



**THE COMBAT DRONE: AN EXTENSION OF  
THE HUMAN BODY**

**A MORAL AND LEGAL ASSESSMENT OF THE USE OF  
COMBAT DRONES IN CONTEMPORARY ARMED CONFLICT**

THESIS 2012-2013

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Word Count: 29.995





## ABSTRACT

*The advent of drone strikes has raised serious concerns about their consequences for the protection of civilians under international human rights law. In this thesis it is examined how combat drones in contemporary armed conflict – targeted killings and asymmetric war – can be morally and legally assessed. This research approaches the drone as a medium, rather than an autonomous robot, and compares just war theory with the minimal applicable legal standard of protection, the law of non-international armed conflict. It is argued that the legality and morality of drones for targeted killings in the war against terrorism depends upon compliance with ius in bello. It is asserted that combat drones require a stricter application of ius in bello because 1.) to neglect their full capability for accuracy violates customary precaution requirements, 2.) a permissive application of ius in bello endangers civilians due to the proximity of contemporary battlefields to civilian areas, and 3.) the its risk-free nature of the drone inspires abuse of the already weak UN Charter. It is concluded that specific IHL regulations on the use of combat drones would strengthen ius in bello as a last guarantee for the protection of those not participating in war.*

## ACKNOWLEDGEMENTS

The forthcoming of this thesis could not have been accomplished without the support of many. Therefore I would like to express my sincere thanks to all of those who contributed to it. To begin with, I would like to thank John Reynolds for his encouragement. A warm thanks and appreciation to Angela Melchiorre for stepping up and ensuring a placement in a university that would best satisfy my needs and the needs of my thesis. She has shown herself to be a true E.MA Director, in putting the interest of her students first. At Vilnius University I owe my gratitude to Kestutis Girnius for challenging me, to Renata Vaisviliene for giving me confidence, and to Dainius Zalimas for the generous means, time, devotion and kindness in supervising this thesis.

Further I would like to thank my E.MA colleagues and, by now dear friends, in particular, Aleksandra Koneva, Ellen Gorris, Anand Deo, Tigran Safaryan, Maria Rehder and Kamadi Byonabye for the good times, the moral support, advice and sometimes very necessary distraction. In Vilnius I would like to thank my lovely neighbour Nour Al Bittar, for her hospitality, care and friendship, Andrei Prakharevich for the productive, and less productive, hours spent in the library, and Timothy Fawehinmi for his professional advice, but especially for making me smile. Also a big thanks to Ruta Satrovaite for her company and eagerness in showing me something of Lithuania.

At home I would like to thank my dear, dear friends, especially Dhanu Goes, Laura Huijskens, Stephanie Verstift, Astine Antonyan, Sanne van Nistelrooij and Fleur Bardoul and family, Laura Schellings, Sander Schellings and Tessa van Aspert, for keeping me happy and motivated. But most of all I am thankful to my parents, José and René Schellings, for making this all possible, by facilitating, but especially by their infinite belief and trust in me.

Edith H.A. Schellings

12 July 2013

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## LIST OF ACRONYMS

ACHR: American Convention on Human Rights  
AP I: Additional Protocol I (to the Geneva Conventions)  
AP II: Additional Protocol II (to the Geneva Conventions)  
CIA: Central Intelligence Agency  
ECHR: European Convention on Human Rights  
ECtHR: European Court of Human Rights  
GC: Geneva Convention  
HRW: Human Rights Watch  
IAC: International Armed Conflict  
ICCPR: International Covenant on Civil and Political Rights  
ICC: International Criminal Court  
ICRC: International Committee of the Red Cross  
ICTY: International Criminal Tribunal for the former Yugoslavia  
ICJ: International Court of Justice  
IHL : International Humanitarian Law  
JWT: Just War Theory  
IHRL/HRL: International Human Rights Law  
NIAC: Non-International Armed Conflict  
LOAC: Law of Armed Conflicts  
UAS: Unmanned Aerial System  
UAV: Unmanned Aerial Vehicle  
UN: United Nations  
US: United States

## INTRODUCTION

Under the guise of the War on Terror, between 2002 and today, the United States' has carried out between 409 and 449 drone attacks in the territories of Yemen and Pakistan and, since 2007, Somalia. Between 2780 and 3893 people have been killed, of which 423 to 1244 civilians, including 270 to 199 children.<sup>1</sup> (The dissimilitude of the numbers can be explained by disputing sources, resulting from varying definitions of 'civilians' and 'combatants' and the interpretation of data according to personal agendas.) Taking into account that combat drones fall within the category of so called precision weapons,<sup>2</sup> and the fact that the US actually legitimizes the use of these weapons because of their accuracy, the amount of 'collateral damage' is alarmingly high. Moreover, although the number of civilian deaths has decreased over the last months, the number of attacks has increased substantially since 2009.<sup>3</sup> Apparently, the threshold for authorizing drone strikes, thus armed force, has lowered both in numbers and geographical boundaries.

Within the context of technological developments and evolving strategies of war, it is important to assess whether such "revolutions in military affairs"<sup>4</sup> as the combat drone – formally known as Unmanned Aerial Vehicles (UAV's) or Unmanned Aerial Systems (UAS's) – may have consequences for the legal framework that regulates them. As Jean Pictet already argued in 1984, "major changes in combat methods will inevitably entail, sooner or later, a revision of the legal provisions precisely because the balance between necessity and humanity has been upset".<sup>5</sup> With the emergence and rapid increase of combat drones employed in today's armed conflicts, it is relevant to question whether this prediction has now become reality. Is

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<sup>1</sup> Bureau of Investigative Journalism, Covert War on Terror – The Datasets, <http://www.thebureauinvestigates.com/category/projects/drone-data/> (consulted on 05 May 2013).

<sup>2</sup> Schmitt, 2005, passim.

<sup>3</sup> Bureau of Investigative Journalism, Covert Drone War. The Reaper Presidency: Obama's 300<sup>th</sup> drone strike in Pakistan, available at <http://www.thebureauinvestigates.com/2012/12/03/the-reaper-presidency-obamas-300th-drone-strike-in-pakistan/> (consulted on 06 May 2013).

<sup>4</sup> This term stems originally from the theory of technological development of the Soviet Armed Forces in the 1970's and 1980's but today used more in general to describe contemporary technological revolutions in warfare, in particular in communications. See for example, Max Boot, *War Made New: Weapons, Warriors, and the Making of the Modern World*, London: Penguin, 2007.

<sup>5</sup> Pictet, 1985 (a), p. 258.



the current legal framework of international humanitarian law (IHL) – regulating the protection “of persons who do not, or no longer, participate in the hostilities (e.g. civilians and wounded, sick or captured combatants) and [...] the conduct of hostilities (i.e. the means and methods of warfare)”<sup>6</sup> – still sufficient? Or do we have to adapt or expand it on the basis of moral observations? In other words, the question of research is: *How can the use of combat drones in contemporary armed conflict – targeted killings in the US war against terrorism and asymmetric war in general – be morally and legally assessed?*

In order to answer the research question, and to make the outcome of this study more generally applicable to the use of combat drones in contemporary war, first, the following questions should be answered: What moral and legal frameworks are applicable to the use of combat drones? What is the minimal legal standard of protection applicable to drone attacks in war? What weaknesses and potential legal gaps does a comparison between the moral- and legal framework bring to light? These questions will be addressed in Chapter 1.

In Chapter 2 questions about the nature of the combat drone as a means of warfare will be addressed. How can the combat drone be defined? How is it related to the military history and the advancement of weapons in general? How does it work? What are its technological implications? And, is the combat drone significantly new and different in a way that it could influence the application of *ius ad bellum* (regulating the permissible resort to war) and *ius in bello* (regulating the permissible conduct of war)?

Chapter 3 will finally bring the findings of the first two chapters together in order to assess the morality and legality of combat drones in contemporary armed conflict. Since combat drones are currently most employed by the US within the context of the War on Terror, the first question is whether this war, and therefore the means by which its employed, is morally and legally permissible. In other words, to what extent is the war against terrorism in correspondence with *ius ad bellum*? Further, what implications does the use of combat drones have for compliance with *ius in bello*? And

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<sup>6</sup> ICRC, Guide to the Legal Review of New Weapons New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977, pp. 931-956 in *International Review of the Red Cross*, vol. 88, no. 864, 2006, p. 932.

finally, does the applicable international law sufficiently protect the lives of those not participating in war? If not, what kind of regulations are required?

This thesis aims to clarify the legal obscurity about the use of combat drones, in order to answer to the need for the legal review of new weapons, means and methods of warfare as prescribed by IHL. According to the International Committee of the Red Cross (ICRC) – the organ mandated with the monitoring with and reviewing of these documents – this obligation is of a customary nature and therefore should be performed by all states before the new weapon is put to use to prevent violations of IHL.<sup>7</sup> This legal review deserves increased attention in a time where new weapon technologies develop at a fast pace.<sup>8</sup> In practice, however, it appears that the process of legal review of new weapons, in our case combat drones, is set in motion only after they are put to use and concerns of the international community have surfaced.

The need to answer the questions above is great, since the use of combat drones seems to have become common practice by now, without being properly subjected to legal review. This in turn will undermine the protection of human rights. The fact that the US government has not been forced to temporarily cease the use of combat drones until legal clarity has been achieved, is more attributable to the US' hegemonic position within international politics and the weakness of international law-enforcement mechanisms, than to the absence of dispute. The relevance of this thesis is also illustrated by the fact that in addition to the US, also Israel, the United Kingdom, France, Russia, Turkey, India, China, Hezbollah and Iran are already in possession of combat drones, with Germany seriously considering their acquirement. In addition, as the recent events in Germany have shown, it is not unlikely, that armed drones will, sooner or later, also fall into the hands of those we consider to be terrorists.<sup>9</sup>

What has hampered the legal review of combat drones so far, is that the debate on drones so far has mainly focused on US' targeted killing practices. The secrecy and contentions surrounding these practices have resulted in extensive coverage in media

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<sup>7</sup> ICRC, 2006, p. 933.

<sup>8</sup> Ibid., p. 933.

<sup>9</sup> The Globe and Mail, Germany probes terror-attack scheme involving model airplane 'drones', 25 June 2013, available at <http://www.theglobeandmail.com/news/world/germany-probes-terror-attack-scheme-using-model-airplane-drones/article12793323/> (consulted on 1 July 2013).

and academic literature, discussing whether these targeted killings might be extrajudicial; the arbitrariness of the infamous ‘kill lists’; President Obama overstepping his powers; the involvement of the CIA and the legal permissibility of the US War on Terror in general. Although these issues are indeed important and definitely deserve thorough investigation, they have also obscured the question of the legality of combat drones as means of warfare.

Another complicating factor in the discourse on combat drones is that these weapons systems are approached as robotic and autonomous weapons. It is argued by authors such as Singer,<sup>10</sup> but also Human Rights Watch (HRW) and Harvard Law School’s International Human Rights Clinic,<sup>11</sup> that combat drones belong to the category of (semi-) autonomous weapons, which in the future might become fully autonomous and raise “serious questions of accountability, which would erode [an] established tool for civilian protection”.<sup>12</sup> Yet, this presumption unnecessarily undermines the notion of accountability. Concerns surrounding autonomous weapons are certainly valid and pressing, but not currently relevant for combat drones. The combat drone is not an autonomous weapon for it is humanly operated, albeit from a large distance. The action radius of the operator is extended by the means of drone technology, which makes the combat drone nothing more, and nothing less, than a medium.<sup>13</sup> Therefore in this thesis, I will approach the combat drones as mediated weapons, extensions of the human body.

In 1964 media theorist Marshall McLuhan published his *Understanding Media: The Extensions of Man*. In this work he argues that technologies, as simple as tools or the printed word, but also radios, airplanes, games and weapons, resulted from bodily stresses or a need to extend storage or mobility functions. Under such stresses, he argued, “it is more natural to fragment our own bodily form, and to allow part of it go into another material”.<sup>14</sup> The act of “extend[ing] our bodily postures and motions into

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<sup>10</sup> Singer, 2009.

<sup>11</sup> Human Rights Watch and Harvard Law School’s International Human Rights Clinic, “Losing Humanity: The Case Against Killer Robots”, 2012.

<sup>12</sup> Ibid.

<sup>13</sup> Kanwar, 2011, p 620.

<sup>14</sup> McLuhan, 1964, p. 181.

new materials, by way of amplification, is a constant drive for more power”.<sup>15</sup> He defined weapons as extensions of our hands, nails and teeth, but also – with the emergence of electric technology – extensions of our central nervous systems, which are able to accelerate the processing of matter, information and experience.<sup>16</sup> More importantly, McLuhan argued that the technologies that we use to act in the world around us, at the same time influence our experience of this world:

“[T]he medium is the message. This is merely to say that the personal and social consequences of any medium – that is, of any extension of ourselves – result from the new scale that is introduced into our affairs by each extension of ourselves, or by any new technology.”<sup>17</sup>

When we categorize combat drones not as (semi-)autonomous weapons, but as extensions of the body, in other words, as media technologies, we avoid the problem of lack of accountability. While at the at the same time other concerns raised by authors like Singer – such as the lowered threshold to war; the physical distancing reducing humanity; the psychological disconnection of the operators; and the risk of technical deficiencies – will remain relevant to the analysis of combat drones.

This thesis will not address unarmed drones because their use, although related to international human rights law (IHRL/HRL) and the right to privacy, falls outside of the scope of IHL. Further, this thesis is written from a human rights perspective. It starts from the assumption that the protection of fundamental rights, as encoded IHRL, is, in principle, extended to wartime. Correspondingly, the approach to the legal regulation of warfare is that of IHL rather than that of the Law Of Armed Conflicts (LOAC) approach.<sup>18</sup> Where the LOAC approach holds “that these laws are primarily designed to regulate the relations between fighting armies and therefore must take military concerns seriously into account” the IHL approach “emphasizes the humanitarian aim”.<sup>19</sup> In a

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<sup>15</sup> McLuhan., p. 181.

<sup>16</sup> Ibid., p. 181-182.

<sup>17</sup> Ibid., p. 7.

<sup>18</sup> See Murphy, 2012, p. 20.

<sup>19</sup> Ibid.

time of progressive individual human rights protection the area of armed conflict cannot stay behind. The increased awareness of humanity in armed conflict can be attributed to the pressure of increased media coverage of wars and concerns prompted by third parties, including courts and tribunals; NGO's; governments; international organizations; civil society.<sup>20</sup>

Further, this thesis will use a comparative approach between moral theory and law, based on the idea that legal documents are fixed codifications of certain moral standards put on paper, (barring jurisprudence and soft-law), while technology and society, including their moral standards, keep evolving. Laws are always a product of their time, trying 'to keep up' with an ever changing world. The assessment of combat drones on both a moral and legal level could therefore give us insight in possible moral challenges to the legal framework. The methodology in this research is not only multidisciplinary by combining moral and legal analysis, but also by involving historical research and media theory, in order to create a more complete understanding on the object of research: the combat drone.

The sources used in this research consist of legal provisions, in particular Common Article 3 of the 1949 Geneva Conventions; international customary law; domestic and international jurisprudence; United Nations resolutions; ICRC publications; quantitative data published by The Bureau of Investigative Journalism – the source that was found to be the most trustworthy by the prominent Stanford/NYU report;<sup>21</sup> – and academic literature and reports by, *inter alia*, Hurka on proportionality, Keegan on the impersonalization of battle, McLuhan on media, Schmitt and Rudesill on precision targeting, Stanford/NYU on drone strikes in Pakistan, and Shaw on risk-transfer militarism.

Finally, it should be noted that combat drones as media technologies – extensions of the human body and psyche – were not earlier central to morality and legality assessments of drones. This thesis therefore intends to shed new light on the

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<sup>20</sup> Murphy, p. 26.

<sup>21</sup> International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at New York University School of Law (Stanford/NYU), *Living under Drones: Death, Injury, and Trauma to Civilians From US Drone Practices in Pakistan*, September 2012, available at <http://www.livingunderdrones.org/download-report/> (consulted on 22 November 2012) p. 29-54.

drone debate by opening up new questions. The conviction that the mediation of war through on-distance operation unavoidably influences perceptions of warfare, with all its consequences, is pivotal to this.

# 1. MORAL AND LEGAL FRAMEWORK

In this chapter I will introduce the moral and legal frameworks that are applicable to the moral and legal permissibility of the use of combat drones in warfare. I will start with a discussion of just war theory as constituting the moral framework. Thereafter, I will take a legal approach that can be described as a minimal one, in the sense that it starts from the least extensive legal protection. In the discussions, a distinction will not only be made between the moral and legal framework, but also between *ius ad bellum* and *ius in bello*.

## 1.1 THE MORAL FRAMEWORK: JUST WAR THEORY

Just war theory – the doctrine of *bellum iustum* – in basic terms, can be described as the moral theory that prescribes the conditions for permissible recourse to war – *ius ad bellum* – and regulations regarding the conduct of war – *ius in bello*.<sup>22</sup> When trying to capture the essence of just war theory it is important to keep in mind that it is a body of theory that was influenced by different components and thinkers and likewise, today, is still interpreted and formulated by different authors. Consequently, just war theory is not one clear and fixed set of moral considerations or prescriptions, but a constantly developing and sometimes diverging discourse that might be best defined as “a comprehensive set of guidelines for the initiation and waging of just war”.<sup>23</sup> Instead of just war theory, therefore sometimes ‘just war tradition’ is thought to capture the discourse more accurately.<sup>24</sup>

For the purposes of this thesis, and its limited scope, I will present modern just war theory here in a rather abstract way, based on its most general characteristics. Wherever relevant, I will address some of the most prominent authors that maintain a more distinct approach. Now, let me begin with briefly discussing the history of this moral theory.

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<sup>22</sup> O’Brien, 1981, p. 13.

<sup>23</sup> Ibid., p. 14.

<sup>24</sup> Rodin, 2002, p 103.

### 1.1.1 HISTORY OF THE JUST WAR TRADITION

The formation of coherent legal ideas (i.e. not laws, but their moral underpinnings) about war started to take shape from the moment people no longer regarded war as something natural, instinctive, or inevitable but as a rational, purposive activity. From about 500 BC, both in China – under the influence of Confucianism – and in classical Greece and Rome – starting with Plato and Aristotle – political, social and moral theory were combined and developed into general rationalistic frameworks that could be applied to any specific decision about war. In Europe the Stoic ideas on natural law – “the idea that the entire world was under the rule of a single universal, transcultural set of moral principles”<sup>25</sup> – were later taken up in Christian theology where in the Middle Ages pacifist ideals were overcome and the foundations for modern just war theory (hereafter, JWT or *bellum iustum*) were laid.<sup>26</sup>

It was St. Augustine who introduced the idea that a war should be *just*, later formulated by St. Thomas Aquinas as the *justa causa* (just cause) requirement, which is pivotal to the legitimate waging of war. In addition Aquinas added that a just war could only be authorized by a sovereign (*auctoritas principis*) and had to be motivated by a right intention (*recta intentio*), which basically was to pursue good, and to avoid evil. Inspired by the violent colonization of the New World, Francisco de Vitoria asserted that only a wrong of sufficient gravity inflicted upon someone could be a *justa causa* for war, and only as a last resort (*ultima ratio*). This ruled out wars of conquest.<sup>27</sup> Francisco Suárez was the first to add the requirement of proportionality, which meant that “the method of conduct needs to be proper, that is, due proportion must be shown at its beginning, during its prosecution and even after victory.”<sup>28</sup>

In the 18<sup>th</sup> century Christian von Wolf drew a distinction between natural law and the law of nations (positive law), which made it possible to state that from a natural law perspective a war could never be objectively just on both sides, while from a positive law perspective justice was no determining factor because there was no objective judge to establish this issue. Consequently, Emerich de Vattel added that what

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<sup>25</sup> Neff, 2005, p. 10.

<sup>26</sup> Ibid., p. 9-11, 46-54.

<sup>27</sup> Sulyok, 2002, p. 115-120.

<sup>28</sup> Ibid., p. 120.



was permissible for one state in war, was also permissible for the other. However, although from a positive law perspective an unjust belligerent could wage war, this did not make the state just in a true moral sense, it only made its legal in practice, i.e. exempted from punishment. Still, by the 19<sup>th</sup> century, positive law had diminished the importance of JWT. War became a ‘sacred right’ of each state (albeit as an ultimate resort), placing the question of justice outside the realm of international law. *Ius ad bellum* was little restrictive, which made *ius in bello* increasingly important in the limitation of war.<sup>29</sup> It was only after the horrors of World War I that strict legal positivism began to decline and the legal manifestations of *bellum iustum* were reconnected with the normative doctrine.<sup>30</sup>

### 1.1.2 IUS AD BELLUM

The theory starts with the assumption that in general killing is not permissible except in the case of exceptional circumstances, such as (but not exclusively) war. In order to call in the exceptional rights of war *justa cause*, *auctoritas principis*, and *recta intention* are required. This means, that firstly, the substance of the *justa cause* must be “sufficiently serious and weighty to overcome the presumption against killing in general and war in particular”.<sup>31</sup> The cause should be so fundamental and important that it is able to emulate the fundamental prohibition on killing. Predominantly, only the following causes are able to fulfil this requirement: “to protect the innocent from unjust attack, to restore rights wrongfully denied, or to re-establish a just order.”<sup>32</sup>

Secondly, wars cannot be waged by individuals but require competent authority. The ones to declare war are those responsible for public affairs and security, that is, public authorities. The most problematic aspect of this requirement is that today, wars are not only waged by states, but also non-state actors. In the conventional sense they would lack *auctoritas principis*, but in practice wars conducted by non-state actors are not necessarily seen as impermissible. What exactly could be counted as proof for a competent authority, however, remains disputable. On the one hand recognition by

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<sup>29</sup> Sulyok, p. 120-126.

<sup>30</sup> Williams, 2008, p 586.

<sup>31</sup> O’Brien, p. 20.

<sup>32</sup> Childress, 1978, p. 436.

foreign powers is very unreliable because of subjective political interests. On the other hand, public support is hard to measure and to qualify as mobilization and cooperation can be the result of coercion.<sup>33</sup>

Thirdly, *recta intentio* refers to the promotion of the good and the avoidance of evil.<sup>34</sup> that the ultimate intention of war should be the pursuance of a just and sustainable peace, which rules out the use of unnecessary destruction and force as this would impede peace and reconciliation. Correspondingly, humanity towards the enemy should be retained as far as possible. Most importantly, the intention of war should be limited to the pursuit of the just cause. The pursuit of *justa cause* must not be used as an excuse for something else. So if the *justa cause* is self-defence, military actions that go further than the protection of a state's borders and aversion of future aggression, are impermissible. A self-defensive war turned into a war of conquest lack *recta intentio* and will turn the just war into an unjust one.<sup>35</sup>

In addition, there are three *ius ad bellum* principles related to the consequences of war. To begin with, proportionality requires that the values sacrificed by using force should be proportionate to those being protected. The force applied should be proportionate and not exceed what is absolutely necessary in order to pursue *justa cause*. Further, the war should have a reasonable chance of success and peaceful remedies should be exhausted, which means that war should only be used as an *ultima ratio*.<sup>36</sup> The principle of proportionality is critical to *ius ad bellum*, as it incorporates the other requirements. The resort to war can, for instance, be unjust despite of the presence of *justa cause* and *ultima ratio* whenever the damage it will cause is excessive or when the damage is more than what a peaceful alternative would achieve.<sup>37</sup>

### 1.1.3 IUS IN BELLO

There are three criteria regulating the conduct of war. These are the requirements of distinction, necessity and proportionality. The discrimination condition means that there

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<sup>33</sup> O'Brien, 1981, p. 17-19.

<sup>34</sup> Holmes, 1989, p. 150.

<sup>35</sup> O'Brien, p. 33-34.

<sup>36</sup> Ibid., p. 30-31.

<sup>37</sup> Hurka, 2005, p. 35-37.

should be a distinction between legitimate and non-legitimate targets of military force.<sup>38</sup> Traditionally, combatants are legitimate targets and civilians are not, which makes distinction the most essential principle in the protection of non-combatants. Nevertheless, this distinction is not as black and white as it seems. Especially when questions of moral liability are involved it becomes hard to draw a line between who is contributing to the war effort and who is not.<sup>39</sup> What about labourers in an arms factory, or nuclear scientists? Are they, and should they, be legitimate targets?

Moreover, the disallowance of killing the innocent is not absolute. “It concerns only targeting and therefore allows the killing of noncombatants as a side effect of force directed at properly military targets, or as “collateral damage”.”<sup>40</sup> This is often referred to as the doctrine of double effect:

“there is a morally relevant distinction between bringing about the death of an innocent person deliberately, either as an end in itself or as a means, and bringing it about as a side effect of something else one does deliberately. In the latter case, even if the outcome is foreseen [...] it is sometimes permitted knowingly to bring about as a side effect of one’s actions something which it would be absolutely impermissible to bring about deliberately as an end or as a means.”<sup>41</sup>

In order to restrain the collateral killings of civilians, the necessity condition requires killing to be of effective use in achieving the military purpose. Unnecessary force is not permissible, not only in relation to civilians, but also when used against combatants. Additionally, the proportionality condition prohibits the excessive force. The evils resulting from a military action, like civilian deaths, have to be proportionate to the good that is to be achieved by this action. A significant military advantage is conditional. The calculation of proportionality includes, like the *ius ad bellum* condition of proportionality, chance of success calculations and last-resort requirements. The idea

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<sup>38</sup> Hurka, p. 36.

<sup>39</sup> See, for instance, McMahan, 2004.

<sup>40</sup> Hurka., p. 36.

<sup>41</sup> Nagel, 1972, p. 130.

behind this is that, in particular when the lives of civilians are at stake, their sacrifice can only be permissible when there is no other alternative in achieving the military advantage and when the chances of success are high, so that the lives lost will not be lost in vain.<sup>42</sup>

#### 1.1.4 THE RELATION BETWEEN IUS AD BELLUM AND IUS IN BELLO

As was suggested in the above, in just war theory the conditions of *ius ad bellum* and *ius in bello* can be interpreted as being interlinked. Whereas Michael Walzer, representing the more traditionalist approach to just war theory, holds the two sets of requirements to be “logically independent” and argues that “[i]t is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules”,<sup>43</sup> others argue that the two sets cannot be seen separately from each other. William O’Brien argues that the requirement of *auctoritas principis* determines belligerent status under *ius in bello* and that *justa cause* and *recta intentio* set the standards for the proportionality of means.<sup>44</sup> Thomas Hurka contends that the *in bello* necessity condition parallels the *ad bellum ultima ratio* condition and that the *in bello* proportionality condition can incorporate the *ad bellum justa cause* and *recta intention* conditions.<sup>45</sup> McMahan goes even further by stating that unjust combatants can never fight a just war.<sup>46</sup>

Consequently, this would mean that in order for a war to be just all requirements have to be met and that the war should remain under continuous review as conditions such as necessity and proportionality should be constantly evaluated in relation to *justa cause*. A critique to these approaches is that in practice this can prove to be problematic. Because, who decides for instance that a cause is just? Of course every party to a war will contend that it is fighting for a *justa cause*. In order to prevent abuses of *ius in bello* regulations, on the basis of *ius ad bellum* claims, in law the two sets of requirements are deliberately kept separate and as discussed earlier, the question of justice was

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<sup>42</sup> Hurka, p. 36-37.

<sup>43</sup> Walzer, [1977] 2006, p. 21.

<sup>44</sup> O’Brien, p. 16.

<sup>45</sup> Hurka, p. 37.

<sup>46</sup> McMahan, 2004, *passim*.

disconnected from international law, and in particular from *ius in bello*. The purpose of this separation is to retain *ius in bello* as a last guarantee for the limitation of war, especially in cases where *ius ad bellum* is not sufficient.

## **1.2 THE LEGAL FRAMEWORK: UN CHARTER, IHL & CUSTOMARY LAW**

In this section I will discuss the legal framework that is relevant for the assessment of the legality of drones as used in armed force. Since drones are currently most employed for targeted killings in the war against terrorism, such an assessment cannot leave out questions about the legitimacy of this war and targeted killings in the first place. Hence, this section will firstly elaborate on the United Nations Charter, the legal equivalent of *ius ad bellum*. Then, because we are talking about the legality of a weapon, relevant legislation on the prohibition and restriction of weapons will be addressed. Finally, those provisions and customary principles of international humanitarian law applicable to the US war on terrorism will be discussed, to sketch the legal framework for the *ius in bello* assessment of the use of combat drones.

### **1.2.1 IUS AD BELLUM: THE UNITED NATIONS CHARTER**

Even though the preambles of treaties are not legally binding, they are highly informing since they contain the core intentions and presumptions underlying a treaty and are guiding the interpretation of other provisions contained in the document. The preamble of the United Nations Charter does the same:

“We the Peoples of the United Nations Determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, [...] to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest [...].”<sup>47</sup>

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<sup>47</sup> Charter of the United Nations (adopted on 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) preamble.

Clearly, the restriction of war and the promotion of peace present the core objectives of the UN Charter. It is acknowledged that warfare impedes economic and social advancement, and the full realization of human dignity, freedom, human rights and justice. Yet, the more dominant argument for this aspiration here, seems to be the idea that the nature of war simply causes indescribable distress and hardship to our lives. Therefore it should be avoided, unless it is in the common interest. Subsequently, Article 2 (4), a customary and *cardinal* principle international law,<sup>48</sup> states that

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>49</sup>

The UN Charter provides for two exceptions to this rule, both captured under Chapter VII. In addition, nowadays discussion has emerged on humanitarian intervention and preventive war as exceptions to the prohibition on the use of force. But in light of the limited space and scope of this thesis, I will not discuss these exceptions here, but focus solely on those within the UN Charter. The first exception under the Charter is in case of authorization by the Security Council and the second in the case of self-defence. As for the procedure of Security Council authorization (Article 42) the Security Council first has to determine, according to Article 39 “the existence of any threat to the peace, breach of the peace, or act of aggression”.<sup>50</sup> Then, it will look for measures not involving armed force in order to restore or maintain international peace and security. “These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”<sup>51</sup> If then, it is felt that these measures are not effective the Security Council may decide to vote on the resort to armed force. In line with Article 27 at least 9 affirmative votes are required, including the concurring votes of the permanent

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<sup>48</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports, 1986, p.14, para. 189.

<sup>49</sup> UN Charter, art 2 (4).

<sup>50</sup> *Ibid.*, art 39.

<sup>51</sup> *Ibid.*, art 41.

members. If successful this authorization will have the form of a Security Council resolution.

The objective of the exception on the prohibition on the use of armed force by the means of Security Council authorization is that of maintaining international peace and security. In contrast, the right to self-defence is based on the protection of state-sovereignty (territorial integrity and political independence) against armed attack. Article 51 provides that a state under (threat of) attack does not have to wait for Security Council authorization, but can take action immediately. This does not, however, relieve the Security Council from its task to maintain or restore international peace and security as it is stated that “[m]easures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”<sup>52</sup>

Article 51 provides for an exception to the prohibition on the use of armed force as stated in Article 2 (4) in the case of self-defence (individual or collective) “if an armed attack occurs”.<sup>53</sup> Moreover, the right to self-defence is a customary principle of international law.<sup>54</sup> The interpretation of this article, especially the interpretation of “if an armed attack occurs,” is nonetheless disputed. Literally taken the phrase implies that self-defence can only be legally appealed to after an attack has taken place. In practice, however, states tend to interpret the article in a more permissive sense, allowing them pre-empt an attack. Unfortunately, the International Court of Justice has so far not expressed any view on the issue.<sup>55</sup>

Yoram Dinstein has argued, though, that there is nothing in the article suggesting a broad anticipatory reading. In fact, he argues, a non-restrictive reading would counter the objective of the UN Charter and Article 2 (4) in particular.<sup>56</sup> Anyway, the Caroline Case of 1837, in which it was ruled that a pre-emptive attack had to be

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<sup>52</sup> UN Charter, art 51.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra* note 48, para. 194.

<sup>55</sup> *Ibid.*

<sup>56</sup> Dinstein, 2005, p.182-187.

responding to an imminent threat – that is, “instant, overwhelming and leaving no choice of means and no moment for deliberation,”<sup>57</sup> – is not relevant to the interpretation of this article as, there was nothing anticipatory about the incident and the case exclusively addressed the issue of armed force short of war.<sup>58</sup> Still, Dinstein argues, that

“the right to self-defence can be invoked in response to an armed attack as soon as it becomes evident to the victim State (on the basis of hard intelligence available at the time) that the attack is in the process of being mounted. There is no need to wait for the bombs to fall – or, for that matter, for fire to open – if it is morally certain that the armed attack is under way [...]”<sup>59</sup>

As for the lawfulness of the response to an armed attack, the ICJ ruled that the criteria of necessity and proportionality are applicable to measures taken in self-defence.<sup>60</sup> Notably, there are less *ius ad bellum* requirements applicable to Article 51 of the UN Charter than there are to the right of self-defence according to just war theory. In the moral framework *ius ad bellum* requires not only *justa cause* (which incorporates necessity), *auctoritas principes* and proportionality, but also *recta intentione*, reasonable the hope of success and *ultima ratio*. In the legal framework, at least in self-defence, these latter three do not seem to be required. Therefore, it can be stated that the legal *ius ad bellum* framework is more permissive than the moral one.

## 1.2.2 RESTRICTIONS ON THE METHODS AND MEANS OF WARFARE

When it comes to the methods and means of warfare, parties to a war are not free to use just any option available: “The right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>61</sup> Firstly, the use of tactics and weapons that are indiscriminate

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<sup>57</sup> IMUNA, 5. The Caroline Case of 1837 - <http://www.imuna.org/blogs/5-caroline-case-1837> (consulted on 17-05-2013.)

<sup>58</sup> Dinstein, p. 184-185.

<sup>59</sup> Ibid., p. 187.

<sup>60</sup> Supra note 48, para. 194.

<sup>61</sup> Regulations Respecting the Laws and Customs of War on Land annex to Convention (IV) respecting the Laws and Customs of War on Land (adopted on 18 October 1907) (The Hague Regulations) art 22.



by nature or cause unnecessary suffering are prohibited according to, *inter alia*, the general principles of distinction, the prohibition of unnecessary suffering and proportionality can be found in the Geneva Conventions,<sup>62</sup> Article 35 of Additional Protocol I (AP I),<sup>63</sup> Article 8 (2) of the Rome Statute,<sup>64</sup> and the Convention on prohibitions or restrictions on the use of certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects (CCW) in general.<sup>65</sup> More relevant, since not all of the above are applicable to non-international armed conflict or ratified by the US, the ICRC has affirmed that these prohibitions are part of international customary law applicable to both international and non-international armed conflict.<sup>66</sup>

The combat drone, as a new weapon, is not prohibited by any treaty. Moreover, it is not indiscriminate by nature – its operation and targeting go according to highly advanced intelligence and precision technology – neither are the weapons it carries (mainly missiles).<sup>67</sup> This does not mean though, that the combat drone cannot be used indiscriminately or cause unnecessary suffering. Therefore, the legal use of the combat drone, as that of any other weapon, is dependent on the compliance with applicable *ius in bello* provisions (which will be discussed in the next section).

The idea that developments in technology should comply with humanitarian principles is already present in the St. Petersburg Declaration of 1868:

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<sup>62</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949) 75 UNTS 85 (GC II); Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949) 75 UNTS 135 (GC III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 (GC IV)

<sup>63</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted on 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I).

<sup>64</sup> Rome Statute of the International Criminal Court (adopted on 17 July 1998, last amended 2010) ISBN No. 92-9227-227-6 (Rome Statute).

<sup>65</sup> Convention on prohibitions or restrictions on the use of certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects (and Protocols) (adopted October 1980, amended on 21 December 2001) 1342 UNTS 137 (CCW).

<sup>66</sup> Henckaerts & Doswald-Beck, 2005 p. 237, 244.

<sup>67</sup> Wuschka, 2011, p. 894.

“The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.”<sup>68</sup>

Although the quote above refers to a declaration only, it is acknowledged by the ICRC that as a customary rule “[e]ach party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects”.<sup>69</sup> Moreover, the Martens Clause, contained in the preamble of the 1899 and 1907 Hague Conventions, taken up as articles in each of the four Geneva Conventions and the Additional Protocols I and II, reaffirmed in the preamble of the CCW,<sup>70</sup> and known to have customary legal status, states:

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”<sup>71</sup>

With this clause it is recognized that the devised law cannot cover all scenarios likely to occur and by this means aims to provide room for application in unforeseen relevant cases, according to the principles of international law. These principles of international law, such as humanity, have in themselves customary status and are therefore as much

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<sup>68</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 29 November 1868, entered into force 11 December 1868) (St. Petersburg Declaration).

<sup>69</sup> Henkaerts & Doswald-Beck, p 56.

<sup>70</sup> Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict” in *International Review of the Red Cross*, No. 317, 1997, retrieved from <http://www.icrc.org/eng/resources/documents/misc/57jnhy.htm> (consulted on 17-05-2013).

<sup>71</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted on 18 October 1907) preamble.

part of IHL as the treaties.<sup>72</sup> Moreover, the quotes above demonstrate the influence of moral theory on the legal framework, as the principles of humanity and necessity, but also reference to the public conscience, are all, initially, moral values.

The legal review of new weapons, means or methods of warfare, is primarily a responsibility of the state. According to the ICRC this obligation is not only binding on parties to the Additional Protocol I, but to all states and should be performed before the new weapon is put to use.<sup>73</sup> The legal review deserves special attention in a time where new weapon technologies develop in a high pace.<sup>74</sup> In practice, however, it appears that the process of legal review of new weapons, in our case combat drones, is set in motion only after they are put to use and concerns of the international community have surfaced. It is therefore of utmost importance to examine the correspondence of combat drones with IHL provisions. In order to do so, first we have to set out what parts of IHL are actually applicable.

### 1.2.3 IUS IN BELLO: COMMON ARTICLE 3 AND CUSTOMARY PRINCIPLES

International Humanitarian Law is the body of law that “comprises the rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed.”<sup>75</sup> It is applicable to human rights law as *lex specialis*, which means that, in principle, also during wartime human rights law is applicable, but that the provisions in IHL should be primarily adhered to.<sup>76</sup> This connection between IHL and HRL is important to note, as it explains that also in IHL, the protection of civilians is bedrock.<sup>77</sup>

The main legal sources of IHL are The Hague Conventions of 1907; the four Geneva Conventions of 1949; the first two Additional Protocols to the Geneva Conventions of 1977; CCW; and the 1998 Rome Statute of the International Criminal

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<sup>72</sup> Boothby, 2009, p. 14.

<sup>73</sup> ICRC, 2006, p. 933.

<sup>74</sup> Ibid.

<sup>75</sup> ICRC, “INTERNATIONAL HUMANITARIAN LAW Answers to your Questions”, Geneva: ICRC, 2002, available at [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0703.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0703.pdf) (consulted on 23 March, 2013), p.4.

<sup>76</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p.136, para, 106.

<sup>77</sup> Lipmann, 2002, p. 2

Court (ICC).<sup>78</sup> But because it is one of the aims of this thesis is to evaluate the legality of combat drones in contemporary war, especially, their employment in the United States' in the War on Terror. In this regard it is important to note, that the US Supreme Court has ruled in *Hamdan v Rumsfeld* that the laws on non-international armed conflict are applicable as a minimum standard to the war against Al-Qaeda.<sup>79</sup> Of course this judgement can be disputed, but in this thesis, as will be explained in the following, the applicability of the law of non-international armed conflict will be accepted for pragmatic reasons.

This body of law is covered by a relatively limited and underdeveloped part of IHL, that is, common Article 3 to the Geneva Conventions and Additional Protocol II (AP II). What is more, the US has not ratified AP II, neither the Rome Statute – with this, denying also the ICC's jurisdiction – which means that, at least, regarding the rules for the protection of those who no longer are taking part in hostilities, only common Article 3 remains applicable to the case of the US' use of combat drones.

Consequently, the approach to be taken in this thesis can be seen as a minimal one. Still, there are several reasons to support this minimal approach. Firstly, the most operations and conflicts combat drones are used in are within the context of NIAC, and it is likely that in the future wars will increasingly be fought between state and non-state actors. Moreover, using a minimal approach has the advantage of its implications being applicable, as a minimal standard, to every other future conflict involving the use of drones. This is so, because the provisions of Article 3 offer for a bottom-line of protection, which is also present – and further extended and detailed – in AP II in the case of NIAC, and the Geneva Conventions and Additional Protocol I (AP I) in the case of international armed conflicts (IAC). Moreover, the legal evaluation of combat drones does not have to rely exclusively on common Article 3 to the Geneva Conventions, as several of its principles have acquired the status of international customary law. Needless to say, it is essential to take these customary principles into account.

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<sup>78</sup> For a complete list, see ICRC, "INTERNATIONAL HUMANITARIAN LAW Answers to your Questions", Geneva: ICRC, 2002, available at [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0703.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0703.pdf) (consulted on 23 March, 2013), p. 10-11.

<sup>79</sup> *Hamdan v Rumsfeld*, US Supreme Court Syllabus, 548 U.S. 557 (2006), para. 4 (d) (ii).

IHL regulates the conduct of war by making clear what is permissible and what is not, and defines the responsibilities of the different actors in war.<sup>80</sup> Common Article 3, applicable to NIAC – “protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a state party to the Geneva Convention, which must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation”<sup>81</sup> – states these efforts as follows:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely [...].<sup>82</sup>

After this, a list of prohibitions “acknowledged to be incomplete”<sup>83</sup> forbids violence to life and person, mutilation, cruel treatment and torture; the taking of hostages; outrages upon personal dignity; and the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court.<sup>84</sup> This list thus comprises of negative obligations. The duty to treat those not taking active part in the hostilities and those *hors de combat* humanely, imposes a positive obligation upon parties to the Geneva conventions. Although the exact meaning of humane treatment is not specified it is generally understood that its meaning is reflected by the detailed rules of IHL, but can be broader as it remains under influence of changes in society.<sup>85</sup> The existence of a positive obligation has important implications, as it, to the least, suggests

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<sup>80</sup> Pictet, 1985 (a), p. 5.

<sup>81</sup> ICRC, 2008, p. 5.

<sup>82</sup> GC I, II, III, IV, 1949, art 3 (1).

<sup>83</sup> Solis, 2010, cited in Murhpy, p. 2.

<sup>84</sup> GC I, II, III, IV, 1949, art 3 (1) a, b, c, d.

<sup>85</sup> Henkaerts & Doswald-Beck, p. 307-308.

that parties to the Geneva Conventions also within non-international armed conflict, have a duty to take precautions to comply with humane treatment.

In comparison with provisions covering IAC, Common Article 3, does not make any distinction between combatants and civilians. The people that are protected under article 3 (1) are persons taking no active part in hostilities. Thus, the distinction between who is a legitimate target in war is primarily based on conduct rather than status. Even so, the provision “implies a concept of civilian comprising those individuals “who do not bear arms” on behalf of a party to the conflict”.<sup>86</sup> Still, in practice it is problematic to decide when exactly a person is taking active part in hostilities and when not. Firstly, because there is no explicit definition of hostilities included in the provision, and secondly, the idea of active (or direct) participation is not defined either. This makes it hard to draw the line between what constitutes direct and indirect participation in hostilities. Although the commentary on AP I does offer a definition of direct participation in hostilities – that is, “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces”<sup>87</sup> – the question remains whether this could be applied similarly to non-international armed conflict under Common Article 3.

Then there is also the question of the temporal scope of application. Here, Nils Melzer, legal advisor for the ICRC, offers a rather sensible interpretation. He argues that the phrase “each Party to the Conflict” already implies that “both State and non-State Parties to the conflict have armed forces distinct from the civilians population”<sup>88</sup> and that this makes clear that:

“members of such armed forces, in contrast to other persons, are considered as “taking no active part in the hostilities” only once they have disengaged from

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<sup>86</sup> Melzer, 2009, p. 28.

<sup>87</sup> ICRC, “Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949”, Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.), ICRC, Geneva, 1987, para. 2199 available at [http://www.loc.gov/r/frd/Military\\_Law/pdf/Commentary\\_GC\\_Protocols.pdf](http://www.loc.gov/r/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf) (consulted on 3 July 2013) para, 1942.

<sup>88</sup> Melzer, p. 28.

their fighting function (“have laid down their arms”) or are placed hors de combat; mere suspension of combat is insufficient.”<sup>89</sup>

A last remark to Common Article 3 to be made here, is that in paragraph 2 it is explicitly encouraged for parties to the conflict to conclude special agreements to bind themselves additionally to provisions applying to international armed conflict. It is emphasized that such application will not affect the legal status of the parties to the conflict.<sup>90</sup> This is purely a matter giving an opening to increase the protection under Common Article 3. The inclusion of such an opening in the article, highlights main objective of IHL:

“to limit the suffering caused by war by protecting and assisting its victims as far as possible. The law therefore addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict which are of humanitarian concern. [...] Its provisions apply to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just.”<sup>91</sup>

The intention to limit suffering to the least possible amount, is already apparent in the complaisant way in which the Martens Clause was phrased and is reliant on the relation between Humanitarian Law and Human Rights Law, and the principle of humanity in particular. In IHL the protection of fundamental rights as encoded in HRL, is, at least in principle, extended to wartime. This means that the principle of humanity – “the imperative which drives a human being to act for the good of fellow beings”<sup>92</sup> – always needs to be balanced against the principle of necessity – “the duty of public authorities

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<sup>89</sup> Melzer, p. 28.

<sup>90</sup> GC I, II, III, IV, art 3 (2).

<sup>91</sup> ICRC, “INTERNATIONAL HUMANITARIAN LAW Answers to your Questions”, Geneva: ICRC, 2002, available at [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0703.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0703.pdf) (consulted on 23 March, 2013), p. 14.

<sup>92</sup> Pictet, 1985 (a), p. 2.

to preserve the state, defend its territorial integrity and maintain order.”<sup>93</sup> This is the case for every action, strategy and method employed during wartime.

It is important to note this linkage here, because from the above, it might seem that the protection offered by Common Article 3 is quite limited. Obviously, in a sense this is the case. But at the same time, the encouragement to apply further provisions as stated in its second paragraph and the nature of Humanitarian Law, urge us to interpret Common Article 3 in the context of this body of law in general. Besides, it is argued that the rules governing IAC should be equally applicable to NIAC.<sup>94</sup> More convincingly, it has been increasingly acknowledged that many of the IHL provisions have developed into customary law that is also applicable to non-international armed conflict. This is not only agreed in the Customary International Law Study of the ICRC, but also visible in international judicial decisions,<sup>95</sup> and the fact that “every humanitarian treaty adopted since 1996 has been made applicable to both international and non-international armed conflicts”.<sup>96</sup>

Taking into account the still existing contentions on the customary nature of certain IHL provisions, in the following I will only discuss those principles that are said to be the cornerstones of *ius in bello* and of which the customary status is undisputed. In other words, those principles that are binding and justiciable regardless of their enshrinement in a treaty and consequently, are not dependent on a state’s ratification of certain treaties. In practice this means that, in a similar fashion to Common Article 3, the customary principles fall under the universal jurisdiction applicable to IHL and can therefore lead to prosecutions in domestic-, and wherever the jurisdiction is accepted, international courts and tribunals. The customary principles do not, however, “in any sense take the place of the rules set forth in the Conventions. It is to these rules that jurists must refer when the detailed application of the Conventions has to be

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<sup>93</sup> Pictet, 1985 (a), p. 2.

<sup>94</sup> Henckaerts & Doswald-Beck, p. xxxv & Watkin, 2007, p. 273 cited in Murphy, p. 7.

<sup>95</sup> See for example, *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para. 125.

<sup>96</sup> ICRC, 2007, p. 965.



considered”.<sup>97</sup> Nonetheless, “[w]hen both sources of law are combined – the treaty and customary law rules – a far stronger regime of obligations of the parties emerges”.<sup>98</sup>

The way in which these fundamental principles are formulated and structured depends on the source that is being used. In spite of this, the core conception of these principles remains the consistent. Here I will rely on two sources to distract these customary principles from. The first is Jean Pictet’s *Development and Principles of International Humanitarian Law* (1985), and the second is the 2005 ICRC study on *Customary International Humanitarian Law*. Notably, as the ICRC study for instance formulated 161 rules of which 148 applicable also to non-international armed conflict,<sup>99</sup> the discussion of the customary principles here, will focus solely on those principles I have deemed directly relevant to the purposes of this research. Those are the principles of humanity, distinction, prohibition of unnecessary suffering and proportionality.

The principle of humanity, as it was already referred to in the above, can be seen as the principle underlying the other principles. It is shared with human rights law means that “[m]ilitary necessity and the maintenance of public order must always be compatible with respect for the human person”.<sup>100</sup> Applied more specifically to armed conflict it requires that “[p]ersons placed hors de combat and those not directly participating in hostilities shall be respected, protected and treated humanely” and, as a result, “[t]he right of the parties to a conflict to choose methods or means of warfare is not unlimited”.<sup>101</sup> Further, the principle of humanity accommodates for the protection of medical and religious personnel and objects, in order to preserve minimal safeguards to the human person.<sup>102</sup>

Second, the principle of distinction holds that “[t]he 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.”<sup>103</sup> Moreover, distinction should not be applied only to the targeting of persons, but also to objects. A

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<sup>97</sup> Pictet, 1985 (b), p. 59.

<sup>98</sup> Pejic, 2011, p. 17.

<sup>99</sup> Pejic, p. 17.

<sup>100</sup> Pictet, 1985 (b), p. 61.

<sup>101</sup> Ibid., p. 63 & Henkaerts & Doswald-Beck, chap. 7.

<sup>102</sup> Henkaerts & Doswald-Beck, chap. 7 & chap 32.

<sup>103</sup> Ibid., p. 3.

difference should be made between military and civilian objectives, of which the latter should not be attacked.<sup>104</sup> This means that indiscriminate attacks are forbidden and the civilian population and objects should never be the object of attack; the use or threats of violence to cause terror among the civilian population is prohibited; that parties to the conflict are required to take precautionary measures “to cause the least possible incidental injuries and damage” to civilians and civilian objects in and after attack;<sup>105</sup> and that only armed forces have the right to attack and resist the enemy.<sup>106</sup>

Next, the principle prohibiting unnecessary suffering can be defined as follows: “The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited”.<sup>107</sup> The difference with the principle of distinction is that the principle of unnecessary suffering is not limited to civilians but should also be applied to combatants. It is not allowed to cause more losses and suffering than that what is necessary in relation to the military objective.<sup>108</sup> This means that certain weapons are prohibited such as poison; biological and chemical weapons; expanding and exploding bullets are prohibited<sup>109</sup> and further, that:

“For every weapon, it is necessary to balance military advantage on one side of the scale against humanitarian considerations on the other. If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.”<sup>110</sup>

Finally the principle of proportionality includes that both “[l]aunching 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 excessive in relation to the

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<sup>104</sup> Pictet, 1985 (b), p. 73-75 & Henkaerts & Doswald-Beck, p. 25-29.

<sup>105</sup> Pictet, 1985 (b), p. 72.

<sup>106</sup> Ibid., p. 72-73 & Henkaerts & Doswald-Beck, chap. 2-3, 5-6.

<sup>107</sup> Henkaerts & Doswald-Beck, p. 237.

<sup>108</sup> Pictet, 1985 (b), p. 75.

<sup>109</sup> Henkaerts & Doswald-Beck, Part IV.

<sup>110</sup> Pictet, 1985 (b), p. 75-76.

concrete and direct military advantage anticipated, is prohibited”<sup>111</sup> and that “[b]elligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy”.<sup>112</sup> As we can see, the principle of the prohibition of unnecessary suffering and the principle of distinction is present in the requirements for proportionality. Likewise, in the application of the principles of distinction and the prohibition of unnecessary suffering proportionality must always be taken into account.

### 1.3 CONCLUSIONS

As argued above the minimum standard applicable to the use of drones in the US war against terrorism is that of non-international armed conflict. In practice, this means Common Article 3 of the Geneva Conventions and the customary principles of IHL, namely those of humanity, distinction, proportionality and the prohibition on unnecessary suffering. Because this legal framework is of customary nature it provides a minimum legal guarantee of protection in every possible armed conflict.

As for the relation between Just war theory and our legal framework, it is not surprising that at first sight, they seem to have a lot in common. This is due, firstly to the influence of Just War thinking on the development of positive law. Additionally, it can be explained by the fact that this thesis relies mainly on customary principles, which are moral values taken up by states as general practice and *opinio juris*.

When we take a closer look, however, some differences between the moral and legal framework can be identified. Regarding *ius ad bellum* it can be stated that the UN Charter seems to be much more permissive than JWT. *Ius in bello*, contrarily, seems to be developed in more detail in IHL in comparison to JWT. This can be explained by the fact that in the *bellum iustum* doctrine, *ius ad bellum* and *ius in bello* cannot be strictly separated, as the question of *in bello* proportionality is related to *justa causa*. But in law – i.e. practice in reality – the interrelation between the two categories would lead to problems, because there is no objective, universally recognized authority, to judge on the justness of a state’s resort to war, let alone enforce its judgement. The separation of

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<sup>111</sup> Henkaerts & Doswald-Beck, p. 46.

<sup>112</sup> Ibid., p. 62.

*ius ad bellum* from *ius in bello* is thus a way to ensure a minimal limitation of war, not by reducing the number of wars, but by limiting their conduct.

## 2. THE COMBAT DRONE IN CONTEXT

In order to make an assessment about the morality and legality of combat drones in contemporary armed conflict, it is necessary to examine the object of research: the combat drone. Correspondingly, in this chapter the combat drone will be defined and placed in its historical context. Further, by briefly examining how drones work, are operated and perform their targeting, a further understanding of the implications of this technology is provided. This makes it possible to answer the question whether the combat drone is a new means of warfare and to what extent our moral and legal frameworks face new challenges.

### 2.1 WHAT IS THE COMBAT DRONE?

Needless to say, combat drones are developed in various different models all with their own technical specifications. In general terms, and for the purposes of this thesis, it can nevertheless be stated that the combat drone is an unmanned military aircraft that is equipped with a weapon, such as a bomb or missile. Further, it holds on-board surveillance- and navigation technology, and targeting systems. Although it is said that the operating systems of drones are becoming more and more autonomous – for instance in being able to, navigate, take-off and land, and trace and identify targets on their own – the current practice is still that they are remotely operated and strikes are being executed by the operators through computer network connection.<sup>113</sup> Therefore, in this thesis the remote operation, instead of autonomy, will be taken as a basic characteristic of combat drones.

The combat drone should not be confused with drones that are used solely for surveillance and intelligence purposes outside the context of war. These, sometimes very small, aircrafts are being used by states as well as amateurs and hobbyists for a range of purposes. India, for example, uses drones to prevent the poaching of rhinos,<sup>114</sup>

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<sup>113</sup> Knoops, 2012, p. 698.

<sup>114</sup> Huffington Post, 'Drones Guard Against Rhino Poaching in India' 09-04-2013, [http://www.huffingtonpost.com/2013/04/09/drones-rhino-poaching-india\\_n\\_3038289.html](http://www.huffingtonpost.com/2013/04/09/drones-rhino-poaching-india_n_3038289.html) (consulted on 25-05-2013).

and Australia is currently considering the use of surveillance drones to intercept boats with asylum seekers.<sup>115</sup> The most common use of drones by states, however, is that of domestic security. Even though the use of surveillance and intelligence drones can bring along legitimate human rights concerns e.g. regarding the infringement of the right to privacy, the nature of such infringements is very different from the ones related to the use of armed force through drones. Therefore unarmed drones will not be further discussed in this thesis.

Based on the above, I contend that in analysing the morality and legality of combat drones (hereafter: drones) the weapon and its operation cannot be treated separately.<sup>116</sup> With this definition I dissociate myself from interpretations that take drones to be mere weapon platforms, leading to the conclusion that their legality, unlike the weapons they carry, would not require any review.<sup>117</sup> In other words, it is sometimes argued that evaluations regarding the lawfulness of drone strikes – e.g. discrimination or proportionality – should focus on the particular bomb or missile “independently of the nature of the platform by which it is delivered.”<sup>118</sup> In my view, such interpretations are incorrect because they overlook the fact that the accuracy of the attack is to a great extent dependent on intelligence and imagery provided by the on board camera’s. Moreover, the mediation of these images – the process from input to output – is likely to have an influence, whether positive or negative, on the way in which this impressions are perceived and interpreted. Consider, for instance, the fact that drones are operated with a time a lag that can take up to several seconds if satellite transmission is used.<sup>119</sup>

Drones have gained increased media attention because of their employment in targeted strikes in the US War on Terror. Yet, this is not the only practice, or method of warfare, drones are used for today. The US also employs them in more conventional war operations as counterinsurgency strategies on Taliban ‘safe havens’ just across the

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<sup>115</sup> The Sydney Morning Herald, ‘Coalition to bring the drones against asylum boats’, 11-04-2013, <http://www.smh.com.au/opinion/political-news/coalition-to-bring-in-the-drones-against-asylum-boats-20130411-2hmyyn.html> (consulted on 25-05-2013).

<sup>116</sup> Harvard Program on Humanitarian Policy and Conflict Research (HCPR), “Manual on International Law Applicable to Air and Missile Warfare”, 15 May 2009 available at [www.ihlresearch.org/amw/manual](http://www.ihlresearch.org/amw/manual) (consulted on 23 March 2013), p. 14.

<sup>117</sup> Wuschka, p. 895.

<sup>118</sup> Schornig, 2010, p. 13.

<sup>119</sup> The Cairo Review of Global Affairs, “Drone Wars”, <http://www.aucegypt.edu/gapp/cairoreview/pages/articledetails.aspx?aid=168> (consulted on 10-06-2013).

Pakistan border.<sup>120</sup> In addition, Israel has been known to use drone strikes for targeted killings of Hamas ‘terrorists’ in Palestine for years now (officially since 2002).<sup>121</sup> Further, NATO has employed drones during the intervention in Libya.<sup>122</sup>

## 2.2 THE COMBAT DRONE IN HISTORICAL CONTEXT

“[E]ven with all the advantages offered by air power, humans still needed to strap themselves into the devices and fly them. There were limits to the risks that could be taken. Whatever an airplane was used for, it ultimately had to return to base with its pilot. Not surprisingly, from the start of the development of airplanes for use in war, engineers labored to circumvent this limitation.”<sup>123</sup>

In spite of its bluntness, I believe that the statement above is quite accurate. In fact, the overcoming of limitations and maximization of efficiency will prove to be central to the development of military strategies.

As Foucault so eloquently described in his *Discipline and Punishment*, from the 18<sup>th</sup> century onwards and under influence of the industrial revolution, the disciplining of the human body gained some new significant characteristics. A mechanistic view of humanity emerged. In different social institutions, such as the military, the action of the human body was differentiated and controlled in more and more detail, parcelled in time, space and movement, under a constant control that was no longer just focused on the outcome of the action, but took the economy and efficiency of the movements as its new objective.<sup>124</sup> This disciplining was not only limited to the human body itself, but also extended to the tools handled by it. Imagine, for instance, the strictly fragmented routine by which soldiers are trained to recharge and present their weapon. In this

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<sup>120</sup> Anderson, 2012, p. 381.

<sup>121</sup> Policymic, ‘Israel Drone Strikes: There’s Another Drone War You’re Not Paying Attention To, And It’s Not Obama’s’, May 2013, <http://www.policymic.com/articles/39735/israel-drone-strikes-there-s-another-drone-war-you-re-not-paying-attention-to-and-it-s-not-obama-s> (consulted on 25-05-2013). & Melzer, 2008, p. 87-88.

<sup>122</sup> Anderson, p. 392.

<sup>123</sup> The Nation, ‘A Brief History of Drones’, 27-02-2012, <http://www.thenation.com/article/166124/brief-history-drones#> (consulted on 25-05-2012).

<sup>124</sup> Foucault, 1975, p. 190-236.

routine the most efficient way – that is, the fastest and requiring the least effort – to recharge the weapon is manifested. Besides, as stated earlier, according to McLuhan the tools and technologies used in human action are part of making this action more efficient and suited to our needs. In this view the human body extends its actions through certain tools and technologies, ever increasing the efficiency of its actions in terms of economy and optimization of result.<sup>125</sup>

The same goes for the development of weapons and warfare. The invention of the tank offered the attacking infantry battalions of the World War I and II not only coverage and a quick breakthrough in their attack, but worked as a *deus ex machina*, a theatrical device, that could be used to manipulate the emotions of its combatants. The effective potential for change of the tank was psychological as it encouraged soldiers to overcome their resistance to movement and charge with the hope of saving their comrades.<sup>126</sup> This technological development, in fact, made the human minds and, therefore, bodies, more subordinate to the general's cause. As John Keegan describes it, this “moral confidence trick” is not only characteristic for the emergence of tanks on the battlefield, but can be seen as a revolution in warfare, caused by the mechanization of armies in general.<sup>127</sup>

At the same time, Keegan argues that the battlefield, in particular during the last three quarters of the 20<sup>th</sup> century, had become more and more dangerous as “the killing power of weapons and the volume of munitions available to feed them has been rising”.<sup>128</sup> These increased hazards of the battlefield are especially problematic for the morale of soldiers and the nation in general, when the war is lost and the sacrifices, so to speak, have proven to be all for nothing. This was in particular the case for the US after the Vietnam War. The demoralized sentiment, in addition to the abolishment of conscription in 1973, posed a danger to the US's military power. So, in order to address this issue, the US took several measures. To begin with, the idea was to increase the quality of their soldiers. Further, enlisting was made more attractive through an increase in military pay and a marketing campaign that pictured the army as the institution where

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<sup>125</sup> McLuhan, p. 181-182.

<sup>126</sup> Keegan, 1976, p. 299-300.

<sup>127</sup> Ibid., p. 299-301.

<sup>128</sup> Ibid., p. 311.



you could fulfil yourself personally and ‘Be All You Can Be’. This resulted in such a high enlisting again, that the standards in the military could be raised.<sup>129</sup>

However, in comparison to the Soviet army – not having abolished the draft, – the US remained largely outnumbered. Moreover, it was lagging behind in the development of conventional weapons necessary for more limited wars, as it had invested all its effort in nuclear research and development. But when it became clear that nuclear weapons were too destructive to be used and both parties to the Cold War had outbalanced each other, the US government realized it had to invest in new conventional weapons. This coincided with the ascension of information technology, in which the US had an expertise that would give them a big advantage on the Soviet Union.<sup>130</sup>

Consequently, the development of so called ‘smart’ bombs and missiles was taken up. (In fact, previous experiments with precision targeting already had been conducted during World War II, in the form of the not very successful German radio-controlled bombs, and propeller equipped missiles, i.e. cruise missiles).<sup>131</sup> By using microelectronic techniques bombs and missiles were incorporated with aiming systems such as radar, lasers, thermal and optical sensors and satellite navigation. The use of these precision munitions, in combination with high-tech command, control and reconnaissance systems made bombing increasingly accurate. Moreover, specialized techniques of such weapons resulted in an even higher division of labour and turned combatants into professionals.<sup>132</sup>

As for the development of drones, Israel was the first to develop military drone technology after the Arab-Israeli War of 1973 and is still an important producer, employer and exporter of drones. Nevertheless, the US is currently the largest producer and the most frequent user of drones.<sup>133</sup> Drones were first put to use after the attacks of

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<sup>129</sup> Boot, 2006, p. 322-324.

<sup>130</sup> Ibid., p. 324-325.

<sup>131</sup> The Nation, ‘A Brief History of Drones’, 27-02-2012, <http://www.thenation.com/article/166124/brief-history-drones#> (consulted on 25-05-2012).

<sup>132</sup> Boot, p. 321-322, 325-327.

<sup>133</sup> Radio Free Europe Radio Liberty, “Drones – Who Makes Them and Who Has Them?”, 31-01-2012, [http://www.rferl.org/content/drones\\_who\\_makes\\_them\\_and\\_who\\_has\\_them/24469168.html](http://www.rferl.org/content/drones_who_makes_them_and_who_has_them/24469168.html) (consulted on 25-05-2013).

9/11 by the US military from 2001 in the war against the Taliban, and from 2002 also by the Central Intelligence Agency (CIA).<sup>134</sup>

## 2.3 TECHNOLOGICAL IMPLICATIONS

Having briefly discussed the broader historical context in which drones have emerged, now it is time to look at what kind of implications the technological characteristics of drones could trigger. In order to do so, it is important to first sketch in general terms how drones work and are being operated.

### 2.3.1 HOW DRONES WORK

To begin with, as drones are unmanned, lighter and often smaller than manned combat aircrafts, they can fly relatively close to the ground. Also they can hover in the air on the same spot for hours. Then, their cameras record the surroundings and send this (via satellite) to the control room, which can be more than 7000 miles away.<sup>135</sup> Further, at least in the case of the US, drones are always operated in pairs:

“The pilot sits on the left side of the computer station, controlling the drones and firing the weapons. The sensor operator sits on the right and controls visual surveillance, with the ability to zoom in and make infrared and other types of radiation visible. The pilot and sensor operator each have five monitors in front of them, with live video feeds from the drone's camera as well as images and data from satellites. The team is in constant radio contact with the Combined Air Operations Center (CAOC) at the US Central Command headquarters in Qatar, through which ground troops request drone deployment, and with the American base in Kandahar, southern Afghanistan, where the UAVs take off and land.”<sup>136</sup>

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<sup>134</sup> The Nation, ‘A Brief History of Drones’, 27-02-2012, <http://www.thenation.com/article/166124/brief-history-drones#> (consulted on 25-05-2012).

<sup>135</sup> The New York Times, “A Day Job Waiting for a Kill Shot a World Away”, 29-08-2012, [http://www.nytimes.com/2012/07/30/us/drone-pilots-waiting-for-a-kill-shot-7000-miles-away.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/07/30/us/drone-pilots-waiting-for-a-kill-shot-7000-miles-away.html?pagewanted=all&_r=0) (consulted on 26-05-2013).

<sup>136</sup> Der Spiegel, “Remote Warriors: How Drone Pilots Wage War”, 12-03-2010, <http://www.spiegel.de/international/world/remote-warriors-how-drone-pilots-wage-war-a-682420.html> (consulted on 25-05-2013).

In conventional war operations where drones are used to support the ground troops, the person in charge of the targeting is the commander on the ground. In such cases the operation is more or less directly related to what is happening on the ground during a certain amount of hours. In contrast, in the case of targeted killing operations, one single operation can last for several weeks of monitoring and finally targeting.<sup>137</sup> The authorization of targeted killings is based on a process of intelligence gathering by the CIA and the creation of so called 'kill lists' or Joint Prioritized Effects Lists (JPEL), in cooperation between the CIA and US government.<sup>138</sup>

### 2.3.2 REMOTE OPERATION

Supposedly, the biggest advantage of the combat drone is that the lives of the pilots are not at risk. In comparison to manned combat aircrafts, like the F-16, the combat drone does not only save a lot of money,<sup>139</sup> but also pilots lives.<sup>140</sup> Yet, one of the disadvantages to the use of drones is that the pilots work long, dull shifts, staring at a screen for several hours.<sup>141</sup> It has been argued that this repetitiveness and dullness increases the risk of mistakes.<sup>142</sup> At the same time it is argued, though, that drone pilots work under high pressure and because of that, a lot of them suffer from emotional exhaustion or burnouts, which again also would increase the risk of mistakes being made.<sup>143</sup> Even though I do not think that dull work necessarily cannot be stressful, these two arguments seem to be slightly contradictory.

Maybe a solution to this issue can be avoided by posing these arguments against the argument that in more conventional air operations, in which time and information are much more limited and the personal life of the pilot is in danger, a high level off

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<sup>137</sup> Der Spiegel, 'Interview With A Drone Pilot: 'It Is Not A Video Game'', 12-03-2010, <http://www.spiegel.de/international/world/interview-with-a-drone-pilot-it-is-not-a-video-game-a-682842.html> (consulted on 25-05-2013).

<sup>138</sup> Finkelstein, 2012, p. 160.

<sup>139</sup> Singer, chap 1. , "The world beyond Boston".

<sup>140</sup> One could argue that the risk to the lives of pilots in manned combat aircrafts is reduced a lot already in comparison to ground troops. Still, the difference here I believe is significant, as the pilots are no longer physically present on the battlefield (which in modern wars also extends to the air).

<sup>141</sup> De Spiegel, 'Interview With A Drone Pilot: 'It Is Not A Video Game'', 12-03-2010, <http://www.spiegel.de/international/world/interview-with-a-drone-pilot-it-is-not-a-video-game-a-682842.html> (consulted on 25-05-2013).

<sup>142</sup> Singer, chap 13, "Neighborhood watch: technology fights back".

<sup>143</sup> Knoops, p. 18.

stress is likely to occur. Contrarily (and ideally), the combat drone would allow for “a coolly professional consideration of what kinds, and how much, violence is required” in each specific situation,<sup>144</sup> and in this way would also reduce the risk of mistakes. Without questioning the validity of the first two arguments, I would say that the latter argument is quite plausible. The only thing I can conclude here is that even if we agree that the use of drones brings along the risk of occurring mistakes, because of either (or both) dullness, repetitiveness or stressfulness, this is substituting the risk of mistakes made under pressure of time, the stakes at risk and threat to personal safety as occurring in the use of manned combat aircrafts, and therefore the risk of mistakes in the use of drones is not likely to be higher than before.

Another implication resulting from the absence of the pilot from the battlefield is the idea that because of this physical, and as argued, moral distancing, the threshold for killing is lowered. Especially when operators are described as sitting with their joysticks in hand, watching at a computer game-like image on the screen, it seems that their job is more like playing a video game than having to do with actual life and death situations. In other words, it has been argued that the game like character of drone operation results in a “war deprived of its substance – a virtual war fought behind computer screens, a war experienced by its participants as a video game, a war with no casualties”.<sup>145</sup> Understandably, such remarks often lead to frustration under drone pilots who do not share this sentiment at all.<sup>146</sup> Indeed I believe it is a bit insensitive to assert that the drone pilots do not realize they are not playing a computer game. Even so, this does not mean that the nature of how we fight battles has not changed significantly over the last centuries, and maybe even more so with the use of remote operation.

Keegan already argued in 1976 that thresholds on killing became easier because of, what he described as, the “impersonalization of battle”. Firstly, the introduction of the uniform and the organization of the military according to ranks, “reduced the individual soldier’s status to that of a mechanical unit in the order of battle”.<sup>147</sup>

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<sup>144</sup> Anderson, p. 381.

<sup>145</sup> Zizek, 2002, p. 37, cited in I.G.R. Shaw, 2012, p 18.

<sup>146</sup> De Spiegel, ‘Interview With A Drone Pilot: ‘It Is Not A Video Game’’, 12-03-2010, <http://www.spiegel.de/international/world/interview-with-a-drone-pilot-it-is-not-a-video-game-a-682842.html> (consulted on 25-05-2013).

<sup>147</sup> Keegan, p. 328.

Secondly, trends in warfare since the middle ages made personal encounters between equal combatants less and less likely to occur as edged weapons were replaced by fire-  
weapons, vision was impeded by smoke and soldiers were drilled to stay on their  
positions. Thirdly,

“the dimensions of the battlefield, completely depopulated of civilians and  
extending far beyond the boundaries of the individual’s perception, the events  
supervening upon it – endless artillery bombardments, sudden and shatteringly  
powerful aerial bombings, mass irruptions of armoured vehicles – reduced his  
[the soldier’s] subjective role, objectively vital though it was, to that of a mere  
victim.”<sup>148</sup>

The sense of littleness, created by the conditions of the modern battlefields, resulted in a  
perception of the opponent, whom the soldier knew only as “indistinguishable figures in  
shapeless and monotone uniforms” with whom he rarely came face to face, as even  
more insignificant and unimportant.

The three developments described here resulted according to Keegan in a  
distancing between the soldier and the killing of the opponent. The physical proximity  
of the opponent was reduced, which in combination with the new forms of training and  
the changing nature of battlefields, also reduced the moral attachment. A nice example  
illustrating the moral distancing from killing within the military, is the use of a lexicon  
for the awarding of high decorations of bravery that refers to killing in terms of  
‘accounting for’ or ‘dispatching or disposing of’ the enemy.<sup>149</sup>

As for the remote operation of drones, in other words, the mediated participation  
in battle, it is then the question whether this trend of ‘impersonalisation’ is being  
continued. On the one hand it can be argued that because of the “dehumanization” of  
war,<sup>150</sup> both in the physical and psychological sense, this is indeed the case. Drone  
operators only experience the world they act in, in a digitalized way. The reality is  
reduced to images on screen. There is no physical proximity which impedes the

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<sup>148</sup> Keegan, p. 328.

<sup>149</sup> Ibid., p. 320-331.

<sup>150</sup> Kanwar, 2011, p. 618.

possibility for interaction and “the less interaction the weaker the tug of humanity, that can, on occasion, lead to spontaneous acts of mercy”.<sup>151</sup> Furthermore, it is argued that “[u]sing drones also dehumanises the people they kill. These are not fellow humans but terrorists, not civilians but collateral damage, not 8-year-old boys or old men of eighty but potential combatants.”<sup>152</sup>

On the other hand, it is actually argued by drone operators that they do not feel less emotionally attached to their targets, but more. In particular in the case of targeted killings, where the target is observed for weeks both when he is engaged in terrorist activities as well as the moments when he is spending time with his family. This close observation is said to lead to a feeling of familiarity that sometimes makes it hard for drone operators to ‘push the button’:

“Of a dozen pilots, sensor operators and supporting intelligence analysts recently interviewed from three American military bases, none acknowledged the kind of personal feelings for Afghans that would keep them awake at night after seeing the bloodshed left by missiles and bombs. But all spoke of a certain intimacy with Afghan family life that traditional pilots never see from 20,000 feet, and that even ground troops seldom experience.”<sup>153</sup>

This quote implies the actual opposite of what is suggested by contestants of the use of drones, and, in my opinion, is not an implausible argument. According to new media theory, factors such as the high tech quality of video footage are able to bring about the occurrence of ‘immersion’ (cf. Bolter and Grusin,) which increases the viewer’s involvement with the object or world on the screen.

Now, when we oppose these views against statements like those claiming that “studies have shown that disconnecting a person, especially by means of distance (be it

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<sup>151</sup> Finkelstein, p. 174.

<sup>152</sup> Information Clearing House, “Dehumanizing War”, 08-01-2013, <http://www.informationclearinghouse.info/article33563.htm#.UO7xZzmPCJo.facebook> (consulted on 10-06-2013).

<sup>153</sup> The New York Times, “A Day Job Waiting for a Kill Shot a World Away”, 29-08-2012, [http://www.nytimes.com/2012/07/30/us/drone-pilots-waiting-for-a-kill-shot-7000-miles-away.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/07/30/us/drone-pilots-waiting-for-a-kill-shot-7000-miles-away.html?pagewanted=all&_r=0) (consulted on 26-05-2013).

physical or emotional) from a potential adversary makes targeting easier and abuses more likely”,<sup>154</sup> the picture becomes quite contradictory. It is striking that no specific references to these studies are mentioned, and moreover whether these studies were conducted on the effect of remotely operated aircrafts or maybe make a more general statement. As much as I am concerned about such implications, it is essential to test these statements on their accuracy. To my knowledge, the psychological implications of remotely operated weapons are still barely investigated, let alone in light of media theory. But especially media and communication sciences could have a lot to contribute to the issues concerned and it is therefore, also one of the intentions of this thesis to chart such research gaps.

To continue, from a slightly different angle, it is claimed by Anderson that the remoteness from the battlefield is in fact a positive characteristic, since “increased safety for fighting personnel [...] allows for a coolly professional consideration of what kinds, and how much, violence is required to accomplish a lawful military mission”.<sup>155</sup> This view does, however, not answer to the contention that the drone operator – not experiencing a similar amount of adrenaline to when he is physically present on the battlefield thereby risking his own life – would appreciate the moral weight of his actions to a lesser extent.

### 2.3.3 PRECISION

A final alleged technological advantage of drones I want to discuss here is that their use is highly efficient and accurate.

“With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, [...] never before has there been a weapon that allows us to distinguish more effectively [...]. [I]t is hard to imagine a tool that can better minimize the risk to civilians than remotely

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<sup>154</sup> ICRC, “International Humanitarian Law and New Weapon Technologies: 34th Round Table on Current Issues of International Humanitarian Law, San Remo, 8-10 September 2011. Keynote address by Dr. Jakob Kellenberger, President, ICRC”, 08-09-2011, <http://www.icrc.org/eng/resources/documents/statement/new-weapon-technologies-statement-2011-09-08.htm> (consulted on 10-06-2013).

<sup>155</sup> Anderson, p. 381.

piloted aircraft. [They have the] ability to fly hundreds of miles over the most treacherous terrain, strike their targets with astonishing precision, and then return to base. [...] [C]ompared against other options, a pilot operating this aircraft remotely, with the benefit of technology and with the safety of distance, might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision, the ability, with laser-like focus, to eliminate the cancerous tumor [...] while limiting damage to the tissue around it, that makes this counterterrorism tool so essential."<sup>156</sup>

Although, the metaphors used in this statement are clearly designed to capture the imagination, the assertions are quite disputable. In a prominent report by Stanford/NYU it was for instance argued that the lack of transparency on drone strikes and related deaths in Pakistan, and the resulting conflicting media reports, impede a credible assessment of the proportionality of collateral damage caused by the attacks.<sup>157</sup> Of course this could also be the case when using other aerial weapons, but it seems that with the use of drones the absence of post-strike investigations has become rule rather than exception. Based on a comparison and evaluation of available data and interviews with Pakistani civilians, the authors of the report argued that the US' dominant narrative on the use of drones in Pakistan, as summarized in the quote above, is simply false.<sup>158</sup>

Notwithstanding the credibility of this report, it cannot be denied that, in principle, drones – employing precision technology – have the potential to be more precise than means of warfare carrying unguided missiles and bombs. In addition, the precision of, for instance, the Predator drone, is said to be higher than that of a traditional jet, because of its ability to fly at a lower speed.<sup>159</sup> On the other hand, one must keep in mind that precision is always highly dependent on accurate reconnaissance and proper control, to make sure that enough precaution is taken to make sure no

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<sup>156</sup> John O Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy", *Woodrow Wilson International Center for Scholars, Washington, DC, 30 April 2012*, available at <http://wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy> (consulted on 07-04-2013).

<sup>157</sup> Stanford/NYU, p. 29-54.

<sup>158</sup> *Ibid.*, p. V.

<sup>159</sup> Wuschka, p. 896.



civilians will be harmed under attack. This makes the notion of ‘precision’ slightly misleading, because even precision targeting is not flawless.<sup>160</sup>

Apart from this, with the swift elaboration of information technologies, the risk that operating systems will be hacked or spoofed, also increases.<sup>161</sup> Only the recent news headlines on China’s profound and large-scale cyber-attacks on US government computer systems show the reality of such threats. Moreover, cyber-warfare is a type of warfare of which the strategies are not limited to the dominion of state actors. It is not unthinkable that in the future terrorist groups – not in the position to acquire drones themselves – will be able to facilitate the technical tools and human skills required to take over the navigation and control of the aircrafts with the intend to harm their adversaries or, more likely, innocent civilians. In light of contemporary fears that nuclear weapons could, or already have, end(ed) up in the hands of terrorists and that biological and chemical weapons can relatively easy be produced by non-state actors,<sup>162</sup> decisions regarding the legality of new weapons and means of warfare, should anticipate on the possibility that, in a similar fashion, drones could be taken over by terrorists.<sup>163</sup> Although drones are no weapons of mass destruction, their attractiveness and, at the same time, danger lies in the fact that they can be operated remotely over huge distance and their potential for accuracy.

## 2.4 CONCLUSIONS

In this chapter we saw that the drive towards a more effective and efficient army and decreased risk for the home-combatants, and arguably also civilians, led to an increasingly mediated warfare. Battles were no longer a face-to-face encounter, but were fought over growing distance by the means of weapons and technologies that became ever more profound. The sword, the gun, the tank, the airplane and the combat

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<sup>160</sup> Boot, p. 321.

<sup>161</sup> National Public Radio, “Hacking Drones And The Dangers it Presents”, 08-07-2012, <http://www.npr.org/2012/07/08/156459939/hacking-drones-and-the-dangers-it-presents> (consulted on 10-06-2013).

<sup>162</sup> Falkenrath, 1998 passim.

<sup>163</sup> In fact, this already seems to be the case in Germany today where current investigations are probing the use of small drones for terrorist attacks. See for example, The Globe and Mail, Germany probes terror-attack scheme involving model airplane ‘drones’, 25 June 2013, available at <http://www.theglobeandmail.com/news/world/germany-probes-terror-attack-scheme-using-model-airplane-drones/article12793323/> (consulted on 1 July 2013).

drone, including its advanced navigation, surveillance, and precision targeting devices, are all media technologies – extensions of the human body – literally and metaphorically, as they optimized human actions by making them more effective while requiring the least possible effort.<sup>164</sup> In other words, drones, like their predecessors, have increased efficiency.

That the increased mediation of warfare possibly morally distanced the combatant from the nature of his actions was not a new concern. Already during the early stages of aerial warfare it was feared that the pilots would no longer realize that they were killing. The advancement of drones has only increased such concerns, as to many the image of the drone pilot behind his computer screens was reminiscent of playing a video game. The idea that the pilot is morally distanced, is however not undisputed as the highly advance video images are also thought to create a sense of proximity and immersion that few combatants on the ground ever experience. Clearly, the psychological implications of drone technology have yet to be thoroughly investigated.

On a different note, the fact that the drone pilot is not physically present on the battlefield and therefore reliant on, often a lot of, rather complex, data, the benefits and efficiency of this media technology could be diminished. As McLuhan argued “the medium is the message”: the technologies we use shape our perception of the world we act in, and, at least to a certain extent, also our actions.<sup>165</sup> The heavy reliance on a vast amount of different data, under pressure of time, carries the risk of misinterpretation and mistakes in targeting. Of course, it remains the question how big this risk is, and whether its downsides are significant enough to delegitimize the combat drone in comparison to more conventional weapons and manned airplanes.

In answering the question whether the drone is significantly new as a means of warfare I believe it is both old and new. It is old in the sense that it is part of a bigger development in history of increasing efficiency and effectiveness that in particular since the industrial revolutions has prevailed in our society. Drones can be seen to be part of what is described as “an ongoing “Revolution in Military Affairs” (RMA) [which] seeks

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<sup>164</sup> McLuhan, *passim*.

<sup>165</sup> *Ibid.*, p 7.

to produce radically more effective – and [...] more humane – militaries by profoundly altering their doctrine, organization, and weaponry through the widespread application of emerging microchip-based technologies, especially advanced computer and communications' systems".<sup>166</sup> To put it bluntly, it is just another technology to optimize efficiency of our actions. It is a perfect example of achieving more, with less effort because it applies precision guided technology, so improves accuracy while reducing the risk to soldiers.

What is new, however, is the increased distance and the maximization, so to speak, of the mediatisation process, which results in the fact that people are operating drones, without ever having first hand experienced the actual surroundings in which they are employed. Moreover, pilots are for the first time entirely risk free. Since financial compensation for perished soldiers is high, this reduces the price of flying drones – much less costly than manned aircrafts – even more. In addition, drones seem to have made the practice of targeted killing something regular, where before it was considered to be unlawful and exceptional. In conclusion it can therefore be stated that these characteristic features make the drone new to an extent that is likely to influence the practical application of both *ius ad bellum* and *ius in bello*.

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<sup>166</sup> Dunlap, 2004, p. 127.

### 3. MORAL AND LEGAL ASSESSMENT

Now the moral and legal framework is set, and the object of this research, the combat drone, is explored, it is time to put the two together and examine the implications of the use of drones for both just war theory and international law. Since drones are currently most employed for targeted killings in the war against terrorism, it is important, first to assess whether the use of drones for such practices is permissible. This permissibility, to a large extent, depends upon the justification of the use of lethal force, i.e. *ius ad bellum*. Therefore, in the following section, the question of the moral and legal permissibility of targeted killings, and the war on terror will be discussed. Afterwards, the question of compliance with the *ius in bello* will be addressed. In the final section, the outcome of both analyses will be put together to answer the question if the current legal framework is sufficient to provide protection to civilian life, in particular in comparison to what is morally required.

#### 3.1 DRONES AND TARGETED KILLING AS A METHOD OF WARFARE

Traditionally, the adequate approach to counter terrorism is that of law-enforcement, which is based on human rights law. This not only has been common state practice, at least, till the beginning of this century, but also, in 2006, this approach was formally accepted by all United Nations member states on the basis of consensus in the form of the UN Global Counter Terrorism Strategy.<sup>167</sup> Nowadays, however, the approach to countering terrorism by the means of criminal justice, is being compromised by the introduction of a war approach. This is visible both the practice of targeted killings as a way of responding to, and preventing transnational terrorist attacks, as well as in law and jurisprudence like UN Security Council resolutions 1368 and 1373 which recognized the right of individual and collective self-defence in response to the attacks of 9/11, as well as any other terrorist attack threatening international peace and

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<sup>167</sup> The United Nations Global Counter Terrorism Strategy, UNGA RES 60/288, UN Doc A/60/288, 20 September 2006

security,<sup>168</sup> and the Israel Supreme Court judgement in the *Targeted Killings Case* where it was affirmed that Israel is currently in a state of armed conflict with various Palestinian terrorist organizations.<sup>169</sup>

Notwithstanding these developments, the in-between approach of targeted killings has raised serious moral and legal questions regarding the permissibility of such force. Moreover, since drones are the most employed method to perform targeted killings, this practice might have implications for the morality and legality of the drones as a means of warfare. Therefore, in the following I will reflect upon the most enunciated arguments in favour of, and against, the targeted killing of terrorists, in order to map the complexities of this debate and to set the stage for their evaluation under *ius in bello* in section 3.2.

### 3.1.1. FROM LAW ENFORCEMENT TO NATIONAL SELF-DEFENCE

The idea behind the criminal approach to countering terrorism is that, since terrorism is a crime – or, more precise, involves activities that are considered criminal, – those engaging in terroristic activities should be arrested, put on trial, and punished if proven guilty. The objective of this procedure is deterrence on the one hand, so preventing the perpetrator (temporarily) of being able to do recommit the crime again while setting a future example for others, and retribution on the other, as the wrong being done is followed by punishment.

Thus, the objective of the law-enforcement is to put a criminal, and in our case, a terrorist, on trial. This means that the aim of arresting a criminal is to capture him alive and the initial goal of the law-enforcement operation can never be to kill.<sup>170</sup> The basic assumption underlying this restriction is the idea that is terrorist is a civilian, just like other criminals are civilians. Irrespectively of the nature and severity of the crimes allegedly committed, this means that the person in question has a right not to be killed. The moral taboo on killing is codified in several universal and regional human rights

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<sup>168</sup> UNSC RES 1368, UN Doc S/RES/1368, 12 September 2001 & UNSC RES 1373, UN Doc S/RES/1373 28 September 2001

<sup>169</sup> *The Public Committee against Torture in Israel v. The Government of Israel (Targeted Killings Case)*, The Supreme Court sitting as the High Court of Justice, Judgement, H CJ 769/02 (2005), para 16.

<sup>170</sup> Maxwell, 2012, p. 37.

documents.<sup>171</sup> Article 6 of the International Covenant on Civil and Political Rights (ICCPR) provides that “every human being has an inherent right to life” and that “no one shall be arbitrarily deprived of his life”.<sup>172</sup> Exceptions to this right are, as provided by the European Convention on Human Rights (ECHR) in case defence of a person against unlawful violence; to effect a lawful arrest or prevent escape of a lawful detainee; or in order to quell a riot or insurrection. Still, however, these exceptions are only legitimate when they are no more than absolutely necessary.<sup>173</sup>

Even though someone might think that terrorists deserve to be killed, this is a matter for the courts to decide.<sup>174</sup> Again this is a universal legal notion that is enshrined in, *inter alia*, Universal Declaration on Human Rights, the ICCPR and the ECHR. E.g. article 14 of the ICCPR provides that every person shall be equal for the law; has a right to be tried by a “competent, independent and impartial tribunal”; to be presumed innocent until proven guilty according to law and to be tried in his presence or to be represented by legal counsel of personal choice.<sup>175</sup> In addition, in a 2008 report to the General Assembly by the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, it was stated that the right to take proceedings before a court must not be diminished by a derogation from the Covenant.

“Despite its absence from the list of non-derogable rights in article 4(2) of the International Covenant on Civil and Political Rights, the Human Rights Committee has treated the right to a fair trial as one which may not be subject to derogation where this would circumvent the protection of non-derogable rights.

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<sup>171</sup> See for instance, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 3, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 6, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR), art 2.

<sup>172</sup> ICCPR, art. 6.

<sup>173</sup> ECHR, art 2.

<sup>174</sup> This is not only common practice and core to the rule of law – where death penalties (although decreasingly inflicted) are imposed by the judiciary, – but also the ruling moral position, in line with the division of powers. This position was first introduced by Aristotle and developed during the Enlightenment by Montesquieu in the form of the *trias politica*, where the executive power lies with the government, the legislative power with the parliament and the judiciary power with the courts.

<sup>175</sup> ICCPR, art 14.

Even in situations when derogation from article 14 is permissible, the principles of legality and the rule of law require that the fundamental requirements of fair trial must be respected.”<sup>176</sup>

It seems that the legal requirement that terrorists (being criminals) should be arrested and undergo a fair trial, has not actually changed. Merely pragmatic objections commenced a movement from the law-enforcement paradigm towards a military context as the transnational nature of contemporary terrorist threats – meaning that certain terrorist organizations are operating from within countries where the law-enforcement is weak or non-existent,<sup>177</sup> – it is thought to be unlikely to stop terrorists through the national criminal justice systems of the states concerned. Moreover, not only would conventional law-enforcement institutions and methods not practically be capable of coping with the threat of terrorism, it would also be naïve to expect that issues for arrest at the governments harbouring them would prevent further acts of terrorism,<sup>178</sup> as the ability and willingness of the harbouring state to cooperate with the issuing state is dependent on extradition treaties and, more importantly, global power relations and political interests.

This led to the concern that terrorists operating from such states would remain virtually immune to arrest. This again, especially after the attacks of September 11 2001, made the US rethink the approach to terrorism.<sup>179</sup> What was needed, was a legal framework that would allow for less restrictions on the killing of terrorists: the framework of armed conflict. Because if terrorists could somehow be considered as combatants or other legitimate targets of war, they could be eliminated directly. This shift in paradigms was legally justified on the basis of Article 51 of the UN Charter and the interpretation of the 9/11 attacks, although not carried out by a state actor, as amounting to an armed attack as prohibited under Article 2 (4).<sup>180</sup> As it was argued, the attacks gave rise to national self-defence, thereby allowing the US to undertake all

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<sup>176</sup> Note by the Secretary-General, “Protection of human rights and fundamental freedoms while countering terrorism” UN DOC A/63/223, 6 August 2008, p. 7

<sup>177</sup> Maxwell, p. 37.

<sup>178</sup> Statman, 2004, “I. Morality and War”.

<sup>179</sup> Maxwell, p. 37 & Knoops, 2012, p. 770-701.

<sup>180</sup> UN Charter, art 2 (4) and 51.

necessary measures to defend itself. In this way the US is justified not only in the war in Afghanistan, but also in a war against terrorism in general.<sup>181</sup>

The opening up of the law approach to counter terrorism, goes accompanied by some dangers. Once the legitimacy of national self-defence to imminent threats is accepted, it is tempting to argue, as is done by Montague, that also those terrorists not directly posing an imminent threat can be legitimately targeted, because of their engagement in “joint aggression even though not all of the actions composing their joint action are individually aggressive”.<sup>182</sup> This would then allow us to look at the “ways in which the actions of members of a group are related to actions of the group as a whole”.<sup>183</sup> When a state then uses joint self- or other defence, targeted killing constitutes only an aggressive component of a defensive joint action. If the defensive joint action is morally permissible also the aggressive component is permissible.<sup>184</sup> Notably, although attractive from a political point of view, this reasoning goes at the cost of the protection of civilian lives.

Besides, the fact remains that exactly because the move away from the law-enforcement paradigm towards an approach of national self-defence is not stemming from doubts about its nature or justness, but from doubts regarding its practical use in countering transnational terrorism, the law-enforcement paradigm is still preferable when feasible. This is, for instance, implied by the idea that before resorting to a targeted killings other measures have to be exhausted. An idea that is, at least officially, also held by the US:

“[O]ur unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible. I have heard it suggested that the Obama Administration somehow prefers killing al-Qaida members rather than capturing them. Nothing could be further from the truth. It is our preference to capture suspected terrorists whenever and wherever feasible.”<sup>185</sup>

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<sup>181</sup> See for instance, Koh, 2010; Brennan, 2012 & Schmitt, 2010, p. 316.

<sup>182</sup> Montague, 2012, p. 293.

<sup>183</sup> Ibid., p. 293.

<sup>184</sup> Ibid., p. 299.

<sup>185</sup> Brennan, 2012, “The Ethics and Efficacy of the President’s Counterterrorism Strategy”.



That targeted killings are morally and legally permissible in the case of severe imminent threat to state security is not so much disputed. Still, contentions like the one by Montague, are dangerous in the way they try to extend the permissibility of killing to those who do not pose an imminent threat. And this is, according to the principle of proportionality – applicable to self-defence – not in correspondence with the necessity of the situation. As a result, such justifications would allow for unnecessary excessive force.

Similarly, to argue that a war framework is applicable, aims to turn all terrorist of a certain group into immediate threats, by ascribing to them some form of belligerent status. And once the applicability of the war framework is accepted it is not very difficult to argue that, at least, some terrorists are legitimate targets in this war. Based on the notion of direct participation in the war, as provided by Common Article 3 and explained in the first chapter of this thesis “for the duration of their participation in hostilities may be directly attacked as if they were combatants”.<sup>186</sup> The legal obscurity of this notion, though, has led to interpretations that try to extend the application of this concept to those who do not fight. An example is Colonel Maxwell who proposed to broaden the application to civilians that contribute to the war effort in general, whenever it can be confirmed that a civilian is a member of a terrorist organization and structurally is contributing to its war efforts, this civilian becomes an (illegitimate) combatant and therefore is liable to be killed.<sup>187</sup>

### 3.1.2 A JUST CAUSE FOR WAR

To answer the question whether the use of combat drones for targeted killings is moral and legal, firstly, a *ius ad bellum* test is required. According to *ius ad bellum* requirements, whether it is morally permissible to resort to war, primarily depends on whether there is a *justa cause*:<sup>188</sup>

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<sup>186</sup> Melzer, 2010, p. 152.

<sup>187</sup> Maxwell, p. 46-59.

<sup>188</sup> Ibid., p. 698.

“As long as the *in bello* criterion for the legitimacy of killing enemy combatants does not depend on the justice of our cause in declaring war in the first place, we can kill with impunity as long as we have committed the quite different wrongful act of engaging in a wrongful declaration or act of war.”<sup>189</sup>

The question then is, obviously, whether the War on Terrorism, as a war of self-defence, had a *justa cause* or whether the War on Terrorism is a creative way of creating the conditions of one’s own defence. A simple bootstrapping trick that makes something permissible that under normal circumstances would be impermissible.<sup>190</sup>

As the war was a response to the 9/11 attacks, a more precise question would be whether this attack was enough to trigger a war of self-defence. It cannot be denied that the UN Security Council indeed authorized the use of armed force in self-defence in response to these attacks.<sup>191</sup> The war in Afghanistan, can therefore be considered a legitimate self-defensive war. Moreover, as Dinstein argues, the perpetrator of an armed attack is not necessarily identified as a state in Article 51.<sup>192</sup> Also in the 2004 Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the court seems to accept the 2001 Security Council resolutions provided that those attacks occur from outside.<sup>193</sup>

Legally speaking indeed, the US has been able to get away with justifying their War on Terror on the basis of the right to self-defence according to Article 51 of the UN Charter.<sup>194</sup> Also others, such as Statman, argue that wars against terrorism – like the US war against Al Qaeda and the Israeli war against Hamas – are justified:

“If ever there could be a *casus belli* on grounds of self-defense, it is such a terror campaign launched against a country or some other collective. From a moral point of view, the values under threat in such cases are far more important than

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<sup>189</sup> Finkelstein, p. 168-169.

<sup>190</sup> McMahan, 2004, p. 695-698.

<sup>191</sup> Supra note 168.

<sup>192</sup> Dinstein, p. 204.

<sup>193</sup> Supra note 76, para, 138-139.

<sup>194</sup> Koh, 2010.

those involved in cases of a mere formal violation of sovereignty, which, under the common view, justify waging war.”<sup>195</sup>

Self-defence is usually explained as the protection of sovereignty. In Article 2 (4) of the UN Charter armed attack is defined as the use or threat of force against the “territorial integrity or political independence” of a state.<sup>196</sup> In Article 51, accordingly, it is then provided that in case of an armed attack, a state has an inherent right to self-defence.

From a moral perspective though, Rodin argues that the concept of state-sovereignty – that which needs to be protected when we are talking about national self-defence – is a factual rather than a normative concept, as the way we interpret it, is dependent on the historical context. In his view sovereignty is an empty vessel that itself lacking normative justification.<sup>197</sup> Also Williams contends that linking legitimate authority to the control of a territory and treating it as a value on its own, is making an ethical claim out of an empirical point.<sup>198</sup> Even Dinstein states that the right to self-defence is not inherent to state-sovereignty.<sup>199</sup>

Subsequently Rodin, rather rigidly, concludes that there is no *moral* justification for national self-defence. But in fact, other justifications for the right to self-defence can be found. Statman’s argument that wars against terrorism are just, because the values protected by them would be far more important than those in case of a formal violation of sovereignty, circumvents the ‘emptiness’ of sovereignty as an ethical claim, by referring to values. He defines these values not as only the lives of civilians, but also the economy and the quality of life in general,<sup>200</sup> thus, in fact, the collective protection of individual rights. Moreover, it can be argued that sovereignty is directly connected to the protection of rights in self-defence, as it is the state that should primarily protect the

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<sup>195</sup> Statman, 2004, “I. Morality and War”.

<sup>196</sup> UN Charter, Article 2 (4).

<sup>197</sup> Rodin, 2002, p. 115-121.

<sup>198</sup> Williams, 2008, p. 582.

<sup>199</sup> Dinstein, p. 180.

<sup>200</sup> Statman, “I. Morality and War”.

rights of its citizens. In the legal framework this is in correspondence with the responsibility to protect.<sup>201</sup>

Notwithstanding the idea of a war of national self-defence based on the collective protection of individual rights – let us assume, absolute rights, like the right to life – being plausible, it is not unproblematic in its application. Because how many rights, or the rights of how many people, have to be violated before allowing the resort to war? It is impossible to give a definite answer to this question. Moreover, when we base the legitimacy of self-defence solely on the protection of rights, we would risk what Robert Nozick has called, a utilitarianism of rights, where rights violations can be justified on the basis that they would prevent a higher amount of other/future rights violations.<sup>202</sup> From a legal perspective, Ben Emmerson has shown similar concerns, stating that there is an “[e]ver-present danger that some States, including States with a proud record of respect for the rule of law, have been willing at times to abandon those core values on the pretext of defending them.”<sup>203</sup> Yet, according to deontologists (and to a certain extent also human rights defenders) the purpose of absolute rights and prohibitions is to *avoid* violations of these at all costs instead of *preventing* violations at all costs.<sup>204</sup>

In most cases, the collective protection of individual rights is not, on its own, a sufficient right to national self-defence. I say most, because there is at least one scenario in which it is commonly accepted that the occurring harm is so morally reprehensible that war is a legitimate means to interfere, that is, in the case of genocide. Besides, we need the right to wage war, and the right to national self-defence, not just for the sake of individual states, but for the sake of the international community in general. In this scenario, the right to self-defence by a state is not merely about the protection of its citizens rights and, possibly, some collective rights or values, but, more importantly, about protecting and preserving international security, peace and a climate of diplomacy

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<sup>201</sup> 2005 World Summit Outcome, UNGA Res 60/1, UN Doc A/RES/60/1, 24 October 2005, para. 138-139.

<sup>202</sup> In Katz, 2012, p. 477.

<sup>203</sup> Emmerson, 20 October 2011.

<sup>204</sup> Nagel, 1972, p. 132 & Katz, p. 447.

over aggression and anarchy.<sup>205</sup> This then, brings us back to the law-enforcement paradigm.

Law-enforcement within the international arena is not like that within the state, where there is a national police and there are effective courts to deal with crime. Instead, on the international level, virtually all the world's states (in the form of the United Nations) have agreed that armed attack against a state can be punished, directly, by the means of national self-defence.<sup>206</sup> From a legal perspective, only the *ius ad bellum* principle of proportionality (balancing necessity and humanity) is applicable to the amount of armed force used in relation to the aim of self-defence. From a moral perspective though, as argued in Chapter 1, not every armed attack allows for a war of self-defence, because in just war theory also the *ius ad bellum* principles of (in particular) hope of success and *ultima ratio* should be applied.<sup>207</sup> If there is no hope of success, then the evils of the war will be useless. Similarly, if the purposes of the war can be brought about by less violent means, resort to war is again impermissible. Moreover, the proportionality requirement incorporates the other two *ius ad bellum* principles because if there is little or no hope of success, most likely the destructiveness of war will be disproportionate to the goods it is supposed to bring about; and a war that would bring about certain goods at not too great costs it still disproportionate if the same goods can be achieved by less destructive means.<sup>208</sup>

The war against terrorism – stretching the boundaries of this armed conflict to a global scale, – makes it furthermore, highly questionable whether there is still, at this moment a *justa cause* to legitimize this war. From a moral perspective, where *justa cause* should be constantly reflected upon throughout the war,<sup>209</sup> this is definitely not the case. The imminence of the threats are definitely not so high that they can meet the *ultima ratio* requirement, which at the same time also makes the armed force disproportionate. Legally speaking, the last resort requirement is not explicitly included

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<sup>205</sup> This was also acknowledged in the 2001 Security Council resolutions, see *supra* note 168.

<sup>206</sup> Here I will not discuss the role of the UN Security Council and its power to adopt resolutions to allow for armed force in other scenarios.

<sup>207</sup> One could argue that from a legal perspective, though these *ad bellum* requirements are implied in the UN Charter, in practice and due to the weaknesses and deficiencies of the international law-enforcement mechanism, their compliance cannot be enforced.

<sup>208</sup> Hurka, p. 35-37.

<sup>209</sup> McMahan, p. 712-713.

in Article 51. Still, since the force applied should be necessary and proportionate (see Section 1.2.1), it can be argued that in cases where the threat by terrorists is not imminent – which is likely the case for most terrorists currently targeted under the guise of the war on terror – the use of lethal force in self-defence is not necessary, therefore not proportionate. The *ultima ratio* requirement is, thus, incorporated in the necessity and proportionality requirements. This is in line with the findings of the Israel Supreme Court that stated that “targeted killing is not to be carried out when it is possible to arrest a terrorist taking a direct part in hostilities, without significant risk to the lives of soldiers.”<sup>210</sup> The last resort requirement then also seems to be applicable to targeted killing in wars of self-defence.

### 3.1.3 ASYMMETRIC WAR

Now before concluding, I will briefly address one other type of argument for the permissibility of targeted killings, namely that of a self-provoked state of asymmetric war by terrorists. It is argued by Finkelstein that terrorists, who violate the *ius in bello* principle of distinction by targeting civilians, undermine the protection this framework was designed to provide. “Where it is not mutually observed, war degenerates into “total war,” a Hobbesian state of nature in which “every man is enemy to every man.”<sup>211</sup> Although one terrorist attack might not threaten international peace and security per se, it can be argued that a more structural use of terrorist strategies, by undermining the *ius in bello* protection of civilians and risking a state of ‘total war’, international peace and security are threatened. In order to prevent this, in some cases targeted killings as law-enforcement would be allowed.<sup>212</sup>

In objection, it was argued by Held that in some cases the recourse to terrorist strategies can be permissible and therefore we should not structurally condemn them on forehand.<sup>213</sup> Nowadays, she argues, the power relations in the world are so very asymmetrical that some actors just have no other means to pressure for change and – required that there is a *justa causa* (i.e. the structural violation of rights) – this would

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<sup>210</sup> Supra note 169.

<sup>211</sup> In Finkelstein, p. 181.

<sup>212</sup> See supra note 168 & 205.

<sup>213</sup> Jaggar, 2005, p. 214.

justify the use of terrorist strategies.<sup>214</sup> Contrarily, according to Statman, the nature of the cause of the terrorist group is morally irrelevant.<sup>215</sup> This is a position towards terrorism that is – surprisingly or not – most prevalent today.

Notably, the idea of the terrorist, in particular in Western media, is surrounded by moral connotations that give new meaning to Said's concept of orientalism: terrorists are generally thought to be foreign born, Arab or Muslim looking, illegitimate in their cause, uncivilized, undisciplined, barbarian, savage, cowardly, treacherous, dishonourable and a murderers.<sup>216</sup> What is more, terrorism "appears biased in favour of the official and against the unofficial, in favour of the strong and against the weak. Assuming until shown otherwise that threats and violence perpetrated by those wearing uniforms or insignia constitute the exercise of legitimate authority, while assuming until shown otherwise that unofficial threats and violence are terrorist, tends to delegitimize struggles by the weak while legitimizing repression by the strong".<sup>217</sup>

This biased discourse not only obscures history and reality, but, in my opinion, serves propagandistic purposes in order to justify countermeasures that otherwise would be considered impermissible. Without playing down the severity of terrorism as a crime, it is essential that such discursive constructions are not overlooked when reviewing the permissibility of targeted killings in the war against terrorism. Therefore, we should have an account of terrorism that is impartial, by leaving open the question of who may be agents of terrorism,<sup>218</sup> and treat terrorism as "a tactic of coercion intended to promote further ends that in themselves may be good, bad or indifferent".<sup>219</sup> Finally, taking into account the asymmetric nature of contemporary power relations and the idea that some terrorist groups could have a *justa causa* – and without excusing them the use of terroristic strategies – this still might somehow lead us to different evaluations on the moral, and potentially also legal, permissibility of targeted killings in those particular cases.

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<sup>214</sup> Held, 1991, *passim* & See e.g. Williams, 2008, p. 596.

<sup>215</sup> Statman, "IV. The effectiveness argument".

<sup>216</sup> Jaggard, p. 212.

<sup>217</sup> *Ibid.*, p. 204.

<sup>218</sup> *Ibid.*, p. 212.

<sup>219</sup> *Ibid.*, p. 209.

### 3.1.4 MORAL VERSUS LEGAL PERMISSIBILITY UNDER IUS AD BELLUM

The above leaves us somewhat undecided on the permissibility of targeted killings, both from a moral and legal perspective. From a moral perspective it could be argued that terrorists are liable to be killed because of the severity of their crimes (as it is done by authors like Statman). On the other hand, terrorists might have a *justa causa* for using terroristic strategies, which does not make this use permissible, but maybe also does not make them liable to be killed. In addition, the moral framework seems more demanding than the legal framework in taking self-defence as a legitimate response to terrorist attacks, as it is subject to more *ius ad bellum* requirements than the legal framework. In both cases it is suggested that currently the war on terrorism has likely ‘outgrown’ its legitimacy since it is no longer proportionate. Still, both from a moral and legal *ius ad bellum* framework, it is difficult to argue against the permissibility of targeted killings and the use of combat drones to execute them in legitimate wars of self-defence, or as a last resort to imminent threats to national security. The question then is, where does this leave us? Now before answering this, I would first like to draw some attention to the temptations inherent to a relaxation of the ban on targeted killings.

In line with Jeremy Waldron, I contend that, although in some cases targeted killing might be morally permissible, it would not be wise to adopt a legal rule that would make targeted killing permissible. A legal permission of targeted killing is prone to abuse, not only by ‘our enemies’ but also by those we consider to be ‘on our side’, because of the “inherently abusive character of the attitude towards killing”.<sup>220</sup> Both past and present have shown that “the temptation to respond to insurgency by targeting people who could be described (convincingly or, for public relations purposes, plausibly) as terrorists would no doubt be irresistible if it were not for the presence of strong legal norms prohibiting assassination.”<sup>221</sup> This danger is already visible in the opinion that if objectives of deterrence and retribution cannot be achieved by law-enforcement, therefore, they “must be imposed by some other entity, such as the army of the injured country”.<sup>222</sup> Such reasoning places retribution as, a moral duty,<sup>223</sup> above

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<sup>220</sup> Waldron, 2012, p. 131.

<sup>221</sup> Ibid., p. 119.

<sup>222</sup> Statman, “II Targeted Killing and Retribution”.



the rule of law and justifies the use of all means for the sake of its objectives (respectively, retribution and deterrence).

Yet, the idea that whenever the designated institutions fail to uphold justice, the duty can be taken over by others is very dangerous and problematic. Surely, it is exactly this idea that is underlying the shift from a law-enforcement paradigm towards that of self-defence in order to allow for targeted killings. If we accept the idea “evildoers need to suffer, and this can be imposed by God, by Nature – or by some human being,”<sup>224</sup> we will find ourselves on a slippery slope where in the end everyone would be allowed to uphold justice. Needless to explain, this state of vigilante justice would result in total chaos and a state of anarchy, which would both be counterproductive and morally undesirable.

Of course, when public order, innocent lives and the survival of a political regime are at stake it can seem much more easy, effective and less costly for authorities to simply ‘eliminate’ those causing the threat, than waiting for the uncertain and slow criminal procedures. But widening the prohibition on killing is treacherous and prone to ubiquitous temptations. “Once the door is opened to calculations of utility and national interest, the usual speculations about the future of freedom, peace and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies.”<sup>225</sup> Moreover, it would erode the taboo against murder in general on the basis of an evaluation of social advantage.<sup>226</sup> While these advantages might be real, a substantive disadvantage of such an erosion is that “once politicians are informed by their moral advisors that it is after all not inappropriate to being thinking in this new way about the whole business of “taking out” one’s enemies or those who can be designated as “enemies of society”.”<sup>227</sup>

McMahan agrees with Waldron’s objection to making targeted killings legally permissible. He adds that the arrest of terrorists, although also not immune to abuse, is

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<sup>223</sup> For instance, Immanuel Kant and Michael Davis but also Daniël Statman (“Targeted Killing”, 2004) and Leo Katz in “Targeted Killing and the Strategic Use of Self-Defense” (2012) seem to imply this. In addition is often referred to the expression of ‘an eye for an eye’ in the Old Testament.

<sup>224</sup> Statman, “II Targeted Killing and Retribution”.

<sup>225</sup> Nagel, p. 129.

<sup>226</sup> Waldron, p. 125-130.

<sup>227</sup> Ibid., p. 130.

favourable because firstly, killing is definite and permanent, whereas imprisonment is not, and secondly, the legal constraints imposed on self-defence in the form of arrest, as present in domestic criminal law, do not have an equivalent in international law that is even remotely comparable.<sup>228</sup> Now, precisely because the moral *ad bellum* requirements of hope of success and *ultima ratio* are not explicitly present in Article 51 of the UN Charter, and because the principles of proportionality and *recta intentio* are difficult to enforce effectively in practice, there is a real risk that legitimate self-defensive wars will be extended beyond their aim of self-defence (like the current War on Terror), on the basis of political interests, without the UN Security Council being able to act against it.

Thus, what are we to make of differences between moral and legal permissibility? McMahan admits that there is a difference between the deep morality of war and the legal framework regulating war. The use of the legal framework would be the standard for daily practice, and the use of the moral framework would provide a basis for the revaluation of the legal framework and a guide for the individual conscience.<sup>229</sup> The latter application, however, is somewhat problematic. Katz, for instance argues that:

“[w]hile it might be better not to carry out the targeted killing *in the sense that it is what one ought to do*, it turns out, on reflection, not to be better in some other, equally important sense – namely in the sense that one might well be less blameworthy if one were willing to engage in such a violation here and now.”<sup>230</sup>

Needless to say, such an interpretation would not only bring us close to vigilante justice, but also would turn criminals into ‘people’s hero’s’ and ‘martyrs’, as they sacrificed their legal slate to keep their moral ledgers clean, on the basis of long-term social advantage. The consequences of accepting this interpretation would be the undermining of absolute prohibitions because then any means can in principle be justified, as long as it leads to a sufficiently worthy end. Hence, “it is particularly important not to lose confidence in our absolutist intuitions, for they are often the only barrier before the

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<sup>228</sup> McMahan, 2012, p. 150.

<sup>229</sup> McMahan, 2004, p. 731-733.

<sup>230</sup> Katz, p. 447-478.

abyss of utilitarian apologies for large-scale murder.”<sup>231</sup> When we are reflecting upon the permissibility of targeted killings, irrespective of whether from the perspective of morality or law, we must therefore always keep in mind that by allowing them, we purport to make permissible actions that otherwise would count as murder.<sup>232</sup>

As stated before, despite of this, it cannot be denied that targeted killings are not only about upholding justice, but also a response to imminent threats and therefore a legitimate means of self-defence. Then the question of whether targeted killings by combat drones are permissible in such contexts relies upon the question of proportionality, and arguably, the requirement of last resort. This means that “[t]argeted killings for which there is not military necessity in the concrete circumstance cannot be justified even if they are not otherwise prohibited under IHL.”<sup>233</sup> In practice, it is very doubtful whether the requirement of proportionality (and thus, military necessity) was met in particular targeted killings. Still, this does not make the combat drone as a means of warfare always illegal, or legal. In self-defensive targeted killings, as in asymmetric war, the question of the legality (and morality) is dependent on *ius in bello*. This is what will be examined in the next section.

### **3.2 DRONES AS (IM)PERMISSIBLE MEANS OF WARFARE**

Now the *ius ad bellum* legality test is completed, the legality of combat drones is examined under *ius in bello*. The analysis here will mainly be a legal one, as it was concluded in Chapter 1 that this framework is better developed and more explicit than the moral one. A comparison would therefore, not add much. Further, the analysis will be focused on general implications for *ius in bello* compliance, rather than separate cases. I will discuss the implications for IHL principles both in targeted killings and asymmetric warfare. I will do this on the basis of a limited approach as I have defended this in section 1.2. Further, as I have argued in section 2.2.2, the combat drone is not an indiscriminate weapon by nature, neither is it of a nature does it always leads to unnecessary suffering. The further question of whether the weapon is used in a way not

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<sup>231</sup> Nagel, p. 126-127.

<sup>232</sup> Waldron, p. 125.

<sup>233</sup> Melzer, 2006, p. 113.

causing unnecessary suffering is therefore dependent upon its application according to the principles of distinction and proportionality.

### 3.2.1 DISTINCTION

The protection of civilians, is without doubt the cornerstone of International Humanitarian Law. In line with this objective, the principle of distinction requires targeting at all times distinguishes between combatants and civilians. Since, drones make use of precision targeting systems, there is hardly any question of their ability to discriminate between combatants and civilians. Sometimes it is even argued that, exactly because of the accurate targeting by the means of precision guidance the adversary is subject to an unfair disadvantage. This is in particular the case within non-international armed conflict, where there is a major asymmetry in equipment and training between the state and non-state party.

From a humanitarian perspective the benefit of precision guidance is that civilians are less exposed to danger “simply because fewer bombs are required. Furthermore, as each bomb hits its target with greater accuracy and predictability, and as explosive yields for certain attacks at least can therefore be reduced, again the potential exists to reduce risk of collateral damage”.<sup>234</sup> But exactly because the targeting is so accurate, this also brings along some changes in targeting that, at least to a certain extent, undo this effect:

“[G]reater precision enables targets to be attacked that previously were off-limits due to likely excessive collateral damage or incidental injury. This is particularly true with regard to urban and dual-use targets. To the extent that such attacks are seldom free of collateral damage and incidental injury, opening additional targets to attack results in a net increase in potential harm to the civilian population. On the other hand, the emphasis on achieving effects rather than simply attrition of the enemy reduces the number of targets to be struck, which

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<sup>234</sup> Boothby, 2009, p. 357.

means fewer occasions when collateral damage or incidental injury may be caused.”<sup>235</sup>

Obviously, as precision increases, the interpretation of the principle of distinction will become ever more demanding.<sup>236</sup> Consequently, it is often argued that states that have precision weapons at their disposal, should apply a stricter operational standard. A logical next question is then, whether the legal standards should be raised as well. In other words, “[i]s technological transformation also transforming legal responsibilities regarding accidents in war?”<sup>237</sup>

RMA, in particular, the information revolution, have increased the availability and quality of advanced intelligence, surveillance, reconnaissance, command, control, communications and consequently, precision targeting. Taking this into account “[e]xpressed in terms of the duty of care, it would be negligent to inflict the same harms even though one’s capacity for control has improved, assuming all else is equal.”<sup>238</sup> The question is then only how much the range of acceptable non-combatant suffering has narrowed in the case of these new technologies and drones in particular.<sup>239</sup>

When considering this question, it is important to remember that the use of precision technology encourages the adversary to place himself among the civilian population for cover, due to the asymmetric nature of contemporary wars. In particular in the case of civilian shields this has led to some discussion. The use of civilian shields is prohibited according to customary law,<sup>240</sup> but in practice this would result in ‘immunity’ for those militants who hide among civilians. This, as it is argued, would be a reason in such scenario’s too raise the bar not too high. To support this argument, it could be argued that the greatest responsibility for the deaths of civilians in such cases is not with the targeting party anyway, but with the party that brings the civilians into danger in the first place.<sup>241</sup> From a moral perspective this might make sense, but in

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<sup>235</sup> Schmitt, 2005, p. 453.

<sup>236</sup> Ibid., p. 456.

<sup>237</sup> Rudesill, 2007, p. 520.

<sup>238</sup> Ibid., p. 534.

<sup>239</sup> Ibid., p. 519-510 & 533-534.

<sup>240</sup> Henkaerts & Doswald-Beck, rule 97.

<sup>241</sup> Hurka, p. 47-48.

practice such reasoning undermines the protection of civilians. Besides, international law does not allow for a violation of a treaty on the basis of violations by other parties.<sup>242</sup> This is not only provided by the Vienna Convention on the Law of Treaties (1969), but also *jus cogens*.<sup>243</sup>

At the same time, however, it is important to note that even though asymmetry in targeting might compel the disadvantaged side to respond by adopting tactics that exploit the protection civilians and civilian objects enjoy,<sup>244</sup> legally speaking these motives are irrelevant.<sup>245</sup> As Schmitt argues: “[a]lthough attacking such “soft targets” is a perversely logical response to battlefield inferiority, it is nevertheless a clear and inexcusable violation of international humanitarian law’s most basic tenet, distinction.”<sup>246</sup> Yet, when we are assessing the permissibility of the combat drone as a means of warfare in general, from a moral perspective, and also from a socio-historical one, it would be strange to ignore the context in which such strategies have emerged. It cannot be denied that with the advancement of precision technologies, and increased asymmetry, targeting has come closer to civilians.

Moreover, asymmetry might lead to desperate and unpredictable responses that even further would undermine the protection of civilians. “[A]n enemy incapable of responding in kind [is likely] to resort to measures that could make war, paradoxically, *more* destructive or inhumane than if the high tech weapons had not been used at all.”<sup>247</sup> The rationale behind this is, especially in the case of remotely operated drones, that when there are less soldiers present on the battlefield – and those that are present are usually very well protected – the only way to fight back for the disadvantaged party, could be the execution of civilian attacks in the home country of dominating party.<sup>248</sup> Thus, even though these developments have no direct legal relevance, they could very

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<sup>242</sup> Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force on 27 January 1980), United Nations, Treaty Series, vol. 1155, p. 331, art. 60.

<sup>243</sup> See, for instance, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, International Law Commission at its fifty-third session, in 2001, UN Doc A/56/10, art. 40, commentary 5 and art. 50 (1).

<sup>244</sup> Schmitt, p. 463.

<sup>245</sup> Von Heinegg, 2011, p. 467.

<sup>246</sup> Schmitt, p. 465.

<sup>247</sup> Dunlap, p.141.

<sup>248</sup> Schörnig, p. 20.

well illustrate that they have a result that is both morally and legally undesirable and therefore show the need for a stricter application of the principle of distinction.

It has been objected against making the legal standard too high on the basis of concerns about the appreciation of IHL in general. Because if the standards become too high, they will be perceived as unrealistic and in the end will lead to more violations on the long term. Moreover, if states that use precision technology will be held to a higher legal standard the “less advanced military would have greater licence to inflict noncombatant casualties, and if prosecution is a real danger, would have a perverse incentive not to acquire more precise weaponry.”<sup>249</sup> Then, the availability of precision technology, prompting the support of stricter targeting rules, would again lessen the advantages derived from the technology.<sup>250</sup> And to impose a strict standard on all would be unfair and mean that most actors could not defend themselves.<sup>251</sup> Notwithstanding the plausibility of these objections, it is necessary to examine what this means for the application of the *ius in bello* principles of distinction and proportionality. How should these principles be interpreted under current technological advancements in order to uphold the protection of civilian lives?

### 3.2.2 PROPORTIONALITY

The principle of proportionality allows for flexibility in the practical application of the principle of distinction, by allowing for civilian deaths, as long as they are not excessive to the military advantage anticipated. As the only object of war is to weaken the enemy’s military capacity, this advantage is often referred to as the military necessity required to achieve this object.<sup>252</sup> Underlying this principle is the doctrine of double effect. This doctrine, mainly used in just war theory, holds that “there is a morally relevant distinction between bringing about the death of an innocent person deliberately, either as an end in itself or as a means, and bringing it about as a side effect of something else one does deliberately”.<sup>253</sup>

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<sup>249</sup> Rudesill, p. 537-538.

<sup>250</sup> Boothby, p. 355.

<sup>251</sup> Rudesill, p. 538.

<sup>252</sup> Lipmann, p. 2.

<sup>253</sup> Nagel, p. 130.

In war this means that a certain amount of foreseen, but unintended, civilian casualty is permissible as long as it is not at a cost too great in relation to the military necessity. Thus, the amount of collateral damage should be proportional to the beneficial effects regarding the achievement of the military objective. Moreover, as McMahan and Hurka have noted, the principle of proportionality creates a relation between *ius in bello* and *ius ad bellum* where the military necessity should be constantly tested on its correspondence with the military objective of the war effort in general, because a structural excessive use of force would make the war as a whole illegitimate.<sup>254</sup>

In relation to targeted killings the Israel Supreme Court ruled that “the proportionality principle accepted as customary international law, according to which collateral damage must not be disproportionate, is to be adhered to. When the damage to innocent civilians is not of proper proportion to the benefit from the military activity (the test of “proportionality *stricto sensu*”), the “targeted killing” is disproportionate.”<sup>255</sup> In other words, means and methods of attack should be chosen that minimize the harm to civilians, without sacrificing military advantage.<sup>256</sup> That the military advantage is not to be sacrificed, does not mean however, that the positive commitment to save civilian lives cannot require the acceptance of risks on the side of soldiers.<sup>257</sup> Obviously, at the same time there are limits to the risks that soldiers should expose themselves to in order to save lives. It is very difficult to specify these risks, and not surprisingly, no court has ever come near to making a statement on the appropriate standard for the weighing of lives.

Fortunately, moral theory can provide us with some guidance here as Hurka, in example, has argued that the lives of ‘our soldiers’ against ‘their civilians’ should be weighed more or less equal. On the one hand, the soldiers are our own and also civilians of our state and therefore enjoy protection, on the other hand, they are soldiers and required to accept some risk to their lives, whereas the civilians of the other state are protected on the basis of their status as civilians.<sup>258</sup> Maybe the most concrete

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<sup>254</sup> McMahan, 2004, p. 713 & Hurka, *passim*.

<sup>255</sup> *Supra* note 169, Opinion President D. Beinisch.

<sup>256</sup> Schmitt, p. 324.

<sup>257</sup> Walzer, 155-156.

<sup>258</sup> Hurka, p. 63-64.



interpretation of this rule was again stated in the *Targeted Killings Case* in which it was argued that ““targeted killing” is not to be carried out when it is possible to arrest a terrorist taking a direct part in hostilities, without significant risk to the lives of soldiers.”<sup>259</sup>

The most important critique on the application of the principle of proportionality as a *ius in bello* criterion is that, in fact, this positive commitment towards the protection of civilian lives is not being made in contemporary wars. As argued in Chapter 2, undoubtedly the advancement of air warfare and a higher reliance on air power has reduced the risk to soldiers’ lives significantly. It is very much disputed however, whether this has also been the case for the lives of civilians. Although overall numbers of casualties of war in general have decreased dramatically in comparison to wars before the second half of the 20<sup>th</sup> century, it is argued that the amount of civilian losses now “make up the larger proportion of those killed and injured, with Western combatants becoming less likely to be casualties.”<sup>260</sup>

The number of civilian casualties of modern wars is difficult to exactly estimate and depends upon definitions of what is a civilian and when we can speak of casualties, or more broadly, war victims. A genuine critique against the widely held ‘nine out of ten’ proposition,<sup>261</sup> is that the sources and definitions used in such estimations are unclear and that the number is likely to be lower.<sup>262</sup> Still, when looking at the general developments in war I can only but agree with Shaw that the NATO war on Kosovo, the Gulf War and the Wars in Iraq and Afghanistan all have in common that they resulted in “very small numbers of casualties to United States and “coalition” [...] On the other hand, these wars have all involved imposing much more extensive casualties on the U.S. and the West’s armed enemies and also, albeit “unintentionally,” on civilian non-combatants.”<sup>263</sup>

Subsequently, the question is whether this is also the case for the use of drones, both in targeted killings and asymmetrical warfare. Despite optimistic claims by, *inter*

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<sup>259</sup> Supra note 169, Opinion President D.Beinisch.

<sup>260</sup> Williams, p. 589.

<sup>261</sup> The proposition that 9 out of 10 war victims are civilians, as stated by the 1991 Casualties of Conflict report of the University of Uppsala, and later taken repeated by many others, see Roberts, 2009, p. 19-32.

<sup>262</sup> Roberts, p. 19-32.

<sup>263</sup> Shaw, 2005 (b), p. 131.

*alia*, the US government, it is contended that multiple drone strikes have caused excessive collateral damage,<sup>264</sup> and that the failure to conduct post-strike investigations not only itself violates the laws of war, but also – resulting in the undercounting of civilian casualties – undermines the *ius in bello* principles.<sup>265</sup> In addition, the Stanford/NYU report states that “from June 2004 through mid-September 2012, available data indicate that drone strikes killed 2,562-3,325 people in Pakistan, of whom 474-881 were civilians, including 176 children. TBIJ [The Bureau of Investigative Journalism] reports that these strikes also injured an additional 1,228-1,362 individuals.”<sup>266</sup> Besides, as argued in the previous section, the characteristics of precision weaponry change the nature of warfare and open up new targets within civilian areas, which again increases the risk posed on civilian lives.

According to Shaw this shift in the proportion of casualties is the result of a militarism of risk transfer in which dead and casualty are transferred from the Western soldier to the civilians of the opponent state. The protection of civilian lives is undermined by a policy that is aimed at keeping the soldier safe. Civilians are not protected as much as practically possible but only as much as necessary to avoid negative publicity. The lives of civilians are simply weighed against political risks stemming from adverse media coverage.<sup>267</sup> About collateral damage he states:

“Although civilian casualties are routinely described as accidents, this outcome is hardly accidental. It is the product of political choices in the refinement of Western military power, at three main levels: strategy, weaponry and media management. The combination of three elements enables the West to fight wars at relatively little *human* cost to itself. And since the risk to human lives, pictured on television, has been since Vietnam the major political risk of war, this also means that the West is able to fight wars with a great reduction in the *political* costs.”<sup>268</sup>

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<sup>264</sup> Obote-Odora, 2010, p. 791.

<sup>265</sup> American Civil Liberties Union et al., 2013, p. 3.

<sup>266</sup> Stanford/NYU, p. vi.

<sup>267</sup> Shaw, p. 143-144.

<sup>268</sup> Ibid., p. 136.

Along the same lines Lippman contends that the protection of civilians under air warfare has degenerated during the 20<sup>th</sup> century and that collateral damage has become accepted as part of the price of armed conflict.<sup>269</sup>

An objection to Shaw's argument is, however, that the 'new Western way of war' *prima facie* seems to meet the *ius in bello* requirements. Indeed during the last decades civilian casualties have reduced in comparison to before. But this is actually not the point. The question should be whether the civilian deaths occurring in contemporary wars are proportionate to the military necessity of the attack concerned. With the risk of soldiers out of the way, it is, however, very tempting to extend the overall military aim of the war far beyond its *justa cause*, which will make it much more likely that the military necessity of this extended aim is lower than initially and collateral damage more likely to be disproportionate.<sup>270</sup> In other words, riskless warfare makes it tempting to achieve more with less, undermining the legitimacy of the military necessity.

Besides, "[a] state fighting a legitimate defensive war is not required in law to cease hostilities when it has vindicated its rights. It may prosecute its war to final victory even after the point at which this is no longer necessary to reverse or frustrate the initial unlawful use of force which provided the justification for the war".<sup>271</sup> This is both resulting from the vagueness of the Charter as from the weakness of the UN system. Notwithstanding the fact that Article 51 does not diminish the duty of the Security Council to monitor the conflict, it is not stated explicitly that this monitoring also concerns the continuing evaluation of *ius ad bellum* criteria. In practice, therefore also it seems that the monitoring is usually mainly focused on the compliance with *ius in bello*. Even if it would be suggested by multiple UN member states that there is a violation of *ius ad bellum*, as past and present have shown, we cannot expect the UN Security Council to enforce strict compliance with the Charter as long as the veto power of the permanent members allows for the privileging of individual state interests over

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<sup>269</sup> Lippman, 2002.

<sup>270</sup> Here I am assuming there is an initial just cause to the war, but of course riskless warfare also makes the waging of pre-emptive-, preventive- and wars of humanitarian intervention more tempting (something Shaw describes as the 'relegitimation of war' but is also asserted by Singer, 2009).

<sup>271</sup> Rodin, p. 112.

international ones; the concerning state (the US) is one of those veto-powered states; and holds a hegemonic position in the world, which makes (e.g. economic) sanctions ineffective or carries negative impacts for other states as well.<sup>272</sup>

Obviously, here we are touching upon *ius ad bellum* criteria. Nonetheless, there are several reasons why this issue should be dealt with in the *ius in bello* framework instead. As stated above, *ius ad bellum* is too much part of the international political arena where it would be very unrealistic to expect an improvement in either the regulation of the resort to war, or in the enforcement of such regulations. Furthermore, since drones, as high-tech precision weapons, have the potential to be very precise, but at the same, time when used negligently are likely to have disastrous consequences for civilians due to the nature of the tactics for which they are employed, that is, targeted killings and asymmetric warfare, in which targeting is in close proximity to civilian areas.<sup>273</sup> Therefore, the principles of distinction and proportionality in attack can, and should be, applied more strictly both as operational and legal standards to utilize this potential.

### 3.2.3 PRECAUTION

Proportionality is not assessed in hindsight but on the basis of what the attacker reasonably believed under the circumstances.<sup>274</sup> Therefore, when we want to assess whether the amount of civilian casualty is proportionate to the anticipated military advantage, we have to look at the precautions that were taken to minimize harm to civilians. Before doing so, it is important to note however, that up to date “no international war crimes litigation has focused on purely accidental violations of the laws of war attributed to negligent use of the advanced technology that has brought about the American “Revolution in Military Affairs” [...]”.<sup>275</sup> This, in combination with the concerns discussed above and accusations that US have used their advanced

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<sup>272</sup> Here, I will leave out of consideration the role of the International Court of Justice (ICJ), even though it has successfully judged in the *Nicaragua Case* [1986] and the *Oil Platforms Case* [2003] that the resort to self-defence was disproportionate. I do so, because these judgements, despite their importance for the rule of law on an international level, are post-fact legal remedies and not, unlike sanctions by the UN Security Council, *preventive* law-enforcement measures.

<sup>273</sup> Estreicher, 2011, p. 2.

<sup>274</sup> Schmitt, p. 322.

<sup>275</sup> Rudesill, p. 519.

capabilities negligently,<sup>276</sup> imply that the legal responsibilities regarding accidents in war should be tightened.

Rudesill proposes that, based on the doctrine of command responsibility and criminal negligence as developed in the war-crime trials and on the basis of *ius in bello* principles, a duty of care prohibiting “the negligent infliction of unintentional harm” should be imposed on combatants.<sup>277</sup> Indeed, as argued in Chapter 1, the IHL applicable to non-international armed conflict, by the means of Common Article 3 imposes a customary positive obligation on each party to the conflict to treat all those not actively participating in battle humanely. Also the customary principles of humanity, distinction and proportionality establish a customary duty of care to take precautions to avoid excessive harm to civilians. Further, Article 57 of Additional Protocol I to the Geneva Conventions (AP I) on precautions in attack,<sup>278</sup> although applicable to International Armed Conflict and not ratified by the US, is thought by many to be of a customary nature and was included *verbatim* by the US in several of its military manuals.<sup>279</sup> Finally, the International Customary Law Study also includes a set of 7 rules establishing precaution in attack to reduce civilian casualty as a customary principle both in IAC and NIAC.<sup>280</sup>

Now, a clear example that plausibly fails to comply with the requirement of precautionary measures in attack, are the so called ‘signature strikes’ the US has employed during the War on Terror. Signature strikes are strikes based on individuals and groups “who bear characteristics associated with terrorism but whose identities are not known”.<sup>281</sup> What characteristics are exactly associated with terrorism and what precautionary measures are taken before the authorization of a strike is not specified by the US. Nonetheless, it might be obvious that targeting based on a pattern of behaviour, or a set of characteristics is not in line with the requirement to “do everything feasible to verify that targets are military objectives”.<sup>282</sup> The violation of this customary rule is at

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<sup>276</sup> Rudesill., p. 518.

<sup>277</sup> Ibid., p. 523.

<sup>278</sup> AP I, art 57

<sup>279</sup> Rudesill, p. 528-529.

<sup>280</sup> Henckaerts & Doswald-Beck, chap. 5.

<sup>281</sup> Klaidman, 2012, cited in Stanford/NYU, p. 15.

<sup>282</sup> Henkaerts & Doswald-Beck, rule 16.

least proof of negligent behaviour and could even amount to a war crime in the sense that it can be interpreted as a violation of the principle of distinction.

Further there are reports of attacks with a clearly excessive amount of civilian death. For instance in the attack of 17 March 2011 in Datta Khel, North Waziristan, a social gathering of government-appointed tribe leaders and local government employees was hit by multiple strikes resulting in over 40 deaths, of which only 4 were likely to be Taliban members and of whom only one was identified by name.<sup>283</sup> It was said that the Taliban members were there to participate in the dispute resolution meeting, so even if they were liable to be killed for other terrorist activities or on the basis of a belligerent status, it might be clear that at that particular moment the military necessity to eliminate them was not pressing. A civilian death percentage of 83,2 to 95,8 is, in all cases, clearly excessive.

Besides, when no sufficient precaution in attack is taken this could not only lead to violations of the principles of distinction and/or proportionality, but also that of humanity and the prohibition on unnecessary suffering. For, although the precision missiles of the combat drone suggest ‘clean’ killing, it must not be underestimated that the cause of death through drones strikes is likely that of incineration, shrapnel and the crushing of organs by the powerful blast waves. Moreover, those who do survive often suffer from limb amputations, shrapnel wounds, disfiguring burns and loss of vision and hearing.<sup>284</sup>

In addition, allegations have been made of the US targeting funeral goers and people who tried to rescue victims of strikes.<sup>285</sup> The interviews conducted by the Stanford/NYU research team confirm the occurrence of ‘double-tap’ strikes where civilians coming to look for survivors in the homes under attack were killed by follow-up strikes.<sup>286</sup> These reports are not only worrying because of “the extent to which secondary strikes comply with international humanitarian law’s basic rules of

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<sup>283</sup> Stanford/NYU, p. 57-62.

<sup>284</sup> Ibid., p. 56.

<sup>285</sup> BIJ, “CIA Tactics in Pakistan include Targeting Rescuers and Funerals”, 4 February 2012, <http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/> (consulted on 03 July 2013).

<sup>286</sup> Stanford, NYU, p. 74-76.

distinction, proportionality, and precautions, but it also potentially violates specific legal protections for medical and humanitarian personnel, and for the wounded.”<sup>287</sup>

Now, in the case of targeted killings it could be helpful to look at case-law of the European Court of Human Rights as it has made some thorough investigations into the application of proportionality, necessity and precautionary measures in relation to the right to life. It is legitimate and logical to do so, firstly, because the practice of targeted killing is close to the law-enforcement (and therefore human rights) paradigm and secondly, because IHL is applicable as *lex specialis* to human rights law, not replacing it. Besides, the IHL prohibition on unnecessary suffering also applies to combatants, to which it is not allowed to cause more losses and suffering than that what is necessary in relation to the military objective.<sup>288</sup>

In *McCann and Others v. UK*, the ECtHR ruled that even though the use of force on the spot by the soldiers was necessary to exercise their duty, a breach of the Right to Life was established on the basis of “the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire”.<sup>289</sup> Translated to targeted killings this has some important implications as drone strikes are firstly, highly reliant upon intelligence and secondly, automatically applying lethal force. It is therefore essential to make sure (leaving aside here the questions of the legality of targeted killings in the first place) that the intelligence on which the strike is based is undisputed. If this is not the case, the combat drone cannot be used as a method, because it does neither allow for elimination by the means of injuring only, nor for the possibility of surrender. The failure to adequately verify the legitimacy of the target does not only prove of insufficient precaution in attack, but also potentially violates the prohibition on unnecessary suffering and the principle of distinction.

It would seem that for the use of drones in war this would work somewhat differently. Nevertheless, I would like to argue, in asymmetric warfare counterinsurgency is often quite similar to targeted killing, as the adversary is hiding

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<sup>287</sup> Stanford/NYU, p. 76.

<sup>288</sup> Pictet, 1985 (a), p. 75.

<sup>289</sup> *McCann and Others v UK*, (App no 18984/91) ECHR 27 September 1995, para. 213

within civilians areas. Exactly because drone strikes have the potential to be so accurate due to their precision technology combined with advanced intelligence, the *in bello* requirements of proportionality, distinction and precaution should be taken more seriously. Objections that this would require the drone employing party to restrict itself in an unrealistic way, leading to a military disadvantage or neutralization of the technological advantage, are in my view strong exaggerations. Neither the World War II terror bombings on Germany; the nuclear bombs on Hiroshima and Nagasaki; nor the excessive and inhumane methods used in Vietnam; were of a military necessity that they would allow for such an excessive use of force or could not have been achieved with less harmful means. Still, for none of these the US was held accountable.

In a time where the protection of human rights becomes ever more prominent and weapon technology has the potential to make war increasingly ‘humane’ – both, for which the US in particular is patting itself on the back – it is not more than logical that *ius in bello* deserve increasing importance and stricter compliance. This means that the bar of the *ius in bello* principles should be raised in two ways. First, where in the past high-altitude bombing was not considered to be a war crime,<sup>290</sup> in the near future in more and more cases it will be, as drones – creating similar (or even better) protection for pilots while at the same time allowing for precision targeting (where high altitude bombing did not) – will become increasingly available.

Second, precision technology, as employed by drones opens up new targets among civilized areas, requires a stricter compliance with the rules of distinction, proportionality and precaution to safeguard, as much as possible, the protection of civilians. This is in line with the ICRC’s commentary on AP I Article 57 which acknowledges that compliance with precautions in attack is dependent on the equipment available.<sup>291</sup> This means that “[t]he technology available to an attacker determines whether an action is feasible, reasonably expected, or apparent, as well as when choice

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<sup>290</sup> International Criminal Tribunal for the Former Yugoslavia (ICTY), Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000), para. 63-70, available at <http://www.icty.org/sid/10052> (consulted on 3 July 2013).

<sup>291</sup> ICRC, “Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949”, Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.), ICRC, Geneva, 1987, para. 2199 available at [http://www.loc.gov/r/frd/Military\\_Law/pdf/Commentary\\_GC\\_Protocols.pdf](http://www.loc.gov/r/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf) (consulted on 3 July 2013).



is possible. In other words, belligerents bear different legal burdens of care determined by the precision assets they possess [...]”.<sup>292</sup>

Assessing the morality and legality of the combat drone, this does not mean this method of warfare should be prohibited. On the contrary, there is nothing wrong with protecting home state soldiers. Moreover, the potential to save innocent lives (despite the fact that precision targeting also raises some questions about the nature of warfare in general, which I will discuss in the following section,) is from both a military and humanitarian perspective very welcome. But when and where this technology is available it must be demanded that military necessity is balanced against humanity. The security offered to ‘our’ soldiers by the combat drone should not be abused to extend a war beyond its necessity, the *justa cause*, thereby unnecessarily putting innocent civilian lives at stake, but for a more accurate precautions in attack – regarding the selection of targets, as well as, the moment and method of attack – thereby minimizing civilian harm. The combat drone thus urges us to a stricter application of *ius in bello* because it is technically capable of doing so and not using this potential could violate the customary requirement to take precaution in attack; a permissive interpretation of *ius in bello* endangers civilians due to the proximity of today’s battlefields to civilians; and because its nature requires us to do so, in order to compensate for the inherent temptations to ease the legal *ius ad bellum* principles of *justa cause*, proportionality and necessity.

### 3.3 CONCLUSIONS: REGULATION AND ENFORCEMENT

Having concluded that drones should be regulated through a stricter application of *ius in bello*, the question remains how, in practice, this can be realized. The aim of this last section is not so much to find a definite answer to this question, but on the one hand to show which direction to avoid, and on the other to introduce a few realistic proposals for a stricter regulation of *ius in bello*. As we will see, the potential of such proposals lies exactly in the fact that it is not too invasive.

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<sup>292</sup> Schmitt, p. 460.

### 3.3.1 THE ROAD NOT TO BE TAKEN

Something that absolutely needs to be avoided, is that the use of drones will fall into a third category in between that of law-enforcement and warfare.<sup>293</sup> Categories like those of ‘armed force shot of war’ are particularly dangerous because they carry with themselves a misperception of bloodlessness or ‘cleanliness’. Dunlap warns however that exactly since “[a]dvanced technology provides the capability to employ coercion via non- or low-lethal means in a way that greatly minimizes the immediate noncombatant losses [...] care must be taken to ensure that misapprehensions of the nature and implications of military means do not delude decision makers with visions of “bloodlessly” compelling opponents short of violent conflict. Absent such caution we risk taking actions with the dangerous potential to spin out of control into full-scale war.”<sup>294</sup> What is more, “[w]hile technology may effectively reduce the risk to soldiers and the probability of collateral damage it may also lead to more frequent uses of low level force to quell a perceived threat if the moral and political calculus – what is understood as just cause – is altered based on the scale of force being applied.”<sup>295</sup>

In a way, the creation of an in-between category is already happening with the practice of targeted killings. When the use of drones, particularly when used without further assistance of forces on the ground, so without territorial occupation,<sup>296</sup> there is a risk that the use of drones will be considered to fall outside the category of war as a last resort, but become just an alternative measure to which the last resort requirement is not applied.<sup>297</sup> This would then not only allow for a much more frequent use of drone strikes – making the shift from diplomacy to force too easy,<sup>298</sup> – but also carry a big risk of escalation of violence because once a party has decided to resort to armed force, it is not likely cease until either it has accomplished its objectives, or faces total defeat.

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<sup>293</sup> See, for instance, Kahn, 2002.

<sup>294</sup> Dunlap, p. 142.

<sup>295</sup> Brunstetter and Braun, 2013, p. 94-95.

<sup>296</sup> It has been argued that the use of new advanced weaponry like combat drones would result in a form of virtual occupation. It is, however, too far-fetched to assume that virtual occupation results in effective control of the territory and its population to a degree by which it would be reasonable to hold the ‘virtual occupier’ responsible for ensuring the protection of the enemy’s civilian lives. See, Murhpy, p. 20-24.

<sup>297</sup> Brunstetter and Braun, p. 95.

<sup>298</sup> Walzer, p. 79.

In other words, when drones will be treated as belonging to a form of force that is less harmful or invasive than war – which is, as I have argued in the previous section, not a characteristic of the weapon, but only of its potential compliance to the IHL principles – we might come close to the legitimization of wars that currently, both from a moral and legal perspective are considered to be impermissible,<sup>299</sup> namely, the area of preventive war. The right to self-defence has always been prone to abuse. “Throughout the post-Charter period, states have continuously attempted to utilize Article 51 to reassert some of their lost legal competence to use force by pushing the boundaries of national-defense towards the inclusion of anticipation, defense of nationals abroad, and defense against economic aggression.”<sup>300</sup> When it is conceived that drones are a more humane use of force, this temptation to abuse the right to self-defence will only increase.

Indeed, “the idea that making war itself more humane – including by creating legal codes for the conduct of war – has always given rise to arguments that humanizing war reduces the disincentives to engage in it.”<sup>301</sup> Notably, this is something that should be avoided, otherwise the UN Charter and the UN as an organisation would miss their purpose of maintaining international peace and security. Also, IHL would lose its significance, because even if war would become less deadly, when we would have more wars, or ‘armed force short of war’, the total amount of harm will not decrease and potentially even increase. Thus, although the right to self-defence is based on the protection of state-sovereignty – which despite its lack of moral substance could still be a value worth defending based on factual or pragmatic purposes - “[i]t would be a mistake to suppose that the real evil of war is the assault on sovereignty rather than the untold sorrow of modern war. For if the world were organized on non-Westphalian lines – as some think it already is – the ban on first use of force would have the same consequentialist rationale (averting the “untold sorrow” of war) but would imply nothing about state sovereignty or its protection.”<sup>302</sup>

The inherent tension between Article 51 and Article 1 (1) of the UN Charter – “guaranteeing states’ sovereignty and endorsing a right of national self-defence will

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<sup>299</sup> See, Walzer, chap. 5; Luban, 2004, and the UN Charter, chap 7.

<sup>300</sup> Rodin, p. 117.

<sup>301</sup> Anderson, p. 389.

<sup>302</sup> Luban, p. 218.

sometimes further the maintenance of international peace and security (by halting present and deterring future aggression), but it will sometimes have the opposite effect, acting as a destabilizing force on the international community,”<sup>303</sup> – and the inherent danger of the combat drone to lower the threshold, and extend and escalate, the use of force, combined with the difficulties of enforcing compliance with *ius ad bellum*, show the importance of 1.) making sure the combat drone will be regulated, on a case by case basis, either under the law-enforcement paradigm, or the war paradigm, but never by and in-between category, 2.) that in both paradigms, but especially in the war paradigm where the protection of civilians is less developed in NIACs, the *ius in bello* principles are being more strictly interpreted and enforced.

### 3.3.2 PROPOSALS FOR REGULATION

Choosing for a regulation of drones through *ius in bello* rather than *ius ad bellum* does not mean that it is an easy task. Basically, the main principles are already there, and what really should be improved is their enforcement and consequently the interpretation of these principles in the courts and tribunals. In our case, this role would be reserved for domestic courts, as universal jurisdiction is the only option to hold the US accountable for current violations of IHL (see section 1.2.4), but of course in other scenario’s jurisprudence from the ICC and other international tribunals on this issue would be a major contribution.

To begin with Samuel Estreicher argues that the principle of proportionality in attack is too elastic an “manipulable”, and that the ‘excessive loss’ formulation is “not only truer to the text of AP I but provides a sounder, more principled basis for judging violations instead of proportionality.”<sup>304</sup> The term ‘excessive loss’ was not chosen accidentally. During the drafting process of AP I, first the term ‘disproportionate loss’ was used, but under objections that this would require a comparison between dissimilar things and would be too easy to manipulate, the excessive loss phrasing was used.<sup>305</sup>

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<sup>303</sup> Rodin, p. 117.

<sup>304</sup> Estreicher, p. 3.

<sup>305</sup> Estreicher, p 7-8.

According to (customary) Article 57, the attack should not be excessive in relation to the concrete and direct military advantage anticipated.<sup>306</sup> Moreover, “the anticipated military advantage is not limited to the immediate battle that causes the civilian loss at issue but relates to the attack as whole.”<sup>307</sup> Consequently, the test for determining whether the civilian cost likely to be caused by an attack is excessive, is that of necessity:

“Thus, so long as a matter of fact the attack has a concrete and direct military objective, the determinative question is whether the commander has used the “least deleterious” (in terms of civilian loss) means of achieving that objective. This is the “proportionality” and “necessity” test applicable to choice of weapons or methods of warfare generally. As Professor (now ICJ Judge) Christopher Greenwood has observed, “the crucial question is whether other weapons or methods of warfare available at the time would have achieved the same military goal as effectively while causing less suffering or injury.”<sup>308</sup>

When formulated like this, rather than in terms of proportionality, an abstract comparison of incomparable values is being avoided. Although this proposal might seem rather straightforward, in my view it is very valuable exactly because of its simplicity. This could only contribute to its efficacy.

Furthermore, Obote-Odora makes a more exigent proposal: to criminalize excessive collateral damage. “It is because ‘collateral damage’ is not necessarily a war crime under the Laws of Armed Conflict, among other things, that has led to non-prosecution of persons responsible for excessive deaths of civilians during international and non-international armed conflicts.”<sup>309</sup> Consequently collateral damage is currently just a term used to conveniently facilitate the ‘accidental’ killing of civilians. But instead of using collateral damage as an excusing term – implying already that the damage is the result of an accident – the author proposes to adopt a provision that would

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<sup>306</sup> AP I, art, 57 (2c).

<sup>307</sup> Estreicher, p. 9.

<sup>308</sup> Ibid., p. 11.

<sup>309</sup> Obote-Odora, p. 789.

criminalize the infliction of excessive collateral damage. It would then be up to objective and transparent investigations by international or domestic courts to establish whether the collateral damage was accidental or not, based on the circumstances of decision making; the location and selection of the target; the manner of communication to the executives; and the precautions taken in attack.<sup>310</sup>

Also the latter proposal is, in my view, not too invasive, as it would not require an amendment of the major provisions of IHL, but merely add collateral damage as a crime under the war conventions. In this case, the value of such an explicit reference to the prohibition on the infliction of excessive collateral damage is more a way of emphasizing the other principles of distinction, proportionality and precaution, than to state something new. The straightforward and not too invasive nature of the two proposals above, is exactly what makes them realistic in their application.

In addition, it can be argued that a new set of rules on the application of *ius in bello* for the use of drones (and potentially similar means of warfare) could be adopted, for instance as an amendment to AP I and II. On the one hand, this is not a necessary requirement as the IHL principles already require the minimization of civilian harm and therefore, on a case by case basis, when applied properly, should result in a sufficient protection. On the other hand, however, we see that in practice these principles (maybe because precision technology misleads us in thinking that we do not have to make any extra effort to apply these principles) are not always applied in strict correspondence with military necessity, resulting in a unnecessary and, therefore, excessive civilian deaths. Concrete provisions on the use of new technologies, such as the combat drone, would emphasize the importance of compliance with the IHL principles and would allow for incorporating the need for a stricter application of the principles wherever and whenever such technologies are available.

Nonetheless, I believe the most important role in protecting civilian lives is to be played by military commanders in executing operations that are compliant with *ius in bello*. Furthermore, another important part has to be played by the judges in the courts and tribunals in enforcing this stricter application. Especially, if no formal legal clarifications (like the above) to the Geneva Conventions and its Additional Protocols

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<sup>310</sup> Obote-Odora., p. 792.

will be accepted – which could be the case, as the IHL requirements, in principle, already require the strictest (that is, the most beneficial for the protection of civilians) application possible in every situation, the main challenge will lie with those two actors.

Finally, there are also some positive predictions for the prosecution of negligence in drone attacks. The digital control and operation of an attack, result in more and better documented evidence, like emails, audio intercepts and imagery.<sup>311</sup> This could make it easier to investigate “who made bad decisions, with what information available, after what efforts to inform themselves, and when.”<sup>312</sup> What might prove to be problematic in this regard, however, is that the prosecution would be dependent on the cooperation of the state whose personnel is prosecuted.<sup>313</sup> Of course it is questionable to what extent a state is willing to provide such substantive evidence of negligence by its own military personnel even within a domestic or military court. At the same time, a state’s unwillingness to conduct, at least, transparent and independent investigations into allegations insufficient precaution, especially when such extensive documentation is available, would, *a fortiori*, damage its credibility. Still, if this does not urge a state to undertake such investigations, UN fact-finding missions could be set up, to investigate these allegations of IHL violations instead, thereby building a case for prosecution and strengthening the rule of law in *ius in bello*.

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<sup>311</sup> Rudesill, p. 541.

<sup>312</sup> Ibid., p. 542.

<sup>313</sup> Ibid., p. 542.

## CONCLUSION

In this thesis I set out to investigate whether under the advent of combat drones in contemporary armed conflict the legal framework of international humanitarian law is still sufficient to protect those not participating in hostilities. The central question of this thesis was *How can the use of combat drones in contemporary armed conflict – targeted killings in the US war against terrorism and asymmetric war in general – be morally and legally assessed?*

In order to answer this question I analysed the basic principles of just war theory and the applicable international law. The use of combat drones is contentious partially because of their employment in targeted killings in the US war against terrorism, this required not only a discussion of *ius in bello*, but also *ius ad bellum* in both frameworks. The legal *ius in bello* framework was established on the basis of a minimal standard of protection, that is Common Article 3 to the Geneva Conventions and the customary principles of humanity, distinction, prohibition on unnecessary suffering and proportionality. The comparison of the two frameworks indicated that the UN Charter, is much less restrictive than *ius ad bellum* in just war theory, but that *ius in bello* is legally more explicit than in JWT. A result of the disconnection from the question of justice in international law, which maintained a strict separation between *ius ad bellum* and *ius in bello*, made the latter an ever effectual last guarantee in limiting the horrors of war.

Subsequently, the combat drone as the object of research was examined. The drone was defined as a means of warfare that needs to be reviewed in its entirety, rather than the weapon it is equipped with. It was concluded that the drone is both old and new. On the one hand it is part of an on-going social and technological development towards a higher efficiency of human action. On the other hand it extends human action in an unprecedented way and the implications of this complex mediation process could likely have implications for the practical application of both *ius ad bellum* and *ius in bello*. Thus the combat drone, in that sense, is significantly new and different.



Furthermore, as combat drones are currently most employed for targeted killings in the War on Terror which requires a *ius ad bellum* assessment, I argued that although it is unlikely from a legal perspective, but even more so from a moral one, that the War on Terror at present is a legitimate war of self-defence, this does not rule out that in other scenarios it can be moral and sometimes even legal, to use targeted killings as a last resort in response to imminent threats in self-defence.

Despite of this, it was stated that we have to be careful in legally permitting targeted killings. This would be dangerous in light of the inabilities of the international law-enforcement system to control and enforce the correct application of such a rule, but even more because of the inherent abusive character of such a rule. As history has shown, under political pressure and risks to state security it is all but too tempting to 'eliminate' threatening elements. Yet, this will undermine the rule of law and international peace and security, by allowing for the prerequisites of a state of vigilante justice. Furthermore, such a permission would discard the protection of universal human rights, in particular the right to life and the right to a fair trial and by allowing for derogations of two of the most foundational rights currently protected, undoing all that has been accomplished in the protection of universal human rights.

Nonetheless, it cannot be concluded otherwise that the legality and morality of the use of drones for targeted killings in the war against terrorism is dependent upon compliance with *ius in bello* requirements. Accordingly, the implications of the use of drones for targeted killings and in asymmetrical war on the application of the customary *ius in bello* principles were lined out. It was established that precision requires stricter application of the principles, firstly, because it is technically possible and it would proof of insufficient precaution not to do so, as IHL requires the *minimization* of civilian loss. Secondly, due to the likely close proximity of civilians to military targets, both in the case of targeted killings and asymmetric war, a permissive application of *ius in bello* would put civilians in significant danger. And thirdly, the risk-free nature of drones, in combination with precision technology, potentially inspires the extension of just wars and self-defensive acts beyond their *justa cause*, and therefore risk no longer to be proportionate.

It is not so much the threshold to use armed force that is lowered by drone technology (although Article 51 of the UN Charter is subject to abuse as well) but the boundaries of the conflict that are extended. Clearly, the war in Afghanistan started legitimately, but has grown out of proportion into the global war against terrorism, in which the necessity of self-defence is no longer significant, thereby more likely resulting in disproportionate lethal force, and collateral damage. It is unfortunate that UN Security Council is weak and incapable of addressing violations by a hegemonic state like the US. So far, the UN Security Council has proved to be useful as a tool of powerful states to curb less powerful states, but whenever a permanent member of the Security Council, and especially the US, is to be held accountable for violations of the UN Charter and IHL – the terror bombings in the Second World War, the indiscriminate targeting and use of dioxins in Vietnam, the Iraq War violating both the UN Charter and IHL, and today, the War on Terror – justice has failed.

Nevertheless, it seems that where the UN Charter fails, IHL retains the potential to offer sufficient protection to those not participating in war. Strictly speaking additional regulations would not be required as the *ius in bello* principles by their very nature require the reduction of civilian harm to the least possible extent. In principle, this should lead on a case by case basis, depending on the necessity of the situation and the technological advancement of the actor concerned, always to the strictest, most beneficial, application. In practice, however, this is not the case. Therefore, it is suggested that explicit reference to excessive collateral damage as a war crime and specific provisions on the implications of drones for the case by case application of the requirements of distinction, proportionality and precautions in attack are adopted as either amendments to AP's I and II or separately. Most importantly, especially if such regulations will not be adopted, it is up to military commanders to comply with these requirements in the strictest sense, and to the courts, to vindicate a stricter application in their judgements.

In answering *how the use of combat drones in contemporary armed conflict – targeted killings in the US war against terrorism and asymmetric war in general – can be morally and legally assessed*, it can be stated that drones require a stricter application of *ius in bello* principles, because the lawfulness (as well as the morality) of an attack is

dependent on the minimization of civilian harm and to neglect their full capability for accuracy is likely to violate customary precaution requirements. Further, a permissive application of *ius in bello* endangers civilians due to the proximity of contemporary battlefields to civilian areas. Moreover, the its risk-free nature of the drone as extensions of the human body inspires abuse of the already weak UN Charter. It is therefore concluded that specific IHL regulations on the use of combat drones would strengthen *ius in bello* as a last guarantee for the protection of those not participating in war.

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