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# Drone strikes within the legal framework of international humanitarian law

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# Summary

In international humanitarian law the fundamental principles of distinction, proportionality and precaution must be respected during armed conflicts. The purpose of these principles is to protect individuals such as civilians who take no part in the hostilities. No matter what type of weapon used during an armed conflict the above principles must be respected, and if the principles are not followed it should be questioned why that is.

In this thesis the protection of civilians during non-international armed conflicts is examined. The civilian protection is examined within the scope of targeted killings through drone operations. The aim is to examine if drone operations are in compliance with international humanitarian law. In this thesis the attention is given to the U.S. drone operations since they have been in focus the past years and the U.S. use these weapons more than any other state in the world. The examination and discussion in this thesis is based on the assumption that the U.S. conflict with al Qaeda is a “conflict not of an international character” as stated in the *Hamdan v. Rumsfeld* case<sup>1</sup> by the U.S. Supreme Court.

The U.S. government has indicated that civilian casualties are at a very low number and that the drone operations are operated within the legal framework of international humanitarian law. However, many media reports and extensive studies in countries where the drone attacks have struck, give contrary reports to the U.S. government reports. The different reports bring concern to whether or not drone operations are in accordance with the fundamental principles of international humanitarian law. This gives reason to examine and question the liability of the drone usage in order to see what legal issues could be at concern and what is causing the concerns.

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<sup>1</sup> *Hamdan v. Rumsfeld*, Volume 548 U.S. 557 (2006).

# Sammanfattning

I internationell humanitär rätt är de fundamentala principerna, distinktion, proportionalitet och försiktighet av yttersta vikt och måste respekteras i väpnade konflikter. Syftet med principerna är att skydda individer såsom civila som ej deltar i stridigheter. Oavsett vilket typ av vapen som används i en väpnad konflikt måste de fundamentala principerna alltid respekteras. I det fall principerna ej efterföljs bör det ifrågasättas varför det sker.

I den här uppsatsen har skyddet av civila i icke-internationella konflikter undersökts. Det civila skyddet inom humanitär rätt vid drönarattacker är i fokus i denna uppsats. Syftet är att undersöka om drönarattacker utförs i enlighet med de fundamentala principerna inom internationell humanitär rätt. I denna uppsats har uppmärksamhet givits till de amerikanska drönarattackerna eftersom att dessa har varit högt aktuella de senaste åren. Jämfört med resten av världen är USA det land som använder flest drönare för att genomföra attacker. Diskussionen i denna uppsats är baserat på antagandet att USA:s konflikt med al Qaeda är en konflikt av icke-internationell karaktär, vilket stadgades av USA:s Supreme Court i fallet *Hamdan v. Rumsfeld*.<sup>2</sup>

USA:s regering har påpekat att antalet döda civila är få och att drönarattackerna är utförda i enlighet med internationell humanitär rätt. Det finns dock betydligt antal nyhetsartiklar, rapporter och studier från länder drabbade av drönarattacker som visar motsatt information än den USA:s regering påstår angående döda civila. De olika rapporter som givits angående civilas död ger upphov till oro angående drönarattacker legalitet, och huruvida attackerna utförs i enlighet med de fundamentala principerna inom internationell humanitär rätt. De olika rapporter som finns är en anledning till varför drönarattacker bör granskas för att försöka bringa

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<sup>2</sup> *Hamdan v. Rumsfeld*, Volume 548 U.S. 557 (2006).

klarhet i eventuella legalitetsproblem samt vad som orsakar legalitetsproblemen.

# Preface

Time really does fly by. The most valuable part for me throughout these years of my legal journey is everything that I have learnt.

As I have been writing my thesis I have been situated in Los Angeles, California. To be in the U.S. gave me a stronger personal feeling to the legal issues and a deeper sentiment to my work. It has been a great opportunity due to my thesis topic.

I hold great gratitude for my supervisor Markus Gunneflo for guiding me through my work. I also could not be more thankful to everyone at The Faculty of Law at Lund University who have helped me with everything I've needed in order to finish my education. Letters of recommendation have been written, proof of registration letters have been sent, anything in order to help me achieve my goals. I would also like to thank the Faculty of Law at UCLA for accepting me into their Visiting Scholars & Researchers Program, the resources at the law library were very beneficial for my research.

Lastly, thank you to my closest that stood by me through my time in law school, especially before every exam where I believe every law student is probably not on their best behavior.

It was tough, but it was fun.

Lund, 5 January 2015.

Alice Amini

# Abbreviations

API-II	Protocol Additional to the Geneva Conventions I-II of 8 June 1977
GC I-IV	The Geneva Conventions of 12 August 1949 I-IV
HPCR	The Program on Humanitarian Policy and Conflict Research at Harvard University
IAC	International armed conflict
ICC	International Criminal Court
ICJ	International Criminal Court of Justice
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
NIAC	Non-international armed conflict
UAV	Unmanned Aerial Vehicle
U.N	The United Nations
U.S.	The United States of America



# 1 Introduction

## 1.1 Background

When drones started to be used in targeted killings they gave rise to a debate amongst scholars and throughout media. The United States drone operations began after the 9/11 attacks in New York and Washington. Since then the U.S. drones operations has increased and the weapon is becoming appealing to other countries as well. In this thesis the U.S. drone operations are examined within the context of International Humanitarian Law based on the *Hamdan v. Rumsfeld* decision by the U.S. Supreme Court. In the decision it was concluded that the U.S. conflict with al Qaeda is a non-international armed conflict, which will also be the start out point for this paper.<sup>3</sup> Based on that, I have examined if the principles of distinction, precaution and proportionality within the context of IHL can and are respected in U.S. drone operations.

In the *Hamdan* decision it was decided that the conflict between U.S. and al Qaeda served as a “conflict not of an international character” in accordance with the common Article 3 in Geneva Conventions I-IV. Therefore, according to the U.S. Supreme Court, one could say that IHL has proven the ability to cover conflicts between a state and “transnational non-state actors”.<sup>4</sup> The U.S. Supreme court’s reasoning is that the conflict between U.S. and al Qaeda cannot be considered of an international character because a transnational non-state actor does not belong to any state.<sup>5</sup> Subsequently the transnational group does not fulfil the condition of a “high contracting party” as required in Article 2 GC I-IV.<sup>6</sup>

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<sup>3</sup> *Hamdan v. Rumsfeld*, Volume 548 U.S. 557 (2006) p. 628-631.

<sup>4</sup> The expression “transnational non-state actors” refers to an organized group that uses violent force throughout different states.

<sup>5</sup> *Hamdan v. Rumsfeld*, p. 628-631.

<sup>6</sup> Melzer, Nils, *Targeted Killing in International Law*, 2008, Oxford University Press, p. 267.

As of today many ongoing armed conflicts are between a state and an armed group. Therefore today's battlefields have changed since 9/11, not just in matters of their position amongst civilian areas, but also in the way that combatants move around. Nowadays many combatants intermingle with civilians, which makes it harder to distinguish civilians from combatants and that requires a more careful method of attack. If an excessive amount of civilians are killed it is a breach of the proportionality principle, the distinction principle, and the precautionary principle since not enough effort to spare civilians was taken before the attack. Today's weapon technology and the use of it should be able to comply with today's battlefields.

IHL's purpose in an armed conflict is to protect civilians. The U.S. government has argued that the drones cause less civilian deaths and that it is "exceedingly rare" for civilians to get killed in drone strikes.<sup>7</sup> Since IHL regulate acceptable weapons for use, better weapons are produced. By better I refer to the way that a weapon causes less suffering and harm to civilians than past weapons, such as nuclear bombs. Surely a drone is not by any means as destructible as the nuclear bomb, however that should not prevent the examination of drone usage. How else should mankind improve weapons and methods of warfare, to ultimately perhaps one day, not put any civilian lives at risk? The fact is that these newer improved drones, also referred to as UAV's, still harm and kill innocent individuals. That is why the legality and use of drones is examined in this thesis. Mistakes and collateral damage have occurred in drone strikes during which even U.S. investigations have disclosed that the mistakes were due to miscommunication and irresponsibility. In some cases it could strongly be questioned if the collateral damage was proportional. Therefore it is my belief that the discussion of legality, ethicality and morality should always be apparent when deadly weapons are involved. Especially when there is

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<sup>7</sup> Speech by John Brennan, Assistant to the President for Homeland Security and Counterterrorism, "The Ethics and Efficacy of the President's Counterterrorism Strategy" Wilson Center, Washington, DC, April 30, 2012, available at: <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

uncertainty of how many civilians are struck. In this thesis only the legality aspect is discussed, based on the *Hamdan* decision. It is problematic that a lot of the information about the U.S. drone program is confidential. However, that is a stronger reason for why the spotlight should be on the U.S. drone program, and what could be examined is based upon available information.

## 1.2 Purpose

The purpose of this thesis is to examine the legal outcomes in drone usage based on the decision of the U.S. Supreme Court in *Hamdan v. Rumsfeld*. The judgment in the *Hamdan* case was that the U.S conflict with al Qaeda served as a “conflict not of an international character”.<sup>8</sup> Based on that conclusion this thesis aims to examine the legal results of IHL’s fundamental principles of distinction, precaution and proportionality in relation to drone usage. The drone’s capability of respecting the legal framework will be discussed, whether the capability lies in the weapon’s technology or how it is being used. The U.S. drone operations are of interest since they have taken place in numerous of attacks since 2002. Therefore the focus will be on the U.S. drone operations and the way the U.S. manages these operations. The reason for this is to examine if the operations respect civilian’s legal protection before and during attacks. Is it possible for drone operators to respect the distinction principle in today’s armed conflicts where the battlefields have become spread out and the traditional soldier looks like a civilian? Could precaution be taken and what constitutes as excessive in proportionality? Within this context the arguments for and against drones will be examined. The purpose is to examine how drone attacks by the U.S. are conducted, how do they find and define their targets in drone operations. The question is whether or not the used means and methods of strikes are legal within the context of the fundamental principles in IHL. Even if drones were to be considered weapons in accordance with

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<sup>8</sup> *Hamdan v. Rumsfeld*, p. 628-631.

the means of combat, there may still be the case where they are not used in accordance with the methods of combat.<sup>9</sup>

### **1.3 Research Questions**

The research questions in this thesis are based on that U.S. drone operations in non-international armed conflicts must respect the core principles of international humanitarian law such as: distinction, proportionality and precaution. Therefore the question is who may be a lawful target due to the principle of distinction and how does the U.S. apply the distinction principle in drone operations? Is the U.S. applying the distinction principle correctly to take constant care for civilians? Moreover, can and is precaution taken in U.S. drone attacks in order to protect civilians? Furthermore what is considered as “proportional” and is there reason to believe that the principle of proportionality is in jeopardy in U.S. drone attacks?

The research questions are connected to the main purpose of this thesis. I ask how the drone operations respect civilian protection by law in real life and not only on paper.

### **1.4 Method**

Due to the fact that drone operations are present in our world, this thesis takes a critical point of view. I have used an explanatory method for the legal framework, which works as a basis for understanding the arguments of the legality/illegality of drones. Further on I have examined the existing debate on U.S. drone operations and why drone operations are or are not compatible with the fundamental principles of IHL. As I have examined the arguments, I have ended the thesis with my conclusions analysing the debate in relation to the law.

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<sup>9</sup> Means of combat implies to the weapon being used, while method of combat implies to the way that the weapon is used, Sandoz Yves, Swinarski Christopher, Zimmerman Bruno, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August, 1949*, (ICRC), Geneva, 1987, ICRC, para. 1957.

## 1.5 Material

The materials used in this thesis are mainly based on customary law, the Geneva Conventions and its two Additional Protocols. My facts are also derived from literature, legal articles and news articles regarding this thesis's topic. I have also used The International Committee's of the Red Cross (ICRC) study on customary international humanitarian law. The study on customary rules recognized by ICRC study is the most extensive study available at the moment. However, the study does not hold the status of a legal source. I have referred to the study due to the fact that many scholars and experts have referred to it in literature and legal articles.

Referrals to the ICRC study "The interpretive guidance on the notion of direct participation in hostilities in international humanitarian law" has also been made in this thesis. Responsible for the study was the legal adviser Dr. Nils Melzer. This ICRC study has also been referred to in literature and legal journals, which is also a reason for the referral in this thesis. Furthermore, it is the most extensive work on the notion of direct participation in hostilities available. However, it does not constitute as a legal source. Although, the study is a result of five years of meetings with legal experts and is therefore generally accepted as accurate. However, the study has also been considered controversial and there is disagreement on some of the propositions.<sup>10</sup> The U.S. has however not voiced any opinion on the matter.

Due to the confidentiality of U.S. drone operations, much information from the U.S. government cannot be found. The information derived from the U.S. government is mainly statement speeches, which I have referred to and can be found as electronic sources. Because of the confidentiality reason many news reports can be found on this topic where eyewitnesses of drone attacks have reported their situation. News reports with leaked confidential

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<sup>10</sup> Schmitt, Michael, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, Harvard National Security Journal, 2010.

information can also be found. An extensive study was also made by the International Human Rights and Conflict Resolution Clinic of Stanford Law School (Stanford Clinic) and the Global Justice Clinic at New York University School of Law (NYU Clinic) on the impact that U.S. drones have had on civilians in Pakistan. The reason for referrals to this study is because the study was made during a nine-month period through detailed interviews with eyewitnesses, experts, lawyers, journalists, the former and current government of Pakistan. Moreover, because a critical viewpoint is taken throughout this thesis on the drone usage, it is important to examine the critical information that is available. Most sources on civilian casualties are news reports and one could argue against the reliability of those sources, however many sources have been well studied and are very likely reliable sources.<sup>11</sup> The idea of this thesis is that the news reports are presently out in the public and because the drone is a weapon capable of killing, the news reports should not be shoved off too easily.

## 1.6 Delimitations

The U.S. conflict with al Qaeda was in the *Hamdan v. Rumsfeld* case determined by the U.S. Supreme court as an "armed conflict not of an international character" and referred to Common article 3 in the Geneva Conventions I-IV.<sup>12</sup> This is the U.S. Supreme Court interpretation and other scholars have argued differently. There are different views on whether the conflict is of non-international or international character. There is also great controversy regarding the U.S. ever being involved in armed conflict with al Qaeda in the first place. Therefore there is disagreement to whether the U.S. is allowed to use military force at all. The U.S. targets are not only located in countries such as Pakistan, Yemen, Afghanistan but also in Canada and other "western" countries.<sup>13</sup> Therefore much can be said on this topic alone

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<sup>11</sup> An extensive amount of legal articles and reviews refer to most of the news articles used in this thesis.

<sup>12</sup> *Hamdan v. Rumsfeld*, p. 628-631.

<sup>13</sup> O'Connell, Mary-Ellen, *Drones under International Law*, Washington University Law, 2010, p. 5-7.

and would require a whole thesis paper. Therefore the controversy will not be discussed in this thesis more than reminding about the disagreement. This thesis is based on the U.S. Supreme Court decision in the *Hamdan* case<sup>14</sup> and an examination of the legal aspects of drone usage based on the decision's outset has been made. The legal framework is limited to the rules of international humanitarian law based on the Geneva Conventions and the additional protocols. The aim of this thesis is to view the legal results of the U.S. conflict with al Qaeda imagining it was to be a conflict of non-international armed character. Therefore the legality or states right to conduct armed conflicts is not discussed. The jus ad bellum issues are because of the start out point of this thesis left aside and the focus is on jus in bello issues. Consequently I will not discuss whether targeted killing as a method of killing is legal or not. Only to clarify the expression "targeted killing" used in this thesis, it is referred to the study by The United Nations where targeted killing is explained as the following: "A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator".<sup>15</sup> There are different views on targeted killing as a legal or illegal method in warfare. There is disagreement between scholars and a lot can be said about this topic alone. Meanwhile targeted killing is not prohibited by IHL, it is accepted as a military response. The general understanding about targeted killings is that it is allowed in international law during conduct of hostilities under the condition that the target is a legitimate military target.<sup>16</sup>

To clarify the word "terror" used in this paper, it is indicated to the meaning within the legal framework of the Geneva Conventions.<sup>17</sup> With this said, the aim of this paper is not to clarify the meaning of terrorism or terrorists. This

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<sup>14</sup> *Hamdan v. Rumsfeld*, p. 628-631.

<sup>15</sup> A/HRC/14/24/Add.6, Alston, Philip, United Nations General assembly, Human rights council report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *Study on targeted killings*, 2010, para. 1.

<sup>16</sup> Melzer, *Targeted Killing in International Law*, p. 4.

<sup>17</sup> Article 33 GC IV, Article 51(2) API, Article 13(2) APII.

thesis's start point is instead based on the fact that a conflict of violence is current. Therefore, focus is on lawfulness and unlawfulness as a result in the current usage of U.S. drones in a non-international armed conflict.

## **1.7 Structure**

This thesis starts with an informative section on what a drone is in order for the reader to follow the arguments and discussion about a drone's capabilities as a weapon further on in the thesis. Thereafter an explanatory chapter of the relevant legal framework is provided where I have examined the legal principles within the framework of my purposes. The legal framework is meant as a base for the debate on the fundamental principles of IHL. I have reviewed the debate on why drone operations are in accordance with the fundamental principles or why they are not after the examination of relevant applicable law. The purpose of the structure is to give the reader a personal valuation of lawfulness or unlawfulness of the drone operations. Lastly I have concluded concerns that could be made about U.S. drone attacks based on the material given in this thesis.



## 2 DRONES AND RELEVANT LEGAL FRAMEWORK FOR DRONE OPERATIONS IN NON-INTERNATIONAL ARMED CONFLICTS

### 2.1 What is a drone?

An *Unmanned Aerial Vehicle*, also referred to as “UAV’s” or drones, is the common term for weapons that operate with their pilot situated on ground instead of in the vehicle. For example, in the U.S. drone operations the operator is actually based in the state of Nevada in United States. The physical pilot situated in Nevada can operate the drone to fly long distances, for example, all the way to Pakistan. Originally, drones were made for other intentions than for use as a weapon in combat. Drones were used for surveillance and to collect information. For the past decade drones have been used in targeted killings, mainly by U.S. and Israel.<sup>18</sup> When operating a drone to conduct targeted killings it means that the operator of the drone is not at any risk during the attack. There is no human body at risk for the party that attacks with a drone. The operator behind the desk, situated perhaps on the other side of the world can click a few buttons and kill human beings. When drones are used in attacks, they can either shoot missiles or drop bombs.<sup>19</sup> It is also possible to have the drone hover over areas for a long time in order to collect data.

There is no specifically custom-made law that regulates the use of drones. The legal framework for the drone as a weapon and its usage in an armed

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<sup>18</sup> De Beer, Lydia, *Unmanned Aircraft Systems (drones) and Law*, Nijmegen, Netherlands 2011, p. 4- 6.

<sup>19</sup> De Beer, Lydia, *Unmanned Aircraft Systems (drones) and Law*, p. 6.

conflict must comply with regulations in IHL.<sup>20</sup> Nonetheless since the victims, or the lawful targets in drone strikes do not have a chance to surrender.

The U.S authorized the use of drones after the World Trade Center attack on September 11, 2001 in New York and Washington. The president at the time, George W. Bush approved the use of force against leaders of the terrorist group al Qaeda.<sup>21</sup> Through the authorization the U.S. started its usage of drones in combat and the first U.S drone attack killed a member of al Qaeda and six other people in Yemen in 2002.<sup>22</sup> Today both the U.S. military and the Central Intelligence Agency (CIA) operate the drone strikes. Drones have substantially been used by the U.S. in different countries to collect information and kill targets.<sup>23</sup>

In the U.S. drone operations the drone models Predator and the Reaper are used. These weapons are constructed with two cameras for both day and nighttime, during nighttime an infrared camera is used. Radar equipment makes it possible for the drone to have view through smoke and clouds. Moreover, once a target is spotted it is possible to keep focus on that target with the help of a laser device that the drone is equipped with.<sup>24</sup> In 2014 the price for the predator model (MQ-1C Gray Eagle) was 5.40 million dollars. The price for the Reaper (MQ-9 Reaper) was 14.42 million dollars. For 2014 the U.S. ordered 15 units of each weapon and for 2015 they have extended their supply with an order of 19 drones of each two models.<sup>25</sup> In comparison to a fighter jet, which approximately costs 140 million dollars

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<sup>20</sup> The Hague Conventions of 1899 and 1907 regulates weapon technology whilst the Geneva Conventions of 1949 regulates the principles that the weapon must be able to respect and the way that the weapon is used must comply with the Geneva Conventions.

<sup>21</sup> S.J.Res.23, 107<sup>th</sup> Congress (2001-2002) Authorization for Use of Military Force.

<sup>22</sup> "CIA killed al Qaeda suspects in Yemen" available at:

<http://news.bbc.co.uk/2/hi/2402479.stm>.

<sup>23</sup> O'Connell, Mary-Ellen, *Unlawful killing with Combat Drones- a case study of Pakistan 2004-2009*, Notre Dame Legal Studies, 2010, p.3.

<sup>24</sup> Enemark, Christian, *Armed Drones and the Ethics of War*, New York, 2014, p.3.

<sup>25</sup> Official U.S. Department of Defense Budget Data for 2014-15, available at: <http://www.bga-aeroweb.com/Defense/Budget-Data/FY2015/MQ-1C-ARMY-PROC-FY2015.pdf>.

one could say that the drone is an inexpensive weapon.<sup>26</sup>

## **2.2 The conclusion in the case of *Hamdan v Rumsfeld***

Salim Ahmed Hamdan was a citizen from Yemen and had worked as a personal driver for Osama Bin Laden. Hamdan was captured and sent to Guantanamo Bay in 2002. One important outcome of the case was that the Supreme Court rejected the Court of appeals and the Bush-administrations theory. The rejected theory was that the U.S. conflict with al Qaeda was "international in scope" with support from Article 2 GC I-IV. The Supreme Court asserted that the U.S. conflict with al Qaeda was not of an international character and that Article 2 in GC I-IV was not applicable. The Supreme Court reasoning was that al Qaeda could not serve as a high contracting party and Article 2 GC demands at least two high contracting parties "an armed conflict which may arise between two or more of the High Contract Parties". However, the Supreme Court came to the conclusion that Article 3 GC I-IV would apply since the article only demands one high contracting party. The U.S. would therefore apply as one of the High Contracting parties, which is the requirement in Article 3 GC I-IV. However, Hamdan was not part of such a high contracting party since al Qaeda does not fulfill that requirement.<sup>27</sup> Thereof Article 3 GC I-IV would be applicable. The court reasoned that only because one party does not serve as a high contracting party does not infer that the conflict automatically becomes international, as the Bush-administration had suggested.<sup>28</sup>

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<sup>26</sup> F-35 Joint Strike fighter is the compared fighter jet, available at: <http://www.bga-aeroweb.com/Defense/F-35-Lightning-II-JSF.html>.

<sup>27</sup> *Hamdan v Rumsfeld*, p. 628-631.

<sup>28</sup> As a reminding note, this is the U.S. Supreme Court interpretation, as explained in the introduction to this thesis there is great controversy on this matter.

## 2.3 The applicability of the Geneva Conventions in non-international armed conflicts

The relevant regulation for the protection of civilians in armed conflicts can be found in the Geneva Conventions, and the Additional Protocols I-II.<sup>29</sup> The API regulates international armed conflicts and APII regulates non-international armed conflicts. However, some principles of API are also applicable in non-international armed conflicts because they are considered as customary law.<sup>30</sup> Besides the Geneva Conventions there are more conventions and rules in IHL such as the Hague Conventions, which mainly regulates weapon rules.

The Geneva Conventions have been ratified by most states in the world, therefore those states are forced to respect the conventions. However, the responsibility to respect the GC is universal and every state in the world is consequently obliged to respect the requirements. Most states in the world are part to the API-II as well, though there are states that have not ratified the API and, or II. For these states it is not required to follow all provisions in the API-II. However, parts of the provisions in the Additional Protocols are considered as customary law, which binds a state whether or not the state has ratified the protocol.<sup>31</sup>

The rules of GC I-IV, API and APII become applicable when an armed conflict occurs. These laws are sometimes referred to as "the law of war".<sup>32</sup> For this thesis it is of relevance that the U.S. have not ratified API-II. However due to the common Article 3 in the GC I-IV, which the U.S. is part to, many of the principles of the API-II still apply for the U.S. This is because of customary law.<sup>33</sup> The principles that are considered as customary

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<sup>29</sup> A complete reference to the Geneva Conventions I-IV is found in the bibliography of this thesis.

<sup>30</sup> See chapter 2.4 on Customary law in non-international armed conflicts.

<sup>31</sup> Customary international humanitarian law is discussed in Chapter 2.4 of this thesis.

<sup>32</sup> The expression "laws of war" is not used in this thesis due to the need of being specific, therefore the legal expression "armed conflict" is used.

<sup>33</sup> ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-I-T, 7 May 1997, para. 611.

law may not be violated whether or not API-II have been ratified.<sup>34</sup> Common Article 3 GC I-IV is an effort to have the parties of a NIAC to be bound by the fundamental humanitarian principles, and to force application of the minimum protection of the Geneva Conventions I-IV and API.<sup>35</sup> Based on the *Hamdan* decision that the U.S. conflict with al Qaeda is a “not of an international character” the Article 3 GC I-IV is applicable and considered as customary international humanitarian law. Subsequently it is also considered effective for non-state armed groups that act transnationally.<sup>36</sup> A clear restriction on civilians and civilian objects cannot be found in Article 3 GC I-IV and APII. However, due to customary law, lethal attacks on civilians and civilian objects are restricted in non-international conflicts.<sup>37</sup> Article 13 (2) APII restricts attacks directed towards civilians in non-international conflicts as well. The role of Customary international law is to finalize and fulfill all international humanitarian law and to fill possible gaps in law.<sup>38</sup>

## 2.4 Customary law in non-international armed conflicts

Customary law was acknowledged as early as 1899. It started out as the so-called “Martens clause” which sets the following principle:

”Civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”<sup>39</sup>

The Marten’s clause principle can be found in Article 2 API and it points out that customary law protects civilians and combatants if these individuals

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<sup>34</sup> Boothby, William, *The Law of targeting*, Oxford, 2012, p. 34.

<sup>35</sup> Moir, Lindsay, *The Law of International Armed Conflicts*, Cambridge, 2002, p. 31.

<sup>36</sup> Bouchet-Saulner, *The Practical Guide to Humanitarian Law*, third edition, Maryland 2014, p. 161.

<sup>37</sup> Van Engeland, Anic e, *Civilian or Combatant - A Challenge for the 21st Century*, Oxford, 2011, p. 55.

<sup>38</sup> Boothby, William, *The Law of targeting*, p. 32.

<sup>39</sup> Article 1.(2) API.

would be in a situation that is not covered by API. Furthermore the ICJ has defined customary law as: "Evidence of a general practice accepted as law".<sup>40</sup> Customary law could be explained functioning as a gap filler for written law and if not respected it is considered a violation of law. Moreover, the recognition of customary law was set in the *Tadic* Case where the court declared that the fundamental rules of APII are reflected in Article 3 GC I-IV.<sup>41</sup> That is also a reason why the fundamental rules in APII are part of generally accepted customary law and thereof applicable to states such as the U.S. that are not part to the APII. Also, the ICRC have pointed out that a majority of the rules for IAC are also applicable in NIAC. With that said, IHL offers a basic protection, and whether the armed conflict is of international or non-international character, the basic rules in international humanitarian law must be followed. This is due to customary law.<sup>42</sup> For example, the applicability of the fundamental principles in NIAC is of importance in regards to the prohibition on lethal force towards individuals who for example take no active part in hostilities, or for those who take an active part and are in need of minimum protection, such as humane treatment.<sup>43</sup> Therefore the fundamental principles of IHL fulfill important humanitarian factors that must always be respected during armed conflicts.

## **2.5 Principles of necessity, distinction, precaution and proportionality within IHL**

This chapter is a review of the fundamental principles of IHL that must be followed in order to protect civilians in the conduct of drone strikes. The principles of distinction, precaution and proportionality are the fundamental principles of IHL that must be respected when operating any act of violence in NIAC.

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<sup>40</sup> Article 38.1 ICJ Statute.

<sup>41</sup> ICTY *Prosecutor v Dusko Tadic*, para. 639.

<sup>42</sup> Van Engeland, *Civilian or Combatant*, p. 58.

<sup>43</sup> Bouchet-Saulner, *The Practical Guide to Humanitarian Law*, p. 93; ICTY *Prosecutor v Dusko Tadic*, para. 639.

## 2.5.1 Distinction

Distinction in armed conflicts is vital in order to protect civilians and civilian objects. A mistake could result in innocent human being's death or injury. IHL requires distinction between a *combatant* versus a *civilian* and *military objects* versus *civilian objects*. Attacks are only allowed towards combatants and military objects.<sup>44</sup> It is a requirement in IHL to differentiate civilians from combatants and prosecution should follow if that rule is violated with a war crime.<sup>45</sup> Furthermore, the ICRC points out the principle of distinction in Article 48 API as customary law.<sup>46</sup> Therefore even if the U.S. has not signed the APII, the rule to not target civilians is legally binding through customary law, which is also based on Article 13(2) APII.<sup>47</sup> The principle is therefore considered applicable in both IAC and NIAC.<sup>48</sup>

Likewise ICRC's study, the customary protection of distinction was also stated in the *Nuclear weapons* case in 1996, where the International Court of Justice identified the principle as a "cardinal principle" and "intransgressible principle of international customary law".<sup>49</sup> Moreover the ICJ stated the following about the principle of distinction in its advisory opinion:

"States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."<sup>50</sup>

As explained, it is prohibited in NIAC to target civilians. The indication in customary law of IHL is that the principle of distinction is applicable in all

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<sup>44</sup> Article 24(1) of the 1923 Hague Rules of Air Warfare; Article 13 APII; Article 48, 52(2) API; Article 2, Hague Convention 1907, (IX); Preamble to St. Petersburg Declaration.

<sup>45</sup> Van Engeland, *Civilian or Combatant*, p. 17.

<sup>46</sup> Henckaerts, Jean-Marie & Doswald-Beck, Louise, *Customary International Humanitarian Law, Volume 1 Rules*, International Committee of the Red Cross (ICRC), Cambridge University press, 2005, rule 1.

<sup>47</sup> Henckaerts & Doswald-beck, *Customary International Humanitarian Law*, rule 1.

<sup>48</sup> Rome Statute of the International Criminal Court (ICC Statute), art 8 (2)(b)(i)-(iii), 8 (2)(e)(i-iii).

<sup>49</sup> International Court of Justice (ICJ) Advisory opinion on Legality of the threat or use of Nuclear Weapons, July 8, 1996, para. 78-79.

<sup>50</sup> ICJ Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996, para. 78.

armed conflicts and must always be respected.<sup>51</sup> Even though the principle is considered as customary law and must be respected in NIAC, there is a difference in how civilian and combatants are defined in the two different categories of NIAC and IAC. Therefore the first step is to decide whether or not an individual is a lawful object for attack. It has to be decided what status the individual benefits from. Either the individual is a civilian, a member of an armed force that is involved in the conflict, or medical or religious personnel.<sup>52</sup> The problematic factor in NIAC, in comparison to IAC is that neither the combatant status nor the civilian status is defined in NIAC.

When dealing with drones and the issue of direct and indirect participation in hostilities the question becomes if drones and the drone operators can apply the distinction principle in IHL as required. It is hard enough for a soldier to make a distinction due to the different issues of uncertainty that are accurate in direct/indirect participation. Are drones equipped well enough to manage the distinction between the already uncertain direct versus indirect participators in the case where an individual is not a member of an “organized armed group”?

### **2.5.1.1 The unlawful target in NIAC**

In customary law for NIAC civilians are identified as “not fighters”.<sup>53</sup> The expression “fighter” is also used in the NIAC manual where distinction is made between fighters and civilians.<sup>54</sup> The term “civilian” in NIAC is given a negative explanation, meaning that the law does not have a list on whom is a civilian. The only time civilians lose their civilian status in NIAC is if they directly participate in the hostilities or become a member of an armed

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<sup>51</sup> Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, rule 1.

<sup>52</sup> Individuals with the status *hors de combat* are also a status option according to Article 3 GC I-IV, however the option is not the focus in this paper and therefore not discussed.

<sup>53</sup> A/HRC/14/24/Add.6. Alston, Philip, *Study on targeted killings*, 2010, p. 10.

<sup>54</sup> International Institute of Humanitarian law, *The Manual on the Law of Non-International Armed Conflict, with commentary*, (NIAC Manual) Sanremo, 2006, para. 1.2.2.



group.<sup>55</sup> Unlawful targets in NIAC are according to Article 3 GC I-IV “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms” This means that if an individual is a member of an armed force, there is no requirement for the member to take an active part in the hostilities, consequently the member may be a lawful target at any time. However, the member is not a target once he chooses to have “laid down their arms” according to Article 3, GC I-IV. When a member of an armed force or a member of a “dissident armed force” or “organized armed group”<sup>56</sup> function as medical or religious personnel they are not lawful targets for attack. Although if the member whom is functioning as medical or religious personnel chose to take an active part in the hostilities their status change and they can be lawful targets to attack.<sup>57</sup>

### **2.5.1.2 The lawful target in NIAC**

Since the term “combatant” is not used in NIAC<sup>58</sup> the “combatant” status could instead be explained as an individual who is, legally not protected from an attack. The question then becomes, during what circumstances will an individual not benefit from protection status in an attack?

The lawful targets in NIAC are members of organized armed groups and civilians who take direct participation in hostilities.<sup>59</sup> Therefore it is of interest to analyse when an individual is considered a member of an organized armed group and what constitutes as direct participation. If following ICRC’s interpretation<sup>60</sup> it concludes that membership occurs when an individual has “continuous combat function”. As mentioned earlier

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<sup>55</sup> NIAC Manual, para 2.1.1.2; Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* rule 6; Article 3 GC I-IV.

<sup>56</sup> “Dissident armed force” and “organized armed groups” are expressions used in Article 1 (1) APII.

<sup>57</sup> Melzer, *Targeted Killing in International Law*, p. 313.

<sup>58</sup> Melzer, *Targeted Killing in International Law*, p. 313.

<sup>59</sup> ICRC, *Interpretive Guidance on the Notion of ‘Direct Participation in Hostilities Under International Humanitarian Law, International Review of the Red Cross*, Volume 90 Number 872 December 2008, p.1002.

<sup>60</sup> Even though there are scholars who do not agree with this interpretation there are also U.S. military experts who accept the interpretation. See: Jon Heller, *One hell of a killing machine- signature strikes and international law*, 2012, p. 6.

a member is a lawful target at any time. This assumption by the ICRC distinguishes individuals with continuous combat function from individuals who only directly participate on a “spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.”<sup>61</sup> Consequently a direct participant is not a lawful target at any time, but only when pursuing direct participation.

One downfall of the regulation in NIAC is that the “fighter” in NIAC does not have the benefit of “prisoner of war” status as the combatant in IAC has.<sup>62</sup>

### **2.5.1.3 Civilians who take part in hostilities**

There are two different situations of civilians who take part in hostilities. Either they take part *directly* or *indirectly*. To decide if an act is considered direct or not, different factors come in to play, especially the intensity of the act. The circumstances of the situation also matter in a decision. However, in every decision it may not be forgotten that the decision must be in accordance with applicable law and the fundamental principles of IHL.

It should be noted that in IHL the expression “hostilities” regards both international and national armed conflicts.<sup>63</sup> Moreover, the concept direct participation derives from Article 3 GC I-IV using the expression “Persons taking no active part in hostilities”. The word *active* is used in the article, however *direct* and *active* are considered to have the same meaning.<sup>64</sup> In the ICRC study on direct participation several factors are pointed out as reasons for the uncertainty when individuals act as direct participators and when they do not, let alone the problems that follow the uncertainty.<sup>65</sup> One of the challenges today is that non-state actors intermingle with civilians, therefore

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<sup>61</sup> ICRC, *Interpretive Guidance on Direct Participation, International Review of the Red Cross*, Volume 90 Number 872 December 2008, p. 1007.

<sup>62</sup> Melzer, *Targeted Killing in International Law*, p. 311.

<sup>63</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities- Under International Humanitarian Law*, 2009, p. 41.

<sup>64</sup> ICRC, *Interpretive Guidance on Direct Participation in Hostilities*, p. 42; Melzer, *Targeted Killing in International Law*, p. 145.

<sup>65</sup> ICRC, *Interpretive Guidance on Direct Participation in Hostilities*, p. 11-12.

the distinction between the two categories is more difficult to detect. Because of that, it is even more essential that the intelligence obtained by the attacking state should be highly reliable, otherwise life-threatening mistakes could be made. If an attacking state only relies on the fact that an individual is a “suspect terrorist” it will not be considered as a satisfactory reason to target that individual.<sup>66</sup>

If a civilian takes direct participation in the hostilities, he will be considered to have lost civilian protection. On the contrary, when the participation is indirect the civilian will not lose his civilian status. This leads to the fact that indirect participants are not legitimate target for attacks, but direct participators are.<sup>67</sup> The ongoing debate is about when the direct participant is a legitimate target. It is not quite easy to define exactly what direct participation encloses and where to draw the line, therefore there are different arguments to the approach. At what times should the civilian be considered to have lost his civilian immunity, would it be at all time or only when the direct participation is taking place? For example, what does the law say about a civilian who is a father and family man during the days, but fights for an armed group during nighttime?

### **2.5.1.3.1 What is considered as direct participation in NIAC?**

The difficulty in this matter is that there is no specification in the Geneva Conventions or the Additional Protocols on what behaviours constitute direct participation.<sup>68</sup> There have been different opinions on what constitutes direct participation in hostilities and for how long.<sup>69</sup> The ICRC identified this lack of specification, which led to their extensive study on the matter.

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<sup>66</sup> Melzer, Nils, *Targeted Killing in International Law*, p. 410.

<sup>67</sup> Van Engeland, *Civilian or Combatant*, p. 42.

<sup>68</sup> Bouchet-Saulner, *The Practical Guide to Humanitarian Law*, p. 60.

<sup>69</sup> Wippman David & Matthew Evangelista, *New Wars New Laws*, New York, 2005, p. 200.

It has been implied that direct participation in hostilities should be considered under the same conditions for both NIAC and IAC.<sup>70</sup> ICRC has pointed out that for an act to be considered as direct participation in hostilities the act needs to fulfil three requirements: there must be “(1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.”<sup>71</sup> If the action fulfills the three requirements direct participation could be the case. As mentioned earlier, IHL does not provide information on when an individual should be considered as a direct participant in hostilities or when an individual is a member of an armed force. Therefore there could be difficulty to decide whether an act fulfils the just mentioned requirements. However, as a solution IHL does state that in situations where all feasible precautions have been taken to determine the individual’s status and it would still be doubtful whether the individual is a lawful or unlawful target, then the civilian status must be chosen. The rule is stated in Article 50 (1) API but is also considered customary law and applicable in NIAC.<sup>72</sup> The rule is utterly important in order to prevent lethal mistakes.

### **2.5.1.3.2 The uncertainty of direct/ indirect participation**

The problem in today’s society, which has developed over time, is that the difference between fighters and civilians has become vague. As the ICRC study points out there are different reasons for the vagueness. Many fighters do not differentiate themselves from the civilians, the behavior is on purpose and some fighters function as civilians during the day but take part in hostilities during nighttime. Another problem is that there are private contractors who have taken on the traditional military tasks. Moreover, the battlefields today are not as separate from the civilian population as they

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<sup>70</sup> ICRC, *Interpretive Guidance on Direct Participation in Hostilities*, p. 44.

<sup>71</sup> ICRC, *Interpretive Guidance on Direct Participation in Hostilities*, p. 46.

<sup>72</sup> HPCR Manual on International Law Applicable to Air and Missile Warfare, Cambridge University Press, 2013 p. 90-91; ICRC, *Interpretive Guidance on Direct Participation*, *International Review of the Red Cross*, Volume 90 Number 872 December 2008, p. 1039.

used to be. Instead, battlefields have moved into civilian populations, such as Gaza City for example. These are several factors as reasons why clarity between direct and indirect participation has become vague and it increases the danger for innocent civilians to be mistaken for combatants/fighters.<sup>73</sup> In the ICRC study there was an understanding amongst the makers of the study that a decision on indirect versus direct participation can best be determined on a case to cases basis. This understanding of case to case decisions is also supported in the *Tadic*- case where the court asserted; "it is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time."<sup>74</sup>

#### **2.5.1.4 The approach in U.S. drone operations to distinguish lawful versus unlawful targets**

The U.S. drone program is publicly confidential but through eyewitnesses, reports from journalists working from locations where drone attacks occur, and leaked information, the public is able to make evaluations of the legality of the known reality. Many strikes occur in Pakistan, Afghanistan and Yemen. However most drone attacks have occurred in Pakistan.<sup>75</sup>

In U.S. drone operations the targets are both known and unknown and the operations are conducted through planning. When a strike is taken towards a known target, the individual is targeted based on his personality, thereof the term "personality strikes". This means that the U.S. knows the individuals name and affiliation. The U.S. explains that the way they go about targeting personality strikes is through having a "high degree of confidence" that the individual is present before the attack occurs. The U.S. also claims that the

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<sup>73</sup> ICRC, Direct participation in hostilities, questions & answers, published 02-06-2009, p. 1, available at: <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm#a2>; Melzer, *Targeted Killing in International Law*, p. 328.

<sup>74</sup> ICTY *Prosecutor v Dusko Tadic*, para. 616.

<sup>75</sup> The Bureau of Investigative Journalism "Get the data: Drone Wars", available at: <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>.

strikes usually are targeted against leaders of “terrorist groups”.<sup>76</sup>

The contrary method to the personality based strike is “signature strikes”. This sort of attack is based on an individual’s patterns of life. The name of the individual usually remains unknown to the U.S. and unfortunately civilian casualties could be a part of this type of strikes. Therefore, the number of civilian casualties is a concern that has been debated, as well as the targeted individual’s status as a lawful-target or not.<sup>77</sup> According to the U.S Supreme Court, the U.S. signature strikes that for example take place in Pakistan are strikes that occur in the situation of a NIAC.<sup>78</sup> However, the issue is whether or not the strikes are carried out in accordance with IHL. Mainly the principle of distinction could be at stake on this matter.

## **2.5.2 Proportionality**

Even if the use of lethal force is allowed in an armed conflict, it must still be proportionate, according to Article 51 API. This means that the effects of the lethal force must be in proportion to the purpose of the military operation. If the lethal force would cause more harm to civilians than necessary in order to achieve the purpose of the operation, then the operation is not proportional and therefore unlawful. Proportionality in attacks is a customary rule and applicable in both IAC and NIAC.<sup>79</sup>

### **2.5.2.1 Collateral damage**

IHL gives room for collateral damage and accepts that innocent individuals might become the victims of an armed conflict. However, the requirement of respect for the principle of proportionality subsequently includes that a

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<sup>76</sup> Speech by John Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” Wilson Center, Washington, DC, April 30, 2012, available at: <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

<sup>77</sup> The Center for Civilians in Conflict and Columbia Law School Human Rights Clinic, *The Civilian Impact of Drones-Unexamined Costs Unanswered Questions*, U.S. 2012, p. 8.

<sup>78</sup> *Hamdan v. Rumsfeld*, (2006) para. 630.

<sup>79</sup> Henckaerts & Doswald-beck, *Customary International Humanitarian Law*, rule 14; ICTY, *Prosecutor v Kupreskic* Case No. IT-95-16-T, 2000, p. 205 ff; Bouchet-Saulnet, *The Practical Guide to Humanitarian Law*, p. 511.

state has a responsibility to prevent and minimize collateral damage in armed conflicts. In order to do so, the fundamental principles of distinction, precaution and proportionality in IHL play an important part. When these principles are followed accordingly the collateral damage could be considered minimized or prevented. Consequently if the principles were not respected accordingly, then the attacking state have not followed the law if the collateral damage is excessive, which therefore could be a violation of IHL.<sup>80</sup>

Collateral damage could be the result of different situations. Naturally, with any lethal weapon, an unlawful target might get killed if the soldier chooses to breach the principle of distinction. Another example is if an unlawful target is in the area of the drone attack and is thereby struck unintentionally. An unlawful target could also be struck because of wrong information, or because of a technical fault.<sup>81</sup>

As for the drones, Senior US officials have argued that the drone is in accordance with the rules of IHL and that civilian casualties are few in drone attacks.<sup>82</sup> This means that according to the U.S. the drone attacks follow rules of distinction, precaution and proportionality.

### **2.5.2.2 What is considered as “excessive” in proportionality?**

ICRC has commented on the implication of *excessive* and believes that in matters of hesitation “the interest for the civilian population should prevail”.<sup>83</sup> Although the comment does not give more guidance than that the protection of civilians is more important than the military means. To bring clarity on this matter it can be said that, it is not the collateral damage that is unlawful, but the *excessive* collateral damage in comparison to the military

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<sup>80</sup> Melzer, *Targeted Killing in International Law*, p. 354, 356.

<sup>81</sup> Enemark, Christian, *Armed Drones and the Ethics of War*, p. 62.

<sup>82</sup> Strawser, Bradley-Jay, *Killing by Remote Control*, Oxford University Press, 2013, p. 126.

<sup>83</sup> Sandoz et al. *Commentary on the Additional Protocols*, para. 1979-80 at p. 625-626.

advantage.<sup>84</sup> To illustrate an example, the proportionality in the CIA attack in Pakistan on June 23<sup>rd</sup> 2009 could be questioned whether or not it was proportionate to kill 45 civilians and 38 lawful targets.<sup>85</sup>

### 2.5.3 Military necessity

The requirement of military necessity is crucial in use of lethal force in targeted killings because it obligates states to have an actual military advantage by their conduct.<sup>86</sup> This means that there should be no other approach of not using lethal force that could reach the same advantage as the targeted killing would.<sup>87</sup> However, it should not be forgotten that the principle of necessity must still be in coherence with the principles of precaution, proportionality and distinction in IHL. Even if it would be a military necessity to use drone missiles in a targeted killing conduct, it is still required to avoid or minimize collateral damage. The risks that impose on civilian population contra the military advantage must be within reasonable measures. When measuring the reasonableness of a conduct it is dependent on several factors, this is because all situations have different circumstances. Factors such as intensity, urgency or degree of necessity matters when considering if the military necessity should outweigh in a certain situation.<sup>88</sup>

### 2.5.4 Precaution

The rule of precaution is important in order to spare civilians and civilian objects. The principle of precaution is recognized as customary law by the ICRC and considered applicable in both international and non-international law.<sup>89</sup> Precaution must be taken before lethal attacks in order to judge

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<sup>84</sup> Sandoz et al. *Commentary on the Additional Protocols*, para. 2206 at p. 683.

<sup>85</sup> "CIA tactics in Pakistan include targeting rescuers and funerals" available at: <http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/>.

<sup>86</sup> Article 52 (2) API.

<sup>87</sup> Melzer, *Targeted Killing in International Law*, p. 294.

<sup>88</sup> Melzer, *Targeted Killing in International Law*, p. 295.

<sup>89</sup> Henckaerts & Doswald-Beck, *Customary International Humanitarian Law*, Rule 18- 21.



whether or not the civilian harm would be greater than the military advantage.<sup>90</sup> If there is a different attacking option available, with a similar military advantage and the option is less dangerous for civilians and civilian objects, then that option must be chosen.<sup>91</sup> The rule of precaution does not only regulate that precaution must be taken before attacks, but an attack must also be canceled if necessary precautions cannot be taken.<sup>92</sup> Furthermore, if the attack might affect the civilian population it is the attacking party's responsibility to give warning before they move forward with the attack. However, there is an exception to the rule of warning, if circumstances do not permit such warning then the responsibility of warning before an attack may be excused.<sup>93</sup>

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<sup>90</sup> Art 57(2)(a)(i) API; Henckaerts & Doswald-beck, *Customary International Humanitarian Law*, Rule 18.

<sup>91</sup> Art 57 (3) API; Henckaerts & Doswald-beck, *Customary International Humanitarian Law*, Rule 21.

<sup>92</sup> Art 57 (2)(b) API; Henckaerts & Doswald-beck, *Customary International Humanitarian Law*, Rule 19.

<sup>93</sup> Art 57(2)(c) API; Henckaerts & Doswald-beck, *Customary International Humanitarian Law*, Rule 19.

# **3 U.S. drone attacks and the legal debate on the fundamental principles of IHL**

## **3.1 The distinction debate**

### **3.1.1 The ability to keep up with the distinction principle in U.S. drone operations**

The advocates for drones mean that drone operations can be run in accordance with the principle of distinction. The drone is equipped with sensors that gather information on what happens on ground, just like a pilot can gather information situated in an airplane.<sup>94</sup> Moreover the drone collects data and information through observation of certain areas and movements of people on ground. The drone operators behind the monitors can observe an area for days and through that collect information about certain “patterns of life”. If the “patterns of life” change and there is no reason to suspect hostility then the drone operation can be canceled. Drone proponents mean that the high-resolution images are monitored thoroughly and that it is possible to monitor the targets for a long period of time until the operators are certain that an attack should take place. Since it is possible to observe areas over a stretched period of time the drone operators can comfortably take their time and analyze movements on ground, therefore they can make better and stronger decisions on distinction.<sup>95</sup>

Drone proponents mean that the drone itself is not illegal, the argument is that the drone is not any different from a piloted aircraft that fires missiles in

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<sup>94</sup> Boothby, *The Law of Targeting*, p. 281.

<sup>95</sup> Schmitt, Michael, *Yearbook on International Humanitarian Law*, Volume 13, 2010, Cambridge University press, p. 320.

warfare. However just as any other weapon, drones could be used in an unlawful way.<sup>96</sup>

As for the U.S. government's standpoint, Harold Koh whom is the State Department Legal Advisor of the U.S. argues that the U.S. usage of drones is legal. Koh claims that the targeted strikes taken by the U.S. and their use of drones follows the fundamental principles of distinction and proportionality in IHL. Koh means that the drone operations therefore comply with the international laws that require targets to be lawful, and that civilians and civilian objects are protected.<sup>97</sup>

### **3.1.2 Lack of capability to distinguish between lawful and unlawful targets in drone operations**

The counter argument for the use of drones and its legality in regards to the principle of distinction is that it is not possible to follow the principle in the contemporary armed conflicts. As explained in earlier chapter, there are several factors why it has become more difficult to distinguish between lawful and unlawful targets today. Due to the challenges in armed conflicts nowadays, there is a difficulty in distinguishing between individuals who directly participate in hostilities, and those who do not. As described in earlier chapter, the ICRC study shows that the battlefields have changed and combatants are now intermingling with civilians.<sup>98</sup> Even if a drone operator through sensors or cameras could distinguish between an individual carrying a weapon and one that is not, it does not satisfy a presumption that the individual actually is a lawful military target. The uncertainty that exists between indirect and direct participants in armed conflicts makes it harder for a drone operator to make such distinction. Opponents mean that drones have a difficulty to collect reliable data. With drones it is especially tough to

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<sup>96</sup> Schmitt, *Yearbook on International Humanitarian Law*, p. 321.

<sup>97</sup> Keynote Speech by Harold Hongsju Koh, Legal Adviser, United States Department of State, at the Annual Meeting of the American Society of International Law, March 25, 2010, p.14, available at: <http://www.state.gov/documents/organization/179305.pdf>.

<sup>98</sup> See chapter 2.5.1.3 on civilians who take part in hostilities.

collect data of distinction between members of insurgent organizations that are hostile to the attacking state, and those who are not.<sup>99</sup> Opponents to the drone usage mean that these weapons are far from perfect, as they have been romanticized and portrayed to be. Therefore there have been cases where the misjudgment of civilians for combatants have cost innocent lives.<sup>100</sup> For example, in one study made by the organization *The Bureau of Investigative Journalism* civilian death numbers are presented as between 25-117 in the period of August 2010-February 2011. For that same period of August-February the U.S. stated that no civilians had been killed in drone strikes.<sup>101</sup>

According to the principle of distinction and as the ICJ advisory opinion on the *Nuclear weapons* case<sup>102</sup> a weapon must be able to distinguish between lawful and unlawful targets. Meanwhile, the advocates for drone usage claim that the drones are capable of such distinction because of high technology cameras and sensors, but there are drone operators who do not agree. Heather Linebaugh, a former drone operator, shares her experience of drones and claim that drones sometimes are incapable of detecting “improvised explosive device”. In the article published in *The Guardian* newspaper she shares the following information;

“The video provided by a drone is not usually clear enough to detect someone carrying a weapon, even on a crystal-clear day with limited cloud and perfect light. This makes it incredibly difficult for the best analysts to identify if someone has weapons for sure. One example comes to mind: "The feed is so pixelated, what if it's a shovel, and not a weapon?" I felt this confusion constantly, as did my fellow UAV analysts. We always wonder if we killed the right people, if we endangered the wrong people, if we destroyed an innocent civilian's life all because of a bad image or angle”.<sup>103</sup>

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<sup>99</sup> Walsh Igoe, James, *The Effectiveness of Drone Strikes in Counterinsurgency and Counterterrorism Campaigns*, United States Army War College Press, 2013, p. 2-3.

<sup>100</sup> Schmitt, *Yearbook on International Humanitarian Law* p. 320.

<sup>101</sup> Stanford/NYU Clinic, *Living under Drones, Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*, 2012, p. 157 (Appendix C, U.S. statements on civilian casualties).

<sup>102</sup> *Supra* note 49.

<sup>103</sup> Heather Linebaugh “I worked on the U.S. drone program. The public should know what really goes on”, available at:

<http://www.theguardian.com/commentisfree/2013/dec/29/drones-us-military>.

Another incident where a former drone operator shares his experience was revealed in 2010 when the website *Wikileaks* leaked a video of a drone attack. One of the operators in that video, Brandon Bryant, talks about his experience in a CNN interview.<sup>104</sup> In the interview, Bryant talks about the incident that occurred in 2007. Before the missile was fired, Bryant saw a small shaped figure running towards the targeted building. The intelligence observer's response to the figure was that it was a dog running. However, Bryant is sure it was not a dog and claims that the figure was a child. Nonetheless, there was not any mentioning in the report about a dog or a child.

In an interview with BBC a former drone operator by the name James Jeffrey, who served for the British Army testifies that it is hard to distinguish lawful from unlawful targets. In the BBC interview Jeffrey confesses to an occasion where he misjudged a child playing on ground for a militant. In the interview Jeffrey says that "From an overhead position it looked like they were burying an improvised explosive device". However thanks to an adult individual that arrived to the scene, Jeffrey realized that the planned target was a child and not an adult lawful target planting explosives. In this particular situation the attack was canceled. Furthermore Jeffrey expresses concern and claims that the drones have made it "too easy to kill".<sup>105</sup>

If following these testimonies from former drone operators, the principle of distinction could be in jeopardy, within the context of IHL the use of a drone in targeted killings cannot uphold the principle of distinction. As a result, this could impose a serious threat to all three fundamental principles of IHL.

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<sup>104</sup> Brandon Bryant "Former drone operator shares his inner torment", available at: <http://www.cnn.com/2013/10/23/us/drone-operator-interview/>.

<sup>105</sup> "Too easy: Ex drone operator on watching civilians die", available at: <http://www.bbc.com/news/world-us-canada-19820760>.

Another concern addressed by opponents is that drone operations do not put the attacking state at any risk and therefore it becomes easier for the drone operator to kill. Since the drone operator is not physically situated on the combat field the care to make proper distinction values decreases, because the operator's own life is not in jeopardy. The attacking state does not only spare the lives of their own men, but their state also save money.<sup>106</sup> Therefore, it has been argued that the proponents of drones might interpret the law too extensively on matters of who can be attacked and at what time.<sup>107</sup> There have been cases where erroneous attacks have occurred and drone operators have killed wrong individuals thinking they were correct targets. One of the first examples of an attack that went wrong was in Afghanistan when a tall man was presumed to be Osama bin Laden. However, this man was Mir Ahmad who worked as a scrap collector. Mir Ahmad and his friends were killed in the misjudged drone strike. Other misguided drone strikes have occurred when individuals "patterns of life" activities have erroneously given drone operators the illusion that the individual is a militant. These mistakes occur even when the human technical intelligence is accompanied by human intelligence located on ground. The reason for some of the mistakes appears to be communication and distance problems.<sup>108</sup> The failure of striking the right target was also evidenced when drone operators situated in Nevada targeted two U.S. servicemen in Afghanistan. The two U.S. servicemen were inaccurately identified as "Talibans". The Pentagon completed a report on the failure attack, it was affirmed that the reason behind the mistake was miscommunication between military personnel.<sup>109</sup>

It is also argued by opponents that breaches of the distinction principle create anger and resentment within individuals in countries where the strikes hit. The former counterterrorism adviser David Kilcullen, for the American

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<sup>106</sup> *Supra* note 25, 26 for drone costs.

<sup>107</sup> A/HRC/14/24/Add.6, Alston, Philip, *Study on targeted killings*, 2010, para. 80.

<sup>108</sup> Williams, Bryan, *Predators-The CIA's Drone War on al Qaeda*, University of Nebraska Press, 2013, p. 216.

<sup>109</sup> "Drone Strike Killed Americans", October 17, 2011, available at: <http://rt.com/usa/drone-american-military-report-057/>.

General, David Petraeus, and Andrew Exum, a former Army Ranger who served in Iraq and Afghanistan have argued that drone strikes are not a long term solution. Kilcullen and Exum have argued that the government make mistakes when trying to distinguish “violent extremists” when they hide in population. Kilcullen claims that “Blowing up people’s houses from the air” turns people against the drones instead of bringing positivity about the drones.<sup>110</sup> The following testimony is an indication that there could be truth to these arguments. Faisal Sharhazad, a U.S. based individual originally from Pakistan pleaded guilty for planting a bomb on May 1, 2010 at Times Square in New York. When Shahrzad was questioned by the judge in court on June 21, 2010 he made the following statement;

“The drone hits in Afghanistan and Iraq. They don’t see children, they don’t see anybody. They kill women, children, they kill everybody...I’m avenging the attack...Americans only care about their own people, but they don’t care about the people elsewhere in the world when they die.”<sup>111</sup>

### **3.1.2.1 Signature strikes in keeping with the principle of distinction**

Through the public material that can be found about “signature strikes” and how they are operated, these strikes might be in conflict with IHL. There is no law that governs the specific striking method of the U.S. drone signature strikes. However, the lawful targets to attack in NIAC, according to requirements in IHL are members of an organized armed group and direct participants.<sup>112</sup> The public information that is available about signature strikes, which are based on “patterns of life”, does not suggest that the strikes follow the requirements of direct participation in hostilities. Hence, as the ICRC points out: the individual must be *engaging* in the hostilities to

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<sup>110</sup> David Kilcullen and Andrew Exum, “Death from above, outrage from below”, New York Times, May 16, 2009, available at:

<http://www.nytimes.com/2009/05/17/opinion/17exum.html?pagewanted=all>. Further arguments from Kilcullen can be found in his book “The accidental Guerilla”.

<sup>111</sup> Berger, J.M, *Jihad Joe: Americans who go to war in the Name of Islam*, University of Nebraska Pres, 2011, p. 160.

<sup>112</sup> ICRC, *Interpretive Guidance on Direct Participation*, p. 45.

justify as a direct participant.<sup>113</sup> To be classified as a member of an organized armed group the individual has to function “continuous combat function”, as concluded by the ICRC. However, if the strikes are largely based on mere assumptions, then the targets might not be lawful targets to attack.

When operating signature strikes the U.S. relies on behavior patterns, instead of pre-existing intelligence where the targets identity is known, such as the personality strikes. Therefore there is legal uncertainty about the signature strikes. The U.S. claims that the targets are lawful targets because they are combatants and the U.S. classify the signature strikes as “other militants”. However, analysts mean that it is impossible for the U.S to know whether or not the signature strikes are lawful targets.<sup>114</sup> The targets remain unidentified and it is a controversial striking method since civilians could be a number amongst the unidentified “other militants”. Individuals might be targeted simply because of behavior or association. This means that the identities of the suspects are unknown and the reason why they are targeted is because their behavior patterns seem suspicious.<sup>115</sup> However, suspicion is not enough reason for targeting an individual.<sup>116</sup> For example, an individual who is not a member of an organized armed group is not a lawful target due to “hanging out” with a member of an organized armed group. The factor that could turn an individual into a lawful target is the individuals “engagement in specific hostile acts”, as the ICRC has concluded in their study.<sup>117</sup> For example, if an individual has dinner with a member of an organized armed group, or rides the same car perhaps, will not make the

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<sup>113</sup> ICRC, *Interpretive Guidance on Direct Participation*, p. 44.

<sup>114</sup> An investigation made by NBC News, through a review of classified CIA documents of 114 drone strikes in Pakistan and Afghanistan between September 2010 - October 2011, “CIA does not know which ‘militants’ are killed in drone strikes as it emerges a quarter of victims are unidentified” available at: <http://www.dailymail.co.uk/news/article-2336801/CIA-does-know-militants-killed-drone-strikes-emerges-QUARTER-victims-unidentified.html>.

<sup>115</sup> Hearing before the Committee on the Judiciary House of Representatives, - Drones and the war on terror: Can the U.S target alleged American terrorists overseas? p. 5.

<sup>116</sup> *Supra* note 72, if there is uncertainty about an individual’s status then the civilian status must be chosen, an individual that is only suspected to be a lawful target does not indicate certainty about the individual’s lawful status.

<sup>117</sup> ICRC, *Interpretive Guidance on Direct Participation in Hostilities*, p. 44.



individual a lawful target merely because his daily life appears similar to the life of the member of an organized armed group.<sup>118</sup> However, if the individual is with a group of armed men driving to an active combat zone and (according to ICRC) is “an integral part of [...] a specific act or operation”<sup>119</sup> he could be considered lawful to attack. In that case the individual could be considered as a direct participant in the hostilities. However, if the car is not driving to an active combat zone then the individual accompanying the member could maybe considered collateral damage if struck. In that case, the proportionality question comes in to play. If the collateral damage was excessive to the purpose of the drone operation then it is a breach of the law.

As mentioned in earlier chapter, for direct participators there are three categories that must be fulfilled. If the “signature target” is planning an attack and the U.S. is aware of that, then this individual may be a lawful target as he will be considered a direct participant.<sup>120</sup>

It appears as if a method used for U.S. signature strikes are that “people in an area of known terrorist activity, or found with a top al Qaeda operative, are probably up to no good” as U.S. officials have indicated.<sup>121</sup> This type of striking has been strongly questioned because it does not show a following of the principle of distinction. It is unclear what “an area of known terrorist activity” could include, though some areas could be acceptable. The acceptable areas would be military objects such as al Qaeda compounds that are used for military purposes at all times. Another example is an al Qaeda training camp where training takes place that supports military acts.<sup>122</sup> However, these are strikes aimed at a military object and it is not a strike purposely aimed at an individual. If the individual would be the main target

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<sup>118</sup> ICRC, Interpretive Guidance on Direct Participation in Hostilities, p. 44.

<sup>119</sup> ICRC, Interpretive Guidance on Direct Participation in Hostilities, *International Review of the Red Cross*, Volume 90, Number 872, 2008, p. 1031.

<sup>120</sup> ICRC, Interpretive Guidance on Direct Participation in Hostilities, *International Review of the Red Cross*, Volume 90, Number 872, 2008, p. 1023.

<sup>121</sup> Stanford/NYU Clinic, *Living under Drones*, p. 13.

<sup>122</sup> Heller, *One Hell of a Killing Machine*, p. 10.

and the individual was neither a member of an organized armed group or a direct participant it would be an unlawful attack. If a strike is targeted against a military object whilst unlawful targets are situated within the military object, then the principle of proportionality must be taken into account, and civilian casualties must not be excessive compared to the military gain. However it is prohibited to aim a strike against a military object that is only suspected to be such. Therefore if the signature strikes are used “in an area of known activity” which is only suspected to be a lawful object for attack then that is a breach of the principle of distinction.<sup>123</sup> Basically, a lawful attack depends on whether the object is a military object, an individual directly participating or a member of an organized armed group. In all other cases an attack should not happen.

The signature strikes are of legal concern if the strikes do not follow the principle of distinction. The strikes are of concern since they are based on an individuals “patterns of life” and it is not very clear what that is. There is no indication that “patterns of life” refers to knowledge about an individual’s membership in an organized armed group because of continuous combat function. Therefore the correct effort according to IHL should be to distinguish an individual’s direct and indirect participation rather than “patterns of life”. If the signature target is not a direct participant, but still a signature for target, then the signature strike is most likely in conflict with IHL.

## **3.2 Drone operations and the debate about precaution**

### **3.2.1 Better prepared strikes with drones**

There are arguers who mean that drones are able to take the same precautionary manners that a human actor could. Precaution is taken through the sensors and monitors by the pilot operating the drone. The pilot

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<sup>123</sup> Heller, *One Hell of a Killing Machine*, p. 14.

is responsible for any violations of law, just as if he would be positioned inside the aircraft.<sup>124</sup> A better precautionary method can be taken since drones can be programmed to be more patient in comparison to human beings in unclear areas. Therefore, a better prepared strike could follow.<sup>125</sup> Furthermore the drone operations are usually operated through a process called CDE, which means “collateral damage estimation”. CDE is a way of predicting the collateral damage before the attack. Through the CDE prediction the loss of civilian's in collateral damage is reduced.<sup>126</sup>

### **3.2.2 Precautionary disadvantage to monitor from above**

Advocates argue that since the drone have better precision as a weapon, it can help protect civilians from harm in a better way than other weapons. However, opponents argue that it is not the whole accurate picture. The decision of preciseness and precautionary measures are not really made by the drone itself. Whether or not civilians are uninjured or constant care is taken in a strike is dependent on the evaluations and choices by the human intelligence that operates the drone. Furthermore opponents argue that because the drone operators are located thousands of miles away from the area where the target is could cause difficulty to gather as correct and reliable information that ground forces could collect. Therefore the distance between locations and to monitor from above could instead work as a disadvantage rather than advantage.<sup>127</sup> Philip Alston whom is a strong opponent of drone attacks, has criticized the usage of drones in his Special UN report. Alston believes, through his own mission to Afghanistan, that even for ground forces it is difficult to achieve correct information. Alston claims that testimonies from witnesses and family members of victims have shared that information has been too difficult for the international forces to

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<sup>124</sup> Dijkhoff, Klas, *War, Law and Technology*, Tilburg University, 2010, p.197.

<sup>125</sup> Dijkhoff, *War, Law and Technology*, p.184.

<sup>126</sup> Joint targeting cycle and collateral damage estimation methodology by the General Council 10 November 2010, available at:

[https://www.aclu.org/files/dronefoia/dod/drone\\_dod\\_ACLU\\_DRONES\\_JOINT\\_STAFF\\_SLIDES\\_1-47.pdf](https://www.aclu.org/files/dronefoia/dod/drone_dod_ACLU_DRONES_JOINT_STAFF_SLIDES_1-47.pdf)

<sup>127</sup> Dijkhoff, *War, Law and Technology*, p. 172-173.

interpret and that the forces were too uninformed of local practices. Therefore the international forces could not attain reliable understandings of situations.<sup>128</sup> Alston reports furthermore that, “While air strikes and raids on legitimate military objectives cause many civilian casualties, too many attacks also target civilians who are mistakenly believed to be combatants. This seem to happen because the IMF were too hasty in concluding that suspicious activity was connected to the Taliban and too credulous in interpreting information provided by civilians”.<sup>129</sup>

The drone operator has a responsibility to make an “honest assessment” whether or not civilians have a possibility to take cover before an attack.<sup>130</sup> However, it might be difficult to take cover when dealing with missiles that for example bomb an entire house. Even if the drone operator would give warning before the attack, it is of great danger for civilians to be in the attacking area. Furthermore the problem of “latency” has through the public information come to known as a concern regarding drones. This means that the video shown on the pilot’s screen is delayed, which has caused difficulty to hit the planned target.<sup>131</sup>

Another interesting note on this topic is arguments made that the new generations of soldiers might not have a correct understanding of a battlefield. The youth today are raised with consoles and playing videogames on for example devices such as X-box and PlayStation. The new youth generation raised on these games is used to combat on a screen. Therefore it has been argued that “having such a degree of comfort with the technology certainly poses a risk of yet more dehumanization”.<sup>132</sup> The legal aspects of these concerns when it comes to the fundamental principles of IHL are that the ease of killing could put the principle of precaution in

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<sup>128</sup> A/HRC/11/2/Add 4, Alston, Philip, *Mission to Afghanistan*, 2009, para. 14-18.

<sup>129</sup> A/HRC/11/2/Add 4, Alston, Philip, *Mission to Afghanistan*, para. 14. (IMF is shortened for International military forces)

<sup>130</sup> HPCR Manual and Commentary, 2013, commentary on rule 32 (c) on p. 146.

<sup>131</sup> “The Drone Zone”, available at: [http://www.nytimes.com/2012/07/08/magazine/the-drone-zone.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/07/08/magazine/the-drone-zone.html?pagewanted=all&_r=0).

<sup>132</sup> Dijkhoff, *War, Law and Technology*, p. 171.

jeopardy. When dehumanizing the soldier from the battlefield creates an incorrect feeling of the situation, which may lessen the precautionary care.

### 3.3 Debating the proportionality measures

#### 3.3.1 Drones save lives

Attackers who plan to attack a military object can through different ways of obtaining information estimate the likely number of civilian casualties in a strike. Civilians might become victims of an attack when a building that is a military object is hit. The civilians situated in the building might be workers, such as housekeepers. However, this type of killing is not a crime or unlawful according to IHL. The law of armed conflict tolerates some civilian deaths in attacks. However as mentioned earlier the collateral damage must not be *excessive* in relation to the military advantage from the attack. Therefore the implication of *excessive* is the crux in proportionality matters. While IHL does not give any directions to what is excessive and what is not, it has been said that a “disproportion between losses and damages caused and the military advantage anticipated” should raise concern. If the disproportion is obvious then the civilian choice should be chosen.<sup>133</sup>

One of the main arguments for drone operations, especially the U.S drone attacks, are that due to their precise targeting method these weapons save more lives than other alternatives. Around 2400-3888 people have been and killed from 2004 and up to this point in Pakistan, according to the *Bureau of Investigative Journalism*, whereas 416-959 appear to be civilians.<sup>134</sup> According to the U.S. government a great number of the killings has been

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<sup>133</sup> Sandoz et al. *Commentary on the Additional Protocols*, paras. 1979-80.

<sup>134</sup> Casualty estimates by the Bureau of Investigation, available at: <http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>.

skilled al Qaeda trainers, leaders and bomb makers.<sup>135</sup> U.S. authorities also claim that civilian casualties are very few.<sup>136</sup>

### **3.3.2 Drone attacks are not within proportional measures**

It is lawful to target a member of an armed force who is directly participating in directing, planning or carrying out an attack against a state's forces. However, to target relatives to the member of the armed force is not lawful, unless they as well are direct participants.<sup>137</sup> The problem occurs when drone attacks strike direct participants, but unfortunately the people physically close to him who might be unlawful targets, also become struck. The opponents mean that this situation happens in reality and should not be ignored, especially if the civilian causality is excessive compared to the military advantage. When a drone operator fires a missile it destroys larger areas, in other words, this is not the case of one bullet killing one individual. When drone attacks occur and a target is for example, situated in a house amongst other unlawful targets, the drone operator does not know, unless seen on the monitor screen, if the lawful target escapes the house. Without ground forces and only limited view from above the drone operator might hit and strike with the assumption that the target is in the house, but instead all the unlawful targets get killed.<sup>138</sup> The concern is whether or not it is proportional to commit such act in order to kill one lawful target. Even if precaution was fully taken before the attack, and the attack was a misjudged mistake it cannot justify an excessive amount of civilian death. Furthermore, the fact that distinction between lawful and unlawful targets have become harder and in cases where missions are managed without ground forces, it

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<sup>135</sup> "Senior al Qaeda and Taliban leaders killed in US airstrikes in Pakistan 2004-2014", available at: <http://www.longwarjournal.org/pakistan-strikes-hvts.php>;"Obama's Speech on Drone Policy" May 2013, 2013, available at: [http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html?pagewanted=all&_r=0).

<sup>136</sup> *Supra* note 101.

<sup>137</sup> ICRC, *Interpretive Guidance on Direct Participation in Hostilities* p. 33.

<sup>138</sup> Schmitt, *Yearbook of International Humanitarian Law*, p.322.

becomes harder to estimate civilian casualties and stay within proportional measures.<sup>139</sup>

The arguments that propose the U.S. drone attacks have killed a disproportionate number of civilians stems from the available public information, especially the Pakistani press on the attacks in Pakistan. In an article the UN urges the importance of drone attacks to be reported when civilian become victims. The secrecy around drone use and the lack of detailed information about the attacks remain a problem according to the UN rights experts.<sup>140</sup> The following are only a few news report examples from attacks with suggested disproportionate civilian casualties.

The Pakistani daily news, *Dawn*, reported in 2010 that over 700 were killed in 44 U.S drone strikes in 2009. *Dawn* reports that only five of the drone attacks were able to strike their targets, and that the cost for those five targets has been 700 innocent civilians.<sup>141</sup> Comparable reports have been made through news reports and professional journals in western press as well. The Guardian reported in July 27, 2011, that the claim of few civilians as victims of drone strikes is disputable.<sup>142</sup> In The Guardian article a local Pakistani reports that “for every 10 to 15 people killed, maybe they get one militant”. This certain local Pakistani has made it his purpose to photograph and document the drone missiles and he attends the attacked spots even though the danger is high.

An example that bring concern as a breach of not only the proportionality principle, but also the distinction and precaution principle occurred in February 2010 in Uruzgan Province, Afghanistan. A drone attack caused the

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<sup>139</sup> Bianchi Andrea & Naqvi Yasmin, *International Humanitarian Law and Terrorism*, Oxford and Portland Oregon, 2011, p. 165.

<sup>140</sup> “UN rights experts call for transparency in the use of armed drones, citing risks of illegal use” available at: <http://www.un.org/apps/news/story.asp?NewsID=46338&Cr=terror&Cr1=drone#.VFf5X80xTCR>.

<sup>141</sup> “Over 700 killed in drone strikes in 2009”, available at:

<http://www.dawn.com/news/958386/over-700-killed-in-44-drone-strikes-in-2009>.

<sup>142</sup> “US drone attacks in pakistan claiming many civilian lives, says campaigner”, available at: <http://www.theguardian.com/world/2011/jul/17/us-drone-strikes-pakistan-waziristan>.

death of 23 individuals because of wrong information. In this case, drone operators attacked three trucks filled with civilians. The striking failure was due to mistaken “patterns of life”. The drone operators thought the trucks were “Taliban” convoys, even though the convoys were tracked by the drone operators for three and half hours before the attack. The U.S. Army General Stanley M. McChrystal and Major General Timothy P. McHale wrote a report on the incident and declared that the misguided attack was due to miscommunication. In the report it was stated that the information from the predator crew was “inaccurate and unprofessional”.<sup>143</sup> It was also revealed that predator operators failed to notice women in the convoy, even though the operators spotted two children nearby. The information that the drone operators provided led the ground crew to believe the vehicles carried only “armed military-aged men”.<sup>144</sup>

Opponents to the drone programs mean that civilian casualties are more than reported and that the secrecy and different reports of the drone operations are therefore an issue.<sup>145</sup> An extensive research on drone attack’s affect on civilians resulted in a report made by the International Human Rights and Conflict Resolution Clinic of Stanford Law School (Stanford Clinic) and the Global Justice Clinic at New York University School of Law (NYU Clinic).<sup>146</sup> The report indicates that the U.S. drone program creates fear amongst the civilian population. The drones can fly above the civilian communities throughout day and night and that creates anxiety amongst civilians. Civilians live under fear because strikings has hit civilians and rescuers before, therefore civilians know that if a strike hits they cannot protect themselves. The report implies that some people even stay away

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<sup>143</sup>“U.S Report faults Air Force drone crew, ground commanders in Afghan civilian deaths”, available at: <http://articles.latimes.com/2010/may/29/world/la-fg-afghan-drone-20100531>. Copies from part of the investigation report can be found at: <http://www.isaf.nato.int/images/stories/File/April2010-Dari/May2010Revised/Uruzgan%20investigation%20findings.pdf>.

<sup>144</sup> “Drone operators blamed in airstrike that killed Afghan civilians in February” available at: <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/29/AR2010052901390.html>.

<sup>145</sup> Stanford/NYU Clinic, *Living under Drones*, p. 144.

<sup>146</sup> Stanford/NYU Clinic, *Living under Drones, Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan*, 2012.



from gatherings in groups, or even educational and financial opportunities because of the fear to draw attention to the drone operators.<sup>147</sup> The report also indicates that victims of the drone attacks in Pakistan affirm the fear of helping injured civilians in drone attacks. On several occasions have drone operators struck one area twice to make sure the target is really hit. In the report this is also referred to as “double tap strikings”. When rescuers run to the scene to help victims, they have too become injured due to the “double tap striking”.<sup>148</sup> For example, a report from the *Bureau of Investigative Journalism* reported the following:

“A three- month investigation including eyewitness reports has found evidence that at least 50 civilians were killed in follow-up strikes when they had gone to help victims. More than 20 civilians have also been attacked in deliberate strikes on funerals and mourners”.<sup>149</sup>

The reports on the “double tap striking” bring concern for all three fundamental principles of IHL. The fear civilians live with as the Stanford/NYU study shows, could also be a sign of vast occurring collateral damage, instead of minor damage as the U.S. claims. Furthermore, the double tap strikings might not only impose a breach of the proportionality principle, since it could raise the risk for higher civilian casualty, which then could lead to excessive civilian casualty, but also the principle of distinction. The rescuers who run to the attacked scene could very well be medical personnel, and those are as explained in earlier chapters, unlawful targets.<sup>150</sup>

Another incident which has been given attention to in media occurred in December 12, 2013 in Radda, Yemen. A U.S. drone shooting missiles at the wedding party killed guests. The organization *Human Rights Watch* published a report on the accident and found through interviews of the

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<sup>147</sup> Stanford/NYU Clinic, *Living under Drones*, p. 55-56.

<sup>148</sup> Stanford/NYU Clinic, *Living under Drones*, p. 74-76.

<sup>149</sup> “Obama terror drones: CIA tactics in Pakistan include targeting rescuers and funerals” available at: <http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/>.

<sup>150</sup> *Supra* note 57.

victim's relatives that there were civilian victims in the attack.<sup>151</sup> Even if a missile was to hit a lawful target in a situation as this, the proportionality principle must still be respected. Excessive killing of unlawful targets is not lawful in order to achieve a necessary military goal. Collateral damage is accepted in IHL but a misuse of that permission is illegal. Perhaps the argument that it becomes easier to kill is already happening in the drone operations.<sup>152</sup>

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<sup>151</sup> Human Rights Watch report, *A wedding that became a funeral, U.S drone attack on marriage procession in Yemen*, available at: <http://www.hrw.org/node/123244/section/9>.

<sup>152</sup> *Supra* note 105.

# 4 Conclusions

## 4.1 Overall conclusions

One could say that unmanned aerial vehicles as a weapon do not impose a legal issue alone. The principle of distinction could be respected if the cameras on the drone are as good as human eyes, thus the argument of drones in comparison to strikes by military airplanes. Furthermore, the possibility to have vision through the drone's cameras for a long time without feeling stressed and consequently cause an unnecessary strike is a positive factor. It could also be argued that within the principle of proportionality the drone itself is not much of a different weapon than a bomb. The drones fire missiles and can also drop bombs. On the precautionary matters the drone is also a weapon that through its observing capabilities could generally be considered to maintain the precautionary principle. Obviously, for states that chose to use drones in combat gain many benefits. Using drones in combat spares lives of pilots because they sit in a safe seat far away from the combat zone with no fear for their own survival. In addition to that, the absence of a pilot positioned in the vehicle means that no human emotions inside the vehicle could risk affecting the operation on a combat field. At the same time the state does not only spare lives but also money since drones are inexpensive and easy to produce. Moreover, drones are not only capable of firing missiles or drop bombs but this vehicle is also able to collect information through surveillance. The drone is efficient to fly for many hours without becoming tired, as a human being would. This all lead to the conclusion that drones are a suitable weapon in advantage for the attacking states, since their own soldier's life is not put at risk. However, the legal questions and issues remains regarding how states will manage the legal regulations of IHL when operating drones.

In my viewpoint the legal concerns that drones could impose are through each single strike and how those are managed. Within the context of IHL legal concerns occur when a target is struck but was not a lawful target due

to breach of the distinction principle. The crucial question becomes whether the target was a “fighter”, a direct participant or an individual taking no active part in the hostilities. Therefore it might not be the drone’s technical functions that may raise the legal questions, but the way the strikes are managed. The issue lies in how states decide to manage their drone usage and if they manage it within the framework of IHL. When a state has access to a powerful weapon as a drone, it must also be used with responsibility and respect for the laws governing its usage. Since the drone fires missiles it is of great importance to respect the principle of distinction and proportionality in order to protect civilians, as IHL requires. Regarding the strikes based on “patterns of life” it seems as a heightened risk of not judging an individual’s status based on engagement in hostility, but more as a judgement based on suspicion. To attack a target based on suspicion is, as examined in this thesis, not legal.

Obviously it is difficult to make proper valuations and sort out reliable sources when dealing with the effects of the drone strikes. However there has been, as shown in this paper, that in drone attacks mistakes have occurred, as admitted by the U.S. Mistakes such as those raise legal difficulties, such as if the drone operator is capable of respecting the principle of distinction with this type of weapon. Even when the ground forces supply the drone operator with information mistakes have occurred due to miscommunication.<sup>153</sup> Perhaps to rely too much on the surveillance with the help of a drone causes misjudgement. Cameras and sensors might not give the correct information, compared to if the soldier would have been physically on spot to manage the attack.

The operator of the drone must make an “honest assessment” to whether or not civilians have a possibility to take cover before an attack or not.<sup>154</sup> This in my opinion might be difficult when dealing with missiles for example that bomb an entire house. Even if the drone operator would give warning

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<sup>153</sup> *Supra* note 143.

<sup>154</sup> HPCR Manual and Commentary, 2013, commentary on rule 32 (c) on p. 146.

first, it is of great danger for civilians to be in the attacking area. Another concern in my point of view is that a drone fly from up above and have a view of directly overhead which could result in mistakes. This is because a situation might not be as it looks like from up above. A view of someone burying a bomb by the side of the road might be a child playing with toys. If the confessions from the former drone operators Heather Linebaugh, Bryant Brandon and James Jeffrey are correct then the drone cameras do not have the best view.<sup>155</sup> The cameras and sensors on the drone play an important role. Since the drone flies on a high altitude the pictures must be zoomed in and the assessment will be based on how good the pixels are at a high zoomed in picture. The factor that could be weighed against that is the fact that drones can surveillance an area for a longer time than a physical pilot situated in an aircraft. However the cameras must still be good enough to follow the distinction principle and distinguish the lawful targets from unlawful targets.

Another problem could be the rumored latency issue. What happens if the lawful target detects the drone and manages to escape? From the time that the drone operator presses the button “hellfire” it takes between 15-20 seconds for the attack to occur. In addition to that, the drone operator’s video is delayed by a few seconds. What happens then if a civilian, during those seconds enters the targeted area? The drone operator might have already pressed hellfire. Perhaps strict precautionary restrictions when risking innocent individuals lives is not a bad idea. Of course the civilian could be count as collateral damage. However, in the precautionary matter the question is if the drone as a weapon is suitable if collateral damage is supposed to happen multiple times because of latency issues. If that is the case then drones should be improved before they are used.

Political, moral and ethical questions are also of concern. Questions as if it is a fair method of combatting. Perhaps the fact that the pilots are not endangering their lives causes the political decision to use armed force into

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<sup>155</sup> See pages 32-33.

an easier option. The distance between the target and the individual in control of the powerful weapon – the drone operator might impose a risk to lessened care taken in battle. Injured targets that are hit the first time might become “hors de combat” which means that they have surrendered, but only to get struck again, because the drone operator behind the screen does not know what the target’s move really is signaling. Furthermore dehumanization follows when using weapons distant from targets, because the weapon holder does not get the real feeling of the applied damage caused as if he had been on the battlefield.<sup>156</sup> For the attacking state there are no deaths, grieving families, and it is cheaper to use drones than to have military soldiers on the combat locations. However, political, moral and ethical concerns have not been the aim of this paper, but only legal concerns. Though Philip Alston’s report should be given more attention to. In Alston’s report the concern about drone operators developing a “play station mentality” is portrayed. The fact that the operators are killing human beings through pressing buttons on a machine through viewing the scenario on a screen might result in an incorrect value for the right to life. Therefore acting justly might not be an ability the new raised drone operator will be capable of.<sup>157</sup> When a person’s own life is not a stake it becomes a different battlefield, to be able to click a button to kill as a daily routine may not be as foreign, difficult or scary after a while. For these reasons the risk of becoming more capable of killing increases and less care is taken which could increase the risk for casualties.

Legally viewed, if the lethal force carried by the attacking state can operate a drone attack in accordance with the fundamental principles of IHL, then the drone operation leans towards lawful. Hence the drone operation must be proportionate and necessary to the military purpose and the drone operators must be able to distinguish between lawful and unlawful targets. Furthermore, if collateral damage should occur it must be minimized, meaning it may not be excessive to the military purpose. It could be hard for

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<sup>156</sup> Dijkhoff, *War, Law and Technology*, p. 173-174.

<sup>157</sup> A/HRC/14/24/Add.6, UN, Alston, Philip, *Study on targeted killings*, 2010, p. 25.

a court to settle that the use of drones could never be applicable with the principles of IHL. Even though, due to many media reports and studies, as discussed in this thesis, some drone attacks might have already failed to respect the fundamental principles of IHL. If drones become improved without technical issues the main problem of its use lays in how an attack is managed. Because of the secrecy concerning the U.S drone program it is difficult to determine how carefully the program manages to follow IHL principles in each strike. However the different numbers of civilian casualties in reports from the U.S. government and media reports should raise concern and question the liability of the U.S drone usage. The U.S government claims that the drone program satisfies all fundamental requirements in IHL. But after my examination I strongly doubt that the U.S. drone program, especially the “signature strikes” are in accordance with the fundamental principles of IHL in a non-international armed conflict. Therefore it is critical to keep the drones and the drone operations under a constant legal microscope. Even if scholars would consider the drones as a suitable weapon, it is still dependent on what weapons the drones are compared to and how drone operations are managed.

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