Targeted killings of ‘suspected’ terrorists carried out by US drones – an analysis of the applicability of international humanitarian law

An overview and analysis of the practice of drone targeted killings and the complex legal questions this practice is raising with regards to international humanitarian law and its applicability to the “war on terror”.

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<td>UAV</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights of 1948</td>
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1 Introduction

1.1 Statement of the problem

Unmanned drones – or unmanned aerial vehicles (UAV) - are increasingly being employed to conduct targeted killings of ‘suspected’ terrorists in the context of the “war on terror”.¹ This raises a lot of questions, both of moral, ethical, political and legal character. This thesis will focus on the legal concerns surrounding these issues. The questions and concerns are intricate and complex. What is targeted killings and how do they comply with international humanitarian law, especially in regards to the “war on terror”? Can the “war on terror” be categorized as an armed conflict? Which legal requirements need to be fulfilled for an armed conflict to be determined? How does targeting on the basis of ‘suspicion’ comply with international law and human rights law? How should certain fundamental principles of international humanitarian law be interpreted and applied? These are some of the questions that will be discussed below.

The use of drone strikes as a method to target and kill has sparked international criticism from legal experts.² However, it seems that the international community has been hesitant to interfere with the practice. One of the reasons for this might be the legal controversy surrounding the use of drones and its legality.³ There is a pressing need for the international community to reach an international consensus on certain key legal notions within international humanitarian law with regards to the use of lethal force on ‘alleged terrorists’ in the “war on terror” and whether the “war on terror” falls within the material scope of international humanitarian law. The legality of drone targeted killings, and whether IHL is the applicable law to determine the lawfulness, is an intensely debated issue.

This master thesis focuses largely on the four Geneva Conventions of 1949 and the two additional protocols of 1977.⁴ This is the law that applies during wartime, also known as international humanitarian law (IHL). The most important question will therefore be whether IHL is applicable to the “war on terror” and thus whether IHL can be applied when determining the legality of drone targeted killings. For IHL to be applicable the “war on terror” has to constitute an “armed conflict” under IHL. When analysing whether the “war on terror” falls within the scope of IHL the thesis won’t necessarily focus on the practise of one specific State. How-

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¹ See as an example the situation in Yemen in chapter 1.5.
² David Whetham (2017) p. 95.
³ Craig Martin (2017) p. 38.
⁴ The US and Pakistan have not ratified the additional protocols and are therefore not formally bound. However, some provisions are the result of customary law and are considered fundamental humanitarian principles. Customary law and fundamental principles of humanitarian law are binding for the US and Pakistan.
ever, as the title implies, there will be partial focus on the US as a State actor. Drone targeted killings carried out in Pakistan and Yemen will be used to illustrate the current practice. It is, however, important to clarify that the use of drones is not limited to the US. That being said, it is undoubtedly their practice of using drones to kill ‘suspected’ terrorists that has attracted the most attention from the international community.

The term ‘drones’ will in this thesis be understood as remote-controlled unmanned aerial vehicles equipped with artilleries and capable of targeting individuals and execute killings. They are a quite new appearance in armed conflicts and have to some extent replaced piloted bomber aircrafts. They are changing the way hostilities are being fought. Initially they were planned for intelligence gathering and investigations. Drones used for these purposes also raise legal questions. However, in this thesis the focus will be on the use of ‘killer’ drones.

Sadly as their use has increased, so has their misuse. It has been reported that the use of drones for targeted killings in some incidents has led to high civilian casualties and illegitimate killings (more about this in chapter 1.5).

1.2 The focus of the thesis

This thesis will concentrate on IHL’s applicability and the lawfulness of drone targeted killings carried out by the US in the context of the “war on terror”. To assess whether IHL is applicable I will both have to examine whether the “war on terror” can be regarded as an armed conflict under IHL and by doing so I find it relevant to also assess the legal status of terrorists under IHL. The thesis will also briefly explain how the situation in Pakistan and Yemen is today. Pakistan and Yemen will here work as examples of illustration. The reason these two countries are chosen is because the US has carried out a large number of drone strikes in these two areas. These drone strikes have lead to a high number of civilian casualties. This will be further explained in chapter 1.5. I will also discuss what the consequences are if IHL is regarded not applicable and what consequences this will have for the legality of drone use in regards to international human rights law. The thesis will also briefly analyse international humanitarian laws relationship to international human rights law and their parallel applicability.

The thesis will try not to focus on jus ad bellum, which is the law that determines when the use of armed force is acceptable. This includes the right to self-defence under the Charter of

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5 The White House (2013). Former President Obama mentioned in his speech that drones were initially planned for intelligence gathering and investigations.

the United Nations and the criteria for when an armed attack is justified. However, it might be appropriate to mention this law briefly when taking into consideration that some armed attacks that qualify as self-defence under the Charter of the United Nations, triggering *jus ad bellum*, often also qualify the start of an “armed conflict” making *jus in bello* applicable.7 *Jus in bello* is the law applicable to the conduct of hostilities during an armed conflict.8 Thus, it is the law applicable once an armed conflict has started, also referred to as international humanitarian law (IHL). This thesis will not focus on the legality of the use of drones as a weapon after international weapon treaties.

The primary questions this thesis will examine are *whether IHL is applicable to the “war on terror” and thus whether drone targeted killings, with focus on those in Pakistan and Yemen, are legal under IHL if applicable*. This involves an examination of what is the legal status of terrorists under IHL and whether the use of lethal force based on ‘suspicion’ is in accordance with IHL and IHRL. The thesis will briefly examine *how targeted killings of ‘suspected terrorists’ is a violation of international human rights law*, especially with regards to the right individuals have to be protected from deprivations of life. Even if drone targeted killings are compliant with IHL, it might not be compliant with international human rights. This is where the complexity really presents itself. However, the main focus will be on international humanitarian law.

### 1.3 Method, sources and research questions

As a legal positivist my conclusions will primarily be based on written rules, regulations, judgments, and principles that have been expressly endorsed and recognized by judicial bodies and States. However, in fear of not being able to think “outside the box” I will find it both very important – also very interesting - to research the diverse opinions of law professors and academics on how to interpret the Geneva Conventions of 1949, including the two additional protocols, and how to view the “war on terror” and the legal status of terrorists and drone targeted killings. This will be reflected in my use of sources. The research is primarily based on literature review.

While writing it is important for me to try and find professors that disagreed with my own line of thoughts and legal point of view, and track down the professors disagreeing with each other. I find this to be important in order to show different interpretations of the law *de lege lata*,

but also some de lege ferenda perspectives when this seems appropriate. De lege lata and de lege ferenda discussions will, however, be noticeably distinguished.

To summarize: in this thesis I intend to determine whether IHL is applicable to the “war on terror” and what legal status terrorists enjoy under IHL. I also intend to determine the legality of targeted killings carried out by drones aimed at suspected terrorists. I will conduct the research from an armed conflict model. This means that the most central question will be whether IHL applies to “the war on terror”, thus whether the “war on terror” can be regarded as an armed conflict under IHL. If IHL applies, one can use IHL when determining the legal status of terrorists and the legality of using drones to target and kill suspected terrorists.

The main questions will be as follows

• Is IHL applicable to the “war on terror”?
• Can and should the “war on terror” be regarded as an armed conflict?
• Is targeting on the basis of suspicion consistent with international humanitarian law and international human rights law?

Supplementary questions will be as follows

• Can a “terrorist group” be a party to an armed conflict?
• Does IHL offer any protections to terrorists as combatants?

1.4 Definition of targeted killings

This thesis revolves around the use of drones to carry out ‘targeted killings’. The term ‘targeted killing’ means the use of lethal force against a specific person by a State official or by the orders of a State official with the intent to eliminate the person.9

Summarized one can say that ‘targeted killings’ have five cumulative elements in common:10

1) They consist of the use of lethal force against another human being
2) They have to have an element of intent (in contrast to unintentional or accidental killings), premeditation (in contrast to acts driven by impulse or passion) and deliberation (in contrast to deaths that are intended and premeditated, but is still not the authentic

aim of the operation, as opposed to ‘targeted killings’ where the actual aim of the operations are the death of the individual).

3) They have to be aimed at specific persons
4) Those specific persons are not in the custody of those who target (hereby excluding executions)
5) They must be subjects governed by international law (subjects of international law are primarily States. Thus the ‘targeted killing’ must be carried out by a State official or by the orders of a State official, or a non-State actor to the extent that non-State actors can be regarded as subjects of international law. This will be more discussed in chapter 4 and 5).11

Targeted killings may be committed both in peacetime and during armed conflicts. The term ‘targeted killings’ is not defined in international law, however, it is widely used and defined by academics.12 What lies in the term ‘targeted killings’ differ from what lies in the term ‘assassinations’: while ‘assassinations’ are always illegal under international law (generally understood as murder), ‘targeted killings’ might be legal in some circumstances.13

The intention behind a ‘targeted killing’ can both be of punishing or preventive character.14 It’s important to distinguish between the different functions behind the targeted killing and with which intention the act is performed since this distinction can have an important influence on the legality of the act.15 Sometimes targeted killings are carried out in an attempt to save someone else’s life, or plural lives. However, killing on the basis of ‘suspicion’ and not concrete evidence are what makes targeted killings morally and legally complex. And that is what this thesis will focus on. This thesis will only focus on the targeted killings done by drones to kill ‘suspected’ terrorists in order to prevent terrorist acts from happening, combat global terrorism in the context of the “war on terror”, and eliminate threats or those responsible for 11 September 2001.

Although State sponsored ‘targeted killings’ are not a new phenomenon, the use of drones to carry out ‘targeted killings’ is a fairly new method of warfare.16 The first lethal drone strike registered, where the intention was to eliminate a specific target, was possibly the one that found place in Afghanistan in February 2002, when CIA target someone they suspected were

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15 Ibid, see also p. 14.
Osama Bin Laden, but later found out wasn’t. Three men – likely concluded to be civilians gathering scrape metal - were killed.\textsuperscript{17} Unfortunately this isn’t the only time a drone strike aimed at specific persons has lead to civilian casualties, unintentional deaths, collateral damage to property and other social, economic and cultural resources.\textsuperscript{18}

The rules that regulates whether “targeted killings” are legal or illegal vary depending on the specific situation. “’Targeted killing” is not a term defined in international law, consequently it doesn’t fit perfectly into any specific legal framework.\textsuperscript{19} To figure out de lege lata one therefore has to analyse the different scenarios in relations to the applicable law.\textsuperscript{20} Since this thesis will focus on the killing of ‘suspected’ terrorists in the context of the “war on terror”, it needs to be analysed whether IHL is applicable or whether IHL is inadequate to deal with “the war on terror”. When this is examined the thesis will further go on to examine whether targeted killings of ‘suspected’ terrorists are in compliance with IHL (if applicable) and IHRL.

1.5 The “war on terror” – overview of the situation in Pakistan and Yemen

In May 2013, President Barack Obama held a speech at the National Defence University regarding US drone policy and counterterror policy.\textsuperscript{21} In his speech the former President labelled the US drone operations in Pakistan and Yemen (amongst others) as a part of a legal war by saying:

“Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war -- a war waged proportionally, in last resort, and in self-defense.”\textsuperscript{22}

In his speech the former President also emphasized the struggles relating to tackling the threat of global terrorism, however, stating that the US drone programme was legally superior to other alternatives.\textsuperscript{23} As other alternatives he mentioned using Special Forces or ground troops to capture and kill ‘suspected’ terrorists in countries where the US was not formally at war.\textsuperscript{24}

\begin{footnotesize}\begin{itemize}
\item[17] Craig Martin (2017) p. 41, see also John Sifton (2012).
\item[18] Craig Martin (2017) p. 41-43.
\item[19] UNHRC UN Doc. A/HRC/14/24 Add.6 (2010), p. 5.
\item[21] Axel Gerdau (2013).
\item[22] The White House (2013).
\item[24] Ibid.
\end{itemize}\end{footnotesize}
What can be gathered from this speech is 1) that the US Government view itself at war with terrorist organizations, such as al Qaeda, Taliban and associated forces. With associated forces one might also include ISIS (the Islamic State), considering that ISIS is deemed to have originated, in part, out of al Qaeda.\textsuperscript{25} Drone strikes directed at ISIS have also been registered.\textsuperscript{26} 2) Another fact that can be gathered from this speech is that drone strikes are the preferable method of warfare to capture and kill alleged terrorists, especially in difficult terrain and where the US does not have ground troops.

The US government are of the opinion that drone strikes respect human rights. US State officials, also former President Barack Obama, argues that the use of drones to perform drone targeted killings has only improved the respect for human rights.\textsuperscript{27} They argue that drones have a much better accuracy than other alternatives, thus making them more preferable in regards to the principle of proportionality under IHL.\textsuperscript{28} The international community on the other hand, including Human Rights Watch and Amnesty International, is of another opinion.\textsuperscript{29} They claim, amongst other things, that the more restricted framework of IHRL is the framework applicable and not IHL.\textsuperscript{30} Which of the two frameworks that are applicable will be discussed further in chapter 4 and 5.

Correct and trustworthy data regarding drone targeted killings is difficult to collect. However, some data is available through the independent, not-for-profit British media organization The Bureau of Investigative Journalism. They are common known public platform, known for providing mostly accurate data. The Bureau of Investigative Journalism claims that the US Government have carried out drone strikes in Pakistan since 2004 and in Yemen since 2002.\textsuperscript{31} All targets have been deemed to have ties to al Qaeda or Taliban, but unfortunately civilian causalities have happened and wrong assumptions have been made.\textsuperscript{32}

The Bureau of Investigative Journalism reports that there have been 424 drone strikes in Pakistan between 2004 and 2016, resulting in between 2500-3992 deaths where between 424-966

\textsuperscript{25} Council on Foreign Relations (2016).
\textsuperscript{26} H. Cooper and E. Schmitt (2016).
\textsuperscript{27} Daniel R. Brunstetter and Arturo Jimenez-Bacardi (2017) p.73, see also The White House (2013) and Obama's speech.
\textsuperscript{28} Ibid.
\textsuperscript{29} Daniel R. Brunstetter and Arturo Jimenez-Bacardi (2017) p. 72.
\textsuperscript{30} Ibid.
\textsuperscript{31} The Bureau of Investigative Journalism (2017).
\textsuperscript{32} Ibid.
where civilians and between 168-207 of these were children. In Yemen there has been reported and confirmed between 111-120 drone strikes between 2002-2016 (with only one drone strike before 2009) resulting in the deaths of between 474-693 individuals, where 64-94 of these were confirmed to be civilians and of these 7 children. However, the possible number of deaths, deaths of civilians and children are estimated to be much higher. In Yemen there has been reported and confirmed between 111-120 drone strikes between 2002-2016 (with only one drone strike before 2009) resulting in the deaths of between 474-693 individuals, where 64-94 of these were confirmed to be civilians and of these 7 children. However, the possible number of deaths, deaths of civilians and children are estimated to be much higher.

In Pakistan one does notice a decrease in drone strikes from 2004-2016, with only 3 strikes in 2016. This is a significant decrease in comparison to the previous years. However, drone targeted killings are still happening in Pakistan with the last one reported 2 March 2017 (last checked 4 April 2017) and many worry that President Trump might increase the drone strike operation in the years to come.

In Yemen, however, one does notice an increase in the amount of strikes, or at least no reduction. 2016 was the year with the most drone strikes with as much as 32 drone strikes reported. In 2017 there has been reported 4 strikes so far (last checked 4 April 2017).

1.6 Outline

In Chapter 2 I intend to shed light on the difficulty determining what lies in the term ‘terrorism’ and ‘terrorists’ in international law and the lack of definition. It is important to shed light and clarify these problems in regards to my later analysis in chapter 4 where I’ll try and determine the legal status of terrorists and whether terrorists have any place in IHL. Chapter 2 will here work as an explanation as to why the legal status of terrorists is unclear and problematic.

Chapter 3 describes the two different legal frameworks and their relationship. It also gives an introduction to the applicability of IHL to the global war on terror. The intention is to give an introduction to what conditions must be met for the “war on terror” to be governed by IHL. The most important conditions and whether they are met will be discussed further in chapter 4.

Chapter 4 examines whether the “war on terror” fits into the armed conflict model in IHL, either as an international armed conflict or a non-international armed conflict. Thus, making IHL applicable. This chapter will also contain a discussion regarding the legal status of terror-

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33 Ibid.
34 Ibid.
35 Rory Geoghegan (2017), see also P. Bergen and D. Sterman (2017).
36 The Bureau of Investigative Journalism (2017).
ists within the two armed conflict models and whether IHL is adequate or inadequate to deal with the “war on terror” based on this discussion.

Chapter 5 examines the human rights perspective on the legality of drone targeted killings on ‘suspected’ terrorists in regards to the right not to be arbitrarily deprived of life. This chapter intend to shed light on the relationship between IHL and IHRL and how they concur when the right to life conflicts with the use of lethal force in armed conflicts. I find it important, in case the conclusion is that IHL is not applicable, to discuss how human rights deals with the generally non-derogable right to life in relations to legitimate and non-legitimate ‘targeted killings’.

Chapter 6 will contain the conclusion as to whether or not IHL is applicable to the targeted killings on ‘suspected’ terrorists carried out by the US in the context of the “war on terror”.

2 Defining terrorism in international law

“Few words are plagued by so much indeterminacy, subjectivity, and political disagreement as ‘terror’, ‘terrorize’, ‘terrorism’ and ‘terrorists’.”

Identifying and defining terms is of fundamental importance when practicing law. Without a clear definition of term used it is almost impossible to understand the applicable law. The practice of drone targeted killings in the context of the “war on terror” to kill alleged ‘terrorists’ is a criticized practice. One of the reasons the practice has sparked international criticism is because the terms ‘terrorists’ and ‘terrorism’ is very politically loaded and vague. There is no homogenous agreement on what terrorism precisely amounts to. The UN has so far failed to produce a definition of ‘terrorism’ generally accepted by the international community.

In this chapter I will present a short examination of the evolution of the definition of terrorism in international law and some concerns related to the lack of definition.

2.1 ‘Terrorism’ as a heated and evocative term throughout history

The word ‘terror’ in the Oxford English Living Dictionary is described as extreme fear. The word ‘terror’ is a Latin word that found its way into the French and English language in the 14th century. The conceptions of ‘terrorism’ and ‘terrorists’ entered political discussion

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38 See chapter 2.2.
39 https://en.oxforddictionaries.com/definition/terror
in the late 18th century in relation to the French Revolution.\textsuperscript{42} The idea of terrorism as a State-controlled instrument to gain control or as an abusive method to gain or demonstrate power continued until the end of World War II. During World War I and World War II States had used their military to ‘terrorize’ other States. They also used ‘terror’ against own citizens as a means of social control.\textsuperscript{43} In today’s society terrorism is mainly thought of as a non-State practice and ‘terrorists’ are regarded as non-State actors.\textsuperscript{44} Today ‘terrorists’ is mainly regarded as fundamentalist religious opponents, or fundamentalist political opponents, without any formal ties to any State or territory, which take prisoners, carry out attacks on civilians and where the attacks are unpredictable and non-compliant to international customary law or international humanitarian law.\textsuperscript{45} Their method of warfare therefore causes tremendous fear amongst civilians.

2.1.1 The impact of 11 September 2001

Today’s conception of ‘terrorists’ and ‘terrorism’ is somewhat characterized by the attacks on the twin towers on 11 September 2001. This was a devastating attack that shook the whole world. After 11 September 2001 one can undoubtedly claim that the terms ‘terrorism’ and ‘terrorists’ got even more evocative, especially in the United States, making it even harder to reach an international consensus on how to legally define terrorism.

The first international respond to the assaults on 11 September 2001 was the UNSC Resolution 1373 of 28 September 2001.\textsuperscript{46} Historically this is one of the most radical UN resolutions.\textsuperscript{47} However, not even this resolution contains a definition of terrorism, which is extraordinary considering its strong obligations for Member States to actuate counter-terrorism measures.\textsuperscript{48} When the ‘war on terror’ was declared, despite the lack of a legal definition, the international community did something troubling when they conflated all unconnected terrorists together into an undifferentiated enemy, ignoring the specificity of the different ideologies behind the different terrorist-attacks/groups.\textsuperscript{49}

\begin{thebibliography}{99}
\bibitem{42} Reuven Young (2006) p. 27.
\bibitem{43} Ben Saul (2006) p. 2.
\bibitem{44} Ibid.
\bibitem{45} Ibid.
\bibitem{46} UNSC S/Res/1373 (2001).
\bibitem{47} Mark Leon Goldberg (2012).
\bibitem{48} Alex Conte (2005) p. 11.
\bibitem{49} Ibid p. 3, see also Jeffrey Record (2004) p. 52-53.
\end{thebibliography}
2.1.2 Lack of definition leads to a failure to discriminate

To have a good strategy, make intelligent choices and use the right resources one has to discriminate the threats.\(^{50}\) A failure to discriminate between different threats and their origin has a lot of worrying consequences. First, not discriminating between the different ideologies behind the different terrorists groups might make the enemy grow larger and more vicious. Knowing their case is not being heard nor seen might make them feel overlooked, and again make them more rebellious. Second, an undefined enemy leads to fear, which again leads to lack of trust. Civilians of same origin and race as the ‘terrorists’ might be judged and mistaken for being a part of the terrorists group and therefore wrongfully targeted. Not only is targeting civilians a breach of international human rights and international humanitarian law, but it can also increase the recruitment of terrorists. Revenge is thought to be one of the most important motivational causes of terrorism.\(^{51}\) A failure to discriminate dehumanizes the opponents, it invites unfortunate mistakes and a failure to discriminate between greater and lesser threats can also have disastrous consequences.\(^{52}\)

The situation that occurred after 11 September 2001 is a prime example of the consequences that occur when the enemy is not identified clearly enough. In 2003 the United States, as a response to 11 September 2001, invaded and occupied Iraq. When doing so they misjudged a brutal, but controlled, state for an extension of a global terrorist threat.\(^{53}\) They invaded Iraq and declared “war on terrorism”. The “war on terror” is still to this date a complex and undefined war.

2.2 Attempts to define terrorism in international treaties

Terrorism has been on the international agenda since 1934 when The League of Nations started discussing a draft on criminalizing terrorism. The result of the draft was the Convention for the Prevention and Punishment of Terrorism of 1937 (Geneva Convention of 1937).\(^{54}\) This was the first international treaty regarding counter-terrorism, but it never came into force. However, one cannot overrate its significance. It was the first wide-ranging, thought-through and many-sided convention regarding the need to battle terrorism.\(^{55}\) It also contains an attempt to define terrorism:

\(^{53}\) Ibid.
\(^{54}\) United Nations Counter-Terrorism Implementation Task Force (date unknown).
“(…) criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons, or the general public.”

However, the definition is wide, unspecified, simplified and vague. This opens up for many different interpretations of ‘terrorism’. The more undefined a concept is, the easier it is to abuse. A lack of a more comprehensive definition also leads to lack of legitimacy. The term terrorism is therefore both undependable, but also much taken advantage of.

Since the Convention of 1937 the international community has developed 19 international legal instruments to counter terrorism. All these instruments have in common that they were all elaborated under the auspices of the UN and the International Atomic Energy Agency (IAEA). They are all accessible to partaking by all Member States. However, none of these treaties contains a generally accepted definition of terrorism that all Member States wish to endorse, like the one in the Geneva Convention of 1937. Not even the most essential treaties, like the Charter of the United Nations, contain a comprehensive definition. Neither does the Rome Statue of the International Criminal Court. It doesn’t even mention terrorism in its list of which crimes it has jurisdiction. Although one can argue that terrorism might fall under art. 7.

56 Article 1, para. 1.
59 Preamble and Part 2 of the Rome Statue of the ICC.
The attempt to define terrorism remains as one of the most unsolved and difficult tasks of the international community when developing antiterrorism treaties, either it is regional or international. Different treaties have different definitions. Laws that are considered *lex specialis* often has more comprehensive and specific definitions of ‘terrorism’, but also a much more narrow scope. What is lacking is a generally accepted legal definition that all Member States wishes to endorse. Still in 2017 there is no universal agreement on the definition of terrorism. Already in 1974 Richard Reeve Baxter, a widely published American jurist, expressed a general discomfort about the use of terrorism as a concept of war without a clear definition. He stated:

“We have cause to regret that a legal concept of ‘terrorism’ was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.”

Robert Reeve Baxter would undoubtedly have been sceptical about the today’s on-going “war on terror”. However, it is important that one does not blindly follow the widely held view that international law does not provide a definition of terrorism what so ever. There is, as mentioned shortly above, many treaties that in fact does attempt to define terrorism. However, most of these definitions are not undisputed.

It is also important to know that the failure to create a definition of terrorism that all Member States wish to endorse does not lie exclusively in the debate about what should amount to terrorism, but also in the purpose of the act. For example, how would the international community decide on a conclusive distinction between terrorists and freedom fighters? Most people will agree that the two Nobel Peace Prize laureates Yasser Arafat and Nelson Mandela are more freedom fighters than they are terrorists. However, at a certain point, they were both on the list of USA most wanted terrorists. One man’s terrorist is often another man’s freedom fighter. It all depends on who is doing the labelling.

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60 Garlicki Zdzislaw (2005) p. 3.
61 A doctrine relating to the interpretation of law. It states that when two laws govern the same factual situation, the law that is more specific overrides the more general law.
64 Alex Conte (2005) p. 12.
3 International legal framework

3.1 Two legal frameworks

The first and most important legal question that needs to be examined is: what is the international law applicable? The lawfulness of drone strikes carried out to target and kill alleged terrorists in the context of the “war on terror” depends on the law applicable, which is not unquestionable and easy to determine.

When assessing the conduct of armed attacks two legal frameworks are primarily provoked: this is international humanitarian law (hereby IHL) – applicable when there is constituted an “armed conflict” between two or more of the High Contracting Parties67 or between a State and a non-State group (more about this below) - and international human rights law (hereby IHRL) which as a general rule is applicable at all times, with a very few exceptions.

The reason it is important to distinguish these two legal frameworks is because IHL has more lenient rules than IHRL when it comes to the use of lethal force. IHRL has stricter rules and higher fundamental guarantees than IHL. This is understandable considering that IHL applies during times of war where the strict and high standard rules of IHRL are difficult to abide.

However, IHL and IHRL does not regulate when it is justified to use force against another State or territory. The UN Charter regulates this. IHL only applies once an armed conflict has started, whenever or wherever they occur. Whether or not the armed conflict was constituted legally is irrelevant for the application of IHL. It applies regardless.

3.2 International humanitarian law and the global war on terror

International humanitarian law (IHL) is a set of treaties that govern the conduct of both parties during armed conflicts. It aims to reduce the suffering of protected persons and civilians and restrict the means and methods of warfare.68 The rules of IHL are fair and important rules that both parties to the conflict need to respect. It regulates the conduct of hostilities and the legal status of the combatants. IHL provides duties and responsibilities to the combatants, but in return it offers legal protection.69 States are bound to the treaties of IHL in which they have

67 Geneva Conventions of 1949 common art. 2.
consented, but they are also bound by the rules of customary humanitarian law to which they have not insistently protested.\textsuperscript{70}

As mentioned above, IHL does not bother with the war’s legality.\textsuperscript{71} This is the difference between \textit{jus in bello} and \textit{jus ad bellum}. \textit{Jus in bello} refers to IHL, the laws that apply during war, while \textit{jus ad bellum} refers to the rules that regulate whether States may or may not resort to war or the use of armed force. \textit{Jus in bello} and \textit{jus ad bellum} remains independent of each other. IHL works unrelatedly to the causes of the conflict or whether the conflict is just.\textsuperscript{72}

After the gruesome attack on 11 September 2001, the President of the US, the US Congress and the UN all authorized the use of force in self-defence against global terrorism as a whole.\textsuperscript{73} The attack on 11 of September was carried out and interpreted as an armed attack on the United States, one that justified self-defence operations. However, more than a decade has past and military operations are still being carried out in attempt to kill all responsible terrorists. No matter how one views the situation, few people will argue against the fact that the situation that has now occurred is a war. However, whether it is a “war” adequately governed by international humanitarian (IHL) is another question. Accordingly, this is what needs to be examined.

It is not undisputed that international terrorism does not perfectly fit into any existing frameworks governing armed conflicts.\textsuperscript{74} Not only is ‘terrorism’ itself poorly defined\textsuperscript{75}, but the “war on terror” has also created a new type of “fighter” known as “unlawful combatants”, who by some authors are defined as unprotected illegal combatants, while other define them as combatants with basic rights, but no prisoner-of-war status.\textsuperscript{76} Some might even just claim they are civilian criminals. Terrorists do not have any specific or defined place in the Geneva Conventions. Hence a question one might ask is whether IHL even should be regarded adequate when the law inadequately regulates the activities of this new type of “fighters” and inadequately states their legal status.\textsuperscript{77} However, first thing that needs to be examined is whether the “war on terror” is an armed conflict under IHL \textit{de lege lata}.

\textsuperscript{70} Jann. K. Kleffner (2013) p. 53.
\textsuperscript{71} Dan Belz (2006) p. 100.
\textsuperscript{72} ICRC (2015).
\textsuperscript{73} UN doc. S/RES/1368 and Public Law 107-40.
\textsuperscript{74} Glenn M. Sulmasy (2014) p. 311. See also chapter 2 above.
\textsuperscript{75} Chapter 2 above.
\textsuperscript{76} Glenn M. Sulmasy (2014) p. 311, see also Ingrid Detter’s article from 2007.
\textsuperscript{77} Ibid.
4 Is the “war on terror” an armed conflict?

For IHL to apply there has to exist an “armed conflict”. This is one of the most important preconditions for the applicability of IHL. What lies in the term “armed conflict” differs from international armed conflict (IAC) and non-international armed conflict (NIAC). NIACs are armed conflicts taking place mainly within the territorial boundaries of a State, where the hostilities are between the authorities of a State and organized armed groups (OAGs), or between said armed groups.\(^7\) However, IACs are armed conflicts between two or more States.\(^7\)

The question one can ask is whether the term “armed conflict” in NIACs is wide enough to also govern hostilities between a State and a transnational OAG involved in terrorist-attacks, or whether the war on terror due to its global phenomenon has to be regarded as an IAC. However, if so, the traditional definition of the term “armed conflict” in IAC – defined as a conflict between two or more States – might has to undergo a new consideration due to the fact that the “war on terror” does not fulfil the preconditions of a traditional State-against-State-conflict.

4.1 Can the “war on terror” be regarded as an IAC?

There is no doubt that the “war on terror” is an armed conflict with no respect for borders. However, it is somewhat doubtful whether this cross-border armed conflict can be considered an “international armed conflict” as defined under IHL. The “war on terror” takes form of a chain of terrorist attacks and anti-terrorists missions in numerous States. The question is whether this chain of attacks and operations constitute an international armed conflict under IHL so that IHL applies. Or does it constitute a new type of armed conflict that has yet to be regulated leaving the existent IHL inadequate to deal with this new form of armed conflict?\(^8\)

4.1.1 Common article 2 of the Geneva Conventions

For the four Geneva Conventions of 1949 - including the Additional Protocol I of 1977\(^9\) - to be applicable on the “war on terror”, the “war on terror” has to be regarded as an IAC. An

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\(^7\) Dieter Fleck (2013) p. 581.

\(^7\) Common article 2 of The four Geneva Conventions of 1949.

\(^7\) Sylvain Vité (2009) p. 92-93.

\(^9\) Important reminder: the US and Pakistan have not ratified the additional protocols and they are therefor not bound by them, at least not formally. However, since the additional protocols build on the principles already embodied in the Geneva Conventions, and since they were made only to clarify and add to some of these principles, I find it sufficient to mention them when appropriate.
“international armed conflict” (IAC) is defined in the four 1949 Geneva Conventions as a war or “any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Simplified this translates to conflicts between States. This can both be a conflict where two States are directly fighting against each other across borders, but it can also govern those situations where a State indirectly or directly interferes in a previously existing non-international armed conflict (NIAC) and with the interference makes it international by “internationalizing” it.

This might happen if a State on the “outside” sends forces to a territory to support one of the parties to the conflict. However, it can also happen if an outsider starts guiding or supporting one of the parties from afar. The International Criminal Tribunal for the former Yugoslavia (ICTY) pointed this out in the case Prosecutor v. Tadic from 15 July 1999. However, not all interference necessarily leads to that the conflict becomes international.

As mentioned above the “war on terror” is a war between States on one side and armed terrorists organisations on the other side. It is not a State v. State conflict, but States v. OAG conflict. Traditionally and generally the “war on terror” therefor falls without the material scope of IHL. However, it is generally accepted that IHL binds OAGs, especially in non-international armed conflicts. However, it is not as clear as to whether IHL binds, or even applies, to OAGs as a party in an international armed conflict. Is it even possible for an OAG to be an independent party in an IAC? The answer is unfortunately no de lege lata. The treaties of IHL does not open for the possibility of an OAG being a party to an international armed conflict. One might argue whether Common article 2 of the Geneva Conventions of 1949 de lege ferenda should be given a wider interpretation – a new consideration - or changed, but de lege lata does not open for the possibility of an OAG being an independent party to an international armed conflict.

Accordingly, for “war on terror” to be regarded as an international armed conflict the US therefore has to objectively be regarded at war with one of the countries hosting the terrorists in which they are targeting, for example Yemen or Pakistan. The applicability of IHL is unrelated to the will of governments. IHL can therefore be applicable although the parties them-

82 Common article 2 of the 1949 Geneva Conventions.
84 See Prosecutor v. Tadic Judgment (Appeals Chamber) para 84.
86 Common article 3 of the Geneva Conventions of 1949.
88 Common Article 2 of the four Geneva Conventions of 1949, see also Sylvain Vité (2009) p. 72.
selves do not view the situation as a war. IHL is applicable when certain factual conditions are met. And the factual conditions are met whenever “there is a resort to armed force between States (...)”89 The ‘war on terror’ can therefore only be deemed “internationalized” if military operations are conducted against a terrorist group acting on behalf of a foreign State, as an example one can mention Taliban in Afghanistan in 2001.90 However, it is a fact that most, if not all, terrorists groups today are not acting behalf of any government. The terrorists groups in Yemen and Pakistan are for example not acting on behalf of the Yemeni or Pakistani government, or any other foreign State. The “war on terror” is therefore not a conflict between States.

4.1.2 Can an armed attack directed at a terrorists group in a foreign State result in an IAC?

Another question one might ask is whether the continuous drone strikes aimed at ‘suspected’ terrorists could be regarded as an act of war against the sovereign entities where the terrorists are located, illustratively Pakistan and Yemen? This is a question I will only briefly give a presentation of considering that this thesis revolves around *jus in bello* and not *jus in bellum*. It is important to not ignore this issue. As mentioned above an international armed conflict might occur if a State (hereby the US) interferes indirectly or directly in a previously existing non-international armed conflict (NIAC), and by doing so “internationalize” the conflict.91 If US had used armed force within the domain of Yemen and Pakistan as sovereign States without their consent then this would most probably be sufficient to trigger the applicability of international humanitarian law, regarding it as an international armed conflict.92 However, both Pakistan and Yemen are deemed to have consented to US drone strikes on their territory, although there have been times where the States have claimed contrary or it has been speculated whether this is true or not.93 Regardless of this, Pakistan has now recently communicated that they want an end to all future drone operations on their territory, but it is still not clear yet whether the US will respect this or not.94 The rules regulating whether an attack on foreign land constitutes an act of war is not regulated by international humanitarian law, but by the law governing the use of interstate force regulated by the Charter of the United Nations (*jus*

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89 *Prosecutor v. Tadic*, Decision of the Defence Motion 2 October 1995, para. 70, see also Common Article 2 of the four Geneva Conventions of 1949.
91 *Prosecutor v. Tadic*, Judgment (Appeals Chamber) para. 84.
92 Nils Melzer (2013) p. 20, see also Sylvain Vité (2009) p. 73.
94 Muhammad Idrees Ahmad (2013), Peter Bergen and David Sterman (2017).
4.1.3 Is there a third classification such as “unlawful combatants”?

Another issue relating to the assumption that the "war on terror" is an international armed conflict is the legal status of terrorists. The term "war on terror" does imply that the struggles to combat international terrorism fall into the category of an armed conflict as discussed above. As briefly mentioned above in chapter 2 and chapter 3.2, the terms “terrorists” and “terrorism” has no special status in the Geneva Conventions of 1949. The Geneva Conventions of 1949 only makes one fundamental distinction and only operates with two categories: civilians and combatants. All who is not civilians are combatants, and those who are not combatants are civilians. If the “war on terror” is regarded as an international armed conflict, will the term “terrorists” therfore fall within one of these two categories? Will suspected terrorists be protected by IHL at all? How should this new type of “warrior” be interpreted?

The aim in international armed conflicts is to weaken the other party’s military force. That is why all operations shall be directed only against military objectives, cf. article 48 AP I. For this to be practically and factually possible it has to be clear what the military objectives are, in contrast to civilian objectives. For combatants to be distinguished from civilians, they must wear uniforms or emblems. The principle of distinction is a fundamental principle in humanitarian law. It is the parties’ responsibility to distinguish between military objects and civilian objects. Taking into account this model, terrorists can only be targeted depending on their status. If they are combatants and military objectives, drones can target them legitimate, but if they are regarded as civilians they shall not be the objects of attacks.

One of the issues with regarding the “war on terror” as an international armed conflict is the fact that terrorists don’t fit into the combatant model or the civilian model. Combatants are members of the armed forces of one of the States that are parties to the conflict, or part of an

97 Knut Ipsen (2013) p. 79, see also AP I part III and part IV
98 Although the US is not bound by AP I the government is still bound by this principle which is one of the main principles of humanitarian law.
99 Although the US is not bound by AP I the government is still bound by this principle which is also one of the main principles of humanitarian law. See AP I article 44 para. 3.
100 David Kretzmer (2005) p. 190.
101 AP I article 51 para. 2.
armed force or group belonging to one of the State parties.102 Civilians are everyone who is not a combatant. Does this mean that terrorists should be regarded as civilians considering that they are not combatants, and therefore shall not be targeted except “for such time they take direct part in hostilities”?103 Or should they be put in a third category?

Traditionally, before 2001, “terrorists” were considered civilian criminals.104 Civilian criminals were not traditionally punished internationally, but domestically. They were punished solely within the national criminal system of the country affected.105 The problems with regarding terrorists as civilians is that they can only be targeted as mentioned above in “such time they take direct part in hostilities”, but for the rest of the time they enjoy the same immunity as civilians. If we accept this model terrorists would enjoy the best of both worlds.106 A terrorist could enjoy the protection as a civilian most of the time, also during the planning of terrorist attacks, while only being regarded as a legitimate target while carrying out terrorist attacks.107 Another issue, problematized by Kretzmer, is that such an understanding of terrorists might damage the practical function of article 51 of the Charter of the United Nations regarding self-defence. If we follow a model like this targeting terrorists responsible for an armed attack would only be legitimate whilst the terrorists are carrying out the attack,108 this because the terrorists could only be targeted “for such time they take direct part in hostilities”.109 This seems complicated, unjust and not practical.

Accordingly there is an intensive debate going on whether “terrorists” should and can be regarded as “unlawful combatants”110 or “unprivileged belligerents”111 and whether such a third category exists in IHL. The question is whether the term “unlawful combatants” describes a group of belligerents that falls within one of the two traditional categories of IHL - combatants (prisoner-of-war status) or civilians – or whether it constitutes its own category.112 The distinction is important when analysing whether terrorists enjoys the protection of civilians or combatants, or whether they enjoy no protection at all and thus whether the “war on terror” therefore should not be regarded as an international armed conflict due to its inadequacy.

102 AP I article 43 para. 1 and 2, cf. GC III article 4 litra a para. 4.
103 AP I article 51 para 3.
105 Ibid.
107 Ibid.
108 Ibid.
109 AP I article 51 para. 3.
111 Knut Ipsen (2013) p. 82.
Those who are entitled to the status of combatant\textsuperscript{113} are certified to take part directly in hostilities within the restrictions imposed by international humanitarian law.\textsuperscript{114} They can therefore not be punished for their participation, unless they violate IHL. However, “unlawful combatants” are those who 1) take direct part in hostilities as “combatants”, but without this entitlement, and 2) do so by violating the law, therefore “unlawful”. They can therefore unlike lawful combatants be punished for participation. If captured by the adversary they are denied the protection of combatants (the prisoner-of-war status\textsuperscript{115} and the protection of GC III) since they do not fulfil the essential conditions. But they are also denied the status of a civilian and the protection of GC IV. They therefore differ from civilian criminals, which are entitled to exactly the same rights as any civilian, expect for the fact that they have done punishable acts. Civilians also have the right to be protected from direct attacks and from the side effects of hostilities directed at the military, unless they take part in hostilities. If civilians take part in hostilities they are legitimate targets for such time as they are taking a direct part in the hostilities.\textsuperscript{116} However, they do keep their status as civilians.\textsuperscript{117}

The use of a third category such as “unlawful combatants” is both controversial and problematic. There is a legal uncertainty that has to be examined and this uncertainty is whether the rights of combatants or the rights of civilians apply to “unlawful combatants” or whether other sets of rules apply, or no rules at all.\textsuperscript{118} The latter would be worrying and give “unlawful combatants” less protection than civilians. They would be objects to military attacks and at the same time enjoy no immunity when it comes to prosecution.

Another aspect is that civilians may generally only be arrested if they have violated a specific law and therefore have a detailed charge against them. If there is no specific proof against him or her, he or she will have to be released. A party to the conflict cannot target civilians on the basis of ‘suspicion’. If in doubt whether the civilian is violating the law or taking direct part in hostilities, the civilian shall enjoy the benefit of the doubt and they are not to be targeted.\textsuperscript{119} This might explain why the US advocates for the use of such a third category in the “war on terror”.\textsuperscript{120} Having such a category makes the killing of ‘suspected terrorist’ via drone strikes

\textsuperscript{113} AP I article 43 para. 1 and 2, see also HagueReg article 3.
\textsuperscript{114} AP I article 35
\textsuperscript{115} GC III art. 4.
\textsuperscript{116} AP I article 51 para. 3
\textsuperscript{117} AP I chapter II.
\textsuperscript{118} Roland Otto (2010) p. 325
\textsuperscript{119} AP I article 50 para 1, see also article 52 para. 3.
more legit, considering that they are neither combatants (which means they do not enjoy immunity from prosecution) nor civilians (which means that they can be targeted). IHL also has more lenient rules on the use of lethal force than international human rights law has. It is therefore preferable for the states that carry out drone targeted killings that they do so in accordance with IHL, with IHL being the applicable law.

“To use this third category in order to reduce the individual protection below the minimum standard of human rights is under no circumstances legally acceptable.”

The term “unlawful combatants” is imprecise. If a person is captured on the battlefield after taking direct part in hostility it is not always evident whether this person is a combatant or a civilian who has taken up arms. In these cases Article 5 of GC III and Article 45 of AP I orders that a “competent tribunal” shall determine the prisoner’s status.

Some authors are of the opinion that “unlawful combatants” should de lege ferenda constitute their own status in international humanitarian law – a status that leaves them “unprotected.” It is important to mention that terrorists do enjoy a minimum of protection in accordance with the fundamental guarantees in AP I article 75 regardless of whether they are regarded as combatants, civilians or “unlawful combatants”. However, if terrorists are regarded as “unlawful combatants” they do fall outside the protection that is granted to prisoners of war under GC III, and also outside protection granted to protected person under GC IV. They are therefore in some cases referred to as “extra-conventional persons.” Some argue that to be protected by the law, one needs to follow the law to earn one’s protection. If you have duties then follow your duties, unless you lose the right to the protection the law gives you. In her article “The Law of War and Illegal Combatants” Ingrid Detter writes “there is a duty for anyone who seeks the protection of the law of war to distinguish himself from the civilian population. (…) there has been a rule that those who do not openly show that they are belligerents, especially by wearing a uniform, are excluded from protective rules of the law of war”. What Ingrid Detter is referring to here is the principle of distinction which is briefly mentioned above.

121 Knut Ipsen (2013) p. 84, 302
125 Ingrid Detter de Frankopan. Professor of International Law at the University of Stockholm, lawyer, arbitrator and author.
The “warriors” in an international armed conflict is either a combatant entitled to the prisoner of war status, or it is civilians who have taken up arms. There is no in-between, at least not de lege lata. I am, however, of the opinion that the same should be the case de lege ferenda. There is no group that should be legitimate targeted, but not enjoy prisoner of war status if captured. The term “unlawful combatants” has no real roots in the Geneva Conventions. The Geneva Conventions aims to give rights and duties to both fighters and civilians. Leaving a group “unprotected” seems to be against the objectives of the Geneva Conventions. Considering that terrorists are not combatants due to the fact that they do not meet the requirements, they therefore have to be regarded as civilians. When an armed conflict is between a State and a terrorist group, it would make little sense to classify terrorists as civilians. Both parties to a conflict should hold military and combatants, due to the fact that the whole aim of an international armed conflict is to weaken the other party’s military force.\(^{127}\) Due to these facts it would be more appropriate to examine whether the “war on terror” constitutes a non-international armed conflict.

4.1.4 Conclusion

Since the applicability of IHL is tied to certain conditions and there are not sufficient evidences that these conditions are met in this scenario, I therefore conclude that the “war on terror” is not an armed conflict of international character under IHL. This is the law de lege lata. This conclusion is mostly due to the fact that for an armed conflict to be international there has to be a conflict between two or more States, cf. common article 2 of the four Geneva Conventions of 1949.\(^{128}\) The “war on terror” is objectively, or at least formally, not a war between States, but a war between States and OAGs. It therefore can’t be regarded as an IAC de lege lata, nor should it be regarded as an IAC de lege ferenda. The reasoning behind this is that the Geneva Conventions and Additional Protocol I do not open for the possibility of terrorist being combatants. They are therefore technically civilians. IHL can’t be applicable to a war were only one of the parties have combatants. A war against civilians does not work in terms of the Charter of the United Nations, IHL or humanitarian principles. I therefore conclude that the “war on terror” is not and should not be regarded as an armed conflict of international character (IAC) under IHL.


4.2 Can the “war on terror” be regarded as an NIAC?

To analyse what a “non-international armed conflict” (NIAC) is under IHL one must examine two main legal sources: 1) Common Article 3 of the four Geneva Conventions of 1949 and 2) Additional Protocol II of 1977 (AP II).129

First, it is important to note that the definition in Common Article 3 of the four Geneva Conventions of 1949 are more open and broad than the definition in Additional Protocol II of 1977. The definition in AP II is more restricted, but in return offers much greater protection to civilians, combatants and victims. The Geneva Conventions are ratified by all countries and are thus regarded as universally embraced and therefore universal law.130 Under Common Article 3 of the four Geneva Conventions, non-international armed conflicts’ are conflicts “not of an international character occurring in the territory of one of the High Contracting Parties (...)”. This provision refers back to the definition in Common Article 2, which deals with armed conflicts between “two or more of the High Contracting Parties (...)”, which again (as mentioned above) refers to conflicts between States. Non-international armed conflicts (NIACs) are therefore, in contrast to “international armed conflicts”, internal armed conflicts where one of the parties might be a High Contracting State and the other a non-governmental armed force, or it can be a conflict between two or more non-governmental groups (OAGs).131 It is, however, not a conflict between two or more High Contracting Parties. Since the Geneva Conventions are ratified by all countries and therefore are universally embraced the requirement that the conflict has to occur in “the territory of one of the High Contracting Parties” have lost its importance in practice.132 All States are High Contracting Parties.

However, it is generally accepted that not every internal dispute is an armed conflict under IHL. One has to distinguish between armed conflicts and less serious forms of violence and disturbances, such as riots and banditry. This is not mentioned in Common Article 3, but in AP II article 1, para. 2. However, it is generally accepted that this lower threshold also applies to Common Article 3.133 An armed conflict is said, by the ICTY, to occur when the tensions

129 Important reminder: the US and Pakistan have not ratified and is not bound by the two Additional Protocols to the Geneva Convention. However, as shown in this chapter, the case law regarding Common Article 3 shows that when understanding Common Article 3 one must apply almost the same criteria as is constituted in Additional Protocol II. Many of the provisions in AP II is regarded customary law, but not all.
130 ICRC (2009).
131 Common article 3 of the Geneva Conventions, cf. AP II article 1 para. 1.
133 Ibid, see also AP II article 1 para. 1.
and disturbances reach a level of intensity defining the situation as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. Thus, for the “war on terror” to be regarded as an NIAC the hostilities have to reach some level of intensity and extent and the adverse parties must demonstrate a minimum level of organization. The test for deciding whether an armed conflict exists was set out by ICTY in the case Prosecutor v. Tadic and has been used steadily by the Tribunal since. The test consists of two criteria: 

1) First the intensity of the conflict has to be examined. If the conflict constitutes a “protracted armed violence” than we might be dealing with something more than just internal disturbances and an armed conflict might exist.
2) Secondly, the organization of the parties has to be assessed; referring to the requirement that the protracted armed violence has to happen between governmental authorities and organized armed groups (OAGs) or between such groups within a State, as mentioned above.

Firstly 1) the “war on terror” is a broad and undefined term. Not all terrorist actions qualify as an armed conflict. Some terrorist actions might just be a result of internal disturbance. Nevertheless, when speaking of Taliban, al Qaeda and ISIS one has to agree that these are all groups that have a certain consistency in their violent behaviour and that the war against these groups, and the carried out drone strikes with the assistance from the US, has lead to a “protracted armed violence” constituting a non-international armed conflict.

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134 Prosecutor v. Tadic, Decision of the Defence Motion 2 October 1995, para. 70.
135 AP II art. 1 para. 2, see also Sylvain Vité (2009) p. 70.
Table 1: table borrowed from Derek Jinks' article from 2005 p. 22, to illustrate how the level of intensity should be understood in determining whether an armed conflict exists in regards to Common article 3. The table also takes into account humanitarian concerns and how the States themselves view the situation. If the intensity is high, IHL applies even if the State itself denies that IHL is applicable. However, if the intensity is low and the State itself denies IHL, then IHL is not applicable. IHL is, however, always applicable under Common article 3 if the State party to the conflict interprets it as an “armed conflict”, regardless of the level of intensity.

<table>
<thead>
<tr>
<th><strong>Humanitarian Costs</strong></th>
<th><strong>High Intensity (organized, protracted)</strong></th>
<th><strong>Low Intensity (disorganized, short-lived)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sovereignty Costs</strong></td>
<td><strong>State Asserts Sovereign Prerogative; Denies Humanitarian Law Applicable</strong></td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td><strong>State Accepts Applicability of Humanitarian Law</strong></td>
<td>Yes</td>
</tr>
</tbody>
</table>

Secondly 2) even if it is accepted that the level of violence is reached to establish an armed conflict, one still have to examine whether the terrorist group is organized enough to be regarded as a “part” to the conflict. For this to be the case the non-governmental groups involved, in this case the terrorists groups such as al Qaeda, Taliban and ISIS (see chapter 1.5 above), must i) hold organized armed forces, and ii) the forces have to be under a specific command and have the ability and capacity to carry out and withstand military operations.\(^{138}\) One can undoubtedly claim that al Qaeda, Taliban and ISIS all have a certain command structure and that they possess organized armed forces.\(^{139}\)

It is quite evident that these criteria are met in regards to the “war on terror”, especially with regards to the terrorists groups in Pakistan and Yemen. The conflicts here both consist of armed groups with some minimal organization (OAGs) and they have, undoubtedly, reached the minimum level of intensity that is required for non-international armed conflicts to exist.

\(^{138}\) Ibid.

One might even argue that the hostilities between these groups (and their links) and the US have reached a high level of intensity.\textsuperscript{140}

However, for the “war on terror” to be regarded as a non-international armed conflict the conflict has to occur “in the territory” of a State party and be “not of an international character”.\textsuperscript{141} Both Common Article 3 of the Geneva Conventions and AP II article 1 para. 1 has this as a requirement. Although the “war on terror” does occur in the territory of a State, it does not fulfil the requirement of not being of “an international character” considering that the conflict transcends borders. Some advocate that this provision in Common Article 3 of the Geneva Conventions was created with this wording to exclude every conflict not of an internal character, so that the provision only covers situations similar to traditional “civil wars”.\textsuperscript{142} It is not doubted that when the Geneva Conventions were first drafted the treaty makers had classic “civil wars” in mind when establishing this provision. However, the later drafting history shows that they deviated from this when later proposals that would have established this ones and for all were rejected. The Diplomatic Conference rejected a draft of the article that would have restricted the application to only “civil wars”.\textsuperscript{143}

Occurring in the territory of many States the “war on terror” is undoubtedly of a transnational character. Does this mean that “the war on terror” is neither a NIAC nor an IAC and that IHL is therefore not applicable, or should the “war on terror” be placed in one of these models although IHL does not explicitly address such conflicts? One should maybe be hesitant to claim that the parties are not subject to the rules of IHL, denying them and those affected the protection in which these provisions give. It would therefore be preferable and more in line with humanitarian principles to try and stretch the definition of a non-international armed conflict to also govern transnational conflicts that do not fit into the international armed conflict model.\textsuperscript{144} Roland Otto argues that any armed conflict “should be – and factually is – covered by international humanitarian law either applicable to international or to non-international armed conflicts.”\textsuperscript{145}

Professor in law David Jinks argues that Common Article 3 can and should be interpreted wide enough so that conflicts occurring between one or more states against a transnational armed group are also governed by the article. He reasons this by arguing that there is no “ap-

\textsuperscript{140} Derek Jinks (2005) p. 23, see also chapter 1.5.
\textsuperscript{141} See Common article 3 of the Geneva Conventions, and also AP II article 1 para. 1.
\textsuperscript{142} Derek Jinks (2005) p. 24.
\textsuperscript{143} Ibid.
\textsuperscript{144} I share Kretzmer’s and Jinks opinion. See David Kretzmer (2005) p. 190.
parent rationale for such a regulatory gap” where international armed conflicts are covered properly, and civil wars are covered properly, but not conflicts between a “state and a foreign-based (or transnational) armed group or an internal armed conflict that spills over an international border into the territory of another state.” 146 David Kretzmer argues in a similar way as David Jinks. He claims similar to Jinks that the “war on terror” fits better within the non-international armed conflict model, than the international armed conflict model. He argues that there is no functional reason why IHL should apply to an armed conflict between a State and an OAG within its territory, but not also an armed conflict with “such a group that is not restricted to its territory.” 147 However, he admits that the “code on non-international armed conflicts” does not formally apply and that neither the law-enforcement model nor the armed conflict model provides a satisfactory framework to deal with the “war on terror” as a transnational conflict. 148

It is not easy to determine whether a transnational armed conflict should be viewed as a non-international armed conflict that has turned “international” by interference from other States (as mentioned in chapter 4.2.1.1) or if it should be viewed as a cross-border non-international armed conflict. However, one thing is not uncertain and that is that there is no general applicability of IHL to the “war on terror” de lege lata. One can without being unreasonable claim that IHL is insufficient and that the “war on terror” falls outside the scope of IHL. Nevertheless, as shown, it can be discussed whether the “war on terror” should be regarded as a non-international armed conflict and thus making IHL applicable de lege ferenda.

I personally agree with Derek Jinks, and David Kretzmer. Common Article 3 does not give any comprehensive definition of what an armed conflict is. It only gives a negative definition: non-international armed conflicts are armed conflicts “not of an international character”, here referring back to Common Article 2 where international armed conflicts are defined as a conflict between States. The drafting history of Common Article 3 suggests that Common Article 3 were established when the drafters came to the awareness that non-qualifying bodies (in this case terrorist groups) did de facto have the power and ability to wage war and be a party to a war. 149 After my interpretation Common Article 3, and AP II, operates as a safeguard to ensure that States “shall be bound to apply” and grant at least a “minimum” level of protection to persons taking no active part in hostilities and to ensure that humanitarian principles are adhered to, and that the people in need of protection are protected. 150 Considering that the

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146 Derek Jinks (2005) p. 25.
148 Ibid.
149 David A. Elder (1979) p. 38.
150 Common Article 3 para. 1 and 2.
“war on terror” as defined in this thesis is not an IAC (neither de lege lata nor de lege ferenda), as concluded in 4.1.4, I find it at least reasonable, if not also obvious and clear, that “the war on terror” at least should be considered as an NIAC de lege ferenda. My conclusion is built on the following reasons:

1) Any armed conflict should be regarded as either an IAC or a NIAC to ensure that IHL is applicable. Thus ensuring that the parties are bound to at least a minimum set of fundamental humanitarian principle.
2) The “war on terror” would be considered a non-international armed conflict if it wasn’t for the fact that it is of a transnational character and does not occur only within one State. OAGs do have a place in non-international armed conflicts de lege lata.
3) Common Article 2 of the Geneva Conventions gives a positive legal definition and is tied to certain conditions.
4) Common Article 3 of the Geneva Conventions gives a negative legal definition and, after my interpretation, aims to govern conflicts that does not fall within the scope of Common Article 2.
5) Common Article 3, and AP II, offers a minimum level of protection that needs to be respected, and thus aims to cover every other conflict that does not fall within Common Article 2 to ensure that humanitarian principles are maintained.

These facts all supports, after my opinion, the idea that the “war on terror” fits within the non-international armed conflict model, than the international armed conflict model. And as mentioned, any armed conflict should be regarded as either an IAC or a NIAC to ensure the applicability of IHL de lege ferenda. There is not doubt that the level of intensity and the organization of the parties in the “war on terror”, at least in Pakistan and Yemen, have reached such a threshold and structure that an armed conflict exists.

4.3 IHL’s inadequacy

However, although I argue that the “war on terror” should be regarded as an NIAC de lege ferenda, I still do find that the rules in Common Article 3 and AP II is inadequate to deal with the “war on terror”. After my opinion the “war on terror” does require the international community to establish new sets of treaties. It does not fit into the IAC model due to the fact that it doesn’t meet the conditions, but also due to the fact that the “war on terror” creates a new type of “warrior” and a new type of “armed forces” that does not fit well in the models established in the Geneva Conventions. Neither does the “war on terror” fit well into the NIAC model considering that the rules here are made in order to apply to a conflict within one territory, while the “war on terror” is a conflict that transcends borders.
The legal status of ‘terrorists’ is also not clear in a non-international armed conflict like in international armed conflicts, as discussed above. Common Article 3 of the Geneva Conventions and AP II does not make any attempt to define what a “combatant” is. The only term mentioned in these treaties is the term ‘civilians’, while it seems clear that for a conflict to exist there also has to be ‘non-civilians’. The international instruments don’t give an answer to who is a combatant in a non-international armed conflict. In contrast to the term ‘combatant’ in an IAC, the term ‘combatant’ in a NIAC is open for interpretation. When there’s no conditions for who and when a ‘terrorist’ in the “war on terror” is regarded as a ‘combatant’, they can technically be legitimately targeted at all times. This can be taken advantage of. The fundamental principle of distinction does apply in non-international armed conflict as well, like it applies in international armed conflicts. This is an important humanitarian principle of customary law. It obliges states to distinguish between those who they can target (combatants and military objects) and those who they are required to protect from harm (non-combatants and civilian objects). However, when regarding the “war on terror” as a NIAC this distinction might be difficult to accomplish in practice considering the lack of a definition of ‘combatants’ in AP II and due to the lack of definition of ‘terrorists’ and ‘terrorism’ in general, as seen in chapter 2. Thus there is no clear enemy, which again puts civilians at risk of being suspected and unjustly targeted.

The reasons AP II doesn’t contain a definition of combatants is because the international community has been hesitant to grant rebellious groups, insurgents and unlawful belligerents the status of ‘combatants’. This would provide them an element of legitimacy and it would provide them with immunity from criminal liability and POW-status. This is not wishful. States want to have the ability to prosecute rebels and rioters under domestic law. However, this puts the “war on terror” in a difficult situation. Who are the combatants? The combatants in a non-international armed conflict are obviously understood to be the members of the OAG and the members of the armed forces of the State party. However, how does one distinguish the members of the OAG from civilians? Although the principle of distinction generally applies in non-international armed conflicts as well, there are no provisions in AP II that obliges

152 Ibid.
153 AP I article 43 compared to Common Article 3 of the Geneva Convention and AP II Part IV.
154 See AP II article 13 para. 2 where the treaty makes a distinction between military targets and civilian targets stating that civilians shall not be the object of attack. For this provision to work in practice one has to be able to distinguish the two.
157 AP II article 1 para. 1.
the parties to wear distinctive emblems. The State party will probably notice who are combatants during hostilities, but outside the heat of the battle it might be hard to determine who are combatants and who are civilians. Terrorists do in practice then almost have the same legal status as civilians. They are “safe” outside hostilities, due to the other party not being able to distinguish them, but when taking part in hostilities they are legitimate objects of attack. Not only does this give terrorists the ability to hide amongst civilians which grants them undeserved protection, but most importantly: it sets civilians at risk and weaken their protection. During NIACs civilians shall enjoy general protection and shall not be objects of attack.

It seems that the only solutions de lege ferenda would be to 1) grant combatant status to terrorists who repeatedly and actively take part in terrorists attack and who evidently based on intelligent information have been active in the organization, but then also offer them POW-status and immunity. 2) Offer them combatant status, but without granting them POW-status and immunity, which would give States the right to target and kill terrorists at all times, leaving them ‘unprotected’, which would be worrying and against the principle of human rights law and humanitarian law. Or 3) Not offer them combatant status, making human rights law applicable, which would grant terrorists with the right to due process of law and the right to presumption of innocence. Then one would not be allowed to legitimately target terrorists on the basis of ‘suspicion’. One cannot have the best of both worlds. Although establishing the “war on terror” as a NIAC might be more preferable than establishing it as an IAC, there is evidently still a pressing need for the international community to clarify the status of terrorists and create new treaties.

5 Human rights law and international humanitarian law

5.1 Parallel applicability

International humanitarian law is not a self-contained body of law, but must be applied in context of other principles and provisions of international law. It is now generally accepted that the application of IHL does not exclude the application of human rights law. International human rights law (IHRL) is applicable both in peacetime and in times of an armed conflict. Thus applicable at all times, also during armed conflicts, except for situations where a State

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158 See as an example GC III article 4 litra A para. 2.
159 AP II article 13 para. 3.
160 AP II article 13 para. 1 and para. 2.
161 UDHR article 11.
has used its possibility to derogate.\textsuperscript{164} IHL is on the other hand, and as mentioned above, only applicable during armed conflicts. It is therefore a law applicable \textit{lex specialis}. Accordingly, regardless of whether the “war on terror” falls within the scope of IHL, IHRL will always be applicable. IHRL is therefore applicable \textit{lex generalis}. That means that the parties to the “war on terror” do have obligations irrespective of whether IHL is applicable and cannot fight the “war” unconcerned about international rules.

IHL and IHRL obviously have much in common due to the fact that they both are concerned with the protection of individuals.\textsuperscript{165} However, there are also some differences. IHRL primarily binds States and international organizations and operates within the territory of States. It is created to operate in peacetime and regulates the relationship between States and its citizens. States have human rights obligations and when they are breached the States in question are held responsible.\textsuperscript{166} It is disputed and not sure whether IHRL binds OAGs, whereas IHL binds both States and OAGs.\textsuperscript{167} IHL regulates the relationship between armed forces, victims and civilians.

The applicability of IHRL is generally limited to individuals subject to the jurisdiction and authority of a State.\textsuperscript{168} The individuals subject to the jurisdiction and authority of a State are those who find themselves within the national borders of a State, or within an area occupied by a State on the territory of another State.\textsuperscript{169} Under non-international armed conflict law this means that the State in which the conflict is in, and other States who have occupied areas and are under control of territories in this State, are obliged to follow IHRL. This means that the States are prohibited from arbitrarily deprive individuals of their lives\textsuperscript{170}, that they are to grant individuals with the presumption of innocence\textsuperscript{171} and that they are bound to respect individuals’ right to a fair trial before an independent and competent court.\textsuperscript{172}

As stated above repeatedly: the “war on terror” is not an IAC. If anything it is closest to a NIAC. However, regarding the “war on terror” as an NIAC is not sufficient either considering that it transcends borders. This also creates issues when we speak of the applicability of hu-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{164} ICCPR article 4, ECHR article 15, ACHR article 27. However, some laws are non-derogable such as the right to life and the right to a fair trial which will be examined below.
\item \textsuperscript{165} Jann K. Kleffner (2013) p. 72.
\item \textsuperscript{166} Ibid.
\item \textsuperscript{167} Ibid.
\item \textsuperscript{168} ICCPR article 2 para. 1, ACHR article 1 para. 1, ECHR article 1.
\item \textsuperscript{169} UNHR (2004) para 10.
\item \textsuperscript{170} ICCPR article 6, ECHR article 2.
\item \textsuperscript{171} UDHR article 11.
\item \textsuperscript{172} ICCPR article 14 and 16, and ECHR article 6.
\end{itemize}
\end{footnotesize}
man rights. Due to the fact that the “war on terror” transcends borders we have a jurisdiction issue. The terrorists are not within US jurisdiction when targeted by drones, but illustratively under Pakistan and Yemen’s, or any other country’s, jurisdiction. Since the ‘suspected’ terrorists are not under US control or on US territory, they fall outside US jurisdiction and responsibility (at least when interpreting the law strictly). We here meet an impediment. However, it is obvious that human rights principles still apply. Any other conclusion would violate the core meaning and idea behind human rights as an establishment. It is, however, important to not ignore this shortcoming of IHRL.

It is evidently and obviously difficult to ensure respect for human rights in armed conflicts, especially in NIACs where the complicated relationship between IHL and IHRL is of significantly practical relevance. OAGs are often unaware of their human rights obligations (if they have any) and the State in which they are in conflict with often have a hard time ensuring that the respect for human rights are maintained in their territory.

It is important to clarify that IHRL in no way supersedes IHL. They enjoy parallel applicability. They can work simultaneously in a number of cases. However, when a conflict occurs between different provisions the *lex specialis* principle applies. This is something that will be more discussed below. Below I will examine the legality of US drone strikes aimed at ‘suspected’ terrorists in the context of the “war on terror” from a human rights perspective, especially in regards to the right to life. IHRL will be interpreted with the view that IHL is also applicable in connection with my conclusion above that the “war on terror” should be regarded as a non-international armed conflict.

### 5.2 The non-derogable right not to be arbitrarily deprived of life

ICCPR forbids “arbitrary” deprivations of life. The right to life is a non-derogable and absolute human right. It is perhaps the most fundamental of all human rights obligations. The use of “arbitrary” lethal force is therefore a violation of fundamental human rights principles. Accordingly, in relation to the facts above, the legality of drone targeted killings from a human rights perspective depends on what is considered to be arbitrary in the context of the

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175 Jann K. Kleffner (2013) p. 73.
176 ICCPR article 6 para. 1, see also ACHR article 4 para. 1 and ECHR article 2 para. 1.
177 ICCPR article 4 para. 2.
178 See as an example UNHRC (1982) para. 1 and 5, preable of ICCPR and ICCPR article 6.
laws applicable to the “war on terror”, thus IHL. The International Court of Justice (ICJ) addressed this issue in the Nuclear Weapons Adversary Opinion:

“In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”¹⁷⁹

Accordingly the legality of the use of drones to target and kill terrorists from a human rights perspective must be determined by the principle of lex specialis in regards to IHL, more specific Common Article 3 and Additional Protocol II.

It is obvious that the right not to be arbitrarily deprived of life should be interpreted differently in wartime and in peacetime, in regards to what is deemed “arbitrarily”. Situations where it is regarded not arbitrary to take someone’s life may occur more often in armed conflicts, for example during the conduct of hostilities, than in peacetime. In war it is often a matter of life and death. International humanitarian law does give the parties the right to target members each other’s armed forces as long as civilians are spared.¹⁸⁰ Killing civilians would undoubtedly be deemed arbitrary, unless and for such times they take direct part in hostilities.¹⁸¹

Applying the lex specialis principle would give IHL precedence, in some extent, because it is designed to only apply during armed conflicts and therefore have specific rules that deal with abnormal circumstances. IHRL is more general. Accordingly, killing ‘combatants’ during hostilities is in general not arbitrary and is therefore in compliance to both IHL and IHRL.

But what is arbitrary in regards to the “war on terror” and the killing of ‘suspected’ terrorists? Considering that ‘combatants’ are not noticeably defined in non-international armed conflicts (NIACs) as they are in international armed conflicts (IACs), the test of what is arbitrary suddenly gets more complicated. After my opinion and interpretation, due to the lack of a broader and clear definition, this means that the law of NIACs does not regulate who can be non-arbitrary killed outside situations when taking direct part in hostilities, which again means that

¹⁸⁰ AP I article 52 para. 2, cf. Article 43 para. 2.
¹⁸¹ AP II article 13 para. 3.
all killings are arbitrary and prohibited outside the conduct of hostilities.\textsuperscript{182} In the Nicaragua Case, ICJ implied that the prohibition of violence to life, especially murder, which comes to show in Common Article 3 of the Geneva Conventions para. 1, is derived from a general principle of law and reflects “elementary considerations of humanity”\textsuperscript{183} Thus drone attacks against ‘suspected’ terrorists would be regarded as arbitrary when they are not taking direct part in hostilities when targeted. Outside the conduct of hostilities they are therefore enjoying the protection offered to civilians.\textsuperscript{184} Targeting civilians, except for such time they are taking direct part in hostilities, is a direct violation of IHL and IHRL.

In reference to what was discussed above under chapter 5.1 in regards to the jurisdiction issue, it seems that ICJ in the Nicaragua case clarified that the prohibition in Common Article 3 regarding violence to life and person, particular murder, is binding extraterritorial.\textsuperscript{185} It establishes a universal customary standard applicable “at any time and any place whatsoever.”\textsuperscript{186} Consequently, the prohibition is also binding to the US outside their territory, and thus applicable to the drone operations in the context of the “war on terror”.

It is important to mention that the use of lethal force can be allowed also outside the conduct of hostilities – in times of peace.\textsuperscript{187} However, the exceptions are few and they have a narrow scope. No derogation is allowed outside of the strict defined exceptions.\textsuperscript{188} The UNBFF provision 9 states that the use of lethal force outside of an armed conflict is permitted only if it is strictly and directly necessarily in cases of 1) self-defence or defence of others against an “imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life” and 2) other less critical means are insufficient and lethal force is the only way to avoid the situation. These exceptions are widely considered not to be “arbitrary” in the meaning of ICCPR article 6.\textsuperscript{189}

Thus, due to the strict interpretation, it would appear that ‘suspected’ terrorists can only be targeted if it exists credible evidence, in such case that they lose their status as ‘suspects’, or

\begin{itemize}
\item \textsuperscript{182} Common article 3 of the Geneva Conventions para. 1 litra a, also AP II article 13 para. 3. If IHL doesn’t provide any more clarity than IHRL, the \textit{lex specialis principle} won’t have any practical meaning, giving IHRL precedence due to the fact that IHRL provides general law where more specific definitions doesn’t exist, which would be the case here.
\item \textsuperscript{183} Nicaragua vs. United States of America (1986) para. 218.
\item \textsuperscript{184} AP II article 13 para. 3 ”for such time”.
\item \textsuperscript{185} Nicaragua vs. United States of America (1986) para. 218.
\item \textsuperscript{186} Common article 3 of the Geneva Conventions para. 1.
\item \textsuperscript{187} See as an example ECHR article 2, para. 2, Roland Otto (2010) p. 78, UNBFF provision 9. Death penalties is also, in some countries, exceptions to the right to life.
\item \textsuperscript{188} Roland Otto (2010) p. 79.
\item \textsuperscript{189} Ibid.
\end{itemize}
that it at least exists a high probability, that the terrorists is in fact terrorists who is planning and preparing a future terrorist attack and no other means are available to stop this terrorist attack from happening other than eliminating the individual.\textsuperscript{190} There has to exist an “imminent threat or serious injury” and it has to abide the standards of proportionality and necessity.\textsuperscript{191} Thus, just the fact that the targeted terrorists have the status as ‘suspects’ would per definition constitute that these criteria are not met.

Whether the use of lethal force on ‘suspected terrorists’ is permitted is determined by the principle of necessity\textsuperscript{192} and principle of proportionality.\textsuperscript{193} It is accordingly necessary to review whether there is any possibility to choose milder and less restrictive means in order to stop ‘suspected’ terrorists. This is also supported by the UNHRC (see below).

The Human Rights Committee (UNHRC) has made it clear that they find the practise of targeting ‘suspected’ terrorists concerning, noting that state parties “should not use “targeted killings” as a deterrent or punishment”.\textsuperscript{194} They should ensure that “the utmost consideration is given to the principle of proportionality in all its responses to terrorists threats and activities.”\textsuperscript{195} Thus “before resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.”\textsuperscript{196}

Considering the facts presented in chapter 1.5 it seems that the US is more lenient in their targeting policy than what is allowed under IHL and IHRL when concurred. Killing ‘suspected terrorists by drone strikes shows no attempt to arrest. The former President of the United States, President Barack Obama, stated in his speech in 2013 that the US drone programme is legally superior to other alternatives (see above in chapter 1.5).\textsuperscript{197} It is legally superior to for example having Special Forces or ground troops capturing ‘suspected’ terrorists in countries where the US is not formally at war.\textsuperscript{198} He went on to defend drones as the superior alternative also due to difficult terrain, claiming that al Qaeda and its affiliates hides in the “most

\textsuperscript{190} David Kretzmer (2005) p. 203.
\textsuperscript{192} The principle of necessity demands that the least restrictive mean is chosen. See UNBFF provision 5.
\textsuperscript{193} The principle of proportionality demands that the advantage must be greater than the damage and has close ties to the principle of necessity.
\textsuperscript{194} UNHRC (2003) para. 15.
\textsuperscript{195} Ibid.
\textsuperscript{196} Ibid.
\textsuperscript{197} Michael J. Boyle (2017) p. 1, see also The White House (2013).
\textsuperscript{198} Ibid.
distant and unforgiving places on Earth”, leading to that the host States “lacks the capacity or will to take action”. 199

One might discuss whether such arguments justify the use of lethal force due to the principle of proportionality and necessity. I find it difficult to see how terrorists not taking direct part in hostilities, or being involved in military operations, can be viewed as “imminent threats” under UNBFF provision 9. The more appropriate way would, if not being able to arrest, be to at least give them an opportunity to surrender, before using lethal force as a last resort. However, as mentioned, it’s hard to see how a terrorist could be of “imminent threat” when not partaking in hostilities or military operations. It’s even more so knowing they are far away hiding in distant and unforgiving places far away from civilization, where national or foreign troops can’t reach. Targeting a terrorist who is not of an imminent threat would not be governed by UNBFF provision 9, thus not non-arbitrary. It would therefore be a violation of ICCPR article 6.

6 Conclusion

This thesis has demonstrated that the practice of drone targeted killings of ‘suspected terrorists’ in the context of the “war on terror” do raise a great deal of multifaceted, intricate and complex questions. One of the most important questions it raises is whether IHL is applicable to the “war on terror”. This is a difficult question to answer. Ideally, I should have analysed and assessed the “war on terror” on a case-to-case basis, since not all terrorist actions is an act of war. However, due to the scope of this thesis, I have simplified it. I’ve come to the conclusion that the “war on terror” can and should be regarded as a non-international armed conflict (NIAC). This might be an unpopular conclusion due to the war’s international character, but as shown above: it fits better within the NIAC model than the IAC model. The treaties of IACs have more defined restrictions and limitations. The treaties of NIACs, however, do not contain such clear defined restrictions and are therefore more open for interpretation.

After my opinion any armed conflict should be regarded to fall within the scope of IHL. Thus when examining the lawfulness of drone targeted killings in the context of the “war on terror” the IHL laws of NIAC should apply.

Whether a drone targeted killing of a ‘suspected’ terrorist is permissible under IHL depends on the case-to-case circumstances and has to be assessed accordingly. As discussed above it might be hard to distinguish terrorists from civilians due to the undefined legal status of terrorists. Since combatants are not defined in NIACs, they are regarded as “non-civilians” or

...civilians taking direct part in hostilities.200 Drone targeted killings aimed at these individuals will therefore in most cases violate the prohibition of indiscriminate attack.201 One might also violate the principle of proportionality and necessity. It is therefore a pressing need for the international community to define terrorists and their legal status in IHL and supplement the already existing treaties with new treaties.

This thesis has also demonstrated how IHRL and IHL interact. Under IHRL drone targeted killings of ‘suspected’ terrorists will most probably never be legitimate due to the right not to be arbitrarily deprived of life. The criteria for a killing not be arbitrary are very strict. The right to a fair trial and right to due process of law are of fundamental importance. For the use of deadly force to be legal it has to exist an imminent threat and the use of deadly force has to be regarded as the last resort. Only when no other alternatives are deemed possible can deadly force be viewed legitimate. It has to be absolutely necessary in order to save lives from an imminent threat and the amount of force has to be proportionate to the threat. A ‘targeted killing’ is defined as a deadly force that has elements of intent, premeditation and deliberation.202 The targeted killing has to be the aim of the whole operation. It is therefore highly unlikely that IHRL will regard such a killing as being justifiable since it has an element of cold-bloodedness and calculation, and not as a sudden responds to a sudden threat triggering the use of self-defence.

Since IHL applies as lex specialis and IHRL as lex generalis, IHRL applies when IHL lacks the laws and definitions to sufficiently deal with the abnormalities of an armed conflict. IHL is in many ways inadequate to deal with the “war on terror” which means that IHRL applies. Based on the conclusions and the discussions above it is not unreasonable to question whether drone targeted killings of ‘suspected’ terrorists in the “war on terror” are in compliance with international law. I stress that there should be considerable doubt as to whether they are legal, this from a general point of view. There is too much uncertainty under IHL, and too much uncertainty regarding the legal status of terrorists, not to be sceptical. The conclusion is therefore, with the precautions that my opinion and analytical reflection might contain opinions that are debatable, that drone targeted killings of ‘suspected’ terrorists are most likely in general unlawful, except for those cases they are justifiable under IHRL.

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200 AP II article 13 para. 3.
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<tr>
<td>GC II</td>
<td>Geneva Convention II of 1949 for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.</td>
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<tr>
<td>GC III</td>
<td>Geneva Convention III of 1949 relative to the Treatment of Prisoners of War.</td>
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<td>GC IV</td>
<td>Geneva Convention IV of 1949 relative to the Protection of Civilian Persons in Time of War.</td>
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<td>HagueReg</td>
<td>Hague Regulation of 18 October 1907 regarding the Laws and Customs of War and Land.</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights of 1948.</td>
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**US Law**

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**Cases**

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