signature strikes can be a form of guilt by association as it assumes that rest areas are military objectives and thus legitimate targets. This is so because the signatures risk bypassing DDE and collateral damage concerns and states that rest areas are legitimate targets on the same level as military barracks. For example, a legitimate target’s rest area will most likely be its home. Thus, a signature strike aimed at a ‘rest area’ is not sufficiently discriminate and assumes guilt by association for all other individuals living in the same apartment and building as a single legitimate target. To be legitimate, a strike targeting rest areas ought to account for *jus in bello* proportionality (collateral damage and double effect). Moreover, this signature also involves elements of geographical profiling insofar as it assumes that if a rest area is in enemy territory, it is a legitimate target without the need to investigate further the true nature (‘identity’) of the building in question, to verify if the houses contributes to the conflict.

d) Signature 10: Consorting with known militants

The reasoning behind this signature is the belief that “‘consorting with known militants’ can be considered ‘sympathising’ or ‘collaborating’ with an organized armed group.”[[437]](#footnote-437) Further, Filkins reported being told by a high-level American official that ‘consorting with known militants’ makes one liable to be targeted in a signature strike.[[438]](#footnote-438) An early example of such approach to targeting is the 14 October 2011 ‘YEM033’ strike that killed Abdel Rahman Anwar al Awlaki, Anwar al Awlaki’s 16-years old son, who was also an American citizen.[[439]](#footnote-439) “He was killed two weeks after his father, while having dinner with his cousin and some friends. Immediately after the strike, anonymous U.S. officials asserted that the younger Awlaki was connected to al Qaeda and was 21 years old. After the family produced his birth certificate, the U.S. changed its position.”[[440]](#footnote-440) Later, an Obama administration official stated that the strike was “an outrageous mistake… They were going after the guy sitting next to him.”[[441]](#footnote-441) This neighbour was probably “Sarhan al Qusa (aka Farhan al Quso) brother of AQAP leader Fahd al-Qusa or Quso.”[[442]](#footnote-442) However, Sheikh Abu Bakr told *Reuters*: “The tribe had reached an agreement with a number of its sons accused of belonging to al Qaeda to return to the just path, and they were due to return home today, Saturday. But instead of that, we received them as mutilated corpses.”[[443]](#footnote-443)

The act of ‘consorting with known militants’ is considered a legitimate basis to justify a signature strike because is assumes that being with a ‘known militant’ is sufficient to make one a legitimate target liable to be killed by a UAV signature strike. This is a clear example of guilt by association. As described earlier, consorting or ‘hanging out’ is, at best, a secondary act that is insufficient to make the individual a legitimate target and at worst, it is an entirely unrelated act. Either way, such strikes cannot be interpreted as discriminate.

e) Signature 14: Facilitators

There is contradicting information on the case of facilitators. On 4 May 2010, David S. Cloud of the *Los Angeles Times* reported that “people who are determined to be raising money for Al Qaeda or who only facilitate its operations are not targeted, according to a senior administration official.”[[444]](#footnote-444) Yet, on the same day, CNN’s Pentagon correspondent, Barbara Starr, reported statements from an administration official saying: “The enemy, to be sure, has lost commanders, operational planners, weapons specialists, facilitators and more.”[[445]](#footnote-445) This implies that facilitators are being targeted. Moreover, *The Guardian* reported that US officials considered attacks on “an al-Qaida facilitator.”[[446]](#footnote-446) The case of key facilitators has been discussed in the previous chapter and this signature exists to accommodate situations where the facilitator is not known, which means that they cannot be placed on targeting lists and personality strikes cannot be used. The central issue here is the lack of clear definition of what is intended by ‘facilitator’. As Becker and Shane ask: “What’s al Qaeda facilitator? […] If I open a gate and you drive through it, am I a facilitator?”[[447]](#footnote-447) Actions making an individual liable to be killed in a UAV personality strike because they are a key facilitator (and thus morally responsible for threats) have been explored in Chapter Three. Moreover, signatures 2 and 3 (‘transporting weapons’ and ‘handling explosives’) account for situations where operators find a facilitator not on a personality strike targeting list. Thus, this ‘facilitators’ signature is aimed at other actions that facilitate the conflict, without defining them. Although this might not seem problematic, it raises ethical issues and concerns in regard to the use of guilt by association similar to the ones in signature 10 (‘consorting with known militants’). Indeed, any type of association with legitimate target can become ‘facilitation’, which can then legitimise a signature strike, ultimately leading to mis-discriminate strikes because of guilt by association.

Broadly, facilitators are not directly involved in the conflict insofar as they are not taking up arms and fighting. They pose *secondary* actions, which can relate to the conflict, considering these acts as essential contributions to the conflict is an excessive expansion of what counts as ‘secondary’ acts. Consequently, the central concern in regard to facilitation and discrimination has to do with the essentiality of the acts: how important is the action to the fighting. Only constitutive acts can make the perpetrator a legitimate target with *situational discrimination* by posing an immediate threat or being actively engaged in harming. Much like in the case of key facilitators presented in Chapter Three, the wife of a known and identified legitimate target cannot be considered a facilitator because she provides meals to the combatant. The wife’s actions are not *causally* linked to the legitimate target’s combat activities and therefore she cannot be considered a legitimate target. This is somewhat complementary to signature 8 ‘rest areas’, which focuses on the physical infrastructures. In order to avoid an excessive use of the ‘facilitator’ signature to assign ‘soldier’ status using guilt by association, only known and identified key facilitators can be targeted by drone personality strikes (applying *individual discrimination*), as argued in the previous chapter. For cases where UAV operators witness individuals contributing directly and essentially to the conflict, they can be considered legitimate targets if they pose an immediate threat (applying *situational discrimination*). If the threat is not imminent, then the suspect can be tracked with UAVs to gain more intelligence. Relying on *situational discrimination* rather than the ‘facilitators’ signature to identify legitimate targets will lead to a more discriminate application of the discrimination criterion in drone use.

f) Signature 15: Funerals

The last signature that is ethically problematic because it is a form of guilt by association is ‘funeral strikes’. As early as February 2012, *TBIJ* reported on the use of “deliberate strikes on funerals and mourners.”[[448]](#footnote-448) In a January 2014 press briefing, the UN Office of the High Commissioner for Human Rights stated: “We strongly condemn the shelling of a funeral procession that killed 21 civilians and injured 30 others, including children, at Al-Dhalai Governorate on 27 December 2013.”[[449]](#footnote-449) More recently, on 5 June 2015, UAVs targeted vehicles leaving a funeral in the Tirazayi District of the Khost Province, Afghanistan.[[450]](#footnote-450) This signature assumes that individuals attending the funeral of a militant are also militants that can be targeted legitimately. This is another clear case of guilt by association for the same reasons as described in the case of ‘signature 10: consorting with known militants’. Attending the funeral of a legitimate target does not make the attendees legitimate targets by association. This cannot be interpreted as being discriminate.

In addition to the use of guilt by association, the profiling used in signature strikes also raises ethical concerns. The following four signatures rely on profiling to identify legitimate targets.

a) Signature 9: Military-age male in area of known terrorist activity

The first signature based on profiling is the one that sees all military-aged men in an area of terrorist activity as combatants, and thus as legitimate targets. In 2012, *The New York Times* reported that the Obama administration has come to consider “all military-aged males in a strike zone as combatants.”[[451]](#footnote-451) For example, on 9 June 2015, a UAV strike (‘YEM1995’) killed Nasir al-Wuhayshai, al-Qaeda’s leader, without knowing beforehand that he was part of the targets.[[452]](#footnote-452) Indeed, the attack was a signature strike “permitted to fire based on patterns of suspected militant activity.”[[453]](#footnote-453)

It is interesting to note that the use of this type of profiling and generalisations in the application of discrimination is not new. The ‘military-age men’ signature (MAM) can be traced back to the Vietnam War.[[454]](#footnote-454) In *My* *American Journey*, Colin Powell, former U.S. Secretary of State, writes: “I recall a phrase we used in the field, MAM, for military age male. If a helo spotted a peasant in black pajamas who looked remotely suspicious, a possible MAM, the pilot would circle and fire in front of him. If he moved, his movement was judged evidence of hostile intent, and the next burst was not in front but at him.”[[455]](#footnote-455) Although not new, the long loiter capabilities facilitate the use of targeting strategies such as this one. The MAM approach is a targeting shortcut used to adapt the classic soldier-civilian line of discrimination between legitimate and illegitimate targets in war to a context of asymmetrical warfare. As Cameron Munter stated, a MAM is any male aged between 20 and 40. This is a clear case of profiling.[[456]](#footnote-456) The MAM profile/signature is highly problematic in regard to discrimination since it considers large portions of the population as legitimate targets, regardless of their occupation or implication in the hostilities. Indeed, this signature attempts to identify would-be soldiers to apply the soldier-civilian line of discrimination to legitimise strikes. However, considering all military-age men in an area of terrorist activity as legitimate targets is equivalent to assuming that some form of mandatory general conscription is in place in the enemy territory. Yet, this is far from being the truth. It is indiscriminate to assume that all military-age men in Afghanistan are Taliban fighters. This is a clear example of a non-distributive group profile being used to justify strikes. Males between the age of 20 and 40 represent a large proportion of the overall male population in many countries. Moreover, males a few years older or younger could easily be thought of being of ‘military age’, widening the group of men who can be considered as legitimate targets for a signature strike. Simply put, this signature is ethically problematic because it is not a discriminate approach to targeting. It relies on the old and out-dated soldier-civilian approach to discrimination and considers all ‘soldiers’ as legitimate targets regardless of actions or responsibility. Instead, when *individual discrimination* cannot be applied, legitimate targets are identified by the threat they pose (*situational* discrimination) and not simply by their apparent age. Importantly, the MAM signature assumes that age is a distributive profile for ‘soldiers’ which is excessive profiling and leads to unjust and indiscriminate strikes.

b) Signatures 11 and 12: Group of armed men travelling towards conflict/Armed men traveling in trucks in Al-Qaeda-controlled areas

In 2012, Greg Miller reported that “CIA drones flying over Pakistan’s tribal belt are allowed to strike groups of armed militants traveling by truck toward the war in Afghanistan, for example, even when there is no indication of the presence of al-Qaeda operatives or a high-value terrorist.”[[457]](#footnote-457) Further, the *FDD’s Long War Journal* reported that on 14 April 2012, drones targeted alleged militants travelling in Baydah, Yemen, an area controlled by al-Qaeda at the time of the strike.[[458]](#footnote-458) The vehicle was travelling towards “the neighboring province of Abyan, where Yemeni troops have been fighting AQAP in the city of Lawdar for the past week.”[[459]](#footnote-459) Another example is strike ‘YEM194’ of 2 June 2015 targeted two or three vehicles in northern Yemen traveling in areas of conflict between militias.[[460]](#footnote-460) Similarly, armed men travelling in trucks in al-Qaeda-controlled areas can also be targeted by a signature strike. For example, the *FDD’s Long War Journal* and the *Yemen Post* reported UAV strikes targeting vehicles travelling in the Azzan district, an al-Qaeda stronghold.[[461]](#footnote-461) Another example is strike ‘OB346’ of 8 October 2014 which “targeted a moving vehicle in the Datta Khel area, near the Afghan border.”[[462]](#footnote-462)

These two signatures are very similar and raise the same ethical issue, namely that they use profiling which leads to mis-discriminate strikes. At first glance, these two signatures may not appear too problematic since the targets are armed, which can lead to threats and involvement in the hostilities, thus potentially justifying a strike. Yet, two problems arise with the use of these two signatures. Firstly, in regard to application, there is an important cultural component that is being overlooked: it is common for men to be armed in everyday life in Yemen and Pakistan. A 2013 article by Ali Abulohoom of the *Yemen Times* states: “In Yemen, a weapon is a symbol of manhood, power and pride.”[[463]](#footnote-463) Further, Abulohood argued that Kalashnikov are ‘much-prized’ and that rocket launchers and bazookas are not uncommon in cities.[[464]](#footnote-464) Similarly, a 2009 *The Wall Street Journal* discussed Pakistan’s ‘gun culture’ in an article titled ‘For Middle-Class Pakistanis, a Gun Is a Must-Have Accessory’.[[465]](#footnote-465) It argued: “In Pakistan, collecting guns—and firing them—has become a national tradition, dubbed the ‘Kalashnikov culture.’”[[466]](#footnote-466) The broad implications of this is that any men carrying a coveted AK-47 for example, who happens to live near an area of conflict or in a territory controlled by al-Qaeda can be profiled as a legitimate target for a signature strike. Celebratory gunfire is a common occurrence in both Yemen and Pakistan, thus men travelling with a firearm to a wedding, for example, could be considered to fit either of the above signatures without being involved in the conflict. This is ethically problematic as it profiles a vast proportion of the population of a ‘Kalashnikov culture’ as legitimate targets because of said culture. This is not to say that cultural gun ownership automatically makes these weapons non-threatening. Rather, this highlights the need for an awareness that being armed does not automatically equate al-Qaeda or Taliban fighter. The same way that in the USA, not all gun owners are members of the Citizens for Constitutional Freedom, the Oregon militia group who occupied the Malheur National Wildlife Refuge in early 2016.[[467]](#footnote-467)

Secondly, and more fundamentally, these two signatures use non-distributive group profiles. This then leads to mis-discriminate and unjust strikes. This is due to the vagueness of the signatures’ parameters, especially their geographical areas. Indeed, ‘towards conflict’ is particularly vague, especially when there is fighting in multiple different areas. Thus, nearly all directions of travel can be considered to be oriented towards conflict at some point or another. In regard to travel in ‘al-Qaeda-controlled area’, this profiles all men in such territories as legitimate targets regardless of whether or not they are immediate threats or engaged in harm. Perhaps the armed man is returning home, in al-Qaeda controlled territory, after attending a festive occasion, thus carrying a weapon he brought to take part in the celebratory gunfire. These two signatures illustrate the importance of profiling and its impact on discrimination. Briefly, these two signatures lead to mis-discriminate strikes because they rely on the profiling using characteristics that are deemed to be indicative of combatant status in an attempt to implement the old soldier-civilian line of discrimination. This leads to an excessive broadening of who can be considered a legitimate target. This can be avoided by using *situational discrimination* to identify legitimate targets outside of targeting lists.

c) Signature 13: Training to join al-Qaeda

This signature is closely linked to signature 5 (Al-Qaeda training camp), which will be explored in the following section, but with more flexibility in regard to the location of the training. The *Los Angeles Times* reported that US officials have said that “fighters training for possible operations in Afghanistan”*[[468]](#footnote-468)* are legitimate targets for UAV signature strikes.

The central issue here again is that this signature is a non-distributive group profile that lacks limits. Any form of physical activity can be considered to be training ‘to join al-Qaeda’ instead of simply being undertaken for good health. Training is considered to be a sign of soldier status sufficient to make the use of force legitimate, but what constitutes ‘training’ is unclear. As *The New York Times* reports: “The joke was that when the C.I.A. sees ‘three guys doing jumping jacks,’ the agency thinks it is a terrorist training camp.”[[469]](#footnote-469) It is not difficult to see how the use of this signature leads to mis-discriminate strikes based on the profiling of targets. If an individual or a group of individuals are suspected to be training to join an enemy organisation, UAVs should be used to gather valuable intelligence on their whereabouts and lethal force should only be used if *individual* or *situational* discrimination can be implemented.

Thirdly, five signatures can be considered ethically acceptable within certain limits. Indeed, signatures 1 through 3 can represent a direct implication in the conflict bringing moral responsibility and thus justifying a UAV strike according to the interpretation of *individual discrimination* presented earlier in this thesis. Indeed, planning attacks, transporting weapons and handling explosives are three actions that are direct implications in the conflict. Moreover, these actions can bring an individual moral responsibility for the conflict, making the perpetrators legitimate targets following *individual discrimination*. Thus, these signatures can be ethically acceptable because they are linked to the criteria that make personality strikes legitimate whilst allowing some flexibility for cases where responsibility is unknown. Consequently, since personality strikes cannot take place, targets of opportunity (whose identities are unknown) are targeted. Additionally, signatures 4 and 5 target military objectives.

a) Signature 1: Planning attacks

The first signature identified by Heller is probably one of the most obvious ones: planning attacks. As *The* *Wall Street Journal* reports:

To target such unidentified individuals and groups, the officials said, the CIA and JSOC must determine that their militant activities are significant enough to warrant treating them as so-called high-value targets or that they are plotting against U.S. and Western interests, a "force protection" rationale being cited for the strikes.

‘You don't necessarily need to know the guy's name. You don't have to have a 10-sheet dossier on him. But you have to know the activities this person has been engaged in,’ a U.S. official said.[[470]](#footnote-470)

Moreover, Harold Koh, former legal advisor of the US Department of State, stated that “the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks.”[[471]](#footnote-471) Similarly, in February 2014, *The Washington Post* reiterated that Obama’s 2013 speech on counterterrorism stated that the US has the authority to target and kill individuals “plotting with al-Qaeda”[[472]](#footnote-472) even if their identities are not known. For example, on 6 August 2013, strike ‘YEM134’ targeted and killed four al-Qaeda militants who were planning attacks on hydrocarbon infrastructures on the coast of the Arabian Sea.[[473]](#footnote-473)

Planning attacks brings individual moral responsibility, as defined in *individual discrimination*, which is sufficient to make one liable to be killed in war by a personality strike. This signature allows for the targeting of individuals who plan attacks but who are not identified, which means that they cannot be placed on targeting lists.

b) Signature 2: Transporting weapons

In 2015, *The* *Wall Street Journal* reported that “surveillance showing they [the targets] are transporting weapons”[[474]](#footnote-474) is one of the pattern of behaviour that can justify a signature strike. An example of such signature being use is the ‘YEM187’ strike.[[475]](#footnote-475) This attack occurred on 19 April 2015 in the Shabwa province of Yemen and killed three alleged al-Qaeda members: “the suspects were driving in a vehicle transporting weapons in the Saeed district in the eastern Shabwa province when the drone killed them.”[[476]](#footnote-476)

This signature can be ethically acceptable because it fits with the actions of key facilitators. Indeed, without weapons, the fighting could not go on. Transporting weapons can make an individual liable to be killed by a personality strike since it can be sufficient to generate moral responsibility for threats in the conflict and consequentially, make the perpetrators legitimate targets with *individual discrimination*. However, this signature allows flexibility for situations where operators see weapons being transported but there are doubts on the level of individual moral responsibility which is necessary to identify legitimate targets with *individual discrimination*. This signature allows for the targeting of innocent imminent threats, such as the driver who is unaware that he is transporting weapons for example. Ethical issues arise when this signature is interpreted to allow the targeting of any armed individual under the pretext that they are transporting weapons, especially when the targeting is being done in areas with strong gun cultures, as this can easily amount to profiling. Therefore, in order to be ethically acceptable, the transporter of weapons ought to pose an immediate threat (by indicating the intent to use the weapons for example) to bring liability with *situational discrimination*.

c) Signature 3: Handling explosives

Closely linked to the previous signature, the handling of explosives and the fabrication of bombs can also be sufficient to make an individual liable to be killed by UAV strike. “Officials say some decisions are straightforward – for example, if drones observe bomb-making […] In one cases cited by officials, a missile was fired at a compound where unknown individuals were seen assembling a car bomb.”[[477]](#footnote-477) Similarly, on 12 June 2014 strike ‘OB334’ targeted a house that was storing explosives and also destroyed vehicles loaded with explosives.[[478]](#footnote-478) Further, Greg Miller of *The Washington Post* has reported that ‘unloading explosives’ is sufficient to justify a signature strike.[[479]](#footnote-479)

‘Handling explosives’ can be a legitimate foundation for a signature strike because such actions are a direct implication in the conflict, making the perpetrator a legitimate target because they bear an individual moral responsibility for the conflict (*individual discrimination*). More specifically, this signature can refer to two types of actions. Firstly, handling explosives can refer to bomb-making. Individuals taking part in such activities are legitimate targets because they are directly involved in the conflict and thus bear some responsibility for the threat, as presented in Chapter Three (key facilitators). This signature can account for situations where the target is not on a targeting list. Secondly, ‘handling explosives’ can refer to the transport and supplying of weapons to fighters. It is here that the situations are more ethically problematic with risks of profiling, as presented in the ‘transporting weapons’ signature.

d) Signatures 4 and 5: Al-Qaeda compound and Al-Qaeda training camp

In the context where al-Qaeda is the enemy, the group’s compounds can be considered military objectives thus making them legitimate targets for UAV strikes. Issues come from the lack of clear definition of what is an al-Qaeda compound. The January 2015 strike that killed the two al-Qaeda hostages discussed earlier is an example of a signature strike targeting an al-Qaeda compound. Another example is the 19 July 2014 strike where multiple missiles were fired at a “sprawling compound in Pakistan’s northwestern tribal region bordering Afghanistan […] killing eleven militants.”[[480]](#footnote-480) Following the same logic as with compounds, al-Qaeda training camps can be legitimate targets for signature strikes.[[481]](#footnote-481) For example, strike ‘YEM160’ of 20 April 2014 targeted ‘alleged’ al-Qaeda training camps in the Abyan province of Yemen.[[482]](#footnote-482) The reasoning behind these two signatures is that the sites are military objectives in the context of a war against al-Qaeda and their associated forces, in the same way as a military base would be considered a legitimate target in a conventional conflict. However, in asymmetrical and non-traditional warfare, the differentiation between enemy compounds or training camps and civilian objectives is increasingly difficult, especially when enemy fighters hide amongst innocent illegitimate targets and ‘compound’ or ‘training camp’ are not defined. Considering this, strikes against al-Qaeda compounds and training camps will only be legitimate if there is irrefutable intelligence to prove that the site is indeed a compound or a training camp used by the enemy. Situations where there is a doubt call for great care and was discussed earlier in this section with signature 7 (suspicious camp).

Briefly, some signatures can lead to legitimate strikes without raising too many important ethical problems because the actions they target are direct implications in the conflict, which makes the perpetrator a legitimate target for a UAV strikes. The three signatures presented above (‘planning attacks’, ‘transporting weapons’, and ‘handling explosives’) are actions that make the perpetrator liable to be to be placed on a targeting list but allow for a certain degree of flexibility for cases where the responsibility of the perpetrator is not known. Indeed, the actions of these three signatures could make the perpetrators legitimate targets according to *individual discrimination*, as described in Chapter Three. Nevertheless, operators must be aware that there is a considerable risk of guilt by association, which leads to mis-discriminate strikes. Moreover, the ‘al-Qaeda training camp’ or ‘compound’ signatures allow for the targeting of locations (physical military objectives) rather than individuals. Strikes targeting these locations can be legitimate and justified as they are aimed at identified military objectives. However, proportionality, collateral damage and the DDE will play an important role in determining whether a strike against these military objectives can be just.

*Situational discrimination* is a necessary addition to *individual discrimination* because it allows for the targeting of innocent immediate threats. Individuals whose level of responsibility is unknown (or if they are not responsible) but who still pose immediate threats can be identified as legitimate targets with *situational discrimination* following the guidance presented in this chapter. Furthermore, *situational discrimination* brings greater applicability to the discrimination criterion for cases where *individual discrimination* cannot be implemented, but without having to return to discrimination based on ‘soldier’ status. In addition to this, it is important to bear in mind that discrimination is not the only requirement to be fulfilled in order for the fighting to be just. The use of force also ought to be proportional. In situational discrimination, a strike will only be proportionate if the use of lethal force is the only available means to end the on-going harm or to prevent the imminent threat. This is especially important with the use of drones since these weapons have the capability to hold-off strikes and wait in order to verify if a threat is indeed truly imminent or simply pending/potentially upcoming. The following section will further explore the benefits the implementation of *situational discrimination* would have on the upholding of the discrimination criterion in contemporary warfare.

2. *Situational Discrimination* and Signatures

Essentially, applying *situational discrimination* in combat entails a rejection of the use of signatures. Instead of identifying legitimate targets on the basis of characteristics and patterns, they are identified as such because of the situations they are engaged in. Only imminent threats are legitimate targets. Additionally, strikes will only be proportionate if the use of lethal force is the only way to stop the harm for occurring. This means that ‘imminent’ is understood in a strict sense referring to events on the brink of happening. As was mentioned previously, UAVs offer the unique ability to track potential targets uninterruptedly for extended periods of time. This therefore means that UAVs can track potential targets posing a threat until the threat either dissipates or becomes imminent. UAVs’ extensive tracking and surveillance capabilities means that drone operators have the power to abstain from launching strikes if the threat is not imminent, allowing for a better implementation of the discrimination and proportionality criteria, making the use of signatures unnecessary. In cases of non-imminent threats, drones can be used in conjunction with ground troops such as special forces raids, in order to neutralize the threat with the use of non-lethal means. This would bring a proportionate use of force. In more tangible terms, instead of relying on signatures, legitimate targets should be identified by the situations they are in. In other words, imminent threats are legitimate targets. Discrimination is situation-dependent rather than an attempt to apply the out-dated soldier-civilian line with the use of pre-determined characteristics. It was argued earlier that three signatures can be acceptable: planning attacks, transporting weapons, and handling explosives. This is because these types of actions that *can* make the perpetrator a legitimate target with *individual discrimination*. However, merely taking part in such activities is not sufficient, the perpetrator also ought to be posing an imminent threat where only the use of lethal force can neutralize the threat or be currently engaged in harming. Only then will the use of lethal drone strike be legitimate and discriminate. This is *situational* strikes.

Combined, the use of situational discrimination in conjunction with *individual discrimination* allows for the legitimate targeting of targets of opportunity, for cases when drone operators ‘stumble upon’ individuals engaged in harm or posing an immediate threat but whose responsibility is unknown. Additionally, *situational discrimination* allowsfor the targeting of innocent threats such as the coerced suicide bombers for example. If the threat is considerable but not imminent, the operators can track the potential target’s actions in order to determine whether or not they fulfil the criteria of *situational discrimination* and proportionality to make a strike legitimate and just. If the potential target does not fulfil one or both of the requirements, then the use of lethal force cannot be considered just. In other words, the flexibility brought by the use of situational discrimination allows for the potentially just targeting of targets of opportunity as well as individuals who do not fulfil the *individual discrimination* requirements to make them a legitimate target. In short, for the discrimination criterion to be implemented and upheld in contemporary drone warfare situational strikes ought to replace the use of signature strikes.

3. Infrastructures

There are two signatures that present a slightly different case for discrimination. Signatures 4 and 5 (al-Qaeda compound and training camp) refer to physical locations rather than individuals or patterns of life/behaviour. Therefore, *situational discrimination* is difficult to apply to such cases. In order for attacks on such infrastructures to be legitimate, there ought to be strong evidence of the military nature of the buildings. Thus, it is closer to an application of individual discrimination rather than situational discrimination insofar as the ‘identity’ (use) of the building ought to be known and it ought to play a direct contribution to the conflict (war effort). IHL’s definition of ‘military object’ should be used: “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”[[483]](#footnote-483) In addition to this, concerns of double effect and collateral damage are key in order to make the targeting of a physical building just, discriminate and proportionate. When there are doubts as to whether a building is used by enemy combatants as a ‘military’ base (military objectives) or not, the use of lethal force ought to be avoided until the status of the building can be confirmed. This will prevent an indiscriminate use of force on suspected.

In asymmetrical warfare, many of these potential legitimate infrastructures serve a double function. They house both legitimate and illegitimate targets. In such cases, two alternative routes are available. One option is for drone operators to focus on gathering intelligence on the building to confirm its status and use, staying away from the use of guilt by association. Ground troops are favoured in order to approach the situation in the most discriminate manner. The other option is to use advance warning of the upcoming strike, giving illegitimate targets a chance to leave the premises, as suggested by Briand Orend in the elaboration of his due care requirement.[[484]](#footnote-484) As Orend states: “offensive tactics and manoeuvres must be carefully planned, in advance, with a keen eye towards minimizing civilian casualties.”[[485]](#footnote-485) This has been seen in the targeting of ISIS installations for example: “So for the first time on Oct. 21 [2015], the U.S.-led coalition dropped leaflets warning ISIS drivers to flee before bombs began destroying hundreds of their trucks.”[[486]](#footnote-486) Briefly, instead of being signatures, enemy infrastructures ought to be approached with individual discrimination and a great attention to due care in order for strikes to be just.

D. Summary

In signature strikes, the personal identities of the targets are not known prior to the strike (unlike in personality strikes). Therefore, legitimate targets are to be identified by other means. It is here that the second principle of discrimination presented in Chapter Two comes into play. Instead of following the soldier-civilian line and identifying targets by their patterns of life, *situational discrimination* should be used. This means that legitimate targets are identified as such because of the situations in which they are involved and the threats they are posing. This principle of discrimination identifies legitimate targets on the basis on whether or not they are an immediate threat. In other words, legitimate targets are individuals who pose an immediate threat. Moreover, the use of force ought to be the only option to neutralise the imminent threat to make a strike just.

In summary, this chapter argued that signature strikes are ethically problematic and cannot be seen as discriminate because they rely on guilt by association and profiling to identify targets. Instead of relying on the old soldier-civilian line of discrimination, UAV strikes should focus on the situations in which potential targets are involved in order to determine if they are legitimate targets or not. These situational strikes would replace signature strikes and act as a complement to personality strikes. This new type of targeting implementing *situational discrimination* would allow for the discriminate targeting of unidentified individuals (not on targeting lists) that are posing an immediate threat without having to rely on targeting shortcuts, guilt by association, and profiling.

Chapter 5: Case Study 3 – Double Tap Strikes

[U]sually, when a drone strikes and people die, nobody comes near the bodies for half an hour because they fear another missile will strike.[[487]](#footnote-487)

- Faheem Qureshi, UAV strike survivor

A. Defining Double Tap Strikes

The *Living Under Drones* report defines a double tap strike as a use of force where “a targeted strike site is hit multiple time in relatively quick succession.”[[488]](#footnote-488) However, this thesis will adopt a more extensive view of double tap strikes that includes any type of follow-up strikes (secondary, tertiary, etc.) in the same location carried out with the intent to increase the efficacy of the use of force whilst also limiting the enemy’s comeback capabilities. Three different types of double tap are identified: technical, remedial, and tactical. In technical double taps, the secondary strike is launched almost immediately after the first one, much like a double-click on a computer mouse. Remedial double taps are used when the initial strike failed at eliminating the intended target and the secondary strike is aimed at the surviving targets of the initial strike. Finally, tactical double taps are used to inhibit rescue operations and to limit the enemy’s comeback capabilities. In these last two types of double tap strikes, there is a longer delay between the initial and secondary strikes.

1. Types of Double Tap Strikes and Use

a) Technical

According to former US Air Force Captain Matthew J. Nasuti: “double tap means that the military fires two Hellfire missiles at each target in order to ensure that at least one hits the target.”[[489]](#footnote-489) This constitutes a technical double tap. The motivation behind the use of this targeting strategy is rooted in the technical accuracy of the weapons used in drone strikes. UAV strikes use precision laser-guided missiles such as the Hellfire or GPS-guided missiles, and Joint Direct Attack Munitions (JDAM). The accuracy of these types of missiles is calculated with the ‘circular error probable’ (CEP hereafter) which refers to the radius around the intended target where the weapon will land *50 percent of the time.* CEP is “an indicator of the delivery accuracy of a weapon system, used as a factor in determining probable damage to a target. It is the radius of a circle within which half of a missile’s projectiles fall.”[[490]](#footnote-490) As US Air Force Colonel Jill Long highlights, it is important to bear in mind that “aviators use CEP to determine the general accuracy of a weapon and *not* as the determining factor in assessing potential collateral damage.”[[491]](#footnote-491) This means that CEP only refers to the geographical area where the missile might fall, without taking into consideration who or what might be present in the area of the strike. In regard to Hellfire missiles, Derek Gregory of the University of British Columbia states that they have a CEP between 3 and 8 meters[[492]](#footnote-492), whilst the larger JDAMs have a CEP between 10 and 13 meters.[[493]](#footnote-493) To put this in perspective, the aerial bombs used during the Vietnam War had a CEP over 100 meters.[[494]](#footnote-494)

Technical double taps are the result of multiple missiles being launched quasi-simultaneously in order to increase the chances of striking within the targeted CEP from 50% to 75% (in the case of two missiles) making it comparable to a double-click on a computer mouse. Kristina Benson therefore suggests that the use of double tap strikes “may have in fact been initiated at the suggestion of manufacturer Lockheed-Martin as a way to compensate for the inaccuracy of HELLFIRE missiles.”[[495]](#footnote-495) Nevertheless, it is essential to remember that the decision to launch a technical double tap remains deliberate. Drones do not automatically launch two missiles at once every time they fire. The additional attack power, and therefore destruction, is purposeful. This will prove important when discussing the ethical implications of this targeting strategy as it is the key differentiating factor between double tap strikes and signature strikes. This is also important because it brings into play the intentions leading to the use of technical double tap strikes: to increase the targeting accuracy by increasing the level of destruction associated with the use of force. Indeed, this targeting strategy is used to limit the chance of missing the intended target when a missile is fired by also firing a ‘backup’ missile almost simultaneously.

*TBIJ*’s database of UAV strikes lists many tactical double taps where a drone has fired two missiles at a target. However, considering the secrecy surrounding drone strikes, accurate numbers on the proportions of double tap strikes are difficult to ascertain. Nevertheless, according to *TBIJ* data, out of the 17 strikes that occurred in the months of May, June, and July 2012, five strikes were confirmed as being double taps.[[496]](#footnote-496) A more recent example of a double tap strike can be found with strike ‘OB367’ where two missiles hit a residence on 1 June 2015[[497]](#footnote-497): “‘A U.S. drone fired two missiles at a militant compound in Shawal area killing at least four militants,’ a senior security official based in Pakistan's northwestern Peshawar, told Agence France Presse, asking that he not be named.”[[498]](#footnote-498)

b) Remedial

The second type of double tap occurs when the secondary strike follows an unsuccessful initial strike insofar as the target has not been eliminated. In Gavin Hood’s 2016 ‘Eye in the Sky’ film, a drone strike is launched at a house where some al-Shabaab militants are getting ready to conduct a double suicide bombing. After the strike, whilst the drone operators are identifying the victims, it rapidly becomes apparent that one of the targets, a radicalised British citizen in the top-5 international terrorist most wanted list, has survived the strike. British colonel Katherine Powell, played by Helen Mirren, then orders a second strike on the same target in order to eliminate the survivor. This scenario illustrates the use of a remedial double tap strike.

The intent behind remedial secondary strikes is to correct the ineffectiveness of the initial strike if it failed to eliminate the intended target. This implies that there is a longer delay between the initial and secondary strikes in the case of remedial double tap. The secondary strike is not necessarily in the same location as the initial one, but both strikes have the same target(s). If the initial strike was aimed at a moving vehicle for example, the secondary strike will be aimed at a different location but the same target. The key difference between remedial and technical double tap strikes is the intention behind the use of secondary strikes. Here, the intent is to correct a mistake or failure in the initial targeting whereas the intent in technical double tap strikes is to increase the statistical accuracy of missiles.

c) Tactical

Much like with remedial double tap strikes, there is a longer delay between the initial and secondary strike in tactical double tap strikes. However, this type of double tap is not aimed at correcting a mistake or failure, as in the strategy presented above. Instead, it is aimed at limiting the enemy’s comeback capabilities. This is achieved by targeting rescuers and first-responders in the minutes or hours following the initial strike. Ultimately, tactical double tap strikes also have the longer-term intention to inhibit future assistance in the aftermath of drone strikes, which leads to a more destructive use of force. In other words, tactical double tap strikes are motivated by two intentions: to attack rescuers and first responders, but also, more broadly, to act as a deterrent for future rescuers. This second intent is essential here as it has long-term dissuasive effects in addition to being a considerable display of destructive power.

A widely reported example of a tactical double tap strike occurred on 6 June 2012. As Jerome Tylor of *The* *Independent* described: “an unmanned drone was flying high above the Pakistani village of Datta Khel in north Waziristan. […] As the drone circled it let off the first of its Hellfire missiles, slamming into a small house and reducing it to rubble. When residents rushed to the scene of the attack to see if they could help they were struck again.”[[499]](#footnote-499) On 1 August 2013, *TBIJ* published an article titled ‘Get the data: The return of double-tap drone strikes’[[500]](#footnote-500) in which it reported that an investigation found five instances of a tactical double tap strike only between May and July 2012 in Pakistan. These findings were also corroborated by *Reprieve*, a legal human rights charity based in the UK, who stated: “There are several other strikes in 2012 which killed civilians and have been widely reported by independent sources: two such strikes in July 2012, where rescue workers were targeted, killing more than 20 civilians.”[[501]](#footnote-501)

d) Summary

The following situations illustrate the different types of double tap strikes. These cases occur between rival gang members A and B who are involved in a ‘turf war’. B wishes to kill A and thus begins firing on A when their paths cross.

* A fires multiple times in the direction of B in hopes that at least one of the bullets will hit B. This is a technical double tap.
* A shoots at B in self-defence. B is injured but not killed. A sees that B has survived and shots B again. This is a remedial double tap.
* A shoots at B in self-defence and hides behind a nearby bus shelter. B is not killed by the shot. C is a nearby passer-by who overheard the gunshots and come to assist B. A shoots the C. This is a tactical double tap aimed at limiting B’s chances of survival.
* B’s initial attack was a ‘drive-by’. A shoots at B in self-defence. B is fatally injured and crashes its vehicle in a bus shelter, causing a fire. A remains nearby. A few hours later and once the fire has died, local residents come to clear the debris. A then targets the individuals involved the cleaning. This is also an example of tactical double tap aimed at inhibiting future rescue operations, thus limiting the enemy’s comeback capabilities.

These scenarios illustrate the extent to which the notion of intent is central in the different types of double tap strikes. Intentions are also key when it comes to differentiating between double tap strikes and signature strikes, as will be discussed in the following section. Importantly, the different intents behind the use of double tap strikes will raise different challenges for the implementation of the discrimination criterion in drone warfare

2. Difference from Signature Strikes

In *The Drone Debate*, Avery Plaw, Matthew S. Fricker and Carlos R. Colon do not differentiate between double tap strikes and signature strikes insofar as they interpret double taps as a form of signature aimed at rescuers (where being a rescuer is the ‘signature’ or pattern of behaviour) rather than being a distinct targeting strategy: “A final category of signature strike that requires some individual attention is the so-called double tap. These are drone strikes that involve at least two rounds of attack separated by a pause, and where the second volley targets those involved in rescue efforts following the first strike.”[[502]](#footnote-502) Similarly, Markus Gunneflo states: “A particularly wicked species of such signature strikes are so called ‘double taps’ where individuals who have come to help victims of a first strike are killed in a second strike […]. Presumably the idea is that those who come to the rescue of or mourn victims of a strike also lead a ‘pattern of life’ sufficiently threatening to America and Americans to merit their being put to death.”[[503]](#footnote-503)

This assessment of double taps as signatures is not entirely flawed. However, it is overly simplistic as it fails to acknowledge that the use of signature strikes and double tap strikes are motivated by different intentions. As demonstrated in Chapter Four, signature strikes are aimed at targets whose identity are unknown but who fit certain patterns of behaviours identified as being indicative of combatant status: “A signature is constructed from observing a pattern of life – coding the behaviour and geography of individuals; targeting their very lifeworld.”[[504]](#footnote-504) In comparison, double tap strikes are not aimed at patterns of life, such as the handling of explosives or planning attacks, but broadly aim to increase the efficacy of the use of force and to limit the enemy’s comeback capabilities, which leads to the use of secondary strike in the seconds or hours that follow the initial use of force. In signature strikes, the aim is not to increase the efficacy and lethality of a strike but rather to identify legitimate targets whose identity is unknown and to apply the discrimination criterion. In other words, the aim of signature strikes is the application of the soldier-civilian line of discrimination when the identity of the target is unknown. ‘Signatures’ that are seen as indicative of combatant status are used as a basis of target selection. Instead of focussing on target identification (as is the case in signature strikes). Double tap strikes aim to increase the efficacy of the targeting after discrimination has been applied and legitimate targets have been identified. Therefore, signature strikes and double tap strikes are different because they are motivated by different intentions. The former aims to identify legitimate targets and apply the discrimination criterion whilst the latter focuses on increasing accuracy (technical strikes), correcting inaccurate targeting (remedial strikes) as well as deterring on-going and future rescue (tactical strikes). This difference in intentions indicates that a distinction must be drawn between signature strikes and double tap strikes. Further, tactical double tap strikes cannot be considered a ‘rescuers’ signature because they are not targeting legitimate targets whose identity is unknown. Indeed, the second strike is launched with the intention of reducing the comeback capabilities of the enemy by increasing the statistical chances of successfully striking the intended target (technical double tap), by targeting the survivors of the initial strike (remedial double tap), and by inhibiting future rescue operations (tactical double tap). Moreover, the conception of double tap strikes as a ‘rescuers’ signature fails to account for the use of technical and remedial double tap. Consequentially, double tap should be examined separately from signature strike because they are different targeting strategies with different intentions and implications.

3. Double Taps and Drones

The use of double tap strikes in drone warfare has become heavily publicised and reported. In 2012, Michael B. Kelly of *Business Insider* wrote that “NYU student John Begley is tweeting every reported U.S. drone strike since 2002, and the feed highlights a disturbing tactic employed by the U.S. that is widely considered a war crime. Known as ‘double tap’ the tactic involves bombing a target multiple times in relatively quick succession, meaning that the second strike often hits first responders.”[[505]](#footnote-505) Further, *TBIJ* argues that

the first confirmed attack on rescuers took place in North Waziristan on May 16 2009. According to Mushtaq Yusufzai, a local journalist, Taliban militants had gathered in the village of Khaisor. […] A CIA drone fired its missiles into the Taliban group, killing at least a dozen people. Villagers joined surviving Taliban as they tried to retrieve the dead and injured. But as rescuers clambered through the demolished house the drones struck again. Two missiles slammed into the rubble, killing many more. At least 29 people died in total.[[506]](#footnote-506)

More broadly, *TBIJ* reported that multiple drone strikes have “killed dozens of civilians who had come to help rescue victims or were attending funerals”[[507]](#footnote-507) and Glenn Greenwald of *The Guardian* stated: “the Obama administration now routinely uses tactics in Pakistan long denounced as terrorism when used by others, and does so with so little controversy.”[[508]](#footnote-508) It is interesting to note that the double tap targeting strategy is neither new nor exclusive to drone warfare. For example, in May 2004, a FBI weekly bulletin warned law enforcement forces that terrorists were prone to the use of double tap tactics where explosives can be planted in everyday objects or “sequential suicide attacks in the same locations, and are generally detonated less than one hour after initial attack, targeting first responders as well as the general population.”[[509]](#footnote-509) Similarly, a 2007 report by the US Homeland Security Institute on the success and failure of terrorist attacks stated that double tap is “a favourite tactic of Hamas”[[510]](#footnote-510) where “a device is set off, and when police and other first responders arrive, a second, larger device is set off to inflict more casualties and spread panic.”[[511]](#footnote-511) More recently, the 28 November 2015 bombing of a Doctors Without Borders [MSF] hospital in the Homs region of Syria was a double tap strike conducted by the Syrian air force.[[512]](#footnote-512) “‘This bombing shows all the signs of a double-tap, where one area is bombed and then a second bombing hits the paramedic response teams or the nearest hospital providing care,’ said Brice de le Vingne, director of operations for MSF. ‘This double-tap tactic shows a level of calculated destruction that can scarcely be imagined.’”[[513]](#footnote-513)

Double tap strikes conducted in the context of contemporary drone warfare to increase targeting efficacy and limit comeback capabilities raise many ethical issues when it comes to the application and upholding of the discrimination criterion.

B. Challenges for Discrimination

Since double taps are secondary strikes, they follow either a signature or a personality strike. Therefore, the ethical issues that arise with either personality or signature strikes described in Chapters Three and Four remain valid and relevant here. The discussion in this chapter will focus on the secondary strike. It will be assumed that the initial strike was justified and legitimate in order to concentrate on the separate and unique ethical issues that are generated by the use of double tap strikes. These strike poses additional ethical challenges for the *jus in bello* discrimination criterion since this targeting strategy is not centred on the identification of would-be combatants. Instead, this targeting strategy is focussed on increasing the accuracy of the targeting and limiting the enemy’s comeback capabilities. This leads to mis-discriminate strikes where targets are wrongfully considered as legitimate on the basis of assistance and geographical proximity rather than involvement in the conflict. Essentially, double tap strikes are different from signature and personality strikes because they are not focussed on the implementation of the *jus in bello* discrimination criterion but rather with a limitation of the enemy’s comeback capabilities and increased strike efficacy. This fundamental difference in intent brings different ethical issues which ought to be explored.

This chapter will argue that double tap strikes are problematic because they lead to excessive harm as they neglect the *jus in bello* proportionality requirement and do not place sufficient importance on the principle of military necessity. Furthermore, secondary double tap strikes have long-term consequences since they act as a deterrent for rescue operations and assistance in the aftermath of strikes, which has important and too often ignored, societal impacts, such as anticipatory anxiety,[[514]](#footnote-514) communal mistrust, and inhibited socio-economic activity.[[515]](#footnote-515) These additional effects are also concerning because they increase the harm and destruction associated with the use of double tap strikes.

a) Ethical Challenges for Technical Double Tap Strikes

The central issue with technical double tap strikes is that they can exceed the limits set by the *jus in bello* proportionality requirement. This is because the *jus in bello* proportionality and discrimination are not re-applied before the launch of the second strike. This is relevant in the application of the discrimination criterion because it means that there are no indications that the secondary strike is necessary. Thus, the second strike is excessive because the harm caused cannot be proportionate to the military advantage the second strike brings (since it is unknown). This section will argue that the harm caused by the use of technical double tap strikes can often be excessive and unjust because they neglect the importance of three factors: discrimination, military necessity, and proportionality. This targeting strategy will be explored in light of the reinterpretation of discrimination presented in Chapter Two and it will be argued that technical double tap strikes cannot be considered discriminate and therefore should not be used.

Firstly, in technical double tap, the secondary strike makes no attempts to apply the discrimination criterion because the calculations made in the target selection for the first strike are considered to remain valid for the secondary strike. However, this assumption is an over-simplification of the realities of conflict where situations and contexts change from one second to the other. The status of an intended target can change after the first strike (by becoming *hors de combat*, by being killed, or by no longer posing an imminent threat) which can then make the secondary strike an excessive use of force increasing the level destruction, and leading to the mis-discriminate targeting of illegitimate targets. Because of the rapid succession of strikes, there is no time to review the damage achieved by the first strike or to evaluate the necessity for a second strike. Much like individuals who are to be considered as non-combatants when their status is unknown, it should be assumed that the objective of the strike was achieved with the first strike. Failure to do so challenges the discrimination criterion as it leads to mis-discriminate strikes where no attempt is made to ensure that the target of the second strike is legitimate and liable to be killed. Rather, it is assumed that it remained legitimate between the initial and secondary strike. Yet, this is not always the case. A legitimate target for an initial strike is not automatically liable to be killed in a secondary strike after having survived the first strike. If the initial strike has put an end to an imminent threat, then a target originally identified as legitimate following *situational discrimination* is no longer a legitimate target. For example, if an initial strike failed to kill an unidentified individual transporting weapons bus successfully destroyed the vehicle or the weapons, then a secondary strike would be unnecessary following *situational discrimination* since the target no longer poses an imminent threat. Broadly, the framework for discrimination presented in Chapter Two identifies legitimate targets either by their actions posing as an immediate threat with *situational discrimination* or with *individual discrimination* by having some individually moral responsibility for the conflict. Since the secondary strike in a technical double tap is launched without surveying the consequences of the initial strike, it cannot be assumed that the discrimination criterion is applied nor can it be assumed that the target remains legitimate after the first strike. This has important repercussions on the necessity and proportionality of the use of force, especially when it comes to the potential harm and collateral damage of each individual strike is different. This is why either *individual* or *situational* discrimination ought to be applied before each strike.

Moreover, the use of drones can facilitate the re-application of the discrimination criterion since these weapons have the capability to hover above a strike zone and survey the aftermath of the strike, the use of pre-emptive or preventive secondary ‘backup’ strikes such as a technical double tap is not necessary. Drone operators have the possibility to fire one missile and then wait to survey the aftermath of the strike to see if it successfully reached the intended target before launching a secondary ‘backup’ strike. If the initial target was identified with *individual discrimination*, then the individual ought to be re-identified before the launch of a secondary strike for the discrimination criterion to be appropriately applied. If the initial target was identified with *situational discrimination*, then operators ought to evaluate if threat is still imminent before to launch a second strike. In other words, drone operators need to re-apply the discrimination and proportionality requirements before launching the second strike. Yet, the use of technical double tap does not make use of this potential, which means these strikes can be an excessive and unnecessary in regard to both the discrimination and proportionality *jus in bello* requirements. Essentially, the *jus in bello* calculations that were valid at the time of the initial strike can become inaccurate by the time the secondary strike is launched, even if they are only separated by a few seconds. To overcome this challenge, it is important to re-evaluate the status of the intended target (by re-applying discrimination) before each use of force instead of relying on a form of pre-emptive ‘backup’ strikes like technical double tap strikes.

Secondly, technical double tap strikes are ethically problematic in regard to military necessity. This principle is closely linked to the *jus in bello* proportionality criteria as it “allow[s] us to weigh the harms at stake, so that we can determine whether the morally weighted harm inflicted can be reduced at a reasonable cost to the agents.”[[516]](#footnote-516) Because there is no review of the necessity of the second strike prior to its launch, technical double tap strikes cause excessive harm since there are no indications that the second strike is needed. It is here that the fundamental ethical issues lie: since the secondary strike is launched before the outcome of the initial strike can be surveyed, its military necessity and function cannot be evaluated adequately. If the initial strike successfully eliminated the intended target, the secondary strike serves no military necessity and therefore cannot be considered proportional: the harm caused by the strike cannot be balanced against its military advantage since it has already been reached. Therefore, the use of force in the secondary strike is disproportionate and unnecessary. Since the necessity of a secondary technical double tap strike can never be evaluated because of the brief delay between the strikes, this requirement cannot be adequately fulfilled in technical double tap strikes.

Thirdly, technical double tap strikes are ethically problematic because they can be disproportionate. By firing two missiles in rapid succession, technical double tap strikes can increase the physical destruction caused by the use of force. Considering that the *jus in bello* proportionality requirement in centred around the notion that the harm caused by the use of force should not exceed the military advantage generated in addition to being as limited if possible, the use of tactical double tap is ethically problematic since the military advantage of the second strike is unknown. The proportionality requirement prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilians objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”[[517]](#footnote-517) Adil Ahmad Haque argues: “To evaluate the proportionality of a particular drone strike, we must compare the losses the strike will inflict on civilians to the losses the strike will prevent from befalling soldiers or civilians over the remainder of the conflict.”[[518]](#footnote-518) However, since the second strike is launched before the aftermath of the initial strike are known, there is not enough information available on whether the first strike was successful. This then means that the harm caused by the use of force cannot be balanced with the advantage it brings since this advantage is unknown or inexistent (in cases where the initial strike was successful) and therefore, it cannot be considered proportional. Briefly, if the use of force is not calculated as being proportionate by balancing the advantage it brings with the harm it causes, then it is excessive. Here, ‘excessive’ refers to two elements. First, technical double taps are excessive in the sense that they cannot be seen as necessary since their military necessity and proportionality are not evaluated before the strike is launched. Second, these strikes are also excessive in the sense that they generate greater physical destruction than originally anticipated or might be needed. It would be easy to assume that launching one or two missiles at the same target makes little difference in terms of physical destruction because the explosions would be on top of each other. Yet, this assumption is wrong and would only be valid in a world where the weapon technology has reached a perfect targeting accuracy rate, but this is not the case in reality. For example, two Hellfire missiles successfully falling within their CEP but at opposing ends of their respective perimeter can be 16 meters apart. Bearing in mind that a standard English carriageway has a width of 7.3 meters[[519]](#footnote-519) and a 4-lanes dual carriage way is 14.7 meters wide (18 meters if it has a hardshoulder),[[520]](#footnote-520) such distance between the two landing sites can have considerable impact on the harm caused by the use of force. Additionally, the distance between the two missiles can be much greater when one or both missiles land outside of the CEP radius since it is only reached 50% of the time. Statistically, the accuracy odds indicate that in double tap strikes, only one missile (sometimes none) will fall within the CEP perimeter. Thus, it becomes apparent that a secondary strike leads to additional destruction instead of simply ‘re-striking’ the already destroyed area, which highlights the importance of a proportionate use of force. This illustrates the extent to which the use of secondary strike increases the physical destruction caused by the use of force. Additionally, it is important to bear in mind that the targets and the surroundings of any strike are not immobile or stationary. This means that between the initial and secondary strike, rescuers, first-responders, and passer-by can rush to the scene of the strike to assist the victims. This is relevant as it can lead to the targeting of illegitimate targets. These factors ought to be included in the proportionality calculations of the secondary strike. However, these calculations do not occur because the second strike is launched before the situation can be re-evaluated. Indeed, these strikes are launched seconds after the initial strike ‘in case’ the first strike is unsuccessful. This does not satisfy the proportionality criterion that calls for the use of force to be proportionally limited to the military aim sought.

Instead of launching a tactical double tap strike, operators need to re-confirm that the intended target is a legitimate target following either *individual* or *situational discrimination* before launching the strike. It cannot be assumed that the calculations made prior to the launch of the first strike remain unchanged between the initial and secondary strike. For example, the initial strike might have successfully ended an imminent threat by destroying explosives without killing the individuals (application of *situational discrimination*), then the targets are no longer legitimate because they are no longer posing an imminent threat following the interpretation of *situational discrimination* presented in Chapter Two. Moreover, if the discrimination and proportionality criteria are considered to be the same for both the initial and secondary strikes instead of being re-applied, the secondary strike cannot be considered as having fulfilled those requirements because calculations regarding the *jus in bello* criteria are not permanently valid nor do they remain valid for a certain timeframe. Instead, they are only valid for the moment of the strike. Therefore, the rapid ‘double-click’-esque double tap strike can cause excessive unnecessary harm which raises many important questions in regard to the implementation of the *jus in bello* principles of discrimination and proportionality, as well as military necessity. The secondary strike can increase both the risks of collateral damage and destruction because of the CEP of drone strikes and the limited chances of the two missiles striking the exact same location. More importantly, the inability to calculate the necessity of the secondary strike means that this requirement cannot be fulfilled, which then means that the proportionality of the strike cannot be adequately calculated either. In other words, technical double tap strikes cannot be considered necessary or proportional.

Considering this, for a secondary strike to be just, both the *jus in bello* proportionality and discrimination requirements ought to be re-applied before each strike. This then implies a longer delay between the two strikes, as it is the case in remedial double tap strikes for example. In short, tactical double tap strikes are ethically problematic and should be avoided in contemporary drone warfare as they are cause excessive and unnecessary harm.

b) Ethical Challenges for Remedial Double Tap Strikes

As discussed previously, remedial double tap strikes occur when the initial strike was unsuccessful at eliminating its intended target. Unlike what happens in technical double tap strikes, there is a longer delay between the initial and secondary strike. This allows for the outcome of the first strike to be surveyed before the launch of the second missile. Initially this targeting strategy might not appear problematic since it is aimed at what would be considered a legitimate target but who was unsuccessfully targeted. However, it is important to re-apply all the *jus in bello* criteria before launching the secondary strike since both the requirements can change between both strikes.

Firstly, in regard to discrimination, the targeting of a missed legitimate target appears to be unproblematic. Yet, Walzer’s first war convention recognises that an immunity from attack is granted to injured soldiers: “The first principle of the war convention is that, once war has begun, soldiers are subject to attack at any time (unless they are wounded or captured).”[[521]](#footnote-521) This refers to the duty to protect: “Under IHL, as soon as a person is wounded, they are protected, no matter how they were wounded, nor if they participated in hostilities on any side. A combatant who is wounded and ceases fighting can no longer be considered a combatant. The wounded must be collected and given medical care with the minimum delay possible.”[[522]](#footnote-522) Indeed, wounded military personal made *hors de combat­* (outside the fight) are traditionally considered illegitimate targets because they no longer contribute to the war effort. The use of drones presents an additional difficulty for the treatment of injured fighters since these weapons have no capture capabilities. Thus, drone operators facing injured targets face two options: launch a second strike or abstain from launching a strike but continue surveillance.

Returning to the framework of discrimination presented in Chapter Two, individuals can be legitimate targets because of the situations they are engaged in (immediate threats; *situational discrimination*) or because of their individual moral responsibility for threats in the conflict (*individual discrimination*). Thus, if there are any wounded survivors of a drone strike a follow-up attack could be highly problematic as it fails to take into account that the target could be wounded and therefore might no longer be posing an immediate threat. The differentiating factor at play here has to do with the type of strike the remedial double tap follows. In the case of a remedial strike following a personality strike based on *individual discrimination*, a secondary strike on a legitimate target will be legitimate if the target is liable to be killed and the initial strike was unsuccessful. Yet, prior to launching the remedial strike, the legitimate target’s status ought to be re-confirmed by re-applying individual discrimination and verifying the target’s identity, minimising the risk of ‘false-positives’ or cases of mistaken identities. Furthermore, this process must ensure that targets indeed bear an individual moral responsibility for the conflict (by being a key facilitator, a commander, a leader, or a recruiter). The remedial strike targeting legitimate targets identified following *individual discrimination* can be considered proportionate as it would prevent future harm by eliminating ongoing and continuing contributions to the conflict. The threat posed by individuals bearing an individual moral responsibility in the conflict remains even if they are injured.

With situational strikes, individuals become legitimate targets because they pose an immediate threat and the use of force is the only way to end the harm or neutralize the threat (*situational discrimination*). Here, the legitimacy of a remedial double tap depends of the outcome of the initial strike. The distinction between a legitimate and illegitimate secondary strike is contingent on whether the threat remains imminent after the first strike. If the initial strike has put an end to the threat, then the target is no longer legitimate. Moreover, if the first strike has ended the threat but without killing the perpetrator, such as destroying a vehicle transporting weapons but without killing the driver for example, then, a remedial double tap would be unnecessary because the threat is no longer imminent, making the target illegitimate. If the weapons being transported have been destroyed, the driver is no longer a legitimate target because he no longer represents an immediate threat following *situational discrimination*. In the face of an injured individual who was a legitimate target for the initial strike but who is not a legitimate target for a secondary strike, like the driver, an emphasis needs to be placed on non-lethal means. The use of lethal force against the driver would be excessive and unjust since the target is no longer a legitimate target because the threat posed is no longer imminent. Although the driver might be involved in future harm, this is not sufficient to make him liable to be killed. When available, ground troops could be sent to capture the target. If capture is not feasible, drones should be used to track future whereabouts of the driver in order to gather more intelligence on the enemy’s activities. In the case of the surviving weapons transporter, capturing or following the driver and tracking its whereabouts after the strike could lead to intelligence gains. The determining factors at play are whether the target still represents an imminent threat and if the use of lethal force is the only way to neutralize the threat. A possibility of future threat or contribution remains from the surviving driver. However, it is not sufficient to make the driver a legitimate target because the threat is not immediate nor direct. If available, non-lethal means such as capture can be used against the driver to limit its potential future contribution to the conflict but the use of lethal force in a secondary strike would be excessive. However, if the imminent threat or on-going harm remains present after the initial strike, then a remedial double tap can be justified. For example, if an individual is preparing a suicide attack and the initial strike failed at neutralizing the threat, then a remedial secondary strike can be legitimate if the proportionality criterion is also re-applied in the targeting of the legitimate target.

In sum, remedial strikes following individual strikes will be discriminate if they are aimed at a legitimate target identified following *individual discrimination* and if the strike is both necessary and proportional. They will only be justified if the target remains a legitimate target after the initial strike (if they still fulfil the *situational discrimination* criterion). If the threat is no longer imminent but the perpetrator has not been killed, a remedial secondary strike would be excessive as it would lead to the targeting of an illegitimate target, which is highly problematic for the implementation of the discrimination criterion. Briefly, a remedial strike will only be legitimate if the original target remains a legitimate target following *individual* or *situational discrimination* after the first strike.

c) Ethical Challenges for Tactical Double Tap Strikes

The last type of double tap strikes intends on limiting the enemy’s comeback capabilities by targeting rescuers and first-responders after an initial strike. It is important to remember that tactical double tap strikes have a double intent. Firstly, this strategy is used to target rescuers and first responders to limit the enemy’s comeback capabilities. Secondly, these strikes are used as a deterrent to prevent future assistance, whilst also increasing the destruction caused. Here, ‘rescuers’ and ‘first-responders’ are used to refer to anyone who gives assistances to the victims of a strike, regardless of whether they are trained health-care providers or not.[[523]](#footnote-523) This means that tactical double tap strikes are ethically problematic for discrimination because legitimate situational strikes are based on threats. However, this is not present in tactical double tap strikes. As discussed in Chapters Two and Four, when the identity of the target is unknown, legitimate targets are identified because of the situations they are engaged in (*situational discrimination*). Only immediate threat can be considered legitimate targets for situational strikes. In the case of personality strikes, targets are placed on a ‘kill list’ and legitimate targets are individually morally responsible for the conflict (*individual discrimination*). However, in tactical double tap strikes, all individuals that rush to a strike zone are considered legitimate targets because of their willingness to assist and help strike victims is seen as indicating an association or link with the targets of the strike. This is a form of guilt by association and profiling based on willingness to provide succour. This guilt by succour is ethically problematic for the discrimination criterion because it assumes that assisting the victims of a strike is indicative of complicity. Therefore, using assistance as a justification for strikes assumes that willingness to help is motivated by an approval of the targets activities or complicity. This argument underlies the conception of double tap strikes as a signature strike aimed at ‘rescuers’ rather than a different and separate targeting. This is concerning. In signature strikes, guilt by association is used to identify ‘cousins’ of the primary actors of the wrongdoing. These cousin actions are seen as necessary to the conflict and as amounting to complicity that is then sufficient to bring liability. Although the complicity of signature strikes is dubious, as was argued in the previous chapter, it nevertheless relies on a certain link to the conflict. With tactical double tap strikes, however, the link between the targets of double tap strikes and the targets of the primary strike is based on geographical proximity and assistance. Indeed, tactical double taps target individuals who assist the victims of the primary strike. Yet, this assistance is not synonymous with complicity in the actions of the original target but simply indicative of willingness to help. Moreover, these actions are not sufficient to make one a legitimate target with either *individual* or *situational* discrimination following the framework presented earlier in this thesis. Much like workers in a factory providing soldiers with what they need as human beings (such as food) are not traditionally assimilated to the soldier category (unlike the munitions factory worker), rescuers do not contribute to the war effort in such a way as to be considered combatants. They do not pose an immediate threat. Food factory workers are not responsible for threats in the conflict nor do they pose an immediate direct threat and therefore cannot be considered legitimate targets. Similarly, individuals providing succour such as rescuers or first-responders (both professional and auxiliary) should not be considered legitimate targets for a tactical double tap strike because they are not involved in the conflict by representing an imminent threat. In other words, they do not fulfil the *situational discrimination* criteria set out in Chapter Two.

Take the following situation to illustrate the problematic aspect of the use of guilt by succour in double tap strikes: A person is walking in an alley at night and comes face to face with a criminal. The criminal robs the person at knifepoint. However, the victim is carrying a firearm and shoots the robber in self-defence and then runs home, leaving the robber injured on the floor. A few moments later, a passer-by who heard the gun shot runs over to the injured robber to give some assistance and to call emergency services. The passer-by is a Good Samaritan whose willingness to assist the injured robber is not indicative of involvement in the robber’s criminal activities nor should it be seen as a sign of complicity with the criminal. Doing so is an example of guilt by succour. Without any other information being available, the only connection between the robber and the passer-by is physical proximity and succour. Geographical vicinity and willingness to assist are not sufficient basis for complicity. It is worth reiterating that the identification of legitimate targets in war is based on a direct involvement in the conflict (*situational discrimination*) and not on all activities that can be linked to the conflict, explaining why the munitions factory worker can be a target but not the food factory worker, to use a recurring example. The key here is the level of involvement in the conflict. There is a difference between assisting (succour) and aiding (abetting). With assistance and succour, the individuals are not contributing to the war effort or to the fighting in a direct way. They are not posing an immediate threat nor are they engaged in harming. However, when it comes to aiding and abetting, these individuals are contributing to the conflict by facilitating the conflict which can make them legitimate targets with either *individual discrimination* if they are identified as key facilitators or with *situational discrimination* if their actions are posing an immediate threat and that the use of lethal force is the only way to eliminate the threat (such as the driver carrying weapons for example.)

It cannot be assumed that rescuers are members of the enemy’s armed forces medical corps since assistance to victims in the aftermath of a drone strike, or any other type of attack, is not exclusive to military personnel. There is no timeframe after a strike where one is a combatant while tending the to wounded. Even if this was the case, army medical personnel are to be immune from attacks according to military codes and IHL. As MSF states, a core and fundamental requirement of IHL is the duty to provide care:

The duty of treating the wounded and sick, and the correlating protection of medical personnel and facilities, has been at the core of international humanitarian law (IHL) since its inception in 1864. This was further enshrined in the Four Geneva Conventions of 1949 and the Two Additional Protocols of 1977. The protection of medical services in war zones is also part of International Humanitarian Customary Rules and is reflected in the domestic law and military code of all countries around the world. [[524]](#footnote-524)

Therefore, medical personal should not be considered part of the conflict and thus, cannot be considered legitimate targets. The same applies to non-medical personnel assisting the wounded after an attack. Moreover, providing succour is fundamentally different from the guilt by association used in signature strikes because of its lack of link to the conflict (it is not a situation that brings liability). In signature strikes, targets are identified because of their implication in the conflict: each ‘signature’ is considered indicative of combatant status in order to apply the soldier-civilian line of discrimination in a context of asymmetrical warfare, as presented in Chapter Four. Following Plaw et al.’s argument seeing ‘rescuers’ as a signature implies that being a rescuer is indicative of combatant status since signature attempt to identify activities that are characteristic of combatants. This is problematic because, even when following the classic soldier-civilian approach to discrimination, which this thesis presents as being inappropriate and even out-dated for drone combat, all soldiers are seen as legitimate targets and medical personal as not. Indeed, as Larry May highlights: “The Geneva Convention call for a clear separation of people into two camps: those who are protected from assault, including army medical personnel, injured soldiers, prisoners of war, and civilians on the one hand, and soldiers actively engaged in hostilities on the other hand.”[[525]](#footnote-525) Additionally, all individuals providing succour should not be considered as contributing to the war effort because, as Bouvier writes, “providing succor[sic] and care for wounded and sick persons, whatever their side in the conflict, friends and enemies in war alike, is a paradigmatic situation of humanity.”[[526]](#footnote-526) Further, Bouvier also recognizes humanity and impartiality as the ‘landmarks’ for an ethical approach: “an ethics of care does not imply favouring family or friends: on the contrary, it implies establishing a ‘just distance’ between the professional and the patient.”[[527]](#footnote-527) This means that assistance is separated from the actions of the initial target and cannot be seen or interpreted as a sign of complicity, reiterating that assistance cannot be seen as indicative of collusion or of an approval of the target’s actions. More importantly, the duty of impartiality in the response implies that assistance cannot be considered as indicative of combatant status to identify enemy targets: “medical neutrality [states that] rescue activities and medical care are not contingent on strategic aims; under this condition they are able to provide non-discriminatory care for wounded and sick persons.”[[528]](#footnote-528) Thus, the use of guilt by succour through the use of tactical double tap strikes is ethically challenging for the discrimination criterion as it leads to mis-discriminate strikes based on an unjust approach to target identification. Indeed, tactical double tap strikes cannot be seen as an attempt to apply the soldier-civilian line of discrimination because medical personnel are not legitimate targets. Moreover, assisting the victims of the strike, whatever of their status, does not constitute an action that can make one a legitimate target following the interpretation of discrimination outlined in Chapter Two: assistance does not pose an immediate threat (*situational discrimination*). Also, assistance does not generate individual responsibility for the conflict (*individual discrimination*). Thus, these strikes cannot be considered discriminate because they are knowingly and intentionally aimed at illegitimate targets. This targeting strategy is especially troubling considering that a moral duty to rescue is generally recognised. Furthermore, the interpretation of double tap strikes as a ‘rescuers’ signature is to be rejected. Assuming that actions of rescuers are indicative of combatant status and brings liability to legitimately be killed is deeply ethically problematic.

On the issue of the targeting of rescuers, UN special rapporteur on extrajudicial killings, summary or arbitrary executions Christof Heyns states that secondary attacks (double tap) on rescuers are a war crime.[[529]](#footnote-529) Clive Stafford Smith argues that double tap strikes are the equivalent of “attacking the Red Cross on the battlefield.”[[530]](#footnote-530) He also states: “It’s not legitimate to attack anyone who is not a combatant.”[[531]](#footnote-531) Indeed, the intentional targeting of rescuers is unjust, it does not respect the *jus in bello* discrimination criterion and leads to excessive harm. Unless rescuers can be identified as legitimate targets with either *situational* or *individual discrimination*, a tactical double tap strike targeting them would lead to a mis-discriminate strike on illegitimate targets and thus to an unjust use of lethal force. This then causes excessive harm and destruction to the targeted area. Tactical double tap strikes will only be legitimate if the discrimination criterion is adequately applied before the second strike. In sum, assisting the victims of a strike is not an involvement in the conflict insofar as it does not contribute to what can be considered the ‘war effort’. Therefore, rescuers are illegitimate targets.

A second reason why tactical double tap strikes are ethically problematic is because their intention is to dissuade the future assistance of the victims. In the long term, this targeting strategy will limit the comeback capabilities of the enemy after violence occurs because otherwise non-involved individuals will be reticent to assist victims, in fear of being targeted by follow-up violence. Tactical double tap strikes are used as a tool of deterrence. As Greenwald states: “Not only does that tactic intimidate rescuers from helping the wounded and removing the dead, but it also ensures that journalists will be unwilling to go to the scene of a drone attack out of fear of a follow-up attack.”[[532]](#footnote-532) This dissuasive effect has also been highlighted by the *Living Under Drones* report, which states:

Crucially, the threat of ‘double tap’ reportedly deters not only the spontaneous humanitarian instinct of neighbors and bystanders in the immediate vicinity of strikes, but also professional humanitarian workers providing emergency medical relied to the wounded. According to a health professional familiar with North Waziristan, one humanitarian organization had a ‘policy not to go immediately [to a reported drone strike] because of follow up strikes. There is a six hour mandatory delay. According to the same source, therefore, ‘only the locals, the poor, [who] will pick up the bodies of loved ones.[[533]](#footnote-533)

The deterrent effect of double tap strikes is ethically challenging because it causes unnecessary suffering. Indeed, the wounded victims of drone strikes are left to suffer without assistance, which can lead to an increased death toll. In that sense, wounded victims who could survive their injuries if given appropriate care and assistance are left to suffer and succumb to their wounds. This thesis will not engage in philosophical discussion on the implications of a quick death compared to death in suffering. Without advocating mercy killings, the use of tactical double tap strikes can be seen as increasing the overall harm brought by the use of lethal force since it can prolong the death of individuals. As Michael J. Boyle argues: “These so-called ‘double tap’ strikes have increased civilian casualties, as families of the victims and emergency services are now reluctant to come to the aid of those injured for fear that they will fall victim to a follow-on attack. The result is that those injured often lie suffering, and sometimes die, for lack of medical attention.”[[534]](#footnote-534) Hence, it can be argued that double tap strikes can lead to an increased death toll for each strike. Furthermore, this dissuasive effect impacts community life as it generates a climate of fear and suspicion. To that effect, on 19 May 2015, the Pakistani Ministry of Foreign Affairs issued a brief press release stating that drone strikes “generate distrust among the local populace.”[[535]](#footnote-535) This can have considerable impact on the conflict in general as it can lead to a further alienation of the local populations and a sense of being abandoned since first responders aid workers in the area will not go to the scenes of a drone attack until hours after the strike. This can then have an impact on recruitment for enemy organizations and for the conflict resolution perspectives. After all, “succoring [sic] a person in danger appeals to a basic sentiment of humanity, involving feelings and emotions of compassion and pity. Witnessing a situation of extreme danger or violence causes a reaction of shock and horror, failure to act and provide succour leads to feelings of shame, indignity, humiliation, and a sense of failing one’s own humanity.”[[536]](#footnote-536) This failure to succour can come from the fear and is a consequence of the dissuasive effect of double tap strikes and can lead to a feeling of being wrongfully and unjustly attacked. This can then facilitate recruitment for the enemy organization.[[537]](#footnote-537)

Broadly, this suggests that the use of double tap strikes raises ethical issues beyond the application of the discrimination criterion that are nevertheless significant and that ought to be considered when discussing this targeting strategy. Furthermore, the deterrent effect of a potential secondary strike ought to be taken into account in the proportionality calculations as it fits with the potential foreseen but unintended consequences of the use of force: the killing brought by the secondary strike cannot be justified under the Doctrine of Double Effect. As was presented previously in this thesis, the DDE allows for *some* collateral damage that is foreseen yet unintended. However, the harm to illegitimate targets brought by tactical double tap strikes cannot be considered ‘unintended’. To the contrary, this targeting strategy is used with the intention to dissuade rescue operation and limit the enemy’s comeback capabilities. This is highly ethically problematic as it amounts to the intentional targeting of illegitimate targets outside of what can be acceptable under the DDE. It also suggests a certain disregard for the *jus in bello* requirements of discrimination and proportionality since these are not applied before the second strike. Thus, tactical double tap strikes relying on guilt by succour cannot be considered just or legitimate.

The use of all three types of double tap strikes is problematic for the implementation of the *jus in bello* discrimination requirement because they can cause excessive harm as well as being mis-discriminate. Double tap strikes cannot be considered as a legitimate implementation of both *jus in bello* criteria if these are not re-applied before the follow-up strikes. Moreover, this targeting strategy has considerable impacts beyond the destruction caused by the weapons, because of the societal side-effect such as alienation they generate.

C. Application

Much like the discussions of the previous two chapters, this final section will review the impact the reinterpretation of the discrimination would have on the use of double tap strikes and will explore the application of double tap strikes following either a personality or situational strike, building on the arguments presented in Chapters Three and Four. In both cases, a secondary strike will only be discriminate and just if the *just in bello* criteria are re-applied before the secondary strike. This means that the discrimination and proportionality requirements are ‘reset’ after each strike and ought to be re-applied. The calculations and evaluations that were valid at the time of the initial personality or situational strike are not automatically valid and applicable for the secondary strike. This is because situations change rapidly between strikes. People in the surrounding area will give assistance to the victims and the initial target of the strike might be eliminated making the secondary strike unnecessary and causing excessive harm. This means that technical double tap strikes (double-click-esque) are always unjust because they do not apply the *jus in bello* requirements before the launch of the strike. In addition to this, secondary strikes intentionally targeting survivors and rescuers are unjust because they are aimed at illegitimate targets and should not be used. Therefore, the only type of double tap strike that can be just and discriminate is remedial strikes following an unsuccessful (or partially successful) initial strike. However, the requirements for the secondary strike to be just will depend on the target. Thus, it depends on the format of the initial strike (personality or situational) and the level of discrimination being implemented in the identification of legitimate targets.

1. Following a Personality Strike

Firstly, a remedial secondary strike can be justified if it follows a personality strike. Indeed, if a personality strike is launched at a legitimate target identified following *individual discrimination* (liable to be killed because of an individual moral responsibility for threats in the conflict as discussed in Chapter Three) and the drone operators see that the indented target of the strike survived, then a remedial secondary strike canbe justified if the intended target remains liable to be killed.

Take the following example: An initial personality strike is launched at a target who is identified as liable to be killed following an application of the *individual discrimination* criteria because the target has a moral responsibility by being the commander of a group of fighters. Firstly, if the drone operators decide to launch a technical double tap firing two missiles aimed at the commander to increase the chance of the strike being successful, this is a pre-emptive back-up strike and there are no indications that a second strike is necessary in the first place. The first strike might have been successful at eliminating the commander but since the *jus in bello* criteria are not re-applied before the second strike, there is no way of knowing if this is the case. The key implication of this is that the necessity and military advantage brought by the secondary strike is unknown, which then means that the proportionality of the strike cannot be calculated. Thus, the use of technical double tap to target the commander leads to excessive and unnecessary harm. Moreover, the use of force cannot be balanced with the military advantage sought and therefore the proportionality of the strike cannot be evaluated. Without this, it cannot be determined whether the secondary strike was proportionate and necessary. Although the initial strike was aimed at a legitimate target following *individual discrimination* (the enemy commander), the discrimination criterion was not applied before the second strike, which can lead to the targeting of illegitimate targets. The operators did not wait to verify if the commander survived the initial strike, thus remaining a legitimate target. Without knowing if the commander is still alive, the proportionality and necessity of the secondary strike cannot be accurately calculated. This is especially important since rescuers can rush to the scene of the first strike to assist the victims and survivors and they are at risk of being targeted by the secondary strike. Without re-applying discrimination, it is uncertain whether the secondary strike is necessary since the initial strike might have successfully eliminated the target. As was argued earlier, technical double tap strikes should not be used because they lead to excessive harm. Further, this targeting is also problematic since there are no indications that the second strike is aimed at a legitimate target if the discrimination criterion is not re-applied before the strike. However, if drone operators see that they have missed their target (the commander survived the initial strike), they can decide to launch a remedial secondary strike. This decision implies the re-application of the discrimination criterion. Before the launch of the second strike, the operators need to re-evaluate its proportionality and necessity in order to determine if the targeting fulfils all the *jus in bello* requirements. This would include ensuring that the second strike is still discriminate and does not target illegitimate targets such as rescuers who might rush to the scene of the first strike to assist victims.

Further, in addition to confirming the identity of the legitimate target (commander), the necessity and proportionality of the secondary strike ought to be evaluated. Operators need to take into account that the calculations established for the first strike have probably changed since the surroundings of strike zones are not immobile. Moreover, special attention should also be placed on the use of minimal force to achieve the sought military aim whenever the situations permit. This means that capture raids should be favoured when the use of a lethal drone strike on the target would bring a high level of collateral damage, in cases where human shields are being used for example. If this is not possible, drone operators need to take advantage of the surveillance capabilities offered by these weapons in order to wait until a more discriminate and proportionate use of force is possible. For example, if the initial strike injured (without killing) the commander, a remedial secondary strike can be justified if the identity of the target remains confirmed and individual moral responsibility for the conflict remains clear (application of *individual discrimination*). The targeting of injured or wounded targets might appear ethically problematic but injury does not bring an end to the individual moral responsibility that made the target liable to be killed. Therefore, an injured target can remain legitimate if *individual* (or *situational*) discrimination can be applied.

Returning to the example used earlier: After launching a strike that kills the commander, drone operators decide to continue their surveillance of the targeted area with the intention of targeting the first-responders and rescuers who rush to the scene of the strike to assist the victims. This tactical double tap strike would bring unnecessary harm. This is because the secondary strike is based on a mis-application of the discrimination criterion that uses guilt by succour to identify legitimate targets. Further, the military necessity of targeting rescuers is highly questionable on an ethical level. In addition to the *jus in bello* issues linked to the use of this type of targeting, the deterrent impact of these strikes on rescue operations is considerable since it leads to additional harm and suffering. This dissuasive intent is ethically troubling as it generates unnecessary and disproportionate suffering.

The *jus in bello* proportionality requirement becomes ever more important in secondary strikes as it ought to take into account the rescuers and first responders in the risk of collateral damage for the strike. A secondary personality strike, like the one in the *Eye in the Sky* scenario presented earlier, will only be legitimate if it does not intentionally target rescuers and first responders, since these are illegitimate targets. For secondary strike to be legitimate, they must take the form of a repeated personality strike. This means that the target of the strike is not identified because of its proximity to a strike zone but rather because of individual moral responsibility in the conflict making the target liable to be killed (*individual discrimination*). Since liability to be killed comes from individual moral responsibility for the war, an injured or missed target remains a legitimate target for a personality strike. However, the *jus in bello* proportionality requirement remains essential and ought to be re-applied before a secondary strike can be launched. In other words, instead of using tactical double tap strikes or technical double tap with the intention of limiting the comeback capabilities of the enemy, a secondary strike can be used as a ‘re-application’ of the discrimination criterion.

2. Following a Situational Strike

Chapter Four argued that signature strikes ought to be replaced by situational strikes where legitimate targets are identified by the situations in which they are engaged, by being an immediate threat conflict (*situational discrimination*). Considering this, a secondary strike will only be justified if the threat remains imminent after the initial strike (aimed that the prevention of the imminent harm or to put an end to an ongoing harm).

Take the following case for example: An initial situational strike is launched at a target who is posing an immediate threat by preparing for a suicide attack (the targets appear to be coerced and thus do not fulfil the criterion set by *individual discrimination*). Firstly, the drone operators decide to launch a technical double tap targeting the future suicide-bomber to increase the probability of successfully eliminating the threat. Much like with the technical double tap aimed at the commander presented earlier, a technical double tap strike aimed at the suicide-bomber indicates a disregard for the discrimination criterion since this requirement is not applied before the second strike. Moreover, this targeting also leads to excessive and unnecessary harm since there are no indications that the second strike is necessary. Indeed, it is unknown whether the first strike successfully neutralized the imminent threat by destroying the suicide vests, which means that the necessity of the secondary strike cannot be evaluated. This also means that the proportionality of the use of force cannot be established. This ultimately means that the use of technical double tap strikes following a situational strike leads to a mis-discriminate strike and an excessive use of force and thus should not be used.

Secondly, if the initial strike failed to stop the suicide bomber’s preparations, the drone operators can decide to launch a remedial double tap strike after having re-applied the discrimination criterion. The determining factor here is whether the target remains legitimate after the first strike. If the preparations remains ongoing, the bomber remains a legitimate target posing an imminent threat. A secondary remedial strike can be legitimate if it is also proportional. The decision to launch the second strike must take into consideration the new individuals who might have gravitate towards the strike site to provide succour to the victims. However, if the initial strike destroyed the explosive equipment without killing the bomber, he no longer poses an imminent threat. Although it is true that the bomb-maker can remain a threat in the long-term, it is no longer a legitimate target if the threat posed is no longer imminent. Lethal force ought to remain a last resort and an emphasis on non-lethal means and intelligence is necessary when facing non-imminent threats. Indeed, the bomber is no longer a legitimate target posing an immediate threat if the initial strike destroyed the explosives. Thus, a remedial double tap strike would be mis-discriminate and lead to excessive and unjustified harm. Although the bomber can still be considered threatening and might pose a future threat, this is not sufficient to be liable to be killed in a remedial double tap strike. Non-lethal means such as capture or surveillance can be used against the surviving bomb-maker in order to gain valuable intelligence in the fight against the enemy.

Thirdly, after having successfully targeted the suicide bomber, the drone operators decide to continue to survey the scene of the strike. A few hours after the initial strike, a tactical double tap strike is launched targeting the individuals involved in clearing the debris. This secondary tactical strike intends on limiting the enemy’s comeback capabilities as well as acting as a deterrent for rescue actions. If the targets of the secondary strike are selected because of their assistance, this is a mis-discriminate strike since it is aimed at illegitimate targets and relies on guilt by succour. Indeed, clearing debris after a strike or providing first aid to victims is not sufficient involvement in the conflict and cannot be considered an immediate direct threat making the target legitimate and liable to be killed. For the secondary strike to be legitimate, the discrimination criterion needs to be re-applied to identify legitimate targets with either *individual* or *situational discrimination*. In addition to being identified as legitimate and liable to be killed, the use of lethal force ought to be necessary and proportional.

Therefore, double tap strikes are not automatically discriminate or just. The discrimination criterion needs to be applied for each individual strike, because it does not remain valid for extended periods of time. This means that the only type of double tap strike that can be considered ethically acceptable is remedial strikes but only if the *jus in bello* requirements are re-applied before the strike. The key factor here is whether the target remains a legitimate target after the first strike. The remedial strike thus become a repeat of the initial personality or situational strike instead of a double tap.

Interestingly, Brian Glyn Williams suggest a rather different approach to the ethical implications of tactical double tap strikes as he argues that the rescuers and first responders rarely involve illegitimate targets:

There are many such accounts in the Pakistani press which make it clear that the Taliban have a policy of cordoning off drone strikes impact zones as they are moving to assist or retrieve their wounded or dead comrades. It is, by contrast, all but impossible to find reports in the Pakistani press of *average civilians* rushing to the scene of a drone strike on Taliban terrorists/insurgents to help out wounded militants or retrieve their bodies. So well known is the Taliban’s propensity to cordon of areas where their comrades have been killed or wounded in a drone strike that a FATA-based Pakistani official even offered the Americans some advice on how to kill more Taliban using drones. According to *Al Jazeera* ‘He explained that after a strike, the terrorists seal off the area to collect the bodies; in the first 10-24 hours after an attack, the only people in the area are terrorists. You should hit them again - there are no innocents there at that time.’ [[538]](#footnote-538)

This argument should not be considered as a justification for the use of tactical double tap strikes or a validation of the view that ‘rescuers’ is an adequate signature indicating combatant status. Rather, it suggests that if it is possible to identify the rescuers and first responders as member of the enemy organisation, they can be identified as legitimate targets following *individual* or *situational discrimination* which can lead to their targeting. This can also generate new opportunities for intelligence gathering by tracking the whereabouts of some rescuers for example. Instead of contradicting the argument presented in this chapter, Williams’ argument points to the possibility and feasibility of the re-application of the *jus in bello* criteria after an initial strike as suggested above, instead of relying on technical and tactical double tap targeting strategies. Therefore, rather than using double tap strikes, drone operators should rely on personality and situational strikes following the guidelines presented in Chapters Three and Four. In addition to re-applying discrimination, the *jus in bello* proportionality requirement remains essential and also needs re-applying, especially considering that the proportionality calculations between the initial and follow-up strikes change since legitimate and illegitimate targets are not static.

D. Summary

In brief, the use of double tap strikes in drone warfare is not without ethical issues. This chapter has differentiated this targeting strategy from signature strikes. Double tap strikes are used with the intention of increasing the efficacy of the use of force as well as limiting the enemy’s comeback capabilities. There are three types of double tap strikes. Firstly, technical double tap which are aimed at increasing the accuracy of the targeting by firing multiple missiles at the same target in rapid succession. Secondly, remedial double tap strikes are used when the initial strike was unsuccessful at eliminating the intended target. Finally, tactical double tap strikes are launched minutes or hours after the initial strike with the intent of eliminating rescuers and first-responders. This inhibits future rescue operations and limits the enemy’s comeback capabilities.

The overarching ethical issues that come from the use of these double tap strikes concern an excessive use of force and an unjust identification of legitimate targets. To overcome these issues, it has been argued that both the proportionality and the discrimination *jus in bello* criteria ought to be re-applied before each strike, essentially eliminating the use of tactical and technical double tap strikes leaving only remedial secondary strikes.

This concludes the case study review of discrimination in contemporary drone warfare. The final chapter of this thesis will regroup the findings of each case study and evaluate their implications for the reinterpretation of discrimination presented in Chapter Two in order to conclude on whether it is a viable alternative understanding of discrimination.

PART 3: Concluding Remarks

Conclusion

Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

- Article 51(7), Additional Protocol I to the 1949 Geneva Convention[[539]](#footnote-539)

A. Summary

This thesis explored the question of whether the just war criterion of discrimination can be upheld in modern drone warfare. This questioning stems from the difficulty in applying discrimination in the contemporary context where drones are being deployed. The implementation of discrimination is difficult because asymmetrical warfare is characterised by the involvement of irregular fighters who hide amongst illegitimate targets, making them difficult to find and identify. Moreover, many legitimate targets in asymmetrical warfare are described as being ‘farmer-fighters’ or part-time combatants, which increases the difficulty in identifying them. To overcome these issues, targeting strategies have been developed to assign combatants status to individuals in asymmetrical contexts in order to make them legitimate targets. Although some of these strategies are not exclusive to the use of drones, their use is facilitated by the deployment of UAV technology and especially because of the unique targeting made possible by the use of these weapons.

The first chapter of this thesis reviewed the current understandings of discrimination in the just war theory literature and identified three broad families of approaches to the *jus in bello* discrimination criterion. First, the traditionalist (or orthodox) approach to just war theory suggests a membership-based approach to liability where all members of the soldier class are legitimate targets. This approach is based on the moral equality of combatants as well as the independence of *jus ad bellum* and *jus in bello*. Secondly, a ‘moderate’ form of traditionalism was identified. This approach rejects the moral equality of combatants but accepts the independence of *jus ad bellum* and *jus in bello*. Here, legitimate targets are identified as such because they are engaged in harm. Thirdly, revisionist just war theorists reject the independence of *jus ad bellum* and *jus in bello* as well as the moral equality of combatants. Legitimate targets are identified on an individual basis and liability comes from responsibility in the conflict. In addition to this, international humanitarian law (IHL) distinguishes between members of the armed forces who are legitimate targets and civilians who are illegitimate targets. This interpretation represents the current *status quo* in the implementation of discrimination in conflict.

Through this review of the relevant literature on discrimination, one recurring problem was found: the difficulty to identify legitimate targets in the context of contemporary asymmetrical warfare. This then brings considerable ethical issues since the targeting strategies lead to what this thesis has called mis-discriminate strikes. These strikes cannot be considered just because they legitimise the killing of illegitimate targets. Yet, they are not indiscriminate since an attempt is made to differentiate legitimate targets from illegitimate targets. Moreover, some of the strategies used in drone warfare were also identified as bringing excessive harm and suffering. Therefore, there is a need for an interpretation of discrimination that would be applicable in drone warfare, making the identification of legitimate targets less challenging and making discrimination more applicable by overcoming the ‘real-world objection’. To that effect, Chapter Two elaborated a dual framework for discrimination that brings greater applicability and flexibility to the criterion. Firstly, *individual discrimination* is inspired by revisionist just war and identifies legitimate targets because of their moral responsibility for threats in the conflict. Four actions bring this liability: being the commander of a group of fighters; being the leader of a group of fighters; being a key facilitator; or being a key recruiter. Because liability comes from individual responsibility, targets are placed on ‘targeting lists’ before the launch of strikes. Secondly, another understanding of discrimination is necessary in order to make it more applicable in situations where drone operators find individuals who pose an immediate threat but without being responsible (or when responsibility is unknown) meaning that *individual discrimination* cannot be implemented. *Situational discrimination* is used to identify legitimate targets on the basis of imminent threats: only individuals who pose an immediate threat and where the use of lethal force is the only means to end the threat are liable to be killed. Essentially, this framework identifies different threats that require different responses. This dual framework is the used to review the implementation of discrimination in drone warfare. It is important to reiterate that because drones have no capture capabilities and are limited to the use of lethal force, the liability threshold is elevated and only individuals who are liable to be killed are identified as legitimate targets.

 The first targeting strategy used in drone warfare is personality strike where future targets are identified and named on a ‘kill list’ or targeting list. For this approach to targeting to be just and discriminate, legitimate targets ought to be identified using *individual discrimination*. Moreover, drone operators ought to show restraint and hold off strikes in cases where the identity or status of a potential target is uncertain. Returning to the research question, the discrimination criterion can be upheld and implemented in contemporary drone warfare with the use of *individual discrimination* to identify legitimate targets for personality strikes.

Secondly, signature strikes rely on profiling and guilt by association to identify legitimate targets. However, for the discrimination criterion to be implemented and upheld in drone warfare, signature strikes ought to be replaced by situational strikes implementing *situational discrimination*. This allows for the legitimate targeting of targets of opportunity and innocent threats. Thus, for discrimination to be implemented and upheld in drone warfare, targets will be liable to be killed if they pose an immediate threat and there are no other means to end the threat (proportionality and *situational discrimination*).

Thirdly, double tap strikes were examined, and it was argued that both the *jus in bello* proportionality and discrimination criteria need to be re-applied before the secondary strike. Therefore, tactical (few seconds between the initial and secondary strike) and technical (longer delay between the two) are not to be used because they bring an excessive harm and the targeting of unjust targets. This means that only remedial strikes that re-apply *individual* or *situational discrimination* can be legitimate. Thus, the secondary strike is a repetition of the personality of situational strike it follows.

In short, the just war criterion of discrimination can be upheld in modern drone warfare. The identification problem of contemporary asymmetrical warfare can be overcome by the use of the dual framework presented in this thesis. This approach sets out two complimentary understandings of discrimination that are be applicable in asymmetrical drone warfare.

B. Direct Participation in Hostilities

In addition to being a clear contribution to the just war literature, the discrimination framework presented in this thesis also has broader impact on international humanitarian law as it can provide a framework for understanding the notion of ‘direct participation in hostilities’.

Although civilians are generally considered illegitimate targets in war, IHL recognises that at times, some civilians will be engaged in the fighting and thus should be considered legitimate targets. As such, the notion of ‘direct participation in hostilities’ (DPH) has been developed as a limit to civilian immunity. Article 51 of the 1977 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, states:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. […]

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.[[540]](#footnote-540)

The issue is that this notion of ‘direct part in hostilities’ is not defined. Although the lack of clear definition can be advantageous insofar as it leaves space for flexibility, this ability to adapt to changing situations can also lead to application problems since the scale of actions and link to hostilities are unclear. Therefore, the notion of DPH is open to interpretation and can be implemented differently in different scenarios. Further, there can be conflicting understandings of DPH which complicates the use of the notion. As the International Committee of the Red Cross (ICRC) states “neither the Geneva Conventions nor their Additional Protocols provide a definition of what conduct amounts to direct participation in hostilities. The contemporary challenge, therefore, is to provide clear criteria for the distinction not just between civilians and the armed forces, but also between peaceful civilians and civilians who directly participate in hostilities.”[[541]](#footnote-541)

The ICRC attempted to overcome this definition issue in 2009 with the publication of the volume titled *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, which was the culmination of six years of expert meetings and research on the topic.[[542]](#footnote-542) The ICRC’s understanding of DPH is summarised as referring “to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.”[[543]](#footnote-543) Further, the ICRC recognises three cumulative constitutive elements to DPH: a threshold of harm, direct causation, and a belligerent nexus.[[544]](#footnote-544) Firstly, the threshold of harm means that the action ought to have an adverse effect on the military operations of capacity of a party to the conflict or to cause death, injury, or destruction to protected persons/places.[[545]](#footnote-545) Secondly, there must be a causal link between the act and the harm caused.[[546]](#footnote-546) Thirdly, to be considered as DPH, the act must be “designed to cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”[[547]](#footnote-547)

The main difficulty with the ICRC’s definition is that it does not present a clear approach to the notion of DPH, which remains difficult to apply. Moreover, this interpretation of DPH is not universally accepted and it is often criticised for being too much of a ‘revolving door’. Driving an ammunition truck has been interpreted as both an example and a limit to the notion of DPH in IHL. In its interpretative guidance, the ICRC states that the transport of ammunition to an active firing position “almost certainly”[[548]](#footnote-548) is DPH but driving an ammunition truck “from a factory to a port for further shipping to a storehouse in a conflict zone, on the other hand, is too remote from the use of that ammunition in specific military operations to cause the ensuing harm directly.”[[549]](#footnote-549) However, a 2008 judgement by the International Criminal Tribunal for the former Yugoslavia (ICTY) included the transport of “weapons in proximity to combat operations”[[550]](#footnote-550) in its list of examples of direct participation in hostilities. The ICTY’s *Strugar* judgement differs from the ICRC position since it expands DPH to the transport of ammunition near combat, without having to be involved in the supply of ammunition to the frontline, which the ICRC would consider too far removed to constitute DPH.

It is in light of these interpretation and definition problems that the discrimination framework presented in this thesis becomes interesting. Both *individual discrimination* and *situational discrimination* can be used to define the notion of direct participation in hostilities in a way that can be applied in combat operations. Firstly, the actions generating moral responsibility in *individual discrimination* amount to DPH which can make the perpetrator a legitimate target. Indeed, being the commander or leader of a group of fighters clearly amounts to direct participation in hostilities. Moreover, being a key facilitator or a recruiter can also amount to DPH even if the perpetrators are not actively engaged in the fighting, as explored earlier in this thesis. Secondly, using *situational discrimination*, individuals posing an immediate direct threat are directly participating in hostilities and thus legitimate targets.

The use of this thesis’ dual framework for discrimination has considerable advantages when it comes to understanding DPH. First, it is rapidly applicable and fairly simple to understand especially since it does not require a series of questions to be answered unlike the ICRC’s guidance. Second, the framework moves away from membership or status-based liability. Third, the use of *individual* and *situational discrimination* can be less restrictive in targeting since it can make supporting the fighting sufficient to become a legitimate target (with certain clerics or recruiters for example). Finally, *individual* and *situational discrimination* set necessary temporal limits to when the targets are liable to be killed. With *individual discrimination*, individuals can be legitimate targets until their involvement in the conflict has ended so their responsibility is no longer ongoing. With *situational discrimination*, the determining factor is the imminence of the threat. When the imminent threat has been neutralised, then the perpetrator is no longer a legitimate target.

In short, the twofold framework for discrimination presented in this thesis also contributes to the field of international law since it can provide an understanding of the notion of direct participation in hostilities, which is becoming increasingly important in the context of asymmetrical warfare.

C. Future Research

Lastly, the research and framework presented in this thesis opens the door for future research on two topics. Firstly, building on the discussion presented above on the notion of direct participation in hostilities, the reformulation of discrimination can be used to further clarify debates in the field of IHL. Secondly, in addition to bringing a challenge for the *jus in bello* criteria, the use of drones also impacts the *jus ad bellum* criteria. It has been argued that the use of drones and the rise of non-state actors challenge the classic conception of *jus ad bellum* which do not distinguish between the use of force and war. For example, in the 2006 preface to *Just and Unjust Wars,* Michael Walzer writes: “The argument about *jus ad bellum* needs to be extended, therefore, to *jus ad vim*. We urgently need a theory of just and unjust use of force.”[[551]](#footnote-551) *Jus ad vim* “provides justification for the use of force that would be unacceptable in a law enforcement context, without invoking the permissive authorities of actual war.”[[552]](#footnote-552) Similarly, Daniel Brunstetter and Megan Braun argue that “the *jus ad bellum* framework does not offer sufficient leverage for assessing the *jus ad vim* actions that have become the hallmarks of the Obama administration’s approach to combating terrorism.”[[553]](#footnote-553) Thus, there is scope for future research exploring the impact the use of drones has on *jus ad bellum* considerations. In addition to *jus ad vim*, the issue of accountability in drone strikes is another challenge brought by the use of UAVs that needs further research. Indeed, many questions remain on the issue of where liability and accountability begin and end along the chain of command. Is accountability limited to the person who pulls the trigger? Does it also include the individuals who identify the target as liable? Is everyone involved in the elaboration of targeting lists also accountable for a drone strike? These are serious questions that require answers. One of the most important limitations for research on accountability is the secrecy that surrounds the decision to launch drone strikes.

It is interesting to note that as drone technology has developed, so has their non-lethal uses. Recently, the United Nations started to use drones in peacekeeping missions in Africa.[[554]](#footnote-554) The first deployment was in 2013 in the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).[[555]](#footnote-555) Hervé Ladsous, UN under-secretary-general for peacekeeping operations, states: “We get much better information about what is happening on the ground. We can see groups on the prowl. I saw some of the photos captured by the drones. In certain circumstances, we can actually recognize the faces. We now have knowledge of what is happening on the ground and how to mitigate or to proactively intervene.”[[556]](#footnote-556) He also states that drones are “the way to go.”[[557]](#footnote-557)

In closing, it is safe to say that drones are here to stay. They have the potential to be one of the most humane forms of warfare, but this will depend on the way they are used. One way to make the use of drones more just and discriminate is to identify targets using *situational discrimination* or *individual discrimination*, following the framework presented in this thesis.

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Appendix: Target Selection for a ‘Disposition Matrix’

According to *The Atlantic*, the flow chart below illustrates the process through which individuals were placed on a ‘kill list’ by the Obama administration.



Source: ‘How Obama Decides Your Fate If He Thinks You're a Terrorist’, *The Atlantic*. Available online: <https://www.theatlantic.com/misc/disposition-matrix/%3E> [Last accessed: 23 August 2017]

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2. It is important to note that the discussion of this thesis will focus on *unmanned* aerial weapons. These are not to be confused with fully automated weapons. With UAVs, the aircraft is controlled by humans, as opposed to automated ‘killer robots’ which are guided by artificial intelligence and advance computer programming. [↑](#footnote-ref-2)
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“Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.”

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