The Dehumanisation of Drone Warfare:

Scrutinising the Legal Response to the Proliferation of UAVs in Contemporary Armed Conflict

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Submitted in accordance with the requirements for the degree of
Doctor of Philosophy

The University of Leeds
School of Law
Faculty of Social Sciences

90,371 words
January 2020

Declaration

The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

Abstract

This thesis introduces the notion of dehumanisation, elucidates its relationship with detachment and distance, and demonstrates how technology, in particular drone warfare, has contributed to detachment and dehumanisation in armed conflict. Drone warfare is transforming war from defined periods of high-intensity conflict in concentrated geographical locations to continuous and indefinite periods of low-intensity operations without boundaries. This blurs the line between war and peace, creating greater human insecurity towards life. The thesis assesses the legal response to this rapid development of technology and changing landscape of armed conflict. The thesis scrutinises International Humanitarian Law (IHL), International Human Rights Law (IHRL), and UK domestic governance. The research concludes that through physical and psychological distancing, drones anonymise the enemy, leading to a partial dehumanisation whereby the humanity of a person is masked, blurred, or faded. This in turn leads to a reduced resistance to killing and a greater willingness to engage in low-intensity operations involving armed attack.

The thesis further concludes that there are weaknesses in laws that may be exploited by the technological advancements of Unmanned Aerial Vehicles (UAVs), and that incremental adjustments must be made to ensure the proper regulation of UAVs in armed conflict. States enjoy the ability to deploy independent drone operations without the responsibility of committing to an official armed conflict. IHL cannot be applied in times of peace, and IHRL faces problems of enforceability. The normative applicability of law is therefore limited and undermined. This thesis proposes that use of military drones should be limited to official and legally recognised armed conflicts, while calling for further clarification and unification on the relationship between IHL and IHRL.

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Chapter One

Introduction

1.1 Thesis statement

The rapid development of technology in recent times has impacted on the nature and evolution of armed conflict. This thesis posits that the proliferation of Unmanned Aerial Vehicles (UAVs), more commonly referred to as drones, has led to a more permissive approach to armed aggression. Physical distance between weapon and target is linked to psychological detachment, resulting in the dehumanisation of the enemy. This thesis further argues that the laws regulating armed conflict are not sufficiently equipped to deal with the abovementioned implications. Rather than seeking to develop new principles or values, the existing legal framework can be updated to reflect the changing landscape of armed conflict.

1.2 Research objectives

The research objectives of this study are threefold. The first objective is to examine whether the use of UAVs in armed conflict is leading to psychological detachment from the enemy resulting in their dehumanisation. The development of smart weapons has reduced human presence on the active battlefield, at least on one side. The thesis seeks to ascertain whether the detached nature of drone warfare has anonymised and dehumanised the enemy, diminishing the necessary innate psychological barriers towards killing.

The second objective is to assess whether the drone phenomenon has significantly changed the nature of contemporary armed conflict. The ease with which drone operations can be deployed, and the ability of drones to transcend borders with such

efficiency, is unprecedented. This development has led to an increasingly unilateral mode of conflict. The thesis examines the argument that drone warfare has blurred the lines between war and peace by transforming armed attack – traditionally viewed as the last resort – into the first resort.

The third objective is to assess whether contemporary armed conflict is in line with existing legal principles and the values that lie behind them. The thesis also seeks to determine whether the laws pertaining to armed conflict are adequate to sufficiently regulate the changing landscape of drone warfare. The research covers International Humanitarian law (IHL), International Human Rights Law (IHRL), and UK national governance. This research is conducted on the basis that *jus in bello* is premised on humanitarian principles such as the protection of life and the containment of the use of force.[1]

1.3 Background

Armed conflict has existed for as long as human beings have. Rules surrounding armed conflict have existed for just as long. The Sanskrit Mahābhārata outlined the rules of warfare in ancient India over 400 years before the birth of Christ.[2] The Old Testament and the Qur'ān have mention of the laws of war.[3] Human attempts to regulate warfare throughout human history are a clear sign of humanity's resistance towards conflict, or at least its consequences. While war may be accepted as a necessary product of human co-existence, its destructive consequences have led human beings to curb its existence, and

[1] Christof Heyns, 'Coming to Terms with Drones' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) viii
[2] Bagish Chandra Nirmal, 'International Humanitarian Law in Ancient India' in Venkateshwara Mani (ed.), *The Handbook of International Humanitarian Law in South Asia* (Oxford University Press, Oxford, 2007) 37-38
[3] Qur'an 2:190; Deuteronomy 20

it has thus been treated throughout history as a last resort. Dave Grossman notes, "…[the] singular lack of enthusiasm for killing one's fellow man has existed throughout military history."[4] The compulsion not to kill is indeed internalised in most human beings as an innate inhibition.[5] Military historian S.L.A. Marshall describes the average and healthy individual as an "conscientious objector, unknowing" when faced with the task of killing another person, adding that said individual "has such an inner and usually unrealized resistance toward killing a fellow man that the will not of his own volition take life if it is possible to turn away from that responsibility."[6] In World War Two, no more than 15-25% of personnel who had the opportunity to engage ever fired their weapon against the enemy,[7] demonstrating humanity's hesitance towards killing.

1.3.1 The Law of Armed Conflict

The origin of modern International Humanitarian Law is most commonly attributed to the Lieber Code, created by Francis Lieber in 1863 in response to the first industrial war.[8] Lieber invoked the idea of humanity in warfare alongside justice and honour. The humanitarian aspect of The Law of Armed Conflict officially began with Henri Dunant's efforts. The Swiss businessman, upon witnessing the appalling state of the dead and wounded in the battlefield of Solferino (1859), rallied the people to create an organisation that would tend to the wounded and sick in battle. As a result, the International Committee of the Red Cross (ICRC) was established in 1863. The 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field[9] was indeed the

[4] Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995) 16
[5] ibid
[6] Samuel Marshall, *Men Against Fire: The Problem of Battle Command* (University of Oklahoma Press, Norman, 2000) 79
[7] ibid 54
[8] US War Department, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, vol.3, no.3 (1899) 148-164
[9] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31

first instance that international law protected human values in warfare.[10] It has since been enriched by a number of treaties in the form of Geneva Conventions (1949) and Additional Protocols (1977).[11]

IHL does not seek to end war, but rather seeks to balance military necessity with maintaining an element of humanity. It is premised on a number of underlying principles such as the protection of civilian life, the principle of distinction, and the principle of proportionality, all of which are explained and analysed in great detail in Chapter 3.[12] IHL is central to this research as the thesis seeks to ascertain whether drone warfare is in line with the abovementioned principles. Having been drafted largely in the 19th century, is IHL sufficiently equipped to regulate rapidly developing technology, and if not, what changes are needed to ensure its adequacy?

1.3.2 International Human Rights Law

International Human Rights Law was created to preserve the inalienable rights of individuals in peacetime, primarily against potential transgressions by their own state. However, it is of growing relevance to this research in light of the ever-increasing acceptance regarding its application in armed conflicts.[13] IHRL is widely understood to

[10] Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context* (Martinus Nijhoff Publishers, Leiden, 2011) 197-198

[11] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609

[12] Subchapter 3.4: '*Jus in bello*: principles of IHL'

[13] Theodor Meron, 'The Humanization of Humanitarian Law', *American Journal of International Law*, vol.94, no.2 (2000) 239-287

be potentially applicable in a wide variety of situations.[14] That being said, prior to the 1990s, there was no expectation for IHRL to be implemented in armed conflicts. More recently, it has been described as a "gap-filler" to reinforce the humanitarian aspects of IHL, adding specificity to the broader overarching ideals of IHL.[15] IHRL provides individuals with 'rights' whereas IHL imposes 'obligations' on states. Regardless of which stance is more dominant or prevailing, which will be discussed in Chapter 4, IHRL creates an additional avenue of potential recourse and is thus worth researching in full.

1.3.3 National governance

Domestic law serves the purpose of safeguarding a state's own citizens. The proliferation of drone warfare has implications for a number of domestic issues such as the use of lethal force, the arms trade, and counter-terrorism. In line with the researcher's UK background and heritage, the focus will be on UK domestic law. Parallels will be made to US domestic law considering US dominance in drone activity. Analysing domestic governance alongside international law also adds to the originality of the research.

1.3.4 Dehumanisation

This study is centred on the concept of the dehumanisation of armed conflict. To humanise someone is to "perceive him as an individual, independent and distinguishable from others, capable of making choices…"[16] To dehumanise is therefore to remove this human element from a person – to view them as less than human. Dehumanisation is used as a tool to remove the aforementioned innate inhibitions against violence or conflict.

[14] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, Oxford, 2008) 22-23

[15] Yuval Shany, Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, Oxford, 2011) 25-26

[16] Herbert Kelman, 'Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers', *Journal of Social Issues,* vol.29, no.4 (1973) 48

Hannah Arendt notes, "It is quite conceivable that one fine day a highly organized and mechanized humanity will as a whole conclude quite democratically – namely, by majority decision – that for humanity as a whole it would be better to liquidate certain parts thereof."[17] This can only be done when the "certain parts" of the human population in question are no longer deemed sufficiently human. For example, the Nazis labelled Jews as *Untermenschen* ("subhumans") because they were convinced that, although Jews looked every bit as human as the average Aryan, it "was a façade and that, concealed behind it, Jews were really filthy, parasitic vermin."[18] The Nazis conceded that killing humans was indeed wrong, but exterminating rats, on the other hand, was of course permissible.[19] In the Vietnam War, the Vietnamese were referred to as "gooks", which literally means "prostitute", but became synonymous with "foreigner" and was attributed to Vietnamese citizens.[20]

Herbert Kelman adds that, "The [human] inhibitions against murdering fellow human beings are generally so strong that the victims must be deprived of their human status if systematic killing is to proceed in a smooth and orderly fashion."[21] As a result, "the extent [by which] the victims are dehumanised, principles of morality no longer apply to them and moral restrains against killing are more readily overcome."[22] Central to this thesis, Gregory H. Stanton, the founder and president of the human rights organisation Genocide Watch, states that dehumanisation overcomes the normal human revulsion against murder.[23]

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[17] Hannah Arendt, *The Origins of Totalitarianism* (Harvest Books, San Diego, 1979) 299
[18] David Smith, *Less Than Human: Why We Demean, Enslave, and Exterminate Others* (St. Martin's Press, New York, 2011) 5
[19] ibid 15
[20] Stanley Milgram, *Obedience to Authority* (Printer & Martin Ltd., London, 2013) 181
[21] David Smith, *Less Than Human: Why We Demean, Enslave, and Exterminate Others* (St. Martin's Press, New York, 2011) 15
[22] ibid
[23] Gregory Stanton quoted in David Smith, *Less Than Human: Why We Demean, Enslave, and Exterminate Others* (St. Martin's Press, New York, 2011) 142

As with the foregoing examples, dehumanisation is often discussed in the wake of genocides or ethnic cleansing. When Franz Stangl, former SS Officer and commandant of the Solibor and Treblinka concentration camps, was asked why the humiliation and cruelties within Nazi concentration camps were carried out even though the victims were destined for death regardless, he replied, "To make it possible for them to do what they were doing."[24] Primo Levi adds: "Before dying, the victim must be degraded so that the murderer will be less burdened by guilt."[25] Dehumanisation is the process by which human beings are rendered so radically "other" that it becomes possible for their persecutors to kill or harm them without condemnation or remorse.[26]

1.3.5 Drone warfare

Though dehumanisation is most often discussed in times of genocide, it is not limited to murder on a mass scale. As will be discussed in great detail in Chapter 2, dehumanisation can also occur through more limited applications of diminished empathy. Simon Baron-Cohen attributes a lack of empathy as the underlying reason behind our ability to cause harm to others.[27]

Drone technology enables a state to wage armed attacks from the confines of its own territory without the commitment of forces on the ground. Lt. Col. David Branham of the U.S. Air Force notes, "It's possible that in our lifetime we will be able to run a conflict

[24] Primo Levi, *The Drowned and the Saved* (Abacus, London, 1989) 100-101
[25] ibid
[26] Sophie Oliver, 'Dehumanization: Perceiving the Body as (In) Human' in Paulus Kaufman and others (eds.), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Springer, New York, 2010) 89
[27] Simon Baron-Cohen, *Zero Degrees of Empathy: A Theory of Human Cruelty and Kindness* (Penguin Books, London, 2011)

without ever leaving the United States."[28] While armed conflict is growing in autonomy and human presence is diminishing significantly, this study researches the link between physical distance, psychological detachment, dehumanisation, and conflict. Drone warfare is analysed as a mechanism by which physical distance and diminished human presence can lead to reduced inhibitions towards violence and armed aggression.

1.4 Originality

Each subtopic within this study has been previously researched, but this thesis is unique in its combination of these topics and the perspectives it presents. Dehumanisation has been previously researched as a psychological phenomenon, usually in the context of genocides. The capability of drones has been researched and analysed, usually from a technological perspective. The relationship between IHL and IHRL has been frequently discussed, and the relevance or applicability of international law is questioned at regular intervals. This research, however, combines the aforementioned subjects to pose the questions: is drone technology being used as a tool to dehumanise? And is the current legal framework sufficient to acknowledge and regulate these technological developments and their implications?

1.4.1 Dehumanisation

The topic of dehumanisation is usually researched from a psychological perspective. David Smith reflects on the history of dehumanisation and its possible origins[29] and Simon Baron-Cohen links dehumanisation to empathy, or a lack thereof.[30] Both works have been utilised to comprehend the psychology behind dehumanisation as well as its

[28] Matthew Brzezinski, 'The Unmanned Army', (*New York Times*, 2003) available at <https://www.nytimes.com/2003/04/20/magazine/the-unmanned-army.html> on 8 January 2020
[29] David Smith, *Less Than Human: Why We Demean, Enslave, and Exterminate Others* (St. Martin's Press, New York, 2011)
[30] Simon Baron-Cohen, *Zero Degrees of Empathy: A Theory of Human Cruelty and Kindness* (Penguin Books, London, 2011)

possible origins and causes. Dave Grossman provides an insight into the psychological cost of killing in warfare.[31] This thesis uses those insights and juxtaposes the effects of killing in traditional battle to that in drone warfare. Nick Haslam provides a unique and useful distinction between "animalistic dehumanisation" and "mechanistic dehumanisation", the former being the type of dehumanisation associated with genocides, usually entailing the degrading of human beings to the level of animals or worse.[32] The latter is related to dehumanisation stemming as a result of physical and emotional distance. [33] Contributing to the literature, this thesis proposes a third category of dehumanisation: "partial dehumanisation" where the humanity of the person is masked, blurred, or faded.[34]

1.4.2 Drone warfare

There is an abundance of research on the technological capabilities of UAVs and there is increasing commentary on the changing landscape of armed conflict. Michael Horowitz and Matthew Fuhrmann discuss the causes and implications of the proliferation of UAVs, [35] and Micah Zenko and Sarah Kreps argue the case for limiting said proliferation.[36] This thesis contributes to the commentary around drone warfare changing the landscape of armed conflict, while providing original research on the detachment of drones leading to the dehumanisation of the enemy.

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[31] Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995)
[32] Nick Haslam, 'Dehumanization: An Integrative Review', *Personality and Social Psychology Review,* (2006), Vol. 10, No.3, 262
[33] ibid
[34] Subchapter 2.2.2
[35] Michael Horowitz and Matthew Fuhrmann, 'Droning On: Explaining the Proliferation of Unmanned Aerial Vehicles', *International Organization*, vol.71, no.2, 397-418
[36] Michael Zenko and Sarah Kreps, *Limiting Armed Drone Proliferation* (Council on Foreign Relations Press, 2014)

Grégoire Chamayou's *Drone Theory*[37] provides invaluable insight into the way drones and unmanned systems have transformed warfare. He discusses at length the psychological effect of conducting a war from such long distances, from the perspective of both sides of the conflict. This thesis combines Grossman's research regarding the psychological cost of killing with Chamayou's analysis of the psychology of warring from a distance. Grossman devised a graph (Figure 2.2 in Chapter 2) that compares physical distance from the target with resistance to killing, demonstrating an inverse correlation. In other words, the further one is from the enemy, the less resistance one has towards killing them. Chamayou considers the placement of UAVs on such a graph, discussing their highly unique nature and their ability to be simultaneously nearby and far away.

This thesis makes specific and detailed mention of Stanley Milgram's *Obedience to Authority*.[38] Milgram devised an experiment using unsuspecting volunteers and tested their willingness to inflict pain on others. Milgram's primary objective was to study the relationship between evil crimes and the concept of obedience. While he discovered a strong correlation between the subjects' willingness to inflict pain on others and their perceived duty to obey an authority figure, this thesis extrapolates from the same data an equally strong correlation between acts of violence and detachment. It also shows a relationship between physical distance and psychological distance, which correlates to Grossman's analysis of the psychology of killing as well as Chamayou's application to drone warfare.

1.4.3 Legal analysis

[37] Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015)
[38] Stanley Milgram, *Obedience to Authority* (Printer & Martin Ltd., London, 2013)

The rapid advancement of drone technology has led to the emergence of literature on drone warfare. Previous attempts to analyse the use of drones as a military strategy have tended to concentrate on the legality of the use of drones. Research conducted by academics such as O'Connell,[39] Blum and Heyman,[40] and Murphy and Radsan[41] have analysed the lawfulness of drone warfare by concentrating on the use of drones as opposed to questioning whether international standards can control the use of drones. The approach in this thesis is to adopt the premise that the use of drone technology as a military tactic is a technological development like any many others and should be regulated within current international legal standards.

The *Tallinn Manual* is consulted as a framework to approach the innovation of technological weapons.[42] The *Tallinn Manual* is an academic, non-binding study on how international law can be applied to cyber warfare. Cyber warfare and drone warfare share similarities in that they are both unconventional and, if unchecked, have the potential to bypass current international regulations. This issue is discussed in further detail in Chapter 3.

Some attempts at governance have emerged. The European Parliament passed a resolution on the use of armed drones in 2014,[43] and in 2017 there were attempts to create

[39] Mary O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan 2004-2009' in Simon Bronitt, Miriam Gani and Saskia Hufnagel (eds.) *Shooting to Kill, Socio-Legal Perspectives on the use of Lethal Force* (Hart Publishing, Oxford, 2012) 143-144
[40] Gabriella Blum and Philip Heymann, 'Law and Policy of Targeted Killing', *Harvard National Security Journal*vol.1, no.146 (2010) 149-151
[41] Richard Murphy and Afsheen Radsan, 'Due Process and Targeted Killing of Terrorists', *Cardozo Law Review*, vol.31, no.405 (2009) 409-411
[42] Michael Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, Cambridge, 2017) 421
[43] European Parliament Resolution of 27 February 2014 on the Use of Armed Drones (2014/2567(RSP)) OJ C 285

a common position from the EU.[44] The US army has outlined its policy on the law of war with regards to targeting,[45] as has the UK government,[46] but many have challenged the legitimacy of such asymmetrical warfare and the permissibility of such use of force.[47] Arguments have also been made in support of drone warfare[48] and this thesis shall compare the many different stances and analyse their arguments in light of the added dimension of dehumanising the enemy. Research into the dehumanising effect of this method of warfare is a valuable addition to the literature.

1.5 Methodology

This research relies on an integrated mixed-methods methodology, which utilises and adopts the approaches of non-law disciplines in conjunction with its legal approach.[49] Among the different subjects involved in this study are political science, international relations, and psychology. The primary aim of this research is to assess whether the proliferation of UAVs has fostered dehumanisation in armed conflict, and whether the law is equipped to deal with these technological advancements. This aim necessitates research into the psychology of dehumanisation, the impact of distance and detachment,

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[44] Jessica Dorsey and Giulia Bonacquisti, 'Towards an EU common position on the use of armed drones', *Directorate-General for External Policies: Policy Department* (European Parliament, 2017)
[45] Department of the US Army, *Targeting and the Law of War: Administrative Investigations and Criminal Law Supplement*, (2017)
[46] House of Commons and House of Lords, 'The Government's Policy on the use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16', *Joint Committee on Human Rights*, HL 49, HC 747 (2016-2017)
[47] Alejandro Chehtman, 'The ad bellum Challenges of Drones: Recalibrating Permissible Use of Force', *European Journal of International Law*, vol.28, no.1.1, (2017) 173-197; Vivek Sehrawat, 'Legal Status of Drones under LOAC and International Law', *Penn State Journal of Law and International Affairs*, vol.5, no.1, (2017) 166-205; Vivek Sehrawat, 'Autonomous Weapon System: Law of Armed Conflict (LOAC) and Other Legal Challenges', *Computer Law and Security Review*, vol.33, no.1, (2017) 38-56; Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne, and Thompson Chengeta, 'The International Law Framework Regulating the Use of Armed Drones', *International and Comparative Law Quarterly*, vol.65, no.4 (2016) 791-827
[48] John Yoo, 'Embracing the Machines: Rationalist War and New Weapons Technologies', *California Law Review*, vol.105, no.2 (2017) 444-499
[49] Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing, Oxford, 2011)

and the political relationships between the nations that are affected by technological advancements in armed conflict.

1.5.1 Doctrinal methodology

One methodology used in the study is doctrinal. 'Doctrine' is defined as "a synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent, or justifies a segment of the law as part of a larger system of law."[50] The doctrine in question is primarily legal and so is comprised of cases, statutes, treaties, and rules. Doctrinal methodology first involves locating the sources of law, and then interpreting and analysing said source.[51] In this case, international treaties such as the Geneva Conventions of 1949 and Hague Conventions of 1907, largely regarded as the two major "streams"[52] or "currents"[53] of International Humanitarian Law, are the primary sources of international law. In addition, human rights laws are drawn from the European Convention on Human Rights, affecting not just the use of force but also the issue of jurisdiction. Domestic sources include the Human Rights Act 1998 and the laws governing the authorisation and application of lethal force.

These sources are primarily located on paper and in online databases, such as Westlaw and LexisNexis, as well as online browsers such as Google Scholar. The Institute of Advanced Legal Studies in London was utilised for its special collections in international law, as was the Peace Palace Library. The libraries of the University of Leeds and

[50] Trischa Mann (ed.), *Australian Law Dictionary* (Oxford University Press, Oxford, 2010) 197
[51] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', *Deakin Law Review*, vol.17, no.1 (2012) 110
[52] Mark Reisman and Chris Antoniou (eds.), *The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict* (Villard, New York, 1994) xxi
[53] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*: *An Introduction to International Humanitarian Law* 3rd ed. (International Committee of the Red Cross, Geneva, 2001) 19

University of Manchester were visited regularly due to their easy access to relevant data. Electronic resources such as the International Criminal Court and International Committee of the Red Cross websites were also utilised.

The legal researcher analyses and interprets these sources, "demystifying"[54] them for others. However, the task is not only to locate and explain the laws, but also to apply them in relevant situations; "The lawyer researcher examines the legislative provision, examines the situation and then decides if the situation comes within the rule."[55] The technological advances in warfare are both rapid and constant, and so the researcher must consider the advancements in light of the legal provisions.

Doctrinal methodology provides structure, rigour, and discipline to research, which is essential in legal research.[56] McKerchar argues that one of the primary virtues of doctrinal methodology is for the research to "follow accepted conventions, using clear rationales, and for the research to be systematic and purposive with a robust framework."[57] Simmonds goes on to explain that, "Legal doctrine, the corpus of rules, principles, doctrines, and concepts used as a basis for legal reasoning and justification, represents the *heart* of a legal system."[58] A strict doctrinal method focuses on the primacy of critical reasoning based around authoritative texts,[59] taking the perspective of an "insider".[60]

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[54] Geoffrey Samuel, 'Can Legal Research Be Demystified', *Legal Studies*, vol.29, no.2, (2009) 181
[55] John Farrar, *Legal Reasoning* (Thomson Reuters, Sydney, 2010) 92
[56] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', *Deakin Law Review*, vol. 17, no.1 (2012) 112
[57] Margaret McKerchar, *Design and Conduct of Research in Tax, Law, and Accounting* (Lawbook Co., Pyrmont, 2010) 116
[58] Nigel Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (Manchester University Press, Manchester, 1984) 1
[59] Christopher McCrudden, 'Legal Research and the Social Sciences', *Law Quarterly Review*, vol. 632 (2016) 633
[60] ibid

In an interdisciplinary project such as this, such grounding is necessary to maintain consistency in legal analysis. However, taking account of the perspectives and methodologies of international relations, political science, and psychology, an exclusively doctrinal approach would not be suitable. Hutchinson and Duncan argue that the majority of contemporary legal researchers acknowledge that it is important to build on doctrinal research conclusions by using sociological or other "outsider" perspectives,[61] and so the project reflects this advice.

This thesis, while acknowledging the virtues of a doctrinal methodology, adopts a socio-legal approach. While legal research has historically been directed solely towards the legal experts, interdisciplinary research in the area of international law is often directed towards those outside a narrow legally trained discipline.[62]

1.5.2 Socio-legal methodology

The overall approach of the study may be better defined as a socio-legal study. One of the defining characteristics of socio-legal studies is to locate law in a non-legal context.[63] The study aims to assess the law in the current context of its emergent practice. Law does not exist in a vacuum; it is developed through the society in which it arises and indeed, in this case, in the wider environment beyond any single society.[64] Both domestic politics and international relations play vital roles in shaping the direction of the law of warfare. Therefore, a socio-legal approach, which concerns itself with law in action rather than simply a theoretical perspective, seems appropriate.[65] Feenan notes that studies in law

[61] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', *Deakin Law Review*, vol. 17, no.1, 115
[62] ibid 118-119
[63] Dermot Feenan, 'Socio-Legal Studies and the Humanities', *International Journal of Law in Context*, vol.5, no.3 (Cambridge University Press, Cambridge, 2009) 235
[64] Robert Cryer, Tamara Hervey, and Bal Sokhi-Bulley, *Research Methodologies in EU and International Law* (Hart Publishing, London, 2011) 86
[65] ibid

connected to the humanities are based on the view that the texts and laws at hand must have "humanistic" relevance to law.[66]

This thesis is socio-legal in its emphasis on practice. A key debate regarding international law and human rights law is its applicability and practice, and so the thesis places considerable emphasis on considering the relationship between theory and practice in the development of laws. It is also inter-disciplinary in theory, as mentioned above, discussing at length the subjects of political science, international relations, and psychology. The research, under this socio-legal methodology, is focused on secondary data, such as articles, journals, and reviews from non-law disciplines. This aspect of the study will seek to capture the contemporary and constantly changing nature of technology.

1.5.3 Other methodologies

This research is not quantitative, as quantitative research is concerned with numerical values, choosing subjects, and constructing statistical models.[67] The law, on the other hand, "is not a datum; it is in constant evolution, developing in ways that are sometimes startling and endlessly inventive."[68] In addition, a quantitative approach would be less original since published data gathered by dedicated bodies such as Human Rights Watch[69] and Amnesty International[70] can be used as secondary sources. As for qualitative methodologies, this thesis is concerned with embedded internal values such as humanity

[66] Dermot Feenan, 'Socio-Legal Studies and the Humanities', *International Journal of Law in Context*, vol. 5, no.3 (Cambridge University Press, Cambridge, 2009) 237
[67] Parmjit Singh, Chan Fook, and Gurnam Sidhu, *A Comprehensive Guide to Writing A Research Proposal* (Venton Publishing, 2006) 107
[68] Christopher McCrudden, 'Legal Research and the Social Sciences', *Law Quarterly Review*, vol.632 (2016) 38
[69] Human Rights Watch, '*Between a Drone and Al-Qaeda*' *: The Civilian Cost of US Targeted Killings in Yemen* (Human Rights Watch, 2013)
[70] Amnesty International, '*Will I Be Next?*' *US Drone Strikes in Pakistan* (Amnesty International Publications, London, 2013)

rather than the external counting of frequencies. However, the exploration of such values through techniques such as fieldwork interviews were not undertaken for a number of reasons, most of which surround security and clearance.

As the thesis pertains to armed conflict, relevant interviewees are predominantly in dangerous locations, which would pose a health and safety issue, both for interviewer and interviewee. Government officials that may be interviewed may not always be authorised to provide all the relevant details due to the sensitive nature of the topic. The research therefore focuses on literature already published by the abovementioned organisations and thus favours a desk-research methodology based on doctrinal and socio-legal methods. This research is also not a comparative study. The focus of the study is IHL, IHRL, and UK domestic law, all of which are analysed in conjunction to address the regulation of UAVs in armed conflict. Parallels are made to US regulations due to the extent of US involvement in drone warfare globally, but the thesis does not comprehensively compare legislation.

1.6 Chapter outlines

1.6.1 Chapter 2: dehumanisation

Chapter 2 focuses on the underlying principles that underpin the thesis. It sets out the notions and relationship between dehumanisation, psychological detachment, technology in warfare, and the changing landscapes of armed conflict. It begins by introducing the notion of dehumanisation. The chapter then highlights the role of detachment in dehumanisation, and Stanley Milgram's experiments are discussed and analysed in detail. The chapter progresses and highlights the role of distance in dehumanisation. The

concepts of "animalistic dehumanisation" and "mechanistic dehumanisation" are fleshed out and contrasted,[71] and a new third category – "partial dehumanisation" – is proposed.

The role of language is then considered as a method of dehumanisation. Overt attempts to degrade one's humanity through language[72] are compared to more implicit and anonymised language.[73] The chapter proceeds to examine the role of technology in dehumanisation. A relationship is made between physical distance from the enemy and resistance to killing. The ability of drone technology to be physically distant while experiencing some aspects of closeness – such as being able to view and track the enemy's movements with relative precision – leads to a detailed discussion on the concepts of space, presence, and access, and how these contribute to emotional detachment. The chapter progresses to discuss the nature of unilateral armed conflicts. The drone's ability to engage in armed attacks without the commitment of forces on the ground changes the landscape of conflict and introduces the notion of transcending borders, which blur the lines between war and peace. The chapter also discusses the implications of being constantly monitored, and the anxiety, dread, and psychological trauma of living in areas where drones are employed.

The chapter concludes by acknowledging the reality of drone warfare and the increasing number of UAVs being manufactured and deployed. It also concludes that drones are not *per se* illegal or reprehensible, but rather that the nature of their use must be monitored and regulated. Their potentially dehumanising effects must be considered when

[71] Nick Haslam, 'Dehumanization: An Integrative Review', *Personality and Social Psychology Review,* vol.10, no.3 (2006) 262
[72] David Smith, *Less Than Human: Why We Demean, Enslave, and Exterminate Others* (St. Martin's Press, New York, 2011) 15
[73] Jeffrey Bachman and Jack Holland, 'Lethal Sterility: Innovative Dehumanisation in Legal Justifications of Obama's Drone Policy', *International Journal of Human Rights,* vol.23, no.6 (2019) 1032

regulating their deployment and production. The chapters that follow discuss the relevant legal frameworks and whether they are currently sufficient to regulate these emerging technologies that are fostering dehumanisation and changing the landscape of armed conflict.

1.6.2 Chapter 3: The Law of Armed Conflict

Chapter 3 assesses whether IHL is sufficiently equipped to deal with and regulate drone warfare and whether drone warfare is in line with IHL's underlying values, namely, that of humanity, the protection of life, and the containment of the use of force. Although the chapter is primarily pertaining to *jus in bello* (the principles of international law), the chapter begins with a discussion on *jus ad bellum* (the criteria of entering into an armed conflict). This is because the uniquely flexible nature of drones leads some to conflate the two principles. Discussing IHL's ability to regulate drones as a military tool is different to assessing the use of drones in the first instance. IHL indeed prohibits the threat or use of force. The chapter identifies two exceptions to this prohibition: self-defence[74] and consent.[75] The definition of 'imminence' is debated and the chapter outlines the arguments surrounding its scope. The *Caroline Case* is cited as an authority alongside Article 51, which is contrasted to US reliance on its own domestic law such as the Authorisation for the Use of Military Force 2001 (AUMF).[76] The controversy around drone warfare is brought to light, as their ability to attack and retreat with relative immediacy obscures the notions of *jus in bello* and *jus ad bellum*, requiring further discussion on the topic.

[74] Charter of the United Nations, 24 October 1945, 1 UNTS XVI
[75] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), General Assembly Official Records 56th session, supplement no.10 (A/56/10), art.20, para 5
[76] Authorization for Use of Military Force, S.J. Res 23, 107th Cong. (2001)

In order to better appreciate the implications of drone technology, the chapter briefly outlines the evolution of military warfare. The chapter then turns to *jus in bello* – the principles of IHL – focusing on the protection of life, due process, the principle of distinction, and the principle of proportionality. These principles are all made relevant to drone warfare, such as ascertaining whether there is jurisdiction for drone strikes when assessing the proportionality of an attack, or categorising drone attack subjects when assessing whether there is sufficient distinction between combatants and civilians. The chapter presents the Guantanamo Bay detention camp as a case study, highlighting the consequences of failing to implement the protections conferred by IHL, with particular emphasis on the issue of categorising different types of combatants. The chapter then takes a closer look at the principle of proportionality, discussing it in light of autonomous warfare. The discussion then turns to issues of targeting arising from drone strikes and the ability to identify direct participants in hostilities. The lack of clarity as to what constitutes direct participation has led to much confusion as to what constitutes a valid target. This leads to further discussion on IHL's ability to regulate non-human weapons.

The chapter concludes by reiterating the fact that current IHL was not written with the expectation of the increasingly fast-paced military operations experienced today. Prolonged periods of low-intensity conflict, and the rise and significance of non-state actors, are the two primary developments in international armed conflict that are not sufficiently addressed. The options as to how IHL can better regulate the use of UAVs are discussed alongside the merits and flaws of each option. The chapter concludes by proposing that the most pragmatic solution is for IHL to update and evolve in a similar method to the *Tallinn Manual*,[77] which deals with cyber-security and also faces similar

[77] Michael Schmidt, *Tallinn Manual 2.0 on The International Law Applicable to Cyber Warfare* (CUP, 2017) 421

issues pertaining to non-state actors. It did not immediately change the law, but served as a stepping-stone to apply updates.[78] Adjustments in IHL in this regard should consider the detachment and dehumanisation outlined in Chapter 2 as a reference point.

1.6.3 Chapter 4: International Human Rights Law

Chapter 4 assesses whether IHRL has scope to provide an outlet in cases where IHL may not, and whether it is sufficient to deal with and regulate drone warfare. The chapter begins by outlining two general issues related to IHRL in armed conflict: jurisdiction and responsibility.[79] The chapter discusses in detail what constitutes sufficient jurisdiction. It also introduces the notion of "jurisdiction in waiting", where a state may extraterritorially apply the public powers of another state instantaneously. Following this, the chapter revisits the debate of whether IHRL is applicable to armed conflicts. The discussion then turns to the applicability of IHRL to the use of drones, and whether applicability is shared with IHL or not. The first half of the chapter concludes by confirming the applicability of positive obligations on states to actively take steps to preserve life as per Article 2, as well as the applicability of IHRL to armed conflicts.

The second half of the chapter discusses specific rights under IHRL, with emphasis on the right to life and due process. The focus of the chapter is assessing how these rights are applied to drone warfare. The United Nations Universal Declaration of Human Rights,[80] the ICCPR,[81] and the European Convention on Human Rights[82] are all engaged with in this discussion. The notions of positive and negative rights and obligations are

[78] ibid
[79] Eleni Kannis, 'Pulling (Apart) the Triggers of Extraterritorial Jurisdiction', *University of Western Australia Law Review*, vol.40 (2015) 221-243
[80] Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71
[81] International Covenant on Civil and Political Rights, 19 December 1966, 999
[82] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

examined, especially with regards to the right to life and drone strikes' unique ability to personalise and target while simultaneously dehumanise. The discussion turns to the extraterritorial application of the right to life and whether states can be held accountable for drone use when they are deployed outside of the state's territorial jurisdiction.[83] This question also brings up the issue of complicity; a state may have knowledge or indirect participation in an act even if not directly involved. Discussion ensues as to the responsibility of said state to uphold the law and attempt to prevent the act.

The chapter then discusses the right to life in the context of targeted killings. Specific mention is made of the implications of completely autonomous weaponry capable of independent decision-making. The nuanced moral, ethical, and practical reality underpinning armed conflict may not be considered by autonomous robotics, even if capable of independent thinking. The discussion then turns to the topic of due process, a bulwark against arbitrary state power. The different models of due process are outlined alongside their practical implications. Finally, the notion of *jus cogens* (peremptory norm) is introduced, a principle that seeks to protect fundamental values of the international community. The chapter concludes by arguing for the applicability of IHRL in armed conflict, citing its flexibility in application in the form of margins of appreciation and the permissible derogations.

1.6.4 Chapter 5: national governance

Chapter 5 is the final substantive chapter in the thesis, continuing on from Chapters 3 and 4 in assessing whether contemporary armed conflict and technology pertaining to war are in line with existing legal principles and the values that lie behind them. This chapter

[83] Robert Frau, 'Unmanned Military Systems and Extraterritorial Application of Human Rights Law', *Groningen Journal of International Law,* vol.1, no.1 (2013) 1-18; Christof Heyns and others, 'The International Law Framework Regulating the Use of Drones', *International and Comparative Law Quarterly,* vol.64, no.4 (2016) 791-827

analyses national governance and topics that may impact the use of UAVs in armed conflict, such as lethal force, the arms trade, and counter-terrorism. It focuses on UK law while making parallels to US law. The chapter begins by discussing state responsibility. UK compliance in drone operations is scrutinised, especially as British intelligence may have been used in targeted killings carried out in countries that the UK is not at war with, such as Yemen, Somalia, and Pakistan. The targeted killings of Reyaad Khan and Ruhul Amin in 2015 are highlighted as demonstrating the difficulty in holding governments to account due to secrecy laws allowing the state to conceal information on the grounds of national security.

The chapter then turns to domestic legal powers to use lethal force, examining the provisions governing the use of force for both individuals and states. It discusses self-defence as a defence for the use of force, noting the potential significance of automation being used a defence in future development of UAVs. Necessity is also explored as a defence, which is compared to duress, such as in the case of the Baha Mousa killing. As for the use of force by a state, the most common defence is imminence, and discussion ensues as to whether the requirements for imminence must be updated to reflect the fact-paced nature of autonomous weaponry. The chapter then proceeds to outline the relevant national mechanisms of government. It discusses accountability to Parliament, including through the Joint Committee on Human Rights, and accountability to the judiciary. It then discusses the issue of counterterrorism, and the relationship between barring the return of British citizens accused of terrorism and the use of UAVs as an alternative to deal with their perceived threat. The chapter proceeds to discuss the arms trade, outlining the legislation controlling arms exports, both international and domestic. UK, US, EU, and international regulations are compared and discussed, as well as their impact on the development and use of UAVs.

Analysis is also made of the Wassenaar Arrangement, aimed to ensure transparency and responsibility in the export and transfer of arms and dual-purpose equipment and technology.[84] The chapter then highlights UK oversight of the arms trade and equipment usage, as well as parliamentary oversight and accountability. The chapter notes the dichotomy between liberty, security, and finances, concluding that the UK is prioritising security over liberty. It also highlights the consequences of using counter-terrorism as a near-permanent mode of governance, stressing the need to ensure security whilst maintaining sufficient accountability.

1.6.5 Chapter 6: Conclusion

Chapter 6 concludes the thesis, outlining and elucidating the research findings. The chapter highlights the foremost findings of the entire thesis before breaking down the conclusions of each chapter. The chapter then puts forward a case for originality, outlining the contribution this thesis presents to the existing literature. Finally, the chapter ends with concluding remarks, balancing a pragmatic view of the current landscape with vital suggestions on how to best move forward.

Chapter Two

[84] The Wassenaar Agreement, *What is the Wassenaar Agreement?* (2018) available at <https://www.wassenaar.org/the-wassenaar-arrangement/> on 25 June 2019

Dehumanisation

2.1 Introduction

This chapter introduces the notion of dehumanisation, elucidating its relationship with detachment and distance. It demonstrates how technology, in particular drone warfare, has contributed to detachment and dehumanisation. The chapter outlines the premise on which this research based, namely that drone warfare, through dehumanisation and detachment, is transforming war from defined periods of high-intensity conflict in concentrated geographical locations to continuous and indefinite periods of low-intensity operations without boundaries, effectively blurring the line between war and peace. It sets the framework for the remaining chapters to analyse the law. Chapters 3, 4, and 5 will explore IHL, IHRL, and domestic law respectively in light of the notion of dehumanisation elucidated throughout this chapter.

This chapter addresses the first research objective: to examine whether the use of UAVs in armed conflict is leading to psychological detachment from the enemy resulting in their dehumanisation. As mentioned, the detached nature of drone warfare has anonymised and dehumanised the enemy, greatly diminishing the necessary psychological barriers of killing. It also addresses the second research objective: the examination of whether the drone phenomenon has significantly changed the nature of contemporary armed conflict to the extent of blurring the lines of war and peace. The ability of drones to transcend borders with such efficiency has reduced the consequences of war, namely, the risk of human death on one side of the conflict. Armed attack, traditionally the last resort, is becoming the first resort, and the increasingly unilateral nature of such aggression, where

only one side attacks, may lead to a greater frequency of such operations. Effectively, drone systems and targeted killing policies have lowered the bar for armed attack.[85]

The chapter begins by explaining the concept of dehumanisation and its role in armed conflict. A distinction is made between 'animalistic dehumanisation', which is the very explicit form of dehumanisation fuelled by contempt and disgust, and 'mechanistic dehumanisation', which is developed as a result of indifference as well as physical and psychological detachment.[86] This research primarily concerns the latter. The chapter analyses the role of detachment in the process of dehumanisation, using Stanley Milgram's famous *Obedience to Authority* tests as a basis to compare levels of detachment and their impact; the more detached a person is psychologically, the easier it is for them to commit acts of violence or cruelty. Following this, a link is made between physical distance and psychological distance; the further one is from their enemy, the easier it is to dehumanise them. David Grossman's *On Killing* is used to explain the significance and impact of killing from a distance.[87] Soldiers who have killed from close distances give personal accounts, and these narrations are juxtaposed to those of drone operators killing from great distances.

The chapter discusses the role of technology and its relevance to dehumanisation, which is again linked to armed conflict, and different forms of weaponry are compared. A negative correlation is formed between the physical distance to a target and the resistance to killing. Drones are discussed in this context; their unique and breakthrough design warranted in-depth analysis of how they would compare to previous forms of combat.

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[85] Mark Mazzetti, *The Way of the Knife: The CIA, A Secret Army, and a War at the Ends of the Earth* (Penguin Press, New York, 2013) 100
[86] Nick Haslam, 'Dehumanization: An Integrative Review', *Personality and Social Psychology Review,* vol.10, no.3 (2006) 262
[87] Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995)

Drones are often perceived as being 'closer' to the battlefield due to their ability to observe the actions of the enemy from afar. However, Grégoire Chamayou's *Drone Theory* provides a detailed explanation as to why drones' 'access' into enemy territory is not enough to consider them as 'close' per se.[88] In short, their access is not reciprocal, and so they cannot be considered as sufficiently 'present'.[89] These concepts are explained and elaborated upon in further detail in Subchapter 2.2.4.

The chapter then progresses to demonstrate the implications of detachment. Drone operators are quoted as comparing their work to video gaming, and the post-traumatic stress disorder (PTSD) they suffer is more akin to that which occurs from boredom than the typical PTSD found in soldiers returning from traditional battle. The role of language to dehumanise is highlighted, and an example is made of the Obama administration's drone campaign, which utilised non-descriptive language to anonymise the enemy.[90] The chapter ends by discussing the consequences of drone warfare on the culture and development of armed conflict, which has grown increasingly unilateral. The nature of such unilateral conflict is discussed in detail in Subchapter 2.3 below. Preventative surgical strikes resemble manhunting, and the willingness to frequently resort to drone strike operations presents dubious moral and legal implications. The last resort of armed conflict becomes the first resort, and killing becomes much easier and preferred than capturing. The culture of armed conflict is rapidly changing, and borders are now easily transcended. This has led to a permissive approach to armed conflict, taking us from clearly defined periods of war and peace to the ability to create a constant and perpetual period of potential armed conflict.

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[88] Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015) 116
[89] ibid 248
[90] Jeffrey Bachman and Jack Holland, 'Lethal Sterility: Innovative Dehumanisation in Legal Justifications of Obama's Drone Policy', *International Journal of Human Rights,* vol.23, no.6 (2019) 1032

2.2 The theory of dehumanisation

One method to strip someone of their inalienable rights as a human being is to deny their human status – to dehumanise them[91] and negate their identity as a human being.[92] Yoshio Tshuchiya, a Japanese war veteran, describes how he was ordered to bayonet unarmed Chinese civilians in the Nanking massacre of 1937, and what it was that enabled him to comply with this order: "If I'd thought of them as human beings I couldn't have done it. But…I thought of them as animals or below human beings."[93] Similarly, Elie Ngarambe, who took part in the Rwandan genocide, admitted that the *génocidaires* "did not know that the [Tutsi] were human beings, because if they had thought about that they wouldn't have killed them. Let me include myself as someone who accepted it; I wouldn't have accepted that they [the Tutsi] are human beings."[94] The US soldier and ex-drone operator Steven Green raped a 14-year old Iraqi girl and killed her alongside her family because "he didn't view Iraqis as human."[95]

Simon Baron-Cohen, a psychopathologist and neuroscientist, asserts that while a lack of empathy is not the sole pathway to cruelty, it is the final pathway. At that point, one becomes capable of dehumanising other people, of turning the other person into an object.[96] Baron-Cohen concludes that treating others as objects is one of the worst things

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[91] Herbert Kelman, 'Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers', *Journal of Social Issues,* vol.29, no.4 (1973) 48

[92] Sophie Oliver, 'Dehumanization: Perceiving the Body as (In) Human' in Paulus Kaufman and others (eds.), *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Springer, New York, 2010) 87

[93] Laurence Rees, *Horror in the East: Japan and the Atrocities of World War II* (DaCapo Press, New York, 2002) 28

[94] Daniel Goldhagen, *Worse Than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity* (Hachette Digital, London, 2009) 535

[95] Mail Foreign Service, '"I Didn't Think of Iraqis as Humans", says U.S. Soldier who Raped 14-year-old Girl Before Killing her and her Family', *Daily Mail* (21 December 2010) available at <https://www.dailymail.co.uk/news/article-1340207/I-didnt-think-Iraqis-humans-says-U-S-soldier-raped-14-year-old-girl-killing-her-family.html> on 23 February 2017

[96] Simon Baron-Cohen, *Zero Degrees of Empathy*: A Theory of Human Cruelty and Kindness (Penguin Books, London, 2011) 15

one can do to another human being; to ignore their subjectivity, their thoughts and feelings.[97]

2.2.1 Dehumanisation and the role of detachment

"Even Eichmann was sickened when he toured the concentration camps, but to participate in mass murder he had only to sit at a desk and shuffle papers."[98] As evidenced by the innumerable wars, genocides, and killings throughout history, humans are capable of the most grotesque actions. Many of these actions were indeed carried out by people who consider themselves good and decent. During the Third Reich, Speer "talked himself into believing that his work was strictly that of an architect and administrator, and that it was not his role to agonize over 'political' matters."[99] The question then arises as to how people who would ordinarily be considered good are willing to commit acts of cruelty of their own free will. Stanley Milgram, a psychologist at Yale University, conducted an experiment to find the answer.[100] In light of the atrocities of the Second World War, Milgram conducted a series of experiments in 1961 following the start of the trial of German Nazi war criminal Adolf Eichmann. The question was being asked: were Eichmann and the Nazis merely following orders? Milgram sought to study the relationship between committing evil crimes and the concept of obedience, producing conclusive results. A strong link could also be made between acts of cruelty and the concept of detachment.

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[97] ibid
[98] Stanley Milgram, *Obedience to Authority* (Printer & Martin Ltd., London, 2013) 12
[99] Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Oxford University Press, Oxford, 1982) 67; Mark Phythian, *The Politics of British Arms Sales Since 1964*, (Manchester University Press, Manchester, 2000) 313
[100] ibid

Milgram devised an experiment comprised of three people: a 'teacher', a 'learner', and an 'experimenter'.[101] The unsuspecting candidates were designated the teacher role and were the subject of the experiment, while the learner and experimenter were both actors. The learner is strapped to a chair and is connected to a shock generator. The learner is asked to answer some multiple-choice questions, and every time a question is answered incorrectly, an electric shock is administered. After every question, the intensity of the shock increases. The first shock is 15 volts (minor discomfort) and the final shock is 450 volts (excruciating pain), and the shocks in between increase in intensity accordingly. The results found that *all* participants continued until 300 volts, and 65% of the participants continued until the very end, administering 450 volts.[102]

Milgram repeated the experiment, but with the learner being placed in varying proximities in order to observe the role of detachment in the ability to carry out acts of cruelty and the willingness to inflict pain. In the original experiment, Experiment 1, the learner was in another room, and the victim's complaints and moans were transcribed onto a screen for the subject to read. At 75 volts, the victim would start to grunt and show signs of discomfort. At 150 volts, the victim would cry out "Experimenter, get me out of here! I won't be in the experiment any more! I refuse to go on!"[103] At 300 volts, the victim would simply scream in agonising pain. The subject would read the responses on the transcript, but from 300 volts onwards, he would also hear muffled banging from the adjacent room. As mentioned, 65% of the subjects continued until the very end.

In Experiment 2, voice feedback was introduced. The experiment was identical to Experiment 1, except that the victim's complaints were clearly heard through

[101] ibid 16
[102] ibid 33
[103] ibid 25

microphones. In Experiment 3, the victim was placed in the same room as the subject, and so the subject had visual proximity as well as audio. In Experiment 4, touch proximity was introduced. This was identical to Experiment 3, except that from 150 volts onwards, the victim would refuse to answer a question, and so the subject was ordered to force the victim's hand onto the plate himself. Figure 2.1 demonstrates the dramatic decrease in co-operation as the proximity of the victim increases and is rendered more immediate to the subject.

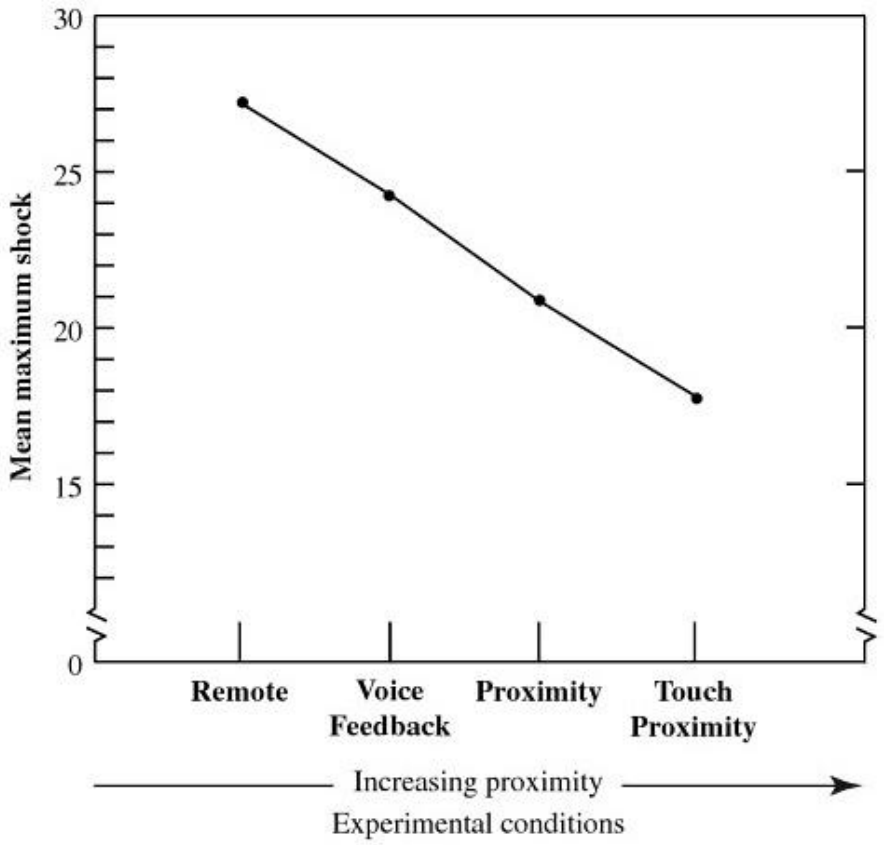

Figure 2.1: Willingness to administer shocks vis-à-vis closeness to the victim. Adapted from Stanley Milgram, *Obedience to Authority*, Printer & Martin Ltd., London (2013) 37

In Experiment 1 (remote), 65% of the subjects completed the course until the end; 62.5% completed it in Experiment 2 (voice feedback); 40% completed it in Experiment 3 (proximity); and 30% completed it in Experiment 4 (touch proximity). As can be seen in the figure, the most dramatic decrease in co-operation was when spatial closeness (physical proximity) was introduced. A link could be made to drone warfare and killing the enemy from extreme distances. In drone warfare, not only is there an absence of touch proximity or spatial-proximity, there is no audio proximity either. The drone operator is as detached as one can possibly be.

One of the subjects in Milgram's experiment, referring to the remote condition in Experiment 1, recalled: "It's funny how you really begin to forget that there's a guy out there, even though you can hear him. For a long time I just concentrated on pressing the switches and reading the words."[104] This is referred to as narrowing the cognitive field; the victim is put out of mind in order to diminish the severity of the act. When the victim is close, Milgram notes, "He necessarily intrudes on the subject's awareness, since he is continuously visible."[105] These visible cues prompt empathetic responses, whereas without the cues, the victim's suffering is more abstract and remote.[106]

When the victim is remote, the subject is more likely to compartmentalise his actions. In other words, it is more difficult for the subject to see a connection between his actions and their consequences for the victim because there is a physical separation of the act and its effects.[107] The lever is depressed in one room and cries are heard in another. There is correlation, but it is not complete. When the victim is brought much closer, the correlation increases greatly, and when touch proximity is introduced, there is total correlation. When

[104] ibid 39
[105] ibid
[106] ibid 37
[107] ibid 40

the subject is no longer detached from the reality and consequences of his actions, he considers their implications much more.

Since Milgram's experiment gained worldwide notoriety, it has been studied relentlessly over the last half century. Milgram famously deduced from his experiments that ordinary people could commit grotesque acts when commanded to do so by an authority, using the Holocaust as his primary example. But a number of academics have attempted to bring into question the accuracy of Milgram's extrapolations, arguing that there is a notable difference between someone being *in* authority, and someone being *an* authority on a particular matter.[108] Therefore, the authority wielded by the likes of Hitler cannot be compared to the authority of a doctor. The former, as explained by Stephen S.C. Patten, is called "simple-command authority"[109] and is where the authority is a legal one, or one based on power. The latter is an "expert-command authority" and is obeyed due to a presumed expertise on a matter. The subject is given assurances from the experimenter's statements, supposedly backed with credible scientific studies, that despite the painful nature of the shocks, they are not dangerous.[110]

Evidence is cited from Milgram's own experiment. In one of the cases, the 'experimenter' urged the subject to continue by assuring him that there was no permanent tissue damage. The subject replied, "Yes, but I know what shocks do to you. I'm an electrical engineer, and I have had shocks…and you get real shook up by them – especially if you know the

[108] Stephen C. Patten, Milgram's Shocking Experiments', *Philosophy*, vol.52, no.202 (1977) 425-440; Mario Morelli, 'Milgram's Dilemma of Obedience', *Metaphilosophy*, vol.14, no.3-4 (1983) 183-189; Thomas Blass, 'The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority', *Journal of Applied Social Psychology*, vol.29, no.5 (1999) 955-978

[109] Stephen C. Patten, 'Milgram's Shocking Experiments', *Philosophy*, vol.52, no.202 (1977) 425-440

[110] Don Mixon, *Further Conditions of Obedience and Disobedience to Authority*, (University of Nevada, University of Microfilms, 1971); Don Mixon, 'Instead of Deception', *Journal for the Theory of Social Behaviour*, vol.2, no.2 (1972) 145-177

next one is coming. I'm sorry."[111] Here, the subject uses his own authority as an expert in electrical engineering to override the experimenter's authority and as a result resist his commands. Milgram accepted such a distinction in the types of authority, but maintained that his conclusions were still justified: "As frequently happens, real life is more complex than textbooks: Both components co-exist in one person. The experimenter is both the person 'in charge' and is presumed by subjects to possess expert knowledge."[112]

Another criticism of Milgram's studies is conveyed by Alexander Haslam and Stephen Reicher, who argue that Milgram's results are less about people following orders blindly, but more about people being convinced that what they are doing is the right thing to do. Examples were given from some of the subjects who were thanked at the end of the experiment and replied buoyantly, claiming that they were happy to help.[113] Prior to his trial, Eichmann himself was reported to have said that his only regret was that he did not kill more Jews.[114] This admittance would contradict Milgram's claim that Eichmann was, at least initially, an ordinary man who was not inherently bloodthirsty or cruel. This criticism is perhaps weaker, because some of the subjects that were reluctant and uncomfortable still continued when ordered by the experimenter.

While the above criticisms must be taken into consideration with regards to Milgram's theory of obedience, they do not detract from the theory of detachment. Whether or not the subjects went ahead with the shocks because they were obeying the person who was *in* authority or whether it was because they were *an* authority does not change the fact

[111] Jeffrey Goldstein, *Social Psychology* (Academic Press Inc., London, 1980) 284
[112] Stanley Milgram, 'Reflections on "Morelli's Dilemma of Obedience"', *Metaphilosophy*, vol.14 (1983) 191-192
[113] Alexander Haslam and Stephen Reicher, 'Contesting the "Nature" of Conformity: What Milgram and Zimbardo's Studies Really Show', *PLoS Biology*, vol.10, no.11 (2012) 2
[114] David Cesarni, *Eichmann: His Life and Crimes* (Heinemann, London, 2004)

that the more detached the subject was to the victim, the greater the likelihood of them administering shocks until the very end.

2.2.2 Dehumanisation and the role of distance

Ben Shalit notes that increasing the distance between the combatants allows for an increase in the degree of human aggression.[115] Psychological and physical distancing are often both interlinked, and one may lead to the other. Modern technology has developed numerous mechanisms such as automated missiles, drones, long-range rockets, and so on. Each advance increases the kill-range. In his book *On Killing*, retired Lieutenant Colonel David Grossman discussed in depth the effect of killing from a distance, as well as the trauma of killing in close proximity and the relative ease of killing from afar. He compiled numerous accounts of surviving soldiers and their experiences. Grossman quotes Glenn Gray:

> "Unless he is caught up in murderous ecstasy, destroying is easier when done from a little remove. With every foot of distance there is a corresponding decrease in reality. Imagination flags and fails altogether when distances become too great. So it is that much of the mindless cruelty of recent wars has been perpetrated by warriors at a distance, who could not guess what havoc their powerful weapons were occasioning."[116]

A clear link is made between the distance of the kill, and the subsequent trauma, or lack thereof, to the attacker. When killing in the vicinity of your enemy, you hear the screams,

[115] Ben Shalit, *The Psychology of Conflict and Combat* (Praeger Publishers, New York, 1988)
[116] Glenn Gray, quoted in Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995) 97

and see the blood, remembering your foe's last utterance. This intense connection makes it that much more difficult to kill. In many cases, it becomes an obstacle to kill – perhaps a necessary obstacle, as elaborated upon further in Subchapter 2.2.4. Colonel Barry Bridger of the US Air Force described the difference between air combat and ground battle: "You see an aircraft; you see a target on the ground – you're not eyeball to eyeball with the sweat and the emotions of combat, and so it doesn't become so emotional for you and so personalised. And I think it is easier to do in that sense – you're not affected."[117]

As the distance between combatants increases, both physically and psychologically, a direct correlation arises between the distance and the emotions exhibited as a result. An RAF aircrew member described the scenes 20,000 feet above ground level immediately after firebombing the city of Hamburg in 1943: "I saw no streets, no outlines of buildings, only brighter fires which flared like yellow torches against a background of bright red ash. Above the city was a misty red haze. I looked down, fascinated but aghast, satisfied yet horrified."[118] The wording of the last sentence is particularly noteworthy; the juxtaposition of "fascinated" and "aghast", of "satisfied" and "horrified". The RAF crew were not close enough to see the individual deaths of each human, but were close enough to imagine the consequence of their actions. Close enough to be "horrified", but far enough to "enjoy" a level of satisfaction.

The detachment developed as a result of physical and/or psychological distance differs from the dehumanisation described in horrific massacres and genocides. Nick Haslam differentiates varying forms of dehumanisation. 'Animalistic dehumanisation' involves

[117] Barry Bridger, quoted in Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995) 110
[118] RAF aircrew, quoted in Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995) 101

the denial of 'Uniquely Human' attributes, which is typically accompanied by emotions of contempt and disgust. Uniquely Human attributes are characteristics that define the boundary that separates humans from the related category of animals, and this is the type of dehumanisation associated with the Holocaust and other genocides.[119]

'Mechanistic dehumanisation', on the other hand, involves the objectifying denial of 'Essentially Human' attributes, which are characteristics that are typically or essentially human but may not be the same ones that distinguish us from other species.[120] It is usually directed towards people whom the person feels psychologically distant and socially unrelated.[121] It is often accompanied by indifference, a lack of empathy, and an abstract and de-individualised view of others. This form of dehumanisation is more akin to the detachment developed by killing from a distance. That being said, it is possible for the latter type to develop into the former, as in the abovementioned case of Steven Green. A third type of dehumanisation may perhaps be added: a 'partial dehumanisation', where the humanity of the enemy is masked, blurred, or faded; their humanity is recognised, but it is not enough to stop the perpetrator from killing them. Drone operators may perhaps fit into this category.

Opotow coins the term 'moral exclusion', where people are placed outside the boundary in which moral values, rules, and considerations of fairness apply.[122] The main consequence of moral exclusion is the feeling of disconnectedness and indifference. These feelings are what facilitate the ability to commit acts that one may not necessarily be able to commit otherwise, such as kill. As Richard Evans famously said, "The road to

[119] Nick Haslam, 'Dehumanization: An Integrative Review', *Personality and Social Psychology Review,* vol.10, no.3 (2006) 262
[120] ibid
[121] ibid
[122] Susan Opotow, 'Moral Exclusion and Injustice: An Introduction', *Journal of Social Issues*, vol.46, no.1 (1990) 1

Auschwitz was built by hate, but paved with indifference."[123] In Milgram's experiment analysed in Subchapter 2.2.1, one of the subjects continued to administer painful shocks because he was told that "the experiment *requires* that you continue" and that "it's *got* to go on".[124] He did not ask *why* it must continue, or more importantly *who* decided that it must continue. For him, the human element had faded and it was the *experiment* that needed to be followed. Upon analysing the transcripts of war crime trials, such as that of Eichmann, Milgram outlined a recurring theme: when such acts occur, they are conducted with an administrative outlook rather than a moral one.[125]

Dehumanisation is just one form of moral exclusion. Opotow described a milder but equally significant form of exclusion, which is psychological distancing – perceiving others as objects or as non-existent.[126] The more psychologically distant one is, "the more likely they are to involve 'cold' cognition-based judgements"[127] rather than make decisions based on emotion and empathy – the very same empathy cited as a requirement for overcoming dehumanisation.[128] Drone operators are said to demonstrate the actualisation of this distancing, feeling "no emotional attachment to the enemy". One operator stated, "I have a duty, and I execute the duty."[129] This soldier compartmentalises; his emotions are compartmentalised from his actions; his life is compartmentalised from his job. Stanley Milgram concluded from his abovementioned study that perhaps the most *fundamental* lesson learned from his experiments is that ordinary people, simply doing

[123] Richard Evans, *In Hitler's Shadow*, (I.B. Tauris, London, 1989)
[124] Stanley Milgram, *Obedience to Authority* (Printer & Martin Ltd., London, 2013) 10
[125] ibid 186
[126] Richard Evans, *In Hitler's Shadow*, (I.B. Tauris, London, 1989)
[127]Nick Haslam, 'Dehumanization: An Integrative Review', *Personality and Social Psychology Review,* vol.10, no.3 (2006) 262
[128] Jodi Halpern and Harvey Weinstein, 'Rehumanizing the Other: Empathy and Reconciliation', *Human Rights Quarterly*, vol.26, no.3 (2004) 561-583
[129] Elisabeth Bumiller, 'A Day Job Waiting for a Kill Shot a World Away', (*New York Times*, 2012) available at <https://www.nytimes.com/2012/07/30/us/drone-pilots-waiting-for-a-kill-shot-7000-miles-away.html> on 12 December 2019

their jobs, and without any particular hostility on their part, "can become agents in a terrible destructive process".[130] Grossman compartmentalises the different types of distancing into cultural, moral, social, and mechanical distancing. All these forms of distancing occur, one way or another, during warfare. However, modern technology has led to the proliferation of mechanical distancing. Grossman describes it as "the sterile Nintendo-game unreality of killing through a TV screen, a thermal sight, a sniper sight, or some other kind of mechanical bugger that permits the killer to deny the humanity of his victim."[131]

2.2.3 Dehumanisation and the role of language

Language is perhaps the foremost tool used to dehumanise. It was reported that as the Iraq war commenced, a computer programme was devised called the 'Bugsplat Program', which approximated how many civilians would die in a particular bombing raid. On the opening day, it was estimated that 22 of the planned bombing attacks on Iraq would produce a 'heavy bugsplat', which is defined as more than 30 civilian deaths per raid. General Tommy Franks said: "Go ahead, we're doing all 22."[132] Robert Koehler labels the term 'bugsplat' itself as "ultimate disrespect and indifference", arguing that "it begins with a state of mind".[133] In the infamous Rwandan genocide, the Tutsis were called *inyenzi,* cockroaches. A secret military operation began against the Tutsis, called "operation insecticide".[134] While the latter example demonstrates outward and explicit dehumanisation, one cannot help but notice the similarity in the names of the operations. In both cases, the deceased were referred to as insects.

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[130] Stanley Milgram, *Obedience to Authority* (Printer & Martin Ltd., London, 2013) 7-8
[131] Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995) 160
[132] Robert C Koehler, '"Bugsplat": The Civilian Toll of War', *Baltimore Sun* (1 January 2012)
[133] ibid
[134] David Smith, *Less Than Human: Why We Demean, Enslave, and Exterminate Others* (St. Martin's Press, New York, 2011) 152

The use of language to dehumanise the enemy is not always overt or aggressive. Research into the Obama administration's drone campaign found increasing use of non-descriptive accounts in order to anonymise the enemy.[135] Individuals are transformed into objects so that the act of killing is perceived as an abstract concept as opposed to a recorded event. While already established in military vernacular, acts of killing were more frequently referred to as "operations",[136] which imply a corrective procedure. Use of the popular term "targeted killing" was dramatically reduced[137] and was replaced with variations of "target", 'targeting", and 'targeted".[138] While "targets" are often only suspects, being called a "target" legitimises lethal force by assigning guilt.[139] An act that may be described by some as murder can be politically labelled an assassination, which has become out-dated and is frequently referred to as a targeted killing, more recently replaced with targeted operation.

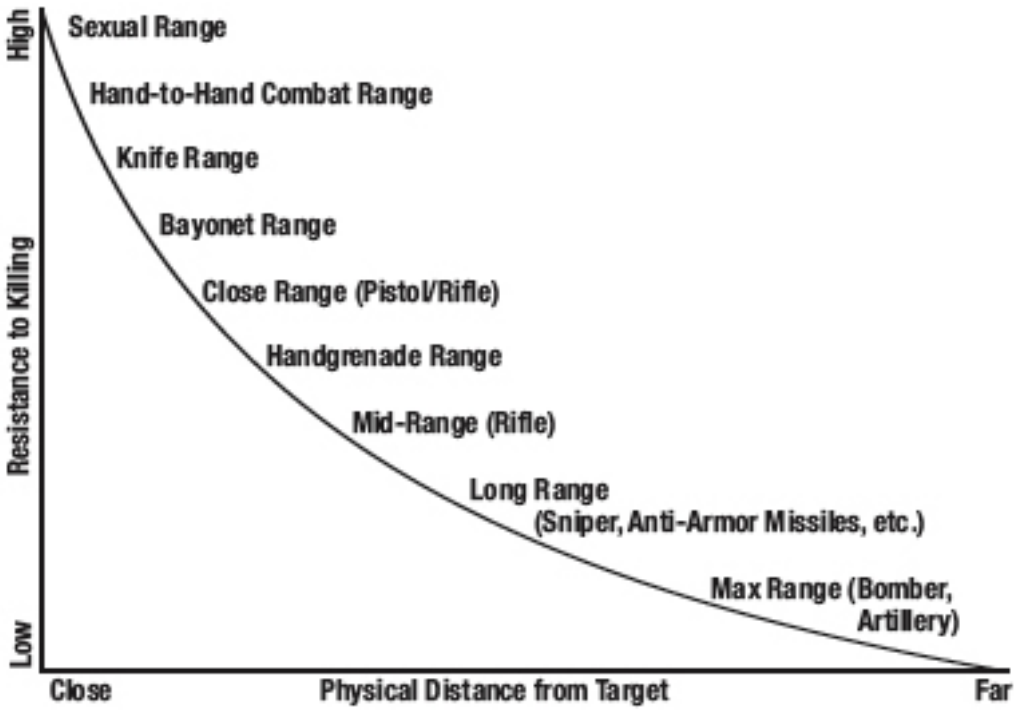
This development of vernacular is a carefully crafted, deliberate attempt to pacify the audience. Bachman and Holland analysed the Obama administration's literature, concluding, "The administration employed innovative techniques of dehumanisation, moving away from Bush's efforts to animalise enemies, instead adopting a sanguine, bureaucratic language to veil the act of killing."[140] In order words, a conscious effort was

[135] Jeffrey Bachman and Jack Holland, 'Lethal Sterility: Innovative Dehumanisation in Legal Justifications of Obama's Drone Policy', *The International Journal of Human Rights,* vol.23, no.6 (2019) 1032
[136] Harold Koh, 'The Obama Administration and International Law' (speech), *104th Annual Meeting of the American Society of International Law*, March 2010
[137] Jeh Johnson, 'National Security Law, Lawyers, and Lawyering in the Obama Administration', *Yale Law and Policy Review*, vol.31, no.1 (2012) 141-150
[138] Harold Koh, 'The Obama Administration and International Law' (speech), *104th Annual Meeting of the American Society of International Law*, March 2010
[139] Michael Gross, 'Assassination and Targeted Killing: Law Enforcement, Execution or self Defense?' *Journal of Applied Philosophy*, vol.23, no.3 (2006) 326
[140] Jeffrey Bachman and Jack Holland, 'Lethal Sterility: Innovative Dehumanisation in Legal Justifications of Obama's Drone Policy', *The International Journal of Human Rights,* vol.23, no.6 (2019) 1030

made to transition from ‘animalistic dehumanisation’ to ‘mechanistic dehumanisation’, as described in Subchapter 2.2.2. Bachman and Holland continue: “…[the] legal case for drones amounted to a particularly lethal sterility; murder through the mundane, with assassination enabled through the bureaucratically banal.” [141] The Obama administration’s language used to detach and distance its actions from its consequences mirrors its decision to opt for drones as its weapon of choice, as will be explained below.

2.2.4 Dehumanisation and the role of technology

Richard Holmes describes how the development of new weapon systems that enables soldiers to fire more lethal weapons more accurately and to longer ranges has resulted in the enemy becoming a mere anonymous figure glowing on a thermal imager. Figure 2.2 aptly illustrates the varying degrees of distance and the correlation between physical distance and resistance to killing.



[141] ibid 1031

Figure 2.2: Resistance to killing vis-à-vis physical distance. Reproduced from Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, (Time Warner Book Group, New York, 1995) 98

One may place drone operations furthest to the right on the x-axis, past aerial bombing and artillery. It can be argued, though, that drone operators have a closer proximity than traditional bomber pilots; they can see the exact people they are shooting. Military psychologist Hugo Ortega concedes that the drone operators can see the battle taking place in extraordinary detail, causing "a sort of guilt."[142] However, Grégoire Chamayou provides a detailed and sophisticated explanation as to why the visual access available to the drone operators does not translate to a greater sense of empathy to their victims.

The problem with what we call 'distance' is that technology now has the ability to exercise different forms of access without others. For example, by looking at something thousands of miles away through a camera, you are now simultaneously both close and distant depending on your understanding of the word. You can see the other person, and if there is a microphone, you can hear them too, but you cannot touch them. Do you share a presence with the other person? Physical distance no longer necessarily implies perceptual distance.[143] A distinction should therefore be made between *presence* and *access*.

To be 'co-present', two living entities must be accessible to one another; they must have the ability to affect one another.[144] Looking at someone through a camera thousands of miles away does not meet the conditions of co-presence. They cannot see, hear, or touch

[142] Hugo Ortega, quoted in Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015) 110
[143] Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015) 116
[144] ibid 248

you. Not only is the accessibility limited, it is also one way. The more senses present, the more multidimensional and intense the presence is. If two armies are physically present, they are co-existent, but they are only co-present when they are within reach of one another on the battlefield.

The breakthrough technology of drone warfare has created a situation where one side has access to the other, but the access is not reciprocal. The drone operator has reach of his enemy, and can attack him in a matter of seconds. His enemy, on the other hand, cannot reach him at all, and in most cases, does not even know of his existence. Does this constitute presence? Partial proximity, through sight or hearing, is not necessarily enough to instil the same sense of empathy. One side having visual access to the other is not enough to claim that they are in their presence; they can have co-existence, but not co-presence. In the case of drone strikes, co-presence is not reciprocal.[145] The distinction between drone strikes and previous aerial warfare, such as fighter jets and missiles, is that drones allow presence on one side. The attacker can see exactly where his enemy is with extreme precision, whereas his enemy is not aware of his existence at all. Efforts to make oneself out of sight through camouflage or distancing oneself from the enemy have always existed, but this complete revolution of presence has resulted in completely unilateral armed attack. The consequence of unilateral armed attack shall be expanded upon further in Subchapter 2.3.

Distance measured by numerical values is not sufficient to measure degrees of empathy or co-presence. A drone operator may be thousands of miles away, but can view his enemy as if they were right next to each other. That being said, the proximity remains

[145] ibid 249

partial. A drone operator concedes, "There's no flesh on your monitor, just coordinates."[146] Chamayou summarises:

> "One is never spattered by the adversary's blood. No doubt the absence of any physical soiling corresponds to less of a sense of moral soiling…it shows just enough to make it possible to take aim, but not enough to get a clear view. Above all, it ensures that the operator will never see his victim seeing him doing what he does to him."[147]

Milgram's experiments prove that it is easier to harm a person when the victim is unable to observe our actions than when the aggressor is visible. This is because when the person is under the victim's scrutiny, it gives rise to shame and guilt. When the access is not reciprocal, it is easier.[148] Grossman observed that the critical factor in the incidence of psychiatric casualties among soldiers was the experience of "close-up, inescapable, interpersonal hatred and aggression".[149] Milgram notes, "The manifest function of allowing the victim of a firing squad to be blindfolded is to make the occasion less stressful for him, but it may also serve a latent function of reducing the stress of the executioner."[150] The subjects in his experiment indeed showed a reluctance to look at the victim when administering the shocks.[151]

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[146] William Saletan, 'Joystick v Jihad: The Temptation of Remote Controlled Killing', Slate, (12 February 2006) available at <https://slate.com/technology/2006/02/the-temptation-of-remote-controlled-killing.html> on 12 December 2019
[147] Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015) 117-118
[148] Stanley Milgram, *Obedience to Authority* (Printer & Martin Ltd., London, 2013) 39
[149] Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995) 75-81
[150] Stanley Milgram, *Obedience to Authority* (Printer & Martin Ltd., London, 2013) 39-40
[151] ibid 35

An Israeli tank gunner recalls, "You see it all as if it were happening on a TV screen…I don't see people, that's one good thing about it."[152] Vicki Divoll, a former CIA lawyer, extended this mentality to the public, conceding, "People are a lot more comfortable with a Predator strike that kills many people than with a throat-killing that kills one."[153] Traditionally, soldiers carry the "moral weight of war",[154] exempting civilians from such responsibility. Drone operators, working from the safe confines of their office in their home country and surrounded by civilians, perhaps do not bear the same level of guilt as combatants who are in the physical presence of their enemies.

Considering the various dimensions of proximity and their relationship to each other, it can be concluded that despite the visual exposure of the drone operators, their 'proximity' is nevertheless much further than the RAF pilot quoted above who was torn between awe and disgust upon witnessing the consequences of his actions. This claim is supported by evidence of drone operators' reactions to the consequences of their actions. When asked how it feels to kill an enemy through a TV screen, some operators replied, "Oh, it's a gamer's delight"[155] and that it is "almost like playing the computer game 'Civilisation' in which you direct units an armies in battle."[156] Some even showed active enjoyment: "It's like a video game. It can get a little bloodthirsty. But it's fucking cool."[157]

Thereafter, soldiers refrained from making these types of statements. Instead, reports began to circulate that drone operators would often suffer from PTSD due to their

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[152] Richard Holmes quoted in Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995) 169
[153] Jane Mayer, 'The Predator War', *New Yorker*, October 26, 2009
[154] Nancy Sherman, *The Untold War: Inside the Hearts, Minds, and Souls of Our Soldiers* (W.W. Norton, New York, 2010) 1
[155] Matt J. Martin, *Predator: The Remote-Control Air War over Iraq and Afghanistan: A Pilot's Story* (Zenith Press, Minneapolis, 2010) 31
[156] ibid
[157] Peter W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (Penguin, New York, 2009) 332

emotional attachment.[158] However, empirical data does not support such a claim. Hugo Ortega conducted a substantial investigation, testing drone operators with various psychological tests. Ortega concluded that no such diagnoses were needed: "We haven't diagnosed any pilots with PTSD…The major findings of the work so far have been that the popularized idea of watching the combat was really not what was producing the most day-to-day stress for these guys." [159] Instead, Ortega categorised any stress or psychological problems the operators suffer from as normal day-to-day stress. Long hours, as opposed to killing men, women, and children, cause their anxiety:

> "Shift work, schedule changes – those are the top number one issue for stress. And then they have long hours, low manning. It's really kind of a boring job to be vigilant on the same thing for days and days and days. It's really boring. It's kind of terrible…if you look through the stuff, they don't say, "Because I was in combat." They don't say, "Because we had to blow up a building." They don't say, "Because we saw people getting blown up." That's not what causes their stress – at least not subjectively to them. It's all the other quality of life things (that they complain about) that everyone else would complain about too."[160]

Ortega clearly demonstrates in detail how the stress of the drone operators is not likened to the PTSD of traditional soldiers. Drone operators may be stressed, for whatever reason,

[158] 'Come in Ground Control: UAVs from the Ground Up', *Air-force Technology* (17 November 2010)
[159] Hugo Ortega, 'Combat Stress in Remotely Piloted/Unmanned Aircraft System Operations', *Brookings Institution,* (lecture), (3 February 2012)
[160] ibid

yet the trauma is missing. In reality, the primary cause of stress amongst drone operators is in fact boredom.

> "The work here is extremely boring. Men pass whole nights watching a screen on which, for the most part, appear unchanging images of another desert on the other side of the planet. Eating Doritos and M&Ms, they wait for something to happen: months of monotony and milliseconds of mayhem."[161]

The result is an eagerness for action; any activity is sought to kill their boredom. Situated in a base 45 minutes from Las Vegas, watching a village in Afghanistan, one pilot remarks disappointingly, "I was hoping we could make a rifle out, never mind." The sensor operator replies, "That truck would make a beautiful target."[162] Two hours later, someone enters the room, asking, "What's the master plan, fellas?" To which the pilot responds, assumingly more agitated, "I don't know, hope we get to shoot the truck with all the dudes in it."[163] Such quotes are a stark contrast to the horrors of war described by foot soldiers on the ground. William Manchester, a US soldier turned author recalls: "…I shot him with a .45 and I felt remorse and shame. I can remember whispering foolishly, 'I'm sorry' and then just throwing up…I threw up all over myself. It was a betrayal of what I'd been taught since a child."[164]

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[161] Gerald Krueger and Peter Hancock, *Hours of Boredom, Moments of Terror: Temporal Desynchrony in Military and Security Force Operations*, National Defense University, Washington DC, (2010)
[162] Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015) 3
[163] ibid 4
[164] William Manchester, quoted in Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995) 116

The drone operator, on the other hand, relished the kill – a clear indication of emotional detachment from his victim. An Israeli paratrooper and a Jordanian soldier met in Jerusalem in 1967. The Israeli paratrooper narrated:

> "We looked at each other for half a second and I knew it was up to me, personally, to kill him, there was no one else there. The whole thing must have lasted less than a second, but it's printed on my mind like a slow motion movie. I fired from the hip and I can still see the bullets splashed against the wall about a meter to his left…there was so much blood…I vomited, until the rest of the boys came."[165]

In addition to the great distress caused by killing another man, it is worth noting the hesitation – "we looked at each other for half a second" – coupled with reluctance to accept responsibility – "I knew it was up to me". The soldier waited until the last moment, until it was certain that there was no other option but to kill. The drone operators quoted above, on the other hand, were eager to look for any opportunity to kill.

The ironic element is that these technological advances were designed to allow us to kill more accurately and thus more humanely, yet the development of these weapons is arguably making us behave less humanely. Unmanned systems have accelerated the depersonalisation of the use of force.[166] Such technology allows us to take risks that we would not take with less sophisticated technology. With such a gulf in access, the very

[165] John Gau, Richard Holmes, and John Keegan, *Soldiers: A History of Men in Battle* (Hamish Hamilton Ltd., London, 1985)
[166] Christof Heyns, 'Coming to Terms with Drones', in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) vii

same features that make these advanced mechanisms more humane serve to dehumanise the enemy and thus contribute to inhumane behaviour. The practice of targeted killing, and thus killing in general – which is normally the exception requiring justification – is becoming the norm as well as a ready option.

The detachment and depersonalisation of drone operators described throughout this chapter is acknowledged and even cited as a defence by drone advocates. It is argued that making calculated and rational decisions is better than allowing emotion and adrenaline to cloud a soldier's judgement.[167] While this point is acknowledged, this thesis aims to highlight the broader consequences of such a depersonalised mode of warfare. As explained in Chapter 1, the compulsion not to kill is internalised in most human beings as an innate inhibition.[168] This resistance, while viewed as an obstacle, should be viewed as a good and necessary thing. Armed conflict is indeed a last resort, and the laws of armed conflict are in place to regulate and thus mitigate the dire consequences of an inherently unfortunate circumstance. Laws, treaties, and agreements are all tools developed to resist physical conflict. Our innate disposition to avoid conflict is perhaps the most vital tool to this end. Developing technology to bypass these inhibitions goes against the underlying principles of humanitarian law, even if not technically contravening its rules and regulations.

This thesis acknowledges the improved accuracy of drones when compared to more primitive forms of weaponry. Therefore, drones cannot be said to be more immoral or evil per se. They are designed to be quicker, more decisive, and with less risk to

[167] Joshua Foust, 'A Liberal Case for Drones: Why Human Rights Advocates Should Stop Worrying About the Phantom Fear of Autonomy', *Foreign Policy*, 15 May 2013 available at <https://foreignpolicy.com/2013/05/15/a-liberal-case-for-drones/> on 17 October 2019
[168] Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Time Warner Book Group, New York, 1995)

civilians.[169] As a result, they have even been described as "the most humane form of warfare."[170] Paradoxically, this accuracy of drones is transforming warfare into an exercise of reduced humanity. Daniel Brunstetter argues that officials may begin to act as if the threshold of last resort no longer applies to drones.[171] The reality on the ground reflects this fear: in an April 2013 hearing before the US Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Human Rights, Yemeni democracy activist Farea al-Muslimi testified that a recent drone strike in his home village of Wessab killed a suspect everyone knew who "could have easily been arrested."[172] Yemeni officials complain that they are not given sufficient opportunities to allow their US-trained counterterrorism squad to pursue Al-Qaeda operatives.[173]

Brunstetter and Braun develop the argument further, explaining how drones forestall the threshold of last resort for larger military deployment, without applying the same criteria to drones themselves. As a result, "The use of drones as a means to enhance a state's capacity to act on just cause proportionately and discriminately may lead to the propensity to do the opposite."[174] Martin Cook asks: is there a point at which war is so genuinely antiseptic that the barrier to engaging in it in the first place is virtually erased?[175]

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[169] New America, *International Security*, available at <http://securitydata.newamerica.net/drones/pakistan-analysis.html> on 18 September 2019
[170] Michael Lewis, 'Drones: Actually the Most Humane Form of Warfare Ever' (*The Atlantic*, 2013) available at <https://www.theatlantic.com/international/archive/2013/08/drones-actually-the-most-humane-form-of-warfare-ever/278746/> on 20 January 2019
[171] Daniel Brunstetter, 'Can We Wage a Just Drone War?' (*The Atlantic*, 2012) available at <https://www.theatlantic.com/technology/archive/2012/07/can-we-wage-a-just-drone-war/260055/> on 10 January 2020
[172] Farea al-Muslimi quoted in Jennifer Walsh, 'The Morality of Drone Warfare' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 231
[173] Jennifer Walsh, 'The Morality of Drone Warfare' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 39
[174] Daniel Brunstetter and Megan Braun, 'The Implication of Drones on the Just War Tradition' in *Ethics and International Affairs*, vol.25, no.3 (2011) 346
[175] Martin Cook, 'Drone Warfare and Military Ethics' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 61

2.3 Unilateral armed attacks

As a result of a drone's ability to facilitate armed attacks without the commitment of forces on the ground, efforts are not made to immobilise the enemy, but rather to locate and eradicate; traditional interactive battle evolves into manhunting. "The strategy of militarized manhunting is essentially *preventative.* It is not so much a matter of responding to actual attacks but rather of preventing the development of emerging threats by the early elimination of their potential agents – 'to detect, deter, detain, or destroy networks before they can harm'[176] – and to do this in the absence of any direct imminent threat."[177]

US President Bill Clinton's Defence Secretary, William Cohen, affirmed that: "The paramount lesson learned from Operation Allied Force [in the NATO bombing of Yugoslavia] is that the well-being of our people must remain our first priority."[178] The data attests to the claim, with NATO forces suffering 0 casualties in the 38,004 raids carried out over 78 days.[179] As it becomes clear that "our" combatants are more valuable and worthy of protection than "their" civilians, the next plan of action is to take every step to avoid any home casualty. The introduction of unmanned and automated drones is thus welcomed. The consequence, though, is a greater willingness to engage in armed aggression.

[176] George Crawford, *Manhunting: Reversing the Polarity of Warfare* (America Star Books, 2008) 12
[177] Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015) 34
[178] William S. Cohen and Henry H. Shelton, *Joint Statement on Kosovo After-Action Review Before the Senate Armed Service Committee* (14 October 1999) 27
[179] Andrew J. Bacevich and Eliot A. Cohen, *War over Kosovo: Politics and Strategy in a Global Age* (Columbia University Press, New York, 2001) 21

By practically eradicating the possibility of death on one side, the lives of the enemy become increasingly dispensable. Michael Walzer argues that it "introduces a radical inequality in the value of lives, and thus breaks with the inviolable principle of the equal dignity of all human lives." [180] Chamayou adds, "Warfare, from being possibly asymmetrical, becomes absolutely unilateral. What could still claim to be combat is converted into a campaign of what is, quite simply, slaughter."[181] The enemy "can be eliminated from afar as one watches on a screen, softly enclosed within a climatized 'safe zone'. Asymmetrical warfare becomes radicalized, unilateral. Of course people would still die, but only on one side."[182] Drone warfare does not eliminate risk, but simply transfers it from one society to another[183] – from the country deploying the drones to the country where the enemy is located, including civilians situated in the same location.

Inequality has always existed in warfare; two armies are almost never completely equal. However, the complete invulnerability of drone warfare is both radical and unprecedented. While completely unilateral and overwhelming forms of weaponry have previously existed, such as the atomic bomb, the key difference is that the likes of the atomic bomb are truly viewed as the last resort. Their use is extremely rare due to their sheer destructiveness. The use of nuclear weapons was also constrained by the principle of mutually assured destruction. Drone operations, however, are very quickly becoming the first resort. Overwhelming invulnerability is no longer a deterrent, but is now an adopted and relished advantage.

[180] Michael Walzer, 'The Triumph of Just War Theory (and the Dangers of Success)', *Arguing About War* (New Haven, Yale University Press, 2005) 16
[181] Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015) 13
[182] ibid 24
[183] Jennifer Walsh, 'The Morality of Drone Warfare' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 26

The fact that one may engage in warfare with no possibility of being harmed changes the nature of armed aggression, as well as the mentality of those conducting it. Such weaponry is described as "God-like" not only by critics, but also weapons manufacturers themselves, who use monikers derived from ancient mythology. The US military research agency DARPA is building a drone with 92 cameras called "Argus" – an omniscient figure in Greek mythology with 100 eyes.[184] The Sierra Nevada Corporation has created a video-capture technology, a spherical array of nine cameras attached to an aerial drone. It is called "Gorgon Stare," named after a figure in Greek mythology that turns any onlookers into stone. Aimed at surveilling whole cities, its motto is "*motto oculus semper vigilans* (an always watchful eye)."[185] The promoters of drones boast that these machines have "revolutionised our ability to provide a constant stare against our enemy".[186]

US Colonel Theodore Osowski describes the overwhelming power as "Kind of like having God overhead. And lightning comes down in the form of a Hellfire."[187] A drone operator admitted that he felt "like a God hurling thunderbolts from afar".[188] David Rhode, the famous American journalist kidnapped by the Taliban in 2008 described his experience in Waziristan: "The drones were terrifying. From the ground, it is impossible to determine who or what they are tracking as they circle overhead. The buzz of a distant propeller is a constant reminder of imminent death." Rhode summarised the civilians'

[184] Stephen Graham, 'Drone: Robot Imperium', *TNI Working Papers: War and Pacification*, (Transnational Institute, 2016) 8
[185] Mark Dorrian, 'Drone Semiosis: Weaponry and Witnessing', Cabinet Magazine, no.54 (2014) 48
[186] Julian E. Barnes, 'Military Refines "A Constant Stare Against Our Enemies"', (*LA Times*, 2009) available at <https://www.latimes.com/archives/la-xpm-2009-nov-02-na-drone-eyes2-story.html> on 13 December 2019
[187] Colonel Theodore Osowski quoted in Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015) 37
[188] Matt Martin and Charles Sasser, *Predator: The Remote Control Air War Over Iraq and Afghanistan* (Zenith Press, Minneapolis, 2010) 3

condition as "hell on earth."[189] The Stanford Study, *Living Under Drones*, notes that the mere presence of drones, whether engaged in direct attack or not, induces both fear and hatred in the hearts of the population.[190]

This condition of dread, which does not differentiate between civilians and combatants, is a form of dehumanisation itself. Humans are reduced to enemy targets, regardless of age, sex, or innocence. Entire civilian populations are under permanent surveillance and are in constant fear of imminent death. Safety is an inherently human concern, and so if a population are in constant fear of their own safety, it is reasonable to question whether their humanity is being disregarded. The near-constant surveillance generates a certain level of stress in such populations knowing that death can be delivered from an unseen source overhead. It is telling within the context of dehumanisation that much of the research in the United States on the psychological harm caused by drone warfare has been conducted on drone operators rather than civilian subjects in countries such as Pakistan, Syria, or Yemen. Instead, emphasis is placed on the needs of operators, which perpetuates the process mentioned in Subchapter 2.2.2 of 'partial dehumanisation' whereby the humanity of the enemy is masked.

Drone operators learn and actualise the art of psychological distancing, whereby those in distant lands can be morally excluded or at least diminished from considerations of fairness or human rights or the right to life. For example, Nemar highlights the prevalence of PTSD among Yemeni civilians and states:

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[189] David Rhode, 'Reuters Magazine: The Drone War', *Reuters* (17 January 2012) available at <https://www.reuters.com/article/us-david-rohde-drone-wars-idUSTRE80P11I20120126> on 13 December 2019

[190] International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (2012)

> "For a large swathe of population in Yemen, living under a sky that has become a constant source of trauma is an everyday reality. The sky in the Yemeni countryside, or the United States (US) drones' playground, regularly inflicts violence without any warning or reason on people that are already vulnerable to both poverty and conflict."[191]

This sense of psychological harm is enhanced when children are indiscriminately killed and mutilated in supposedly accurate targeted attacks. Similarly, Ahmed outlines the widespread incidence of stress and post traumatic disorder in regions of Pakistan regularly targeted by drones. In these areas, "PTSD, however, is a seemingly never-ending aftershock to trauma in the form of anxiety, depression, paranoia, or all of the above, with 40 percent of people living in the Federally Administered Tribal Areas having suffered from PTSD at some point."[192]

The implication of UAVs representing ancient Greek gods extends beyond creative rhetoric and rather is a reflection of a cultural trend in international armed aggression. Legal commentators note a "decrease" in warfare in modern times, citing that the Great Powers have not fought each other directly for 70 years and that armed conflict, subject to exceptions, is contained and limited to certain regions, such as in the Middle East.[193] This belittlement of conflict in non-European countries directly correlates to European domination over the region. While the financial costs and political consequences of war

[191] Radidja Nemar *Psychological Harm in The Humanitarian Impact of Drones* (2017) available at <https://reliefweb.int/sites/reliefweb.int/files/resources/humanitarian-impact-of-drones.pdf> on 20 January 2019
[192] Beenish Ahmed, 'In Pakistan, its not just Soldiers with PTSD', *Parallels* (2013) available at <https://www.npr.org/sections/parallels/2013/11/06/243527892/in-pakistan-its-not-just-soldiers-with-ptsd> on 20 January 2019
[193] John Yoo, 'Embracing the Machines: Rationalist War and New Weapons Technologies', *California Law Review*, vol.105, no.2 (2017) 474

are carefully calculated, the disastrous effects on the regions targeted, as well as the inhabitants therein, are not. The added importance given to some lives over others, while already implicit in the actions of Western governments, is occasionally vocalised, as explicitly mentioned by US General Myers: "Though we are concerned about any number of unintended civilian casualties, to be honest, the one number, the one horrific number that stands foremost in my mind, is the over 5,000 men, women and children that were killed on 11 September."[194]

Precision-strike technology is said to shorten wars with the ability to target specific individuals, notably leaders and generals. The "lightning quick invasion of Iraq in 2003"[195] is used as an example of such technology. The fact that the 42 days between 20 March 2003 and 1 May 2003 of formal invasion are cited as a triumph without considering the hundreds of thousands of deaths and perpetual warfare in the following decade is the direct result of the abovementioned compartmentalisation of war. It is also a reflection of Western nations' exaggerated perception of their own ability to intervene in global issues, most often through military means, despite the likelihood of exacerbating other problems through the use of force.[196] As the US had the ability to strike from afar and with little physical consequence to its own people, the destructive impact on the civilian opposition was not considered to the same extent. Senator John McCain downplayed the non-combatant casualties in Afghanistan, stating, "Issues such as Ramadan or civilian casualties, however regrettable and however tragic…have to be

[194] Richard Myers, Department of Defense News Briefing with Secretary Donald Rumsfeld (5 October 2001)
[195] John Yoo, 'Embracing the Machines: Rationalist War and New Weapons Technologies', *California Law Review*, vol.105, no.2 (2017) 445
[196] Christof Heyns, 'Coming to Terms with Drones', in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) viii

secondary to the primary goal of eliminating the enemy."[197] The deaths of civilians, labelled "collateral damage" is becoming increasingly acceptable in the name of the greater good, namely, the obliteration of terrorists in pursuit of freedom and security.

2.4 Transcending borders

Drones demand extra scrutiny because of their ability to transcend borders. Christof Haynes, the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, mentioned as early as 2013 that "The expansive use of armed drones by the first States to acquire them, if not challenged, can do structural damage to the cornerstones of international security and set precedents that undermine the protection of life across the globe in the longer term."[198] In short, these pinpoint strikes blur the line between war and peace. Moreover, they transform the social context of war; something once considered an act of "supreme sacrifice and national mobilisation" has become a distant, secretive process of robotic strikes against an unknown kill-list.[199]

Mary Ellen O'Connell describes drones as "seductive" because they lower the political and psychological barriers to using lethal force.[200] Such assertions are again supported by empirical data: a March 2011 report from the Development, Concepts, and Doctrine Centre of the United Kingdom Ministry of Defence concluded that the availability of drone weapons was indeed a factor in the decision of British leaders to participate in

[197] Russ Buettner, 'Stray U.S. Bomb Kill 13: Friends and Foes Angered', *New York Daily News* (29 October 2001)
[198] Christof Heyns, Special Rapporteur, *Extrajudicial, Summary, or Arbitrary Executions*, UN Document A/68/382 (13 September 2013)
[199] David Cortright and Rachel Fairhurst, 'Assessing the Debate on Drone Warfare' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 10
[200] Mary Ellen O'Connell, 'Seductive Drones: Learning from a Decade of Lethal Operations', *Journal of Law, Information and Science*, no.11-35 (2011)

military operations in Pakistan and Yemen.[201] The report stated, "It is unlikely that a similar scale of force would be used if this [unmanned] capability were not available."[202]

The blurring of war and peace has long-standing effects: states are able to employ force on a routine basis, continuously, for an indefinite period of time. Heyns quite crucially asserts that a wider use of force for longer periods of time would "run counter to the notion that war – and the transnational use of force in general - must be of limited duration and scope, and that there should be a time of healing and recovery following conflict."[203] The transformation of armed conflict from a fixed territory over a limited period of time, to boundless scope over an indefinite period of time, is truly significant. The Global War on Terror, often used to justify this increased scope, is viewed by most countries and international agencies as in breach of international law and would thus not qualify as an official armed conflict.[204]

States have the ever-growing temptation to increasingly engage in low-intensity but drawn-out applications of force that know few geographic or temporal boundaries.[205] A counter argument is that new weapons may indeed spread war farther, but they will "render it shallower in its destructiveness."[206] This lure of reduced destruction may however encourage mission expansion. In other words, densely populated civilian areas

[201] United Kingdom Ministry of Defence, *The UK Approach to Unmanned Aircraft Systems*, Joint Doctrine Note (March 2011) 5-9; David Cortright and Rachel Fairhurst, 'Assessing the Debate on Drone Warfare' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 10
[202] United Kingdom Ministry of Defence, *The UK Approach to Unmanned Aircraft Systems*, Joint Doctrine Note (March 2011) 5-9
[203] Christof Heyns, Special Rapporteur, *Extrajudicial, Summary, or Arbitrary Executions*, UN Document A/68/382 (13 September 2013)
[204] UN ECOSOC, 62nd Sess, Future E/CN.4/2006/120 (15 February 2006)
[205] Christof Heyns, Special Rapporteur, *Extrajudicial, Summary, or Arbitrary Executions*, UN Document A/68/382 (13 September 2013)
[206] John Yoo, 'Embracing the Machines: Rationalist War and New Weapons Technologies', *California Law Review*, vol.105, no.2, (2017) 464

that would otherwise be protected by IHL could become viable targets due to the promise of greater accuracy, in turn increasing the magnitude of potential damage.[207] There are a number of reports of civilians living in areas where drone strikes have taken place, citing frequent cases of PTSD. Some suffer anxiety attacks upon hearing the sound of kettle, reminiscent of the whizzing of a drone – a sign of imminent death. Such an effect over an entire population, young children and the elderly included, may not be proportionate to the military objection therein, especially over long periods of time.

Drone advocates argue that they do not inflict unnecessary suffering, like poisoned bullets or blinding lasers,[208] but the abovementioned psychological trauma inflicted as a result can be interpreted as disproportionate. These same advocates boast the idea of "near constant, ubiquitous air support"[209] as praise, disregarding the impact of constant surveillance on an entire nation. While there is no doubting the well-established historical relationship between dehumanisation and war, the physical and psychological distancing of contemporary forms of warfare aids this dehumanisation.

2.5 Accuracy and decision-making

It is said that the drone is the most efficient weapon to date in differentiating between combatants and civilians.[210] This claim leads to a conflation between the accuracy of the drone itself, and the precision of intelligence and methodology. Chamayou states, "The fact that your weapon enables you to destroy precisely whomever you wish does not mean

[207] John Sweeney et al., 'Nato Bombed Chinese Deliberately', (*The Guardian,* 1999) available at <https://www.theguardian.com/world/1999/oct/17/balkans> on 18 September 2019; Human Rights Watch, *Why They Died* (2007) 8 available at <https://www.hrw.org/sites/default/files/reports/lebanon0907.pdf> on 18 September 2019
[208] John Yoo, 'Embracing the Machines: Rationalist War and New Weapons Technologies', *California Law Review*, vol.105, no.2 (2017) 479
[209] ibid 452
[210] John Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy', Wilson Center (30 April 2012)

that you are more capable of making out who is and who is not a legitimate target."[211] In other words, the precision of a strike has no bearing on the pertinence of the targeting in the first place. Chamayou uses the analogy that it would be tantamount to saying that a guillotine, because of the precision of its blade, makes it better able to distinguish between the guilty and the innocent.[212] The "total vertical vision"[213] of the drone operators is conflated with the precision of the military intelligence used to make a decision.

Professor Michael Schmitt summarises the point by making a distinction between accuracy and precision: "Accuracy is the ability of a weapon to strike a specified location…precision involves identifying targets in a timely fashion and striking them accurately."[214] Flawed intelligence,[215] human error,[216] and information overload[217] can all contribute to the reduced precision of a drone attack, and technological malfunctions[218] can also compromise its accuracy.

By compiling thousands of hours of surveillance, a "pattern of life analysis"[219] is employed whereby certain behavioural patterns are analysed. If there are any inconsistencies found, the target is found to be a potential threat. This is part of the two-

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[211] Grégoire Chamayou (trans. Janet Lloyd), *Drone Theory* (Penguin Books, London, 2015) 143
[212] ibid
[213] Stephen Graham, "Drone: Robot Imperium", *TNI Working Papers: War and Pacification* (Transnational Institute, 2016) 8
[214] Michael Schmitt, 'War, Technology and the Law of Armed Conflict', *International Law Studies*, vol.82, no.137 (2006) 146
[215] Thomas McDonnell, 'Sow What You Reap: Using Predator and Reaper Drone to Carry Out Assassinations or Targeted Killings of Suspected Islamic Terrorists', *Washington International Law Review*, vol.44, no.243 (2012) 3
[216] David Zucchino, 'U.S. Drones Suffer from Human Error, Computer Glitches in Afghanistan', *Huffington Post,* (7 July 2010) available at <https://www.huffingtonpost.com/2010/07/07/us-drones-suffer-from-hum_n_637767.html?ncid=engmodushpmg00000006> on 12 December 2019
[217] Thom Shanker and Matt Richtel, 'In New Military, Data Overload Can Be Deadly' (*New York Times,* 2011)
[218] Naureen Shah, 'Civilian Harm from Drone Strikes: Assessing Limitations and Responding to Harm', *Columbia Law School Human Rights Clinic* (8 May 2013) 3
[219] US Army, 'The Targeting Process', *Field Manual*, no. 3-60, B-3 (2010)

track approach to targeted strikes termed "personality strikes" and "signature strikes" used against individuals on a "kill list."[220] The former refers to strikes aimed at a known combatant in an area and is therefore specifically targeted. The latter involves strikes where it is not known for certain that a potential combatant is in the area. However, the area is targeted because it is believed that certain individuals "match a pre-identified signature of behaviour that the US links to militant activity or association."[221] This means that an individual may be targeted simply because of their movements, behaviour, affiliations, or relationships.

It is difficult to see how such damage could be controlled or limited when signature attacks are being used. Initially, drone attacks were termed personality strikes carried out on named high-value targets.[222] However, the process soon evolved to signature attacks, which consist of striking unidentified terrorists based on their personal networks and patterns of behaviour and movement. The process is defined in the following way: "Determining someone is a member of a terrorist group involves looking at a variety of signatures, from the information and intelligence that in some ways is unique to the US government, for example, to the extent the individual performs functions to the benefit of a particular terrorist group, or to the extent an individual's activities are analogous to those traditionally performed by a military."[223]

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[220] International Human Rights and Conflict Resolution Clinic, *Living Under Drones* Stanford Law School (2015) available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-Living-Under-Drones.pdf> on 19 January 2019

[221] Columbia Law School *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* (Center for Civilians in Conflict, Columbia Law School, New York 2012) 8

[222] International Human Rights and conflict Resolution Clinic *Living under Drones* Stanford Law School (2015) available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/07/Stanford-NYU-Living-Under-Drones.pdf> on 19 January 2019

[223] Spencer Ackerman, 'US Continues Signature Strikes on People Suspected of Terrorist Links' (*The Guardian,* 2016) available at <https://www.theguardian.com/us-news/2016/jul/01/obama-continue-signature-strikes-drones-civilian-deaths> on 19 January 2019

The strikes are based not on sound intelligence that the person targeted is a terrorist, but rather that they are sufficiently similar to warrant attack. This has led one US official declare that a person in such a scenario is considered a terrorist until proven otherwise.[224] The problem with such a statement is that the purported terrorists never get a chance to prove otherwise, as they are subject to extrajudicial termination. This results in a process of indiscriminately killing people without actually verifying who they are. The fact that they are acknowledged as suspects and are not yet convicted for wrongdoing means that the legal threshold of danger justified to kill someone is often not met.[225] The targets are dehumanised to the extent that they are not considered worth the due process afforded to anyone else under international law.

The problem is further exacerbated by the difference between pre-planned and dynamic strikes. The former is based on specific intelligence and is timed to take place at a specific time. The latter is based on when a window of opportunity unexpectedly presents itself. This means that there is usually insufficient time to make full assessments of the validity and accuracy of intelligence or even the potential for collateral damage in the strike zone. It is this indiscriminate 'hit and miss' approach that more often leads to large numbers of civilian fatalities and injuries, thereby potentially breaching the United Nation's stipulation regarding the proportionality of targeted killings.[226] This potential breach is especially relevant as innocent people have been wrongly targeted on both personality and signature lists.[227] The pattern of life analysis must receive greater scrutiny as a form

[224] ibid
[225] Jeffrey Bachman and Jack Holland, 'Lethal Sterility: Innovative Dehumanisation in Legal Justifications of Obama's Drone Policy', *The International Journal of Human Rights,* vol.23, no.6 (2019) 1039
[226] Lynn E. Davis, Michael McNerney, and Michael D. Greenberg, *Clarifying the Rules for Targeted Killing: an Analytical Framework for Policies Involving Long-Range Armed Drones*, (Rand Corporation, Santa Monica, CA, 2016)
[227] Global Justice Clinic, *Living Under Drones: Death, Injury and Trauma to Civilians From U.S. Drone Practices in Pakistan* (New York University School of Law, New York, 2012);

of ascertaining a potential threat. The margin for error is inherently larger, as patterns of activity are always subject to interpretation.

As outlined above, drones and any other unmanned weaponry systems still largely rely on human intelligence to identify potential targets. The accuracy of the drone itself therefore has no impact on the accuracy of the intelligence provided. According to Jane Mayer, local informants used in northern Pakistan are "notoriously unreliable."[228] In fact, local informants often manipulate the CIA and their counterparts to forward local political agendas. In 2010, a US drone killed Jaber al-Shabwani, a Yemeni deputy governor, based on the faulty intelligence of a local political rival.[229] Moreover, despite the claim that US drones are targeting high-level Al-Qaeda operatives, statistics show that the majority of those targeted in drone strikes in Yemen and Pakistan are low-level militants predominantly engaged in local insurgencies.[230] One may begin to develop reservations about such a permissive approach to targeted killing.

Drones are praised for their ability to gather information over a long period of time. Notwithstanding the moral implications outlined above, this abundance of intelligence also has an effect on the efficiency of the information gathered. While on-board sensors identify who is taking part in an act, they cannot decipher why; they are unable to understand the social dynamics of a particular conflict. There is an overload of information, most of which is irrelevant, thereby drowning out the necessary facts needed

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Sascha-Dominik Bachmann, 'Targeted Killings: Contemporary Challenges, Risks and Opportunities'*, Journal of Conflict and Security Law,* vol.18, no.2 (2013) 259-288

[228] Jane Mayer, 'The Predator War: What are the Risks of the C.I.A's Covert Drone Program?' *The New Yorker*, October 26, (2009)

[229] David Cortright and Rachel Fairhurst, 'Assessing the Debate on Drone Warfare' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 14

[230] Micah Zenko, *Reforming the U.S. Drone Strike Policies*, Center for Preventive Action, Special Council Report No. 65, New York: Council on Foreign Relations, January (2013) 10

for a successful operation. A SEAL Team assault was chosen to target Osama Bin Laden as opposed to a drone strike for this very reason.[231] The operation was of course much riskier than a precision-guided bomb, but President Obama wanted to be absolutely sure of the accuracy of the intelligence. One must then note the discrepancy between the assurance that drones are accurate enough in their intelligence, and the insistence for an on-the-ground team when the stakes are raised. Obama declared that, "As a matter of policy, the preference of the United States is to capture terrorist suspects"[232] which directly contradicts the infamously exponential rise of drone operations over the two decades.[233]

Sara Kreps and John Kaag highlight the fact that the decision to attack a particular target depends on moral calculation, not technical capacity. "The ability to undertake more precise, targeted strikes should not be confused with the determination of legal or ethical legitimacy."[234] In other words, the concepts of distinction and proportionality must be treated separately. The added emphasis placed on scrutinising drones is because their unique characteristics conflate the two aforementioned notions. Similarly, the concepts of *jus ad bellum* and *jus in bello* are brought into play. These discussions are analysed in detail in Chapter 3.

2.6 Conclusion

[231] Helene Cooper, 'Bin Laden Dead, Obama Says', (*The New York Times*, 2011) available at < https://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html> on 17 October 2019

[232] Barack Obama, *The Future of Our Fight Against Terrorism*, 23 March 2013, available at < https://obamawhitehouse.archives.gov/the-press-office/2016/12/06/remarks-president-administrations-approach-counterterrorism> on 29 September 2019

[233] See Chapter 6 for statistics

[234] Sarah Kreps and John Kaag, 'The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis', *Polity*, vol.44, no.2, (2012) 276

This aim of this chapter was to explain the impact of dehumanisation on armed conflict. It demonstrated the role of technology, in particular drones and UAVs, in exacerbating the issue of detachment and dehumanisation. It concludes that through physical and psychological distancing, drones dehumanise and anonymise the enemy, leading to a reduced resistance to killing and in turn a greater willingness to engage in low-intensity operations of armed aggression.

This chapter underpinned the moral implications of drone warfare. Undoubtedly, warfare is growing in autonomy and technology is developing exponentially. The wish to carry out military operations without risking the lives of home soldiers or civilians now takes the form of the drone phenomenon. The first drone strike was reported in 2002,[235] and since then their usage has grown considerably. In Pakistan, there were 46 strikes from 2004-2008, compared to 308 from 2009-2013.[236] Since 2015, there have been 1,383 drone strikes in Afghanistan alone.[237]

While there are calls to ban all autonomous weapons,[238] this thesis acknowledges that drones are, as a matter of fact, a significant part of armed conflict, and their use will only increase. Industry estimates predict that the global market of UAVs will rise to $89 billion over the next ten years.[239] According to the Congressional Research Service, UAVs "are

[235] John Yoo, 'Embracing the Machines: Rationalist War and New Weapons Technologies', *California Law Review*, vol.105, no.2 (2017) 451
[236] Bill Roggio and Alexander Mayer, 'Analysis: A Look at US Airstrikes in Pakistan Through September 2009', *Long War Journal* (2011) available at <https://www.longwarjournal.org/archives/2009/10/analysis_us_airstrik.php> on 12 December 2019
[237] The Bureau of Investigative Journalism, *Drone Warfare: The Evolving International Use of Armed Drones*, available at <https://v1.thebureauinvestigates.com/category/projects/drones/drones-war-drones/> on 2 December 2019
[238] Bill Keller, 'Smart Drones', (*New York Times,* 2013) available at <https://www.nytimes.com/2013/03/17/opinion/sunday/keller-smart-drones.html> on 2 December 2019
[239] John Yoo, 'Embracing the Machines: Rationalist War and New Weapons Technologies', *California Law Review*, vol.105, no.2, (2017) 451

expected to take on every type of mission currently flown by manned aircraft."[240] While the US currently dominates the global deployment of drones, their relatively accessible technology means that it is likely for more and more nations, as well as non-state actors, to engage in drone warfare.[241]

This trend, in conjunction with emerging technologies such as artificial intelligence and robotics, has serious implications for the future of armed force as well as international law, which must be scrutinised in light of dehumanisation and detachment. The remainder of this thesis considers the various legal frameworks by which UAVs may be governed, focusing on IHL, IHRL, and UK domestic law, but also considering soft law guidance and administrative regulation. If drones are not deemed to be inherently illegal, which they are not, and if their presence is acknowledged, then the most pertinent questions at hand are regarding their implications, their governance, and their relationship with the law. Are the abovementioned modes of law sufficiently equipped to deal with the rapid developments and impacts of drone warfare? Do they sufficiently consider the effects of dehumanisation and its impact on armed conflict? If not, what changes or adjustments can be made to the law not only to regulate drone warfare, but also to humanise its effects?

[240] Jeremiah Gertler, Congressional Research Service, *U.S. Manned Aerial Systems*, no.6 (2012)
[241] Alan Dawson, 'China Considered Killing Naw Kham with Drone', *Bangkok Post* (20 February 2013) available at <https://www.bangkokpost.com/thailand/politics/336872/china-considered-killing-naw-kham-with-drone> on 2 December 2019

Chapter Three

The Law of Armed Conflict

3.1. Introduction

This chapter addresses the research objective of assessing whether contemporary armed conflict is in line with existing legal principles and the values that are meant to govern them.[242] The previous chapter identified the connection between distance, detachment, and dehumanisation and technological advancements in armed conflict over the course of the last few decades. It concluded that the lack of human agency coupled with the physical and psychological distancing of drone warfare contributed to the dehumanisation of the enemy. This chapter progresses the thesis by examining the applicability of IHL to changes in military strategies arising from the use of technology. The chapter begins by discussing the topic of *jus ad bellum* and issues pertaining to the permissibility of entering war. While the premise and bulk of the chapter is strictly related to *jus in bello*, international humanitarian law, the unique nature of UAVs and drone warfare has often led to a conflation between the two concepts. Individual acts of armed aggression give rise to academic discussions about the nature of the acts as well as their permissibility in the first place. It is therefore necessary to make mention of issues related to the decision to resort to drones before delving into the intricate matters of IHL rules during warfare. The chapter then analyses the applicability of existing IHL to drones and UAVs.

[242] Research objective number three outlined in Chapter 1

In order to pursue the research aim in this chapter, it is necessary to examine at least three aspects of the applicability of IHL to the drone warfare tactics. First, the chapter examines the evolution of military warfare as the basis to argue that military techniques have long evolved over time and the law has to change in step with these developments. Second, the chapter then progresses to examine the various uses of drone warfare as the basis to explore the contemporary use of drone warfare as a military tactic. Third, the chapter examines the ability of existing IHL as the basis to control and regulate the use of drone warfare. The final section provides a conclusion by arguing that there are weaknesses in the applicability of IHL that require development in order to ensure state usage of drone warfare can be legitimately analysed. It further concludes that drones need not be banned outright, and that IHL can instead be updated in light of the capabilities posed by UAVs. Throughout the chapter, the theme of dehumanisation is maintained and the legal discussions are conducted within the context of UAVs' lack of human agency and the moral implications that such technological advancements carry.

The question at hand is not about the legality of drones per se, but the regulation of their use to secure the values at the core of the IHL system, such as the protection of life and the containment of the use of force.[243] The primary objective of the discussion in this chapter is to conduct an assessment of the ability of IHL to regulate the use of drone warfare. The objective of this discussion is to assess whether, if at all, IHL can provide a basis to regulate the use of drone warfare tactics. The discussion in this chapter will demonstrate that there are significant issues with IHL as it is currently constructed to regulate conduct of parties during hostilities.[244] Through the work of key writers such as

[243] Christof Heyns, 'Coming to Terms with Drones' in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) viii

[244] Vivek Sehrawat, 'Legal Status of Drones under LOAC and International Law' *Penn State Journal of Law and International Affairs* vol.5, no.1 (2017) 166-205

Crawford,[245] Dinstein,[246] and Ryngaert,[247] the discussion will show that a significant part of the problem with IHL as a regulatory tool is the fact that IHL is not clear on the distinction between combatants and civilians in determining the rights of those involved in hostilities.[248] The particular problem arises where the actor involved in hostilities does not fit the state-centric view of IHL law whereas in reality there may be state and non-state actors.[249] The complex problem created by non-state actors is the fact that they may well act like combatants but from a strict legal perspective they cannot be considered as combatants in light of the construction of IHL law. Nevertheless, the discussion will also show that there are issues around defining non-state actors as civilians. This confusion around the definition of non-state actors poses a significant issue as to the rights that are owed to these non-state actors on the basis of IHL.

3.2 Background

A general theme over the last century has been the rise of the technological era, which has spilled into every facet of life, including military strategy. The exponential advancement of technology and its subsequent impact on the development of weaponry has thrust autonomous systems into the legal spotlight.[250] Specifically, the use of unmanned aerial vehicles (UAVs) provides states with the ability to engage militarily without the need of placing any human resources at risk. As discussed in Chapter 2, this has had an impact on military strategy, namely the normalisation of a more permissive

[245] Emily Crawford, *International Humanitarian Law* (Cambridge University Press, 2015)
[246] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004)
[247] Cedric Ryngaert, *Non-State Actors and International Humanitarian Law* (The Institute for International Law, Leuven, 2008)
[248] Anicée van Engeland, *Civilian or Combatant? A Challenge for the 21st Century* (Oxford University Press, Oxford, 2011)
[249] Cedric Ryngaert, *Non-State Actors and International Humanitarian Law* (The Institute for International Law, Leuven, 2008)
[250] Nathan Leys, 'Autonomous Weapon Systems and International Crises' *Strategic Studies Quarterly* (Spring, 2018) 48-73

approach to armed conflict. Heyns, Cortright, and Fairhurst all note that the prospect of multiple states operating secretive drone policies according to their own interpretation of international law is not a desirable outcome from a global security perspective.[251] Although the lawfulness *per se* of drones as military weapon is not the purview of this chapter, it is necessary to consider the lawfulness question given that the discussion will show that there is a degree of conflation between lawfulness *per se* of drones and their regulation during hostilities. Ambiguity in international law in this regard naturally "leaves dangerous latitude for differences of practice by States."[252]

Martin Cook adds that it would be simply unacceptable for every nation to use drones on their own authority for surveillance and lethal attack inside the sovereignty of states with which they are not at war. Such an international standard "would be radically destabilizing to any notion of an international legal regime."[253] As of 2013, between 75 and 87 countries allegedly possess drone technology, with 26 of those countries already possessing armed models.[254] Those numbers would likely have increased considerably by now. Mark Mazzetti describes the situation in the US as a largely ad hoc system without any clear standards as to when it is permissible to kill, or who is a legitimate target.[255] If every state then decided on its own independent approach, it may very well develop into an anarchic international atmosphere that could raise inter-state tensions.

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[251] David Cortright and Rachel Fairhurst, 'Assessing the Debate on Drone Warfare' in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 6

[252] Ben Emmerson, *UN Human Rights Council: Report of the Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms While Countering Terrorism*, February 28, (2014) 27

[253] Martin Cook, 'Drone Warfare and Military Ethics' in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 58

[254] Peter Singer, 'The Global Swarm', (*Foreign Policy*, 2013) available at <https://foreignpolicy.com/2013/03/11/the-global-swarm/> on 12 December 2019

[255] Mark Mazzetti, *The Way of the Knife: The CIA, A Secret Army, and a War at the Ends of the Earth* (Penguin Press, New York, 2013) 315

Within modern times, IHL and IHRL have both struggled to place normative constraints on the use of remote or dispersed violence.[256] Of particular concern is the presumption of states such as the US and the UK that the law should conform to the use of drones rather than drone use conforming to international law.[257] It is therefore imperative to consider drone warfare in light of the Law of Armed Conflict (LOAC), especially considering their unique attributes already discussed.

3.3 *Jus ad bellum*: the decision to resort to drones

Although the decision to resort to drones in conflict is primarily a matter of *jus ad bellum,* it may be argued that a preliminary and precursory issue relates to assessing the lawfulness of deciding to use drones in the first instance.[258] Specifically, the relevance of considering *jus ad bellum* here is to demonstrate that some of the arguments on the ability of IHL to regulate drones as a military tactic is conflated with the decision to use drones in the first instance given this relatively new military tactic.[259] The decision to resort to drones is controlled by international law and follows the same approach that would apply to any state decision to engage militarily. Specifically, Article 2(4) of the UN Charter states: "All Members shall refrain in their international relations from the against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[260] In light of the discussion in the previous section, it is clear that the decision to use drones to pursue a military objective

[256] Boyd van Dijk, 'Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions*', American Journal of International Law*, vol.112, no.4 (2018) 553-582
[257] Ray Acheson and others (eds.), 'The Humanitarian Impact of Drones', *Women's International League for Peace and Freedom*, no.36 (2017) 3-150
[258] Alejandro Chehtman, 'The Ad Bellum Challenge of Drone: Recalibrating Permissible Use of Force', *European Journal of International Law*, vol.28, no.1 (2017) 173-197
[259] Heather M. Roff, 'Lethal Autonomous Weapons and Jus ad Bellum Proportionality', *Case Western Reserve Journal of International Law*, vol.47, no.1 (2015) 38-52; International Bar Association, *The Legality of Armed Drones under International Law* (2017) available at <https://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Legality-of-armed-drone-strikes.aspx> on 22 January 2019
[260] Charter of the United Nations, 24 October 1945, 1 UNTS XVI

would necessarily engage international law in the same vein as the decision to use any other warfare tactic such as soldiers, armed vehicles, and so on.

Despite the general prohibition in international law on the threat or use of force, there are two general accepted exceptions to this prohibition.

3.3.1 Self-defence

The first situation where a state can justify the use of drones is on the basis of [either collective or individual] self-defence.[261] This is indeed the case for any other use of military tool. Specifically, Article 51 of the UN Charter expressly allows for the use of force in self-defence. It reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[262] For this exception to apply, a number of components need to be satisfied. The first condition is "armed attack"; this can take many forms and does not need to reach a certain threshold of intensity in order to be considered for the purpose of self-defence.[263] The second condition is that it is "on-going or imminent"; this stipulation is subject to much debate.[264] Some argue that the armed attack must occur, and others argue that self-defence can be triggered before an attack occurs, if the threat was imminent.[265] While the former is more explicit in Article 51, the latter interpretation seems to have traction, such as in the United Nations Secretary-General's response In Larger Freedom: "Imminent threats are fully covered by Article 51, which

[261] Dennis R. Scmidt and Luca Trenta, 'Changes in the Law of Self Defence? Drones, Imminence, and International Norm Dynamics' *Journal on the use of Force and International Law,* vol.5, no.2 (2018) 201-245
[262] Charter of the United Nations, 24 October 1945, 1 UNTS XVI
[263] Tom Ruys, *Armed Attack and Article 51 of the UN Charter* (Cambridge University Press, Cambridge, 2010) 33-35
[264] ibid
[265] ibid

safeguards the inherent right of sovereign states to defend themselves against armed attack. Lawyers have long recognised that this covers an imminent attack as well as one that has already happened."[266]

Customary legal usage defines imminence as the clear and present danger of a concrete and specific threat of violence.[267] There must therefore be a demonstrable threat of attack or loss of life. The Obama administration has attempted to bypass this obstacle by redefining the very term. It was noted in Department of Justice 'White Paper' in 2013 that imminence "does not require…clear evidence that a specific attack on US persons and interests will take place in the immediate future,"[268] which is the opposite of the long-understood and agreed-upon definition of imminence. International law insists that imminence requires evidence of a specific attack in the immediate future, whereas the Obama administration only requires a target to be "generally engaged" in terrorist activities.[269] It may also be useful to point out here that the US justification can be supported by reference to their own domestic legal standards such as the 'Authorisation for the Use of Military Force' 2001 (AUMF),[270] which was created in the aftermath of the September 11th 2001 terrorist attacks, as the basis to justify taking military action against those responsible forces and/or those associated forces. According to American Civil Liberties Union's Jameel Jaffar, the AUMF aimed to "redefine the word imminence

[266] 'In Larger Freedom: Towards Development, Security and Human Rights for All', *Report of the Secretary General* (2005) 124
[267] David Cortright and Rachel Fairhurst, 'Assessing the Debate on Drone Warfare' in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 12
[268] US Department of Justice, 'Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who is a Senior Operational Leader of Al Qa'ida or an Associated Force', *US Department of Justice White Paper* (2013)
[269] US Department of Justice, 'Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who is a Senior Operational Leader of Al Qa'ida or an Associated Force', *US Department of Justice White Paper*, (2013); Attorney General Eric Holder, Department of Justice, Speech at North-Western University (March 2012)
[270] Authorization for Use of Military Force, S.J. Res 23, 107th Cong. (2001)

in a way that deprives the word of its ordinary meaning."[271] The UK Attorney General Jeremy Wright has also endorsed the idea that the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent.[272] Wright maintains that this approach does not necessarily dispense with the concept of imminence, however for all intents and purposes it does, as it creates a situation where the updated definition overrides the initial definition entirely.

The *Caroline Case* is an authoritative formulation, stating that an imminent attack is described as "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[273] However, it obvious that expanding the rule to include attacks that have not actually happened is dangerous, as it could be stretched in a way that harms the world order. In light of this danger, and despite it predating the UN Charter, the *Caroline Case* is still cited for setting the requirements for a pre-emptive strike. The *Caroline Case* requires self-defence to be "nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[274] This was further established by the ICJ in the *Nicaragua Case*,[275] stating this rule is customary. The ICJ stated in the *Nicaragua Case* that the definition of "armed attack" could extend to cover attacks by "armed bands, groups, irregulars, or mercenaries", but these actors must have been sent "by or on behalf of a State."[276]

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[271] Jameel Jaffar, *ACLU Blog of Rights*, February 2013
[272] Jeremy Wright, Attorney General's Speech at the International Institute for Strategic Studies, available at <https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies> on 12 December 2019
[273] Daniel Webster (1841), quoted in Hunter Miller (ed.), *British-American Diplomacy, The Caroline Case,* available at <https://avalon.law.yale.edu/19th_century/br-1842d.asp> on 7 January 2020
[274] ibid
[275] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, [1986] ICJ Rep 14
[276] ibid

In the past, the US has relied upon Article 51 to justify drone strikes against the Taliban and al-Qaeda.[277] The use of drones in Iraq and Syria has also been justified by the UK and the US in a similar way.[278] The Legal Adviser of the U.S. State Department Harold Koh stated in 2010 that, "As a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defence under international law."[279] More specifically, he noted: "It is considered the view of this Administration – and it has certainly been my experience during my time as Legal Adviser – that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." The use of such lethal weapons, with such ease, requires a higher standard of justification than anticipatory self-defence.

United Nations Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, dismissed the use of pre-emptive drone strikes as it "threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life."[280] In 2002, the Bush administration stretched the concept of legitimate anticipatory self-defence in IHL to cover independent US actions to eliminate the capabilities of the enemy without the need

[277] Harold Koh, 'The Obama Administration and International Law' (March 2010), speech at the Annual Meeting of the American Society of International Law (stating that the US 'may use force consistent with its inherent right to self-defence under international law'), available at www.state.gov/documents/organization/179305.pdf on 4 July 2018; John Yoo, "Embracing the Machines: Rationalist War and New Weapons Technologies", *California Law Review*, vol.105, no.2, (2017) 448

[278] Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the UN, addressed to the President of the Security Council, UN Doc S/2015/688; Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the UN, addressed to the Secretary-General, UN Doc S/2014/695

[279] Harold Koh, Legal Adviser, Department of State, The Obama Administration and International Law, Keynote Address at the Annual Meeting of the American Society of International Law (March 25, 2010)

[280] Philip Alston, *Study on Targeted Killings*, UN Document (May 28, 2010)

for intelligence of specific imminent attacks or threats.[281] As a result, it is arguable that IHL has the ability to form the basis to regulate the use of drones during hostilities.

It is important to emphasise here that the focus of the discussion in this section is on the ability of the law, specifically IHL, to regulate the on-going use of drones as a warfare military tactic. Therefore, the discussion on the decision to resort to drones is not necessarily as relevant to this thesis as this is a separate legal issue. Specifically, the decision to resort to drones brings into question the lawfulness of the military action in first instance, whereas the discussion in this chapter is on the applicability of IHL to drone warfare operations.[282] Nevertheless, it is important to recognise that the decision by any state to rely on a drone to pursue a military objective is subject to review in international law so as to determine the lawfulness of the action in first instance.[283] IHL is often referred to as *jus in bello*, and the laws regulating the rightfulness of the use of force is known as *jus ad bellum*.[284] The two regimes should always be seen as separate and not be confused with another.[285] Advocates of the proliferation of drones cite the legal separation between *jus ad bellum* and *jus in bello* as a defence of the use of drones. John Yoo articulates the argument as follows:

> "A nation's decision to wage war cannot automatically rule in or out any types of weapons. Once a conflict has begun, the laws of

[281] US President, National Security Strategy of the United States of America (2017) available at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> on 8 January 2020
[282] International Bar Association, *The Legality of Armed Drones under International Law* (2017) available at <https://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Legality-of-armed-drone-strikes.aspx> on 22 January 2019
[283] Karianne Nesland, *Game of Drones* (University of Oslo, Oslo, 2017)
[284] Antoine A. Bouvier and Harvey J. Langholtz, *International Humanitarian Law and the Law of Armed Conflict* (Peace Operations Training Institute, VA, 2012)
[285] Okimoto Keichiro, 'The Relationship between Jus ad Bellum and Jus in Bello' in Marc Weller (ed.), *Oxford Handbook of the use of Force in International Law* (2016)

> war switch from the lawfulness of going to war and the narrower, repeated question whether the choice of weapon in a particular context is reasonable. Whether to use a drone, or a ballistic missile, or a commando team to kill an enemy commander has no bearing on whether the United States legitimately could use force in Pakistan or against al-Qaeda."[286]

While the distinction between *jus ad bellum* and *jus in bello* is imperative, the argument here is conflated. The call to scrutinise the use of drones and its effect on armed conflict is not pertaining to the legality of the war itself, but rather its ability to transcend the traditional boundaries of war as outlined above. The ability to attack with relative immediacy, without the need to retreat, results in a situation where a nation enjoys peace at home while maintaining armed aggression elsewhere.[287] Security analyst Lawrence Korb states that perhaps "robots will make people think, 'Gee, warfare is easy' and that leaders will hold the impression that they can win a war with just "three men and a satellite phone".[288] Those three men, it may be noted, are not in harm's way, whereas the enemy most certainly are. This lack of human agency required in drone warfare, at least from one side, calls for extra scrutiny. This is especially the case as technology develops to potentially grant these weapons decision-making capability and even responsibility. Chapter 2 already elucidated the dehumanisation and detachment as a result of this reduced human agency.

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[286] John Yoo, 'Embracing the Machines: Rationalist War and New Weapons Technologies', *California Law Review*, vol. 105 (2017) 464
[287] Michael W. Lewis, 'Drones and the Boundaries of the Battlefield', *Texas International Law Journal*, vol.47, no.293 (2011)
[288] Lawrence Korb quoted in Peter Singer, *Robots at War: The New Battlefield* (Wilson Quarterly, 2009)

3.3.2 Consent

The second exception to the prohibition of the threat or use of force is where a state has given its consent to the use of military intervention by another state. In the past, countries have cited the consent of another nation as giving permission to use lethal force.[289] It is important to note here that the state "may only grant consent to operations that it could itself legally conduct" and the state "cannot lawfully allow attacks that would violate applicable human rights or humanitarian law norms, since it does not itself enjoy such authority."[290] Therefore, a state can only consent to the use of drones insofar as it would legally be entitled to resort to drones itself.[291] The US claims that the governments of countries where airstrikes are conducted either consent, or have lost the right to consent if they fail to act sufficiently or take responsibility.[292] However, international law does not currently provide specific guidance as to what constitutes capacity or willingness; there is no time limit before the victim state can act on behalf of another state, or whether they must have express permission. If the state in which an attack is being planned or terrorists are located is both capable and willing to subdue the terrorists, it is not permissible in international law for the victim state to use its own force.[293] In Yemen, for example, officials were cited as claiming that they were not given sufficient opportunity for their own US-trained counterterrorism squads to pursue al-Qaeda operatives.[294] The

[289] John Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy', prepared remarks at the Woodrow Wilson International Center for Scholars (April 2012) available at <www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> on 4 July 2018)

[290] Michael Schmitt, 'Drone Attacks under the Jus ad Bellum and Jus in Bello: Clearing the "Fog of Law"' *Yearbook of International Humanitarian Law,* vol.13 (2010) 315

[291] ibid

[292] Theresa Reinold, 'The Sovereignty Dodge and Responsibility to Control: Should the U.S. Do What Pakistan Won't Do?' *Journal of Intervention and Statebuilding*, vol. 5, no. 4 (2011) 395-417

[293] Ashley Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense', *Virginia Journal for International Law*, no. 52, vol. 3 (2012) 483

[294] Jennifer Walsh, 'The Morality of Drone Warfare" in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 39

Yemeni civilian parliament issued a formal declaration demanding that drone strikes cease.[295]

In April 2012, Pakistani politicians repeatedly called for an end to US drone strikes in Pakistan.[296] Further, in 2013 the Pakistani government explicitly rejected the notion that it was unwilling or unable to combat the terrorists on its soil, citing the 145,000 Pakistani armed forces members across its border and increased communication with tribal communities, amongst other things.[297] The UN Special Rapporteur for Counterterrorism and Human Rights, Ben Emmerson, has also examined this specific question and concluded: "as a matter of international law the US drone campaign in Pakistan is being conducted without the consent of the elected representatives of the people or the legitimate government of the state."[298] Mark Mazzetti and Martin Cook report that the Directorate of Inter-Services Intelligence in Pakistan authorised US drone strikes,[299] however the decision to consent under international law lies with the head of state. Moreover, the notion of "unable or unwilling" is not found in customary international law, treaties, or general principle in law, but instead originates from Chatham House, a UK international affairs think tank,[300] which does not bind any state under international law. In any case, international law under the UN will necessitate evidence of a sufficient

[295] Mohamed Ghobari and Maha El Dahan, 'Yemeni parliament in non-binding vote against drone attacks' *Reuters News*, December 15, 2013, available at: https://www.reuters.com/article/us-yemen-drones/yemeni-parliament-in-non-binding-vote-against-drone-attacks-idUSBRE9BE0EN20131215 (accessed August 9, 2018)
[296] Salman Masood and Declan Walsh, 'Pakistan gives U.S. a List of Demands, Including an End to C.I.A. Drone Strikes', (*New York Times,* 2012)
[297] Office of High Commissioner for Human Rights, 'Statement of the Special Rapporteur Following Meetings in Pakistan' (March 2013)
[298] Office of High Commissioner for Human Rights, 'Statement of the Special Rapporteur Following Meetings in Pakistan', March 2013
[299] David Cortright and Rachel Fairhurst, 'Assessing the Debate on Drone Warfare' in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 15
[300] Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', *International and Comparative Law Quarterly*, vol. 55, no. 4 (2006) 963-972

threat of or an armed attack so as to ensure that the resort to drones was proportionate and necessary.[301]

3.3.3 The evolution of military warfare

The decision to resort to drones is inextricably linked to the technological developments that lead to such a choice. Warfare has developed over time in phases, and with each phase, the dynamic of armed conflict shifts accordingly. As aforementioned, a key shift in drone warfare is the ability to commit to relatively spontaneous acts of aggression. In order to better understand the implications of such developments, it is pertinent to briefly review the historical development of military warfare. The starting point should be to define an armed conflict to understand the circumstances a state may need to rely on warfare to achieve its objectives.

For the purposes of the discussion in this thesis, "armed conflict" is defined non-legally as being "the logical outcome of an attempt of one group to protect or increase its political, social and economic welfare at the expense of another group."[302] The evolution of modern warfare can be divided in to at least three distinctive phases: the era of 'mass war' from the French revolution to the World Wars; the era of 'expert wars' from the Cold War to the 21st century; and the current era of technology and non-state actors. The division of warfare usage into these three phases assists the analysis by being able to explain the changing nature of war and the tactics adopted to fight wars.

[301] ibid
[302] Vincent Bernard, 'Tactics, Techniques, Tragedies: A Humanitarian Perspective on the Changing Face of War' in International Red Cross, *International Review of the Red Cross* (IRC, 2015) 959; ICRC, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?* (2008) 2-3

3.3.3.1 The era of mass war

Up to the mid-19th century, subject to exceptions, armed conflicts have followed the Rousseauian conception of war; namely, the meeting of two armies disconnected from their civilian populations.[303] The laws of war were therefore modelled on this traditional format.[304] As a result, IHL treaties are largely applicable to these types of conflicts. In fact, the only treaty provisions that apply to non-international armed conflicts (NIACs) are Common Article 3 and Additional Protocol II. Prior to the French Revolution, the use of war in the eighteenth century in Europe was premised upon a unity of time, action, and place. Battles emerged in towns and villages across Europe waged by soldiers in search of reward for loyalty or as a feudal duty.[305] Victory was won on the battlefield by soldiers in combat, which meant that war had a clear starting point; the engagement of battle, and a clear end point; the victorious side winning the battle.[306] This understanding of armed conflict is important as it demonstrates that original foundations of international legal standards were deeply shaped by this understanding and implementation of war and the use of warfare.

The French Revolution brought about a period of reconfiguration in Europe with countries seeking expansion and conquests.[307] A key consequence of the use of warfare arising from the French Revolution was the first use of mass conscription where citizens were compulsorily enlisted to join the army to fight for the nation.[308] The use of

[303] Antonio Cassese, 'Current Challenges to International Humanitarian Law' in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, Oxford, 2015) 8
[304] ibid
[305] Edward Kolla, *Sovereignty, International Law and the French Revolution* (Cambridge University Press, 2017) 18-22
[306] ibid
[307] Rafael Sanchez, *War, State and Development: Fiscal Military States in the Eighteenth Century,* (Pamploma, 2007) 34-38
[308] Boyd Hilton, *A Mad, Bad and Dangerous People: England 1783-1846* (New Oxford History of England, 2006) 86-92

conscription changed the face of wars by giving states military might that never existed prior to the French Revolution. The development of nation armies meant that there was a new need for a development in weaponry to equip these new nation armies. In supporting the development of nation armies, progress was made in armed conflict through the development of ballistics where rifled barrel weapons with automatic fire and improvements to explosives allowed citizen armies to become significantly more equipped but without demanding professional training. Other technological developments, such as the arrival of the railway, also helped nation armies by facilitating their quick deployment around a country.[309]

The American Civil War from 1861-1864 and the Boer War from 1899-1902 revealed the impact of the development of mass nation armies, and that a very high number of civilian casualties can be inflicted by large armies with improved weaponry.[310] The loss of life associated with mass war arising from technological developments sharply focused the consequences of developments and 'improvements' in warfare.[311] The development and improvement in warfare during this phase primarily revolved around the ability to make explosives on an industrial scale that were capable of causing serious destruction to life and property. While these advancements were intended to cause destruction on a greater scale, they were motivated by loss of life, further reinforcing the notion that loss of life is the foremost factor that affects decision-making in armed conflict. Removing or severely reducing the possibility and risk of loss of life on one side will therefore have a tremendous impact on the way in which an armed conflict is carried out.

[309] Thomas Sargent and François Velde, 'Macroeconomic Policies of the French Revolution', *Journal of Political Economy,* vol.103, no.3 (1995) 488-492
[310] Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Conflict', *European Journal of International Law,* vol.22, no.1 (2011) 220-221
[311] ibid

The 20th century's application of "total wars"[312] tested the value of IHL treaties and their applicability. Entire nations, including civilians, were thrust into the reality of war along with their many atrocities by and against them. A.J.P Taylor notes, "The 19th century formulated the laws of war; the 20th century was expected to apply them."[313] Gerd Oberleitner adds that the traumatic First and Second World Wars demonstrated that its "technocratic rules could either be easily circumvented or used to justify morally abhorrent episodes."[314] Traditional understandings of war being fought on the battlefield across Europe but especially in France and Belgium remained in World War I, but advancements in weaponry revealed the destruction to life and property that can stem from mass war engagement.[315] In World War II, the development of aerial bombardment and the emergence of the total war strategy revealed the impact of the developments in warfare and its ability to inflict mass human casualties and the total destruction of towns and villages. The arrival of mass nation soldiers with weapons, armoured vehicles, and planes created the backdrop for the development of international legal standards as the basis to attempt to establish minimum standards on the use of such armed conflict.

The era of mass war highlighted the fact that contemporary warfare developed from the emergence of nation armies. These armies were capable of inflicting mass destruction given the technological developments in explosives and weapons that were characterised by the use of soldiers, armoured vehicles, and planes. The type of warfare utilised during

[312] Antonio Cassese, 'Current Challenges to International Humanitarian Law' in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, Oxford, 2015) 8
[313] Alan J.P. Taylor, 'War and Peace' in *London Review of Books,* vol.2 no.19 (1980) 3
[314] Gerd Oberleitner, 'Humanitarian Law as a Source of Human Rights Law' in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, Oxford, 2015) 287
[315] Charles Townshend, *The Oxford History of Modern War* (Oxford University Press, Oxford, 2000) 43-49

this phase is best classified as being a form of industrialised warfare given the style and scale of mass destruction.[316]

3.3.3.2 The era of expert wars

In the aftermath of World War II, a period of decolonisation and polarisation between Eastern and Western countries resulted in a decline of the type of warfare utilised in previous conflicts.[317] Industrial war between two opposing sides relying on the deployment of national armies using weapons, explosives, planes, and armoured vehicles has virtually dissipated. The Cold War marked a distinction in warfare that rested on threats, intelligence operations, and spying between Western and Eastern countries in an attempt to exert their supremacy at the international level in the new world order that stemmed from the end of World War II.[318] The horrors of the consequences of war highlighted from World War I and II may in part explain this change in warfare where no state had the political desire for war on an industrial scale.

At this stage, a conscious effort was made to reduce human agency in armed conflict in a bid to reduce home casualties.[319] Further, throughout the course of the early twentieth century there was a growing human rights awakening where the horrors particular of World War II exposed a political willingness to construct minimum human rights

[316] Vincent Bernard, 'Tactics, Techniques, Tragedies: A Humanitarian Perspective on the Changing Face of War' in International Red Cross, *International Review of the Red Cross* (2015) 959; ICRC, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?* (2008) 2-3
[317] Cary Fraser, *Decolonization and the Cold War* (Appalachian State University, Boone, 2013)
[318] Joshua Goldstein and Jon Pevehouse, *International Relations* (Pearson Longman, 2006) 18-21
[319] Nicolas Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge of International Humanitarian Law', *Journal of Conflict and Security*, vol.16, no.2 (2011) 225-262

obligations on the state.[320] This had an impact given the lack of political appetite to fund and face all out mass war.

During the course of the 1990s, the use of military force emerged sporadically in response to a particular humanitarian need to intervene in the internal affairs of a sovereign state. For example, the US intervened in Somalia in 1992 on humanitarian grounds due to the concerns around serious abuses of human rights by the state.[321] This phase marked a period where states sought to rely on military warfare for the supposed protection and maintenance of international peace and security. This theme of using military force continues with the most recent and enduring 'war on terror', which resulted in military action in Iraq and Afghanistan in 2001. The justification for the most recent use of the military action was constructed on the basis of an alleged necessity for self-defence by dealing with terror.[322]

According to Ferraro, there are at least three ways to classify this phase of armed conflict.[323] First, the use of warfare tactics to deal with the threat to international security posed by non-state actor groups who have the capacity to inflict mass destruction in states. Second, the prolonged period of military action in the most recent Iraq and Afghanistan wars has dampened the willingness of Western countries to resort to the use of military

[320] Arthur W. Purdue, *The Transformative Impact of World War II* (2016) available at <http://ieg-ego.eu/en/threads/alliances-and-wars/war-as-an-agent-of-transfer/a-w-purdue-the-transformative-impact-of-world-war-ii> on 22 January 2019
[321] Stefano Recchia, 'Pragmatism over Principle: US Intervention and Burden Shifting in Somalia 1992-1993', *Journal of Strategic Studies* (2018) 1-25; Piers Robinson, 'Operation Restore Hope and the Illusion of a News Media Driven Intervention', *Political Studie*s, vol.40, no.5 (2001) 941-956
[322] Christian J. Tams, 'The Use of Force against Terrorists', *European Journal of International Law,* vol.20 (2009) 359-397
[323] Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict' *International Review of the Red Cross*, vol.97, no.900 (2015) 1230-1235

interventions that require ground resources such as soldiers.[324] Third, there is a growing realisation by Western governments of the political perception of military action on their national electorate making them less electable.[325] The seemingly less evasive and more covert employment of UAVs developed in the third era of warfare is viewed as less damaging in terms of public opinion, danger to home soldiers, and cost. This reality is perhaps evidence of the successful dehumanisation of armed conflict as explain in Chapter 2.

3.3.3.3 The era of technology and non-state actors

There are three issues that require discussion: the use of drones in international armed conflicts (IACs); the use of drones in non-international armed conflicts (NIACs); and the ability of states to accurately target military objectives through drone usage.

IHL makes a distinction between international armed conflicts (a conflict between states) and non-international armed conflicts (a conflict between states and non-state actors, or between multiple non-state actors). IHL applies to both but differentiates the two and applies different rules to each scenario. In NIACs, those who can be targeted include "dissident armed forces and other organized armed groups."[326] Additional Protocol II, Article 13(3) includes civilians who take a direct part in hostilities.[327] Sarkees and Wayman note that NIACs occurred three times more than IACs up until 2007,[328] with the likelihood of an increase since then. An example of such a case is *Nicaragua v United States of America*, where the International Court of Justice (ICJ) reached the conclusion

[324] ibid
[325] ibid
[326] ICRC, Customary IHL Database, available at <https://ihl-databases.icrc.org/ihl/INTRO/475?OpenDocument> on 3 October 2018
[327] ibid
[328] Valerie Epps, 'Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule', *Georgia Journal of International and Comparative Law*, vol.41, no.11-39 (2013) 307-356

that the US and Nicaragua were in an IAC, while rebels and Nicaragua were in an NIAC.[329] At first instance, it could be assumed that this move from IACs to more NIACs causes a gap in the law applicable to NIACs. However, while treaty law separates the two, CIL has bridged the gap, making most rules applicable to both IACs and NIACs. The International Tribunal for the former Yugoslavia (ICTY) confirms this, stating: "Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife."[330]

The existence of an international armed conflict does not require a declaration of war or the recognition of war. For example, Roscini's work on the relevant rules on the use of force in international law relevant to cyber-attacks notes that commonly there will be no need for a state of war to be formally declared.[331] Specifically, Common Article 2 of the Geneva Conventions clearly expresses "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." The regulation of these types of conflicts fall under the four Geneva Conventions 1949 and Additional Protocol I 1977, as mentioned above. The Geneva Conventions have universal recognition as the baseline standard required of all those engaged in hostilities and can be considered as existing as part of customary international law.[332] As a result, it is clear that where an international armed conflict is engaged, the use of drones as the basis to target military objectives must

[329] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, [1986] ICJ Rep 14
[330] *Prosecutor v Tadić* [1995] ICTY IT-94-1
[331] Marco Roscini, *Cyber Operations and the Use of Force in International Law* (OUP, 2014), 12-15; Michael Schmitt and Jelena Pejic (eds.), *International Law and Armed Conflict: Exploring the Faultlines* (Brill, BV, 2007)
[332] Jean-Marie Henckaerts and Louise Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law: Vol. I: Rules* (Cambridge University Press, Cambridge, 2005) 22-29

be in compliance with IHL principles, which may be supplemented by principles from other areas of international law such as IHRL (Chapter 4).[333]

The rise of NIACs has intensified since the 11 September 2001 attacks in the US where non-state actors demonstrated an ability to inflict mass destruction almost anywhere in the world.[334] Consequently, states have responded to this threat emanating from non-state actors as the basis to maintain international peace and security by specifically seeking to target known non-state actors. To further clarify, it is important to note here that for the purposes of the discussion in this chapter, an NIAC is where there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[335] This means that there must be a sufficient degree of fighting that involves a non-state group that is sufficiently organised.[336]

Further, if Additional Protocol II from Geneva Conventions is to apply, there is a higher threshold required where the non-state actor must have an organisational command and be in control of a territorial area or region.[337] However, Additional Protocol II has not become part of CIL yet, which means that this additional threshold currently is only applicable between contracting states as part of international treaty law.[338] As a result, the

[333] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 136
[334] Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict', *Journal of International Criminal Justice* 65, vol.11, no.1 (2013) 67-69
[335] *Prosecutor v Tadić* [1995] ICTY IT-94-1, Appeals Chamber Judgment (15 July 1999) 70
[336] International Law Association Committee on the Use of Force, Hague Conference, *Final Report on the Meaning of Armed Conflict in International Law* (ILA, 2010) 2
[337] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609
[338] There are currently 168 countries as state parties with a further three countries as state signatories, available ICRC, Customary IHL Database, available at <https://ihl-databases.icrc.org/ihl/INTRO/475?OpenDocument> on 10 August 2018

threshold required is merely that the non-state group is sufficiently organised and the fighting is sufficiently intense.

In the context of NIACs that have emerged over the course of the last decade, this definition does not always match the reality in practice. For example, the US often refers to their on-going conflict with "al-Qaeda, the Taliban and other associated forces."[339] While the 2001 AUMF does not actually use the phrase "associated forces",[340] the Obama administration has since used it frequently in numerous operations.[341] This means that the US is effectively using the term "non-international armed conflict" as an all-encompassing umbrella term to describe all of its responses to various groups or individuals who follow an ideology established by al-Qaeda or the Taliban. This attribution is problematic from a legal perspective, as it tends to conflate different military groups that may share an ideology but are not necessarily connected to represent a sufficiently organised group in line with the legal definition of an NIAC.

For example, in the fight against al-Qaeda, many US strikes are not actually targeted at core al-Qaeda members. Instead, most targets are "associated forces of al-Qaeda."[342] In 2012, John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, identified four "adherents" and "affiliates" of al-Qaeda targeted in

[339] Harold Koh, Legal Adviser, Department of State, The Obama Administration and International Law, Keynote Address at the Annual Meeting of the American Society of International Law (March 25, 2010)
[340] The Authorization for Use of Military Force, available at <https://www.govinfo.gov/content/pkg/BILLS-107sjres23enr/pdf/BILLS-107sjres23enr.pdf> on 3 October 2018
[341] Report on The Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, 4, available at <https://fas.org/man/eprint/frameworks.pdf> on 3 October 2018
[342] Pardiss Kebriaei, 'Justifying the Right to Kill: Problems of Law, transparency, and Accountability', in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 92

Somalia, Yemen, Nigeria, and other parts of North and West Africa.[343] Since then, it has gone further to include "associates of associates" in Syria, Libya, and Mali.[344] Moreover, the claim of association or adherence is weak; a shared ideology is not sufficient to be identified as cobelligerents. An associated force is not any terrorist group in the world that merely embraces the al-Qaeda ideology.[345] One of the primary groups often targeted, al-Shabab, is said to have very "weak" organisational links to al-Qaeda; "the strongest tie between al-Shabab and al-Qaeda seems to be ideological."[346] While President Obama stated that the United States "must define our effort not as a boundless war on terror",[347] the reality on the ground is not reflective of such. Some countries, such as the UK, have rejected the US' contention that they can brand their actions against various groups as being NIACs for this very reason.[348]

Following 2001, the then President George W. Bush issued a national security directive that lifted a long-standing ban on CIA involvement in assassinations,[349] and since then targeted attacks on leaders of militant organisations have become a norm, each of which justified as a part of the war on terror.[350] Examples include the targeted attack on Osama

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[343] John Brennan, 'The Ethics and Efficacy of the President's Counterterrorism Strategy', *International Security Studies*, April 2012 (transcript)
[344] Pardiss Kebriaei, 'Justifying the Right to Kill: Problems of Law, transparency, and Accountability', in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 92; https://www.csis.org/programs/international-security-program/isp-archives/homeland-security-and-counterterrorism-program (accessed August 10, 2018)
[345] Jeh Johnson, 'National Security Law, Lawyers, and Lawyering in the Obama Administration', *Yale Law and Policy Review*, vol.31, no.1 (2002) 141-150
[346] Stephanie Hanson, 'Al-Shabaab', (*Council on Foreign Relations*, August 20, 2011) <https://www.cfr.org/backgrounder/al-shabab > accessed 30 July 2019
[347] White House, Office of the Press Secretary, 'Fact Sheet: The President's May 23 Speech on Counterterrorism', May 2013
[348] House of Commons and House of Lords, 'The Government's Policy on the use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16', *Joint Committee on Human Rights*, HL 141, HC 574 (2016-2017) paras 3.52-3.53
[349] Executive Order 12333 (4 December 1981) part 2.11; William Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (Princeton University Press, Princeton, 2003) 1
[350] Andris Banka and Adam Quinn, 'Killing Norms Softly: US Targeted Killing, Quasi-secrecy and the Assassination Ban', *Security Studies*, vol.27, no.4 (2018) 665-703

bin Laden in Pakistan, which may be questioned as to whether it could be considered lawful to invade a sovereign country and to kill an individual within that country in a manner that poses a significant threat to his family.[351] Legally, terrorists can be killed on sight, regardless of the threat they currently represent.[352] In 2001, the AUMF passed by US Congress authorised the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planed, authorized, committed, or aided the terrorist attacks that occurred on September 11th 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."[353] Such a broad and encompassing description has facilitated the abovementioned permissive approach to targeted killing.

Killing is permitted by the LOAC when a state of armed conflict exists but is limited insofar as civilians must not be directly targeted. Specifically, as noted above, it is the killing of combatants that is only considered to be permissible. As contemporary wars aimed at managing the terrorism are not bounded by geography or time, this allows for a free reign of killing. For instance, the US' AUMF expressly recognises a perpetual right to target those responsible forces and their associated forces for the 11 September 2001 attacks.[354] In 2011, UAVs were sent to Libya, ultimately contributing to Colonel Qaddafi's death. The US were not in armed conflict with Libya yet were given authority

[351] Sonny Hodgin, 'Killing Osama bin Laden: Legal and Necessary', *Widener Law Review* vol.20, no.1 (2014) 2-3; Ashley Deeks, 'Pakistan's Sovereignty and the Killing of Osama Bin Laden', *American Society of International Law* vol.15, no.11, (2001) 4-5

[352] Jennifer Welsh, 'The Morality of "Drone Warfare"' in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 32

[353] Govtrack, 'S.J.Res. 23 – 107th Congress: Authorization for Use of Military Force' (Govtrack, 2001) <https://www.govtrack.us/congress/bills/107/sjres23> accessed 3 October 2018

[354] Congressional Research Service *Presidential References to the 2001 Authorization for use of Military force in Publicly Available Executive Actions and Reports to Congress* Washington: Congressional Research Service (2016)

by the UN Security Council to use all necessary means to protect the civilians.[355] At the same time, the US relied on the fact that they were not technically at war to claim that they did not require congressional authorisation for its actions. In sum, the US acted aggressively similar to a nation in war, while reaping the rewards of technically not being at war. Jennifer Walsh argues that the US is very well aware of its ambiguous position, noting that the fact that US officials use "imminence" as a justification implies that the "US itself believes – despite its invocation of the war paradigm – that it is engaged in a qualitatively different kind of activity…and that an independent justification for every act of targeted killing is morally and legally required."[356]

In 2010, the US government confirmed that it no longer uses the term "global war on terror" and instead is in armed conflict[357] with "al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."[358] While the term has changed, strikes in half a dozen countries continue, with a dramatic increase in Afghanistan. Article 51 implies that the use of force in self-defence is restricted to a state that is responsible for an attack, and the Afghani Taliban, which was responsible, was already removed from power.[359]

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[355] Christopher M. Blanchard, *Libya: Unrest and US Policy* (Congressional Research Service, Washington DC, 2011)
[356] Jennifer Walsh, 'The Morality of Drone Warfare' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 38-39
[357] Christian Thomas, *Al Qaeda and US Policy: Middle East and Africa,* Congressional Research Service, Washington DC, 2018)
[358] Harold Hongju Koh, 'The Obama Administration and International Law' (speech), *104th Annual Meeting of the American Society of International Law*, March 2010
[359] David Kretzmer, 'The Inherent right to Self Defence and Proportionality in Jus Ad Bellum', *European Journal of International Law,* vol.24, no.1 (2013) 235-282

There are two key concepts that require further exploration: the degree of organisation, and degree of intensity required before an NIAC can be recognised to trigger IHL rules.

3.3.3.3.1 NIACs: the degree of organisation required

There has been much consideration of the degree of organisation required before an NIAC can be recognised to trigger IHL rules. For example, Article 1 of the Additional Protocol II makes clear that there must be a degree of organisation in light of its definition of an NIAC. Specifically, Article 1 defines an NIAC as:

> "…taking place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[360]

Additionally, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Boskoski*[361] opined, "the degree of organisation required to engage in 'protracted violence' was lower than the level of organisation that it would take to conduct a "sustained and concerted military operation."[362] It is made clear that the level of organisation is not the same as the level of organisation of a state's forces. The ICTY identified a number of different factors including "the existence of headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms,

[360] ICRC, Customary IHL Database, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=93F022B3010AA404C12563CD0051E738> on 3 October 2018
[361] *Prosecutor v Boškoski and Tarčulovski* [2008] ICTY IT-04-82-T
[362] ibid

the use of spokesperson and public communiqués, and the erection of checkpoints" as the basis to identify sufficient levels of organisation.[363] Additionally, in *Haradinaj* it was identified that there would normally be "a command structure" to support a contention that sufficient organisation existed so as to be considered capable of formulating military tactics.[364]

It may be argued that this definition of organisation would not be met by the likes of al-Qaeda, as it is not a single global entity with a command structure capable of directing and formulating military objectives. Rather, modern groups such as al-Qaeda may be more akin to developing an ideology capable of inspiring small groups or even pockets of individuals who would not meet the threshold currently envisaged for IHL to apply to NIACs against these types of groups. However, it may be possible that some entities under the umbrella of al-Qaeda, such as al-Qaeda in Pakistan, al-Qaeda in the Arabian Peninsula, or al-Shabab may be sufficient to fall within IHL.[365] Nevertheless, again it may be argued that IHL has another deficiency here were it may not apply to particular individuals or pockets of individuals who are al-Qaeda inspired given the lack of organisation to meet the threshold for IHL to apply.[366]

3.3.3.3.2 NIACs: the degree of intensity required

The requirement of a minimum intensity is aimed at excluding some types of internal violence such as "riots, isolated and sporadic acts of violence, and other acts of a similar

[363] *Prosecutor v Boškoski and Tarčulovski* [2008] ICTY IT-04-82-T para 197
[364] *Prosecutor v Haradinaj et al.* [2008] ICTY IT-04-84-T, paras 71-72
[365] United Nations Human Rights Office of the High Commissioner *Protection of Civilians: Building the Foundation for Peace, Security and Human Rights in Somalia* (2017) available at <https://www.ohchr.org/Documents/Countries/SO/ReportProtectionofCivilians.pdf> on 19 January 2019
[366] Tamás Hoffman, *Squaring the Circle? International Humanitarian Law and Transnational Armed Conflicts* (2011) available at <http://ssrn.com/abstract=1734486 > on January 19, 2019

nature."[367] However, the attainment of a sufficient degree of intensity is decided on a case-by-case basis. The ICTY identified "the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and, whether any resolutions on the matter have been passed."[368] It may be therefore argued that the level of intensity requires a consideration of the duration and the magnitude in order to determine whether the required threshold has been reached. It is highly debatable as to whether the individualised and randomised attacks perpetrated against prevailing non-state actors can be considered as sufficient to meet the minimum threshold envisaged by the intensity requirement.[369]

As a result, the legal definition of an NIAC might not necessarily match the reality in practice where drones may be deployed to pursue a state's military objective. A significant issue here is the fact that some uses of drones may well be occurring outside IHL given that the definition of NIACs does not necessarily reflect the reality in practice. Consequently, it may be argued that there is a specific problem with the current definition of NIACs, where technically speaking states may not be regulated by IHL given that their use of drones may fall outside of the legal definition.[370]

[367] Additional Protocol II, Article 1
[368] *Prosecutor v Limaj et al.* [2005] ICTY IT-03-66-T, para 90
[369] Max Brookman-Byrne, 'Drone use Outside Areas of Active Hostilities: An Examination of the Legal Paradigms Governing US Covert Remote Strikes'*, Netherlands International Law Review*, vol.64, no.1 (2017); Michael Schmitt, 'Charting the Legal Geography of Non-International Armed Conflict' *International Law Studies* vol.90, no.1 (2014) 1-19
[370] Michael Schmitt, 'Unmanned Combat Systems and International Humanitarian Law: Simplifying the oft Benighted Debate', *Boston University International Law Journal,* vol.30 (2012) 595-619

A further issue is the fact that NIACs may have an international dimension; members of small organisations can cross borders without notice. This can be misleading given the classification of this type of conflict as being non-international. For instance, in Afghanistan there were numerous instances where the states engaged in military conflict against non-state actors spilled over into Pakistani territory.[371] This creates a technical legal problem given that the very nature of the definition of a non-international conflict is meant to occur within the same territorial border. However, this problem may be resolvable by the fact that the Common Article 2 Geneva Convention is clear that an international war is "between two or more High Contracting Parties". As the spill over of NIACs have not been directed against another state but specifically against a known non-state actor, it may be acceptable that this type of conflict remains accurately classifiable as non-international. However, it would not be entirely foreseeable that states may interpret such military action as being in violation of their national sovereignty. If this were to be the case, then there may still be a problem with the definition of NIACs being connected to territory.

3.3.4 *Jus ad bellum*: a summary

This chapter has been split into two overarching sections: 1) *jus ad bellum*, the permissibility, decision, and requirements of entering an armed conflict, alongside related issues pertaining to the nature and history of warfare, and 2) *jus in bello*, the principles and rules of war to be followed once armed conflict has commenced. The unique nature of drone warfare and its technological capabilities necessitated an in-depth discussion as to how these technological advancements have affected the notions and implications of armed conflict.

[371] Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press, Oxford, 2012) 62

The chapter first begins by introducing the topic of technology, in particular how it has shifted the nature of armed conflict into a more permissive affair. The relative ease by which UAVs are deployed from a state of peace has contributed to a conflation between arguments on drones being used as a military tactic, and the decision to resort to armed conflict in the first instance. The chapter clarifies that the decision to use drones engages international law in the same vein as any other warfare tactic. It then elaborates on the relevant exceptions to the probation of the threat or use of force, namely self-defence and consent. Self-defence must in retaliation to an attack that is on-going or imminent, and consent must be given by states that have the authority to conduct those operations themselves.

The section then discusses the evolution of military warfare in a bid to contextualise the phenomenon of drones and UAVs in general. It highlights three primary shifts in armed conflict: 1) the era of mass war, based on the Rousseauian conception of warfare between two structured armies disconnected from their civilian populations, 2) the era of expert wars following the horrors of the World Wars, creating a conscious effort to reduce human agency in war, and 3) the current era of technology and how exponential technological advancements have thrust forward the relevance of non-state actors and their roles in NIACs.

The analysis will now turn to *jus in bello* and how the principles of IHL apply to drone warfare.

3.4 *Jus in bello*: principles of IHL

The discussion will now proceed to examine the principles of IHL in order to identify and evaluate the current legal standards. The purpose of this section is to begin considering whether existing IHL standards are capable of regulating the use of drones as a military warfare tactic. After briefly outlining the different facets of IHL, the remainder of the chapter will discuss the protection of life under IHL, due process under IHL, the principle of distinction, and the principle of proportionality, relating them all back to the core theme of drone warfare. The case of Guantanamo is examined as a case study to demonstrate the relevance and importance of defining combatants in armed conflict as well as the implications of bypassing said categorisations. The chapter ends by analysing the issues of targeting arising from drones and the ability, or lack thereof, of IHL to regulate non-human weapons.

IHL essentially asks the questions: when can you attack? Who can you attack? In what way can you attack? And is it permissible to attack at all? The following subchapters of the protection of life, due process, distinction, and proportionality are the main principles that deal with these questions and are therefore discussed in the most detail.

IHL does not seek to end war, but rather seeks to balance military necessity with maintaining an element of humanity. First codified in 1864 with the creation of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, [372] modern IHL continued to develop through numerous treaties and conventions, covering diverse aspects of the conduct of warring parties.[373] IHL seeks to limit the effect of armed conflict. It does so by offering protection not only to civilians

[372] Jean Pictet, 'The New Geneva Conventions for the Protection of War Victims', *American Journal of International Law*, vol.45, no.3 (1951) 462-475
[373] Waldemar Solf, 'Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I', *American University International Law Review*, vol.1, no.1 (1986) 119-121

and civilian infrastructure, but also to combatants who are for example wounded or captured.[374] In order to do so, IHL is centred mainly on a number of principles that can adapt to the changing technologies of contemporary armed conflict.[375]

Since the first Geneva Convention in 1864, a number of treaty-based sources have enriched IHL. These include, but are not limited to: the First Geneva Convention of 1949, which covers the protection and care for the wounded and sick of armed conflict on land; the Second Geneva Convention of 1949, which concerns the protection and care for the wounded, sick and shipwrecked of armed conflict at sea; the Third Geneva Convention of 1949, relating to the treatment of prisoners of war; the Fourth Geneva Convention of 1949, concerning the protection of civilians in time of war; Additional Protocol I of 1977, relating to the protection of victims of international armed conflicts; Additional Protocol II of the same year, covering the protection of victims of non-international armed conflicts; the 1954 Convention on the Protection of Cultural Property during armed conflict; the 1972 Biological Weapons Convention; the 1980 Convention on Conventional Weapons; and 1993 Convention on Chemical Weapons.[376]

Customary International Law (CIL) is also a binding source of international law. The International Committee of The Red Cross has built a database that contains 161 rules customary IHL.[377] The database covers areas such as targeting, protected persons,

[374] Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' *International Review of the Red Cross,* vol.87, no.857, (2005) 177-179
[375] Emily Crawford, *International Humanitarian Law,* (Cambridge University Press, Cambridge, 2015) 44-46
[376] ICRC, Customary IHL Database, available at <https://www.icrc.org/en/document/treaties-and-customary-law> on 3 October 2018
[377] ICRC, Customary IHL Database, available at <https://www.icrc.org/en/icrc-databases-international-humanitarian-law> on 3 October 2018

methods of warfare, weapons, treatment of civilians and persons Hors De Combat (out of action due to injury), and rules pertaining to the implantation of IHL.[378]

According to the ICRC, the principles of IHL can be broadly categorised into 15 rules directed towards combatants.[379] These are: 1) do not target civilians, civilian property, or civilian public buildings; 2) do not launch any attack if the civilian collateral damage is expected to be greater than the military advantage; 3) take the necessary precautions to protect civilians before and during attacks; 4) do not use prohibited weapons and do not engage in unlawful methods of war; 5) collect and car for the wounded and dead, whether friend or enemy; 6) respect the rights of prisoners and all other people under your control, and treat them humanely; do not commit summary executions; 7) do not take hostages, or use human shields; 8) do not displace civilians, unless necessary for their safety or for imperative military reasons; 9) respect civilian property; do not loot or steal; 10) respect women; do not commit or permit rape or sexual abuse against anyone; 11) protect children; do not recruit them into our armed forced and do not use them in hostilities; 12) respect medical personnel, hospitals, and ambulances; do not misuse protective symbols such as the Red Cross or Red Crescent; 13) allow impartial humanitarian relief for civilians in need; 14) put these rules into practice; respect them even if the enemy does not. Abstain from reprisals which are in violation of the law or armed conflict; 15) prevent violations of these rules; if violations occur, report it to your commander. Violations must be investigated and sanctions in accordance with international standards.

Illustrated by the above, IHL covers a wide range of rules relating to conflict. It regulates

[378] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law: Vol I Rules* ICRC (Cambridge University Press, 2009)
[379] International Committee of the Red Cross, *Basic Rules of the Geneva Conventions and Their Additional Protocols*, ref. 0365 (1988)

both actions and omissions. It also awards specific protection to groups such as humanitarian workers, medical staff, women, and children. That said, IHL allows for targeting of combatants if the targeting was not conducted with illegal means, such as with banned weapons or through perfidy. According to IHL, not all civilian casualties amount to breaches. IHL allows for collateral damage according to military necessity, also known as the principle of proportionality, discussed in detail in Subchapter 3.4.5.[380] IHL does not require the eradication of all civilian casualties. Instead, it requires the combatants to exercise due consideration of IHL.[381] However, exercising judgement is an inherently human attribute. Issues such as distinguishing between civilians and combatants, assessing the military necessity, applying exceptions to vital humanitarian norms, are all difficult questions that have severe consequences attached to them.

3.4.1 The protection of life under IHL

The protection of life under IHL is governed by the principle of distinction, which means that direct attacks are only permitted against members of the armed forces that are part of a conflict; it is not permitted to target civilians.[382] Dorman makes the point that, "in combat situations, the entire body of international humanitarian law can be reduced to the obligation to observe the principle of distinction."[383] This has been a contested topic by the United States, which argues that distinction gives an unfair advantage to terrorists, as IHL demands that combatants distinguish themselves from civilians and refrain from deliberately or indiscriminately targeting them. The principle of distinction was first outlined in the St Petersburg Declaration 1868, which mandated that weakening the

[380] Emanuela-Chiara Gillard, *Proportionality in the conduct of Hostilities: The Incidental Harm Side of the Assessment* (Chatham House, London 2018)
[381] Bruce Cronin, 'Reckless Endangerment Warfare: Civilian Casualties and the Collateral Damage Exception in IHL', *Journal of Peace Research* vol.50, no.2 (2013) 175-187
[382] Nils Melzer, *Targeted Killing in International Human Rights Law* (Oxford University Press, Oxford, 2008)
[383] Kristen Dorman, 'Proportionality and Distinction in the International Criminal Tribunal for the Former Yugoslavia', *Australian International Law Journal*, vol.12 (2005) 84-98

enemy's military forces was the only legitimate object that states should endeavour to accomplish during war.[384] The principle was not specifically mentioned in the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War in 1907. However, it was alluded to in Article 25, which prohibits attacks on civilian centres such as towns, villages, dwellings, and undefended buildings.[385] It is also contained in the Geneva Conventions 1949 relating to the victims of international armed conflicts, as well as being codified in Articles 48, 51(2), and 52(2) of Additional Protocol I.[386] This is because groups such as Al Qaeda, ISIS, and *Tanzim Qaidat al-Jihad fi Bilad al-Rafidayn* (also known as Al Qaeda in Iraq) either blend in with local populations or use them as potential shields. Consequently, counter terrorism operations are almost certain to breach the principle of distinction, as it is often difficult to make a clear judgment in identifying a terrorist as opposed to a civilian.

IHL consists of a series of treaties, conventions, and customs that deal with humanitarian problems that stem from armed conflicts. It is primarily concerned with protecting life and property by placing limits on the way conflicts can be carried out. IHL is only applicable to armed conflict and does not cover internal tensions or disturbances such as isolated acts of violence. "The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting."[387] IHL is primarily contained within the Geneva Conventions, improving the protections offered to civilians in conflict. The Protocols also extended protection to other groups such as medical personnel,

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[384] ICRC, *Declaration Renouncing the Use, In Times of War, of Explosive Projectiles Under 400 Grammes Weight* (2019) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C> on 15 February 2019

[385] Detlev F. Vagts, The Hague Conventions and Arms Control, *American Journal of International Law* vol.94, no.1 (2000) 31-41

[386] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law* (University of Cambridge, Cambridge, 2005)

[387] ICRC, *What is International Humanitarian Law* (2004) available at <https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf> on 10 January 2020

detainees, and internees. Collectively, they form the core of IHL, especially as they codify the rules of warfare.[388] However, its genesis goes further back to ancient texts such as the Art of War by Sun Tzu, which outlined the obligation to care for the wounded and prisoners as well as the Codes of Chivalry which were developed from medieval codes of conduct regulating moral codes of conduct and the laws of war,[389] to the First Hague Peace Conference of 1899, which revised the declaration concerning the laws and customs of war decided by the Conference of Brussels in 1874.[390] This was superseded by the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

A difference between the Hague and Geneva Conventions relates to the concept of reciprocity. The Hague Conventions makes limited provision for reciprocity. It was contained within the Martens Clause (also known as the *si omnes* clause) named after Fyodor de Martens, the Russian delegate at the Convention in 1907. It maintained that the provisions of the Convention would only apply exclusively to signatory states. However, the Geneva Conventions apply without considerations of reciprocity.[391]Additional protections are contained within the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict[392] and the 1972 Biological Weapons Convention;[393] the 1980 Conventional Weapons Convention and its five

[388] Medicins Sans Frontieres, *Geneva Conventions of 1949 and Additional Protocols I and II of 1977* (Medicins Sans Frontiere, Geneva, 2019)
[389] Rene Moelke and Gerhard Kummel, 'Chivalry and Codes of Conduct: Can the Virtue of Chivalry Epitomise Guidelines for Interpersonal Conduct?' *Journal of Military Ethics* vol.6, no.4 (2007) 292-302
[390] International Committee of the Red Cross *Treaties, State Parties and Commentaries* (2019) available at <https://ihl-databases.icrc.org/ihl/INTRO/195> on 15 January 2019
[391] Sean Watts 'Reciprocity and the Law of War', *Harvard International Law Review,* vol.50, no.2 (2009) 366-434
[392] UNESCO, *Convention for the Protection of Cultural Property in the Event of Armed Conflict* 2019 available at <http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html> on 15 January 2019
[393] United Nations Office of Disarmament Affairs (UNODA) *The Biological Weapons Convention* 2019 available at <https://www.un.org/disarmament/wmd/bio/ > on 15 January 2019

protocols; the 1993 Chemical Weapons Convention; the 1997 Ottawa Convention on Anti-Personnel Mines and the 2000 Optional Protocol to the Convention on the rights of the child on the involvement of children in armed conflict.[394]

The protection of life has also been stretched to include circumstances where there is an intention to take life, even if no life has actually been taken. This was established in the case of *Makaratzis v Greece,* which involved the Greek police shooting someone for failing to stop.[395] The argument made before the court was that the police had used excessive force in trying to apprehend him, thereby placing his life in danger. He furthermore alleged that there had been an inadequate investigation conducted by the authorities. In reaching a decision, the Court considered a number of relevant factors such as the prevailing terrorist threat at the time in Greece posed by groups such as '17N' or '17 November' and the accompanying heightened sense of anxiety among law enforcement officials[396] in light of the recent assassination of American officials near the US embassy.

The Court went on to acknowledge that the police would have been justified in using firearms to neutralize the threat being posed by the driver.[397] The fact that the driver subsequently turned out to be unarmed did not invalidate the perception of threat and the reasonable suspicion that led to the use of force. However, the actual response was still considered to be chaotic and lacking in control and professionalism, inasmuch as the police responded with a hail of fire from a variety of firearms including revolvers, pistols, and submachine guns.[398] This unprofessionalism raised serious questions regarding the

[394] ibid
[395] *Makaratzis v Greece,* App No. 50385/99 (ECHR, 20 December 2004)
[396] ibid para 65
[397] ibid para 66
[398] *Makaratzis v Greece,* App No. 50385/99 (ECHR, 20 December 2004)

conduct and organisation of the police's operation and response. The Court duly ruled that the officers of the state had violated the requirement to protect life from the use of lethal force irrespective of whether life had actually been taken. The actions of the police in repeatedly shooting at the suspect in circumstances where he posed no threat to theirs or anyone else's lives therefore contravened Article 2.[399]

Other relevant cases have included *Andreou v Turkey* in which Turkish armed forces indiscriminately fired into a crowd of demonstrators, injuring but not killing the complainant. This represented another example of the excessive use of force which threatened life, even though none was actually taken. Another example is the case of *Soare and Others v Romania* in which the 19-year-old claimant was shot in the head by the police and yet survived although in a paralysed condition. The ECHR ruled unanimously that the actions of the police constituted a breach of the Article 2 protection of the right to life.

3.4.2 Due process under IHL

A prime factor involved in due process under IHL is the determination that the beginning or existence of an armed conflict will in turn trigger the applicability of IHL. In this respect the ICRC states the following:

> "International humanitarian law distinguishes two types of armed conflicts, namely: international armed conflicts, opposing two or more States, and non-international armed conflicts, between governmental forces and nongovernmental armed groups, or between such groups only. IHL treaty law also establishes a

[399] ibid

> distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II".[400]

IHL is particularly robust in the protections it provides in relation to due process. It contains obligations that apply to individuals *hors de combat* and allows no exceptions to these duties.[401] The way that a state wishes to define a specific person or group makes no difference to its applicability. The obligations hold once there are two or more parties in armed conflict irrespective of one party choosing to define the other as a terrorist, criminal, or unlawful combatant. Even more relevant is the fact that IHL prohibits the very acts that are often described as terrorism, such as threatening to or indeed carrying out attacks on civilians. It also does not prevent governments from adopting measures to combat such unlawful acts within the confines of due process. Furthermore, IHL is based on non-reciprocity, which prohibits reprisals in kind. The breach of obligations by one side does not empower the other to respond in the same manner. In this respect the ICRC quotes rule 140 of the Vienna Convention on the Law of Treaties regarding the principle of reciprocity by stating:

> "The Geneva Conventions emphasise in common Article 1 that the High Contracting Parties undertake to respect and ensure

[400] International Review of the Red Cross, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?* (2008) available at <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> on 8 January 2019

[401] UN Human Rights Office of the High Commissioner, *Persons Hors de Combat in Non International Armed Conflicts* (2017) available at <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/ohchr_syria_-_hors_de_combat_-_legal_note_en.pdf> on 21 January 2019

> respect for the Conventions 'in all circumstances'. The rules in common Article 3 must also be observed 'in all circumstances'. General recognition that respect for treaties of a humanitarian nature cannot be dependent on respect by other States parties is found in the Vienna Convention on the Law of Treaties."[402]

Due process with regards to the right to a fair trial under IHL is guaranteed under the Geneva Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. These collectively outline what a suspect is entitled to.

The United States has continuously securitised the threat posed by transnational terrorism as an existential threat requiring extraordinary measures that would not ordinarily be countenanced.[403] Paradoxically, it has been argued that the IHL principle of distinction has been partially responsible for the proliferation of extra-judicial killings by drone attacks. This principle requires combatants to be distinct from civilians, which usually comes in the form a uniform of some description that identifies them as a combatant.[404] However, the rise of asymmetric warfare as a means of countering great military powers such as the United States has led to terror groups both not distinguishing themselves from civilian as well as using civilians as shields. While IHL has recognised the practice of shielding as unlawful, it has still been clear that this does not justify reciprocal attacks on

[402] ICRC, *Rule 140 Principle of Reciprocity* (2019) available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule140> on 10 January 2019
[403] Fred Vultee, 'Securitization: A New Approach to the Framing of the War on Terror', *Journalism Practice,* vol.4, no.1 (2010); A O'Donnell, 'Securitization and Counter Terrorism and the Silencing of Dissent: The Educational Implications of Prevent', *British Journal of Educational Studies*, vol.64, no.1 (2016); Vladimir Sulovic, *Meaning of Security and Theory of Securitization* (Belgrade Centre for Security Policy, Belgrade, 2010)
[404] Nils Melzer, *Targeted Killing in International Law*, (Oxford University Press, Oxford, 2008)

such targets. Lewis and Crawford make the argument that while it has been suggested that the use of drones has been driven by the need to protect aircrew, in reality such risks are minimal. Instead, drones have been justified precisely because of issues such as shielding and distinction in that smart targeting can theoretically eliminate targets while protecting civilians.[405]

3.4.2.1 Establishing jurisdiction for drone strikes

Establishing jurisdiction for drone strikes would entail whether a state is exercising control over an area when it decides to use drones or UAVs as an offensive weapon for the purpose of violating the right to life. Even in instances when a state uses drones extraterritorially at the invitation of, or with the permission of, the host state, there is still the prohibition under IHL to not use force that is unnecessary, disproportionate, unreasonably collateral, or which targets non-combatants.[406] While the ECHR in the *Bankovic* ruling rejected the claim that an aerial bombardment constituted effective control, this applied to the use of conventional manned fighters and bombers. However it has been suggested that control should indeed be applied to UAVs, especially as they are slower than conventional aircraft and can spend extended periods of time over an area before a decision is made to strike a ground target. This has been described by "jurisdiction in waiting."[407] Targeted killings by drones can therefore be permissible under IHL, especially as under IHRL the right to life does not apply once it is conducted during a legal act of war. The one proviso however is that the targeted combatant must be operating under a "continuous combat function."[408]

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[405] Michael Lewis and Emily Crawford, *Drones and Distinction: How IHL Encouraged the Rise of Drones*, vol.44, no.3 (2013) 1127-1166
[406] Lynn E. Davis, Michael J. McNerney, and Michael D. Greenberg, *Clarifying the Rules for Targeted Killing: An Analytical Framework for Policies Involving Long Range Armed Drones* (The Rand Corporation, Washington, 2016) 5
[407] Robert Frau and Michael Ramsden, 'Drones in International Law', *Groningen Journal of International Law*, vol.1, no.1 (2013) 9
[408] ibid 11

Consequently, complying with IHL involves the careful planning of attacks to ensure that collateral damage is reduced as much as is feasible. In particular, the Additional Protocol I or API *jus in bello* proportionality standard of IHL[409] entails a responsibility to cancel or suspend an attack if there is the likelihood that a target is not of a military nature, or that the collateral damage is likely to be excessive or lacking in proportionality. Failure to adhere to this stricture regarding proportionality can be a source of criminal liability if an attack is planned and exercised in the knowledge that it will cause significant collateral damage.

3.4.3 Distinction

The principle of distinction, the principle that belligerents must take steps to distinguish between combatants and civilians, is one of the foremost principles of law relevant to this thesis. As discussed above, the principle of distinction, alongside the principle of proportionality, governs the protection of life in IHL. The very first rule of the ICRC IHL CIL database reads: "Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians." "Civilians" according to rule 5 of the ICRC study "are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians." Therefore in order to understand who is a civilian, we must understand who qualifies to be a combatant. Combatants are defined as "All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel". However, not all states adopt the abovementioned definition of a "combatant."[410] For example, the US government uses

[409] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3
[410] Noelle Quenivet, 'The "War on Terror" and the Principle of Distinction in International Humanitarian Law' *Colombian Yearbook of International Law,* vol.3 (2010) 155-168

very broad definitions of "combatant" or "militant" in a bid to reduce the civilian death toll.[411] US policy in Yemen and Pakistan defied normative LOAC guidelines; males of fighting age were assumed by default to be combatants unless evidence was provided to the contrary.[412] This directly goes against the core values of the LOAC, in particular the immunity of civilians to acts of deliberate killing.[413] The purpose of the principle of distinction is to ensure that from a legal perspective only those who are classified as being a combatant can lawfully participate in conflicts or be treated as primary targets.[414] Therefore, the definition of a combatant holds significant implications from the perspective of IHL in determining the rights and obligations owed by participants in conflicts.

In light of the significance of the formal recognition of combatants, a core concern that arises is whether a terrorist should be viewed as being a combatant or a civilian. If terrorists are capable of being viewed as combatants, then the status of terrorists in armed conflicts are elevated to that of state armies involved in armed conflicts.[415] This would mean that terrorists could lawfully become legitimate military targets under IHL.[416] However, if terrorists can only be viewed as being civilians, then they cannot lawfully be targeted under IHL and as a result IHL would not necessarily regulate the use of many

[411] Human Rights Watch, 'Joint Letter to President Obama on Drone Strikes and Targeted Killing', April 2013
[412] Jennifer Walsh, 'The Slow Death of the Non-Combatant', *Canada International Council's Special Feature of Drones* (December 2012)
[413] Jennifer Welsh, 'The Morality of "Drone Warfare"' in Cortright, Fairhurst, and Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications*, (University of Chicago Press, London, 2015) 42
[414] Emily Crawford, *International Humanitarian Law* (CUP, 2013) 2-3; Jean Pictet, *Commentary of the Geneva Conventions, Fourth Geneva Convention* (ICRC, 1958) 51
[415] Michael Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' in Michael Schmitt, *Essays on Law and War at the Fault Lines,* (Springer, 2011) 99-102
[416] ibid

drone attacks.[417] Consequently, the distinction between combatants and civilians is fundamental to the question as to whether IHL law can regulate the use of drones.

This is especially the case given the rise in the use of drone technology to target non-state actors who are commonly classified as being terrorists.[418] If terrorists may be classified as civilians, then IHL law would suggest that any direct targeting of civilians would be unlawful. However, if terrorists can come within the definition of a combatant then they can be lawfully targeted as part of a legitimate military objective. Diverging from international norms, the Bush administration coined the term "non-lawful combatant" through a series of memos in 2002 by the Office of Legal Counsel. The term describes failed-state and non-state actors, who therefore are not protected by Geneva Conventions ore even US federal War Crimes Act, as they are technically not lawful enemy combatants.[419]

In order to explore who can become a combatant, it is necessary to examine the philosophical foundations of the principle of distinction as the basis to understand the current construction of the principle in IHL.[420] Nabulsi argues that the principle of distinction is one of the most fundamental principles in IHL, as it underpins the very rationale of having a set of legal principles to regulate the conduct of participants in on-going hostilities.[421] This is due to the fact that the principle of distinction is about ensuring that civilians should be immune from any targeting in conflicts. One of the earliest

[417] Robert Barnidge, 'Civilian Casualties and Drone Attacks: Issues in International Humanitarian Law' in Robert Barnidge, (ed.) *The Liberal Way of War* (Taylor and Francis, 2016) 125-129
[418] Michael Lewis, 'Drones and the Battlefield', *Texas International Law Journal*, vol.47 (2011) 299-301
[419] Memorandum from Assistant Attorney General Jay Bybee for Attorney General Alberto Gonzales (January 2002)
[420] Noelle Quenivet, 'The "War on Terror" and the Principle of Distinction in International Humanitarian Law', *Colombian Yearbook of International Law*, vol.3 (2010) 155-186
[421] Karma Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (OUP, 2005) 19-22

constructions of this belief was in the Preamble of the 'Declaration of St. Petersburg 1868' which expresses that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."[422]

In the early writings on international law, it was often argued that civilians could never be considered legitimate targets unless they participated in the conflict. For example, Grotius contended that "by the law of war armed men and those who offer resistance are killed...it is right that in war those who have taken up arms should pay the penalty, but that the guiltless should not be injured."[423] Additionally, in one of the first attempts to codify the principle of distinction, the Lieber Code 1863 affirmed that:

> "As civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[424]

It is evident from the historical development of the principle of distinction that the law has long sought to differentiate between those directly involved in hostilities and

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[422] ICRC, *Declaration Renouncing the Use, In Times of War, of Explosive Projectiles Under 400 Grammes Weight* (2019) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C> on 15 February 2019

[423] Hugo Grotius, *The Law of War and Peace* reprinted in Leon Friedman (ed.) *The Law of War: A Documentary History* (Random House, 1972) 88-89

[424] Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field (Lieber Code), Article 22 (Apr. 24, 1863) in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and other Documents* (Brill, 2004) 6

civilians. The most recent expression of this principle in IHL law is found in Additional Protocol I, Article 48, which states that:

> "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."[425]

This definition is now considered part of CIL even though a number of states have yet to ratify the Additional Protocols.[426] This definition creates at least two important obligations for participants in hostilities relevant to considering who can be a combatant.[427] First, those involved in hostilities must distinguish between civilians and combatants so that only combatants are directly targeted. This creates a further obligation on participants to clearly distinguish combatants from civilians where combatants are expected to be clearly visible to participants in hostilities.[428] This visibility is commonly achieved by the wearing of common military uniforms or insignia that can identify individuals as being a combatant. Second, states must also mark military installations so they can become distinguishable from civilian properties.[429] This effectively means that

[425] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3
[426] Michael Lewis and Emily Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones', *Georgetown Journal of International Law,* vol.44, no.3 (2013) 1137; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (ICRC, 1005), Rule 16
[427] Nils Melzer, *The Principle of Distinction under International Humanitarian Law* (2008)
[428] Amanda Alexander, 'A Short History of International Humanitarian Law', *European Journal of International Law,* vol.26, no.1 (2015) 109-138
[429] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3

military installations should be removed from civilians insofar as it can be considered feasible to do so, which has been confirmed in various cases before the International Criminal Tribunal for the Former Yugoslavia (ICTY).[430]

The requirements of the principle of distinction, which necessitate a separation of combatants and civilians, may be considered as clearly applicable to states involved in hostilities.[431] The complication is the rise of non-state actors where non-state armed groups or individuals become involved in hostilities.[432] Although it may be argued that the exclusion of non-state actors from the distinction principle would only serve to defeat the purpose of IHL and its role in regulating the conduct between participants in hostilities, it is undeniable that the construction of IHL is very state-centric.[433] The current construction of IHL only envisages the control of hostilities where the main actors in those hostilities are states, or more accurately, state armies. Cases where there may only be one state involved and one or more non-state actors in hostilities effectively blur the line between civilians and combatants, as it is difficult to pinpoint the precise point at which a civilian, as a non-state actor, becomes a combatant.

The state-centric view of IHL is further compounded by the Commentary to Protocol I, which expressly confirms that a state has a primary obligation to its own population. It is difficult to find a legal basis to hold non-state actors responsible to its own population to ensure that they distinguish themselves from civilians. This exposes a significant weakness in IHL where there is effectively a gap in the construction of IHL so as to be

[430] *Prosecutor v Kupreškić et al*. [2000] ICTY IT-95-16-T; *Prosecutor v Galić* [2003] ICTY IT-98-29-T; *Prosecutor v Dragomir Milošević* [2007] ICTY IT-98-29/1
[431] ICRC, *The Principle of Distinction between Civilians and Combatants* (ICRC, Geneva, 2019)
[432] Collegium, *Relevance of International Humanitarian Law to Non-State Actors* (Council of Europe, Bruges, 2002)
[433] Zakaria Dabone, 'International Law: Armed Groups in a State-Centric System', *International Review of the Red Cross*, vol.93 no.882 (2011) 395-424

able to distinguish effectively between civilian and combatants. This is due to the fact that the failure on the part of IHL to either include or exclude terrorists as being combatants may be giving terrorists an advantage where they are not obliged to differentiate between combatant and civilians, whilst state actors involved in hostilities will be required to do so.

This gap evident in the construction of IHL has led some, such as Quenivet, to argue that IHL may have informally moved to three categories of participants in hostilities.[434] The combatant and civilian distinction remains but a further category of "unlawful combatant" arises as a direct result of non-state actors being involved in hostilities.[435] "Unlawful combatants" do not easily fall within the traditional definition of combatants given that IHL draws a distinction only between combatants and civilians.[436] The necessity for a further category of combatants was exposed by the existence of US detention centre based in Guantanamo Bay, as illustrated further shortly in Subchapter 3.4.4.

A proportion of those detained in Guantanamo Bay were neither classifiable as civilians not participating within hostilities, nor as combatants being fully engaged in hostilities.[437] The difficulty with distinction is also argued by Watkin who describes a lack of consensus that "people" fall solely into one of the two groups: "lawful combatants", and "civilians".[438] Therefore, it is not accurate to suggest that there are only two categories of those involved in hostilities. It is further argued by Newton that a third category of person

[434] Noelle Quenivet, 'The "War on Terror" and the Principle of Distinction in International Humanitarian Law', *Colombian Yearbook of International Law,* vol.3 (2010) 165
[435] ibid
[436] George Aldrich, 'The Taliban, al-Qaeda, and the Determination of Illegal Combatants', *American Journal of International Law* vo.96, no.893, (2002) 895-897
[437] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge, 2004) 29
[438] Kenneth Watkin, 'Assessing Proportionality: Moral Complexity and Legal Rules', *Yearbook of International Humanitarian Law,* vol.8, no.3 (2005) 11

has always existed but just has never been expressly included in IHL given that the International Committee of the Red Cross (ICRC) remained wedded to the notion of the civilian/combatant distinction.[439] This is despite the ICRC Commentary to the Geneva Conventions expressing that:

> "…every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can fall outside the law".[440]

The recognition of a third category is further supported by some countries, such as the United States (US), who recognises that there are people who falls outside the strict remit of the civilian/combatant divide who cannot be classified as being either a combatant or a civilian.[441] However, Quenivet contends that a more accurate understanding of IHL is to accept that the distinction between combatants and civilians remains as is currently constructed in IHL.[442] However, there are now evident sub-categories within these two main categories of participants in hostilities. This approach is also supported in the "Direct Participants in Hostilities" Guidelines (DPH), which suggests that civilians who get involved in hostilities become participants and can be labelled as "civilians losing

[439] Michael Newton, 'Unlawful Belligerency after September 11: History Revisited and Law Revisited' in David Wippman and Matthew Evangelista, (eds.) *New Wars, New Law? Applying Laws of War in the 21st Century Conflicts* (Transnational Publishers, London, 2005) 100-101
[440] Jean Pictet, *Commentary of the Geneva Conventions, Fourth Geneva Convention* (ICRC, 1958) 51
[441] Robert Kolb and Richard Hyde, *An introduction to the International Law of Armed Conflicts* (Hart Publishing, 2008) 205
[442] Noelle Quenivet, 'The "War on Terror" and the Principle of Distinction in International Humanitarian Law', *Colombian Yearbook of International Law,* vol.3 (2010) 166

their protection".[443] However, it is important to acknowledge even if IHL has evolved to a state of two categories with sub-categories, there remains much debate around the level of rights retained or lost by said sub-categories.[444]

This discussion highlights the gap in IHL around the definition of a combatant. This is particularly evident when considering whether terrorists can accurately be defined as a combatant or a civilian.[445] Nevertheless, it does not seem to be appropriate to label terrorists as combatants given that IHL does not expressly support this contention.[446] It is equally inappropriate to refuse to recognise the potential that a third category exists which blurs the line between civilian and combatant. Consequently, it seems suitable to accept Quenivet's argument that sub-categories in each of the two main categories exist. It would seem that terrorists could fall within a sub-category of civilian when those terrorists are non-state actors. However, the more formalised those non-state actors in hostilities are, the greater the likelihood that they become directly comparable with armies and may therefore be realistically considered as being a subcategory in the combatant category.[447]

This approach to defining the scope of the principle of distinction may also be supported by reference to IHL that regulates cyberspace. Although the discussion in this thesis does not concern the hostilities conducted in cyberspace, there has been some recent

[443] ICRC, *Interpretative Guides on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (2009) available at <https://www.icrc.org/en/publication/0990-interpretive-guidance-notion-direct-participation-hostilities-under-international> on 10 January 2020
[444] Steven R. Ratner, 'Are the Geneva Conventions Out of Date?' *Law Quad Notes*, vol.66 (2005) 67
[445] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* Geneva (2003) available at <https://www.icrc.org/en/doc/resources/documents/report/5xrdcc.htm> on 10 January 2020
[446] René Vark, 'The Status and Protection of Unlawful Combatants', *Juridica International,* vol.X (2005) 191-198
[447] Shannon Bosch, *The Combatant Status of Non-State Actors in International Armed Conflicts, in Light of the notion of Direct Participation in Hostilities* (University of Natal, Durban, 2012)

developments in this area of IHL that may indeed serve a useful comparator.[448] According to the *Tallinn Manual*, an individual who does not belong to an armed organised group cannot be considered a combatant even if they comply with combatant criteria.[449] However, Rule 26 of the *Tallinn Manual* provides that armed forces who "…fail to comply with the requirements of combatant status lose their...combatant immunity."[450] This may be considered as consistent with IHL discussed above, as the current construction of IHL only recognised combatants and civilians.

This discussion exposes a significant issue in IHL that will need to be addressed if IHL can be considered as capable of regulating hostilities. If drone warfare tactics are to be utilised on an increasing scale in the future, there will need to be a clearly defined legal framework that establishes the legality of the use of this type of military tactic. This is especially relevant as the future proliferation of drone use threatens to transform the nature of war from an exceptional situation in which conflict takes place within a limited space and duration to an on-going, low intensity engagement that transcends territorial boundaries. At present, IHL offers fewer protections to life than IHRL, which will be discussed in great detail in Chapter 4, precisely because war is perceived as a limited exception to the norm of peace. Technological advancements in the areas of cyber-warfare, robotics, artificial intelligence, and UAVs however are the future of armed conflict. These developments pose the prospect of conflict becoming the norm in the form of protracted low intensity affairs. The need for a clearly defined framework is also relevant as to date drones have seldom been used in inter-state conflicts but rather in NIACs. That being said, it can be argued that there are not nearly as many inter-state

[448] Michael Schmidt, *Tallinn Manual 2.0 on The International Law Applicable to Cyber Warfare* (CUP, 2017) 421
[449] ibid
[450] ibid

conflicts as there are NIACs. Yet, in the few inter-state conflicts, such as between Russia and Ukraine, drones have been used.[451]

One suggestion for clarity relates to instances when a state uses UAVs against non-state actors operating in a number of different states. Heyns et al. suggest that under IHL these could be considered as a single, global, NIAC. In such a scenario IHL rules would apply to all drone strikes carried out irrespective of where they were. This would require aggregating the entire spectrum of violence employed when establishing the intensity threshold for NIACs.[452] However such an approach would only apply within the IHL context of how force can be used, but not whether or when it should be used, which legally falls outside the scope of IHL. The issue of distinction will also be examined in greater detail at the end of this chapter.

3.4.4 Defining combatants in IHL: Guantánamo as a case study

The case of Guantanamo embodies the primary themes about IHL covered in this thesis, combining the issues of the protection of life as well as due process and the distinguishing of combatants and civilians. Guantanamo is a striking illustration of what can unfold when protections conferred by IHL are not implemented, further highlighting the shortcomings of current IHL with particular regards to categorising different types of combatants.

It is indisputable that US and British military actions in Iraq and Afghanistan constitute

[451] Aric Toler, '#MinskMonitor: Ukrainian Helicopter Downs Russian Drone' (*Medium,* 1 November 2018) available at <https://medium.com/dfrlab/minskmonitor-ukrainian-helicopter-downs-russian-drone-f4a8eeeccb7e> on 22 April 2019

[452] Christof Heyns and others, 'The International Law Framework Regulating the Use of Armed Drones' *International and comparative Law Quarterly*, vol.65 (2016) 808; Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict', *Journal of International Criminal justice* vol.11, no.1 (2013) 65-88

armed conflict in accordance with IHL.[453] Therefore, anyone captured, arrested, or detained in these conflicts fall under the protections of IHL. They fall into two categories: captured combatants who are protected by the Third Geneva Convention, or civilians who are protected by the Fourth Geneva Convention. The issue with regard to their detention in Guantanamo is that the US argues that they occupy neither status as combatant nor civilian, but rather are "unlawful combatants".[454] They are therefore "subject only to the protections afforded by IHL because of its *lex specialis status*, and not IHRL."[455] In addition, the fact that they are not being held in the United States but in foreign countries means that they are not covered by the laws or constitutional human rights protections of the United States.[456] This has been challenged as contrary to IHL, as a country cannot arbitrarily create a category that prevents an individual from being considered as neither a combatant who has become a prisoner of war nor a civilian.

The US position raises the question of extraterritorial jurisdiction over sites such as Guantanamo and other black sites around the globe. IHL dictates that terror suspects are afforded protection, either as enemy combatants who have become prisoners of war, or as civilians. As Tuck and de Saint Maurice state:

> "The designation of a group as a 'terrorist organisation' or its conduct as 'terrorist acts' has absolutely no bearing upon the applicability and application of international humanitarian law.

[453] Catherine Moore, 'The United States, International Humanitarian Law and the Prisoners at Guantanamo Bay', *International Journal of Human Rights,* vol.7, no.2 (2011) 1-27
[454] Marco Sassoli, *The Status of Persons Held in Guantanamo under International Humanitarian Law Journal of International Criminal Justice,* vol.2, no.1 (2004) 96
[455] US Department of State, *21.U.S. Additional Response to the Request for Precautionary Measures – Detention of Enemy Combatants at Guantanamo Bay,* Cuba, IACHR (15 July 2002)
[456] Patricia Goedde, 'Human Rights of Guantánamo Detainees under International and US Law: Revisiting the US Supreme Court Cases', *Journal of East Asia & International Law* (2014) 17

> The law applies in each and every case in which – as a matter of fact two or more organised parties are in armed conflict against one another, regardless of whether they are labelled terrorists or criminals."[457]

The correct procedure for people apprehended for these offences would have been prosecution and imprisonment if found guilty. Arguably, the main reason this has not been done rests on the general illegality of the means by which they have come into captivity or treatment once in captivity. This refers to processes such as extraordinary rendition in which people have been illegally kidnapped in countries across the globe and secretly transported to black sites and interrogated, often with the use of "enhanced interrogation techniques", often a euphemism for torture.[458] They have been denied the fundamental principles of due process such as the right to legal representation, impartiality, the presumption of innocence, *habeas corpus* and the right to be brought to trial in timely manner.[459]

This all means that any subsequent trial would be dismissed on the grounds that the defendant's rights have been flagrantly abused. It is instructive that in the recent case of *Belhaj and Anor v DPP*, the UK's Supreme Court ruled that with respect to rendition, the doctrine of state immunity does not prohibit claims being made against the government arising from further detention.[460] This is one of a number of similar rendition-based

[457] David Tuck and Thomas de Saint Maurice, 'International Humanitarian Law: A Legal Framework for Exceptional Circumstances', *Humanitarian Law and Policy* (2017) available at <https://blogs.icrc.org/law-and-policy/2017/11/30/international-humanitarian-law-legal-framework-exceptional-circumstances/> on 10 January 2019
[458] Elspeth Guild, Didier Bigo, and Mark Gibney, (Eds.) *Extraordinary Rendition: Addressing the Challenges of Accountability* (Routledge, Abingdon, 2018)
[459] Intelligence and Security Committee of Parliament *Detainee Mistreatment and Rendition* 2009-2010 HC1113 London: House of Commons
[460] Nicholas Clapham, *The Belhaj Finale: Exclusion of Closed Materiel Procedure Means less Scrutiny of DPP Decisions* (UK Human Rights Blog, 2018) available at

rulings handed down by domestic courts and the ECHR.[461] Therefore, the US has had to construct alternative legal justifications for their actions. These examples demonstrate a pattern of illegality and disregard for international law on the part of the US and its allies with specific reference to the UK in the way they have prosecuted the war on terror.

The case of Guantanamo is controversial, as the US has effectively attempted to place the detainees beyond the law. The US has categorised these detainees as existing in a legal limbo as they are perceived to be neither combatants nor civilians. However, as Sassoli avers, no one can be considered outside the classifications and protections of a combatant who has become a prisoner of war under the Third Geneva Convention or a civilian under the Fourth Geneva Convention. [462] He asserts that the captured Taliban should be considered as prisoners of war, and as for al-Qaeda members captured in Afghanistan, "…it may be justified to deny them prisoner of war status, on a number of legal grounds. However, as protected civilians, they may not be deported to Guantánamo, but may be detained in Afghanistan for the prosecution and punishment of criminal offences (including for having directly participated in hostilities)."[463]

Pearlman also categorically argues that US activity in Guantánamo Bay violate its obligations under the Third Geneva Convention as well as the International Covenant for Civil and Political Rights (ICCPR) and Convention Against Torture (CAT) in addition to customary international law (CIL).[464] These violations "…include illegal

<https://ukhumanrightsblog.com/2018/07/05/the-belhaj-finale-exclusion-of-closed-material-procedure-means-less-scrutiny-of-dpp-decisions-nicholas-clapham/> on 18 January 2019

[461] ECHR, 'Secret Detention Sites' available at <https://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF> on18 January 2019

[462] Marco Sassoli, 'The Status of Prisoners Held in Guantanamo under International Humanitarian Law', *Journal of International Criminal Justice,* vol.2 (2004) 96

[463] ibid

[464] Samantha Pearlman, 'Human Rights Violations at Guantanamo Bay: How the United States has Avoided Enforcement of International Norms', S*eattle University Law Review*, vol.38 (2015) 1109

and indefinite detention, torture, inhumane conditions, unfair trials (military commissions), and many more. These are human rights violations." [465] The extraterritorial legality of the use by the United States of its detention facility in Guantanamo is therefore an important test case regarding extraterritorial jurisdiction. De Londras makes the point that the prosecution of the war on terror has been characterised by attempts to deny suspects access to the right of habeas corpus in a US federal court.[466]

This is especially relevant as some prisoners have died while in custody, and their prolonged detention without due process can be construed as a violation of their right to life.[467] There have also been allegations that deaths reported as suicides were actually homicides, though a lack of transparency and accountability has made these allegations difficult to prove. Examples include the deaths of Mohammed al-Hanashi in 2007 and Abdul Rahman Al Amri in 2009, in which data released by the National Criminal Investigative Service under the Freedom of Information Act (despite heavily redacted sections) supported investigative evidence suggesting that these two detainees did not commit suicide.[468] Another prime example concerns deaths of Yassar Talal Al Zahrani, Mani Shaman Turki Al Habardi Al Tabi, and Ali Abdullah Ahmed, who all allegedly hanged themselves on the night of 9 June 2006.[469] The official accounts of this mass suicide failed to explain some basic questions as to how the three suspects managed to bind their own hands and feet together, shoved rags down their own throats, managed to

[465] ibid 1109
[466] Fiona de Londras, 'Guantanamo Bay: Towards Legality?' *Modern Law Review*, vol.791, no.1 (2008) 35
[467] Jonathan Hafetz, *Habeas Corpus After 9/11: Confronting America's New Global Detention System* (New York University Press, New York, 2011)
[468] Jonathan Kaye, *Cover-Up at Guantanamo: The NCIS Investigation into the 'Suicides' of Mohammed al Hanashi and Abdul Al Amri* (Independently Published, 2017)
[469] Stephen Lendman, *State-Sponsored Murders at Guantanamo: Extrajudicial Assassinations of Prisoners* (2016)

hang the noose themselves at an inaccessible height, or hid their deaths from guards for two hours.[470] These are some examples of a general process of obfuscation in investigating this event.[471]

The decision to label non-US terror detainees as enemy combatants and deny them constitutional protections in Guantanamo and other black sites around the world was based on the decision of the Supreme Court in both 1883 and 1891, namely that the constitution had no extraterritorial applicability in another country "as an axiom of international jurisprudence."[472] Another key ruling was made in the case of *Ahrens v Clark* in which the Supreme Court ruled that a federal district court could only issue a writ of *habeas corpus* for a person who was detained within court's territorial jurisdiction.[473] This also correspondingly meant that detainees could only file petitions with courts in the districts where they were being detained. This ruling therefore failed to the address the situation of those being detained abroad and outside US federal jurisdiction. A similar ruling was made in the case of Johnson *v Eisentrager* to the effect that German war criminals being detained in Germany were not in the jurisdiction of US courts, as they had at no time been physically present on US sovereign territory.[474]

In the case of *Boumediene v Bush*, the US Supreme Court ruled against the use of Guantanamo as a rights-free detention zone.[475] While the lease of 1903 allows the United

[470] Mark Denbeaux 'Death in Camp Delta' *Center for Policy Research, Seton Hall University School of Law* Newark, NJ, 2009) 4
[471] Mark Denbeaux and others, 'DOD Contradicts DOD: An analysis of the response to death in Camp Delta', *Center for Policy Research, Seton Hall University School of Law* Newark, NJ, 2014
[472] Kermit Roosevelt III, 'Guantanamo and the Conflict of Laws: Rasul and Beyond'*, University of Pennsylvania Law Review,* vol.153 (2017) 2030
[473] *Ahrens v Clark* [1948] US 188 335
[474] *Johnson v Eisentrager* [1948] US 339 763
[475] Riddhi Dasgupta, 'Boumediene v. Bush and Extraterritorial Habeas Corpus in Wartime', *Hastings Constitutional Law Quarterly,* vol.36, no.3 (2009) 425-456

States complete jurisdiction over the area, sovereignty ultimately remains with Cuba. The Supreme Court ruled by a 5-4 majority that the Military Commissions Act 2006 allowing for the right of habeas corpus of detainees to be suspended was unconstitutional and that detainees were entitled to a writ of *habeas corpus.* The response of Congress was the passage of the Military Commissions Act 2009 provided key rights to non-citizens of the United States charged or suspected of planning or committing acts of terrorism against the country.[476] These protections included the non-admissibility of statements obtained by torture, cruel, inhumane, or degrading treatment, protection against self-incrimination, protections against double jeopardy, and the rights to counsel, present evidence, or appeal decisions. However, these developments still did not address the issues regarding the legality of extraterritorial jurisdiction in Guantanamo under international law.[477]

The United States government has always claimed that the detainees at Guantanamo are only entitled to the protections provided under IHL as a result of its *lex specialis* status (or law governing a specific subject matter which overrides laws pertaining to general matters), but not under the protection of IHL.[478] In this case, the specific matter at hand is the viewing of Guantanamo detainees as enemy combatants who were engaged in armed conflict. As stated earlier, they were not even covered by human rights protections afforded under American law by virtue of their being detained in Cuba rather than the United States. This interpretation of international law presupposes that IHL and IHRL are

[476] Jennifer K. Elsea, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues* (Congressional Research Office, Washington, 2014)
[477] David J. R. Frakt, 'Applying International Fair Trial Standards to the Military Commissions of Guantanamo' *Southern Illinois University Law Journal,* vol.37 (2013) 551-597
[478] US Department of State, *21.U.S. Additional Response to the Request for Precautionary Measures – Detention of Enemy Combatants at Guantanamo Bay,* Cuba, IACHR (15 July 2002); Alexander Orakhelashvili, The Interaction between Human Rights Law and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' *European Journal of International Law,* vol.19, no.1 (2008) 162

mutually exclusive, although this view has been contested. For example, some see a form of complementarity in that they aim to perform the same function, but in different ways.[479]

Some also see a mixed framework where human rights law is used "as a robust gap-filler by tending to construe the absence of individual rights under IHL as a legal *lacuna*, and not a 'negative arrangement'".[480] The United Nations as well as the Inter American Commission in Human Rights (IACHR) have both concurred that Guantanamo is controlled not by Cuba, but by the United States.[481] This obviates the following argument made by the US authorities regarding obligations over sovereign US territory.

The US government has tried to make a distinction between sovereignty and jurisdiction, arguing that the original leasing agreement with Cuba allows for it to retain sovereignty over the area.[482] As a result, detainees are not entitled to the same protections available to those on sovereign US territory. This interpretation is based on the traditional Westphalian approach to the sovereignty of the nation state whereby one state cannot breach the jurisdiction of another state within its own territorial limits.[483] In making this argument, the US government fell back on the case of *Johnson v Eisentrager* where the Court ruled that German prisoners of war held in detention in Germany at the end of the Second World War were not entitled to contest their detention on the grounds of a breach of *habeas corpus.* This was based on the reasoning that American courts had no

[479] Alejandro L. Escorihuela, 'Humanitarian and Human Rights Law: The Politics of Distinction', *Michigan State Journal of International Law* vol.19, no.2 (2011) 551-597
[480] Yuval Shany, 'Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror' in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, Oxford, 2011) 26
[481] Cindy Buys, 'The Role of International Law and Institutions in US Detention Policy and Practices'*, Southern Illinois University Law Journal,* vol.37 (2013) 522
[482] Suzanne E. Gordon, 'Changing Concepts of Sovereignty and Jurisdiction in the Global Economy: Is There a Territorial Connection?' Working Paper Series 1, *University of Toronto Institute of European Studies*
[483] Daud Hassan, 'The Rise of the Territorial State and the Treaty of Westphalia' *Yearbook of New Zealand Jurisprudence* vol.9 (2006) 62-70

jurisdiction in Germany, as well as the fact that the German prisoners were never on sovereign US territory.

Of particular relevance here is the *Lotus* case,[484] which involved a collision in international waters between the Lotus and a Turkish ship, Boz-Court, in which eight Turkish sailors drowned. The Turkish authorities subsequently prosecuted the French officer on watch of the Lotus with manslaughter. France objected that Turkey did not have jurisdiction over a French citizen for an event that occurred in international waters. The case was referred to the International Court of Justice, which ruled that Turkey had not violated international law by its actions. This ruling meant that France did not exercise exclusive jurisdiction over what occurred in its ships on the high seas. Therefore, an offence committed on a French ship that had an impact on a vessel of another state, in this case Turkey, meant that there was nothing in international law prohibiting the Turkish authorities from responding as if the offence had been conducted on its vessel as well. This was referred to as subjective territorial jurisdiction and would go on to have a significant impact on customary international law.[485] Further case law corroboration came from the case of *United States v Spelar*[486] in which the Court ruled: "A US airbase in Newfoundland which had been acquired from Great Britain in 1941 was a foreign country within the provisions of the Federal Torts Act excluding recovery thereunder for claims arising in a foreign country".[487] It should be noted however that in instances such

[484] Permanent Court of International Justice, *The Case of S.S. Lotus: France v. Turkey Judgment* 1927
[485] An Hertogen, 'Letting Lotus Bloom', *The European Journal of International Law,* vol.26, no.4 (2016) 901-926
[486] William W. Bishop, *United States v. Spelar, American Journal of International Law,* vol.44, no.2 (1950) 408-409
[487] ibid 408

as this, Status of Force Agreements with states hosting US military forces will also govern the status and jurisdiction of military personnel.[488]

This view of extraterritorial jurisdiction was always a problematic basis for denying jurisdictional responsibility, especially as the existence of embassies, considered the sovereign territory of the foreign rather than the host state, has always been a repudiation of this strict interpretation of sovereignty. Proponents of international law in particular have always contested this interpretation.[489] Both the ICCPR and the UN Human Rights Committee have reiterated the same point, namely that a country cannot commit acts deemed unlawful in its own territory, in the territory of another state.[490] This has been confirmed in a number of domestic rulings such as in *Gherebi v Bush* and *US v Shiroma.* As Winchester argues, the conclusions under IHL, IHRL, and US case law is:

> "The United States has de jure sovereignty over Guantánamo Bay; de jure meaning that sovereignty has been relinquished from one group and given to another. Therefore, the United States is fully sovereign in the de facto sense; de facto is the term used to describe a government that is actually in control of a territory although it may not be legally recognized."[491]

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[488] United States Department of State, *Report on Status of Forces*, Washington, International Security Advisory Board, US Department of State (2015)
[489] Anthony J. Colangelo, 'What is Extraterritorial Jurisdiction?' *Cornell Law Review*, vol.99 (2014) 1303-1352
[490] Kevin J. Heller, *Does the ICCPR Apply Extraterritorially?* Opinio Juris 2006, available at <http://opiniojuris.org/2006/07/18/does-the-iccpr-apply-extraterritorially/> on 14 November 2018
[491] Sydney T. Winchester, *Examining the Legality of the Guantanamo Bay Detention Center According to International Humanitarian Law and International Human Rights Law* (University of Central Florida, Florida, 2016) 12

Approximately nine people have died at Guantanamo since its inception.[492] Some have died under suspicious circumstances. Many of these detainees, alongside others in similar sites around the world, have been subject to torture, abuse, cruel, inhuman, and degrading acts and behaviour.[493] The pictures released from Abu Ghraib demonstrated the true extent of the atrocities committed by US personnel.[494] Such acts are contrary to IHL as well as IHRL. Guantanamo therefore represents what Reprieve terms a declaration of "no human rights; as it has effectively created a category of human beings for whom universal human rights, which are deemed to be outmoded, do not apply."[495] This is an abrogation of its commitments under international law, especially with reference to Art. 3 of the Universal Declaration of Human Rights, which guarantees the right to life, liberty, and the security of the person. However, the consensus based on both international law and case law is that extraterritorial jurisdiction does apply to the human rights violations that have been taking place in Guantanamo as well as other countries where the US is conducting similar activities.

3.4.5 Proportionality

The principle of proportionality is another core principle designed to uphold the preservation of life under IHL. Rule 14 of the ICRC IHL CIL database reads: "Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be

[492] ACLU, *Guantanamo by the Numbers* (2018 available at https://www.aclu.org/issues/national-security/detention/guantanamo-numbers on 18 December 2018)
[493] International Bar Association, *Detention and Trial at Guantanamo Bay and Other US Detention Centres* London, International Bar Association (2009)
[494] George R. Mastroianni, 'Looking Back: Understanding Abu Ghraib', *Parameters,* vol.14, no.2, 2013)
[495] Reprieve, *The Declaration of No Human Rights* 2018, available at <https://reprieve.org.uk/the-declaration-of-no-human-rights/> on 9 November 2018

excessive in relation to the concrete and direct military advantage anticipated, is prohibited."[496]

Not all civilian casualties amount to breaches of IHL.[497] In fact, they do not have to be casualties resulting of an error or mistake; a party to the conflict can be sure that there will be collateral damage in civilian lives, and still proceed with the attack legally. Instead, the legality is dependent on the object of the attack and its justification.[498] Article 8(2)(b)(vi) states that that proportionality is measured "in relation to the concrete and direct overall military advantage anticipated."[499] Given the fluidity of this concept, proportionality is measured on a case-by-case basis. The level of human judgment involved is significant, as what may be a military advantage for one commanding officer, may not be for the other. Equally, what may be seen as excessive collateral damage by one may not be by the other.[500] This brings an element of uncertainty to drone warfare, where fully autonomous systems would be following a standard of law designed for human recognition and interpretation. The more autonomy granted to technology in armed conflict, particularly with regards to decision-making, the more significant this matter will become. The issue is then compounded manifold with the advent of artificial intelligence, however the technology and capabilities of artificial intelligence is outside the scope of this research. It will nevertheless be an extremely pertinent area of research in the near future, particularly in relation to armed conflict.

[496] ICRC, Customary IHL Database, available at >https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14< on 3 October 2018
[497] Eva Svoboda and Emanuela-Chiara Gillard, 'Protection of Civilians in Armed Conflict: Bridging the Gap between Law and Reality', *Humanitarian Policy Group*, vol.64 (2015) 1-8
[498] Lynn E. Davis, Michael McNerney, and Michael D. Greenberg, *Clarifying the rules of Targeted Killing* (Rand Corporation, Washington, 2016)
[499] ICRC, Customary IHL Database, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter4_rule14> on 3 October 2018
[500] Jason Wei, *The Case for Drone Warfare* (Dartmouth College, Dartmouth, 2016)

The subjectivity of applying the principle of proportionality poses further questions such as: who is responsible when a violation of IHL is committed by an autonomous weapon? What if this violation was committed without the intent or recklessness of a human being? Intentionality or recklessness is required for a war crimes prosecution,[501] and so a potential loophole is created. Some have argued for command responsibility to apply to autonomous weaponry.[502] Command responsibility, or superior responsibility, places responsibility of an act on a superior if they, with sufficient exercisable control, have knowledge of the subordinate's act or intended act, and fail to take necessary and reasonable measure to prevent or punish them.[503] However, command responsibility is based on the premise of intention, namely the failure to detect or report said intention. It is therefore difficult to apply to autonomous systems. Punishing superior officers for the crimes of autonomous weapons may be more akin to punishing negligence as opposed to recklessness or intention. War crimes would then need to be expanded to include negligence, which may risk over-criminalisation. At the same time, not holding anyone accountable can be viewed as accepting injustice.

The premise of responsibility may be taken further to the extent that fingers are pointed at weapons manufacturers. Examples can be taken from WW2 cases such as *United States v Carl Krauch, et al.*, also known as The IG Farben trial.[504] The directors of IG Farben, a German conglomerate of chemical firms, were found guilty of committing war crimes

[501] Rebecca Crootof, 'War Torts: Accountability for Autonomous Weapon Systems', *University of Pennsylvania Law Review*, vol.164, no.6 (2016) 1375; Badar, Mohamed Elewa, 'The Concept of mens rea in International Criminal Law: the Case for a Unified Approach', *Bloomsbury Publishing* (2013); Geert-Jan Alexander Knoops, *Mens Rea at the International Criminal Court* (Brill, 2016)
[502] Christof Heyns, *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, UN document A/26/36 (April 2013) 81
[503] ICRC, Customary IHL Database, available at <https://ihl-databases.icrc.org/ihl/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument> on 4 October 2018
[504] UN War Crimes Commission, 'The I.G. Farben Trials', *UN War Crimes Commission* Vol.X (1949)

amongst other counts for their role in manufacturing Zyklon B, a poison gas used in the Nazi extermination camps.[505] Such cases may be used as precedents for placing responsibility on drone manufacturers. However, a distinction could be made noting that Zyklon B was produced solely for the illegal intent of contributing to genocide. Drones and UAVs on the other hand are not inherently illegal and are more akin to the manufacturing of guns as opposed to chemical poisons.[506] A more relevant comparison may be the use of Caterpillar Bulldozers utilised frequently by the Israeli army to bulldoze Palestinian houses, ultimately leading to the death of American citizen Rachel Corrie in 2003.[507] Caterpillar Inc. was indeed taken to court however the case was dismissed and the Ninth Circuit Court of Appeals affirmed the district court's dismissal of the lawsuit, ruling that the court did not have jurisdiction to decide the case because Caterpillar's bulldozers were ultimately paid for by the United States Government. It found that it did not have jurisdiction to decide the case because it would intrude upon the United States political branches' foreign policy decisions.[508] The question then remains as to how the issue of responsibility will be dealt in light of UAVs' increasingly autonomous nature.

3.4.6 The issue of targeting arising from drones

Targeted killing can only be implemented against those combatants who are in a recognised armed conflict and there is "extremely clear evidence" that they are directly participating in hostility, or are an immediate threat to life and where capture is not feasible.[509] However, the DoJ 2013 White Paper on drone strikes specifically states that

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[505] ibid
[506] Mary Manjikian, *A Typology of Arguments about Drone Ethics*: (US Army War College, Carlisle, 2017)
[507] Jon Donnison, 'Rachel Corrie: Court rules that Israel not at Fault for Death', (*BBC*, 2012) available at <https://www.bbc.co.uk/news/world-middle-east-1939181> on 22 January 2019
[508] *Corrie et al. v Caterpillar, Inc.,* a Foreign Corporation ("Caterpillar") Case No. CV-05192-FDB
[509] David Whetham, 'Drones and Targeted Killing: Angels or Assassins', in David Whetham (ed.), *Killing by Remote Control: The Ethics of an Unmanned Military*, (Oxford University Press, Oxford, 2013) 76

the US "does not require clear evidence that a specific attack on US persons and interests will take place in the immediate future."[510] A common justification for not adhering to an accurate definition of imminence in counterterrorism is that in the context of targeted killing, the "last resort" of killing comes earlier than in routine police work, because terrorists "operate outside the legal jurisdiction of the people they intend to kill."[511] Jennifer Welsh notes that it is difficult to argue that individuals pose a genuinely imminent threat when the US, as largely is the case, do not know who they are or what they intend to do.[512]

As previously outlined, one of the core principles of IHL is that the state must distinguish between civilian and military targets.[513] In the context of drones, this principle may be considered as being particularly important to the way drones are used by states as opposed to their deployment as a combat mechanism. Article 48 of the Additional Protocol I requires that "the civilian population and combatants and between civilian objects and military objectives". This requirement of targeting is further recognised in Article 51(1) of Additional Protocol I and Article 13(1) of the Additional Protocol II. Further, this principle is also recognised as a core principle of customary international law.[514]

Article 52(2) of the Additional Protocol I clearly expresses that "attacks shall be limited strictly to military objectives.[515] Insofar as objects are concerned, military objectives are

[510] Department of Justice White Paper on Drone Strikes, February 2013
[511] Jeff McMahan, *Killing in War* (Oxford University Press, Oxford, 2009) 31
[512] Jennifer Walsh, 'The Morality of Drone Warfare' in David Cortright, Rachel Fairhurst, and Kristen Wall (eds.), *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, London, 2015) 233, footnote 54
[513] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports (1996) 226, para 78.
[514] ICRC, Commentary of 2016 to Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva 12 August 1949
[515] ICRC, *General Protection of Civilian Objects* (2019) available at <https://ihl-databases.icrc.org/ihl/WebART/470-750067> on 23 January 2019

limited to those 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." As a result of these standards, it is evident that there is a clear requirement on states to make sure that they take sufficient precautions that civilians are not targeted as part of the pursuit of their military objectives. Article 57 of the Additional Protocol I is also clear that as part of the state's precautionary steps, they must ensure that civilian entities are sufficiently protected.[516]

The main rationale for the distinction between civilians and combatants is to ensure that civilians are not targeted during hostilities. However, this prohibition in IHL law is not absolute. IHL only provides rights to combatants to participate in hostilities and therefore there is a degree of confusion as to whether terrorists or non-state actors defined as being within a sub-category of civilians have such rights to participate in hostilities. Those participants defined as combatants have rights contained in the Geneva Conventions 1949 and the Additional Protocol I. Specifically, Article 4A of the Geneva Convention III 1949 provides a right to prisoner of war status if captured during hostilities.[517] Articles 43 and 44 of the Additional Protocol I define "armed forces" and "combatants" so as to afford them a particular right to participate in the enduring hostilities.[518]

The significant advantage of being labelled combatants is that they are immune from criminal prosecution so long as their conduct during the hostilities has been in compliance

[516] ICRC, *Precautions in Attack* (2019) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/9ac284404d38ed2bc1256311002afd89/50fb5579fb098faac12563cd0051dd7c> on 23 January 2019
[517] ICRC, *Combatants and Prisoners of War* (2019) available at <https://ihl-databases.icrc.org/ihl/WebART/375-590007?OpenDocument on 23 January 2019
[518] ibid

with LOAC.[519] They also have the right to a fair trial.[520] However, the significant downside of being defined as being a combatant is the fact that they become legitimate military targets until they surrender or are wounded.

Those participants in hostilities that are labelled as civilians who take part in hostilities are treated differently from combatants whereby they are only considered as taken "direct part in hostilities" without the rights associated with combatants, such as prisoner of war status or combatant immunity.[521] This effectively means that those civilians who take part in hostilities do not become combatants but merely become civilians who take direct part in hostilities, costing them their civilian immunity.[522] Furthermore, they also become legitimate targets for the remainder of their involvement in the conflict without the combatant rights. The loss of rights for civilians who take part in hostilities is clear from Article 51(3) of the Additional Protocol I which states that "civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."[523] This protection afforded to civilians relates to not being the target of hostilities, the protection of civilians from the dangers in the hostilities, and the prohibition on indiscriminate attacks on civilians.

From a legal perspective, a critical issue is what constitutes "direct participation in hostilities" as the definition of this will determine whether a civilian participating in a

[519] Knut Ipsen, 'Combatants and Non-Combatants' in Fleck, *The Handbook of Humanitarian Law in Armed Conflict* (OUP, 2008) 301
[520] ICRC, Customary IHL Database, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule100_sectiona> on 23 January 2019
[521] Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (OUP, 2010) 187-189
[522] ICRC, *Direct Participation in Hostilities under International Humanitarian Law* (ICRC, 2003)
[523] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3

conflict will lose their civilian rights.[524] There has been some attempt to provide clarity on what is meant by "direct participation in hostilities. For example, the ICTY also undertook a definition of "direct participation in hostilities" in *Strugar* which defined it as "acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party."[525] The ICTY provided some examples of direct participation:

> "…bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces."

However, the Israeli Supreme Court in Public Committee Against Torture in *Israel v Government of Israel*[526] identified the dangers of having too broad or too narrow of a definition with a need for courts to be mindful of the need for a flexible definition where judges should adopt a functional approach on a case-by-case basis. In this particular case, the Court opined that those who acted voluntarily by, for example, acting as a human shield should be considered as being a direct participant.[527] However, those who provided essential goods or services such as the selling of food to combatants should not be considered as being directly involved in hostilities.[528]

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[524] Michael Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', *International Law and Politics* vol.42 (2010) 697-739
[525] *Prosecutor v Pavle Strugar* [2008] ICTY IT-01-42-A
[526] HCJ 769/02 *The Public Committee Against Torture in Israel v Government of Israel* [2006]
[527] ibid para 35
[528] ibid para 35-37

The ICRC has issued guidance on what is capable of amounting to direct participation by reference to the definition to the rights of a civilian as being:

> "…persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities."[529]

However, this definition does not provide clarity on what is capable of constituting direct participation.[530] Further, the 'ICRC Study on the Customary Status of International Humanitarian Law' expressly conceded this point by expressly acknowledging "a precise definition of the term 'direct participation in hostilities' does not exist."[531] The definition is particularly complex in NIACs where Article 3 in the Geneva Conventions and Additional Protocol II acknowledges participants but does not legitimise participation in conflicts. The 'Interpretative Guidance' states that:

[529] Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law', *International Review of the Red Cross*, vol.90 (2009) 995
[530] International Committee of the Red Cross, *Direct Participation in Hostilities Under International Humanitarian Law* (ICRC, 2003); Michael Schmitt, 'Deconstructing Direct Participation in hostilities: The Constitutive Elements', *International Law and Politics*, vol.42 (2010) 697-739
[531] International Committee of the Red Cross, *Customary International Humanitarian Law: Rules* (ICRC, 2005)

> "…In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities (continuous combat function)."[532]

The key problem is that there is no definition of what constitutes direct participation and further there is a new term that requires interpretation including "continuous combat function". This does not provide a basis to understand the point at which a non-state actor in hostilities loses their civilian status. The Interpretative Guidelines goes on to qualify the meaning of direct participation as being linked to three cumulative acts including:

> "(1) The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)."[533]

The requirement of these three cumulative acts may be taken as evidence of a desire to ensure that those civilians involved in a minimal participation in

[532] Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law', *International Review of the Red Cross*, vol.90 (2009) 1002
[533] ibid 1016

hostilities are not considered participants in the hostilities.[534] As a result, it may be argued that before a terrorist, as a non-state actor, becomes a legitimate military target, they must engage in a minimal range of acts before losing their civilian immunity.[535] However, it seems from the construction and interpretation of IHL that this determination on a minimal range of acts is very subjective to the facts of a conflict.[536]

The problem with this approach in IHL is that terrorists can easily rely on this weakness to effectively blend in with populations as a guise to retain civilian immunity which questions whether IHL can regulate this type of hostility.[537] The lack of clarity on the level of participation required creates considerable opportunity for terrorists to retain their civilian status, which would in effect limit the application of IHL given that civilians cannot be targeted.[538] In light of this discussion it is now appropriate to progress to the next section to analyse the applicability of IHL to drone warfare operations.

3.4.7 IHL's ability to regulate non-human weapons

[534] Hays Parks, 'Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise and Legally Incorrect', *New York University Journal of International Law and Politics,* vol.42, no.769 (2010) 777
[535] Michael John-Hopkins, 'Extrapolation of Criminal Modes of Liability to Target Analysis under IHL: Developing a Framework for Understanding Direct Participation in Hostilities and Membership of International Armed Groups in Non-International Armed Conflict', *Conflict and Security Law* vol.22, no.2 (2017) 275-310
[536] Michael Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', *Journal of International Law and Politics,* vol.42 (2010) 697-739; Nils Melzer, 'The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities Under IHL', *American society of International Law,* (2017) 299-306
[537] Frida Lindstrom, *Asymmetric Warfare and Challenges to International Humanitarian Law* (Uppsala University, Uppsala, 2012); Ivan Arreguín-Toft *How the Weak Win Wars: A Theory of Asymmetric Conflict* (Cambridge University Press, Cambridge, 2005)
[538] Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing, Oxford, 2008)

It may be argued that there are at least three blind spots in the applicability of IHL to regulate the on-going use of drones in NIACs.

First, the definition of an NIAC may not capture the reality of NIACs in practice.[539] Specifically, the requirement of an adequately intense conflict where the non-state entity is sufficiently organised may not always be the case given that modern threats to international peace and security can emanate from individuals as well as groups. While these groups and individuals may be bound by an ideology, it is highly questionable whether they are sufficiently organised in line with the definition envisaged for an NIAC. This suggests that states may have a need to engage in using drones to pursue a military objective, but that usage is not accurately captured by the legal definition of an armed conflict.

Second, there may be a need for IHL to recognise the need for NIACs to span international borders given the ability of non-state actors to move between countries as the basis to hide from states.[540] The problem exposed by the definition of combatant and civilian highlighted the potential that terrorist can use the gap in IHL to conceal themselves as civilians.[541]

Third, the level of organisation required does not capture all NIACs. Specifically, those individuals or smaller groups who may be inspired by larger entities may not be covered by IHL. This would mean that if an individual was inspired by al-Qaeda but operated

[539] Anthony Cullen, *The Concept of Non-International Armed Conflict in IHL* (Cambridge University Press, Cambridge, 2010)
[540] Alison Duxbury, 'Drawing Lines in the Sand – Characterising Conflicts for the purpose of Teaching IHL', *Melbourne Journal of International Law*, vol.8 (2007) 259-272
[541] Ingrid Detter, 'The Law of War and Illegal Combatants', *The George Washington Law Review,* vol.75 (2007) 1050-1104

outside of a specific command structure, any action taken against them by a state would not necessarily be regulated by IHL.[542]

3.5 Conclusion

The primary aim of this chapter was to assess the ability of IHL to regulate the use of drone warfare. The study then demonstrated that warfare has dramatically changed in step with technological developments. This technological shift has proven to be a pivotal moment in the evolution of armed conflict. As demonstrated throughout the chapter, much of current IHL has been premised upon the fact that wars have traditionally been fought on the battlefield. These wars were usually fought in defined periods of high-intensity battles between states. The proliferation of technologically advanced weaponry, in particular UAVs, has led to two established changes in armed conflict: prolonged periods of low-intensity conflict, and the rise and significance of non-state actors. Current IHL was not therefore written with the expectation of the increasingly fast-paced military operations experienced today.

The chapter then progressed to examine the ability of IHL as an international legal standard to regulate the use of drones. This discussion found that there were two issues at hand. First, the issue of the lawfulness of a state's action to engage militarily, which is addressed as part of the normal rules of international law found within the UN framework of laws. Second, after the decision to engage militarily, a further issue is whether IHL is equipped to sufficiently control the use of drones. The discussion here found that there at least two core key limitations of IHL in the regulation of drones. First, IHL does not define NIACs sufficiently to cover the prevailing circumstances where a state may decide

[542] Cedric Ryngaert, *Non-State Actors and IHL* (Institute for International Law, Leuven, 2008)

to use drones to pursue a military objective. Second, there are issues around constructing the threshold requirements of IHL for a minimum level of organisation and a sufficient degree of intensity before IHL can apply.[543] This creates a significant blind spot where IHL may not technically apply to circumstances where a state decides to rely on drones to pursue a military objective. There is an almost complete failure in IHL to define with sufficient clarity whether a terrorist can be considered a combatant or a civilian.[544] Furthermore, IHL does not sufficiently define the point at which a terrorist might be viewed initially as a civilian in a conflict but subsequently becomes involved in hostilities and loses their civilian immunity.

Rebecca Crootof identifies four ways in which new technology can be "legally disruptive". It can (A) alter how rules are created or how law is used; (B) make more salient an on-going but unresolved issue; (C) introduce new uncertainty regarding the application or scope of existing rules; or (D) upend foundational tenets of a legal regime, "necessitating a reconceptualization of its aims and purposes."[545] Drone warfare can be said to have disrupted IHL in two of the four ways, namely (B) and (C). It has made more salient the fact that IHL has been developed with a particular state-centric framework in mind based on historic norms that do not necessarily always apply in contemporary conflict. As a result, rules pertaining to non-state actors, for example, require further clarity.[546] The use of drones also highlights questions regarding the relationship between the LOAC and IHRL, which shall be expanded upon in Chapter 4. However, it has not

[543] Geneva Call, *Administration of Justice by Armed Non-State Actors* (2017) available at <https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf> on 24 January 2019
[544] René Vark, 'The Status and Protection of Unlawful Combatants', *Juridica International* vol.x (2005) 191-198
[545] Rebecca Crootof, 'Regulating New Weapons Technologies' in *New Technologies and the Law of Armed Conflict*, Eric Talbot Jensen (ed.) (forthcoming)
[546] Yale Law School, *State Responsibility for Non-State Actors that detain in the course of a NIAC*, Center for Global Legal Challenges (Yale 2015)

disrupted the law to the extent that rules are created differently. And while this research makes frequent reference to the dehumanising effects of drone warfare urging a re-establishing of the aims and purposes of IHL, there is not sufficient argument to claim that it has upend foundational tenets or that a complete reconceptualisation is required.

Given the rise and importance of non-state actors, there is now a need to review the capability of IHL to regulate and control contemporary armed conflict tactics such as drones. Technology and law adapt conjointly; as non-state actors begin to wield more power and influence in international conflicts, states have sought to develop more flexible and autonomous weaponry to combat these sporadic threats. In turn, the law must be evaluated to ensure that any new technology is sufficiently regulated in accordance with existing laws.

3.5.1 Approaches to change

There are at least three options as to how IHL can better regulate the use of UAVs. The first would be an inclusionary approach where IHL requires an update to expressly include drones and UAVs.[547] This would provide a pragmatic basis to recognise that drones and UAVs have formed part of military warfare and now require inclusion within legal frameworks. The first practical advantage is that UAVs deliver missile payloads that are less powerful than conventional bombs and which provide greater command control over firing decisions. For example, these missiles are "one-twentieth the size of a standard laser guided bomb or cruise missile and less than half the size of the smallest precision

[547] Vivek Sehrawat, 'Legal Status of Drones under LOAC and International Law', *Penn State Journal of Law and International Affairs* vol.5, no.1 (2017) 166-205

ordnance dropped from conventional aircraft."[548] Their use can therefore be construed as attempts by governments to comply with the principle of distinction and should therefore be recognised in IHL.

It can also be argued that such provisions for the inclusion of new weapons such as UAVs are already in place with regard to Article 36 of the Additional Protocol I to the Geneva Conventions of 1949 (AP I) in which states are required to decide whether the use of new weapons or methods of warfare are prohibited under IHL. This requirement to review the legality of new weapons applies to all states irrespective of whether they are party to AP I. As the ICRC states, "The assessment will entail an examination of all relevant empirical information, such as the weapon's technical description and actual performance, and its effects on health and the environment."[549] Even if there are no specific rules governing the use of UAVs under international law, their use is still governed by these long-standing provisions of IHL. The advantage of this option is clearly that the provisions governing the use of new weapon systems such as UAVS are already covered in IHL and there is no further need for IHL to be updated which in itself is a difficult prospect.

The problem with this option, however, is that it leaves states with the autonomy to self-authorise new weapons as conforming to IHL. The normal procedure is for states to first review whether a particular weapon is bound under treaty or customary international law. Having done this, they are then obliged to assess whether the use of such weapons comply with the provisions under Additional Protocol I. Finally, "in the absence of relevant treaty or customary rules, the reviewing authority should consider the proposed weapon in light

[548] Michael Lewis and Emily Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones', *Georgetown Journal of International Law,* vol.44, no.3 (2013) 1127-1166
[549] ICRC, *A Guide to the Legal review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977* (2006) available at <file:///C:/Users/msant/Downloads/icrc_002_0902.pdf> on 15 February 2019

of the principles of humanity and the dictates of public conscience, as well as likely future developments of the law."[550] As a result, the United States has controversially legitimised the use of drones in targeted killings as being in accordance with IHL, even though this has been contested. This has been predicated on the argument that current threats necessitate a transformation of the ideas, norms, and rules that constitute the global international order.[551] The subject of targeted killings is discussed further in great detail in Chapter 4 with particular reference to 'the right to life' under IHRL.

Questions have been raised regarding whether the principles of *jus ad bellum* and *jus in bello* can still apply to asymmetric forms of warfare between states and terror groups, or whether the principle of *jus in vim* (the just use of force) should be applied to these circumstances instead. This can be legitimately applied to "state-sponsored uses of force against both state and nonstate actors outside a state's territory that fall short of the quantum and duration associated with traditional warfare."[552] One rationale is that while targeted killings theoretically increase the efficiency of *jus in bello* through increased effectiveness and harm reduction, it also reduces the effectiveness of *jus ad bellum* by making the resort to force easier.[553] The resulting premise is that targeted killings are theoretically justifiable once large-scale military intervention is deemed morally

[550] ICRC, *A Guide to the Legal review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977* (2006) available at <file:///C:/Users/msant/Downloads/icrc_002_0902.pdf> on 15 February 2019
[551] Martin Senn and Jodok Troy, 'The Transformation of Targeted Killing and International Order', *Contemporary Security Policy,* vol.38, no.2 (2017) 176
[552] Daniel Brunstetter and Megan Braun, 'From Jus ad Bellum to Jus ad Vim: Recalibrating our Understanding of the moral use of Force', *Ethics and International Affairs*, vol.27, no.1 (2013) 87-106
[553] Kenneth Anderson, *Efficiency in Bello and ad Bellum: Targeted Killing Through Drone Warfare* (2011) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1812124 on 11 February 2019

permissible.[554] The use of *jus ad vim* is therefore applied to the use of force that falls outside the confines of traditional warfare.

Transnational terrorism has been largely responsible for creating an in-between space of moral and legal uncertainty where, although war has not been declared, force is still being used on a limited, though consistent, scale by state actors.[555] As Brunstetter and Braun state, "The need for a theory of *jus ad vim* arises from a normative trend in military affairs, namely, the perception that in contemporary and future conflicts the large-scale use of force may give way to small-scale, or 'surgical,' applications of force that not only have more limited and more predictable effects, such as reduced collateral damage, but also cost less and do not put 'our' soldiers in harm's way."[556]

One of the potential criticisms of *jus ad vim* is that all forms of violence have the potential for escalation. As Frowe argues, "It is conceivable that belligerents will intentionally structure their actions in such a way so that it is impossible to initiate *ad vim* action without a plausible probability of escalation to war. If so, then the *ad vim* framework might do more harm than good."[557] Marx gives the example of Boko Haram's tactic of kidnapping Nigerian girls and keeping them in their camps in close proximity to their fighters. This precludes *ad vim* actions such as drone strikes as these run the risk on the one hand of harming the victims, and on the other of instigating a full-blown conflict with

[554] Helen Frowe, 'On the Redundancy of Jus ad Vim: A Response to Daniel Brunstetter and Megan Braun', *Ethics and International Affairs*, vol.30, no.1 (2016) 117-129; Shannon Brandt Ford, *Jus ad Vim and the Just use of Lethal force-short-of-war* in Fritz Allhoff, Nicholas G. Evans, and Adam Henschke (eds.), *Routledge Handbook of Ethics and War* (Routledge, 2013)
[555] Michael Walzer, 'On Fighting Terrorism Justly', *International Relations,* vol.21, no.4 (2007) 480
[556] Daniel Brunstetter and Megan Braun, 'From Jus ad Bellum to Jus ad Vim: Recalibrating our Understanding of the moral use of Force', *Ethics and International Affairs* vol.27, no.1 (2013) 106
[557] Helen Frowe, 'On the Redundancy of Jus ad Vim: A Response to Daniel Brunstetter and Megan Braun', *Ethics and International Affairs* vol.30, no.1 (2016) 121

Nigeria. Such actions may, however, encourage other non-state actors to utilise similar actions to prevent the use of drone strikes. In such scenarios, the *ad vim* frameworks would have actually encouraged the use of violent behaviour rather than acting as a restraint.[558]

Another criticism of *jus ad vim* is that the more human rights influence is applied to IHL, the less feasible its application may be. By increasing individual rights and protections to a certain extent, states may in turn apply IHL even less through claims that it will hinder their military capabilities, thereby proving to be counterproductive. Finally, there is the argument that *jus ad vim* makes war less exceptional and more acceptable. In general, these solutions, considering the difficulties in changing international law such as the Geneva Conventions, appear to be Foucauldian forms of discourse aimed at the creation of legal constructs for legitimising acts such as targeted killings that clearly contravene international law.

The second option as to how IHL could regulate the use of UAVs would be an exclusionary approach where IHL could place a ban on the use of drones and UAVs, although a ban may fail to appreciate the reality of the arrival of this new technology which has already formed an important part of military warfare machinery.[559] Placing a ban on the use of drones under IHL would involve justifying why such weapons are sufficiently dangerous to warrant exclusion. The ICRC's legal review on the exclusion of weapons under IHL outline the types of prohibited weapons which include examples such as mines and bobby traps, asphyxiating, poisonous and other gases, bacteriological and

[558] Ryan Matthew Marx, *Creating Space: Drones, Just War and Jus ad Vim* (Kent State University, 2017) 76
[559] David Turns, *Droning on: Some International Humanitarian Aspects of the use of UAVs in Contemporary Armed Conflicts* (Cambridge University Press, Cambridge, 2014)

toxin weapons, and blinding laser weapons.[560] The missiles used by UAVs do not fall into this category of severity, so it would be difficult to rationalise their exclusion based on similar excluded weapons. Also, UAVs have the theoretical advantage over conventional bombing of being more targeted and less discriminatory. Therefore, they have a significant advantage over for example cluster munitions, which indiscriminately takes lives over a large area.

Another potential problem with the banning of UAVs under IHL is that some have argued that it is the principle of distinction that has encouraged the use of such weapons. While some countries have simply ignored the prohibition under IHL against attacking civilians being used as shields by irregular armed forces, others have tried to comply by finding technological means of targeting these forces in a manner that protects civilians.[561] In this respect, the United States has claimed that their targeted strikes try to comply with IHL by making certain that reliable intelligence on potential targets is gathered, often in real time. The fact that a drone can linger over a target for extended periods of time also allows for the time necessary to validate the relevant intelligence, for example through the use of 'pattern of life analysis' techniques.[562] However, the questionable veracity of 'pattern of life analysis' is indeed explained in Subchapter 2.5. The third option is that IHL can be left unchanged, but this approach would also fail to appreciate the use of drones and UAVs as part of military armed conflict.

3.5.2 Proposals

[560] ICRC, *A Guide to the Legal review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977* (2006) available at <https://www.icrc.org/en/publication/0902-guide-legal-review-new-weapons-means-and-methods-warfare-measures-implement-article> on 15 February 2019
[561] Michael Lewis and Emily Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones', *Georgetown Journal of International Law,* vol.44, no.3 (2013) 1127-1166
[562] Laurie R. Blank, 'After Top Gun: How Drone Strikes Impact the Law of War', *University of Pennsylvania Journal of International Law,* vol.33 (2012) 675-718

The most pragmatic solution would be for IHL to continue to update and evolve to ensure that the use of drones and UAVs are regulated. A potential method of updating or evolving the law is to follow the method of the *Tallinn Manual*. Such methods do not immediately change the law, but provide further explanation and detail as to how those laws ought to be applied as well as providing further clarity as to what the laws mean. If states begin to sign up and endorse such manuals, it would be easier to formalise them into law, serving as a stepping-stone of sorts.

Drones, as with other weapons, must satisfy two key legal criteria. The first is that it prevents unnecessary death, injury, and suffering. The second is that it has the capacity to adequately distinguish targets rather than being indiscriminate. This solution of updating IHL would arguably best be achieved in accordance with the four core principles of the law of armed combat: distinction, proportionality, preventing unnecessary suffering, and military necessity. One such area would be clarifying the distinction between direct participants in a conflict as opposed to those not directly involved. This especially applies to terrorists who fall neither within the categories of combatant nor civilian under IHL. The distinction needs to be narrowed, as having too wide an interpretation leads to civilians becoming lawful targets. IHL also needs to be updated to consider factors such as what constitutes military targets, proportionality, and the fact that most conflicts take place intra-state rather than inter-state.[563]

Proportionality on the other hand seeks to minimise incidental casualties and collateral damage. This requires a process of verification of all relevant areas such as the presence of the target, timings, and the need to issue warnings or evacuate an area. However, IHL

[563] Simon Bradley, *Geneva Conventions need Updating says ICRC* (2009) available at <https://www.swissinfo.ch/eng/geneva-conventions-need-updating--says-icrc/225360> on 15 February 2019

needs to produce guidelines as to what constitutes proportionate incidental casualties. This is especially relevant as it is argued that drone strikes kill more people as collateral damage than the actual target, with the kill proportion being on average ten innocent people to every targeted person killed.[564] In like manner, the core objective of preventing unnecessary suffering needs to be clarified under IHL as there is no universally accepted agreement on what constitutes unnecessary suffering. Finally, the objective of military necessity means that states can only deploy force for the purpose of subduing the enemy or achieving specific military objectives. The first point is that theoretically force cannot be resorted to without the existence of actual armed conflict, and the mere presence of a terror suspect in a village or town of a foreign state does not constitute an armed conflict.

Further, the issue of achieving military objectives by firing drones at targets in a country that has not given its permission has become an issue. Pakistan serves as an example of a state that has withdrawn its permission for drone strikes to take place in its territory. Some commentators argue that such a right automatically exists under the UN Charter's Article 51 right to self-defence.[565] However, others have argued that such actions violate both US policy and the sovereignty of the targeted state.[566] IHL therefore needs incremental updating to clarify many of these issues especially as the use of drones will only proliferate in the near future. These proposed adjustments must also take into consideration the increasingly autonomous nature of UAVs as well as their subsequent lack of human agency. The link between drone warfare and detachment and dehumanisation outlined in Chapter 2 may serve as a reference point for adjustments in IHL.

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[564] Neta Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post 9/11 Wars* (Oxford University Press, Oxford 2013)
[565] Vivek Sehrawat, 'Legal Status of Drones under LOAC and International Law', *Penn State Journal of Law and International Affairs,* vol.5, no.1 (2017) 166-205
[566] Waseem Ahmad Qureshi, 'The Legality and Conduct of Drone Attacks', *Notre Dame Journal of International and Comparative Law,* vol.7, no.2 (2017) 91-106

Chapter Four

International Human Rights Law

4.1 Introduction

This chapter continues to address the research objective of assessing whether contemporary armed conflict is in line with existing legal principles and the values that are meant to govern them.[567] Chapter 2 established the connection between drone warfare and dehumanisation. It concluded that there is a link between physical and psychological detachment that can affect the operation and laws of armed conflict. Chapter 3 assessed

[567] Research objective number three outlined in Chapter 1

current IHL and whether it is sufficient to regulate the rapid development of warfare technology. It concluded that IHL contains weaknesses in dealing with modern international conflicts stemming from its state-centric premise. In particular there is a call for greater clarity with regards to the distinction between combatants and civilians in the context of non-state actors. These changes are proposed through adjustments and updates to current laws, as opposed to wholesale overhauls or bans.

The current chapter reviews International Human Rights Law in light of the above. IHRL is assessed in detail after IHL as it is of growing relevance and application to the governing of situations of armed conflict. In some respects, it is a more detailed code and has a stronger enforceability system, such as individuals' right to take people to court. It therefore provides an outlet in cases where IHL may not. Despite this, IHRL poses its own problems that require discussion; there are uncertainties as to whether IHRL applies to a particular conflict, whether it applies to jurisdictions not party to IHRL, and to what extent it applies responsibility to allies of those involved in conflicts. These issues are all discussed throughout the chapter, starting with general issues in IHRL, in particular jurisdiction and responsibility, affirming states' positive obligation to proactively preserve life according to Article 2. The chapter then delves into specific rights under IHRL, namely the right to life and due process, followed by IHRL's applicability in armed conflict, concluding that it is indeed applicable in both times of war and peace.

4.2 General issues: jurisdiction and responsibility

4.2.1 Spatial and personal models of extraterritorial jurisdiction

The concept of IHRL obligations involves the development of the spatial and personal models of extraterritorial jurisdiction.[568] The former refers to the control exercised by a state over a specific area. The latter occurs in instances when agents of a state have or exercise power and authority over someone in another state. This requires that the actions of the agent are attributable to the state she or he is representing, rather than the state where the control is being exercised.[569]

The ruling by the European Court of Human Rights in the *Al-Skeini*[570] case established the fact that the exercise of controlling power by a state in the territory of another constituted jurisdiction. Other recent examples can be found in the case of *Jaloud v Netherlands*,[571] which involved the killing of Azhar Sabah Jaloud in 2004 at a military checkpoint in Iraq by Dutch soldiers. The Dutch authorities argued that control over the area where the killing occurred lay with the British and United States governments, inasmuch as they were the controlling powers. The Dutch soldiers were technically under the authority of the British Army.[572] The European Court of Human Rights ruled that the main issue in question was not that of the status of the occupying power, but rather that of the factual circumstances of the event.[573] The fact that operational control lay with the British Army did not absolve the Dutch of its jurisdictional obligations. The Dutch soldiers were not operating in Iraq due to having been deployed there by the British

[568] Aldo Ingo Sitepu, 'Application of Extraterritorial Jurisdiction in European Convention on Human Rights, Case Study: Al-Skeini and Others v. UK', *Jurnal Hukum International,* vol.13, no.3 (2016) 353-374
[569] Eleni Kannis, 'Pulling (Apart) the Triggers of Extraterritorial Jurisdiction', *University of Western Australia Law Review,* vol.40 (2015) 221-243
[570] *Al-Skeini and Others v United Kingdom* App no 55721/07 (ECHR, 7 July 2011)
[571] *Jaloud v Netherlands* App no 47708/08 (ECHR, 20 November 2014); Friederycke Haijer and Cedric Ryngaert, 'Reflections on Jaloud v. Netherlands', *Journal of International Peacekeeping*, vol.19 (2015) 174-189
[572] F Fleck, *The Handbook of the Law on Visiting Forces* (Oxford University Press, Oxford, 2018)
[573] Jane M. Rooney, 'The Relationship Between Jurisdiction and Attribution After Jaloud v. Netherlands', *Netherlands International Law Review*, vol.62, no.3 (2015) 407-428

government but rather by the Dutch government. They were therefore considered by the Court to be in full command at the time of the shooting and that responsibility for the "impugned act" lay with the Netherlands.[574]

This ruling has been questioned and is indicative of the inherent problems concerning the establishment or extension of jurisdictional responsibility, the practical authority granted to a legal body to administer justice within a defined area of responsibility. For example, Sari argues that "just because States retain full command does not mean that they exercise effective control over their armed forces or that those forces cannot fall under the effective control of another State or organisation."[575] This ruling is hard to reconcile with the ruling in the case of *Behrami v France*[576] involving the responsibility of a French brigade that was part of the KFOR security force in Kosovo for injuries caused by unexploded bombs.[577] The Court ruled that Convention could not be applied to UN Security Council Resolutions and that the application was therefore inadmissible on the ground that it was inadmissible *ratione personae.*[578]

> "This was because the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO. In such circumstances, KFOR was exercising lawfully delegated Chapter VII powers of the

[574] Friederycke Haijer and Cedric Ryngaert, Reflections on Jaloud v. Netherlands', *Journal of International Peacekeeping*, vol.19 (2015) 3
[575] Aurel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions?' *Military Law and Law of War Review*, vol.54 (2015) 12
[576] *Behrami and Behrami v France* App no 71412/01, ECHR (2 May 2007)
[577] Linos-Alexander Sicilianos, 'The European Court of Human Rights facing the Security Council: Towards Systematic Harmonization'*, International and Comparative Law,* vol.66, no.4 (2017) 783-804
[578] *Behrami and Behrami v France* App no 71412/01, ECHR (2 May 2007)

> UNSC so that the impugned action was, in principle, 'attributable to the UN'."[579]

The sending state therefore was not construed as surrendering effective control, even when its armed forces were part of a multinational force.[580] This has been described as a novel ruling inasmuch as the European Court had always maintained that the application of the Convention abroad to be applicable, the state in question needed to "exercise control over a territory much as it did at home".[581] The ruling was therefore construed as diluting the previous threshold of control advocated by the Court.

The second relevant example is the case of *Pisari*,[582] which was another case of a shooting at a checkpoint in 2012, this time by Russian soldiers at a security zone established in the Transdniestrian region of Moldova. In 2015, the European Court of Human Rights ruled unanimously that there had been "a violation of Article 2 (right to life and investigation) of the European Convention on Human Rights against the Russian Federation and that the Russian Federation should be held responsible for consequences arising from a Russian soldier's actions even though they had not occurred in Russia."[583] The ability to make this decision was made easier by the earlier admission of the Russian government to the important points that Pisari was under their jurisdiction and that the shooting had

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[579] ibid
[580] Terry D. Gill and Dieter Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2015) 237
[581] Amy Shepherd, *Reflections on Extra-Territorial ECHR Jurisdiction: Jaloud v The Netherlands* (2015) 476 available at <https://njcm.nl/wp-content/uploads/ntm/40-4_Special_Shepherd.pdf> on 15 November 2018
[582] Lea Raible, *The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should be Read as Game Changers* (University of Maastricht, Maastricht, 2016)
[583] ECHR, 'Russian Federation Responsible for the Death of a Moldovan Citizen at Peacekeeping Checkpoint', ECHR (21 April 2015) available at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-5067528-6236025&filename=003-5067528-6236025.pdf> on 18 January 2019

been their responsibility.[584] However, the Court's ruling in these two cases involves some ambiguity with regard to the two aforementioned spatial and personal models. In the *Jaloud* case, there is the implication, though it is not explicitly stated, that the spatial model applies.

This ruling in the *Jaloud* case is in keeping with the reasoning in the *Al-Skeini* case regarding the principle of controlling public powers. In this instance, the Court stated that "the Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation, or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government."[585] In the circumstances of the *Jaloud* case, the Court implied that the spatial model applies as the Dutch were operating in an area with the consent of the British who were effectively exercising the public power over that territory.[586] However, the explicit statement made by the Court uses the terms, "authority and control over persons passing through a checkpoint", which indicates the applicability of the personal model.[587] As already stated, the spatial model applies to the control a state has over a specific area. The personal model, however, covers instances when someone acting on behalf of a state is empowered to exercise power over someone else in another state where responsibility is assigned to the contracting state rather than the state where the power is exercised.[588]

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[584] Friederycke Haijer and Cedric Ryngaert, 'Reflections on Jaloud v. Netherlands', *Journal of International Peacekeeping*, vol.19 (2015) 174-189
[585] Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg'*, European Journal of International Law,* vol.23, no.1 (2012) 128
[586] Stuart, 'Refining A-Skeini v. UK: The ECHR's Grand Chamber Hearing in Jaloud v. Netherlands', *European Journal of International Law*, available at <https://www.ejiltalk.org/refining-al-skeini-v-uk-the-ecthrs-grand-chamber-hearing-in-jaloud-v-netherlands/> on 5 December 2019
[587] ibid
[588] Samantha Besson, 'International legal theory, The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to'*, Leiden Journal of International Law,* vol.25 (2012) 857-884; Cedric Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights*,' Utrecht Journal of International and European Law*, vol.28, no.4 (2012) 58-60

In the *Pisari* case though, due to Russian acceptance of responsibility and jurisdiction, there is much less elaboration on the judicial reasoning behind the Court's decision.[589] Therefore, there is no overt expression of whether the spatial or personal model applies. However, in referring to the concept of "public powers" articulated in the *Al-Skeini* case, there is the implicit suggestion that more emphasis is placed on the personal model. Some commentators have made the assertion that size can cause the spatial model to be subsumed within the personal model.[590] This is based on the reasoning that events that occur in a spatially limited area, such as a checkpoint in these two instances, are too small for the logical consideration of territorial control.

Further instruction might be derived from the case of *Tagayeva v Russia,* which dealt with the Beslan school siege in 2004 and the way the Russian state responded to the Chechen hostage-takers. The European Court of Human Rights ruled that states remained bound by the terms of the European Convention on Human Rights during a large-scale hostage situation. Galani examines this within the context of recent developments in which hostages are considered victims of human rights abuse. This can include breaches of their rights to life and to not be subject to torture as well as restrictions on their liberty and freedom of movement. The breach of human rights does not just apply to the way hostages are treated by terrorists, but also extends to the way states plan for, and respond to, this threat.

Galani identifies through the Court's case law a threefold responsibility by states in the way they deal with such threats. The first obligation is to take preventative measures to

[589] Lea Raible, *The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should be Read as Game Changers* (University of Maastricht, Maastricht, 2016)
[590] Friederycke Haijer and Cedric Ryngaert, 'Reflections on Jaloud v. Netherlands', *Journal of International Peacekeeping,* vol.19 (2015) 181

ensure such actions do not occur. This applies when the state has knowledge of, or should have had foreknowledge of, an impending hostage-taking attack. The second obligation deals with the way the state deals with the actual hostage-taking scenario. The third is the responsibility in the wake of such an event to adequately investigate the events and take the required remedial action, which can include some form of compensation to victims. Galani describes this as the preventative, operational, and procedural obligation states have under Article 2 and 13 in the fight against terrorism.[591] The Court examined the Russian state's performance in all three areas and concluded that it had failed to meet all three obligations under Article 2.

The importance of the ruling lies in the way the Court balanced the requirements of protecting the human rights of victims of hostage-taking with the requirements of governments being given a margin of appreciation in dealing with challenging situations where any course of action carries a high level of risk. It also confirmed the applicability of positive obligations on states to proactively take steps to uphold the Article 2 right to life. It can be argued that by placing victims and their rights to life under the Convention, the Court has raised the bar in terms of treating victims in a humane fashion. In this case at virtually every level, the Russian government was seen as failing to give primacy to the rights and safety of the hostages. The importance of the right to life of hostages was therefore an important step in humanising such victims that may be in this position in the future. There are certain parallels that can be drawn between this case and the actions of terrorists that hide within civilian populations. The question may arise as to whether civilian populations are being held hostage by terrorists, and whether the same accusation can apply to those civilian populations. This is especially relevant for civilian victims of

[591] Sofia Galani, 'Terrorist Hostage-taking and Human Rights: Protecting Victims of Terrorism under the European Convention on Human Rights', *Human Rights Law Review,* vol.19 (2019) 152

drone strikes often considered to be collateral damage. If the definition of hostage extended to those civilian populations, the stakes would certainly be raised for states considering engaging in drone attacks.

It can be next argued that there are problems in applying these precepts to the extraterritorial use of drones as a counter terrorism tactic.[592] Responsibility for a drone strike that violates the right to life is difficult to assign under the spatial model; by definition, such strikes are used to reach enemies in areas where the targeting government has no territorial control.[593] There is also the fact that the right to life is not absolute. For example, from an international perspective, the International Convention on Civil and Political Rights (ICCPR) only allows derogations from human rights law and the mandate to not violate human life in extraordinary circumstances, such as in times of national emergency or risk where the survival or life of the nation is threatened.[594]

Examples of states derogating from IHRL include the case of *Brannigan v UK*.[595] In this instance, the applicant challenged the derogation by the United Kingdom. This derogation led to their detainment without trial on suspicion of being involved with terrorist associated activity in Northern Ireland. The Court ruled that the derogation was justified and within the appropriate margin of appreciation. However, in the cases of *Şahin Alpay v Turkey*[596] and *Mehmet Hasan Altan v Turkey*,[597] the Court ruled that Turkey had

[592] Amy Shepherd, *'Reflections on extraterritorial ECHR jurisdiction: Jaloud v. the Netherlands'* in Lea, *The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should be Read as Game Changers* (University of Maastricht, Maastricht, 2016)
[593] Claire Methven O'Brien, 'The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: a Rebuttal', *Business and Human Rights Journal,* vol.3, no1 (2018) 47-73
[594] Marko Milanovic, 'Extraterritorial Derogations from Human Rights Treaties in Armed Conflict' in Nehal Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (Oxford University Press, 2016)
[595] *Brannigan and McBride v United Kingdom* App no 14553/89, 14554/89, ECHR (25 May 1993)
[596] *Şahin Alpay v Turkey,* App no 16538/17, ECHR (20 March 2018)
[597] *Mehmet Hasan Altan v Turkey* App no 132377/17, ECHR (20 February 2018)

violated their rights to liberty and free expression by not ending their pre-trial detention once the Constitutional Court had ruled that their detention was unlawful. Turkey's derogation in this instance was extreme and did not fit the criteria of being necessary and proportionate.

Derogations by states from their obligations under the ICCPR have generally been for internal situations that threaten the life of the nation in some manner. These have included cases of serious political and social disturbances (Bolivia and Yugoslavia); terrorist activities (Azerbaijan, Chile, Colombia, Israel, Nepal, Peru, and the United Kingdom); subversive activities (Ecuador and Bolivia); national disasters (hurricane Mitch in Guatemala); acts of sabotage (Peru and Sri Lanka); or civil war (Sudan).[598] However, whenever derogations under Article 4 ICCPR take place, a state is required to ensure that these only occur within strictly defined circumstances, as shown above. These must also be conveyed to the Human Rights Committee to justify the derogations. These requirements were further established in the rulings in the cases of *Ramirez v Uruguay* and *Landinelli Silva v Uruguay*.[599]

Failure to justify derogations would constitute a breach of a country's international law obligations. For example, Michaelsen gives the example of anti-terrorism legislation implemented by the United Kingdom, which attempts to justify derogations from their international legal obligations under both the European Convention on Human Rights and the ICCPR. He argued in 2005 that the circumstances do not meet the required standards

[598] Angelika Siehr, 'Derogation Measures under Article ICCPR, with Special Consideration of the War against International Terrorism', *German Yearbook of International Law,* vol.47 (2004) 550
[599] ibid 551-552

for justifying derogations and as such are therefore unlawful.[600] Drone warfare could perhaps be explicitly addressed in the ICCPR. An amendment may clarify that drones should only be used where there is "clear evidence of a threat to life" in order to limit any permissive drone use in future.

4.2.2 Jurisdiction in waiting

The concept of "jurisdiction in waiting", where a state may instantly exercise all or some of the public powers normally exercised by the home state, does not apply when bombing is used in an indiscriminate manner. [601] It is argued that because drones have the ability to cruise over a particular area for longer periods of time to make a more informed and accurate decision, they do not fit into the category of fighter planes.[602] However, while drones theoretically use targeting weapons, it is still difficult to have such precision as to only kill those in a "continuous combat function" and not innocent bystanders and civilians.[603]

Under IHRL, the arbitrary killing of civilians is prohibited and can only ever be justified when the act has occurred accidentally or unintentionally. From the latter perspective, it is possible for unintended acts to be foreseen as long as they were indeed unintended, "but even then it is licit only where there is no alternative to it."[604] Civilians are therefore afforded protection from direct attack as long as they are not actively taking part in the conflict. For attacks such as bombings and drone strikes, the attacker must take every

[600] Christopher Michaelsen, 'Derogating from International Human Rights Obligations in the War against Terrorism? A British-Australian Perspective', *Terrorism and Political Violence* vol.17, no.11-12 (2005) 131-155
[601] Robert Frau and Michael Ramsden, 'Drones in International Law', *Groningen Journal of International Law,* vol.1 (2013) 9
[602] ibid
[603] Robert Frau, 'Unmanned Military Systems and Extraterritorial Application of Human Rights Law', *Groningen Journal of International Law,* vol.1, no.1 (2013) 1-18
[604] Yuki Tanaka and Marilyn B. Young (eds.), *Bombing Civilians: A Twentieth Century History* (New Press, London, 2009) 209

reasonable measure to ensure that civilians are neither attacked nor harmed, or that the nature of the attack is not indiscriminate. IHRL employs the principle of proportionality to ensure that the force used is not excessive for the purpose being used.[605] This consists of four basic elements which find their legal basis in the Universal Declaration of Human Rights: "(a) the requirement of proportionate force relating to a state's resort to the use of force in self-defence under Article 51 of the UN Charter; (b) the concept of a proportionate, belligerent response in reprisal against an adversary's violation of IHL; (c) the *jus in bello* obligation to ensure that an attack does not cause disproportionate collateral damage; and (d) a state's duty under IHRL to ensure that the use of lethal force for law enforcement purposes is restrained and in proportion to the harm presented."[606]

The increased emphasis on drone warfare by the United States alongside other Western nations in recent years has brought the topic of the proportionate use of force into sharp focus.[607] Many communities in countries such as Afghanistan, Pakistan, and Yemen live with the daily reality that there are drones invisible to the naked eye hovering overhead that could deliver their devastating payload at any moment. This constant surveillance and fear of danger is a source of on-going terror for civilians, as it creates a daily scenario of unprecedented anxiety and fear that daily threatens the right to life.[608] This constant watch is an example of how the pursuit of enabling extraterritorial obligations in securing

[605] Bernard L. Brown, 'The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification', *Cornell International Law Journal,* vol.10, no.1 (1976) 134-155
[606] Jason D. Wright, 'Excessive Ambiguity: Analysing and Refining the Proportionality Standard', *International Review of the Red Cross,* vol.94, no.886 (2012) 826; Dan Efrony and Yuval Shany, 'The Rule Book on the Shelf: Tallinn Manual 2.0 on Cyber Operations and subsequent State Practice' *Hebrew University of Jerusalem Legal Research Paper,* no.18-22 (2018)
[607] Larry Lewis and Diane M. Vavrichek, *Rethinking the Drone War: National Security, Legitimacy, and Civilian Casualties in U.S. Counterterrorism Operations* (Quantico VI: Marine Corps University Press, 2017)
[608] Greg Bruno, *U.S. Drone Activities in Pakistan*, Council on Foreign Relations (2010); James Cavallaro, Stephan Sonnenberg, and Sarah Knuckey, *Living Under Drones: Death, Injury and Trauma to Civilians from U.S. Drone Practices in Pakistan* (New York University School of Law, New York, 2012)

the right to life is hampered by the way in which international relations takes place, especially where it undermines international (human rights) law.

4.2.3 The applicability and jurisdiction of IHRL in armed conflict

A primary issue that requires discussion is whether IHRL is applicable in armed conflicts. A traditional understanding of IHRL is that it is applicable in all situations.[609] However a state may, under certain circumstances, suspend all but the non-derogable aspects of IHRL. These circumstances are limited to cases of public emergency in which the life of the nation is threatened. The ICRC also makes the point that "Derogations have to be distinguished from limitations which are intrinsically related to qualified rights – such as freedom of expression – as opposed to absolute rights, such as freedom from torture, which provide for no possible restrictions and can never be derogated from."[610] The only other permissible exceptions are derogation clauses that have been included in specific treaties.

However, for the purposes of IHRL, the existence of an armed conflict or terrorist attack does not necessarily comply with the way it is defined under domestic law. Such instances are therefore not always sufficient in themselves to warrant being characterised as a state emergency. Instead, the events must pose an imminent threat to the organised life of the nation. Once such circumstances apply and a state of emergency and accompanying derogations have been declared, the state in question is required to notify the relevant international body and outline both the reasons for the derogations and the actions implemented. Even then, there is still a list of limitations that must apply to the declaration of derogations from IHRL commitments. Derogation measures must be "strictly required

[609] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, Oxford, 2008) 22-23

[610] ICRC, *Derogations* (2019) available at <https://casebook.icrc.org/glossary/derogations> on 16 March 2019

by the exigencies of the situation."[611] States must therefore limit the scope, duration, and severity of derogation according to the specific need of the crisis.[612] Entire rights cannot be eradicated or suspended even in the case of an emergency, and states are obliged to ensure that proper safeguards are in place to prevent abuse. Derogations must also be consistent with other obligations of the derogating state under IHL, and derogation must not discriminate based on "race, colour, sex, language, religion or social origin"[613]

IHL[614] and customary international law[615] generally form a more appropriate and explicit means of controlling and regulating the use of armed force in armed conflicts. IHL also constitutes the *lex specialis*, which governs the lawfulness of the use of force against lawful targets in IACs. It can also be argued that the traditional understanding of IHRL is conceived on this basis. There are exceptions to the general guarantee to the right to life. For example, Art. 2 of the European Convention on Human Rights places an obligation on the state to protect the right to life. These obligations are negative, in that it prevents the taking of life as well, and positive, in that it also requires states to protect the lives of its citizens.[616] However, the obligations of Art. 2 are not violated when death occurs in self-defence of oneself or another, during the lawful arrest of someone, or in the course of lawfully quelling a riot.[617]

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[611] Rulac Geneva Academy, *International Human Rights Law* (2017) available at <http://www.rulac.org/legal-framework/international-human-rights-law#collapse2accord> on 17 March 2019
[612] ibid
[613] ibid
[614] Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford University Press, Oxford, 2008)
[615] François Bugnion, *The Law of Armed Conflict: Problems and Prospects* (Chatham House, London, 2005)
[616] Liberty, *Article 2: Right to Life* (2018) available at <https://www.libertyhumanrights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-2-right-life> on 17 December 2018
[617] ibid

In the case of law enforcement, the principles of necessity and proportionality are vital, as they can legitimise the use of deadly force.[618] Therefore, the decision regarding the amount of force to be used must be proportionate to the threat. The principle of necessity is also relevant as the use of deadly force must be absolutely necessary for the protection and preservation of life.[619] Otherwise, offenders must be apprehended. In reality it is often difficult to distinguish between peaceful citizens and those with hostile actions or intent. An example of this difficulty can be found in the findings of the Watson Institute of International and Public Affairs, which has noted that while between 2003 and 2015 approximately 165,000 civilians died in Iraq from direct war related violence, at least twice that number may have died indirectly.[620] One of the many causes of these deaths was civilians who were killed as part of law enforcement during the period of occupation rather than the war itself.

The applicability of human rights in armed conflict is a hotly contested issue on the basis that it would unduly restrict military operations in an unrealistic manner.[621] Specifically, some military personnel engaged in armed conflict perceive IHRL as an unrealistic restraint on military action simply incapable of reflecting the realities of tactical military decision-making.[622] Despite this contention, IHRL remains applicable to all conflicts and represents a further basis to review the lawfulness of the use of UAVs and drones. This argument rests on at least three bases.

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[618] United Nations, *Resource Book on the Use of Force and Firearms in Law Enforcement* (United Nations, New York, 2017)

[619] Lawrence Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law', *Israel Law Review,* vol.47, no.2 (2014) 225-251

[620] Neta C. Crawford, 'Costs of War: Iraqi Civilians', *Watson Institute of International and Public Affairs* (Brown University, Providence, 2015)

[621] Kenneth Anderson, 'Targeted Killing in U.S. Counterterrorism Strategy and Law', *American University Washington College of Law* (2019) 14

[622] ibid

First, IHRL by its very nature has margins of appreciation capable of taking into account military requirements such as practical and tactical security operations. The term refers to the flexibility and room for manoeuvre that the European Court of Human Rights is prepared to allow states to fulfil their human rights obligations under the Convention.[623] The reason that this flexibility is often substantial is because in cases such as times of war, states are allowed, under the provisions of Article 15, to suspend all but a few rights. As O'Boyle states, "a generous margin of appreciation is allowed at such times as national authorities are better placed than Strasbourg institutions to judge when this criterion has been fulfilled (also known as the better position rationale)."[624]

Second, there is a growing body of case law such as *Hassan v United Kingdom* that has converged on the acceptance of the applicability of human rights law to armed conflicts.[625] Examples of rulings establishing this principle include the International Court of Justice.[626] Take the case of *Al-Jedda v UK* in 2011,[627] which involved the applicability of the ECHR to jurisdiction in an area of armed conflict. The applicant was a British national who was interned in Basrah by British forces between 2004 and 2007 on the allegation of being responsible for the recruitment of terrorists. The Court rejected the British government's claim that the internment was attributable to the United Nations. Instead it affirmed the applicability of Article 5.1 of the Convention and that internment was attributable to the United Kingdom.[628]

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[623] Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights*, (Council of Europe, Strasbourg, 2000)
[624] Michael O'Boyle, 'The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle'*, Human Rights Law Journal,* vol.19 (1998) 640
[625] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports (1996) 226, para 25
[626] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 136, para 106
[627] *Al-Jedda v UK* App no 27021/08, ECHR (7 July 2011)
[628] ibid

Third, the construction of IHRL affords states the ability to derogate from their obligations in times of emergency, which includes the ability of states to derogate from even the most fundamental human right, the right to life.[629] However the default position is the inherent right to life, which is likewise emphasised and enforced by all human rights treaties and conventions. For instance, the European Convention on Human Rights (ECHR) prohibit any "intentional deprivation of life" while the American Convention on Human Rights (ACHR) and the UN International Covenant on Human Rights (ICCPR) place an express prohibition on the "arbitrary deprivations of life."[630] The permissible derogation from the right to life in the ECHR allows states to derogate from this obligation to the extent that they engage in "lawful acts of war". Similarly, the UN ICCPR and the ACHR both allow for the derogation of the right to life as long as no life is "arbitrarily deprived."[631] This issue has been examined by the International Court of Justice (ICJ) where in the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, it expressly opined that:

> "…the Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.[632] Respect for the right to life is not, however, such a

[629] ECHR Article 15(1); ICCPR Article 4(1)
[630] ECHR Article 2(1); ICCPR Article 6(1); and ACHR Article 4(1)
[631] Icelandic Human Rights Centre, *The Right not to be Arbitrarily Killed by the State* (2018, available at <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-life/the-right-not-to-be-arbitrarily-killed-by-the-state> on 18 December 2018)
[632] Angelika Siehr, *Derogation measures under Article 4 ICCPR with special consideration of the war against terrorism* (*German Yearbook of International Law* 47, 2004)

> provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities."[633]

However, the ICJ went on to explain that:

> "The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[634]

This statement is significant as it reveals that the view of the ICJ is that IHL, as opposed to IHRL, should be used to determine the lawfulness of the use of drones or UAVs during a conflict as a means of warfare.[635] This contention rests on the basis that IHL is specifically designed and constructed to deal with this type of conflict situation. However, not every use of warfare will necessarily constitute an 'act of warfare' so as to engage IHL law. It is often the case that governments will attempt to re-classify a situation as something other than an act of warfare to evade obligations under IHL.

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[633] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* ICJ Reports (1996) 223, para 25
[634] ibid
[635] Nathalie Weizmann, *Remotely Piloted Aircraft and International Law* (ICRC, 2013) available at <https://www.icrc.org/en/doc/assets/files/2013/remotely-piloted-aircraft-ihl-weizmann.pdf> on 12 December 2019

For example, the British government consistently denied that military action in Northern Ireland constituted an NIAC. Instead, it categorised "the Troubles" as an internal matter pertaining to criminal law.[636] IHRL thus provides a basis to continue to apply to these types of circumstances where a state engages in military action outside of the scope of an act of war.[637] In light of the fact that the military actions over the course of the last three decades have frequently occurred outside of an official declaration of war, IHRL provides an important basis to regulate the use of force, and in particular context of this thesis, the use of drones and UAVs. The ICJ observed that there are at least three different permutations of the relationship between IHRL and IHL: "…some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law."[638]

In light of this discussion it is evident that IHRL may be applicable to the use of drones.[639] That being said, it is important to recognise that IHRL does not apply exclusively but rather shares justification with IHL. However, with reference to IHL it is necessary to understand the thresholds under which the concept of IAC is applicable. The commencement of an IAC is defined as follows:

> "Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of [Common] Article 2, even if one of the

[636] Marko Milanovic, 'The End of the Application of International Humanitarian Law', *International Review of the Red Cross*, vol.96 (2014) 163-188
[637] Michael J. Boyle, 'Is the US Drone War Effective?' *Current History,* vol.113, no.762 (2014) 137
[638] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 136*,* para 106
[639] Michael J Boyle, 'The Legal and Ethical Implications of Drone Warfare'*, The International Journal of Human Rights*, vol.19, no.2 (2015) 105-126

> Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4 [of the Third Geneva Convention]. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application."[640]

This relatively low threshold only requires a dispute between two states to result in the intervention of their armed forces. An IAC comes to an end under IHL when there is a cessation of hostilities that is both permanent and stable. This latter requirement is to avoid the problem where there are ceasefires or lulls in conflict followed by a resumption of hostilities.[641] Milanovic makes the point that the test for completion of an IAC must be an objective and factual one indicating the end of hostilities between all belligerents.[642] Nevertheless, the applicability of IHRL has an important role to play in examining whether it can control states' use of drones, as it has the potential to cover circumstances where IHL simply does not apply given the nature of specific military operations.[643] Examples include where there is no combatant capable of being identifiable in a specific military operation. A state may face internal military operations, where violence is exercised causing disruption, but not reaching the required intensity of violence or

[640] Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, vol.3: Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva, Article 2(1) (1960) 23

[641] Dustin A. Lewis, Gabriella Blum, Naz K. Modirzadeh, 'Indefinite War: Unsettled International Law on the End of Armed Conflict', *Harvard Law School Program on International Law and Armed Conflict,* (2017)

[642] Marko Milanovic, 'The End of the Application of International Humanitarian Law', *International review of the Red Cross*, vol.96 (2014) 173

[643] Christof Heyns and others, 'The International Law Framework Regulating the Use of Drones', *International and Comparative Law Quarterly,* vol.64, no.4 (2016) 791-827

organisation of forces. In such circumstances, the protections provided by IHL will not be available, while IHRL will continue to apply.

An issue that arises with examining the applicability of IHRL to the use of drones as a military tactic is where IHRL applies to a specific military operation or particular armed conflict. It has been demonstrated that IHRL continues to apply to armed conflicts, but the enforceability of IHRL may vary according to ratifications of specific jurisdictions.[644] In many instances, military operations or armed conflicts occur in jurisdictions that may not be a specific party to IHRL treaty law, which can impact its enforceability. For instance, the armed conflict might take place outside of the physical jurisdictional location of international human rights treaties. Therefore, a specific issue is whether, if at all, an affected individual can ever come within the jurisdiction of IHRL.[645]

This issue has been examined in human rights jurisprudence, which has commonly determined that 'jurisdiction' as noted within international human rights treaties has at least two possible dimensions.[646] Specifically, there is a territorial jurisdiction that is connected with the physical location of the state, but there is also secondary jurisdiction that is connected by having a "personal dimension."[647] This simply means that individuals who are within the physical borders of a state automatically come within the physical territorial jurisdiction of the state which automatically engages the state's human rights

[644] ECHR, Article 1, ICCPR, Article 2(1) and ACHR, Article 1(1), all limit the applicability of these human rights standards to the specific jurisdictions of the contracting parties.
[645] Eyal Benvenisti and Alon Harel, 'Embracing the Tension Between National and International Human Rights Law: The Case for Discordant Parity', *International Journal of Constitutional Law,* vol.15, no.1 (2017) 36-59
[646] *Al-Skeini and Others v United Kingdom* App no 55721/07, ECHR (7 July 2011); *Ilascu and Others v Moldova and Russia* App no 48787/99, ECHR (8 July 2004); Tim Dunne and Marianne Hanson, *Human Rights in International Relations* (2008) available at <http://socialsciences.exeter.ac.uk/politics/research/readingroom/Dunne-goodhart-chap04.pdf> on 17 December 2018)
[647] *Al-Skeini* Case, para 131 and *Ilaşcu* Case, para 312; Cedric Ryngaert, *Universal Criminal Jurisdiction over Torture: A State of Affairs* (Institute of International Law, Leuven, 2005)

obligations to that individual. For example, in *Al-Skeini* the applicant was located in the physical territorial jurisdiction of Iraq where the UK no longer had effective operational control given that the Iraq operation was deemed to have ended 1st May 2003. However, the applicant had a personal connection in that the military operation in question was perpetrated by British special forces operating on the ground in the newly reformed Iraq.

The European Court of Human Rights (ECtHR) determined in *Loizidou* that where a state exercises control over another jurisdiction by undertaking the exercise of some public powers normally associated with a state, then the human rights obligations of that state can extraterritorially apply within the controlled other jurisdiction.[648] It therefore reinforces the concept of spatial control in which a state exercises control of an area in another state. This may arise in some instances as a consequence of a military occupation of a country or part of a country. For instance, in *Loizidou*,[649] Turkey had undertaken the exercise of state-like powers by invading part of Cyprus in 1974 but subsequently refused to allow the applicant access to their property. This assumption of power in Cyprus and exercising of state-like powers was sufficient to allow the enforceability of the ECHR on an extra-territorial basis. This interpretation of 'jurisdiction' simply means that where a state exercises sufficient control in a foreign territorial jurisdiction, any human rights obligations of that state can apply on an extraterritorial basis specifically within the foreign territorial jurisdiction.[650]

Beyond a physical territorial connection with a location, and even where states do not exercise sufficient control over a foreign region, the state involved in military operations

[648] *Loizidou v Turkey* App no 15318/89, ECHR (23 March 1995); *Banković and Others v Belgium and Others* App no 52207/99, ECHR (12 December 2001) para 71
[649] *Loizidou v Turkey* App no 15318/89, ECHR (23 March 1995)
[650] Fons Coomans and Menno T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersentia, Antwerp, 2004)

remains bound by their human rights obligations. This means that a state remains bound by human rights on a personal basis between state and citizen.[651] For example, in the *Al-Skeini* case the ECtHR determined that arrested individuals or other individuals held in physical custody by agents of the state within the jurisdiction of another state remain within their international human rights treaty obligations.[652]

Examples such as the war on terror, the use of black sites for interrogation purposes in Guantanamo, extraordinary rendition, and the agreement of some states for the use of its air space by the US have all posed challenges to the extraterritorial applicability of the European Convention on Human Rights.[653] European states that have allied themselves with the US-led war on terror have brought into question the extent to which the Convention's scope applies to such issues. Some have simply argued that the Convention's jurisdiction should be applicable anywhere that a member state is exercising control over the rights of an individual or individuals. However, this is contrary to both the Convention and the ruling of the European Court of Human Rights. In the *Bankovic* case, [654] the Court delineated the exceptions concerning the territorial competence of a state. These exceptions apply in instances where a challenge is made to an extradition or exclusion order where there is joint control by two states; where a state has effective control of an area within the territory of another state and in diplomatic and consular cases.[655]

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[651] *Al-Skeini* Case, para 136
[652] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (University of Oxford, Oxford, 2011)
[653] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', *Leiden Journal of International Law*, vol.25, no.4 (2012) 857-844
[654] Erik Roxstrom, Mark Gibney, and Terje Einarsen, 'The NATO Bombing (*Bankovic et al v Belgium et al*.) and the Limits of Western Human Rights Protection', *Boston University International Law Journal* (2005) 56-136
[655] Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', *The European Journal of International Law*, vol.20, no.4 (2009) 1227

This definition of extraterritorial jurisdiction was narrow and did not conform to the Court's ruling in the case of *Issa v Turkey*.[656] In this instance, the case involved the detention, abuse, and killing of a group of shepherds in Iraq in 1995 by Turkish soldiers who were conducting military manoeuvres near and over the border.[657] In refuting the charges of the applicants who were family members of the murdered shepherds, the Turkish authorities argued that they never had jurisdiction in that area of Northern Iraq.[658] The presence of their soldiers in the area did not conform to the requirements of Article 1 inasmuch as they were not in effective control of the area. The applicants responded:

> "Turkey's ground operations in northern Iraq at the time were sufficient to constitute 'effective overall control' (within the meaning of the Loizidou judgment). Given the degree of control enjoyed by the Turkish armed forces of the area, they argued that the Turkish government had de facto authority over northern Iraq and its inhabitants, as opposed to de jure sovereignty."[659]

The Court went on to uphold the view that a state can be accountable for the violation of the right to life in the territory of another state as long as its agents or representatives are in some form of control of the area at the time of said violation.[660] It does not matter

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[656] Cedric Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights*,' Utrecht Journal of International and European Law,* vol.28, no.4 (2012) 58-60; *Issa v Turkey,* Application No. 31821/96, (16 November 2004)
[657] Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', *The European Journal of International Law*, vol.20, no.4 (2009) 1227
[658] ECHR, *Extra-territorial jurisdiction of ECHR States*, ECHR (July 2011) available at <https://www.refworld.org/pdfid/4e31312d0.pdf> on 18 December 2018
[659] *Issa v Turkey,* Application No. 31821/96, (16 November 2004)
[660] Claire Landais and Léa Bass, 'Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law', *International Review of the Red Cross,* vol.97 (2015) 1295-1311

whether the control being exercised is lawful or not.[661] The rationale for the ruling was that to rule otherwise would have enabled a state to commit violations on the territory of another state in which it was not empowered to do on its own territory.

There has been limited jurisprudence dealing with whether a state exercising insufficient control over another state can remain bound by their human rights obligations for specific actions. This is in relation to specific military operations within foreign jurisdictions where the affected individual is not in the physical custody of the state. The state, for example, may be a contracting party to a human rights treaty but does not have sufficient control over a foreign jurisdiction within which they are engaged in military action but do not have the affected individual in their physical custody.[662] This would be the case if a military operation were pursued by a state in another territorial jurisdiction where the pursuit ultimately impacts the domestic population but none of the local population is within the custody of the state pursuing the military action. The issue remains as to whether that state remains bound by their international human rights treaty obligations even though they may lack sufficient control over the foreign territory.[663]

Cases such as the *Issa* case suggest that it is possible for IHRL to hold states accountable even when the affected individuals are outside of the state's physical custody. For instance, in *Issa* the Turkish authorities pursued a military operation in Iraq which

[661] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (University of Oxford, Oxford, 2011)
[662] ibid 33-37
[663] Vassilis Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility', *Michigan Journal of International Law,* vol.36, no.1 (2014) 129-178; Lord Dyson (Master of the Rolls), *The Extraterritorial Application of the European Convention on Human Rights: Now on a former Footing, but is it a Sound One?* (Judiciary of England and Wales, 2014) available at <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf> on 9 January 2020

resulted in the deaths of some Iraqi shepherds.[664] The circumstances of the deaths were unclear but the evidenced presented to the ECtHR seemed to suggest that the Turkish authorities only came across the shepherds during the course of their military operation.[665] This opened the question as to whether Turkey was not in control at the time their deaths were caused. In this type of circumstance, the ECtHR opined that the state could be theoretically held responsible for their military action even though the concerned individuals were technically not within the control of the state.[666] As a result, it seems that human rights jurisprudence may be willing to impose human rights obligations on states on an extraterritorial basis even if they do not exercise sufficient control over a foreign jurisdiction as long as the affected individual is within the physical custody of the state.

There are at least two key contrasting cases of note that have explored the liability of the state in this type of circumstance. First, in the *Alejandre* case,[667] the Inter-American Commission on Human Rights (IAC) determined that the shooting down of two small planes by the Cuban military was in breach of the right to life enshrined in the 'American Declaration of the Rights and Duties of Man.'[668] This case is significant as it highlights the willingness of an international commission to accept that Cuba retained its human rights obligations over a region that was physically located in international waters.[669] Therefore, Cuba remained liable for its human rights obligations even though it exercised

[664] Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', *European Journal of International Law,* vol.20, no.4 1223-1246
[665] Cedric Ryngaert, 'Clarifying the Extraterritorial Application of the European Convention on Human Rights*,' Utrecht Journal of International and European Law*, vol.28, no.4 (2012) 58-60
[666] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (University of Oxford, Oxford, 2011)
[667] *Alejandre v Republic of Cuba* [1997] 966 F Supp 1239
[668] Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man (2 May 1948)
[669] *Alejandre Jr and Others v Cuba* [1999] IACHR 86/99 Case 11.589

no territorial control over international waters and the planes in question were not in the physical custody of Cuba. Second, in the *Bankovic* case[670] the ECtHR determined that a military operation undertaken by NATO was not bound by the ECHR human rights obligations given that the contracting states involved in the military operation did not exercise sufficient control over the foreign jurisdiction.[671] In *Bankovic*, the issue was pertaining to NATO air strikes in Iraq directed at news and media broadcasting outlets. In this particular case, the lack of control exercisable by the NATO countries meant that the ECHR could not apply on an extraterritorial basis given the exceptional nature of extraterritorial liability.[672]

Specifically, it may be argued that individualised attacks such as those in *Alejandre*,[673] which focus on specific targets, may come within the extraterritorial application of human rights law.[674] This may be attributable to the fact that individualised military operations in international waters may be taken as a desire on the part of the state to exercise control where no other state has exercised such control in that territorial area.

4.2.4 Summary of general applicability

This chapter is divided into two main sections: general issues in IHRL, namely state jurisdiction and responsibility, and specific rights under IHRL, in particular the right to life and due process. The first section began by comparing the spatial and personal models of extraterritorial jurisdiction, analysing the relevant cases and assessing their rulings and

[670] Erik Roxstrom, Mark Gibney, and Terje Einarsen, 'The NATO Bombing (*Bankovic et al v. Belgium et al*.) and the Limits of Western Human Rights Protection', *Boston University International Law Journal* (2005) 66
[671] Eleni Kannis, 'Pulling (Apart) the Triggers for Extraterritorial Jurisdiction'*, University of Western Australia Law Review,* vol.40 (2015) 225
[672] Kerem Altiparmak *'Bankovic:* An Obstacle to the Application of the European Convention on Human Rights in Iraq', *Journal of Conflict and Security Law,* vol.9, no.2 (2004) 213
[673] *Alejandre v Republic of Cuba* 966 F Supp 1239 (1997)
[674] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, Oxford, 2008) 135-139

application in IHRL. The section confirms the applicability of positive obligations on states to actively take steps to preserve life as per Article 2. The chapter then introduced the concept of "jurisdiction in waiting" where a state may extraterritorially apply the public powers of another state instantaneously. The said power cannot be exercised in the case of indiscriminate aerial bombings such that as of fighter jets, and arguments were given as to whether or not drones fall into this category. Finally, the chapter discusses the applicability of IHRL in armed conflicts, arguing that IHRL does apply to armed conflicts but has questionable enforceability on a practical level. It is a hotly contested issue requiring a balancing act between the provision of rights and the consequent restrictions to military operations. IHRL must become more practical as a remedy for individuals suffering injustices; otherwise states will continue to bypass its procedures to maintain military objectives.

The chapter will now turn to specific rights under IHRL, in particular the right to life and due process, assessing how they are applied to drone warfare.

4.3 Specific rights under IHRL

After introducing the general issues of jurisdiction and responsibility, the next section will examine specific rights under IHRL with emphasis on the right to life and due process. The section will include the varying sources that guarantee the right to life, such as ICCPR, the United Nations Declaration on Human Rights, the American declaration of Human Rights, and the European Convention on Human Rights. The section will also examine the concepts of positive and negative rights and obligations, the extraterritorial applicability of the right to life, and due process under IHRL. The concept of the right to life is especially important within the overall context of dehumanisation, which is the central theme of this research.

The use of technologically advanced weapons such as UAVs enables the dehumanisation of the enemy as elucidated in Chapter 2. This has raised the paradoxical juxtaposition of people increasingly being individualised and personalised (through targeted killings) yet simultaneously dehumanised. In this respect, the use of drones or UAVs represents specific circumstances that are unlike other types of weapons. This has been described as follows:

> "The crucial difference between 'fire and forget' weapons such as cruise missiles and drones is rooted in the fact that a cruise missile is directed against a target that is defined and located beforehand, such as a specific military object. Drones, however, can be deployed into a theatre of war and hovering for a long time, waiting for targets to appear or looking for targets actively via remote control and video feed. This characteristic of a more active and flexible use is what makes drones a special case and not simply the next step in a long line of weapons aiming to cover growing distances."[675]

This chapter concentrates on the right to life and due process as these are the rights most directly breached by the use of drones in targeted killings. This is an important process in addressing the research objectives of assessing the extent to which the nature of modern warfare has enabled the moral distancing from the dehumanisation process as well as the

[675] Sassan Gholiagha, 'Individualized and Yet Dehumanized? Targeted Killing via Drones Behemoth', *Journal on Civilisation,* vol.8, no.2 (2015) 129-130

increasing compartmentalisation of warfare that only exposes the civilians of one side of a conflict to danger.

There are a number of specific rights that will not be addressed. While they contribute to the overall process of dehumanisation, they are not necessarily carried out through drone warfare. These include prohibitions against torture, cruel, inhuman or degrading treatment or punishment, or prohibitions against arbitrary arrest and detention. Indeed, it can be argued that while political assassinations have long been a feature of politics, the process of individualisation of conflict represents a paradigm shift towards a form of individualised warfare.[676] This is facilitated by capabilities provided by UAVs and pose new challenges to IHRL.

4.3.1 The right to life

As stated above, the right to life is guaranteed in a number of sources of IHRL. Article 2 of the European Convention on Human Rights states the following:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person

[676] Lauren B. Wilcox, *Bodies of Violence*, (Oxford University Press, Oxford, 2015)

> lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."[677]

Article 2 imposes requirements on states to not just refrain from actions that jeopardise the right to life, but also obligations to ensure such rights are protected and maintained. These are negative and postive rights respectively and will be examined later in this section. However the obligation to positively protect the right to life by taking appropriate steps to safeguard the lives of people within its jurisdiction applies across a range of potential areas. One important point wth regards to positive obligations is that there may be a potentially infinite number of instances in which there is a need to provide potections to life. It is therefore unreasonable to expect the state to be held responsible for blanket universal protections from all forms of threats to life, especially those that occcur in private. There is also a sense in which individuals are personally responsible for not placing themesleves in situation where their lives are threatened. The Court therefore attempted to address this isue in the case of *Öneryildiz v Turkey*[678] in which it stated:

> "…this [positive] obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites ('dangerous activities' – for the relevant European standards."[679]

[677] European Court of Human Rights, *Guide to Article 2 of the European Convention on Human Rights* (Council of Europe, Strasbourg, 2018)
[678] *Öneryildiz v Turkey*, App no 48939/99, ECHR (30 November 2004)
[679] Dimitris Xenos, 'Asserting the Right to Life (Article 2, ECHR) in the Context of Industry', *German Law Journal,* vol.8, no.3 (2007) 236

This case dealt with protection from dangerous industrial activities, and the ruling therefore mandated that the obligations to provide protections to the right to life was based on the dangerous nature of the activities being undertaken in this case within its jurisdiction. These activities were dangerous by their very nature and were proving a threat to workers rather than activities which they were voluntarily exposing themselves to.

Providing such protections requires advanced planning by the state to ensure the establishment and maintenance of adequate legal, regulatory, and institutional provisions. Such obligations have especaily been established in a number of Court rulings. For example in the case of *Paşa and Erkan Erol v Turkey*, the Court ruled that the Turkish state had a positive obligation to protect the right to life by taking effective measures to protect life from being endangered by an anti-personnel mine.[680] In the case of *Budayeva and Others v Russia*, which concerned mortal risks to a community from mudslides, the Court held that "there has been a violation of Article 2 of the Convention in its substantive aspect on account of the State's failure to discharge its positive obligation to protect the right to life; and that there had been a violation of Article 2 of the Convention in its procedural aspect, on account of the lack of an adequate judicial response as required in the event of alleged infringements of the right to life."[681]

The Court has established similar obligations to take preventative actions to protect individuals from risks to life in a number of other areas. These include but are not limited to: the killing of a person in a conflict zone, the killing of someone who has been the witness to a crime, killings of hostages during a terror attack, and the killing of a conscript

[680] *Paşa and Erkan Erol v Turkey* App no 51358/99, ECHR (7 September 1999)
[681] *Budayeva and Others v Russia* App no 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, ECHR (29 March 2008)

during military training or service. In like manner, obligations have been imposed for the protection of members of society from threats to the right to life in the areas of healthcare, domestic violence, environmental harm, the mentally ill, and self-harm. Protections from such risks to life require the state to be proactive in planning and establishing systems for such protections to be available for the general population, as elucidated above in the case of *Tagayeva v Russia*.[682]

As mentioned, these obligations all require a degree of advanced planning by the state so as to protect the right to life. However, the Court has made clear that these obligations do not obviate the individual's responsibility for ensuring his or her personal safety. Therefore Article 2 does not provide or suggest an absolute right to security and protection. This was established in the case of *Molie v Romania*[683] and *Gokdemir v Turkey*.[684]

The right to life under Article 2 has been interpreted as an absolute right, but there are exceptions whereby the article regulates the way state can legitimately use [lethal] force. Therefore, there are certain usages when the right to life contained in Article 2 is not breached. These include when a public authority uses necessary force to: stop someone from committing unlawful violence, make a lawful arrest, prevent them from escaping custody, and to stop a riot, uprising, or other threat to public order.[685]

As for protection in the International Covenant on Civil and Political Rights 1960, Article 6.1 states that:

[682] *Tagayeva v Russia*, App no 42633/18, ECHR (27 August 2018)
[683] *Molie v Romania,* App no 14326/11, ECHR (18 June 2013)
[684] *Gökdemir v Turkey,* App no 66309/09, ECHR (19 May 2015)
[685] Equality and Human Rights Commission *Article 2: Right to Life* (London, 2018)

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."[686]

The current concept of the right to life was outlined in international documents in the United Nation's Universal Declaration of Human Rights as well as the American Declaration of the Rights and Duties of Man in 1948. Article 3 of the United Nation's Universal Declaration of Human Rights states that "Everyone has a right to life, liberty, and security of the person."[687] However, the European Convention on Human Rights of 1950 was the first international document to offer a means of enforcing this right, as well as delineating the circumstances under which it was permissible to take human life.[688] These included capital punishment, a sentence handed down by a court once due process had been carried out, and in cases of self-defence where lethal action was justifiable for the protection of one's life or the life of another.

[686] United Nations Human Rights Office of the High Commissioner, *International Covenant on Civil and Political Rights* (2018)
[687] Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71
[688] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

The case of *Timurtas v Turkey* led to another unique application of Article 2 of the ECHR by the Court.[689] This case involved the disappearance of a man taken into custody by Turkish authorities. The unique aspect of this ruling is that the Court stated that circumstantial evidence was permissible in the absence of a body. It therefore ruled that the Turkish authorities had violated Articles 2 and 3 despite no body having been found.[690] This case moved away from the necessity for direct evidence previously established in *Kurt v Turkey*.[691] This was partly based on the fact that in the *Kurt* case, even though the Turkish authorities had provided details on the relevant domestic legal provisions, they had failed to provide similar details in the *Timurtas* case.

The Court also took into account the contradictory nature of the existing state of emergency powers existing in the region at the time prohibiting liability claims being made against the regional authorities. Article 125 of the Turkish Constitution mandated that all acts by state authorities were subject to judicial review and that such authorities were liable to reparations for damages caused by their actions. Furthermore, the Court could not ascertain the authenticity of the official documentation relating to the victim's detention. In the process it ruled that Convention proceedings did not always require the rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation).[692] The importance of this distinction is that it places a positive, rather than negative, right on states with regards to the right to life. This extends the state's duty further than merely safeguarding the right to life to being obliged

[689] *Timurtaş v Turkey* App no 23531/94, ECHR (13 June 2000)
[690] ibid
[691] *Kurt v Turkey,* App no 15/1997/799/1002, ECHR (25 May 1998)
[692] *Timurtaş v Turkey* App no 23531/94, ECHR (13 June 2000)

to ensure the right to life is maintained. The Court therefore ruled that the provisions of Article 2 included positive obligations on the state to protect the right to life.[693]

4.3.1.1 Positive and negative rights

The concept of rights in general, whether under constitutional or international law, has traditionally been depicted in terms of negative rights. Isaiah Berlin was one of the key thinkers to articulate a difference between negative as opposed to positive freedoms and rights.[694] Negative or first-generation rights have been of particular importance because they underpin most constitutional rights that aim to protect the individual from excessive state power.[695] However, there has always been the argument that negative rights on their own do not enable the individual to access these rights fully and therefore need to be complemented with positive rights, which require state action rather than ensure forbearance. These are the right to access and secure a certain standard of living.[696] The juxtaposition of these two concepts is inherently paradoxical because whereas negative rights place limits on a state's power and right to intervene, positive rights require active state intervention.

A key argument within the field of IHRL, however, is whether positive rights translate to positive obligations and are applicable to areas such as the right to life, liberty, security, a fair trial, privacy, and all the other rights contained in international law such as the European Convention on Human Rights. Positive obligations placed upon states arguably

[693] Irum Taqi, 'Adjudicating Disappearance Cases in Turkey: An Argument for Adopting the Inter-American Court of Human Rights Approach', *Fordham International Law Journal,* vol.24, no.3 (2000) 940-987
[694] Isaiah Berlin, 'The Concept of Liberty' in Isaiah Berlin, *Four Essays on Liberty*, (Oxford University Press, London, 1969)
[695] Bruce Baum and Robert Nichols (eds.), *Isaiah Berlin and the Politics of Freedom: 'Two Concepts of Liberty' 50 Years Later* (Routledge, London, 2013)
[696] John Christman, 'Liberalism and Individual Positive Freedom', *Ethics,* vol.101 (1991) 343-359

take on an even greater significance when applied to extraterritorial jurisdiction. These obligations are positive in that they require a state to take substantive action to eradicate or severely limit the use of the death penalty. This is further elaborated upon below in subsection 4.3.1.2.

The idea of positive rights places a responsibility on the state to actively protect rights rather than simply refraining from interference. The European Court of Human Rights has adopted a twin-track approach in dividing the obligations of states into both negative and positive obligations.[697] Initially, the Convention only dealt with negative rights. This began to change in 1968 with the Court's ruling in the *Belgian Linguistic* case[698] in which "The European Court held that the right to education does not imply a duty on the state party to provide free or subsidized education of a specific type or a specific level. But the court confirmed that there was a right to access for individuals to the existing educational institutions and for individuals to receive official recognition of the studies they have undertaken."[699]

This interpretation theoretically extended the requirements of an obligation from refraining from doing certain things to obligations to take measures to protect the rights of the individual. Akandji-Kombe makes the distinction between the two by stating "Violation of the Convention will result in the first case from inaction, i.e., passivity, on the part of the national authorities, and in the second case from their preventing or limiting the exercise of the right through positive action."[700] It can therefore be argued that Art. 2

[697] Tugba Guler, Positive Obligations in 'Doctrine of the European Court of Human Rights: is it Cogent or Obscure', *European Journal of Multidisciplinary Studies,* vol.16 (2017) 358-364
[698] Thomas Buergenthal, Case Relating to Certain Aspects of the Law on the use of Languages in Education in Belgium Judgment', *International Legal Materials,* vol.8 (1969) 825-849
[699] Sheeba Pillai, 'Right of Education under European Convention for the Protection of Human Rights and fundamental Freedoms 1950', *Christ University Law Journal,* vol.1 (2012) 107-108
[700] Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights*, (Council of Europe, Strasbourg, 2007) 11

of the Convention not only places a negative obligation on the state to refrain from any action that could jeopardise life, but also includes a positive obligation to actively adopt measures to protect life.

A prime example of positive obligations in the context of the right to life where a state was required to take substantive action can be found in the case of *al-Sadoon and Mufdhi v United Kingdom*[701] in which the ECHR ruled that the UK government had done nothing to ensure that the applicants' Convention-based right to life would be secured when transferring them to Iraqi custody.[702] The Court similarly ruled against the UK government in the case of *McCann and Others v United Kingdom*.[703] This case involved the shooting of supposed terror suspects by the SAS on the basis of intelligence, which turned out to be partly false.[704] The court ruled that the deployment of the SAS demonstrated a failure to consider arrests, meaning that the force was disproportionate to the threat and that the provisions to the right to life under Article 2 had been breached. This effectively meant that the state had a positive responsibility to ensure that the principles of the right to life and due process had been maintained.

Examples of rulings given by the Court pertaining to the controversial policy of extraordinary rendition include the cases of *Al- Nashiri v Romania*[705] and *Abu Zubaydah v Lithuania*.[706] The *Al-Nashiri* case involved the renditioning of the suspect to Romania where he was subject to arbitrary detention as well as ill treatment at one of the CIA's secret black site facilities. He was detained at this facility for eighteen months while facing charges in the United States of being involved in terror attacks, which carried the

[701] *Al-Saadoon and Mufdhi v United Kingdom* App no 61498/08, ECHR (30 June 2009)
[702] ibid
[703] *McCann and Others v United Kingdom* App no 18984/91, ECHR (27 September 1995)
[704] ibid
[705] *Al-Nashiri v Romania,* App no 33234/12, ECHR (31 May 2018)
[706] *Abu Zubaydah v Lithuania,* App no 46454/11, ECHR (31 May 2018)

death penalty. The Romanian authorities duly denied responsibility for US actions carried out on these CIA run facilities. However, the Court ruled that the Romanian government knew of the types of activities being carried out on its territory and that these actions contravened rights contained within the Convention. Romania therefore had a positive obligation to ensure that there were no violations of Convention rights being undertaken within its jurisdiction.[707]

In like manner in the *Zubaydah* case, the suspect was subject to enhanced interrogation techniques, including waterboarding. As with Romania, the Lithuanian government claimed to have no knowledge of or control over the activities conducted on its territory by the CIA. However, the Court made the point:

> "Following an extensive and detailed analysis of evidence in the present case, the Court has established conclusively and to the required standard of proof that the Lithuanian authorities knew of the nature and purposes of the CIA's activities in their country and cooperated in the execution of the HVD Programme; and that the Lithuanian authorities knew that, by enabling the CIA to detain terrorist suspects – including the applicant – on their territory, they were exposing them to a serious risk of treatment contrary to the Convention."[708]

[707] ECHR, 'Romania Committed Several Rights Violations due to its Complicity in CIA Secret Detainee Programme', ECHR (31 May 2018)

[708] *Abu Zubaydah v Lithuania,* App no 46454/11, ECHR (31 May 2018) 261

Consequently, the government had failed in its positive obligation to comply with its responsibilities under the convention for actions carried out in its territory. The importance of positive obligations in this regard has been affirmed by the United Nations.[709] These positive obligations apply to states which are required to protect individuals on its territory or over which it has jurisdiction from infringement on their rights. This means taking active steps to ensure that no one operating on its territory is engaging in or contributing to acts of torture.

In addition, "while clearly responsible for wrongful acts committed extraterritorially or having an extraterritorial effect, a State may also be responsible for indirectly attributable extraterritorial wrongfulness owing to a failure to fulfil its positive human rights obligations. In such scenarios, the criterion of "effective control" may be taken into account to assess the standards of due diligence that a State is legally obliged to demonstrate in a given situation."[710] Moreover, the principle of *non-refoulement* imposes an obligation on states to not expel, extradite or *refoule* an individual to another state where there was a real risk of that person being subject to torture, ill treatment, or the death penalty in the receiving state. The Court ruled in the case of *Soering v United Kingdom* that the state executing the extraditing or *refoulement* would be responsible for any breaches of the Convention in the receiving state, even if such breaches were beyond its control.[711]

[709] Amnesty International, *Husayn (Abu Zubaydah v Poland Application No. 7511/13, Written Submission on Behalf of Amnesty International and the International Commission of Jurists Interveners* (2013)
[710] Vassilis Tzevelekos, 'Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility', *Michigan Journal of International Law,* vol.36, no.1 (2014) 129-178
[711] *Soering v United Kingdom* App no 14038/88, ECHR (7 July 1989)

As for the ICCPR, The Human Rights Committee commented on Article 6 of the International Covenant on Civil and Political Rights by stating, "Article 6 recognizes and protects the right to life of all human beings. It is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies which threatens the life of the nation." The Committee went on to stipulate that this comment imposes a positive obligation on a state to enact legislation and measures that actively protects the arbitrary deprivation of life from all threats that are preventable and foreseeable, whether caused by an act or an omission.[712]

Also, state obligations include protecting individuals from threats to the right to life posed by other states, and any institution or company that is operating within its jurisdiction, or most importantly, in other areas subject to its jurisdiction.[713] With regard to extraterritorial jurisdiction, the Committee also reiterated the requirement that states respect the right to life of those who are outside the territory of a state but still under its effective control or comprises territory that it is occupying. Even in instances where the state in question is not exercising effective control, the obligation remains if their military is in the position to have an impact on the right to life of a person or persons.[714]

4.3.1.2 Positive and negative obligations

Positive and negative rights are analysed from the perspective of the individual, whereas positive and negative obligations are analysed from the perspective of the state. As briefly mentioned in Subchapter 4.3.1.1, positive obligations represent obligations that go beyond the requirements to merely respect human rights and require active measures to

[712] Human Rights Committee, *General Comment No.* 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (31 October 2018)
[713] ibid
[714] Aurel Sari, 'Untangling Extra-territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions?' *Military Law and Law of War Review*, vol.54 (2015) 287-318

ensure the protection of such rights as well.[715] Subchapter 4.2.1 articulates the difference between the spatial and personal models of territorial control, namely that the former refers to the control exercised by a state over a specific area whereas the latter occurs in instances when agents of a state exercise power and authority over someone in another state.

Milanovic, however, argues for a third concept; states should be bound by negative obligations where human rights are concerned irrespective of issues relating to territorial borders or control. This is based on the argument that states have control and ultimate authority over and responsibility for their own agents.[716] They are therefore in a position to ensure that these agents do not breach human rights generally and the right to life specifically. However, as Da Costa argues, the omission of an obligation on states to prevent the commission of human rights by third parties, even where it lacks territorial control, is a potential shortcoming of this model.[717] Therefore, states should respect the right to life regardless of issues of territorial jurisdiction specific to each situation.

The Human Rights Committee circulated these recommendations regarding state responsibility for upholding Article 6 within its area of territorial jurisdiction to all 172 states for their perusal and comments. A few states raised issues regarding the use of the term "impacted." This relates to the wording in paragraph 63 of General Comment No. 36 by the Human Rights Committee which states:

[715] Ralph Wilde, 'The Extraterritorial Application of International Human Rights Law on Civil and Political Rights' in Scott Sheeran and Sir Nigel Rodley (eds.), *Routledge Handbook of International Human Rights Law* (Routledge, London, 2013)
[716] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (University of Oxford, Oxford, 2011)
[717] Karen da Costa in Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (University of Oxford, Oxford, 2011) 417

> "In light of Article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner."[718]

Opposition to the term "impacted" was based on a perception that it was too broad a term in comparison to previous practices and interpretations.[719] However, such relatively broad obligations have been established for some time. One prime example is the case of *Lopez Burgos v Uruguay* 1981,[720] which involved the abduction of Uruguayan citizens living abroad by Uruguayan state agents alongside their forcible return to Uruguay. The Court ruled that "the State party is under an obligation, pursuant to article 2 (3) of the Covenant, to provide effective remedies to Lopez Burgos, including immediate release, permission to leave Uruguay and compensation for the violations which he has suffered, and to take steps to ensure that similar violations do not occur in the future."[721]

The problem with the breadth and vagueness of the term impacted is located within the wider problem of when extraterritorial actions can be brought within the purview of the

[718] Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights on the Right to Life* (2018) 15
[719] Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' *European Journal of International Law,* vol.20, no.4 (2009) 1223-1246
[720] *Delia Saldias de Lopez v Uruguay*, CCPR/C/13/D/52/1979, UN Human Rights Committee (29 July 1981)
[721] ibid

European Court of Human Rights. The Court has switched between adopting both narrow and broad views of what constitutes extraterritorial jurisdiction. This has been in response to arguments that human rights should be as universal in nature as possible. However, Miller has argued that, "properly understood, extraterritorial jurisdiction under the European Convention is and should be limited to such situations to maintain a workable balance between the Convention's regional identity and its universalist aspirations."[722] Within this context, the term "impacted" is too general; a state may not be directly responsible for the actions of their soldiers in the territory of another state where they are within the chain of command of another state or international organisation.

4.3.1.3 Extraterritorial applications of the right to life

In order to further explore the ability of the right to life to regulate or limit the use of drones as a military tactic, the discussion will now focus on the extraterritorial application of the right to life, given that drones will for the most part involve extraterritorial military operations. This differs substantially from typical discussions pertaining to the right to life often concentrating on domestic issues. This is evident from the main grounds for derogating from this right, which were stated earlier. These include such instances as the defence of a person from unlawful violence, the effecting of a lawful arrest or to prevent the escape of a person lawfully detained, or to the taking of action for the purpose of quelling a riot or insurrection. These all relate to domestic issues. However, the protection of this fundamental right becomes much more complicated in issues of extraterritorial jurisdiction.

[722] Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', *European Journal of International Law*, vol.20, no.4 (2009) 1223

The biggest issue from a human rights perspective posed by the use of drones as a military tactic is whether states can be held accountable for their use when they are deployed outside of the state's territorial jurisdiction.[723] The above discussion on the right to life noted that this right as part of customary international law exists in a negative form, enjoining on states a minimum negative obligation to at least refrain from taking life.[724] The UN Declaration expresses that "everyone has the right to life" in general terms, a statement not limited by jurisdiction.[725] However, the UN Declaration's non-binding nature poses a particular problem of holding states accountable in respect of an enforceable right. The discussion in the previous section demonstrated that states could be held accountable for human rights obligation on an extraterritorial basis. However, the use of drones, or UAVs in general, as a military tactic poses a particular challenge for the extraterritoriality of human rights treaty law.[726]

Addressing this question therefore requires an understanding of how the internationalisation of human rights can best be achieved in a globalised world in a manner that does not impinge unnecessarily on state sovereignty. The interdependent nature of the global system means that it is far easier for a state to transcend or penetrate the borders of other states through a process termed "stretched social relations."[727] This

[723] Robert Frau, 'Unmanned Military Systems and Extraterritorial Application of Human Rights Law', *Groningen Journal of International Law,* vol.1, no.1 (2013) 1-18; Christof Heyns and others, 'The International Law Framework Regulating the Use of Drones', *International and Comparative Law Quarterly,* vol.64, no.4 (2016) 791-827

[724] Vojin Dimitrijevic, *Customary Law as an Instrument for the Protection of Human Rights* (ISPI, Milan, 2006)

[725] Universal Declaration on Human Rights, Article 3

[726] Ibrahim Kanalan, 'Extraterritorial State Obligations Beyond the Concept of Jurisdiction', *German Law Journal,* vol.19 (2018) 43-64; Nils Melzer, *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare, (*Directorate-General for External Policies, European Parliament, Brussels, 2013)

[727] David Held, *A Globalizing World? Culture, Economics, Politics*, (Routledge, London, 2000) 15

refers to a characteristic of globalisation whereby events in one part of the world have impacts elsewhere. Territorial sovereignty is often insufficient to insulate nation states from these effects. This is facilitated by an international economic system that requires the free movement of finance, goods, capital, people, and services. Globalisation has therefore engendered complications for the post-Westphalian state's ability to exercise absolute and indivisible power and sovereignty within its borders.[728] It has also been criticised for the way it has been managed and the negative effects it has had on developing states in particular,[729] generating a worldwide anti-globalist movement.[730]

Technological advancements in weapons systems have also allowed states to project their power anywhere in the world. The use of drones and other unmanned aerial vehicles is simply the latest manifestation of this ability to respond to perceived threats wherever they might be. This increases the vulnerability of civilian populations and raises the need for extraterritorial obligations to be placed on governments. As Isa and Feyter argue, the international human rights regime has been good on instituting a division of labour between states whereby governments are primarily responsible for those living within their territorial jurisdiction.[731] The transnational applicability of IHRL to nation states, however, is governed by factual circumstances rather than a blanket form of coverage. This is leading to a subtle shift in thinking, as Kanalan argues, from a mere "responsibility to respect and prevent human rights violations that endanger the right to life, but also a positive obligation to protect and fulfil human rights."[732]

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[728] Yale H. Ferguson, 'The Crisis of the State in a Globalizing World', *Globalizations,* vol.3 (2006) 5-8
[729] Joseph Stiglitz, *Globalization and its Discontents* (Penguin, London, 2002)
[730] Anthony Giddens, *Runaway World* (Profile Books, London, 2011)
[731] Felipe Gómez Isa and Koen de Feyter (eds.), *International Human Rights Law in a Human Context,* (University of Deusto, Bilbao, 2009) 58
[732] Ibrahim Kanalan, 'Extraterritorial State Obligations Beyond the Concept of Jurisdiction', *German Law Review,* vol.19 (2018) 44

4.3.1.4 The right to life and complicity: issues of state responsibility

The issue of complicity is important as it deals with instances where a state, while not necessarily committing an act, nevertheless has knowledge of or indirect participation in said act, and thus may have a duty to prevent the act.[733] The concept of state responsibility derives from its legal personality and the obligations that ensue under international law.[734] It applies to both wrongful actions and omissions, and "functions as a general law of wrongs that governs when an international obligation is breached, the consequences that flow from a breach, and who can invoke those consequences (and how). As a consequence, the law of state responsibility is multifaceted and covers a veritable multitude of issues."[735] The term "attribution" refers to the responsibility of a state for breaches in international norms committed by one of its agents in the territory of another state.[736]

The UN's principles governing state responsibility are codified within the Draft Articles of Responsibility of States for International Wrongful Acts.[737] The articles essentially articulate the rules governing a state's responsibility for a breach of its international obligations. The articles establish the basic point that "conduct not in conformity with an international obligation and attributable to a state equals an internationally wrongful act resulting in state responsibility."[738] They outline that an intentionally wrongful act must be attributable to a state under international law and constitute a breach of an international

[733] Richard Nisa, 'Capturing Humanitarian War: the Collusion of Violence and Care in US-Managed Military detention'*, Environment and Planning*, vol.47 (2015) 2276-2291
[734] James E Hickey Jr, 'The Source of International Legal Personality in the 21st Century', *Hofstra Law and Policy Symposium*, vol.2, no.1 (1997) 1-18
[735] Silvia Borelli, *State Responsibility in International Law* (Oxford Bibliographies, 2017)
[736] Kristen E. Boon, 'Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines'*, Melbourne Journal of Law*, vol.15, no.1 (2014) 1-48
[737] United Nations, *Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001* (2008)
[738] Daniel Bodansky and John R Cook, 'Symposium: The ILC's State Responsibility Articles: Introduction and Overview', *American Journal of International Law*, vol.96 (2002) 782

obligation of the state. They also stipulate that international law is distinct from what is considered unlawful action under domestic law. Therefore, a state cannot evade its international obligations by stating that a specific act is in accordance with its internal laws. The Draft Articles do not outline any specific obligations. Instead they simply articulate the circumstances under which obligations are breached and their legal consequences. The concept of state responsibility is laid out in IHL with specific reference to the Geneva Conventions, which mandates that both states and individuals are responsible for their actions.[739] This is particularly significant for issues such as extrajudicial and targeted killings.

The extrajudicial jurisdictional responsibility has been divided into two tests termed the "strict control" and "agency" tests.[740] The former is further sub-divided into two subtests: the "effective control" and "overall control" tests. Effective control occurs where a state gives instruction or direction to its agents or otherwise exercises control over them. Overall control occurs when a state assists in areas such as equipping, financing, or training a group without directly controlling their actions.[741] The latter refers to where a person acts as an agent of a state where those actions can also be attributed to the state in question. The ECtHR has also added an additional test termed the "overall control" test.[742] The issue of complicity, or collusion (terms that are used interchangeably in this research notwithstanding any potential political connotations of the latter), becomes pertinent in instances where there is overall control, and the state has knowledge of the intended use of its support but still fails to take preventative action.

[739] Helen Duffy, *The War on Terror and the Framework of International Law* (Cambridge University Press, Cambridge, 2015)
[740] Elena Ortega, *The Attribution of International Responsibility to a State for Conduct of Private Individuals Within the Territory of Another State* (InDret, Place 2015)
[741] ibid
[742] ibid

In the *Nicaragua* case, the Court established two forms of individuals acting as *de jure* (legally recognised) organs of a state: those who were directly paid, equipped, and supported by a state; and those who while being financed, equipped, and supported were nevertheless acting independently of the supporting state.[743] In this case, the first set of actions with regard to supporting the Contras in *Nicaragua* was attributable to the US, while the second set was not. The reasoning was that the US did not exercise effective control over the Contras' actions that contravened IHRL, such as the indiscriminate killing of civilians. The usage of this test has however been criticised on the grounds that it set an unduly high threshold for attribution and responsibility and that the overall control test would have been more equitable.

In the similar circumstances of the destruction of Malaysian Airlines Flight 17 in 2014 by pro-Russian separatists in Ukraine, it would be difficult to attribute responsibility to Russia on the grounds of exercising effective control. However, their role in supplying, financing, and training these groups in the use of anti-aircraft missiles would arguably be grounds for attributing overall control.[744] Other relevant examples include *Behrami and Behrami v France.*[745] This case dealt with the French government's responsibility for the deaths of Kosovar Albanians by undetonated cluster bombs. The French government argued that KFOR held effective control in Kosovo while UN forces under the UN Mission in Kosovo (UNMIK) was responsible for bomb clearance. The Court duly held that the UN held ultimate authority rather than the French government.[746]

[743] Keith Highet, 'Evidence, the Court, and the Nicaragua Case', *American Journal of International Law,* vol.81, no.1 (1987) 1-56
[744] Stephen Larrabee and others, *Russia and the West after the Ukraine crisis* (Rand Corporation, Santa Monica, 2017)
[745] *Behrami and Behrami v France* App no 71412/01, ECHR (2 May 2007)
[746] Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia', *European Journal of International Law*, vol.18 (2007) 649-688

A contemporary and on-going example of collusion can be found in the mass killings carried out in Yemen by Saudi Arabia with the support of the United States.[747] As with the *Nicaragua* case, the United States may have exercised effective control in terms of the supply and training of Saudi forces, but it does not exercise overall control. However, collusion is still applicable as it does have knowledge of what the Saudi government is doing with the weapons and training provided, and has to date failed to take sufficiently preventative action. This is despite the fact that the Senate has voted to end military support for Saudi Arabia's involvement in Yemen.[748]

This is quite apart from the US' own use of drone strikes in the country. This has been termed a "yellow light" approach to Saudi actions in Yemen in reference to the ambivalence of the US government to the multiple deaths of innocent Yemeni citizens through the indiscriminate use of weapons provided by the US.[749] In this respect an important ruling took place in the case of *R (Campaign Against Arms Trade) v Secretary of State for International Trade*. It involved a public law challenge to the UK government's practice of granting export licences for the sale and export of arms to Saudi Arabia on the grounds that there is no ground to suspect that these weapons are being used to violate IHL, especially with respect to Yemen. The High Court duly upheld the granting of these export licences. In reaching its decision, the Court ruled that:

> "The fact that civilian casualties have occurred does not mean that a breach of International Humanitarian Law has taken place, still

[747] Mohamad Bazzi, *The United States Could End the War in Yemen if it Wanted to* (The Atlantic, 2018) available at <https://www.theatlantic.com/international/archive/2018/09/iran-yemen-saudi-arabia/571465/> on 19 December 2018
[748] Justin Rohrlich, *US Senate: No Military Support for Saudi War in Yemen. Pentagon: LOL* Quartz (2019) available at <https://qz.com/1514582/us-supports-saudi-war-in-yemen-even-after-senate-votes-no/> on 20 January 2019
[749] Daniel L. Byman, *Order From Chaos: The US Yellow Light in Yemen* (Brookings Institute, 2018)

> less a serious breach. Customary international law and International Humanitarian Law have long recognised that civilian casualties in military conflicts occur. The Principle of Distinction prohibits *intentional* attacks against civilians."[750]

Green and Hamer criticised this as being an error in reasoning, as IHL prohibits attacks on civilians even if they were unintentional.[751]

The export of weapons has added to a humanitarian crisis in Yemen. US overall involvement has not only consisted of the provision of smart bombs, aircraft, and other advanced weaponry, but also intelligence briefings, in-flight refueling, and other vital forms of logistical support. While the US does not exercise overall control over the actions of the Saudi government, it can be argued that it is colluding with the breaches of the right to life being committed as it is failing to take adequate action to prevent such atrocities. This obligation was laid out in cases such as *Loizidou v Turkey*,[752] where the Court ruled that a state's obligations with regard to jurisdiction were not confined to its national territory. It could also arise in circumstances where it exercised effective control over an area outside its national territory. Therefore, "States' obligation to secure in such areas the Convention rights and freedoms derived from the fact that they exercised effective control there, whether that was done directly, through the State's armed forces,

[750] Lawrence Hill-Cawthorne, 'Appealing the High Court's Judgment in the Public Law Challenge against UK Arms Export Licenses to Saudi Arabia*', European Journal of International Law* (2018) available at <https://www.ejiltalk.org/appealing-the-high-courts-judgment-in-the-public-law-challenge-against-uk-arms-export-licenses-to-saudi-arabia/> on 10 January 2020

[751] Laura Green and David Hamer, 'The Legality of the UK/Saudi Arms Trade: A Case Study', *European Journal of International Law* (2017) available at <https://www.ejiltalk.org/the-legality-of-the-uk-saudi-arabia-arms-trade-a-case-study/> on 12 December 2019

[752] *Loizidou v Turkey* App no 15318/89, ECHR (23 March 1995)

or through a subordinate local administration."[753] In this respect, Byman echoes Republican Senator Mike Lee of Utah in saying, "the 'yellow light' policy – coupled with the Trump administration's strong embrace – empowers Saudi Arabia and the UAE to take self-defeating steps."[754]

Finally, it must be noted that there may be a distinction between jurisdiction and attribution. In this respect, Milanovic makes the following point:

> "When the state obtains power over a territory and its inhabitants it must, with due diligence, fulfil its obligation to secure or ensure the human rights of all persons within its jurisdiction. This power is a question in fact, of actual authority and control. Despite its name, it is not a legal competence, and it has absolutely nothing to do with that notion of jurisdiction in international law which delimits the municipal legal systems of states. However, jurisdiction does not imply attribution in the sense that anything that occurs within a state's jurisdiction is attributable to it. In such situations, state responsibility may arise for the state's failure to implement positive obligations under human rights treaties."[755]

[753] ECHR, 'Extra-territorial Jurisdiction of States Parties to the European Convention on Human Rights' (July 2018) available at <https://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf> on 13 August 2019
[754] Daniel L. Byman, *Order from Chaos: The US Yellow Light in Yemen* (Brookings Institute, Washington DC, 2018); Dion Nissenbaum, 'US lawmakers Challenge Trump's Support for Saudi War in Yemen', *Wall Street Journal* (2018) available at <https://www.wsj.com/articles/u-s-lawmakers-challenge-trump-support-for-saudi-war-in-yemen-1> on 18 December 2018
[755] Marko Milanovic, 'From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties'*, Human Rights Law Review,* vol.8 (2008) 39

Attribution is therefore concerned with assigning responsibility for prohibited acts that violate rights under international law with respect to the effective control test rather than the extraterritorial applicability of the ECHR. This usually occurs where there are a number of participants and there is uncertainty over who should be held responsible for any violations of rights. In such a scenario, attribution tests may be applied to determine responsibility. This is distinct from jurisdictional issues, which may be regarding what constitutes territory for the purpose of the Convention, or what type of control was exercised at the time.[756] Under normal circumstances, the use of force by drone strikes against the territorial integrity of another state would constitute a violation of Article 2(4) UN Charter. However, Article 20 of the ILC's Draft Articles on State Responsibility allow such territorial breaches to occur once the consent of the government of that state has been obtained. That being said, any resulting actions must both within the boundaries of the consent given as well as those of both IHL and IHRL.

An important consideration is that IHL provides protections, while IHRL provides rights. As mentioned in Chapter 3, protections are given under IHL to everyone, although these may differ depending on the circumstances and their status. These can include the distinction between whether they are a civilian or a combatant, and whether they are part of ongoing hostilities, in detention, or part of a civilian population. There is an obligation on all parties in a conflict to adhere to the provisions of IHL. When these are impinged there is likewise a duty to investigate such breaches. Enforcement also takes place through the provisions of Common Article 1 of the 1949 Geneva Convention, placing a responsibility on third states to ensure that the protections of IHL are respected and observed by the parties of a conflict.

[756] Jane M. Rooney, 'The Relationship Between Jurisdiction and Attribution After *Jaloud v Netherlands*', *Netherlands International Law Review,* vol.62, no.3 (2015) 407-428

IHRL, on the other hand, confers rights that are contained in a range of treaties, conventions, and inter-state agreements. Certain derogations from these rights are allowed under emergency situations that threaten life and the security of the country, but these must be proportionate to the threat being faced. They are also forbidden from being carried out in a discriminatory manner, and they cannot breach the provisions of IHL. Enforcement of IHRL is carried out by the supervisory systems such as the UN's Commission in Human Rights, while at a regional level institutions such as the European Court of Human Rights performs this function.

While IHRL remains applicable in conjunction with IHL during periods of armed conflicts, unlike IHL it also remains applicable outside of periods of armed conflict. The obligation to abide by IHRL commitments in the fight against terrorism has been specifically upheld by the relevant courts and the international community. For example, the UN's Global Counter-Terrorism Strategy states that all efforts to combat terrorism must comply with their obligations under IHRL.[757] Establishing jurisdiction is the first requirement in establishing obligations under IHRL. As aforementioned, the issue of extraterritorial jurisdiction is problematic as Article 2 of the ICCPR restricts state intervention to its own territory or territory over which it has jurisdiction while prohibiting intervention in the territory of another state. However, while the use of such extraterritorial force has been considered applicable, the use of drones remains problematic due to the remoteness of terror groups and the separate geographic locality of drone operators.

[757] International Bar Association, *The Legality of Armed Drones under International Law* (2017) available at <https://www.ibanet.org/Human_Rights_Institute/HRI_Publications/Legality-of-armed-drone-strikes.aspx> on 22 January 2019

Finally, the core provisions of IHRL remain applicable and enforceable at all times and states cannot derogate from these responsibilities under any circumstances. Ultimately, the primary point regarding the applicability of IHL is the existence of an armed conflict between states or between a state and a non-state actor. The legitimacy of drone strike will depend on a range of factors dealing with self-defence, sovereignty, jurisdiction, the intensity, and duration of violence and the ability to distinguish between terrorist fighters and non-combatant civilians. IHRL, however, determines that the use of lethal force (such as targeted killings by drones) outside of an armed conflict is only applicable under the principle of imminence. Therefore, such lethal force is only justifiable when there is an imminent threat to life. Otherwise, law enforcement standards must apply.

4.3.1.5 The right to life and targeted killings

A targeted killing is when the target is not a combatant and is not at the time of the act engaged in hostile activities, but is nevertheless considered a threat to the state.[758] Under IHL it may be lawful although highly circumscribed.[759] It has been defined as the deliberate killing of a specific individual by a state.[760] It should be noted that this is not a recent phenomenon; it has been occurred throughout history, since military and political leaders in other states have always been targeted and killed to further one's own interests. For example, Teergarden refers to the practice in ancient Greek city-states of killing authoritarian leaders of other city-states to "preserve democracy."[761] The practice continues today, predominantly in the form of drone strikes around the world.[762]

[758] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, Oxford, 2008)
[759] Scott MacDonald, 'The Lawful use of Targeted Killing in Contemporary International Humanitarian Law' *Journal of Terrorism Research,* vol.2, no.3 (2011) 126
[760] Martin Senn and Jodok Troy, 'The Transformation of Targeted Killing and International Order', *Contemporary Security Policy,* vol.38, no.2 (2017) 175-211
[761] David A. Teergarden, *Death to tyrants! Ancient Greek Democracy and the Struggle Against Tyranny* (Princeton University Press, Princeton, 2014)
[762] Anthony Dworkin, *Drones and Targeted Killing: Defining a European Position,* (European Council on Foreign Relations, 2013)

While there is no internationally agreed definition of targeted killings, the definition provided by the United Nations is "the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator."[763] The legality of the practice is being developed to accommodate changes in the nature of contemporary conflict. The legality of targeted killings depends on its conformity with important principles of IHL such as distinction, proportionality, and necessity elaborated upon in Chapter 3. As MacDonald argues, "where one stands on the controversial issue frequently informs the terminology used (and by extension its legitimacy). Those opposed to targeted killings commonly use terms such as extra-judicial execution or assassination. Those in favour of the tactic use terms as preventive strike."[764]

The Human Rights Committee has listed five key considerations with regard to the relationship between targeted killings and the right to life. The first is that in cases where a state conducts a targeted killing of a person who is not located on its territory, Article 6 will apply if the state exercises jurisdiction or effective control of the area where the target is located. It is noteworthy that Article 6 guarantees the right to life of all human beings without exception or distinction. This applies universally irrespective of the serious nature of the crimes or offences committed by a person. No one should be arbitrarily deprived of life.[765] The second point is that Article 6 is violated by a state if a targeted killing is arbitrary, even if the killing complies with international and domestic law.

[763] Philip Alston, *Report to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings* (United Nations, 2010) 4
[764] Scott MacDonald, 'The Lawful use of Targeted Killing in Contemporary International Humanitarian Law', *Journal of Terrorism Research,* vol.2, no.3 (2011) 126
[765] ECHR, 'Guide on Article 6 of the European Convention on Human Rights' (April 2019) available at <https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> on 2 March 2019

However, the determination of the arbitrary nature of the killing will need to be determined by the precise facts of the case.

The next point is the obligation of every state to ensure that another state is not contravening the ICCPR Article 6 or ECHR Art. 2 right to life on its territory or area over which it has jurisdiction. This is especially relevant when there is a specific threat to an individual who is especially vulnerable. This means that there are differing areas of liability under Article 6 applying to both the state committing the targeted killing and the state in whose territory the killing is being committed. Further, when there are deprivations of life arising from exceptional measures, usually associated with law enforcement, there must be appropriate safeguards in form of effective investigations, prosecution, and punishment, and where relevant the payment of reparations. Where life has been lost through targeted killings, it is incumbent on state authorities to fully investigate the circumstances and establish the legal justifications for such action. Such requirements are contained within the Minnesota Protocols,[766] which require post operation assessments when there is the likelihood of violations of Article 6 during armed conflicts. The Protocol also applies to all potentially unlawful deaths and:

> "…aims to protect the right to life and advance justice, accountability and the right to a remedy, by promoting the effective investigation of potentially unlawful death or suspected enforced disappearance. The Protocol sets a common standard of performance in investigating potentially unlawful death or suspected enforced disappearance and a shared set of principles

[766] United Nations Human Rights Office of the High Commissioner, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (United Nations, 2017)

> and guidelines for States, as well as for institutions and individuals who play a role in the investigation."[767]

The final requirement is transparency. This means that the results of post operation assessments must be made public unless there are compelling reasons for not doing so, such as a public interest justification, the requirements of privacy, or the protection intelligence and security sources. These exceptions where applicable do not however obviate the obligation to carry out full and precise investigations.[768]

The United Nations Human Rights Committee has long argued against the use of targeted killings as a form of punishment or a deterrent. They further argue that such use against terror targets should be both proportional, subject to strict guidelines, and be part of an overall policy that places emphasis on capturing suspects and targeted killings as a last resort. These stipulations run counter to the practice of the United States of considering all military-age males within a strike zone as potential terrorists and therefore subject to targeted killings by drones.[769] This is part of the "two-track approach" to targeted strikes as detailed in Subchapter 2.6. The question of extraterritorial jurisdiction and responsibility becomes of particular concern when the country being targeted objects to the use of drone strikes within its territory. This especially applies to Pakistan, which has publicly opposed such attacks as a breach of its territorial sovereignty although there have been instances where it has given its tacit approval. It can, however, be argued that no

[767] ibid 1
[768] Shaheed Fatima QC, *Targeted Killing and the Right to Life: A Structural Framework* (Reiss Centre on Law and Security, New York School of Law, 2019)
[769] Columbia Law School, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* (Center for Civilians in Conflict, New York, 2012)

permission has been given for the use of drone attacks in other countries such as Somalia and Yemen.[770]

There is an issue as to whether states should be forced into recognising their obligation on fundamental human rights by reference to specific obligations found in international human rights treaty law. Specifically, it may be argued that the very nature of human rights being inherent to individuals means that individual human rights should not necessarily be dependent on artificial constructions of human rights treaties.[771] This means that there are core ranges of minimum human rights expectations that are capable of being derived by being human.[772]

However, states are reluctant to accept this understanding of human rights, and as a result are generally only willing to be bound by those rights expressly contained within human rights treaties to which they are a party. This may apply where they are required to take humanitarian action for peace keeping or the protection of life under the United Nation's Responsibility to Protect (R2P) programme.[773] Given that the right to life is one of the most fundamental human rights, it is a common right across numerous human rights treaties and the UN Declaration on Human Rights.[774] It is also important to recognise that the right to life forms an important part of customary international law, which

[770] John Odle, 'Targeted Killings in Yemen and Somalia: Can the United States Target Low-Level Terrorists?' *Emory International Law Review,* vol.27 (2013) 604-660
[771] Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' *American Journal of International Law,* vol.99, no.1 (2005) 121-123
[772] United Nations Human Rights Office of the High Commissioner, *Applicable International Human Rights and Humanitarian Law Framework* (2011); Bertrand Ramcharan, *The United Nations High Commissioner for Human Rights and International Humanitarian Law* (Harvard University, Cambridge 2005)
[773] Roisin Burke, 'Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity', *Journal of Conflict and Security Law,* vol.16 (2011) 63-104
[774] ICCPR, Article 6(1) ACHR, Article 4(1) and ECHR, Article 2(1)

demonstrates its centrality as a human right obligation.[775] Furthermore, in *Mrksic et al.* it was identified that certain breaches of the right to life can be considered crimes against humanity.[776]

A common requirement in the construction of the right to life is that the deprivation of life can only be considered lawful if it is non-arbitrarily deprived. For example, Article 6(1) of the ICCPR states that: "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[777] The inclusion of the word "inherent" is often taken as being an indicator of the importance of this right within the ICCPR, which is common in other human rights treaties such as the ECHR and the ACHR.[778]

This non-arbitrary deprivation in in other words explained as states only being allowed to take life as the last resort when all other options fail, and that taking life is necessary to protect life.[779] Soft law standards, such as Principle 9 in the 'UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials', expressly state that "intentional lethal use of firearms may only be made when strictly unavoidable in order

[775] ICCPR, General Comment No.24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UNHRC 1994, CCPR/C/21/Rev.1/Add.6; William Schabas, 'The Right to Life' in Andrew Clapham and Paola Gesta, *The Oxford Handbook of International Law on Armed Conflict* (Oxford University Press, 2014)
[776] *Prosecutor v Mrkšić et al.* [2009] ICTY IT-95-13/1; Monica Feria Tinta, 'Due Process and the Right to Life in the context of the Vienna Convention on consular Relations: Arguing the Le Grand Case', *European Journal of International Law* vol.12, no.2 (2001)
[777] ICCPR, Article 6(1)
[778] Sarah Joseph, *The International Covenant on Civil and Political Rights* (OUP, Oxford (2004) 154
[779] Cordula Droege, 'Elective Affinities? Human Rights and Humanitarian Law', *International Review of the Red Cross*, vol.90, no.871 (2008) 501; David Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' *European Journal of International Law*, vol.16, no.2 (2005) 171

to protect life."[780] Additionally, some human rights treaties such as the ECHR expressly provide an exhaustive list of circumstances where a state may lawfully deprive an individual of their life.[781] The three common permissible exceptions to the right to life include the imposition of the death penalty, killings in the context of armed conflicts, and such actions that are considered to be "necessary and proportionate" in individual uses of lethal force.[782]

There are two common requirements in IHRL that bind states. First, the protection of the right to life in IHRL commonly requires that any use of force by the state must be "necessary".[783] This commonly means that states can only use force if it can be considered as having some legitimate purpose, such as protecting life. This part of the requirement requires a factual assessment to determine whether the use of force can be considered as necessary to protect life.[784] Second, there is a further common requirement that any use of force must be "proportionate".[785] The proportionality requirement is tantamount to a value judgement where it is necessary to examine whether the use of force can be said to outweigh the legitimate goal being pursued by the action taken in the first instance.[786] It is important to note here that this proportionality test uses similar language to the test examined in Chapter 3 pertaining to IHL. However, proportionality tests in IHRL differ significantly from those in IHL by stipulating that force is only

[780] Office of the United Nations Commissioner of Human Rights, B*asic Principles on the Use of Force and Firearms by Law Enforcement Officials*, available at <https://www.ohchr.org/Documents/ProfessionalInterest/firearms.pdf> on 26 January 2019
[781] ECHR, Article 2(2)
[782] Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP, 2010) 167
[783] William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', *European Journal of International Law,* vol.16, no.1 (2005) 741
[784] Geneva Academy, *Use of Force in Law Enforcement and the Right to Life: the Role of the Human Rights Council,* (University of Geneva, Geneva, 2011)
[785] ibid
[786] David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *jus ad bellum'*, *European Journal of International Law,* vol.24, no.1 (2013) 235-282; Amnesty International, *Use of Force* (Amnesty International, Amsterdam, 2016)

considered lawful when it is "strictly necessary" to protect life in immediate or imminent danger.[787] Therefore, any reference to proportionality in this chapter requires a different set of considerations to those already expressed in Chapter 3.

There have been some determinations in the context of the ECHR as to the types of precautions a state must take in order to protect life before a decision is taken to use lethal force. In *McCann*,[788] the ECtHR determined that the use of lethal force by the UK's security agencies was unlawful given that the alleged suspects could have easily been arrested instead of killed. In applying this standard to drones, it can be argued that each case would require an individual assessment to determine whether other alternative less lethal uses of force could have deployed. Furthermore, on the basis of IHRL, it would seem that a state could only use drones to target individuals who pose an immediate or imminent threat to life.

The lawfulness of using drones and UAVs to target individuals is not yet settled in international human rights jurisprudence. Some commentators such as Alston begin from the premise that almost all instances of targeted killing will be unlawful.[789]However, other commentators such as Paust[790] and Orr[791] suggest that so long as targeted killings are justifiable, then killing in this instance may be lawful. Those commentators who tend to support the lawfulness contention of targeted killing draw upon the necessity to engage

[787] Geneva Academy, *Use of Force in Law Enforcement and the Right to Life: the Role of the Human Rights Council* (University of Geneva, Geneva, 2011)
[788] *McCann and Others v United Kingdom* App no 18984/91, ECHR (27 September 1995) para 169
[789] Philip Alston, 'Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', *UN Doc. A/HRC/14/24/Add.6* (28 May 2010) para 33
[790] Jordan Paust, 'Permissible Self-Defence Targeting and the Death of bin Laden', *Denver Journal of International Law and Policy,* vol.39, no.4 (2011) 570-571
[791] Andrew Orr, 'Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law', *Cornell International Law Journal*, vol.44, no.3 (2011) 735-736

in efficient counterterrorism operations.[792] Previously, countries such as the US have sought to argue that targeted killing operations were lawful on the basis of self-defence and the need for the US to respond in ongoing armed conflicts with the Taliban and Al-Qaeda.[793] However, official justifications in favour of the use of force do not commonly reference human rights standards as the basis to offer a legal justification for military action.

The need for both openness and accountability is clear as governments involved in targeted killings have been secretive in their activities, and as a consequence it has been difficult to access information in these cases. One relevant example was the attempt to access information on the targeted killing by the British government of Reyaad Khan and Rahul Amin in Syria, both of whom were British citizens. The UK Upper Tribunal rejected appeals for the release of information although it did curtail the government's power to withhold such information on national security grounds.[794] Eshaghian also argues for some form of judicial oversight of the targeted killings of US citizens. He notes that the Supreme court has also made the ruling that US citizens can be categorised as enemy combatants. He therefore advocates that the judiciary be involved in determining whether someone should be placed on a kill list. This however needs to be limited to the analysis of whether a person is sufficiently linked to a terror group. However, judicial participation should not impinge on issues that are intelligence related or linked to executive decision-making. This includes assessing the extent to which the target poses

[792] Steven David, 'Israel's Policy of Targeted Killing', *Ethics & International Affairs*, vol.17, no.1 (2003) 115-119
[793] Harold Koh, *'The Obama Administration and International Law'*, ASIL Speech, 25 March 2010, available at <http://www.state.gov/s/l/releases/remarks/139119.htm> on 25 September 2018)
[794] *Corderoy and Ahmed v The Information Commissioner* AGO, Cabinet Office [2017] UKUT 495 (AAC)

an imminent threat, or whether it is more feasible to attempt to capture or apprehend the target.[795]

O'Connell identifies that IHRL can only legitimise the use of lethal force where states genuinely limit their use of force to circumstances of "absolute necessity."[796] This standard is high given that human rights should be applicable to all circumstances including those of emergency situations. Circumstances of absolute necessity are when serious emergencies exists that cannot be dealt with by any other means.

4.3.2 Due process

The concept of due process is of prime importance when considering legality under the international law of targeted killings, especially given the speed and nature by which said killings take place.[797] The rights to due process through a fair trial is found in Article 14 ICCPR, Article 6 of the European Convention on Human Rights, (right to a fair trial), Article 7 of the ECHR (no punishment without law) and Protocol No.7 (rights of accused persons), and Article 8 of the ACHR (fair trial right). This section examines the relevance of due process under IHRL and its applicability to drone warfare and targeted killings.

The right to due process is accepted by all legal systems around the world, but the concept is neither universal nor accepted in the same manner by all judicial systems.[798] It is

[795] Michael Eshaghian, 'Are Drone Courts Necessary? An Analysis of Targeted Killings of US Citizens Abroad Through a Procedural Due Process Lens', *Texas Law Review of Politics*, vol.18 (2013) 169-198
[796] Mary O'Connell, 'Remarks: The Resort to Drones Under International Law', *Journal of International Law and Policy*, vol.39, no.4 (2011) 599
[797] Devika Hovell, *The Power of Process* (Oxford University Press, Oxford, 2016)
[798] Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values', *European Journal of International Law,* vol.17 (2006) 187-214

essentially the legal obligation of the government to recognise and respect the legal rights of every individual. In the UK, due process is applicable within the context that before depriving a citizen of life, liberty, or property, the government must follow fair procedures. The right to due process can be traced back to Clause 39 of the Magna Carta, the development of rights and civil liberties in common law and statutes and the Bill of Rights 1689. It is a principle of the British constitution and means that the law applies equally to everyone and that the government is required to operate within its powers. It has three main facets: legal certainty, that all laws must be applied in precise and exact ways; equality, which requires that cases that are alike must be treated the same and every individual has the right to be treated fairly under the law, with no one being above it; and fairness, which requires that all laws and procedures must be freely available to every individual. Due process deals with the administration of justice, and its applicability for the US is contained in specific clauses within the Fifth and Fourteenth Amendments. Its core goals and requirements centre on the principle that:

> "Due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. Thus, the required elements of due process are those that 'minimize substantively unfair or mistaken deprivations' by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests. The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a

> decision be made based on the record, and that a party be allowed to be represented by counsel."[799]

The basis of due process is therefore fairness and it acts as a bulwark against arbitrary state power. It acts to prohibit the ability state of the state to rake a person's life or liberty, or to appropriate their property without the individual having the opportunity to defend his or her position in a court of law. In this respect, its application is often termed substantive due process through which courts determine whether a law or state action unreasonably infringes on the rights of an individual or group. The application of due process however can be flexible and dependent on a range of different factors such as legal systems, rules of evidence and judicial procedures such as precedent. Benjamin McKelvey argues that presidential power to order extrajudicial killings (of Americans) by drone strikes is unconstitutional, as it denies due process to American citizens. He therefore advocates that targeted killings by executive order should be controlled by Congress through the passage of legislation similar to the Foreign Intelligence Surveillance Act (FISA),[800] which enables federal judicial oversight of wiretapping.[801]

There are three models of due process,[802] and the model chosen can indeed impact the type of due process rights and procedures employed. The first is instrumentalist due process, which is based on the desire to achieve accuracy by reducing the propensity for

[799] Justia, *Procedural Due Process* (2005) available at <https://law.justia.com/constitution/us/amendment-14/05-procedural-due-process-civil.html> on 21 June 2019
[800] Foreign Intelligence Surveillance Act 2018
[801] Benjamin McKelvey, 'Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power', *Vanderbilt Journal of Transnational Law,* vol.44 (2011) 1378
[802] Richard B. Saphire, 'Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection', *University of Pennsylvania Law Review* (1978) 127

error through the accurate application of substantive law to the decision-making process. This is usually achieved through the use of clear decision making rules and processes as well as a judiciary that has the power to review the accuracy of decisions.[803] The second model is predicated on the need to recognise and enable dignity, humanity, and autonomy of the individual in the process, as well as the requirement that the individual be kept informed is consulted and treated with the required respect.[804] It has been argued that this concept is grounded in either the liberal democratic tradition of the inherent rights of the individual, or a pluralistic approach in which the interests of the individual or group is involved in the decision making process.[805] The third model is the public interest approach, which aims to achieve accountability through encouraging popular consent in decision-making based on greater public participation as opposed to self-interest.[806]

These distinctions can affect the procedure and implementation of said due process. For example, an emphasis on the instrumentalist approach ensures that the letter of the law is followed in terms of accuracy of decision-making. However, such an emphasis on its own may fail to adequately humanise the individual in a way commensurate with the IHRL objective of protecting their right to a fair trial as a basic human right. Likewise, an overemphasis on the third model's aim of accountability through popular consent may negatively impact the ability of an individual to access their full range of due process rights. This last point has especially been obvious in populist driven policies in the war on terror that have removed the right of due process from some suspects.

[803] Duncan Kennedy, 'Legal Formality', *Journal of Legal Studies,* vol.2 (1973) 351-398
[804] Richard B. Saphire, 'Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection', *University of Pennsylvania Law Review* (1978) 127
[805] Cass R. Sunstein, 'Interest Groups in American Public Law', *Stanford Law Review,* vol.38 (1985–1986) 29-88
[806] Trevor Allan, 'Procedural Fairness and the Duty of Respect', *Oxford Journal of Legal Studies*, vol.18 (1998) 497-516

The concept of due process involves access to a number of areas and provisions in the way justice is administered. These include the independence of the judiciary, impartiality, competence of stature law, equal treatment, the presumption of innocence, public hearings and that notion that hearings are heard within a reasonable time frame.[807] One of the main elements of any system of due process is the right to a fair trial. This right is enshrined in all human rights agreement and conventions.[808] The right to a fair trial is contained within a range of international laws and conventions.[809] For example, Article 14 of the ICCPR outlines the rights to due process. They include: the equality of everyone before courts and tribunals; the right to a fair and public hearing by competent and impartial judicial authorities conducted in a timely manner; the right to be presumed innocent until proven guilty; and the right to be informed of the reason for apprehension and charge and to defend oneself either individually or through legal representation.[810] The right to a fair trial is also contained within the United Nations Universal Declaration of Human Rights.[811] Articles 9 and 10 state respectively, "No one shall be subjected to arbitrary arrest, detention or exile, and everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[812] Similar guarantees are contained within the American Convention, the ASEAN Human Rights Declaration and

[807] Ryan Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Hart, Oxford, 2014)
[808] For example: Icelandic Human Rights Centre, *The Right to Due Process* (2019) available at <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-rights-to-due-process> on 8 January 2019
[809] Piero Leanza and Ondrej Pridal, *The Right to a Fair Trial* (Kluwer, Alphen, 2014)
[810] United Nations Human Rights Office of the High Commissioner, *International Covenant on Civil and Political Rights* (2019) available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx > on 16 March 2019
[811] David Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights: Background...of the Universal Declaration of Human Rights* (Brill, 2001)
[812] Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71

to a lesser extent, the African Charter on Human and Peoples' Rights. Finally, Article 6 of the European Convention on Human Rights states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."[813]

Article 6 goes in to provide a list of additional rights. These are as follows:

> "To be presumed innocent until found guilty (Article 6(2)); to be informed promptly in a language understandable to the suspect of the detail of 'the nature and cause of the accusation against them' (Article 6(3)(a)); to have adequate time and facilities to prepare a defence (Article 6(3)(b)); to defend yourself in person or through legal assistance of your own choosing or, if you cannot afford it, 'to be given it free where the interests of justice so require'

[813] ECHR, *Guide on Article 6 of the European Convention in Human Rights* (April 2018) 6, available at <https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> on 16 March 2019

(Article 6(3)(c)); to examine, or have examined, witnesses and to obtain their attendance and examination (Article 6(3)(d)); to have the free assistance of an interpreter if you cannot understand or speak the language used in court (Article 6(3)(e)).”[814]

Due process must be seen to take place, which is why there is a general requirement that trials be open to the public and the media. The only exceptions are allowed in instances relating to the interests of national security in a democratic society, public order, and the maintenance of morals.[815] Also, trials may be held in secret in cases involving juveniles where the court deems that it necessary for the purposes of justice or to protect the private life of the juvenile.[816]

A significant number of cases dealt with by the UN Human Rights Committee and the European Court of Human Rights pertains to due process with specific reference to the right to a fair trial in the context of armed force. For example, in the case of *Cyprus v Turkey*[817] the Court ruled that the trial of Cypriot civilians in Northern Cyprus by a Turkish military tribunal would constitute a breach in the right to a fair trial.[818] In other instances such as the case of *Markovic v Italy*[819] the Court has chosen to only concentrate on the issue of the fairness of the trial, rather than the substantive circumstances of the

[814] Justice, *Article 6: Right to a Fair Trial* (2019) available at <https://justice.org.uk/article-6-right-fair-trial/> on 16 March 2019
[815] Pitman B. Potter, ‘Due Process and International Law’, *American Journal of International Law,* vol.40, no.2 (1946) 280-302
[816] Icelandic Human Rights Centre, *The Right to Due Process* (2019) available at <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-due-process> on 8 April 2019
[817] *Cyprus v Turkey,* App no 25781/94, ECHR (12 May 2014)
[818] Tugba Guler, ‘Positive Obligations Doctrine of the European Court of Human Rights: is it Cogent or Obscure?’ *European Journal of Multidisciplinary Studies,* vol.16 (2017) 358-364
[819] *Markovic v Italy,* App no 1398/03, ECHR (14 December 2006)

case itself.[820] The use of targeted killings in the war on terror requires a more nuanced approach. Members of terror groups often cannot be distinguished from ordinary members of society, as they do not wear a uniform or insignia that identifies them as part of an armed force.

There is also the problem that there is no universal, standardised definition of terrorism. Cassese does argue that such a definition does exist and has evolved in the international community at the level of customary international law.[821] Others like Ambos take a different view in asserting that "at best, that terrorism is a particularly serious transnational, treaty-based crime that comes close to a 'true' international crime but has not yet reached this status."[822] The European Court of Human Rights in the case of *Brogan v UK*[823] did take into account the extent, vehemence, and persistence of the terrorism in Northern Ireland since 1969 in determining whether the UK, in keeping terror suspects in extended periods of detention without charge, had overstepped the margin of appreciation it is entitled to under Article 5. In reaching a ruling, the Court also accepted the definition of terrorism contained in the Prevention of Terrorism (Temporary Provisions) Act 1984, which viewed terrorism as the use of violence for political purposes, such as to influence the government or intimidate the public.[824]

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[820] Icelandic Human Rights Centre, *The Right to Due Process* (2019) available at <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-due-process> on 17 January 2019

[821] Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', *Journal of International Criminal Justice,* vol.933 (2006) 933-958

[822] Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: is there a Crime of Terrorism under International Law?' *Leiden Journal of International Law,* vol.24, (2011) 655-656

[823] *Brogan and Others v United Kingdom* App no 11209/84, 11234/89, 11266/84, 11386/85, ECHR (29 November 1988)

[824] Clive Walker, 'Prevention of Terrorism (Temporary Provisions) Act 1984', *Modern Law Review,* vol.47, no.6 (1984) 704-713

The lack of a standardised definition can result in interpretations being exceptionally broad leading to an infringement of liberty.[825] It has in turn led to the argument that definitions of terrorism are social constructs specifically designed to fit the subjective requirements of those defining the term.[826] For example, terrorism is described by the US State Department as "premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience" while the FBI defines it as "the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[827]

4.3.3 Terrorism and *jus cogens*

It has been argued that the prohibition of terrorism as a rule of CIL has acquired the status of *jus cogens* (peremptory norm). The principle of *jus cogens* is a peremptory norm of general international law from which no derogation is permitted except under circumstances that is itself permissible under general international law, and which may be changed by a subsequent norm of general international law. The principle of *jus cogens* protects fundamental values of the international community. It is relevant to the way terrorism is countered, for example through targeted killings; it is a universally applicable norm from which no derogation is possible.

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[825] Ben Saul, 'Terrorism as a legal concept' in Genevieve Lennon, and Clive Walker, (eds.), *Routledge Handbook of Law and Terrorism* (Routledge, Abingdon, 2015); Laurie Blank, 'What's in a Word? War, Law and Counter-terrorism' in Genevieve Lennon and Clive Walker, (eds.), *Routledge Handbook of Law and Terrorism* (Routledge, Abingdon, 2015)

[826] Richard Jackson and others, *Terrorism – A Critical Introduction* (Palgrave Macmillan, Basingstoke, 2011); Cynthia A. Karaffa, *The Social Construction of Terrorism* (Emerald Publishing Group, 2015)

[827] Gregor Bruce, 'Definition of Terrorism – Social and Political Effects'*, Journal of Military and Veteran's Health,* vol.21, no.2 (2018) 26-30

Aniel Cardo de Beer traces the development of *jus cogens* as rules of international law that are mandatory and imperative in any circumstances as opposed to the rules of *jus dispositivum* in respect of which variation by states is possible (Fitzmaurice).[828] The principle of *jus cogens* contains elements of natural law and is not dependent on acceptance by states for its relevance or legitimacy. Therefore, the fact that a state does not recognise or accept certain action such as torture or slavery to be *jus cogens* does not invalidate its applicability. Aniel Cardo de Beer also argues that *jus cogens* possesses a hierarchical superiority to other norms of international law that places it outside the normal sources of such laws to the extent that it represents a form of super norm or super law that applies regardless of where it has originated or the extent to which it is accepted by states.[829] This has been affirmed in rulings such as in *Siderman de Blake v Republic of Argentina* in which the US Court of Appeal ruled that *jus cogens* held supremacy over all rules of international law.[830]

Aniel Cardo de Beer goes on to argue that while there is currently no international juridical ruling that affirms terrorism as being *jus cogens*, the more important issue is the extent to which states perceive and accept it as such. The determination of a norm having the status of *jus cogens* is based on its status as a norm of general international law. Therefore, de Beer argues that terrorism fits this criterion as its prohibition is widely accepted and practiced in a variety of laws and treaties. Its prohibition is both a rule of CIL and has been generally accepted by states as a norm from which there is no permitted derogation. Further, it enjoys virtually universal condemnation and when consideration is given to the rights that it prospects such as the right to life, its prohibition can be considered to be hierarchically superior to other legal international norms. She therefore

[828] Aniel Cardo de Beer, *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (Brill, Nijhoff, 2019)
[829] ibid
[830] *Siderman de Blake v Republic of Argentina* (1992) 965 F Supp 2d 699

concludes that the prohibition against terrorism has become the *jus cogens* norm of our times.[831]

Within the context of this research, this reasoning has been used to justify the use of targeted killings in enforcing the universal prohibition against terrorism. However, it does not address the situation when the means used in the form of targeted killings become a form of state-sponsored terrorism. For example, commentators such as Blakely address this issue by:

> "…conceptualising the targeted killings programme as a form of state terrorism, which provides a critical analysis of the drones programme within the context of a long history of violence and terrorism which has underpinned the imperial and neo-imperial projects of the UK and US and the important similarities between the targeted killings programme, and previous UK and US counterinsurgency operations, including prior uses of air power, and operations involving the internment of terror suspects, and the targeting of specific individuals for interrogation and torture or disappearance."[832]

Questions regarding dehumanisation cannot therefore be limited to terrorism by non-state actors. Instead, there is a justifiable case to be made for state terrorism being in breach of *jus cogens*.

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[831] Aniel Cardo de Beer, *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (Brill, Nijhoff, 2019) 11

[832] Ruth Blakeley, 'Drones, State Terrorism and International Law', *Critical Studies in Terrorism,* vol.11, no.2 (2018) 321

4.4 Conclusion

The main aim of this chapter was to examine the capability of IHRL in regulating drone warfare, and whether IHRL provides additional rights not provided by the obligations of IHL. This chapter addressed the research objective of assessing whether contemporary warfare and technology pertaining to war are in line with the existing legal principles of IHRL and the values that are meant to govern them. The chapter examined the different forms of extraterritorial jurisdiction a state can exercise, namely the spatial and personal models of extraterritorial jurisdiction. The importance of these concepts is that they establish a state's positive obligation in protecting the right to life. Therefore, while states have negative obligations in the form of preventing the taking of life, there is also the notion that it is required to protect the lives of its citizens.

The chapter demonstrated how the use of drone strikes in the territory of another state could constitute a breach of Article 2(4) UN Charter. Such strikes are however permissible under Article 20 of the ILC's Draft Articles on State Responsibility once the state where the drones are being deployed gives permission for their use, and the resulting action is within the confines of IHRL. That being said, the data also shows how the US has even breached Article 20 in that drone strikes in Pakistan have continued after the Pakistani government withdrew approval for their use in 2011 after a drone strike killed a number of civilians.[833] Ultimately, the permissibility of drone strikes in armed conflict is determined by a limited range of factors including the duration and intensity of a conflict, the issue of jurisdiction, and the ability to correctly distinguish legitimate targets from innocent civilians. The use of such attacks in peacetime, however, is determined

[833] Colombia Human Rights Clinic, *Counting Drone Strike Deaths* (Colombia Law School 2012); Owen Bowcott, 'US Drones Strikes in Pakistan Carried Out without Government's Consent' (*The Guardian*, 2013) available at <https://www.theguardian.com/world/2013/mar/15/us-drone-strikes-pakistan> on 21 June 2019

primarily by the imminence of a planned attack. This more restrictive criterion for attack is what IHRL offers individuals beyond the scope of IHL.

IHRL prohibits the arbitrary deprivation of life. Life can only be taken as a last resort and when it is necessary to protect life. Drone warfare arguably violates this prohibition, as a state cannot guarantee that such strikes are not arbitrary or that the threats posed by the targets are sufficiently real and immediate to represent to protect life. It is notable that the ECHR does provide a list of exceptions when the state can take life. These include during armed conflict, capital punishment, law enforcement, and self-defence as a last resort.

The chapter examines the premise of whether IHRL can apply to armed conflict. The military has argued that IHRL places an undue restriction on restraint on military operations. However, the chapter outlines the flexibility of IHRL in this respect. Factors such as the margin of appreciation and the permissible derogations allow a measure of flexibility. The chapter argues that IHRL is indeed applicable to armed conflicts. However, there are often issues with enforcing IHRL, such as conflicts in a jurisdiction that is not party to IHRL. This, in turn, makes enforceability problematic. Examples include when a state that is a party to IHRL is conducting military operations in an area outside its jurisdictional competence.

4.4.1 Proposals

The central conundrum of this chapter is finding the right balance between maintaining the integrity of IHRL by sticking to its core values, and increasing its applicability in real-life scenarios. The more stringent and holistic the requirements of IHRL, the less likely states are to adhere to them. For example, in the discussion regarding extraterritorial

control[834] and the application of IHRL, Milanovic proposes a concept that states should be bound by negative obligations to uphold human rights regardless of territorial borders or control.[835] Milanovic is appealing to the inherence of human rights and its attribution to all people. While aiming to further purify the aims of IHRL, this concept would only increase the restrictions on states in a situation where states are already taking active measures to avoid IHRL obligations.

As previously mentioned, the UK government has even challenged the extension of IHRL into armed conflict. In its attempt to curb applicability of IHRL to armed conflict, the UK government cites derogation amongst other techniques. It has argued that the Court in Strasbourg has misinterpreted the ECHR and improperly extended it to apply to military action that is conducted outside a member state's territory. The UK government has considered derogating from the ECHR on the grounds that the actions of its military abroad should only be covered by IHL, which was specifically designed for this purpose. It has considered invoking its right under Article 15 to derogate from the ECHR in times of war, on the argument that the term 'war' should not be understood as applying only to circumstances in which the national survival of the UK is at stake.[836] While this thesis has argued the case as to why IHRL is indeed applicable in armed conflict, its utility can be mitigated by states derogating whenever those rules may apply. The Joint Committee on Human Rights recently made the point that for rights to be effective, they have to be capable of being enforced.[837]

[834] See Subchapters 4.2.1 and 4.3.1.2
[835] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (University of Oxford, Oxford, 2011)
[836] Jane M. Rooney, 'Extraterritorial Derogation from the European Convention on Human Rights in the UK', *European Human Rights Law Review,* vol.6 (2016) 656-633
[837] House of Commons, *Legal Aid 'Deserts' Make Human Rights Unenforceable* (2019)

A solution to this conundrum could pertain to the practicality of IHRL and how realistically it can be used as a remedy for victims who are at risk or have been victimised by UAVs**.** For example, the case of *Rahmatullah v Ministry of Defence*[838] has fizzled out; individual litigation relies on individual litigants who are often far away, in conflict zones, and do not have enough funds. One suggestion has been to set up a tribunal akin to those investigating atrocities and human rights abuses in Yugoslavia, Rwanda, and Sierra Leone.[839] One step in this direction has been UNSC Resolution 2379 in 2017 in which the Security Council requested the creation of an independent investigative team to hold ISIS responsible for atrocities committed in Iraq. In May 2018, the UN appointed Karim Asad Ahmad as the Special Advisor and Head of the Investigative Team. In like manner, the UN passed Resolution 71/248 establishing an international, impartial, and independent mechanism to assist with holding accountable the perpetrators of mass atrocities in Syria. The UN's High Commissioner for Human Rights Zeid Ra'ad Al Hussein stated:

> "Lack of accountability at the national and international levels has clearly encouraged the commission of severe human rights violations and abuses, and repeated violations of international humanitarian law. The Mechanism will collect, consolidate, preserve and analyse evidence; and prepare files on individual suspects, in order to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts, in accordance with international law."[840]

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[838] *Rahmatullah (No 2) (Respondent) v Ministry of Defence and another* [2017] UKSC 1
[839] William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, 2006) 73
[840] UN Human Rights Office of the High Commissioner, *Side Event on the International, Impartial and Independent Mechanism on International Crimes Committed in the Syrian Arab Republic* (2017) available at

A potential issue with this project is that it only addresses violations of IHL carried out by ISIS, while many major state powers were also involved in breaches of both IHL and IHRL. The case of *Rahmatullah*, however, involved claims of wrongful detention and mistreatment of the respondents by British and US military personnel in Afghanistan and Iraq.

In closing, the data presented in this chapter shows that an underlying and recurring issue lies in the uncertain relationship between IHL and IHRL, specifically the boundaries between the two. It is not yet clear which framework applies when lethal force is used outside official armed conflicts. Chapter 3 proposed that drones ought to be limited to official armed conflicts, and this chapter seeks to ascertain which set of rules apply when drones are deployed outside armed conflicts. As a result, the chapter proposes that further clarification and international agreement is required regarding the law that applies to drone usage outside armed conflicts.

On its policy on the use of drones for targeted killing, the Joint Committee on Human Rights states, "We recommend that the Government, in its response to our Report, clarifies its position as to the law which applies when it uses lethal force outside of armed conflict."[841] While the JCHR is a domestic UK review body, its idea pertains to international law and human rights law in general, and so this chapter forwards this recommendation and urges an international consensus in order to prevent the exploitation of the ambiguity surrounding IHL and IHRL. The policy rejected the Government's

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21266> on 6 September 2019

[841] House of Commons and House of Lords, 'The Government's Policy on the use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16', *Joint Committee on Human Rights*, HL 49, HC 747 (2016-2017) para 3.55

attempt to derogate from the right to life in Article 2 where it uses lethal force abroad outside of armed conflict. It denied the claim that such deaths are the results of acts of war, and as a result, the right to life in Article 2 ECHR "inescapably applies to uses of lethal force abroad outside of armed conflict."[842] These recommendations are taken up again in Chapter 5, which addresses the same issues from a domestic law perspective.

Chapter Five

National Governance

5.1 Introduction

While Chapters 3 and 4 analysed International Humanitarian Law and International Human Rights Law respectively, this chapter turns to the domestic governance of topics that may impact the use of UAVs in armed conflict, such as the use of lethal force, the arms trade, and counter-terrorism. While international sources are also used, the focus turns to domestic law, primarily UK domestic law with brief comparisons made with US law. UK law has been chosen as the focus, as it is most relevant, practical, and accessible considering the researcher's UK background as well as US adherence to the 'state secrets privilege'[843] doctrine, which arguably causes the US courts to be more deferential, thus

[842] ibid para 3.62

[843] For more information, see *General Dynamics Corp. v United States*, 563 U.S. 478 (2011); David Rudenstine, 'The Courts and National Security: The Ordeal of the State Secrets Privilege', *University of Baltimore Law Review*, vol.44, no.1 (2014) 37-104; Galit Raguan, 'Masquerading Justiciability: The Misapplication of State Secrets Privilege in Mohamed v. Jeppesen - Reflections from a Comparative Perspective', *Journal of International and Comparative Law* (2012) 423-472; Daniel R. Cassman, 'Keep It Secret, Keep it safe: An Empirical Analysis of the State Secrets Doctrine', *Stanford Law Review* (2015); Steven D.

making UK governance more likely to be impactful in this research. Finally, US domestic law on the above topics have been more extensively researched,[844] and so highlighting UK governance contributes to the originality of the thesis.

This chapter continues to address the research objective of whether contemporary armed conflict and technology pertaining to war are in line with existing legal principles and the values that lie behind them. Like IHL and IHRL, UK domestic law is premised on the notion of safeguarding its citizens. This chapter therefore assesses whether UK law is sufficiently effective and fair to safeguard its citizens with specific regards to contemporary armed conflict and the use of drones. The focus is on the decision-making processes in terms of responsibility, the decision to use lethal force, and accountability and oversight. Other potential mechanisms of governance, such as arms controls over hardware, will not be addressed.[845]

5.2 Responsibility

5.2.1 State responsibility

Article 16 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) dictates that a state is responsible if its agents violate IHL or IHRL. A state is deemed to be complicit when

Schwinn, 'The State Secrets Privilege in the Post-9/11 Era', *Pace Law Review*, vol.30, no.2 (2010) 778-831; Robert M. Chesney, 'State Secrets and the Limits of National Security Litigation', *George Washington Law Review*, vol.75 (2007) 1249-1332

[844] For example see Michael Eshaghian, 'Are Drone Courts Necessary - An Analysis of Targeted Killings of U.S. Citizens Abroad Through a Procedural Due Process Lens', *Texas Review of Law and Politics*, vol.18 (2013) 169-198

[845] See Rachel Stohl and Shannon Dick, *The Arms Trade Treaty and Drones* (The Stimson Centre, Washington DC, 2018); Department of International Trade, *Notice to Exporters 2019/10: Export Control Order 2008 Amended and Control List Updated* (2019); *R (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade (Amnesty International and others intervening)* (2017) EWHC 1726 (Admin) and (2019) EWCA Civ 1020; Wassenaar Agreement, *What is the Wassenaar Agreement?* (2018) available at <https://www.wassenaar.org/the-wassenaar-arrangement/> on 25 June 2019.

it "aids or assists another State in the commission of an internationally wrongful act […if] that State does so with knowledge of the circumstances and the act is such that would have been wrongful had it been committed by the assisting State itself."[846] This responsibility extends to any state that allows its territory to be used to launch extraterritorial drone strikes. The UK has therefore had to consider whether its assistance to the US – by allowing its territory to be used to launch lethal drone strikes on another country – is consistent with national and international law.

An All-Party Parliamentary Group (APPG) on Drones was assembled to carry out an independent inquiry into the way the UK worked with its partners in the extraterritorial use of armed drones. It aimed to build on the report by the Joint Committee on Human Rights on the Government's policy on the use of drones for targeted killing. This report argued that the Secretary of State had misapplied the legal frameworks that apply outside of armed conflict when holding the position that using lethal force outside armed conflicts is in compliance with the LOAC and satisfies the obligations of IHRL.[847] The APPG cast doubt on the way UK drone partnerships are conducted, especially as British support and intelligence may have been used in targeted killings carried out in countries that the UK is not at war with, such as Yemen, Somalia, and Pakistan. The UK is therefore at risk of breaching both domestic and international law, while in the absence of any clear legal basis also risks being complicit in the illegal inflicting of harm on civilians and exposing military personnel to criminal prosecution.[848]

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[846] Cono Giardullo, *The American Drone Programme and the Responsibility of its Partners* (Oxford Human Rights Hub, 2019) available at <https://ohrh.law.ox.ac.uk/the-american-drone-programme-and-the-responsibility-of-its-partners/> on 6 September 2019

[847] House of Commons and House of Lords, 'The Government's Policy on the use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16', *Joint Committee on Human Rights*, HL 141, HC 574, (2016-2017) 83

[848] All-Party Parliamentary Group on Drones Inquiry Report, *The UK's use of Armed Drones: Working with Partners* (2018)

The UK also risks being complicit in the legally dubious and internationally rejected view held by the US that the War on Terror is a single, global NIAC. As mentioned in Subchapter 2.4, most countries and international agencies view the Global War on Terror as in breach of international law and would thus not qualify as an official armed conflict.[849] Bachman and Holland assert, "The Obama administration attempted to unilaterally rewrite the law of armed conflict to permit the killing of 'terrorist suspects' and 'suspected terrorists' outside of an active battlefield."[850] Historically, acts of terrorism were treated as criminal acts as opposed to acts of war,[851] and so Bush's War on Terror and Obama's drone campaigns are both guilty under Alston's assessment, worth relaying: "In the legitimate struggle against terrorism, too many criminal acts have been re-categorized so as to justify addressing them within to framework of the law of armed conflict."[852] The International Committee of the Red Cross adds that the US view risks turning the world into a global battlefield "in which the lower protection of the Law of War is the norm rather than the exception, so that the permissive rules of the Law of War, rather than the stricter rules of human rights law, apply to the use of lethal force against members of Al Qaida wherever in the world they may be found."[853]

The ability to hold the British government responsible and accountable is made difficult by the secrecy laws that allow the state to conceal information on the grounds of national security. One example is the challenge brought by Human Rights Watch into the targeted killings of Reyaad Khan and Ruhul Amin in 2015. The organisation first submitted a

[849] UN ECOSOC, 62nd Sess, Future E/CN.4/2006/120 (15 February 2006)
[850] Jeffrey Bachman and Jack Holland, 'Lethal Sterility: Innovative Dehumanisation in Legal Justifications of Obama's Drone Policy', *The International Journal of Human Rights*, vol.23, no.6 (2019) 1029; Jeffrey Bachman, 'The Lawfulness of Targeted Killing Operations Outside Afghanistan', *Studies in Conflict and Terrorism*, vol.38, no.11 (2015) 1028
[851] ibid
[852] Alston P, *Study on Targeted Killings*, UN Document (May 28, 2010)
[853] International Committee of the Red Cross, *United Kingdom, the Government's Policy on the Use of Drones for Targeted Killings* (2019) available at <https://casebook.icrc.org/case-study/united-kingdom-governments-policy-use-drones-targeted-killings> on 6 September 2019

request for details on the legal advice justifying the attacks under the freedom of information law. The Attorney General and the Cabinet Office rejected it, and the Information Commissioner's Office upheld the refusal. A subsequent legal tribunal rejected the Government's claim that section 23 of the Freedom of Information Act 2000 provided a blanket exemption on disseminating information provided by the security services, and that part of the government's legal advice, such as the interpretation of international law in justifying the killings should be subject to the public interest test.[854]

State responsibility addresses the issue of how practices that were once illegal or forbidden become the norm and a legitimate, sometimes even routine, course of action. Finnemore and Sikkink describe this process of norm establishment as follows: first, a norm is proposed; it then seeks acceptance from a significant mass of actors; before finally gaining wider internalisation. Conformance "is almost automatic".[855] The type of behaviour exhibited by the UK government, whereby it selectively disseminates some information in targeted killings while keeping much of the detail secret has been termed 'quasi secrecy' which involves combining official secrecy and *de facto* public disclosure to provide an effective mechanism for normalising a controversial practice.[856] The aim is to legitimise actions that are legally dubious while making a distinction between permissible targeted killings and prohibited assassinations. The issue of responsibility to the judiciary is discussed further in Subchapter 5.4.3 with an analysis of the case of *R (Gentle) v Prime Minister*.[857]

[854] Corderoy v ICO [2017] UKUT 495 [2018] AACR 19; Freedom of Information Act 2000 (FOIA) Decision Notice, ref: FS50634580
[855] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', *International Organisation,* vol.52, no.4 (1998) 904
[856] Andris Banka and Adam Quinn, 'Killing Norms Softly: US Targeted Killing, Quasi-Secrecy and the Assassination Ban', *Journal of Security Studies,* vol.27, no.4 (2018) 665-703
[857] *R (Gentle) v Prime Minister* [2006] EWCA Civ 1690

5.2.2 Individual responsibility

Individual criminal responsibility for members of the armed services can be found under military criminal law. The Armed Forces Act 2006 contains the main offences against military law in the UK. These can include a range of offences which carry different terms of imprisonment, such as misconduct on operations, mutiny, desertion, making false records, disgraceful conduct of a cruel or indecent kind, disclosing information useful to an enemy, and failing to attend or perform a duty. Cases may be heard in the Service Civilian Court, which is similar to a Magistrates Court and applies to civilians who are subject to service discipline, a Summary Appeals Court, a Court Martial, which is the service equivalent of a Crown Court, and a Court Martial Appeal Court. Prosecutions are brought by the Service Prosecuting Authority.

One area of controversy has been the applicability of the ECHR to UK military personnel, and the government's contention that the HRA was never intended to affect UK military personnel serving abroad. However it is made clear in Section 6 of the HRA that it is "unlawful for a public authority to act in a way that is incompatible with a Convention right", unless required by an Act of Parliament. While Parliament is exempted from falling under a 'public authority', the Ministry of Defence or armed forces are not.[858] In other words, while the public authorities alone are accountable for breaches of human rights, individuals may be liable under criminal law.

The HRA, however, also acts to protect British military personnel. A key case was *Smith and others v Ministry of Defence*[859] in which the Supreme Court ruled that the right to life under Article 2 ECHR could apply to the deaths of two British soldiers in Iraq, and that

[858] Equality and Human Rights Commission, *Human Rights and the Military* (London, 2016)
[859] Supreme Court, *Judgment: Smith and others v. Ministry of Defence (Respondent)* (2013) available at <https://www.supremecourt.uk/cases/docs/uksc-2012-0249-judgment.pdf> on 4 September 2019

the government was obliged to investigate their deaths. The Supreme Court did emphasise, however, that human rights laws and standards should not be applied to the military in such a way as to hamper their operational effectiveness. The effect of the ruling was nevertheless to enhance the protections afforded under the HRA to military personnel such as the right to life.

HRA also impacts the way military criminal law is conducted as well. A prime example of this was the ruling by the European Court of Human Rights in 2003 that required the Royal Navy to suspend all courts martial due to cases where defendants lacked oversight by independent and impartial adjudicators. This led to all courts martial cases in the Royal Navy since the passage of the HRA 1998 being temporarily suspended.[860] The same did not apply to other services as they already had civilian judge advocates appointed by the Lord Chancellor's office. However, this example demonstrated the impact of the HRA on the application of military criminal law.

HRA has also had an impact on the way detainee abuse has been dealt with. A prime example is the inquiry into the treatment and death of Baha Mousa while in the custody of the British Army. The Chairman of the inquiry into his death ruled that there had been corporate failure on the part of the Ministry of Defence in allowing the use of prohibited interrogation methods in Iraq that had led to Baha Mousa suffering 93 injuries prior to his death in British custody.[861] This led to the trial of Corporal Donald Payne, who became the first British soldier to be convicted of the war crime of inhumane treatment of person protected under the Geneva Convention, although he was cleared of manslaughter.

[860] Michael Smith, 'Navy Suspends all Courts Martial' (*The Telegraph*, 2003) available at <https://www.telegraph.co.uk/news/uknews/1449621/Navy-suspends-all-courts-martial.html> on 3 September 2019
[861] Sir William Gage, *The Baha Mousa Public Inquiry Report Vol II* (2011)

5.3 Domestic legal powers to use lethal force

Fikfak and Hooper argue that the Government decides on whether to initiate armed conflict with the power derived from the Royal Prerogative.[862] However in recent years, the view that the House of Commons should be allowed the opportunity to debate any decision to use military force abroad, except in the case of emergencies, has gained traction. This has developed into calls for the government to enshrine the right of parliamentary approval in law.[863] This development occurred in the run up to both Libyan and Syrian conflicts when parliamentary debates demonstrated that there were differing views regarding the continued sole power of the government to decide on engaging in foreign conflicts.[864] In particular, Mello notes that there were disagreements in three main areas: first, the type of operations that should be exempt; second, parliamentary procedures that favour the executive; and importantly, the proper timing of substantive votes.[865]

The convention about the use of war powers is a purely political innovation that has been almost universally welcomed.[866] This requires that the House of Commons be allowed to debate the deployment of armed forces abroad before such deployment takes place. It is meant to counter unilateral decisions by the Prime Minister to use force abroad with a mere semblance of parliamentary accountability. This remains a controversial area, however, as the right to exercise exceptional powers in times of emergency has always

[862] Veronika Fikfak and Hayley Hooper, *Parliament's Secret War*, Hart's Publishing (2018) v
[863] Political and Constitutional Reform Committee, *Parliament's Role in Conflict Decisions: The Way Forward*, HC 892 (2013-2014)
[864] Lords Hansards, *UK Foreign Policy on Libya* (2011); House of Commons, *MPs Debate Military Action Taken Against Libya* (22 March 2011); Claire Mills, House of Commons, *Parliamentary Approval for Military Action*, CBP 7166 (8 May 2018)
[865] Patrick Mello, 'Curbing the Royal Prerogative to use Military Force: the British House of Commons and the Conflicts in Libya and Syria', *West European Politics*, vol.40, no.1 (2017) 80-100
[866] Veronika Fikfak and Hayley Hooper, *Parliament's Secret War*, Hart's Publishing (2018)

been a common feature of the executive. The House of Lords Constitution Committee essentially confirmed this in 2013, concurring with the view that the full cabinet should be the ultimate decision maker regarding the decision to use force.[867]

However, as Blick notes, in recent decades there has been an erosion of the Royal Prerogative with regard to emergency powers, with particular reference to accountability. This has been exacerbated by growing global security matters and events such as the decision to be involved in the invasion of Iraq. Consequently, there has been some transformation of the prerogative, partly through some of it being placed on a statutory basis and partly through enhanced legal and political constraints.[868] A more recent example has been the decision of Prime Minister Boris Johnson to prorogue Parliament from 9 September to 14 October 2019. The Supreme Court subsequently ruled that the advice given to the Queen and the prorogation that followed were unlawful. This has been seen as potentially damaging to the Royal Prerogative, as leader of the opposition Jeremy Corbyn asserted, "There was a danger of the royal prerogative being set directly against the wishes of the majority of the House of Commons."[869]

In the United Kingdom, the use of force is based on both common law and statutory provisions. Under common law, the use of force is permissible in preventing a crime or apprehending or assisting in the apprehension of a person reasonably suspected of committing a crime. The use of force is also permitted under the Criminal Law Act 1967. Other relevant statutes include Section 117 of the Police and Criminal Evidence Act 1984,

[867] House of Lords Constitution Committee, *Constitutional Arrangements for the Use of Armed Force* HL 46 (2013-2014)
[868] Andrew Blick, 'Emergency Powers and the Withering of the Royal Prerogative', *International Journal of Human Rights,* vol.18, no.2 (2014) 195-210
[869] Jessica Elgot, 'What is Prorogation and why is Boris Johnson Using it?' (*The Guardian*, 2019) available at <https://www.theguardian.com/politics/2019/aug/28/what-is-prorogation-prorogue-parliament-boris-johnson-brexit> on 11 October 2019

which provides the authority for the use of force when exercising powers conferred under the Act, and Section 76 of the Criminal Justice and Immigration Act 2008, which provides clarification in the defences to the use of force.

5.3.1 Use of force provisions

This section will examine the provisions governing the use of force for both individuals and states. This is relevant for both military and security personnel who are required to commit targeted killings abroad, and the protections they are entitled to in domestic courts. It also has ramifications for those who are seeking redress in domestic courts for loved ones and family members who have may have been the subjects of extraterritorial and/or extrajudicial killings.

Section 3 of the Criminal Law Act 1967 states that, "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in the effecting or assisting in the lawful arrest of offenders or suspected offenders, or of persons unlawfully at large." The term "reasonable" was further clarified in the Criminal Justice and Immigration Act 2008, which stated, "The question whether the degree of force used by D (the person charged with the offence) was reasonable in the circumstances is to be decided by the reference to the circumstance as D believed them to be…if it is determined that D did genuinely hold it, D is entitled to rely on it whether or not (a) it was mistaken, or (b) if it was mistaken, the mistake was a reasonable on to have made." Section 76(7) of this Act also outlines the required considerations for determining whether force that has been used was reasonable. They are: (a) "that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action, and (b) that evidence

of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose."

Provisions covering the domestic use of force have also been important with regard to the military. This is most applicable to the conduct of the military during the Troubles in Northern Ireland, with particular reference to Bloody Sunday.[870] This importance is exemplified by the Inquiry by Lord Saville into the Bloody Sunday killings, which found that the people killed that day by 1 Para did not pose a threat to them, and that the company was ultimately responsible for the unjustifiable shooting that caused the deaths and injuries.[871] Section 3(1) of the Criminal Law Act (Northern Ireland) 1967 states, "a person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

Common law also provides the individual the right to use as much reasonable force necessary for the purposes of self-defence, as well as to prevent crime or to impact a lawful arrest. The issue of reasonable use of force is especially relevant when excessive force results in the killing of an individual. UK courts have consistently been against the practice of lowering a charge of murder to manslaughter when the offender holds an honest yet unreasonable belief in the use of lethal force. A prime example of this argument was the case of *R. v Clegg*[872] involving a British soldier shooting a killing a joyrider that failed to stop at a military checkpoint in Northern Ireland.[873]

[870] Mark Saville, Hoyt William, and John Toohey, Report of the Bloody Sunday Inquiry (Her Majesty's Stationery Office, London, 2010)
[871] ibid
[872] *R v Clegg* [1995] 1 AC 482 (HL)
[873] Miranda Kaye, 'Excessive Force in Self-Defence After R. v Clegg', *Journal of Criminal Law,* vol.61, no.4 (1997)

An especially controversial case was the killing of Patrick McElhone in 1974 by a British soldier in County Tyrone. At the trial, Justice McDermott found that the soldier had been justified in the killing even though he acknowledged that the soldier did not have the required belief that the victim had been involved in acts of terrorism or posed an immediate threat to his life or safety. Despite this, Justice McDermott still ruled that the soldier's use of force was reasonable, given the fact that the killing occurred in an area where soldiers had previously been attacked and killed. This was despite the fact that the victim was an unarmed member of the public, not associated with any paramilitary organisation or posing a threat.

Walsh argues that this case went far beyond the understood legal principles that govern the use of force in preventing crime. Justice McDermott's interpretation would allow the army or police to use lethal force when apprehending someone, with legitimacy, if they were suspected of terrorism and did not obey the officer's or soldier's commands, even if they were unarmed.[874] This has left Northern Ireland in what has been termed a "legal limbo".[875] The Attorney General subsequently exercised his powers under section 48A of the Criminal Appeal (Northern Ireland) Act 1968 and referred the case to the Court of Criminal Appeal in Northern Ireland on two points of law that had arisen in the case.[876] The Court of Criminal Appeal gave its opinion and then referred the case to the House of Lords, who upheld the rule that only a charge of murder can be brought in the killing by security forces.[877]

[874] Dermot Walsh, *Bloody Sunday and the Rule of Law in Northern Ireland* (Macmillan Press, London, 2000) 175
[875] Fionnuala Aolain, *Conflict Management and State Violence in Northern Ireland* (Blackstaff Press, Belfast, 2000)
[876] *Attorney General for Northern Ireland's Reference (No.1 of 1975)* [1977] AC 105 (Justis, 1976)

[877] Helsinki Watch, *Human Rights in Northern Ireland,* Human Rights Watch (1991) 79

In the subsequent and broader Stalker Inquiry, the findings of which have never been published, the head of the inquiry Deputy Chief constable John Stalker did admit that although he never found written evidence of a shoot to kill policy, there was clear evidence that officers were expected to act accordingly.[878] In 1991, Amnesty International noted prosecutions of 21 members of the security force for using firearms while on duty in Northern Ireland since 1969, not including killings of sectarian nature.[879] 13 were found to be not guilty, one person received a suspended sentence for manslaughter, and only one soldier was convicted of murder. That one soldier was released after serving 27 months and was subsequently reinstated into the army.[880] From 1969-1991, 339 were killed by security forces, most of whom were Catholic, unarmed, and were killed in dubious circumstances."[881]

Of those killed by the security forces, a significant number were joyriders. John Stalker went on to question why judges were overly sympathetic to British soldiers charged with murder. He concluded that it had become virtually impossible to convict a British soldier of murder in the courts of Northern Ireland. This has serious implications for the rule of law, especially as the reverse cases of people charged with the murder of British soldier have witnessed a series of dubious convictions. In 2013, the ECHR was critical of the UK's investigations into the use of lethal force in Northern Ireland and ruled that the delays could not be seen as compatible with the obligation of the state as per Article 2 – the right to life – in ensuring the efficacy of investigations regarding suspicious deaths.[882]

[878] John Stalker, *Stalker: Ireland, Shoot to Kill and the Affair* (Penguin, London, 2000)
[879] Raymond Murray, *State Violence: Northern Ireland 1969-1997* (Mercier Press, Cork, 1998)
[880] *R v Thain* [1985] 11 NIJB 31
[881] Raymond Murray, *State Violence: Northern Ireland 1969-1997* (Mercier Press, Cork, 1998)
[882] Council of Europe, *The European Convention on Human Rights and Policing* (2013); Owen Bowcott, 'UK Failure to Investigate IRA Deaths Breached Human Rights Says ECHR' (*The Guardian*, 2013) available at <https://www.theguardian.com/uk-news/2013/jul/16/ira-leaders-life-uk-european-court> on 5 August 2019

The Bloody Sunday Inquiry[883] was finally set up in 1998 for the purpose of re-examining the Widgery Report on the shooting of 13 people in Londonderry in 1972.[884] As Walker states, the Inquiry was reported in 2010 and was accompanied by a fulsome Prime Ministerial apology for the loss of life, but "the costs and delays of the Bloody Sunday Inquiry have deterred the government from promising any further grand inquiry."[885]

5.3.2 Self-defence of individual criminal responsibility

The principle of reasonable force is a key element in using self-defence as a defence against the use of force. The Criminal Justice and Immigration Act 2008 outlines that the acceptable degree of reasonable force is determined by the circumstances as the defendant believed them to be. If the belief is genuinely held, then it applies regardless of whether the defendant was mistaken, with the exception of mistakes made while voluntarily intoxicated. Self-defence is permissible as a defence to crimes committed through the use of force. The basic principle governing the use of forces was laid out in the case of *Palmer v R,* which limited the use of force in self-defence to only what was reasonably necessary.[886] For example, in the case of *R v Williams (Gladstone)*,[887] the court ruled that an honest mistake in self-defence or prevention of a crime may be a defence even where the mistake was unreasonable. Therefore, the defendant must be judged against the facts as s/he believes them to be. In like manner, it was established in the case of *R v Bird*[888] that there is no duty to retreat in self-defence. In stating that the defendant could only rely

[883] Mark Saville, Hoyt William, and John Toohey, Report of the Bloody Sunday Inquiry (Her Majesty's Stationery Office, London, 2010)
[884] John Widgery, Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day (Her Majesty's Stationery Office, London, 1972)
[885] Clive Walker, *Terrorism and the Law* (Oxford University Press, Oxford, 2011) 13
[886] *Palmer v R [1971] AC 814R (El Gizouli) v Secretary of State for the Home Department* [2019] EWHC 60
[887] *R v Williams (Gladstone)* [1984] 78 Cr App R 276
[888] *R v Bird* [1985] 1 WLR 816

on self-defence if they show that their actions showed that they did not wish to fight, Lord Lane stated:

> "If the defendant is proved to have been attacking or retaliating or revenging himself, then he was not truly acting in self-defence. Evidence that the defendant tried to retreat or tried to call off the fight may be a cast-iron method of casting doubt on the suggestion that he was the attacker or retaliator or the person trying to revenge himself. But it is not by any means the only method of doing that."[889]

Automatism may also be a defence against the use of force where violent actions may be attributed to involuntary action or a lack of capability in maintaining self-control of one's actions. However, the incapacitation must be involuntary and not attributable to recklessness. For example, in the case of *R v Bailey*[890] where the defendant's violent action was attributed to his failure to take insulin medication, the court ruled that unless the failure to take his medication was due to recklessness, hypoglycaemia may be found as an automatism defence.[891]

5.3.3 Necessity

Necessity is another potential defence to the use of force, in both domestic and international criminal law, especially as it involves the compromising of individual autonomy. It also can apply to military necessity within IHL. A prime example is the case of Erdemovic[892] who had been ordered to kill prisoners in Serbia and was told that should

[889] Claire de Than and Russell Heaton, *Criminal Law* (Oxford University Press, Oxford, 2013)
[890] *R v Bailey* [1983] 1 WLR 760
[891] Claire de Than and Russell Heaton, *Criminal Law* (Oxford University Press, Oxford, 2013)
[892] *Prosecutor v Erdemovic* [1996] ICTY IT-96-22-A

he refuse the order, he would also be killed. At his trial he used the defence of necessity and duress. The International Criminal Tribunal for the former Yugoslavia (ICTY) ruled that while the duress was a mitigating factor, it did not absolve him of the crime and he was sentenced to ten years in prison, later commuted to five.

A similar example can be found in the cases of Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, and Berislav Pušić, who were indicted by the ICTY for breaching the Geneva Conventions, violating the laws and customs of war, and crimes against humanity.[893] Their appeals were partially based on the non-disclosure of the Mladic diaries, which demonstrated the level of command and control that he exercised over those under him.[894] These could theoretically be used to attempt to justify their crimes by the use of duress. However, it is often difficult to make a distinction between necessity and duress by threats.[895] In addressing the laws of war, it is often also problematic when formulating treaties to strike the right balance between military necessity and humanitarian interests.[896] There is also controversy over whether the principle can be considered a general or specific defence. It has been defined as:

> "A defence which involves a claim by a defendant that he or she broke the law in order to secure some higher value or because of some external circumstances. The defendant argues that although the crime was committed with the required *actus reus* and *mens*

[893] International Criminal Tribunal for the Former Yugoslavia, *The ICTY Renders its Final Judgment in the Prlic et al. Appeal Case* (2017)
[894] Henry Chu, 'Record Keeping Ratko Mladic's Own Words May Help Convict the Former Bosnian Commander' (*Los Angeles Times*, 2011) available at <https://www.latimes.com/world/la-xpm-2011-may-29-la-fg-serbia-mladic-diaries-20110529-story.html> on 6 September 2019
[895] Finbarr McCauley and Paul McCutcheon, *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) 780
[896] Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, Oxford, 2012) 3

> *rea*, the crime committed was a necessary action: it was a situation of emergency (involving perceived danger)."[897]

The concept often applies to situations where an individual has two unpalatable choices between committing a crime and leaving oneself open to some form of harm or misfortune. The main difference between necessity and duress is that in the latter, the individual is compelled action by threats, whereas for the former, the compulsion to act comes from the circumstances involved.[898] This issue is especially relevant in cases where a soldier is ordered by a superior officer to carry out a potentially unlawful act. An example of this can be found in the Baha Mousa killing by British soldiers in which a subsequent inquiry found that the Ministry of Defence was responsible for a corporate failure in providing guidance on the use of banned interrogation methods.[899] At an operational level, soldiers were required to carry out illegal activities by their superiors such as Corporal Donald Payne who was described as "orchestrating a sickening 'choir' in which hooded detainees were punched in succession so their cries and moans created a grotesque chorus".[900] Gaeta comments on the defence of superior orders by stating:

> "The conditional liability approach, generally accepted by national legal systems, admits the plea as a complete defence, unless the subordinate knew or should have known the illegality of the order or unless the order was manifestly illegal. By contrast, relevant international instruments prior to the Rome Statute have invariably

[897] Law Reform Commission, *Report on Defences in Criminal Law* (2009) 192
[898] David Omerod, *Smith & Hogan's Criminal Law* (Oxford University Press, Oxford, 2006)
[899] William Gage, *The Baha Mousa Public Inquiry Report Vol. III*, Her Majesty's Stationery Office, HC 1452 (2010-12)
[900] Jason Groves, 'Deplorable, Shocking, Shameful: Fox's Verdict on Troops Who Beat Iraqi as he Vows to End Conspiracy of Silence' (*Daily Mail*, 2011) available at <https://www.dailymail.co.uk/news/article-2035029/Baha-Mousa-inquiry-Army-condemned-gratuitous-violence.html> on 28 July 2019

taken the absolute liability approach, according to which obedience to orders is never a defence."[901]

Duress of circumstances, as opposed to duress of threats, has also become a more recognised defence in English law within recent times. The distinction between the two is that duress is where the defendant has been threatened, whereas duress of circumstances does not necessarily require an actual threat; it is enough that the circumstances dictate that if the defendant does not commit the crime, someone will be killed or suffer a serious injury.[902] In order to use duress of circumstance as a defence, the defendant must face an imminent threat of death or serious injury, have reasonable grounds for believing in the threat, be reasonably steadfast in withholding the threat, and have no prior fault pertaining to the threat.[903]

The courts have been arguably circumspect in their acceptance of necessity as a defence due to the risk of its abuse to hide true criminal intentions. Indeed, in the case of *People (DPP) v Kelly,*[904] Judge Moran stated his concerns regarding the danger of social anarchy through the use or overuse of necessity as a defence to the use of force.[905] The legal position based on case law regarding the applicability of necessity as a defence to murder is based on the ruling in *R v Dudley*[906] in which the defendants who were castaways at sea committed murder and cannibalism on a crewmember in order to survive. The court adopted a nuanced if not confusing approach by at once stating categorically that

[901] Paola Gaeta, 'The Defence of Superior Orders: the Statute of the International Criminal Court versus Customary International Law', *European Journal of International Law,* vol.10 (1999) 172
[902] Jonathan Herring, *Criminal Law* (Palgrave Macmillan, London, 2005) 399
[903] Law Reform Commission, *Report on Defences in Criminal Law* (2009) 204
[904] *DPP v Kelly* [2006] IESC 20
[905] Irish Jurist (anon), 'Judicial Decisions in the Republic of Ireland', *Irish Jurist,* vol.23, no.2 (1986) 380-410
[906] *R v Dudley* [1884] EWHC 14 (QB)

necessity can never be a defence to murder, but then sentencing the defendants to six months imprisonment instead of the norm of capital punishment.

However, the definitiveness of this approach was reduced with the ruling in the case of *Re A (Children)*[907] where the decision was made to terminate the life of a non-viable conjoined twin to enable the survival of the other twin. Without such an intervention, both twins would have died. In invoking the defence of necessity, the court outlined the three requirements that must be in place to justify its use: 1) the act must avoid inevitable and/or irreparable evil, 2) the act must stop at that which is reasonably necessary to achieve its purpose, and no more, and 3) the evil inflicted must be proportionate to the evil avoided.[908] However, this ruling must be tempered by the fact that these were exceptional circumstances, which imply that it cannot be generally relied on as a defence to murder. Its conclusiveness as a ruling is lessened by the extenuating circumstances surrounding the case.

There is also a distinction between a justification and excuse. In the former, the responsibility for a wrongful act is accepted without the acceptance that the act itself was necessarily wrong or bad. In the latter, there is an acceptance of the wrongful nature of the act, but no acceptance of responsibility. With the former, while an act may be wrongful, the law can allow some justification for the act irrespective of its wrongful nature. In the case of the latter, however, the act remains wrong notwithstanding the defendant's exemption of guilt. Lowe gives the example of emergency drivers breaking the speed limit on the way to the hospital.[909] A defence can be found in two ways: to

[907] *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] EWCA Civ 254
[908] David Omerod, *Smith & Hogan's Criminal Law* (Oxford University Press, Oxford, 2006) 422
[909] Vaughan Lowe, 'Precluding Wrongfulness or responsibility: A Plea for Excuses', *European Journal of International Law,* vol.10 (1999) 410

explicitly authorise emergency drivers to speed, or to acknowledge the breach in law but ensure that emergency drivers are not prosecuted for it. The first defence may relax adherence to the law whereas the second upholds the law while exempting the understandable breach of law.[910]

This has relevance in both domestic and international law. In domestic law, the emphasis is on defence. Criminal law thus provides definitions of both offences and defences. A defence informs us of the circumstances wherein an act normally considered a crime is otherwise justified or excused.[911] At an international level, the UN Charter not only outlines the general prohibition against the use of force (Art 2(4)) but also the exceptions (Articles 42 and 51). Vidmar cites Article 2(4), which determines that "the use of force is prima facie wrongful under international law yet using force pursuant to Articles 42 and 51 is legally warranted"[912] and as such preclude international wrongfulness. Vidmar adds that the use of force under such circumstances therefore does not constitute an internationally wrongful act.[913]

Glanville Williams elaborated on the difficulties in relying on the defence of necessity by stating, "the peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision…it is in reality a dispensing power exercised by the judges where they are brought to feel that obedience to the law would have endangered some higher value."[914] It is axiomatic that the rule of law requires the government to act legally in the way it conducts international relations. This includes the counter-terrorism policies it pursues extraterritorially. It is therefore of prime importance

[910] ibid
[911] John Cyril Smith, *Justification and Excuse in Criminal Law* (The Hamlyn Trust, 1989) 1
[912] Jure Vidmar, *The Use of Force and Defences in the Law of State Responsibility* (Jean Monnet Working Paper Series, New York School of Law, 2015) 3-4
[913] ibid
[914] Glanville Williams, *Textbook of Criminal Law* (Stevens and Sons, London, 1983) 728

that there is a sound legal basis for such actions, especially where force is to be used outside the boundaries of conventional armed conflict. In like manner, the legal basis the government uses to pursue these policies will determine the applicable legal standards. Should the government pursue a course of action that is not in accordance with domestic and international law, it runs the risk of not just failing to adhere to international norms, but theoretically of ministers facing criminal prosecution.

5.3.4 Defence for the use of force by the state

The government has cited the right of self-defence as justification for targeted killings[915] whereby the right to act in preventative self-defence is partly based on the imminence of an attack.[916] This is regarding the self defence of a state as opposed to individual self defence such as the case of *Clegg*[917] discussed in Subchapter 5.3.1. Under the long-established aforementioned 'Caroline test' for imminence (so-called after a 19th-century case on the use of force), the need to use force in self-defence must be 1) instant, 2) overwhelming, 3) leaving no choice of means, and 4) no moment for deliberation.[918] The government has argued that the concept of imminence needs to be updated to take into account modern realities and threats. The Attorney General emphasised the changing circumstances and context in society compared to that of the 19th century, which is when the Caroline case occurred.[919] Imminence defined in the context of a terrorist threat cannot be equated to the context of troops marching on the horizon in a battle in the 1890s.[920]

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[915] Christine Gray, 'Targeted Killing Outside Armed Conflict: a New Departure for the UK?' *Journal on the Use of Force and International Law*, vol.3, no.2 (2016)
[916] David Turns, 'The United Kingdom, Unmanned Aerial Vehicles, and Targeted Killings', *Insight,* vol.21, no.3 (2017)
[917] *R v Clegg* [1995] 1 AC 482 (HL)
[918] Lords Hansards, *International Self Defence* (21 April 2004)
[919] House of Commons and House of Lords, 'The Government's Policy on the use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16', *Joint Committee on Human Rights*, HL 141, HC 574 (2016-2017) 46
[920] ibid

The argument was countered with the danger of expanding the definition of imminence. An important factor to consider is the degree of proximity required threatened acts and preparatory attacks in order for something to be considered imminent.[921] It is also necessary to outline the relationship between the notion of imminence and time and space; for how long is a threat considered to be imminent after the initial event has passed? A note was made of a UK drone strike in Syria whereby the use of force was authorised by the National Security Council up to three months before it was actually carried out.[922] The Joint Committee on Human Rights policy did however request that the government clarifies the definition of imminence, recognising its ambiguity:

> "We therefore recommend that the Government provides, in its response to our Report, clarification of its understanding of the meaning of "imminence" in the international law of self-defence. In particular, we ask the Government to clarify whether it agrees with our understanding of the legal position, that while international law permits the use of force in self-defence against an imminent attack, it does not authorise the use of force pre-emptively against a threat which is too remote, such as attacks which have been discussed or planned but which remain at a very preparatory stage."[923]

The same policy, however, was used to justify the government's claim to anticipatory self-defence in Syria.[924] Surely, an attack cannot be construed as imminent if the

[921] ibid
[922] ibid
[923] ibid para 3.41
[924] ibid para 3.24

authorisation was given three months before the actual operation. This thesis seeks to highlight the importance of consistency in adhering to such key terms and calls for uniformity in defining said terms.

The issue of imminence also comes into question with regard to the existence of government 'kill lists'.[925] While the government has not confirmed whether such lists exist, the very existence of such a list is contrary to the principle of imminence, in that a potential threat that is on a list for a protracted period of time cannot be construed as constituting an imminent threat to the UK. Therefore if such a list exists, there is clearly a lack of transparency regarding the process by which a name gets added to the list, whether these names are or should be [independently] reviewed over a period of time, and whether there is a need for some form of judicial oversight of the process.

It should also be noted that the guidelines for the terminology, tasking, and employment of unmanned aircraft systems is contained in the Joint Doctrine Publication (JPD) 0-30.2. As well as updating the previous Joint Doctrine Note (JDN) 2/11, it also "describes, from a joint perspective, the use of UAS at the operational level and includes new detail on the UAS tasking process and explains the need to consider not only the 'collect' task, but also the process, exploit and disseminate (PED) functions."[926]

The issue of imminence has ramifications for domestic law with regard to individuals seeking liability for actions carried out by the state or its agents. *R (Hassan) v Secretary of State for Defence*[927] involved the apprehension of the deceased by British soldiers in

[925] European Centre for Constitutional and Human Rights, *Litigating Drone Strikes: Challenging the Global Network of Remote Killing* (2017)
[926] Ministry of Defence, 'Joint Doctrine Publication (JDP) 0-302: Unmanned Aircraft Systems', *The Development, Concepts and Doctrine Centre* (2017) iii
[927] *R (Hassan) v Secretary of State for Defence* [2009] EWHC

Iraq. Hassan was the taken to a US military facility at Camp Bucca and was transferred to the custody of US military personnel. Upon release, his body was found with eight gunshot wounds and covered in bruises. The deceased's brother made a claim that Hassan's arrest and detention had been arbitrary and unlawful, lacking in procedural safeguards guaranteed under Articles 2, 3, and 5 ECHR. He further claimed that the UK had failed to carry out an adequate and proper investigation into the circumstances of his death. The Court eventually ruled that "the powers of internment under the Third and Fourth Geneva Conventions, relied on by the Government as a permitted ground for the capture and detention of Tarek Hassan, are in direct conflict with Article 5.1 of the Convention."[928] Duxbury and Groves argue that the ruling affirms the right to liberty in an IAC as the underlying relationship between IHRL and IHL.[929]

The case of *Rahmatullah v Ministry of Defence* involved claims of wrongful detention and mistreatment of the respondents by British and US military personnel in Afghanistan and Iraq. Mr Ramatullah was a Pakistani national who was apprehended in Iraq by British forces in 2004 and was transferred to the custody of the US military in Afghanistan where he was detained until 2014. Upon his release, he sued both the Foreign and Commonwealth Office and the Ministry of Defence on the grounds of his mistreatment at the hands of British military personnel as well the complicity of the British government in his ten-year detention without charge or trial by US authorities. His was one in a large number of similar claims made by Iraqis.

The High Court held that the claims made by the respondents were justiciable and therefore subject to trial in a court of law. This is important as the concept of imminence

[928] *Hassan v United Kingdom* App no 29750/09 (ECHR, 16 September 2014)
[929] Alison Duxbury and Matthew Groves, *Military Justice in the Modern Age* (Cambridge University Press, 2016) 72

has ramifications for individuals who seek liability under domestic law for actions carried out by the state or its agents. The relevance of this in cases of targeted killings is that it is often difficult for a state to justify a targeted killing in another country on the grounds that the target posed an imminent threat to the targeting state. However, it went on to declare that the Crown act of state doctrine provided a defence to the tort claims. "The Court of Appeal allowed the respondents' appeals. It held that the doctrine provided a tort defence as well as a non-justiciability rule, but that the defence would only apply when the Government could establish that there were compelling grounds of public policy to refuse to give effect to the local tort law."[930] In 2017, the Supreme Court rejected the government's use of state immunity and foreign act of state as a means of preventing an English court from adjudicating in the government's complicity in "serious tortious wrongdoing".[931]

Another example can be found in the case of *Belhaj and another (Appellants) v Director of Public Prosecutions and another (Respondents)*,[932] which involved the appellants being captured and rendered to the authorities in Libya with the assistance of the British Secret Intelligence Service. They were subsequently imprisoned and tortured while in Libyan custody.[933] While the metropolitan Police initially investigated their allegations, the Director of Public Prosecution declined to bring any prosecutions on the grounds of insufficient evidence.[934] A review by the Crown Prosecution Service also arrived at the same conclusion. However, neither body revealed what evidence was available and why

[930] *Rahmatullah (No 2) (Respondent) v Ministry of Defence and another* [2017] UKSC 1 and [2017] UKSC 3
[931] ibid
[932] *Belhaj and another v Director of Public Prosecutions and another* [2018] UKSC 33
[933] Ian Cobain, 'Libyan Rendition: How UK's Role in Kidnap of Families Came to Light' (*The Guardian*, 2018) available at <https://www.theguardian.com/world/2018/may/10/libyan-rendition-how-uks-role-in-kidnap-of-two-families-unravelled> on 26 August 2019
[934] Supreme Court, *Belhaj and another v Director of Public Prosecutions and another* [2018] UKSC 33 On appeal from [2017] EWHC 3056 (Admin)

this was insufficient to bring a prosecution on the grounds of compromising security. The appellants duly sought a judicial review in the High Court. The case was eventually argued before the Supreme Court, which decided to allow the appeal by a majority of three to two.[935] The Court based its decision on the fact that:

> "The adoption of closed material procedure requires specific statutory authority. The Justice and Security Act 2013 gave the High Court a general statutory power, in certain circumstances, to receive "closed material" which is disclosed only to the court and to a special advocate. As explained in the 2011 Justice and Security Green Paper, the Act was a response to a growing number of civil claims for damages against which the government was unable to defend at trial except through the unacceptably damaging disclosure of secret material. Those claims instead had to be settled."[936]

The UK outlined the procedures of the tasking and use of unmanned aircraft systems (UAS) in the Joint Doctrine Publication (JDP) 0-302.[937] The report outlines the systems approved by the National Security Strategic Defence and Security Review of 2015 used by the varying arms of the armed forces. The army employs Desert Hawk III and Watchkeeper unmanned craft, while the Royal Airforce uses the Reaper, soon to be replaced by Protector in 2020. The Royal Navy tended its use of the ScanEagle system in 2017 and at the time of the report alternative systems were being considered. Article 36

[935] *Belhaj and another v Director of Public Prosecutions and another (Respondents)* [2018] UKSC 33
[936] ibid
[937] Ministry of Defence, *Joint Doctrine Publication (JDP) 0-302: Unmanned Aircraft Systems* Development, Concepts and Doctrine Centre (2017)

of Additional Protocol 1 to the Geneva Conventions governs the use of these systems before entering service and operating under the same political authority, command chain supervision, IHL and rules of engagement as manned aircraft.

5.4 National mechanisms of governance

The legislature and judiciary have a role to play in holding the executive accountable with regard to its legislation and policies. Parliament can only play a limited role in this regard due to the way the UK breaches the separation of powers principle, which mandates that no one person should be in more than one of the three organs of the state at a time. Members of Parliament are also members of the executive, therefore a government with a sufficient majority can force through any legislation. The House of Lords, not being elected, can only delay legislation; it cannot overturn it. Another contributing factor is that in the British political system, a Member of Parliament's prime allegiance is to the party before his or her constituency. This means that MPs are always under pressure to vote in favour of the government's laws and policies in the interests of party unity and the continuity of governance. The consequence of this though is that the legislature is not able to hold the executive fully accountable. This results in many of the UK's recent anti-terrorism statutes being passed without proper scrutiny. This especially applies to the Counter-Terrorism and Security Bill, which was "rushed through Parliament with no pre-legislative scrutiny or public consultation on most of its provisions – a speed justified by the increased terror threat posed by the return of young Muslims from Syria and Iraq."[938]

There have been other similar instances where domestic legislation has been fast-tracked through Parliament without proper debate or scrutiny. A prime example was the Anti-Terrorism and Security Act 2001 rushed through Parliament only two months after the

[938] Frances Webber, *Farewell Magna Carta: The Counter Terrorism and Security Bill* (Institute of Race Relations, 2015) available at <http://www.irr.org.uk/news/farewell-magna-carta-the-counter-terrorism-and-security-bill/> on 12 December 2019

9/11 attacks. In 2004 however, the House of Lords ruled that the Act's right to indefinitely detain foreign nationals without charge was incompatible with the Human Rights Act 1998, stating that the Government Order exempting the UK from the right to liberty was unlawful.[939] It went on to note that the fact that only foreign nationals were being detained was discriminatory and unnecessary. It subsequently made a declaration of incompatibility, arguing that the legislation was not compatible with the right to liberty under the Human Rights Act.[940] The government rushed through its replacement in the form of the Prevention of Terrorism Act 2005. Such actions are not consistent with a general responsibility by the government to protect the rights of British citizens and foreign nationals within its jurisdiction.[941] Instead, it constituted precipitate action that was only concerned with security issues.

5.4.1 Accountability to parliament

The UK government has been reluctant to admit to or give details of its involvement in targeted killings by UAVs. Where figures have been released, they have been met with scepticism. For example, the Secretary of Defence gave a written statement to Parliament in 2018 stating that there was only one civilian killed in airstrikes over Iraq and Syria. This was despite government figures stating that the RAF had dropped more than 3,400 bombs and missiles in Syria and Iraq. While these have been responsible for killing 4,315 enemies between September 2014 and January 2019, none of these have apparently been civilians.[942]

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[939] Liberty, *Detention Without Charge* (2019) available at <https://www.libertyhumanrights.org.uk/human-rights/countering-terrorism/detention-without-charge> on 11 July 2019
[940] ibid
[941] House of Lords Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, HL 116–I (2008–09)
[942] James Kearney, 'RAF Airstrikes in Iraq and Syrian: an Assessment', *Action on Armed Violence* (2019)

5.4.1.1 Intelligence and Security Committee of Parliament report: UK lethal drone strikes in Syria

The Intelligence and Security Committee of Parliament report in April 2017, *UK Lethal Drone Strikes in Syria,*[943] is an apt example of insufficient government accountability to Parliament. The Report was about UK lethal drone strikes in Syria, with a focus on the killing of British citizen Reyaad Khan in August 2015. Khan had appeared in an ISIS recruitment video and was suspected of being involved in the planning and execution of terror attacks.[944] The purpose of the Report was to comment on the veracity and diligence of the decisions surrounding the strikes. The Report concluded that the Committee was unable to offer assurances as to the above due to insufficient information provided. The Report describes this failure to provide necessary documentation or witness testimony as "profoundly disappointing".[945]

The Report investigated the Government's justification for the strike on Khan, assessing the four requirements of self-defence, namely: severity, imminence, necessity, and proportionality. Regarding the key requirement of imminence, the Report conceded that "'imminence' may mean different things to different people"[946] and that without

[943] (HC 2016-17, 1152)
[944] House of Commons/House of Lords Joint Committee on Human Rights, 'The Government's Policy on the Use of Drones for Targeted Killing: Government Response to the Committee's Second Report 2015-2016,' *Joint Committee on Human Rights, Committee Office, House of Commons*, HL 141, HC 574 (2016-2017)
[945] Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria* (HC 2016-17, 1152) 3
[946] Intelligence and Security Committee of Parliament (Press release, 2017) 1 available at <http://isc.independent.gov.uk/files/20170426_press_release_on_UK_Lethal_Drone_Strikes_in_Syria.pdf> on 29 May 2020

Ministerial submissions, they were "not in a position to comment"[947] on the process by which Ministers considered the question of imminence. The Committee requested further intelligence reports but were denied by the National Security Secretariat.[948]

While the Committee acknowledged the seriousness of Khan's threat, they were also unable to assess the process by which the Ministers determined the threat to be severe enough to equate to an armed attack.[949] As for proportionality, the Committee bemoaned the lack of information given to properly assess the risk of collateral damage, warning that the matter may go unscrutinised.[950] The Committee concluded that oversight and scrutiny depends on primary evidence – which was not provided sufficiently – and so they could not provide assurance to endorse the authorisation process for the lethal strike.[951]

The Report consistently demonstrated the Government's lack of accountability to Parliament in such key matters. The fact that the situation was nevertheless deemed sufficient to warrant extrajudicial killing is a testament to how the practice of targeted killings is impinging on centuries-old rights such as *habeas corpus*, the principle of being innocent until proven guilty, and the right to a fair trial. Force was used for the imposition of a death sentence on minimally disclosed evidence that would not be sufficient to prosecute a person in a court of law.

[947] Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria* (HC 2016-17, 1152) 14
[948] ibid
[949] ibid 3
[950] Intelligence and Security Committee of Parliament (Press release, 2017) 3 available at <http://isc.independent.gov.uk/files/20170426_press_release_on_UK_Lethal_Drone_Strikes_in_Syria.pdf> on 29 May 2020
[951] Intelligence and Security Committee of Parliament, *UK Lethal Drone Strikes in Syria* (HC 2016-17, 1152) 24

The use of drones in the killing of Reyaad Khan raises the possibility that the continued use of drone strikes in the future in this way will lead to accountability and oversight gaps. As the All-Party Parliamentary Group on Drones Inquiry Report argues, "When UK personnel are embedded with allies, they remain subject to UK disciplinary regulations and ultimate control over their actions remains with the UK. Therefore, the UK will not escape state responsibility for their actions, and lack of parliamentary oversight could leave the UK vulnerable to implication in unlawful actions."[952]

Another key issue with the use of drone strikes is that their increased use has been described as mission creep. Parliament had originally only given permission for surveillance flights over Syria; any expansion of the use of strikes would be without parliamentary authority. Michael Clarke, the Director-General of the Royal United Services Institute, addressed the killing of Reyaad Khan, making note of the inconsistencies between the government's pledges and action on the ground. In October 2014, it was pledged that no military operations would be conducted in Syria. It was also pledged that, unlike CIA drones, UK drones would never be used for targeted assassinations in areas considered outside the UK's legal jurisdiction, namely in areas where the UK or NATO forces were militarily engaged and faced physical threat on the ground.[953] Nevertheless, the strike was made "in an area that the UK does not currently regard, legally, as an operational theatre of war for UK forces."[954]

This further raises the question of the extent to which Parliament can hold the executive to account in the UK. The British judiciary, prior to the era of transnational terrorism,

[952] All Party Parliamentary Group on Drones Inquiry Report, *The UK's use of Armed Drones* (House of Commons, 2018) 35
[953] Ewen MacAskill, 'Drone Killing of British Citizens in Syria Marks Major Departure for UK' (*The Guardian*, 2015) available at <https://www.theguardian.com/world/2015/sep/07/drone-british-citizens-syria-uk-david-cameron> on 9 May 2019
[954] ibid

essentially took a back seat in upholding the rights of the individual in the face of state power where national security was concerned. A prime example was the case of *Liversidge v Anderson*[955] in which the courts failed to hold the executive accountable for the act of executive detention without trial. Lord Diplock highlighted this principle of executive prerogative, stating that the executive government is responsible for national security, not the courts of justice. As such, "It is *par excellence* a non-justiciable question. The judicial process is totally inept to deal with the sort of problem which it involves."[956] In 1995, Lord Justice Simon Brown described the notion of national security as an almost mystical entity, whereby its invocation "instantly discourages the court from satisfactorily fulfilling its normal role of deciding where the balance of public interest lies."[957]

5.4.2 Accountability to the judiciary

While individual cases have been noted throughout the chapter, this subchapter considers the judiciary as a mechanism for accountability in an effort to analyse the overarching view of the role of the judiciary. Davis and de Londras define counter terrorism judicial review as "the use of judicialized processes to challenge state behaviours that fall into the broad category of counter terrorism."[958] The judiciary has been accused in the past of taking a conciliatory approach to the executive prerogative in the use of force. It has consequently often been reluctant to hold the government accountable for its actions in case such actions inhibit its ability to protect the national interest.

A prime example is the case of *R v Jones* in 2006.[959] The defendants broke into and committed acts of criminal damage to the UK airbase at RAF Fairford and other military

[955] Liversidge v Anderson [1941] UKHL 1
[956] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9
[957] ibid
[958] Fergal F. Davies and Fiona de Londras, *Critical Debates on Counter Terrorist Judicial Review* (Cambridge University Press, 2014) 10
[959] *R v Jones* [2006] UKHL 16

targets shortly before the commencement of the Iraq invasion in 2003. Their intention was to disrupt the preparations for the upcoming invasion, which they believed to be unlawful under international law. They were all charged with a range of offences such as criminal damage, attempted arson, and aggravated trespass. Their defence at the trial was predicated on acts being undertaken to prevent the commission of the crime of international aggression. However, it was questionable whether the act of aggression constituted a crime in international law, and whether such a crime was applicable under English law. This led to the need for clarification in the House of Lords prior to the defendants being tried.

Another example is the case of *R (Gentle) v Foreign Secretary*,[960] where the mothers of two British servicemen killed in Iraq requested judicial review on whether the government had taken reasonable steps to ensure that the invasion of Iraq complied with international law. The legal question was whether the incorporation of the Human Rights Act 1998 placed an obligation on the British government to take reasonable steps to ensure such actions were lawful. The court held that such a question regarding the lawfulness of the Iraq invasion was not justiciable on the grounds that ECHR applied to domestic rights and "the principles of international law were not imported wholesale into the Convention."[961]

However, this deference to executive power changed with the ruling in the case of *A v Secretary of State for the Home Department*[962] in which the House of Lords ruled that the conditions of prisoners being held indefinitely at Belmarsh prison were incompatible with

[960] *R (Gentle) v Prime Minister* [2006] EWCA Civ 1690
[961] Henrietta Hill and Stephen Cragg, 'The Lawfulness of War', *New Law Journal,* no.7260 (2007) available at <https://www.newlawjournal.co.uk/content/public-law-update-4> on 10 January 2020
[962] *A v Secretary of State for the Home Department* [2004] UKHL 56

the provisions of Article 5 of the European Convention of Human Rights. This represented a shift in the judiciary automatically accepting the removal of rights of the individual by the executive on the grounds of national security. In like manner, the House of Lords ruled in the case of *Secretary of State for the Home Department v AF and Others*[963] that the conditions attached to control orders, especially with regard to disclosure of material, did not afford defendants a fair trial.

These rulings have re-asserted the independence of the judiciary and the key role it plays in, for example, protecting the Human Rights Act 1998 from executive overreach. A suggestion for overcoming such differences in interpretation may be the use of judicial pre-legislative scrutiny, possibly by a committee of the Supreme Court. Such a system could address the problems of controversial legislation being passed without sufficient legislative scrutiny. A prime example of this was the control orders legislation, which was rushed through Parliament in only 19 days.

5.5 Counter terrorism

The barring of British citizens from returning to the United Kingdom may have direct consequences to both counterterrorism as a whole, and the use of UAVs to combat perceived threats in particular. Drones may be seen as the only solution to deal with individuals that are barred from returning to the UK through terrorism exclusion orders but continue to engage in terrorist activities from abroad. This could in turn lead to an escalation of the use of drones. The related question remains as to the extent to which such exiled individuals pose a sufficient [imminent] risk to the UK to justify such actions. The UNSC Resolution 2178 (2014) requires states to "prevent, disrupt, prosecute, rehabilitate, and reintegrate foreign terrorist fighters (FTFs). While states have an

[963] *Secretary of State for the Home Department v AF and Others* [2009] UKHL 28

obligation to prevent and counter terrorism, including terrorism-related acts committed by FTFs, measures should be carefully designed to ensure that they are human rights-compliant and do not undermine the global human rights and the rule of law framework while countering terrorism."[964] This requirement is at odds with the government's decision to bar the return of such fighters. The government's powers to prosecute returnees have been enhanced with the passage of the Counter-Terrorism and Security Act 2019. However, there is a risk that refusing FTFs to return to the UK may either further radicalise them or leave them trapped in the country where they have been operating. This leaves them in a situation where they are still posing a potential threat to the UK, thereby remaining as candidates for targeted killing by drone strikes. A current prime example is the case of Shamima Begum who, though born British citizen, has been refused the right to return to the UK and stripped of her citizenship.[965]

The situation becomes even more complicated in the case of children. An example is the case of Sally Jones, also known as the "white widow", who fled the UK to join ISIS. She, along with her young son, were targeted and killed by a US drone strike in 2017 while fleeing from Raqqa. The refusal of a potential request to return in these circumstances would leave someone like this stranded in Syria or some other area of conflict. They would therefore continue to be deemed a threat and subject to targeted killings, which would in turn proliferate drone strikes.[966]

5.6 Balancing security and liberty

[964] OSCE, *Guidelines for Addressing the Threats and challenges of Foreign Terrorist Fighters within a Human Rights Framework* (OSCE 2018) 5-6; Christophe Paulussen and Kate Pitcher, 'Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges', *International Centre for Counter Terrorism*, (The Hague, 2018)
[965] *Begum v Secretary of State for the Home Department* SC/163/2019, 7 February 2020 (Special Immigration Appeal Tribunal).
[966] Katherine Brown, 'White Widows: the Myth of the Deadliest Jihadi Women', (*Tony Blair Institute for Global Change*, 2018)

This chapter deals with the problems of balancing the requirements of security and liberty in domestic law within the overall context of the transfer and use of high technology weapons, namely UAVs. The country's security needs are based on countering the threats posed by local and transnational terrorism. At the same time, this has to be undertaken in conjunction with respecting the individual's rights to freedom and procedural fairness. The data presented in the chapter indicates that the British state is prioritising security over liberty.

One such example is the extrajudicial killing of Mohammed Emwazi, or Jihadi John, in which the government justified the attack on the grounds that the circumstances constituted an emergency and therefore did not require parliamentary oversight. Clarke argues that using extrajudicial killing to counter an unspecified or even non-urgent threat where the UK is not engaged in an armed conflict sets a dangerous precedent for other states to follow suit. Legal justification on these grounds "is thin and may be damaging to the international norms the UK seeks to strengthen."[967]

The government's justification of granting licences authorising the sale of arms to Saudi Arabia was that there was not a clear risk that the weapons sold would be used in the commission of breaches of IHL in accordance with Criterion 2 of the Common Rules Governing the Control of Exports of Military Technology and Equipment (European Council Common Position 2008/944/CFSP, December 2008). The High Court initially accepted this justification as an adequate response. This was based on its acceptance of the Government's assertion that "Criterion 2c is focused on a prospective assessment based on an overall judgment of all the information and materials which [the Defendant]

[967] Michael Clarke, 'Killing Jihadi John: Significance and Implications' (*RUSI,* 2015) available at <https://rusi.org/commentary/killing-%E2%80%98jihadi-john%E2%80%99-significance-and-implications> on 8 July 2019

considers appropriate and has available to it. Past and present conduct is one indicator as to future behaviour and attitude towards international law."[968]

This was a deferential approach to executive power; the Court noted that when the Court lacks the particular expertise of a subject, it should be made especially cautious "before interfering with a finely balanced decisions reached after careful and anxious consideration by those who do have the relevant expertise to make the necessary judgments."[969] This was an extraordinary declaration to make, considering this is precisely what courts do on a routine basis where there are legal conflicts. Judges usually do not possess the institutional expertise in other areas of law such as contracts, competition, and trusts law. However, they make assessments based on compliance with the law rather than the carefully balanced decisions that have been reached between two competing or opposing parties.

While this process may be described as a dichotomy between security and liberty, there is also a third factor at work in the form of an economic argument. It is often argued that the export of arms is significantly profitable to the United Kingdom's economy. As of 2018, the number of approved arms export licenses was valued at £6.6 billion, which represents an 83% increase over 2017, allowing the UK to compete with Russia for the position of the world's second largest arms exporter. While this is proving lucrative for UK arms sales, the UK has also been accused of fuelling conflicts and instability in different parts of the world. These weapons are also being used to commit human rights

[968] Laura Green and David Hamer, 'The Legality of the UK/Saudi Arms Trade: A Case Study' (*European Journal of international Law*, 2017) available at <https://www.ejiltalk.org/the-legality-of-the-uk-saudi-arabia-arms-trade-a-case-study/> on 9 July 2019
[969] ibid

atrocities,[970] such as the way Saudi Arabia has used British weapons to commit human rights offences in Yemen.

Another example can be found in the case of arms sold to Egypt and Bahrain. This sale was blocked during the attempts to stamp out the Arab Spring uprisings. By then, however, "it was too late for the Arab citizens being tracked with UK surveillance equipment, bundled into UK armoured vehicles and killed and tortured by a military with access to all manner of UK weaponry."[971] Arms sold to European and US companies are also being diverted to local factions and groups in the Middle East for a lucrative profit. In the process, end-user certificates are being abused, with no penalties levied for such breaches.[972]

5.7 Conclusion

The aim of this chapter was to assess UK domestic law in regulating drone warfare as well as the topics that impact on the use of drones, such as the use of lethal force, counter terrorism, and the arms trade. The chapter found that underlying themes of security and trade have impacted the UK's ability to regulate drone warfare. In particular, the UK's arms trade activity and political ties have put into question the UK's position on drone warfare. The chapter also continued from previous chapters in arguing the inadequacy of popular application of the concepts of self-defence, imminence, and necessity. The case

[970] Cahal Milmo, 'Britain's Arms Exports grow by Billions – as it Sells More Bombs to Drop on Yemen' (*The Essential Daily Briefing*, 2018) available at <https://inews.co.uk/news/uk/uk-arms-exports-statistics-increase-saudi-arabia-bombs-yemen/> on 9 July 2019

[971] Lloyd Russell-Moyle, 'The Arms Trade Isn't the Post Brexit Future We're Looking For' (*The Guardian*, 2017) available at <https://www.theguardian.com/commentisfree/2017/dec/20/uk-arms-trade-no-moral-or-economic-sense-liam-fox-killing-machines> on 9 July 2019

[972] Rod Austin, 'Yemen: Inquiry Finds Saudis Diverting Arms to Factions Loyal to Their Cause' (*The Guardian*, 2018) available at <https://www.theguardian.com/global-development/2018/nov/28/arms-yemen-militia-were-supplied-by-west-find-analysts> on 9 July 2019

of Reyaad Khan was analysed in detail to reveal the shortcomings of these applications and the need to reform them in light of the technologies of drone warfare. Finally, the chapter highlighted the issue of accountability, calling for more accountability and transparency from government, especially in the current era of advanced technology in armed conflict.

5.7.1 Proposals

The thesis echoes the advice of Parliament that the Government ought to establish clear and independent accountability mechanisms regarding the use of lethal force outside instances of armed conflict, with particular regards to drones. Parliament specifically recommends:

> 1) "Automatic referral to the ISC of any such use of lethal force;
> 2) A revised Memorandum of Understanding between the Prime Minister and the ISC making clear that the Government accepts that the ISC has the power to consider intelligence-based military operations, and that the MoD must provide the ISC with all the relevant information about such an operation that the ISC needs to make its investigation effective; and
> 3) Access to independent legal advice rather than legal advice from the Government's lawyers."[973]

This advice is in line with the ECtHR ruling in *McCann*, as outlined in Subchapter 4.3.1.5 on IHRL. This thesis calls for more uniformity between legal frameworks. Applicability

[973] House of Commons and House of Lords, 'The Government's Policy on the use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16', *Joint Committee on Human Rights*, HL 49, HC 747 (2016-2017) para 3.50

– and even enforceability – can increase if key procedures, rulings, and concepts are aligned. In this vein, the chapter calls for further clarification on the definition of imminence, its application to drones, and its relationship with necessity and self-defence. It also calls for further clarification on the threshold required for a terrorist attack or threatened attack to constitute an "armed attack".[974]

With regards to accountability, a potentially key solution to executive overreach has been the convention on the use of war powers, which is a recent and provisional, if not tentative, convention requiring the Government to first seek the approval of Parliament before engaging in the use of force abroad. It has the advantage of requiring parliamentary scrutiny of any decision to go to war. However, this convention is being undermined by the Government's use of remote warfare, which consists of the use of Special Forces and drones. This process has been described as working "by, with, and through local and/or regional forces who do the bulk of the frontline fighting while the UK and its Western allies provide support through capacity building, equipment, air support, or the deployment of special forces."[975] This thesis calls for further work on this convention with specific mention of UAVs in armed attacks.

The Government has stated that certain areas, such as the use of Special Forces, will be exempt from the convention, ostensibly on the grounds that such operations require stealth and secrecy. This statement, however, has been complicated by government assertions that Special Forces were not used in Libya and Syria, which turned out to be false claims. Parliament has largely accepted the argument that Special Forces and intelligence operations need to be conducted without prior public scrutiny. The situation

[974] ibid para 3.29
[975] Liam Walpole and Megan Karlshoej-Pedersen, *Remote Warfare and the Practical Challenges for the Protection of Civilians Strategy* (Oxford Research Group, Oxford, 2019) 1

with the extraterritorial use of drones in targeted killings is more complicated. The convention only covers military operations that involve the use of force where there is a risk to the life of UK armed forces or the military and civilians of other countries. It does not apply to non-combat operations such as surveillance and intelligence gathering. The thesis calls for further clarification in this regard.

More broadly, an underlying issue is how to ensure security in a manner that is accountable and that does not undermine liberty and human rights in an era when counter-terrorism has become a near-permanent mode of governance. These problems are partially constitutional in nature, and any solution would necessarily involve constitutional change, which is difficult to achieve. At present, there are policies in place, such as the gathering of statistics on the use of counter-terrorism powers and the Independent Reviewer of Terrorism Legislation, which works independently of the Government to inform the public and political debate on anti-terrorism laws. However, accountability and knowledge gaps still exist and need to be addressed, including the impact on counter-terror laws on affected communities.[976] Other potential solutions include preventative measures such as the dissemination of counter-narratives, investment in community police officers, and the development of inter-religious dialogues. These solutions require the British government to re-commit itself to the idea that sacrificing liberty for security in domestic law and policy is a counter-productive strategy that causes the type of social disruption that terrorists aim to achieve, in turn leading to the increased dehumanisation of armed conflict outlined throughout the thesis.

[976] Alexander Horne and Clive Walker, 'Lessons Learned From Political Constitutionalism? Comparing the Enactment of Control Orders and Terrorism Prevention and Investigation by the UK Parliament' *Public Law* (2014) 267; Alexander Horne and Clive Walker, 'Parliament and National Security' in Alexander Horne and Andrew Le Sueur (eds.), *Parliament: Legislation and Accountability* (Hart, Oxford, 2016)

Chapter Six

Conclusion

6.1 Research findings

This thesis examined the dehumanisation of drone warfare, scrutinising the legal response to the proliferation of UAVs in armed conflict. It found that the increasing physical distance between combatants created by drone technology has led to psychological distancing and detachment. The enemy is anonymised and partially dehumanised, reducing natural and innate human inhibitions towards killing. Smart weapons have reduced human presence on the battlefield – at least on one side – thereby diminishing the perceived consequences of armed conflict. As a result, armed conflict is growing increasingly unilateral, at times reduced to preventative manhunting. The thesis further found that the drone phenomenon is changing the landscape of contemporary armed conflict. The unprecedented ease with which individual drone operations can be deployed has significantly bridged the gap between war and peace. Extensive mobilisation or commitment to armed conflict is not required to execute specific military operations. The threshold of armed aggression is greatly diminished, transforming armed attack from the last resort to the first option.

Finally, the thesis found that the abovementioned developments in armed conflict undermine the normative ability of IHL and IHRL. Individual drone operations do not currently require the existence of a recognised armed conflict, and as a result are exploiting the conventional frameworks upon which the laws are based as well as the tentative relationship between the two. The current premise upon which the law operates

is not sufficient to adequately regulate drone warfare. International law is premised on traditional modes of combat and therefore does not instruct with enough detail the abilities of more advanced technologies in armed conflict.

6.2 Chapter findings

6.2.1 Chapter 2: dehumanisation

Chapter 2 found a direct relationship between physical distance and psychological distance and detachment. The greater the distance between an act and its consequences, the less attachment there is towards the consequences. This translates into armed conflict; the further the combatants are from one another, the weaker the inhibitions are towards killing. Technology in warfare, in the form of UAVs, has exacerbated the issue, as they create a situation where drone operators are not in any direct line of fire but retain the ability to attack.

The chapter found that the above developments have led to an increasingly unilateral form of armed conflict. Drones transcend borders with relative ease, facilitating targeted killings. This facilitation in turn has grown increasingly preventative, and operations are conducted based on patterns of analysis derived from drone surveillance. The chapter questions the veracity of the accuracy and decision-making process behind these attacks as well as the overarching development of drone warfare.

6.2.2 Chapter 3: The Law of Armed Conflict

Chapter 3 found weaknesses in IHL in its ability to regulate drone warfare. IHL is largely premised on warfare being fought between states in defined locations and periods of high-intensity battles. The rapid development of technologically advanced weapons has led to two situations in which IHL is not currently equipped to govern: prolonged periods of

low-intensity conflict, and the rise and significance of non-state actors. First, NIACs are not sufficiently defined,[977] which indulges states' decision to resort to drones. Second, there are issues regarding the threshold of a minimum level of organisation and a sufficient degree of intensity before IHL can apply.[978] Finally, IHL fails to define with necessary clarity whether a terrorist is considered to be a combatant or a civilian.[979] These discrepancies help create a situation where armed attacks take place but without the necessary regulations.

6.2.3 Chapter 4: International Human Rights Law

This chapter found that IHRL serves as a useful outlet to govern matters where IHL may fall short, but has problems with enforceability. While the chapter maintains that IHRL does indeed apply to armed conflicts, there are uncertainties as to whether IHRL applies to a particular conflict, whether it applies to jurisdictions not party to IHRL, and to what extent it applies responsibility to allies of those involved in conflicts. In other words, IHRL applies to armed conflicts, but its enforceability and application are problematic. One particular issue in IHRL is the extent to which states can be held accountable for the use of drones outside the state's jurisdiction. The chapter has found that case law upholds a state's extraterritorial responsibility in certain circumstances.

The chapter also found that there is sufficient argument to posit that many drone strikes violate IHRL. The arbitrary deprivation of life is prohibited under IHRL, and states are only allowed a small window through which derogations are possible. A state cannot

[977] Alison Duxbury, 'Drawing Lines in the Sand – Characterising Conflicts for the purpose of Teaching IHL', *Melbourne Journal of International Law*, vol.8 (2007) 259-272
[978] Geneva Call, *Administration of Justice by Armed Non-State Actors* (2017) available at <https://genevacall.org/wp-content/uploads/dlm_uploads/2018/09/GaranceTalks_Issue02_Report_2018_web.pdf> on 24 January 2019
[979] René Vark, 'The Status and Protection of Unlawful Combatants', *Juridica International* vol.x (2005) 191-198

always guarantee that strikes are not arbitrary or that threats posed by the targets are sufficiently real and immediate to represent a threat to life.

6.2.4 Chapter 5: national governance

This chapter found that prioritising security and trade has compromised the UK's ability to safeguard its citizens. Dangerous precedents were set when parliamentary oversight was bypassed on grounds of emergency for an unspecified or even non-urgent threat, such as the case of the extrajudicial killing of Mohammed Emwazi. The chapter highlighted the discrepancies in the Government's application of imminence in relation to drone warfare. As per the Caroline test,[980] imminence as a self-defence can only be used for preventative self-defence when the threat is immediate, and the use of such force is necessary for its prevention.

Lucy Fisher summarises the relationship between the unique capabilities of drone warfare and Britain's responsibility to ensure the rule of law, tying together the key notions of this thesis:

> "Herein lies a key tension at the heart of Britain's drone use. While the capability obviates any need to put troops in harm's way on the ground, that lack of physical personnel means strikes are often undertaken without full intelligence and are concluded without sufficient investigation into the outcome. The UK is

[980] Daniel Webster (1841), quoted in Hunter Miller (ed.), *British-American Diplomacy, The Caroline Case* available at <https://avalon.law.yale.edu/19th_century/br-1842d.asp> on 7 January 2020

overreliant on aerial imagery, signals intelligence, assumption and estimates."[981]

6.3 Proposals

This thesis has outlined the consequences of drone warfare and the potential implications of its unrestricted deployment. Rather than favouring an exclusionary approach to ban armed UAVs, this thesis calls for the development of regulations specific to their capabilities. Legal frameworks premised on conventional methods of warfare are not currently sufficient to adequately regulate 'smart' weapons that are unprecedented in their speed of deployment, distance, and precision. Rather than seeking to develop new frameworks, the thesis calls for existing frameworks to be updated and evolved in line with these new technologies. In an increasingly globalised world, this thesis also calls for further uniformity and clarity between different international and national legal frameworks. It specifically calls on the UK to take the initiative as an international leader to implement or at least forward the proposed changes. Recommendations are made for IHL, IHRL, and UK domestic law as follows.

6.3.1 Proposals for IHL

Rather than an overhaul, the most pragmatic solution would be to update and evolve IHL. This thesis proposes the *Tallinn Manual*[982] as a model to emulate and apply to drone warfare. Such an approach is proposed as a stepping-stone towards formalising laws and policies. Two particular aspects of IHL that require further detail and clarification are: 1) the definition of a direct participant in a conflict, especially with regards to terrorists, who

[981] Lucy Fisher, 'Civilians Need Protection From British Drones', (*The Times*, 2019) available at <https://www.thetimes.co.uk/article/civilians-need-protection-from-british-drones-7ltshjfrk> on 11 December 2019

[982] Michael Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, Cambridge, 2017) 421

more often than not fall neither within the categories of combatant nor civilian under IHL, and 2) the definition of an NIAC in an increasingly globalised world where non-state actors have the ability to cross borders. The dehumanisation and detachment outlined throughout the thesis are to serve as reference points for adjustments in IHL.

Regarding the deployment of drones, the thesis proposes that the use of drones be limited to instances of legally recognised armed conflicts. Such a qualifier would assist in deterring the unrestricted use of drones as a first resort in cases of pre-emptive attack. Mary O'Connell testified that "drones are not lawful for use outside combat zones".[983] Special Rapporteur Philip Alston adds that "outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal."[984] Bachman and Holland comment that in spaces outside a legally recognised battlefield, killing individuals suspected of planning or participating in political violence without first attempting to detail them constitutes a violation of both IHL and IHRL.[985] Shiri Krebs concludes her article *Rethinking Targeted Killing Policy* by recommending targeted killings be used as a last resort, only after capture and detention are unavailable, thus respecting and protecting civilian lives on both sides equally.[986] As explained in Chapter 5, most countries and international agencies view the Global War on Terror as in breach of international law and would thus not qualify as an official armed conflict.[987]

6.3.2 Proposals for IHRL

[983] Mary O'Connell, 'Lawful Use of Combat Drones', *US Congress* (28 April 2010)
[984] Alston P, 'Study on Targeted Killings', *UN Document* (28 May 2010)
[985] Jeffrey Bachman and Jack Holland, 'Lethal Sterility: Innovative Dehumanisation in Legal Justifications of Obama's Drone Policy', *International Journal of Human Rights*, vol.23, no.6 (2019) 1029; Jeffrey Bachman, 'The Lawfulness of Targeted Killing Operations Outside Afghanistan', *Studies in Conflict and Terrorism*, vol.38, no.11 (2015) 899-918
[986] Shiri Krebs, "Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians From the Ravages of Both Terrorism and Counterterrorism", *Florida State University Law Review*, vol.44 (2017) 1-53
[987] UN ECOSOC, 62nd Sess, Future E/CN.4/2006/120 (15 February 2006)

This thesis calls for clarification on the legal framework(s) that would apply when drone strikes are conducted outside instances of official armed conflict. This necessitates clearer boundaries to be drawn between IHL and IHRL, and further research to be conducted on their relationship. The Joint Committee on Human Rights called on the UK government to "avoid conflating the Law of War and the ECHR and to remove the scope for such legal confusion by setting out the Government's understanding of how the legal frameworks are to be interpreted and applied in the new situation in which we find ourselves."[988] The "new situation" is referring to the unprecedented capabilities of drone technology. This thesis echoes these recommendations and forwards the idea that clarifying the relationship between legal frameworks is key to combating the effects of drone warfare.

As mentioned throughout the thesis, applying laws designed for conventional uses of lethal force to advanced technologies in war may create insufficiencies in their application. The above-mentioned committee continues to note: "the decision-making process for more conventional uses of lethal force in armed conflict may not be sufficient to ensure compliance with the relevant standards on the use of lethal force. The Government should consider whether any changes to the process are required…"[989] This shows that adjustments to law must be comprehensive with consideration of decision-making and procedure.

There are also calls to revise IHRL to renew official commitment to human rights. For example, there are arguments to extend the notion of inalienable human rights based on

[988] House of Commons and House of Lords, 'The Government's Policy on the use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16', *Joint Committee on Human Rights*, HL 49, HC 747 (2016-2017) para 3.90
[989] ibid para 4.23

the understanding that all human rights are inherent to every human.[990] However, the thesis concedes the extremely delicate balance between maintaining the current integrity of IHRL and increasing its applicability. Finding the right balance is very difficult to achieve. The thesis makes suggestions related to the protection of life, such as extending the definition of a hostage to those civilian populations infiltrated by terrorists who hide within them. It also suggests updating the ICCPR to clarify that drone strikes should only be used where there is "clear evidence of a threat to life".

IHRL is valuable in its offer to provide an outlet to victimised individuals that have not found the opportunity to do so under IHL. The key focus moving forward should therefore pertain to the practicality of IHRL and how to increase its enforceability, perhaps through independent tribunals.

6.3.3 Proposals for domestic law

The thesis proposes that more government accountability will help facilitate the regulation of armed drones. The thesis relies upon Parliament's recommendations that the Government is to automatically refer to the ISC when using armed drones, that the MoD must provide the ISC with the relevant intelligence pertaining to said operations, and that the Government is to seek independent legal advice on those matters instead of government lawyers.[991] The thesis recommends a restatement to the convention about the use of war powers, but with particular reference to drone warfare. The convention should be bolstered to become less tentative or speculative and it should address the unique

[990] Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' *American Journal of International Law,* vol.99, no.1 (2005) 121-123

[991] House of Commons and House of Lords, 'The Government's Policy on the use of Drones for Targeted Killing: Government Response to the Committee's Second Report of Session 2015–16', *Joint Committee on Human Rights*, HL 49, HC 747 (2016-2017) para 3.50

nature of drone warfare in detail. The thesis also recommends a reconsideration of the exception given to Special Forces operations.

More broadly, the thesis urges the British government to re-commit itself to the notion that maintaining individual liberty of its citizens and ensuring their security go hand in hand. This is ensured through maintaining high levels of government accountability in an era of an ever-increasing narrative of counter-terrorism.

6.4 Contribution to originality

This thesis contributes to existing literature, primarily in the form of linking the topics of dehumanisation, detachment, drone warfare, and law. While each topic has been previously researched independently, this thesis creates a coherent stream of thought: dehumanisation removes inhibitions towards killing, and physical distance has a direct correlation with psychological distance and detachment; drone warfare facilitates this dehumanisation through its unique capabilities. Armed conflict is growing increasingly unilateral and preventative as a result, and the law is not currently equipped to sufficiently regulate this rapidly adapting form of combat.

The thesis built on Stanley Milgram's Obedience to Authority experiments.[992] While most analyses pertain to the psychology behind obedience to authority, this thesis analysed the same experiment but from the perspective of detachment. The thesis made note of the varying levels of detachment correlating with the extent to which the subjects were physically distanced from their victim. As a result, the thesis introduced a third notion of dehumanisation applicable to drone warfare – partial dehumanisation – adding to the two established forms of dehumanisation, namely animalistic dehumanisation and

[992] Stanley Milgram, *Obedience to Authority* (Printer & Martin Ltd., London, 2013)

mechanistic dehumanisation.[993] Partial dehumanisation is where the humanity of the person is masked, blurred, or faded, as in the case of drone warfare. The thesis also provided a comprehensive evaluation of different methods of dehumanisation, analysing the role of distance, technology, and even language.

This thesis is original in its consideration of dehumanisation as a cause for creating greater human insecurity towards life or an increased willingness to kill in armed conflict. Currently, the law does not acknowledge the dehumanising aspect of drone warfare. This thesis consistently advises that detachment and dehumanisation are considered as reference points when updating legal frameworks or policies. It is also original in examining both domestic law and international law in conjunction, providing in-depth analysis on IHL, IHRL, and domestic UK governance. This thesis can serve as a reference point for policy makers to apply, for academics to expound upon, and for NGOs and activists to utilise.

6.5 Future research

This research is limited in its scope by the nature of the PhD format, and so there remain a number of important avenues that can be subsequently explored. The most pertinent of these is perhaps automation and the vast implications it holds in armed conflict. In the near future, targeted killings may possibly evolve into the use of autonomous weapons that possess artificial intelligence and can independently make the decision of who to target and when.[994] The Ministry of Defence Joint Doctrine Publication makes a distinction between automated and autonomous systems.[995] The former refers to systems

[993] Nick Haslam, 'Dehumanization: An Integrative Review', *Personality and Social Psychology Review,* vol.10, no.3 (2006) 262
[994] Future of Life Institute, 'Lethal Autonomous Weapons Pledge' (*Future of Life*, 2019) available at <https://futureoflife.org/lethal-autonomous-weapons-pledge/> on 5 April 2019
[995] Ministry of Defence, 'Joint Doctrine Publication (JDP) 0-302: Unmanned Aircraft Systems', *Development, Concepts and Doctrine Centre* (2017)

that are programmed to follow predefined rules in response to sensor inputs, while the latter is capable of choosing from a range of alternative actions without the need for human input or control. The distinction is important as automated systems, despite being useful for reducing operator workload and speeding up decision-making, still remain within the oversight and control of humans. Indeed, there are already semi-autonomous weapons in use that pose limited autonomy in areas such as intelligence gathering, surveillance, target acquisition, and engagement. However, these still remain under the overall control of human beings.

There is doubt as to whether these systems can ever exercise appropriate distinction between legitimate targets and illegitimate ones. Machines, however intelligent and autonomous, have a proven track record of obeying orders; there is no track record of their being able to creatively give orders. While a lack of emotion is often given as an advantage, the realities of war are never black and white. A rational response to a situation may not be the correct moral, ethical, practical, or legal choice. There is no evidence to currently suggest that laws of war, including the plethora of nuances involved, can be programmed into a robot.[996] This underscores the discussion in Subchapter 3.4.5 on 'command responsibility', where responsibility is placed on a superior officer if they have sufficient knowledge of the subordinate's act, or intended act, and fail to take reasonable measures to prevent or punish them. The above-mentioned technological shortcoming creates a host of legal issues pertaining to proportionality and responsibility. Will these autonomous systems – which will be deployed in the not-too-distant future – absolve commanding officers from responsibility? Will they accept responsibility themselves? If

[996] Birmingham Policy Commission, *The Security Impact of Drones: Challenges and Opportunities for the UK*, (University of Birmingham, Birmingham, 2014) 7

so, how can a robot receive punishment? Such legal predicaments must be considered and discussed in anticipation of these technologies, not after their deployment.

Judicial independence will become even more important in the future with the introduction and use of autonomous weapons. There will ultimately need to be human accountability for any erroneous decisions made by autonomous weapons that result in the unnecessary or unlawful loss of life. An independent Supreme Court will have an important role to play in both deciding on cases arising out of the use of autonomous weapons and possibly being involved in judicial pre-legislative scrutiny on their implementation. At present, the international community is divided on how to ensure the compliance of autonomous weapon systems with IHL. "Article 36 of Additional Protocol I to the Geneva Conventions requires states parties to ensure in the 'study, development, acquisition, or adoption of a new weapon' that it would not, 'in some or all circumstances', be prohibited by the Protocol or any other rule of in."[997] The Human Rights Committee in October 2018 made the strong recommendation that such weapons, which lack the capacity for human emotion and judgment, should not be developed, as their use would have serious implications for the principle of the right to life under international law.[998] While this thesis does not necessarily make such recommendations, it certainly concedes that further research is required on the matter. This imminent progression in artificial intelligence and its application to drone warfare conveys a very literal form of dehumanisation – the actual removal of human beings – not only from the battlefield, but also from decision-making responsibilities.

[997] Jarna Petman, *Autonomous Weapons Systems and IHL: Out of the Loop?* (2017)
[998] Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights on the Right to Life* (31 October 2018) CCPR/C/GC/36

6.6 Concluding remarks

Drones are here to stay.[999] Their use has grown exponentially; 2004-2007 saw ten attacks in Pakistani territory compared to 36 in 2008, 54 in 2009, 122 in 2010, and so on.[1000] Ten months into Nobel Peace Prize winner President Obama's tenure, more drone attacks were authorised than in the entirety of President Bush's eight years in office.[1001] There are no signs of slowing down, with plans to expand drone operations into more "high-threat" countries.[1002] In fact, reliance on drones is increasing over time;[1003] since 2011 the U.S. Air Force has trained more drone pilots than bomber pilots and fighter pilots combined.[1004] That is apparently not enough, with a reported "crisis" in finding enough pilots for the required missions to come.[1005] Pragmatically, this thesis does not call for a ban on drones.

Ethically, this thesis does not argue that drones are inherently wrong. Former U.N. Special Rapporteur Professor Philip Alston acknowledges that drone missiles are "no different from any other commonly used weapon, including a gun fired by a soldier or a

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[999] News Release, Office of the High Commissioner, *Statement by Ben Emmerson, UN Special Rapporteur on Counter Terrorism and Human Rights Concerning the Launch of an Inquiry into the Civilian Impact, and Human Rights Implications of the use Drones and Other Forms of Targeted Killing for the Purpose of Counter-Terrorism and Counter-Insurgency* (2013) 2

[1000] New America, 'Drone Strikes: Pakistan' (*New America*, 2018) available at <https://www.newamerica.org/in-depth/americas-counterterrorism-wars/pakistan/> on 13 September 2019

[1001] Hillel Ofek, 'The Tortured Logic of Obama's Drone War', *New Atlantis*, vol.27 (2010) 36

[1002] Eric Schmitt and Michael Schmidt, 'U.S. Drones Patrolling Its Skies Provoke Outrage in Iraq', (*New York Times*, 2012) available at <https://www.nytimes.com/2012/01/30/world/middleeast/iraq-is-angered-by-us-drones-patrolling-its-skies.html> on 13 December 2019

[1003] Alan W. Dowd, 'Drone Wars: Risks and Warnings', *Parameters* (2013) 7-8; Spencer Ackerman and Noah Shachtman, 'Almost 1 in 3 U.S. Warplanes Is a Robot', (*Wired,* 2012) available at <https://www.wired.com/2012/01/drone-report/> on 15 September 2019

[1004] Alan W. Dowd, 'Unmanned Combat', (*Claremont Institute,* 2013) available at <https://www.claremont.org/crb/article/unmanned-combat/> on 15 September 2019

[1005] Kate Brannen, 'Air Force's Lack of Drone Pilots Reaching 'Crisis' Levels', (*Foreign Policy*, 2015) available at <https://foreignpolicy.com/2015/01/15/air-forces-lack-of-drone-pilots-reaching-crisis-levels/> on 7 December 2019

helicopter or gunship that fires missiles."[1006] Inherently, the mechanism of a drone strike cannot be said to be less favourable morally than a gunshot or aerial bomb. In fact, an argument can be made for its moral superiority; the 'old way of war' sought to destroy or annihilate the enemy, which would entail amassing forces to crush the enemy, and oftentimes civilians too.[1007] Drones are designed to be quicker, more decisive, and with less risk to civilians.[1008] Some commentators describe them as "the most humane form of warfare."[1009]

The thesis does not argue for the inherent illegality of drones either. The overarching principle that governs the regulation of weaponry in armed conflict is the prohibition of superfluous injury or unnecessary suffering,[1010] such as with poisoned bullets or blinding lasers.[1011] Drones, in and of themselves, do not contravene this principle. Instead, criticism is directed at the manner in which they are used as well as the frequency and permissibility of their use. Attention is focused on whether specific use of drones (like any other weapon) complies with the LOAC and its fundamental principles, namely that of proportionality, necessity, distinction, precaution, and most importantly, humanity. This applies to each specific drone operation as well as the consequences of drone warfare

[1006] Philip Alston, Report of the UN Special Rapporteur On Extrajudicial, Summary or Arbitrary Executions, *UN Doc*, *A/HRC/14/24/Add.6* (28 May 2010)
[1007] Owen Gross, 'The New Way of War: Is There a Duty to Use Drones?' *Florida Law Review*, vol.67, no.1 (2016) 24; Russell F. Weigley, *The American Way of War: A History of United States Military Strategy and Policy*, (Macmillan Publishing Company, New York, 1973) xxii; Paul G. Gillespie, *Weapon of Choice: The Development of Precision Guided Munitions* (University of Alabama Press, Tuscaloosa, 2006) 156
[1008] New America, *International Security*, available at <http://securitydata.newamerica.net/drones/pakistan-analysis.html> on 18 September 2019
[1009] Michael Lewis, 'Drones: Actually the Most Humane Form of Warfare Ever' (*The Atlantic*, 2013) available at <https://www.theatlantic.com/international/archive/2013/08/drones-actually-the-most-humane-form-of-warfare-ever/278746/> on 20 January 2019
[1010] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts (Protocol 1), 8 June 1977, 1125 UNTS 3 (art. 51 s5(b); art. 57 s2(a)(iii)); *International Committee of the Red Cross*, Rule 70, 'Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering'
[1011] John Yoo, 'Embracing the Machines: Rationalist War and New Weapons Technologies', *California Law Review*, vol.105, no.2 (2017) 479

as a phenomenon and culture, namely that of detachment and dehumanisation, blurring the lines of peace and war. While isolated use of UAVs may potentially be legal, the international culture surrounding armed aggression created as a result may contravene the above-mentioned underlying principles of the LOAC.

In the wake of the USA's first targeted killing by a drone outside an active battlefield in 2002, Special Rapporteur Asma Jahangir expressed that "an alarming precedent might have been set for extrajudicial execution by consent of Government."[1012] She was indeed correct; it set a precedent for a rapid rise in drones being used for targeted assassinations in the decade to come. By 2017, the Obama administration authorised 563 drone strikes in Pakistan, Yemen, and Somalia – over ten times more than were authorised under the Bush administration.[1013] Many of these strikes crossed legal boundaries. Mary O'Connell concluded that there is "no legal right to resort to drone attacks in Pakistan."[1014] Her discussions largely revolved around jurisdictional issues stemming from a lack of consent elaborated upon in great detail in Subchapter 3.2.2.

Quite remarkably, President Obama himself warned of the "limits" of drone use, noting in 2013: "We will not be safer if people abroad believe we strike within their countries without regard for the consequence."[1015] Obama encapsulated the underlying criticisms of the culture drone warfare outlined throughout this thesis, as laid out in Research Objective 2. Ignatieff describes the bombing of Baghdad as the first war where "the

[1012] Asma Jahangir, *Report of the Special Rapporteur*, E/CN.4/2003/3 (13 January 2003)
[1013] 'Get the Data: Drone Wars', *The Bureau of Investigative Journalism*, (1 January 2017) available at <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data> on 4 December 2019
[1014] Mary O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009' in Simon Bronitt (ed.), *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force,* Notre Dame Legal Studies Paper (forthcoming) no.09-43
[1015] *President Barack Obama's State of the Union Address*, White House, Washington DC (28 January 2014)

electorate discovered the intoxicating reality of risk-free warfare."[1016] While all wars have a degree of risk and consequence, the flexibility, anonymity, and distance at which drones operate must be met with regulations specific to its characteristics. With fewer incentives to terminate the violence, the lower cost of war may result in countries resorting to force as a measure equivalent to nonviolent alternatives such as economic sanctions or diplomatic efforts, rather than the last resort that it has always, and should always be.[1017]

[1016] Michael Ignatieff, *Virtual War: Kosovo and Beyond,* (Picador, London, 2000) 168
[1017] Owen Gross, 'The New Way of War: Is There a Duty to Use Drones?' *Florida Law Review*, vol.67, no.1 (2016) 56

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