Game of drones

An assessment of the legal consequences of using drones in targeted killings, in a non-international armed conflict.

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1 Introduction

1.1 Introduction to the issue
The use of drones has experienced an explosive growth in recent history, and these high-tech means of warfare have proven to be invaluable in the fight against terrorism. The reason being that drones can provide a “persistent and capable intelligence, surveillance and reconnaissance”. These technological developments have therefore given States a new advantage concerning the means of warfare. In the context of a non-international armed conflict (hereinafter NIAC), the use of armed drones may be able to fulfil the requirements under the fundamental principles in international humanitarian law regarding distinction and proportionality. However, the question is, does the use of drones change the issue of targeted killing in an armed conflict? Will the use of drones increase the chances of positively identifying and killing enemy fighters, while reducing collateral damage?

In Yemen, from 2002 onwards, the estimated number of drone strikes amounts to a total of 239 confirmed strikes, where the most recent was April 24th 2017. In these strikes the estimated number of confirmed killings is between 866 and 1191 people, of which between 160 and 197 were civilians. It follows that the exact number is difficult to estimate, although it has been claimed that the use of drones increases accuracy. On the one hand, the United States of America (hereinafter the U.S.) released a statement in 2016 claiming that at least 64 civilians had been killed in drone or lethal air attacks against suspected terrorists in non-war zones, without stating when or where the strike occurred. On the other hand, according to other sources, the number is much higher, and ranges from 212 to 325 confirmed killings. Although the main objective is to avoid collateral damage, such as civilian casualties, there is little doubt that incurring civilian casualties is a natural consequence when using drones. How can a State be held accountable for its potential wrongful actions?

Another aspect is that the use of drones can potentially threaten both peace and stability in various regions of the world, dependent upon which State develops an efficient drone program. This is relevant because the use of drones gives States technological advantages in the war on terror, given the drones’ opportunity to monitor massive populations from afar.

1 FY2009-2034 (2009), page 2.
3 Serle and Purkiss (2017), (Numbers last updated April 24).
4 Serle and Purkiss (2017), (Numbers last updated April 24).
5 DeYoung and Miller (2016).
6 DeYoung and Miller (2016).
This means that there is a shift in how modern warfare is carried out, since the war on terror has used both military and non-military means.7

1.2 Terminology
This chapter will explain the terminology used in this thesis.

1.2.1 Drones
There are several definitions on what a drone really is, and it is therefore necessary to distinguish them in the following manner. In technological terms a drone is an unmanned vehicle, more commonly known as an unmanned aerial vehicle (hereinafter UAV) or unmanned aerial system (hereinafter UAS). In other terms a drone is an object that is remotely controlled, or is preprogrammed with flight plans in their computer-system, which is working in conjunction with either sensors and/or GPS.8 The explicit designation of a UAV is either a plane, with no pilot on board, or a remote-controlled plane. There is necessarily an operator controlling the plane from afar, who in many cases is bound to the ground. In comparison, a UAS refers to the system itself, including the plane.9

According to the Norwegian Ethics Committee for the defense sector,10 the use of terminology plays an important role in the discussion of unmanned vehicles.11 The reason for this being that the word ‘drone’ or ‘UAV’ has the association that the plane can act on its own, regardless of being controlled by a human being.

The international community has argued that the word ‘drone’ is given a wider scope than the wording envisages, since the vehicle, or system is characterized by being autonomous. It is therefore relevant to clarify what it means that a vehicle or a system is acting autonomously. A system is autonomous when advanced algorithms and computer technology represents the foundation for operational decisions, or if the system is capable of changing its course or mission based on gathered intelligence.12 This intelligence could therefore give an indication if there is a legitimate target, or if an attack should even take place. These systems are therefore described as ‘automated’ since they are capable of autonomously detecting and

7 Bredesen and Reichborn-Kjennerud (2016), Chapter 1.
10 In Norwegian: Etisk Råd for Forsvarssektoren. This committee works under the Norwegian Department of Defense, and its main purpose is to contribute to an increased ethical awareness among employees within this sector, http://www.forsvarsetikk.no/om-etisk-raad/ (Last accessed 1 April 2017).
attacking targets, without the control by a human operator.\textsuperscript{13} In comparison, NATO has launched its first official definition, stating that a vehicle or system is autonomous when “the execution of a predefined process or events that do not require direct UAV System crew initiation and/or intervention”.\textsuperscript{14} A system is autonomous when there is not an operator who either initiates or controls the actions. In comparison, Great Britain’s Ministry of Defense believes that the requirement is higher, whereas the UAV understands both its surroundings and the mission given in the context of the operation.\textsuperscript{15}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{drone.png}
\caption{Figure 1:}
\end{figure}

As figure 1\textsuperscript{16} indicates there are two distinctions that must be made in order to define UAV’s. For the purpose of this thesis, the term drone, including both long-range armed drones and reaper-drones, refers to combat drones, which are remotely controlled by a drone-pilot.

1.2.2 Terrorism

“The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail”.\textsuperscript{17} This quote shows that it is difficult to get a global consensus on the definition of terrorism. The common belief is that international humanitarian law (hereinafter IHL) provides the legal framework for addressing international terrorism, although IHL does not provide a definition of what terrorism actually is.\textsuperscript{18} IHL does however prohibit “measures” of terrorism, and “acts of terrorism”, c.f. Article 33 of the Fourth Geneva Convention, in force 1950, and article 4 of the Additional Protocol II, in force 1978. The intention of this being that

\begin{itemize}
\item \textsuperscript{13} Meltzer (2013).
\item \textsuperscript{14} Joint Air Power Competence Centre (2010), page 21.
\item \textsuperscript{15} Joint Doctrine Note 2/11 (2011), pp 2 – 3.
\item \textsuperscript{16} De Groof (2016), page 134.
\item \textsuperscript{17} Levitt (1986), page 97.
\item \textsuperscript{18} Bianchi and Naqvi (2014), pp 574 – 577.
\end{itemize}
civilians shall not be victim of a state of terror, and it is prohibited to spread terror amongst the civilian population. This is also viewed as customary IHL.\textsuperscript{19}

Legal scholars have argued that it is necessary to develop a coherent legal definition of terrorism, since the current definitions serve little legal purpose.\textsuperscript{20} This has been especially clear post 9/11, where certain events have been characterized as undoubtedly “international terrorism”,\textsuperscript{21} and the perpetrated acts have been condemned by the international community. The question is whether existing international agreements condemning certain terrorist acts are enough, or if the international community needs a joint and comprehensive definition. Post 9/11 the United Nations Security Council (hereinafter UNSC), felt it necessary to adopt several resolutions to ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that their punishment duly reflects the seriousness of such terrorist acts.\textsuperscript{22} Without defining the content of the term, the UNSC requested the UN member States to not only adopt different measures, but also to work together in order to suppress terrorist acts.

Later on, the UNSC went on to define terrorism as \textit{“criminal acts [...] with the intent to cause death or serious bodily injury [...] with the purpose to provoke a state of terror in the general population [...] or compel a government [...] to do or abstain from doing any act”}.\textsuperscript{23} Although resolutions are not binding, it does show a growing consensus amongst UN member States as to what amounts to terrorism. Kofi Annan, former Secretary-General of the United Nations, stated in 2005 that \textit{“The time has come to complete a comprehensive convention outlawing terrorism in all its forms”}.\textsuperscript{24} This could indicate a gradual shift within the UN, where member States more actively seek to work towards a joint definition. It remains to see if there will be a new Treaty based on the above-mentioned agreed definition. The analysis in this thesis will be based on the preliminary definition of terrorism given in the UNSC Resolution 1566.

\begin{thebibliography}{9}
\bibitem{19} Henckaerts and Doswald-Beck (2005), rule 2, page 8.
\bibitem{20} Baxter (1974).
\bibitem{21} Duffy (2015), pp 29 and following.
\bibitem{22} UNSC Resolution 1373 (2001).
\bibitem{23} UNSC Resolution 1566 (2004).
\bibitem{24} Annan (2005).
\end{thebibliography}
1.3 General principles of international humanitarian law (IHL)

The primary purpose of the rules regulating IHL is to limit the effects of an armed conflict (hereinafter AC). This includes primarily the protection of both civilians as well as persons who are no longer directly engaged in hostilities. The main IHL treaties are the four Geneva Conventions in force 1950, and their two additional protocols (hereinafter AP I and AP II), in force 1978. IHL operates on the basis of certain fundamental principles, some of which are discussed below. In the context of this thesis it is especially the principle of distinction that is relevant, because the only legitimate target in an AC is either a combatant or a civilian taking direct part in hostilities. References to AP I are made, keeping in mind that State practice has established these principles as customary IHL, c.f. the ICRC study of customary IHL.

1.3.1 Distinction

Since many of today’s armed conflicts are of a non-international character, and because there is a gradual shift in military operations, it is increasingly difficult to distinguish who are enemy combatants. In an AC, the principle of distinction is crucial because it distinguishes between who may be lawfully attacked, and persons who must be either spared or protected from the hostilities. This raises the question of who constitutes a legitimate military target.

Under international law there is a distinction between combatants and civilians. Building on the preceding definition of armed forces, stated in AP I article 43, the term ‘combatants’ are usually understood as members of an armed force that participates in hostilities on behalf of a party to the conflict, usually defined as ‘privileged combatants’. It is stated in AP I article 48, that parties in a conflict must at all times distinguish between “civilian population and combatants and between civilian objects and military objects […] and shall direct their operations only against military objectives”. These two categories are mutually exclusive which means in a situation of an AC, every person is either a legitimate military objective, or a protected person. In an AC, the only legitimate military action is when the aim is to weaken the military potential of the enemy. However, this distinction does not include all categories of persons that may be present in an AC, and AP I article 51 must therefore be supplemented with article 51 (2) and 52 (2). This means that attacks cannot be directed against civilians. A civilian is defined as any person that is not a combatant. This is also stated in AP II article 13 (2) where civilians “shall not be the object of the attack”. The ICTY stated in the Galic-

26 Henckaerts and Doswald-Beck, (2005), rule 1, page 3.
28 Meltzer (2014), page 305.
29 Kolb and Hyde (2008), page 127.
30 Kolb and Hyde, (2008), page 125.
case that this is “one of the fundamental principles” of IHL, and that there is an “absolute prohibition on targeting civilians” in an AC.\textsuperscript{31}

Civilians that are characterized as protected, may however lose their protection as a result of their conduct.\textsuperscript{32} This exemption is referred in article 51 (3) of AP 1 and article 13 (3) of AP II, where civilians may lose their protection if they “take a direct part in hostilities”. This is also viewed as customary IHL, where the meaning of the term has not been clarified.\textsuperscript{33} Although there is a consensus when there is doubt whether a person should be considered a civilian, that person shall be considered as such. Otherwise civilians ought to be characterized as peaceful civilians, meaning that they do not take direct participation in hostilities.\textsuperscript{34} Treaty IHL does not define what “direct participation in hostilities is”.\textsuperscript{35} However, it gives an indication that civilians can only be targeted when they are acting in a way which links them to the ongoing conflict.\textsuperscript{36}

The wording must be interpreted in good faith, and in accordance with the ordinary meaning c.f. Vienna Convention on the Law of the Treaties, article 31 (1), in force 1980. In order to assess if a civilian participates in a conflict one must look into the circumstances prevailing at that time. The participation will occur in various degrees of intensity, depending of the conflict in question. While the concept of hostilities refers to the collective resort of force by the parties of the conflict, participation refers to the individual support or involvement perpetrated by either party to that conflict. Dependent on the intensity of the involvement, the participation can either be direct or indirect.\textsuperscript{37} Direct being when the civilian is an active part of the conflict, meaning specific, hostile acts. In order to qualify as direct participation in hostilities, the following three cumulative criteria’s must be fulfilled:\textsuperscript{38}

1) The attack must be likely to result in harm to a party to an AC, meaning that the threshold of harm must be transgressed,

2) There must be a causal link between the act, and the harm likely to result from that act, and

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\textsuperscript{31} Prosecutor v. Stanislav Galic, paragraph 190.
\textsuperscript{32} Meltzer (2014), page 299.
\textsuperscript{33} Henckaerts and Doswald-Beck, (2005), rule 6, page 21.
\textsuperscript{34} Meltzer (2014), page 300.
\textsuperscript{35} Melzer (2009), page 41.
\textsuperscript{36} Rothenberg (2015), page 448.
\textsuperscript{37} Melzer (2009), page 41.
\textsuperscript{38} Melzer (2009), page 46.
3) There must be a belligerent nexus, meaning that the act and harm inflicted must be conducted between two parties in that conflict.

If these requirements are met, a civilian is considered as taking a direct part in an AC. Complying with the principle of distinction every drone pilot must distinguish between a civilian and a combatant, meaning that civilians can only be targeted by drone attacks while participating in hostilities, and only for that period of time.³⁹

1.3.2 Proportionality
Proportionality, in its simplest formulation, means that an attack must be consistent with the anticipated goal.⁴⁰ In my opinion an attack is disproportionate when the force used is clearly excessive given the goals sought to be accomplished. One such example is of the U.S. wanting to target a known tribal-leader of Al-Qaeda in Yemen. If the U.S. launches the attack while the leader is going to prayer, and is surrounded by civilians, it is clear that the attack would be disproportional because of the disproportionate civilian harm likely to be caused. In regard to State practice, debates about proportionality have been controversial, especially regarding asymmetrical attacks.⁴¹ The reason being that enemy combatants have exploited the protections civilians have under IHL. For instance, insurgents in Iraq used mosques as both fighting positions and weapons caches making it more likely that civilians would be harmed.⁴²

States have also established the principle of proportionality as a norm of customary international law.⁴³ The jurisprudence by the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) provide further support for this notion. The ICTY stated in the Galic-case that when assessing civilian casualties regarding proportionality “casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack”.⁴⁴ The ICTY repeated this in the case against Martic.⁴⁵ This indicates that the principle is applicable in both an international and non-international armed conflict, which will be defined in chapter 2. In regard of an international armed conflict, it is stated in article 51 (5)(b) of AP I that: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantages anticipated”. This means

³⁹ De Groof (2016), page 147.
⁴¹ Newton and May (2014), page 85.
⁴² Newton and May (2014), page 85.
⁴³ Henckaerts and Doswald-Beck, (2005), rule 14, page 46.
⁴⁴ Prosecutor v. Stanislav Galic, paragraph 190.
⁴⁵ Prosecutor v. Milan Martic, paragraph 69.
that an attack is prohibited if the attack is expected to cause excessive incidental loss of either civilian life, injury to civilians, damage to civilian objects, or a combination of all three.\textsuperscript{46} The criteria are that the collateral damage resulting from the launched attack would be excessive in relation to the anticipated military advantage.

The U.S. has implemented this principle in their military procedure on targeting. This implies that the principle both is incorporated in regard of command responsibility, and other military personnel in order to prevent excessive use of force – both in international and non-international armed conflicts.\textsuperscript{47} In comparison the Norwegian War Manual states that it is only anticipated losses that are relevant when assessing proportionality.\textsuperscript{48} As a consequence, an attack’s proportionality cannot be evaluated based on information that was not available by the time of the attack. The Norwegian War Manual has a good example regarding these principles, namely concerning targeting an ammunition factory. The factory itself constitutes a legal target, but the people working there are considered to be civilians. The principle of military necessity dictates that the factory is a legitimate target, but the principle of distinction indicates that one must distinguish between civilian and military personnel. Assuming civilian casualties were inevitable, and that the anticipated collateral damage, or loss, was not disproportionate in light of the expected military advantage, the attack would not constitute a breach with IHL.\textsuperscript{49}

In regard to the assessment of what would be unreasonable or excessive, it is relevant to consider if the perpetrating State has the necessary intelligence when launching an attack. This means to take in consideration if the State has planned, decided upon or executed attacks on the basis of the present information gathered.\textsuperscript{50} This indicates that the principle of proportionality creates a legal obligation to refrain from attacks where the harm inflicted is expected to be excessive in relation to the concrete and overall military advantage. It also applies where States willingly accept the potential risk of harming civilians when launching drones against high-value targets.\textsuperscript{51} A U.S.’ drone strike will therefore clearly be excessive if the government has knowledge that the planned attack will not reach the aimed military advantage.

\textsuperscript{46} Henckaerts and Doswald-Beck, (2005), rule 14, page 46.
\textsuperscript{49} Norwegian War Manual (2013), page 15
\textsuperscript{50} Henckaerts and Doswald-Beck, (2005), rule 14, page 50.
1.3.3 Precautions in attack
Since the means of warfare have developed throughout history to become increasingly more lethal, the parties to an armed conflict have an ongoing obligation to spare both the civilian population and civilian objects when conducting military operations.\footnote{Haines (2014), page 287.} This means that all feasible precautions must be taken, in both planning and conducting military operations, in order to avoid or minimize incidental loss of life, injury to civilians and damage to civilian objects.\footnote{Henckaerts and Doswald-Beck (2005), rule 15 page 51.} Several States, including the U.S. and Norway,\footnote{U.S. War Manual (2015), page 79, and the Norwegian War Manual (2013), page 13.} have implemented this principle in their military manuals. The U.S. has adduced that it is important to protect either persons or objects by the party subject to an attack, in order to reduce the risk of damage. This principle is considered part of customary international law,\footnote{Henckaerts and Doswald-Beck (2005), rule 15, page 51.} and is also codified in the AP I article 57 (1).

The U.S. War Manual states that civilians “must not be made the object of attack” and “measures of intimidation or terrorism against the civilian population are prohibited”.\footnote{U.S War Manual (2015), pp 188-189.} This is an interesting aspect when assessing the use of drones in targeted killings, because the current situation indicates that the use of drones contributes to spread terror. It also raises an important question in regard to the impact of new technology when using drones. Will the use of unmanned vehicles be able to give enough accurate information that is necessary when a State decides to target a military objective?

1.4 Methodology
In the following section I will elaborate the relevant legal sources for the purpose of this thesis, and how these sources will be used in order to answer my research question. Article 38 (1) in the Statute of the International Court of Justice, in force 1945 (hereinafter ICJ Statute), which is widely recognized as the “most authoritative and complete statement as to the sources of international law”,\footnote{Shaw (2014), page 50.} provides which sources that are formally recognized as sources in international law.\footnote{Crawford (2012), pp 21-22.} States have consequently agreed that these sources are relevant. This thesis adopts a legal positivism and it will be relevant to assess different sources, such as treaties, customary IHL, general principles, judicial decisions, scholarly writing as well as articles.
1.4.1 Treaties
The international law relevant for targeted killing derives mainly from the four Geneva Conventions. The four Geneva Conventions are relevant because they regulate the conduct of hostilities, and provide protection to civilians. They are also law-making treaties, because they are intended as either universal or general, regarding the rule of law. As the common article 3 of the four Geneva Conventions set out an absolute prohibition for killing civilians in a NIAC, it is especially relevant to assess the use of drones in a NIAC.

Having the nature of treaties in mind, and the fact that their whole foundation is based upon States agreeing on common terms, problems regarding interpretation could arise. The ICJ stated in the case between Costa Rica and Nicaragua that where States party to a treaty have agreed upon a generic term, they must have been aware that the meaning of the term is likely to evolve over time. In regard to treaty interpretation one must therefore assume a dynamic interpretation which will contribute to a development in international law. In accordance with the ruling of the ICJ, the term ‘armed attack’ by the use of UAV’s must be understood with the society’s technological advantages, in regard to modern warfare. This includes taking into consideration the development of using drones in targeted killings, hereby the legal consequences when there is a material breach.

1.4.2 Customary international humanitarian law
It is generally accepted that customary IHL refers to a “general practice accepted as law”, c.f. ICJ Statute article 38. To determine if a customary law exists, one should ask two questions; 1) Is there a general practice, and 2) Is this practice accepted as international law? In the Fisheries-case between the United Kingdom and Norway, the dissenting Judge Read stated that customary law was the “generalization of the practice of States”. These questions are relevant when a Court realizes that there is no law covering the exact situation of a case. Customary IHL is relevant because it will serve as an interpretation factor, and supplement, when assessing the use of drones in targeted killings.

1.4.3 General principles of IHL
As a legal system, international law would be undermined if the ICJ, because of a legal vacuum, or lack of legal basis, was unable to provide a ruling. If such a situation occurs, the Court would deduce rules from “already existing rules, or from basic legal principles, such

61 Costa Rica v. Nicaragua (2009), para 64.
as justice and equity”.64 This means that the Court “chooses, edits and adapts” from other legal systems, in order to find a reasonable solution.65 This is one example of where it is visible that international law has been influenced by various domestic laws. This is relevant because it serves as fundamental principles when assessing the content of IHL.

1.4.4 Subsidiary means for the determination of rules of law
It is stated in article 38 (1)(d) of the ICJ Statutes that judicial decisions and literature are “subsidiary means”, meaning that they can be used as a secondary source in order to determine the content of the rule of law, rather than as a primary source.66

1.4.4.1 Judicial decisions
Judicial decisions are relevant because courts will examine previous decisions in order to distinguish relevant cases. This contributes to create both predictability and consistency in a legal system. However, it is important to recall that the decisions of the ICJ have no binding force “except between the parties [...] of that particular case”, c.f. ICJ Statute article 59.

Decisions from international courts and tribunals, such as the ICJ and ICTY will be used in the analysis below. The latter because the case against Tadic establishes the criteria for the existence of a NIAC against an armed group. The decisions will further highlight how the general principles of IHL are used in practice. It will also be relevant to assess decisions from the U.S. Supreme Court, in regard to what extent common article 3 of the Geneva Conventions applies to combatants in a NIAC. This concern in particular the ruling in Hamdan v. Rumsfeld, where it was decided that this is the case.

1.4.4.2 The use of published scholars
Scholarly or academic literature is an important source in international law, due to the fact that it contributes to focus on structure and form of international law.67 Since the system of international law is still quite young, published scholars will contribute to highlighting and identifying areas where international law should be introduced, as well as making suggestions for the future.68 The latter is important here, as drones are a new means of warfare, and may not have been considered when drafting the main IHL-treaties. For the purpose of this thesis contributions by different scholars have been chosen because they have their own methodology and perspective. The literature chosen has been written by jurists, military

64 Wallace (2002), page 23.
66 Shaw (2014), page 78.
67 Shaw (2014), page 81.
experts as well as writers with a background in social science. This has been a deliberate choice because different methodologies and viewpoint will give this thesis a broader and better informed perspective.

1.4.4.3 Resolutions from the United Nations (UN):
Although the legal status of resolutions from the General Assembly remains somewhat uncertain, it is important to take its wording into consideration. Only those resolutions which are adopted by General Assembly, with regard to either procedural or budgetary questions, are legally binding upon members. All other resolutions are either recommendations or statements given on a specific issue, and they are often characterized as soft law being described as “non-legally binding international instrument”. It is however important to keep in mind that these resolutions will give an indication on the general consensus in the international community as to what the law is. The situation is however different in regard of resolutions adopted by the UNSC, because these are legally binding upon all member States when adopted under Chapter VII of the UN Charter, cf. article 24 and 25. UNSC resolutions are relevant because they give an indication of the constraints imposed by the UN.

1.4.4.4 Reports from both the United Nations (UN) and Non-Governmental Organizations (NGOs)
Reports from both the UN and NGOs will be used, because they provide third-party information on the use of drones in targeted killings. This applies in particular when assessing State responsibility, and in relation to ensuring judicial oversight of military operations, because there is a lack of adequate transparency within the U.S. Government. These reports will highlight the actual situation, and will therefore serve as a control mechanism by showing the concerns to the public. This will potentially give the international community, and victims, the possibility to hold the U.S. accountable for its actions. It is further important because it will give an indication of whether or not the U.S. acts in compliance with the principles of IHL. The reports also include those compiled by the International Committee of the Red Cross (hereinafter ICRC), because the ICRC is an impartial, neutral and independent organization, “ensuring humanitarian protection and assistance for victims of armed conflict and other situations of violence”. It will also be relevant to use reports from Human Rights Watch. Since this international NGO is recognized for its important work in ensuring protection for human rights, and consist of renowned human right experts. These reports will

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70 Wallace (2002), page 30.
contribute to highlight the discrepancy regarding the number of civilian casualties being reported.

1.4.4.5 Government documents
Particularly relevant to the question of targeted killings with the use of drones are the U.S. War Manual, and the Manual on Counterinsurgency. These military manuals describe how the U.S. balances the considerations of effective combat operations. The manuals describe the necessity to avoid unnecessary harm to both civilians and civilian objects, while the safeguarding of the general principles of IHL. It is also relevant to use different documents from the U.S. Government to highlight the sanctioning, in regard to the use of drones. This includes both statements from President Obama, as well as executive orders from former President George W. Bush.

1.5 The research question and the scope of the thesis
The research question is inspired by an article written by Milena Steiro which analyzed the U.S.’ use of drones in the war on terror.72 The main objective of this thesis is to assess the lawfulness and legal consequences of using drones in targeting killings under international law, in the context of a NIAC. The thesis will highlight when drone strikes are in accordance with international law. It will also discuss human rights issues in regard of legal consequences of using drones in targeted killings, focusing on State and individual accountability, and responsibility for damage.

In the following I will define what constitutes an AC, hereby the threshold between an international and non-international armed conflict. The main objective of chapter 3 is to analyze the use of drones in targeted killings, where I will first look at technology in modern warfare, and analyze if technology shapes warfare. I will then assess targeted killings and non-battlefield assassinations, where it will be important to look at what constitutes a targeted killing. This includes clarifying if there are any differences between targeted killings, and signature strikes. Further I will analyze the use of drones in lethal targeting, where I would like to highlight drone strikes perpetrated by the U.S. in Yemen. Finally, I will address the problems regarding state and individual criminal responsibility, as well as remedies for IHL-violations.

It follows that the perspective of this thesis is two-fold, in regard to defining the legal research. The approach in chapter 2 will be a doctrinal research, which relies on using court

72 Steiro, Milena (2012), page 198.
decisions and international treaties to explain the law.73 This means systematizing and clarifying the legal framework of what constitutes an AC, and applying relevant legal provisions to facts. Chapter 3 and 4 will be an empirical legal study, because this will broaden the legal positivistic approach, in regard to using empirical data to answer my research question. The reason for this being that there is an increasing influence of international legal material.74

2 The law of armed conflict

IHL applies to AC’s, although it does not concern the legality of the conflict itself.\(^75\) The law of war provides guidelines on what conduct constitutes an AC. When it comes to terrorism in an AC, IHL provides a prohibition of terrorism in AP I article 51(2), AP II article 13(2) and customary IHL.\(^76\) It states that acts or threats of violence, where the primary focus is to “spread terror” are prohibited, c.f. AP I article 51. In regard to the classification of AC’s, IHL refers to two different types of conflicts: international armed conflicts (hereinafter IAC), and NIAC’s.\(^77\)

The legal framework for an IAC is the four Geneva Conventions, with the exception of common article 3, as well as the AP I from 1977. It is stated in article 2 in these Conventions that they are applicable in “cases of declared war or of any other armed conflict”. An IAC exists if a State uses armed force against another State, independent if either party consider themselves to be at war.\(^78\) Whether there might be a conflict with an organized armed group depends therefore on it falling with the definition of a non-international armed conflict.\(^79\) In comparison, the ICC stated in the case against Lubanga that “if the armed group is not acting on behalf of a government [...] there is no international armed conflict”.\(^80\) This means that an AC between states and non-state actors is considered to be a NIAC.

The legal framework for regulating a NIAC is common article 3 to the Geneva Conventions, and Article 1 of the AP II, where it is stated that the provision applies in conflicts that are of a non-international character. The ICRC states in its Commentary of 1958 to the fourth Geneva Convention that “the conflicts [...] are similar to an international war, but take place within the confines of a single country”.\(^81\) It is further stated that article 3 has a wide field of application, because it covers members of armed groups, as well as civilians.\(^82\) AP II article 1 (2) states that situations that are “internal disturbances and tensions” are excluded by IHL in regard to the distinction of an armed conflict. This means that if armed groups are involved they need to “have the ability to plan and carry out operations for a prolonged period of

\(^75\) Oeter (2013), page 201.
\(^76\) Henckaerts and Doswald-Beck (2005), rule 2, pp 8 – 10.
\(^77\) Geneva Academy of International Humanitarian Law (2012).
\(^78\) Oeter (2013), page 202.
\(^79\) Duffy (2015), page 394.
\(^80\) Prosecutor v. Thomas Lubanga Dyilo (2012), paragraph 541.
\(^81\) ICRC, Commentary of 1958, page 36.
\(^82\) ICRC, Commentary of 1958, page 38.
time”. The criteria for the existence of a NIAC is therefore that the use of force employed must reach a certain level of intensity, and must be distinguishable from sporadic or isolated acts of violence.

The jurisprudence of ICTY states that an NIAC exists with non-state actors that have a certain level of internal organization and structure. The widely-accepted test is articulated by the ICTY in the case against Tadic. The conditions are stated in paragraph 562, and focus on two aspects of a conflict:

a) “the intensity of the conflict”; and
b) “the organization of the parties to the conflict”.

After considering these criteria the conflict is either characterized as armed or mixed character. The criteria are used as laying down a minimum threshold for “distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities which are not subject to international humanitarian law”. Therefore, a NIAC exists, according to jurisprudence from the ICTY, “whenever there is [...] protracted armed violence between governmental authorities and organized armed groups”. The criteria is similar in ICTR, c.f. Kayishema. For the purpose of this thesis the definition from ICTY will be adopted.

The threshold of organization means that the group must have a continuous combat function, and will only then be legitimate military targets. On this basis it is uncertain whether Al-Qaeda, and their supporters, should be characterized as an organized group. It has been discussed whether Al-Qaeda is a loosely connected network, rather than a single transnational organization. However, there is a global consensus that Al-Qaeda is a well-ordered collective that share a common goal by having the same strategies and tactics. It is thus assumed that Al-Qaeda is an organized armed group, because the term is interpreted expansively in regard to this organization. I can agree on this notion, because otherwise it

83 Prosecutor v. Thomas Lubanga Dyilo (2007), paragraph 234.
84 Duffy (2015), page 394.
85 International Commission of Jurists (2009), page 53.
90 Advisory Committee on Issues in Public International Law (2013), page 18.
91 International commission of jurists, (2009), page 54.
92 International commission of jurists, (2009), page 54.
would be difficult to hold them collectively accountable. The U.S. has stated that the conflict with Al-Qaeda is not limited to any specific territory, meaning that it can invoke the law of war-rules on targeting and detention anywhere in the world.\textsuperscript{93} In order for IHL to apply in a NIAC there must be a direct participation in hostilities, and if individuals are targeted remotely it must be “in accordance with the rules regarding legitimate targeting in respect of that conflict”.\textsuperscript{94} While analyzing the U.S.’ warfare post 9/11, an overwhelming majority of the drone strikes are perpetrated in conflicts that are non-international in character, such as Afghanistan, Yemen and Somalia.

The U.S. claims that they are engaged in an ongoing AC with Al-Qaeda, the Taliban and associated forces such as ISIS, since these forces continue to fight the U.S., whether it being in Afghanistan, Iraq, Pakistan or Yemen.\textsuperscript{95} This raises the question of whether or not armed groups should be considered parties to an AC or if they should be considered criminal enterprises.\textsuperscript{96} This distinction is important in the assessment if they can be defeated militarily, in accordance with IHL, or if they can be held criminally liable, in accordance with domestic law. In order for IHL to apply in an AC it is therefore important to identify the parties related to the conflict. There has been a gradual shift in the U.S. regarding what type of conflict exists, where the war on terror has evolved from an IAC, into being considered a NIAC.\textsuperscript{97} This shift reflects the decision by the U.S. Supreme Court in \textit{Hamdan v. Rumsfeld}. This case concerns the military tribunals where the Bush administration tried detainees from Guantanamo Bay. The question was whether or not the U.S. Congress had the legal basis to pass on legislation which prevents the Supreme Court from hearing the case of the accused combatant. The Court issued a 5-3 decision holding that the administration did not have the legal authority to set up these tribunals without congressional authorization, because it would not comply with the Uniform Code of Military Justice or the Geneva Conventions.\textsuperscript{98} This decision has been quoted in support of the existence of a NIAC with the Al-Qaeda, although it is uncertain whether the judgement provides support for this view.\textsuperscript{99} The U.S. has therefore developed a counter-terrorism strategy, where the war on terror would be governed by IHL, but only to the extent the U.S. considered such laws to apply. This indicates that there is a new kind of war against a new kind of enemy, which was not contemplated in the four Geneva Conventions. The U.S. did not find non-state actors engaged in a self-proclaimed war

\begin{itemize}
  \item \textsuperscript{93} Duffy (2015), page 400.
  \item \textsuperscript{94} Duffy (2015), page 402.
  \item \textsuperscript{95} Bush (2007).
  \item \textsuperscript{96} Duffy (2015), page 392.
  \item \textsuperscript{97} Duffy (2015), page 390.
  \item \textsuperscript{98} Hamdan v. Rumsfeld (2006), pp 5 – 6.
  \item \textsuperscript{99} Duffy (2015), page 390.
\end{itemize}
against the U.S., protected by the Conventions, and therefore decided that they would be treated as “illegal or unlawful enemy combatants”. Post 9/11 State practice have therefore accepted a right to self-defense against non-state actors, for example The U.S. against Afghanistan, and Israel responding to Hezbollah in Lebanon.

It is an interesting aspect that the war on terror does not necessarily fulfils the criteria set forth in Tadic. In accordance with the second criterion an AC only exists between State armed forces and clearly identifiable and organized armed groups, which have the capacity to sustain military operations. The ICRC released a statement in 2004 regarding the proper role of IHL in the global war on terror (hereinafter GWOT). In order for IHL to apply, the terrorist activity must rise to the level of an AC. Otherwise, IHL will not apply. An interesting aspect is that the ICRC refers to the principles set forth in Tadic, c.f. last paragraph. The ICRC also implicitly introduces a ‘new’ type of conflict, due to the GWOT, so-called ‘trans-national’-AC’s. These conflicts exists when an armed group is in a prolonged AC with a state, and the prevailing view is that this is a NIAC. Where a State conducts military operations in another State (home state), where the armed group is present, and the latter State has given its consent, the predominant view is that the conflict still qualifies as a NIAC. This is because the attacks are directed against the armed group, and not the State itself. If the attacks are perpetrated against the home State’s infrastructure, and are perpetrated without consent, it is likely that the conflict transforms to an IAC. These qualifications will be assessed when discussing the U.S.’ use of drones in Yemen.

There is a need for balancing the demands of projecting force, what IHL defines as military necessity, and the protection of civilians, what IHL defines as the principle of distinction. When it comes to using drones in targeting, the principle of distinction is important because civilians are never to be purposefully targeted.

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100 International Commission of Jurists, (2009), page 50.
101 Banks (2015), page 144
103 ICRC (2004b).
104 ICRC (2004b).
3 Targeted killings in armed conflict

3.1 The use of drones in the war on terror

3.1.1 Drones in armed conflict

The use of drones in a conventional AC is not a new occurrence, since this weapon has been used for decades. For instance, the U.S. used drones in the Vietnam War during the 1960s, as well as Israel in Lebanon in the 1980s, where these situations amounted to an AC.107 However, the use of drones in AC’s has increased since the conflicts on Balkan during the second half of the 1990’s, and the use of armed drones was first introduced in Yemen in 2001.108 The use has since accelerated, and armed drones have become the preferred weapon of choice. One can discuss whether or not the use of drones will constitute a breach on the general principles of IHL, because States distance themselves from the ongoing conflict, making the decision of using UAV’s in targeting easier. Is the use of drones in accordance with the IHL principles regarding distinction and proportionality in response to an NIAC? As the former CIA director Panetta stated in 2009: “It is very precise and is very limited in terms of collateral damage [...] It’s the only game in town in terms of confronting or trying to disrupt the Al-Qaeda leadership”.109

As mentioned above, civilians cannot be made a deliberate target in an AC. This does not however mean that civilian loss is either legally or morally unacceptable under IHL. In order for the use of drones to be in accordance with the principle of distinction, the armed drone needs to distinguish between civilians and combatants or civilians that take direct participation in the ongoing conflict. This requires knowledge about the conflict itself, as well as that particular civilian’s intention and probable behavior.110

For drones to fulfill this condition they must have an adequate sensory or vision processing system, that separates combatants from civilians.111 In comparison, at this present moment, drones either have cameras or infrared sensors, which may be able to give information if something is human, but not much else. In regard to the principle of proportionality it is doubtful if autonomous weapons will be able to comply with this. Drones does not have the acquired situational awareness to make decisions based on proportionality, in regard to minimizing collateral damage. The U.S. have already developed a software called ‘bugsplat’ whose main purpose is to choose the most appropriate weapon, or munition, and direct it

appropriately. The problem with this software, in my opinion, is that the software can only reduce collateral damage, not completely prevent it. For instance, if an armed drone where to be used in the proximity of a school, currently holding 200 children, applying the appropriate software means that only 50 children dies, rather than 200 if a different bomb where to be used. This could make conducting a strike easier, because it is the lesser of two evils. In comparison, in regard to battlefield atrocities perpetrated by soldiers, the U.S. Surgeon General’s office found after Operation Iraqi Freedom, that only 47% of the soldiers and 38% of the marines agreed that non-combatants should be treated with dignity and respect. This indicates that soldiers are dehumanizing the enemy, something which may be due to inexperienced soldiers and the training they receive, a sense of self-preservation or general disdain for the population where they are sent to fight.

The next question is whether the law of AC either broadens or limits the use of drones in the war on terror. The long-range reach of drones, give States the opportunity to target people in situations that do not meet the threshold of an AC, because drones reduce the risk of losing military personnel because they are no longer sent to the battlefield. The absence of risk of loss could therefore contribute to States using drones more often, and ultimately start a war. Because States no longer risk losing their own soldiers on a traditional battlefield, warfare has also been removed from the publics’ eyes.

The U.S.’s use of drones in AC’s has gone through changes, where drones went from merely gathering information, for the purpose of intelligence, to carrying out independent missions. The use of drones has a twofold purpose; for instance, in battles such as Iraq, UAV’s conducted targeted killings. It also provided real-time information to soldiers on the ground which helped to save lives – such as warning soldiers on the ground of a sniper on a rooftop waiting to ambush them. The U.S. is therefore dependent of cooperation between UAV’s and soldiers, because drones will be a “God’s eye view to the battlefield”. The U.S. further states that drone attacks perpetrated abroad are legal because the U.S. is involved in a new type of AC– meaning the GWOT which gives them the right to target any fighter with ties to Al-Qaeda. Although drones are prized for their efficiency, there has been a discussion on

**References:**

112 Sharkey (2012), page 789.
113 Sharkey (2012), page 789.
118 Singer (2009), page 329.
119 De Groof (2016), page 144.
the reported numbers of civilian casualties.\textsuperscript{120} This is important because of the consequences drone strikes have for the targeted persons, as well as the persons and civilian objects close to them. In comparison, it is noted in the U.S. Military’s Manual on Counterinsurgency that, “\textit{an operation that kills five insurgents is counterproductive, if collateral damage leads to the recruitment of fifty more insurgents}”.\textsuperscript{121} It is consequently likely that the increase of civilian casualties will work as a recruiting tool, and thus escalating the level of conflict in the long term. Because of their professed accuracy, the use of armed drones has been considered a game changer in modern warfare.

3.1.2 Technology in modern warfare

3.1.2.1 Will technology shape warfare in regard to means and methods?
The legal transformation of war is undergoing fundamental changes.\textsuperscript{122} The reason for this being that warfare has been upgraded. This place great demands on the weapon systems. The rapid development of autonomous weapons is based on two main factors: first, avoiding risk-taking with respect to loss of life, and second, ensuring persistence in regard to surveillance.\textsuperscript{123} The first notion concerns the political willingness in regard to risk-taking. For instance, the Gulf War in 1991 has created a modern precedent on the U.S.‘s overwhelming military power in regard to an unrestricted warfare. The conflict gave an indication on how little loss Western nations were willing to accept, and how quickly people expected to win.\textsuperscript{124} Another example is the Balkan conflict and especially Kosovo, where NATO-forces intervened by carrying out a high-altitude bombing campaign that lasted for 78 days.\textsuperscript{125} When it comes to the second notion, in regard to weapons technology, persistence is important because of the development of asymmetrical warfare.\textsuperscript{126} This development requires surveillance that is timely tactical in order to make both operationally and strategically correct decisions. This notion is important in targeted killings when high-value targets are located in densely populated areas.

There is no doubt under IHL that the means and methods of warfare are not unlimited.\textsuperscript{127} Autonomous weapons, as a new type of warfare, need to comply with the principles of IHL, in order to limit the suffering caused by an AC. Customary IHL prohibits weapons that are

\textsuperscript{120} Duffy (2015), page 423.
\textsuperscript{121} Counterinsurgency FM 3-24, MCWP 3-33.5 (2006), page 1 – 25.
\textsuperscript{122} Issacharoff and Pildes (2015), page 388.
\textsuperscript{123} Dyndal and Birkeland (2016), page 39.
\textsuperscript{124} Dyndal and Birkeland (2016), page 39.
\textsuperscript{125} Dyndal and Birkeland (2016), page 39.
\textsuperscript{126} Dyndal and Birkeland (2016), page 40.
\textsuperscript{127} Haines (2014), page 288.
indiscriminate in nature, meaning that they can cause either superfluous injury or unnecessary suffering.\textsuperscript{128} This raises the question of how States can use drones in a lawful manner when being in an AC. In general, armed drones do not seem to violate this criterion. Because drone strikes often occur in populated areas, there would be greater concerns about compliance with the prohibition of indiscriminate attacks due to the potential harm of the blast radius.\textsuperscript{129} This in turn raises another question of how much impact technology will have on the law. As James D. Rae states: “Grave questions will appear in the future if unmanned systems become autonomous and robots are programmed to not only follow the laws and ethics of war but also make lethal decisions”\textsuperscript{130} This statement is interpreted to include the actual drone, as well as the software, and is in my opinion relevant because it raises the question on who decides when and where drones shall be used in an attack. This will be discussed under chapter 3.2.

The use of drones is, as mentioned earlier, a common occurrence in contemporary AC’s. On the one hand drones offer the possibility of reaching one or more objectives of the law of war, meaning to only use lethal force against combatants, while at the same time protecting civilians. On the other hand, for civilians living in areas where drones are deployed, there is both an insecurity and uncertainty regarding where the drone bomb will land, and who the next target may be.\textsuperscript{131} However, due to new technological advances it will change how modern warfare is conducted, because technology is the core ingredient for military innovation.\textsuperscript{132} The military innovation contributes to new ideas to further develop the character of warfare. Technology can define, govern, or rewrite warfare, when it comes to the evolution of weaponry.\textsuperscript{133} The technological advantages raise significant legal issues. The new technologies of war appear to reduce both incidental injury and collateral damage in an AC, by their potential to offer a stricter compliance with the principles of distinction and proportionality.\textsuperscript{134}

When using drones in armed attacks, the main focus is to reveal what is called “patterns of life”, meaning that people being targeted are followed because of their suspicious behavior.\textsuperscript{135} But how can a drone excrete this information, in regard to what patterns in people’s lives that

\textsuperscript{128} Henckaerts and Doswald-Beck (2005), Rule 70 and 71.  
\textsuperscript{129} Casey-Maslen, (2012), page 614.  
\textsuperscript{130} Rae (2014), page 7.  
\textsuperscript{131} Rothenberg (2015), page 441.  
\textsuperscript{132} Roland, (2009).  
\textsuperscript{133} Roland, (2009).  
\textsuperscript{134} Liu, (2012), page 628.  
\textsuperscript{135} Rothenberg (2015), page 444.
can cause suspicion? For instance, from above, any meeting of a large group of men can cause suspicion. Is it a group of insurgents, planning their next attack against a foreign military, is it a group of men engaging in a religious ceremony, or family celebrations? The discussions of autonomous weapons seem to subsist between the legal categories of either ‘weapons’- or ‘combatants’- classifications as either or will fail to acknowledge that “these systems do not inflict violence in a direct manner but rather serve as intermediary platforms from which weapons are deployed”. Therefore, if armed drones are only regulated as weapons, one will have an inadequate solution for the challenges they entail. When drones will expand their capability for collecting data, which will be linked with other data sources available from intercepted communications, for instance social media, this could prove a more adequate target-definition. This will in my view create greater predictability when targeting high-value targets, thereby reducing surprising consequences.

When using drones, States can gather and analyze information on a larger scale than intelligence officers on the ground, giving the predator drone more information in order to attack with striking precision. This is enabled through drones communicating what is currently happening on the battlefield, enabling an immediacy of information. This gives States the possibility of minimizing excessive harm to civilians, because it offers the persons controlling the drone time to delay attacks until the target is either on its own, or has an acceptable distance from other civilians. This differs from for instance using cruise missiles because once they are launched, they cannot shift the time of impact in relation to changes on the battlefield. For orientation, this also applies to fighter jets since these can alter their course, but are not able to follow their targets for a longer period of time.

Although using drones may alter the conduct of warfare, it will in my opinion not determine warfare. It will be important that States work together in order for data-driven warfare to be in compliance with the principles of IHL.

3.1.2.2 Technological vulnerability
The use of drones signals a fundamental change in warfare, because this will change the way States projects power. Drones are currently being operated by teams consisting of a pilot, who

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137 Liu (2012), page 629.
139 Roland (2009).
140 Roland (2009).
141 Rothenberg (2015), page 444.
142 Roland (2009).
controls and maneuvers the aircraft, a sensor operator, who controls the camera(s) and targeting systems and collects data. These teams communicate with commanders, jurists and intelligence analysts who may be situated all over the world. Drone deployment depends on many interconnected variables, which may be subject to technological vulnerability because digital data can be stored indefinitely.\textsuperscript{143} Collected data will therefore be stored for a longer period of time, making it difficult to analyze the relevant data in regard to changes on the battlefield.

Although using drones in NIAC’s has its advantages, there are several limitations. Drones do not have the capability to defend themselves, nor alter their course in order to avoid an attack. Further, they can be severely affected by bad weather, which can create problems with the drones’ communication systems, and cause delays. This is unfortunate when launching an attack against a moving target.\textsuperscript{144} From an operational point of view it is necessary to work towards a more accurate target-recognition, and both controlling and limiting the weapons effect.\textsuperscript{145}

Another significant issue is that collecting massive amounts of data requires skilled analysts to distinguish essential from the non-essential information.\textsuperscript{146} The more data being collected, the more challenging it will be to assess the information. This can create delays, making an attack more difficult. Because patterns are drawn from the collected data, there is a risk of targeting a civilian that was simply in the wrong place, at the wrong time. One could therefore state that the issue of technology has less to do with the drone itself, and more to do with the software used to process data.\textsuperscript{147} This plays a significant role when discussing the legal ramifications regarding the distinction between targeted killings and signature strikes. The ongoing development of unmanned systems therefore seeks to improve sensors, increase both precedence and speed and ensure greater integration between unmanned and manned systems.\textsuperscript{148} This may be crucial in order to further develop, and make use of technological advantages in warfare.

There is also a human aspect of using drones that could constitute a vulnerability. This is primarily the notion of “cubicle warriors”.\textsuperscript{149} As Singer portrays, the term takes its

\textsuperscript{144} Rothenberg (2015), page 445.
\textsuperscript{145} Backstrom and Henderson, (2012), page 486.
\textsuperscript{146} Rothenberg (2015), page 450.
\textsuperscript{147} Rothenberg (2015), page 455.
\textsuperscript{148} Dyndal and Birkeland (2016), page 40.
\textsuperscript{149} Singer (2009), page 329.
inspiration from popular movies, and is often used as a metaphor for technology’s increasing control over people’s daily lives. Because drone pilots are able to go to war, without being in the combat zone, the traditional interpretation of what a soldier really is must be altered. Soldiers on the ground state that there is a strange dichotomy of war because it is the exposure of risk that defines whether someone is respected as a fellow combatant. This means that there is a ‘virtueless war’, where the drone pilot will have an emotional disconnection with the actual warzone. Drone-pilots, however, often recall that the action feels so intense, and as Singer’s examination shows one pilot instinctively reached for the ejection seat. The examination also found that there is a common misconception where drone pilots are characterized as “just playing video games”. Two pilots in Singer’s depth interview stated that “It’s antiseptic. It’s not a potent an emotion as being on the battlefield”, and “It can get a little bloodthirsty. But it’s fucking cool”. There might be a risk of drone pilots forgetting there is an actual NIAC, and that the civilian casualties are real. The decisions that are taken will influence the daily lives of the targeted individual as well as surrounding civilians. The fact that many operations are ‘remote split operations’, meaning that drones fly out of bases located in war zones, while the drone pilot is being located at control stations within the U.S. also poses a vulnerability because it places the UAV directly within the vicinity of combat zone.

There are also limited accepted mechanisms to manage the way data-driven warfare is regulated. This requires States to combine proper legal regulation and share technological advantages, in order to prevent future conflicts. It is important to view the law of war as dynamic, meaning it can evolve over time, in order to reinforce their meaning. There is a need for specific legal norms, as technology evolves throughout time, States are able to create large data files on massive groups of civilians whose accuracy, specificity and efficiency could redefine the nature of the security State.

150 Singer (2009), page 331.
151 Singer (2009), pp 332 – 333.
152 Singer (2009), page 329.
153 Singer (2009), page 328.
3.2 Targeted killings and non-battlefield assassinations

3.2.1 The threshold between targeted killings and signature strikes

There is no prohibition in the laws and customs of war against intentional targeting of individuals, given that the operation itself is lawful and that the interconnected considerations regarding legal and moral norms are met. The use of drones in targeted killings has played a significant role in the GWOT, since the Bush administration began using drones post 9/11. These events have developed two different drone programs – one led by the military, called the Joint Special Operations Command (hereinafter JSOC), and one operated by the Central Intelligence Agency (hereinafter CIA).  

Under the Obama administration the latter program has been further developed, and the use of drones in countries such as Yemen and Pakistan has increased. Because the use of drones is operated covertly by the CIA, it is difficult to determine the precise contours when it complies with the principles of IHL, because the U.S. cannot legally acknowledge covert actions perpetrated by the CIA. Although drone strikes carried out by either the military or the CIA seem to target the same people, the two organizations differ in regard to both transparency, oversight and accountability measures. The dividing of the drone programs can therefore be seen as a way for the U.S.’ to have plausible deniability in regard to drone strikes perpetrated by the CIA. Unlike drone strikes perpetrated by the CIA, military operations are acknowledged by the U.S. officially. According to the Joint Publication 3-60, the targeting cycle is set forth, giving details on how military operations shall cooperate in regard to “planning and execution with a comprehensive, iterative, and logical methodology” in order to achieve the desired purpose of the operation.

Drones play a significant role in these scenarios because they collect data that are relevant in the targeting decision. When either the individual or the targeted group is identified, and is located apart from civilians, drone pilots initiate a strike using precision munitions. After the completed strike, drones continue to hover above the area, continuously transferring data of the aftermath. This gives the U.S. time to assess the strike, in regard to impact, reaction patterns from the civilian population and surveillance, if the perpetrated strike causes riots. This could happen if the strike was based on wrong intelligence, and innocent civilians were harmed.

158 Steiro (2012), page 197.
159 Steiro (2012), page 197.
161 Zenko (2013), page 1.
162 Joint Publication 3-60 (2013), page 1-10.
163 Williams (2013).
164 Rothenberg (2015), page 450.
Armed drones are used in both personality strikes and signature strikes. Personality strikes is where an identified adversary or presumed terrorist is targeted. Signature strikes, is an attack on one or more persons based on a number of characteristics, meaning that the identity of the person, or group, being targeted is unknown. Signature strikes are therefore based on the analysis of collected data, which will seek to reveal suspicious behavioral patterns about a distinct group of people. To conduct a signature strike, the criterion that needs to be fulfilled, is that the group or person must be engaged in suspicious activity that makes them stand out, rather than having evidence of combat activity. The problem with the U.S.’ use of drone strikes against non-state armed groups is that civilians living in war zones can be affected by the strike. For instance, the U.S. launched a predator-drone strike against suspected Taliban-supporters in February 2010. At least 15 unarmed civilians were later confirmed killed, and the U.S. stated that there was no way of knowing beforehand.

In regard to signature strikes, there are in my opinion two cases that stand out. The first is the case against Kamal Darwish. Darwish was the first American killed in a drone strike, because of his surrounding settings due to the fact that he was traveling in a SUV carrying an Al-Qaeda lieutenant. Although Darwish fled the U.S because he was suspected to be connected with the Lackawanna terrorist plot in New York, there was no evidence prior to the strike that gave the U.S. reason to believe he was in the targeted SUV. Nevertheless, his actions as a whole raised some red flags and as an unnamed official puts it “...it would not have made a difference. It you're a terrorist, you're a terrorist”.

The other case of interest is the case against Samir Khan. Khan was a Pakistani-American who was the creator of the Al-Qaeda magazine Inspire. He was a self-proclaimed ‘traitor of America’, and posted instructions on how to make a bomb similar to the one used in the Boston-terror attack. At the time of the assassination the Americans did not know who he was, but the suspicious signature turned out to be correct after the attack. These two cases are important since they show the threshold between a signature strike and an extrajudicial
killing, because the gathered intelligence, analyzed after the perpetrated strike, confirmed the initial suspicion regarding their involvement with Al-Qaeda.

Personality strikes, on the other hand, can further be divided into two sub-categories, namely targeted killings and extrajudicial killings. Extrajudicial killings are when a State uses lethal force against a suspected person that has not been put on trial. The UN Special Rapporteur calls this “*arbitrary executions*” because the targets seem to be either random, or at the wrong place at the wrong time.\(^{174}\) Quoting Nigel S. Rodley: extrajudicial killings are “*killings committed outside the judicial process by, or with the consent of, public officials*”.\(^{175}\) For instance, targeted killings perpetrated outside the scope of an AC can therefore amount to extrajudicial killings. If such strikes violate the principles of IHL, and are committed by either intelligence personnel or State armed forces, these persons can be held accountable for war crimes.\(^{176}\)

Despite the frequency of which the term targeted killing is referred to, the term is not defined under international law, nor does it fit in any particular legal framework. When assessing what constitutes a targeted killing, there are certain supplementary factors that must be met:\(^{177}\)

1. There must be collected enough information about the target.
2. The collected data must be analyzed in order to determine if the intended target is a lawful target.
3. The incidental effects of using drones must be assessed, and precautions be taken to minimize such effects.
4. There must be a proportionality assessment in regard to potential civilian casualties.
5. The weapon must be chosen so that its effect is directed towards the intended target, and
6. The situation must be continuously monitored, in case there is a need to cancel the strike.

From an operational point of view this is important because of target-recognition, and cause and effect by the weapon deployed.\(^{178}\) According to the U.S. Presidential Policy Guidance\(^{179}\) the following criteria must be met before any lethal action can take place:\(^{180}\):

\(^{174}\) UNGA, A/HRC/14/24/Add.6 (2010), page 1.
\(^{175}\) Rodley (1999), page 182.
\(^{176}\) Human Rights Council (2010), page 22.
\(^{177}\) Backstrom and Henderson (2012), page 485.
\(^{178}\) Backstrom and Henderson (2012), page 486.
\(^{179}\) Presidential Policy Guidance (2013), page 1.
1. There must be a near-certainty that the target is present,
2. There must be a near-certainty that civilians will not be injured or killed,
3. There must be an assessment that the relevant capture is not feasible at the time of the operation,
4. There must be conducted a legal analysis to ensure that the action taken is in conformity with the laws of the U.S. and
5. There are no other reasonable alternatives to effectively address the threat against the U.S. persons or interests.

The term ‘targeted killing’ is sought defined by the U.S. in the Joint Publication 3-60. According to this a targeted killing is a: “Process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities”. When it comes to a target’s description it is stated that “A target is an entity (person, place or thing) considered for possible engagement or action to alter or neutralize the function it performs for the adversary”. This is a wide definition, providing an indication that the U.S. can interpret freely within the wording. Targets should therefore be tied logically and causally to objectives at all levels, including strategical, operational and tactical levels. The wording envisages that there is a requirement to minimize the unintended loss of civilian lives, because the targets need to have a combat-function.

The targeting itself is, according to the Joint publication 3-60, further divided into two categories, they are either deliberate or dynamic. A deliberate target means a future plan, where a targeted killing is done within 24-72 hours. A dynamic targeting is employed in operations planning-phase, usually within a 24-hour period. The latter differs from a deliberate targeting because it requires a more immediate response. When it comes to the target itself they can also be divided in two, each having its own subcategory, a target can either be planned, or a target of opportunity. A planned target is known to exist in the operational area, and there are activities planned against them. These can be divided into scheduled targets, meaning targets that are prosecuted at a certain time, or on-call targets, meaning actions that are planned but not for a specific time. On the other hand, targets of opportunity are targets that meet the targeting criteria, but are not selected at the ongoing

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180 The White House, Fact Sheet, (23 May 2013).
181 Joint Publication 3-60, page VII.
182 Joint Publication 3-60, page VII.
183 Joint Publication 3-60, page VII.
184 Joint Publication 3-60, page X.
185 Joint Publication 3-60, page X.
operation. These targets can be divided into unplanned targets, meaning known targets that are not selected because they did not make the joint integrated prioritized target list, and unanticipated targets, meaning targets that are either unknown or unexpected in the operational environment.\textsuperscript{186}

3.2.2 Who may conduct a targeted killing?

When it comes to sanctioning kill or capture operations it is important to analyze the chain of command within the U.S. government, because it raises questions regarding legal capacity, when giving orders on authorization to use military force (hereinafter AUMF-operations). Clear legal authority is crucial where there is a decision to be made in regard to intentional, premediated killing by government.\textsuperscript{187}

Under the U.S. Constitution, the President may order targeted killings in order to defend the U.S. in war. The President’s authority, being commander in chief, is to “repel sudden attacks”.\textsuperscript{188} This has been interpreted as having imminence requirement that seem to be analogous to the doctrine of self-defense in international law.\textsuperscript{189} The wording indicates that the President is given wide powers to both prevent and pursue acts of terrorism. Terrorist attacks are rarely forewarned of neither in time or location. It is for instance difficult to take action if there is a suicide bomber contemplating an attack, if there are no intelligence indicators beforehand. After the events of 9/11 the U.S. developed a strategy where they expect attacks without forewarning, and argues that anticipatory self-defense is lawful because of the possibility of incurring continuous attacks from terrorists. This gives the U.S. President permission to use deadly force against an identified terrorist, without Congressional consent.\textsuperscript{190} The legality of decisions regarding targeted killings may also be conducted by the decision of the U.S. Congress.\textsuperscript{191} For instance, the targeted killing of Osama bin Laden was justified under the clear application of IHL because of the right to kill enemy combatants.\textsuperscript{192} The reason being that bin Laden participated in the ongoing NIAC the U.S. considers itself being a part of. In comparison, the last three decades several U.S. Presidents have authorized targeted killings: Ronald Reagan against Muamar Qaddafi prior to an air strike in Libya in 1984, William (Bill) Clinton against bin Laden before targeting terrorist training camp in

\begin{itemize}
    \item Joint Publication 3-60, page X.
    \item Banks (2015), page 134.
    \item Farrand (edt.) (Rev. edt. 1937), page 246.
    \item Banks (2015), page 134.
    \item Banks (2015), page 134.
    \item Banks (2015), page 138.
    \item Duffy (2015), page 757.
\end{itemize}
Afghanistan in 1998; and George W. Bush against bin Laden and other Al-Qaeda members post 9/11. President Barack Obama continued this practice.

When it comes to President Obama’s use of drones, there was a leak of information within the Obama administration in 2013. The information was an internal policy document that President Obama issued in connection with his speech on drone strikes. This document is both unclassified and redacted, and establishes the procedures for direct action against terrorist targets. The document establishes the procedures for when the U.S. takes direct action, which refers to both lethal and non-lethal use of force, against targets outside the U.S territory. The interesting part is that President Obama states that a target is lawful after being nominated by either the DOD or the CIA’s counsel. Thereinafter an operational plan is proposed, which will undergo a legal review. When the use of lethal force is authorized there are certain preconditions that must be met; First, there must exist a near certainty that an identified high-value target is present. Second, there must be a near certainty that non-combatants will not be injured. This is an interesting notion in regard to civilian casualties in Yemen.

On October 15 2015, The Intercept published leaked, and classified, documents called ‘The Drone Papers’, which gave a rare insight to the decision-making process behind drone strikes under the Obama administration. These documents were provided by a whistleblower, giving detailed information on the U.S. military’s assassination program in for instance Yemen. These leaked documents show the chain of command for ordering drone strikes, carried out by JSOC. In order to fully analyze the decision-making chain, I have included the classified page, which is freely available online:

196 Presidential Policy Guidance, page 11.
197 Scahill (2016), page 56-57.
As figure 2 and President Obama’s procedural documents indicate that the approval of an attack is a two-part process. The first phase is a process from ‘developing a target’ to ‘authorization of a target’, and the second from ‘authorizing’ to ‘actioning’.

The first process is a preliminary phase where the target is assessed, and the delegated authorities build the case for action. If it is proven that the target poses, or will pose, a threat to the U.S. a 60-day authorization to conduct a strike is given.

The second process is where the decision is being made. This means that the elaborated plan is sanctioned by the President of the U.S. If all parties agree, a strike can be initiated, and the sanctioned operation will enter a joint targeting cycle, as shown below.

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199 Scahill (2016), page 60.
Figure 3:

A targeting cycle is a six-phase process that describes the detailed process of conducting a joint targeting-operation. This process is not rigidly sequential, meaning that the cycle provides the framework on how a strike should be conducted.\textsuperscript{203} This includes target development where the purpose is to “characterize the function, criticality and vulnerabilities of each potential target”, and making thorough analysis based on the gathered intelligence.\textsuperscript{204}

The U.S. contends that all drone attacks, perpetrated by the U.S. Department of Defense are lawful, except those perpetrated by the CIA, since these strikes are not publically sanctioned.\textsuperscript{205} When being criticized on the expanded drone strikes, President Obama stated that: “America’s actions are legal...Under domestic law, and international law, the United States is at war with Al-Qaeda, the Taliban and their associated forces...So this is just a war – a war waged proportionally, in last resort, and in self-defense”.\textsuperscript{206} However, some critics disagree. It is argued that the programs’ secrecy contributes to a lack of judicial oversight and transparency, because it is difficult to assess the actual use.\textsuperscript{207} It could subsequently be

\textsuperscript{202} Joint Publication 3-60, page II-4.
\textsuperscript{203} Joint Publication 3-60, page II-3.
\textsuperscript{204} Joint Publication 3-60, page II-7.
\textsuperscript{205} Rothenberg (2015), page 451.
\textsuperscript{206} Obama (2013).
\textsuperscript{207} Rothenberg (2015), page 451.
difficult to fully analyze if such strikes comply with the laws of war. In order for the U.S. to use drones in targeted killings, the applicable law for each location where drones seek to be deployed must be determined.208

3.3 The U.S.’s use of drones in Yemen

U.S. drone operations in Yemen, as well as Pakistan, have happened outside the scope of traditional warfare, and are based on the GWOT where the principle of territoriality does not apply. These operations are carried out by both JSOC and U.S. intelligence services, such as the CIA, where the CIA was the first to use armed drones in the 1980s.209

Yemen has undergone regional political movements, both in the north and in the south, and is one of the poorest countries in the Arab Peninsula. Fighters associated with Al-Qaeda have operated in Yemen since the 1990s, and increased in 2009 when Al-Qaeda’s Yemeni and Saudi-Arabian forces merged.210 This has contributed to an increase in violent attacks, which has led to the cooperation between U.S. and Yemen governments. Since 2002 the U.S. has systematically conducted secret targeted killings within the Yemeni borders.211 However, it is an important notion that these killings have occurred with consent of the Yemeni government.212 This differs from the situation in for instance Pakistan, where the Pakistani government has not given its consent and has complained in the UN about the use of drones by the U.S. in their territory.

There is no definitive overview of the U.S.’s actual use of drones in Yemen, but there are some details regarding secretive missions that have been made public. The U.S. has two drone operations currently working in Yemen, one led by the CIA, and the other by the military’s JSOC, ultimately led by the President.213 Both JSOC and the CIA share the airspace over Yemen, and they alter on taking the lead in drone strikes. Because they share intelligence and coordinate their attacks, it is difficult to determine who exactly is responsible.214 Although President Obama stated in his abovementioned speech that there was a near-certainty that no civilians would be killed or injured,215 there is evidence that drone strikes continue to cause civilian casualties. Research groups have estimated that the U.S. has carried out a total of 81

213 Shachtman and Ackerman (2012).
214 Banks (2015), page 133.
targeted killings in Yemen, one in 2001 and the rest post 2009. Human Rights Watch has examined several targeted killings in Yemen between 2009 and 2011. According to their reports, the majority of the perpetrated strikes indiscriminately killed civilians. This suggests that the above-mentioned notion of near-certainty of avoiding civilian casualties is not fulfilled.

3.3.1 Case studies documenting civilian harm caused by targeted killing

3.3.1.1 Anwar Al-Awlaki, September 30 2011

Al-Awlaki was an American Islamic radicalized cleric, who was killed in a drone strike while traveling in Yemen. The operation was carried out by JSOC, under the direction of the CIA. The killing of Al-Awlaki was explicitly authorized by the Obama administration, as he was placed on a kill or capture list. Al-Awlaki was targeted because he was assumed to be an operational leader of Al-Qaeda, recruiting and encouraging people to take part in indiscriminate killings against Americans, as well as funding terrorist activities. The U.S. asserted that Al-Awlaki was properly vetted to ensure undoubted evidence of responsibility for terrorist activities, and therefore making him a legitimate target. He was also believed to have: “committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals [...] or security”, c.f. executive order 13224.

Al-Awlaki’s father claimed that the U.S. unlawfully targeted his son, because he was neither charged nor convicted, but he did not deny his sons connection with Al-Qaeda. This was a civil case, and it was dismissed for lack of jurisdiction. Yet it is interesting that the U.S. states that Al-Awlaki was targeted out of self-defense, because Al-Awlaki presented a “concrete, specific and imminent threat” to life and safety of U.S. citizens. Similarly, U.S. federal law prohibiting the government from killing U.S. citizens, would not apply when the individual is targeted within the reach of IHL. This means that it is lawful to target enemy combatants even when they are U.S. citizens. However, the case of Al-Awlaki is legally different, because the battlefield is not clearly marked, nor agreed upon. It could hence seem like the killing of Al-Awlaki was an extrajudicial killing, instead of a personality strike. Since the U.S. could

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216 Tayler (2013).
217 Tayler (2013).
218 Issacharoff and Pildes (2015), page 393.
219 Griffin and Fishel (2011).
220 Griffin and Fishel (2011).
221 Office of Foreign Asset Control (2010).
222 Banks (2015), page 133.
224 Nasser Al-Awlaki v. The United States, page 1.
225 Banks (2015), page 141.
not prosecute him domestically, it seems as the government therefore eliminated Al-Awlaki in another way. This is substantiated by statements given from Al-Awlaki prior to his death, where he stated that he would “never surrender”, and that the U.S. would have to “come look for me”.226 It is the combination of authority given to the President in an AUMF and the legal basis, providing intelligence, which will provide sufficient domestic legal authority for targeted killings, as well as under IHL.227

It follows from this that a targeted killing is then legal when the U.S. identifies the target as a combatant participating in terrorist-activities, there exists an imminent threat of continuing attacks and it is determined that capture or arrest is not possible.228 Since these criteria apparently were fulfilled in this case, it is reasonable to deduce that Al-Awlaki was lawfully targeted, although civilians were harmed.

3.3.1.2 Khashamir, August 29 2012

The U.S. launched a drone attack consisting of three Hellfire missiles against a group of five men, gathered behind a mosque. The strike killed four men instantly, and the fifth was killed by a fourth missile while he crawled away.229 Yemeni authorities stated that three of the men were members of Al-Qaeda, and they were gathered because of a meeting. In retrospect, it was revealed that two of the men were respected members of their local community, being respectively a cleric, who openly preached against Al-Qaeda’s violent methods, and a police officer. The other three men were members of Al-Qaeda. The bereaved relatives stated that the members demanded a meeting because the cleric had made a strong denunciation of Al-Qaeda.230 It should be noted that the attack is unacknowledged by the U.S.

This strike is in violation with IHL because the U.S. struck innocent civilians who did not take part in hostilities. The U.S. did not take all feasible precautions to minimize civilian harm, as well as insuring that the targets were lawful military targets. The mosque was further located near the city center, making the risk of civilian casualties imminent.

226 Video interview with Al-Qaeda May 2010. Be noted that the video was uploaded on YouTube, but was removed due to terms of use violations. Partial English transcript was published by Public Intelligence.

227 Banks (2015), page 141.

228 Banks (2015), page 142.

229 Tayler (2013).

230 Tayler (2013).
3.3.1.3  Walad Rabei’ District, September 2 2012

The U.S. launched a strike against the Yemeni district of Walad Rabei’ in 2012. The result was 12 confirmed deaths, all civilian.\(^\text{231}\) There is no information present indicating that the persons killed had ties to Al-Qaeda, and no alleged combatants were killed in this attack. As the Open Society Justice Initiative states – there has been a discussion to what extent the U.S. complies with IHL.\(^\text{232}\) The U.S. has not been launched an investigation as to the lawfulness of the strike, nor have they acknowledged the attack or compensated the bereaved. It is however relevant to mention that the Yemini government has compensated the victim’s families, although some victims believed the compensation to be insufficient.

3.3.1.4  Wessab, April 17 2013

The U.S. launched two drones carrying Hellfire missiles at a car, killing a suspected Al-Qaeda leader, his driver and two bodyguards.\(^\text{233}\) This case is interesting because the strike is apparently not in accordance with the presidential guidance policy.\(^\text{234}\) It seems as the suspected leader could have been captured, and not killed. Although he was linked to Al-Qaeda, there was no evidence that he was a valid military target, and it could be construed that the strike was an extrajudicial killing.\(^\text{235}\)

3.3.1.5  The wedding party that turned into a funeral

The following case is based on a report conducted by the international NGO Human Rights Watch (hereinafter HRW), from 11 to 16 January 2014, which includes interviews with survivors, eyewitness reports as well as videos and photos.\(^\text{236}\)

On December 12, 2013, the U.S. JSOC launched a drone attack on a convoy in Yemen, which killed at least 12 men and wounded at least 15 others, 6 of them seriously. Halfway through the journey the convoy stopped because a car in front had a flat tire. Survivors reported that they heard a buzzing sound increasing in volume. The strike was identified as a JSOC-operation because of the remnants of the drone. Conflicting explanations regarding the alleged target quickly emerged.\(^\text{237}\)


\(^{232}\) Open Society Justice Initiative (2015), page 84.

\(^{233}\) Tayler (2013).

\(^{234}\) Presidential Policy Guidance (2013), page 11.

\(^{235}\) Tayler (2013).

\(^{236}\) Tayler (2014).

\(^{237}\) Tayler (2014).
Yemeni authorities stated that those killed were militants, including an Al-Qaeda member who was on Yemen’s most wanted list. The Yemeni Government further stated that almost every male in the bridal party carried weapons. But this mere fact does not mean that these individuals were taking part in hostilities. There is a cultural aspect, highlighted in the 2013 report, stating that it is custom in Arab weddings to fire celebratory gunshots as a form of expression.238

Two unidentified U.S. officials stated that those killed were militants, and that the intended target was one of Yemen’s most wanted members of Al-Qaeda – Shawqi Ali Ahmad al-Badani. This was confirmed by the Yemeni government, where it was later expressed that al-Badani was wounded, but had survived the attack. Yemeni security analysts investigated the attack, and found out that the name of al-Badani surfaced after the attack.239

It is stated in the report that HRW received an email from the spokesperson of the U.S. National Security Council which stated that the U.S. takes “extraordinary care” to ensure perpetrated strikes comply with both domestic and international law.240 The U.S. further stated that they investigate thoroughly if they “believe civilians may have been killed”.241 And if the investigation concludes that civilians have been killed: “the U.S. has made condolence payments where appropriate and possible”.242 An interesting fact is that the HRW has found no evidence of U.S. remedies being given to families affected by the attack of December 12 2013.243 The Obama administration has however launched an investigation, but compensation is yet to be made. It is possible that the attack may have violated the principles of IHL, because it did not distinguish between combatants and civilians.

The abovementioned cases demonstrate that at times the gathered intelligence is either wrong or inaccurate, and the decision-making process is as a result based on insufficient or erroneous data. It almost appears as the U.S. launches random attacks, and argues in retrospect that the targets were combatants, or members of Al-Qaeda, therefore making the strike within the legal parameters of IHL. Moreover, it is conspicuous that the U.S. states that no civilians are harmed in these attacks.

238 Tayler (2013).
239 Tayler (2014).
240 Email from the U.S. National Security spokeswoman Caitlin Hayden to HRW 3 February 2014. The wording is cited from Tayler’s report from 2014.
241 Email from Caitlin Hayden (2014).
242 Email from Caitlin Hayden (2014).
243 Email from Caitlin Hayden (2014).
4 Accountability for IHL-violations

4.1 State responsibility and individual criminal responsibility

Autonomous weapons raise legal concern in regard to which form of liability shall be implemented. Regardless of the crime, when it comes to individual criminal responsibility, there are two conditions that must be met. First, there must be a criminal act (actus reus), and second the act must be perpetrated with a certain mental state (mens rea). Drones are capable of launching attacks directly against both legitimate targets and civilians, and this can potentially constitute a criminal act. However, the drone itself cannot be held accountable, due to lack of intentionality that must be present in order to establish criminal liability. It is relevant to assess if anyone can be held responsible for the lethal actions conducted through drones. The use of UAVs can be analyzed as legally analogous to actions by human soldiers, in the sense that it could activate the doctrine of either State (indirect) responsibility, or individual (direct) criminal responsibility, including command responsibility.

4.1.1 State responsibility

State responsibility implies that a State can be held accountable when the act is attributable to the State, meaning that State officials act under state authority. The application of State responsibility to IHL-violations is reflected in the four Geneva Conventions, where it is specified that State responsibility exists in addition to holding individuals accountable. This is in accordance with The Fourth Hague Convention, cf. article 3, where a “belligerent party [...] shall be responsible for all acts committed by [...] armed forces”. The U.S. can be held responsible for civilian casualties due to drone strikes, when these strikes amount to a breach of the law of war.

State responsibility is further recognized as being part of the customary IHL, and is considered to be a general rule of State responsibility, due to State practice making it applicable in both an IAC and a NIAC. According to rule 149 of the 2005 ICRC customary international law study, States can be responsible for IHL-violations including:

1. Acts by its organs, including armed forces,
2. Acts by people that are empowered to exercise governmental authority
3. Acts by people, or groups, acting on instructions or direct control,
4. Acts by private people, or groups, which acknowledges and adopts it as its own.

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244 Docherty, Halfon and Rosenberg (edt.) (2015).
245 Docherty, Halfon and Rosenberg (edt.) (2015).
246 Duffy (2015), page 79.
247 Duffy (2015), page 531.
248 Henckaerts and Doswald-Beck (2005), Rule 149, page 530.
The UN International Law Commission adopted the Articles on State Responsibility (hereinafter ASR), in 2001, and codified these secondary international law rules. These articles seek to formulate and codify the basic rules of international law on State responsibility. The basic principle is stated in article 1, cf. article 2, where every wrongful act “entails the international responsibility of that State” and the act must be “attributable to the State [...] and constitute a breach of an international obligation”. If a perpetrated act is not attributable to a State, it will be necessary to assess individual criminal responsibility instead.

According to the U.S., State responsibility may occur when members of the armed forces violate the laws of war. Such violations could be grave breaches of the Geneva Conventions where the Convention’s exact wording is included in chapter 18.9.3 of the manual. The U.S. has taken the position that the obligation in regard to grave breaches in the 1949 Geneva Conventions, could also apply to violations of Common article 3. Accordingly State responsibility could occur in a NIAC. This view differs from the ruling by ICTY in the case against Tadic, where the ICTY stated that grave breaches are “widely understood to be committed only in international armed conflicts”. In this thesis, the view of the U.S. will be assessed.

In order for the U.S. to be held accountable on account of State responsibility in targeted killings the perpetrated drone strike must be attributable to the U.S., meaning that members of the armed forces carried out the strike. The U.S. has taken steps to compensate victims harmed by drone strikes, including ex gratia-payments which is now codified in U.S. law as well as in the military doctrine. The U.S. pays compensation to a victim, without admitting guilt, including to “make payments to foreign persons who have suffered loss from combat operations”.

4.1.2 Individual criminal responsibility
4.1.2.1 Command responsibility

Individual criminal responsibility for serious violations of IHL has many forms, including command responsibility. Command responsibility means that commanders have an obligation

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249 Sassoli (2002), page 402.
250 ASR, General commentary, article 1.
253 Prosecutor v. Dusko Tadic, para 71.
to ensure that their troops respect the law.\textsuperscript{256} This development is due to the fact that international crimes are often perpetrated by low-ranked individuals. Command responsibility is included because superiors would otherwise be absolved from wrongdoing.\textsuperscript{257} It is stated in article 148 of the Fourth Geneva Convention, that no State is “allowed to absolve itself...of any liability incurred by itself”, such as willfully targeting civilians or launching an attack with the knowledge it would be disproportionate.\textsuperscript{258} According to AP I article 86-87 and customary IHL, commanders and superiors are responsible for crimes committed by their subordinates if they had knowledge, or reason to know, that their subordinates would commit such an act and did not prevent their implementation of the attack.\textsuperscript{259}

These articles apply in an IAC, and raise the question if the same legal basis can be used in a NIAC. The ICTY stated in the Hadzihasanovic and Kubura-case that command responsibility also applies in a NIAC.\textsuperscript{260} Furthermore, the ICTY stated that command responsibility can only be imposed when there is “relevant and significant nexus between the crime and the responsibility”.\textsuperscript{261} It must be noted that this rule has been confirmed in several cases brought before the ICTR.\textsuperscript{262}

According to the U.S. War Manual, military leaders have a duty to “take appropriate measures as are within their power to control”.\textsuperscript{263} This principle is based in the case against Yamashita, and has set a precedent for command responsibility.\textsuperscript{264} The U.S. Supreme Court stated that Yamashita failed to take “appropriate measures within his power to control the troops under his command”, and therefore “permitting them to commit brutal atrocities...against people of the United States”.\textsuperscript{265} The JSOC-commander in chief could be held accountable for failed targeted killings in Yemen, if he did not take appropriate measures in order to prevent excessive civilian harm. This is especially relevant if the strike is unsanctioned, or if the commander has accepted the risk of civilian harm while planning the strike.

\begin{itemize}
\item[\textsuperscript{256}] Williamson (2008), page 303.
\item[\textsuperscript{257}] Williamson (2008), page 306.
\item[\textsuperscript{258}] Docherty, Háfthor and Rosenberg (2015).
\item[\textsuperscript{259}] Henckaerts and Doswald-Beck (2005), rule 153, page 558.
\item[\textsuperscript{260}] Prosecutor v. Hadzihasanovic and Kubura (2002), paragraph 175 – 176.
\item[\textsuperscript{261}] Prosecutor v. Hadzihasanovic and Kubura (2006), paragraph 36.
\item[\textsuperscript{263}] U.S. War Manual (2015), page 1059.
\item[\textsuperscript{264}] U.S. War Manual (2015), page 1059.
\item[\textsuperscript{265}] Yamashita v. Styer, page 327 U.S. 13 and 14.
\end{itemize}
4.1.2.2 Individual criminal responsibility

Individual responsibility has been implemented in the Second Hague Convention, cf. article 50, where it is stated that no penalty can be inflicted for acts which the individual is not responsible for. It is also included in the Fourth Geneva Convention, cf. article 33, where “no protected persons may be punished for an offence he or she has not personally committed”. It is also included in both AP I c.f. article 75(4)(b) and AP II c.f. article 6 (2)(b). However, these provisions apply in an IAC, and the question is whether they also can be implemented in a NIAC. This is further supported by the fact that common article 3 of the Geneva Convention does not contain explicit mention of criminal liability. The International Military Tribunal at Nuremberg stated that individual criminal liability is not barred just because there is an absence in treaty law.266 The reason being that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”267, therefore making breaches of common article 3 undoubtedly punishable. These principles are also followed up by the ICTY, c.f. the Tadic case.268 Trials by the ICTY and ICTR therefore confirm that individuals can be held criminally responsible for war crimes perpetrated in a NIAC.269

In the context of a NIAC, State practice establishes the principle as a norm of customary IHL, where “individuals are responsible for war crimes they commit”.270 A drone pilot is therefore responsible not only for committing an unlawful strike harming civilians, but also for assisting in, facilitating, aiding or abetting, as well as planning or instigating the commission of such a strike.271 The responsibility could for instance include remedies such as reparation, which will be discussed in chapter 4.2.

According to the U.S. Military Manual members of the armed forces shall, in good faith, comply with the law of war, and refuse to comply with “clearly illegal orders”.272 Soldiers should perform their duties as they have been directed, and apply their knowledge about the law at their task at hand. However, they do not have a duty to question orders from superiors, since the subordinate can presume that the order is lawfully issued.273 This is in accordance with jurisprudence from the U.S, where the United States Court of Military Appeals stated

266 Trial of the Major War Criminals, page 466.
267 Trial of the Major War Criminals, page 466.
270 Henckaerts and Doswald-Beck (2005), rule 151, page 551.
271 Henckaerts and Doswald-Beck (2005), rule 151, page 554.
that “in the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgement and be held criminally responsible”.\textsuperscript{274} U.S. soldiers can hence be punished in their national jurisdiction, either by non-judicial punishment, or judicial actions in either military or civilian courts, depending on the situations.\textsuperscript{275} It is established in the U.S. Uniform Code of Military Justice, c.f. article 15, that commanders have the authority to impose non-judicial punishment for “minor offenses”.\textsuperscript{276} When it comes to IHL-violations perpetrated by armed forces, there are examples that the U.S. generally prosecute individuals for offenses under domestic, or military law, and not international law.\textsuperscript{277}

### 4.2 Remedies for violations under IHL

When a State violates principles of IHL, victims have a right to remedy as well as access to justice. However, as the Dutch lawyer Liesbeth Zegveld states: “recognition of rights is one thing, the right to claim them is another”.\textsuperscript{278} So far States have been unwilling to entitle victims of IHL-violations remedies, and there are also obstacles due to anticipated fatalities in warfare.\textsuperscript{279}

In regard to the right to remedy, it is stated in ASR, c.f. article 34 that “full reparation...shall take the form of restitution, compensation or satisfaction, either singly or in combination”. The purpose of restitution is to “re-establish the situation that existed before the wrongful act was committed”.\textsuperscript{280} Compensation is set forth in the Fourth Hague Convention, c.f. article 3, where a State shall be “liable to pay compensation”. The purpose is to compensate the inflicted loss, and the damage the unlawful acts has caused, c.f. DASR article 36. An individual may therefore get compensated for “any economically assessable damage”, which is “appropriate and proportional” in regard to the “violation and circumstances” in that particular case.\textsuperscript{281} ASR article 37 states that satisfaction could either be “acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”. A victim may only retrieve satisfaction when restitution and compensation is insufficient.

According to customary IHL, a State responsible for IHL-violations is “required to make full reparation for the loss or injury caused”.\textsuperscript{282} According to State practice, this is considered

\begin{footnotes}
\footnote{United States v. William L. Calley Jr.}
\footnote{U.S. War Manual, page 1100.}
\footnote{U.S. Code § 815, article 15.}
\footnote{U.S. War Manual, page 1101.}
\footnote{Zegveld (2003), page 497.}
\footnote{Zegveld (2003), pp 497 and 501.}
\footnote{Henckaerts and Doswald-Beck (2005), rule 150, page 538.}
\footnote{UNGA, GARES 60/147 (2005), page 6.}
\footnote{Henckaerts and Doswald-Beck (2005), rule 150, page 537.}
\end{footnotes}
applicable in both an IAC and a NIAC.\textsuperscript{283} The abovementioned is also in accordance with the U.S. War Manual, where it is stated in chapter 18.16 that a State has an obligation to “\textit{make full reparation}”, and “\textit{pay compensation}” when there is a breach of the laws of war. An interesting notion is that the U.S states that there is a right to payment or other compensation including ex gratia, to both civilians that were injured or to the families of those killed.\textsuperscript{284} However, the U.S. War Manual states that the responsibility for violations of the law of war is “\textit{owed to other states}”, meaning that in order for the U.S. to be held accountable for IHL-violations, c.f. Geneva Convention and customary IHL, claims must be made by other States.\textsuperscript{285} The reason for this is that the abovementioned legal basis does not give individuals right to remedies, due to the inter-State nature of international obligations.\textsuperscript{286} Although individuals may be held responsible, the general view is that international obligations apply between States. This could be one explanation as to why the U.S. has not been held accountable for drone strikes in Yemen.

According to the UN a victim of a “\textit{gross violation}” of IHL “\textit{shall have equal access to an effective judicial remedy}”, as provided under international law.\textsuperscript{287} This includes access to administrative bodies, as well as those proceedings that are in accordance with IHL.\textsuperscript{288}

When it comes to targeted killings there are two problems which arise in regard to victim’s right to access justice, and those are the question of standing and the doctrine regarding political question.\textsuperscript{289} As Rosen states, standing is problematic for those who seek remedies on behalf of Al-Qaeda members. It is a constitutional condition regarding federal jurisdiction that the plaintiff has the burden to prove that there they “\textit{have suffered injury...a concrete and particularized, actual or imminent invasion of a legally protected interest}”.\textsuperscript{290} This judgement set forth three conditions that must be met in order to access the U.S. Court system. These are set as an “\textit{irreducible constitutional minimum}”\textsuperscript{291}, and is as following:

\begin{itemize}
  \item \textsuperscript{283} Henckaerts and Doswald-Beck (2005), rule 150, page 537.
  \item \textsuperscript{284} Obama (2016).
  \item \textsuperscript{285} U.S. war manual, page 1092.
  \item \textsuperscript{286} U.S. war manual, page 1092.
  \item \textsuperscript{287} UNGA, GARES 60/147 (2005), page 6.
  \item \textsuperscript{288} UNGA, GARES 60/147 (2005), page 6.
  \item \textsuperscript{289} Rosen (2011), page 5282.
  \item \textsuperscript{290} Lujan v. Defenders of Wildlife, page 555.
  \item \textsuperscript{291} Lujan v. Defenders of Wildlife, pp 560 – 561.
\end{itemize}
1. The victim must have suffered an ‘injury in fact’. This means that the injury must be an invasion against a protected legal interest which is concrete, particularized, actual and imminent. This condition is followed up by the U.S. Supreme Court. 292
2. There must be a causal connection between the injury and the alleged conduct.
3. It must be ‘likely’ that the injury will be “redressed by a favorable decision”.

If these conditions are not met, the plaintiff or victim seeking access to justice will not have sufficient standing to access the U.S. Courts. This is apparent in cases regarding either national security or the war on terror, because victims of drone strikes are unlikely to be present during the trial period. Unless a member of the Al-Qaeda willingly admits to take part in hostilities, thus fulfilling the abovementioned conditions, the lawsuit will be dismissed. 293
This also includes prospective relief for an anticipated strike, where the target must gather sufficient evidence that the person is an actual target. 294 Because of considerations regarding national security, as well as the lack of transparency, it is likely that a member of Al-Qaeda cannot predict their status as a legitimate target.

The abovementioned is apparent in the case against Al-Awlaki, 295 although this case differs due to Al-Awlaki being a U.S. citizen. One of the main questions was to what extent a U.S. citizen, either by himself or through others, can use the American legal system to obtain remedies for alleged violations. This regards in particular question of the Courts jurisdiction, because “a court without jurisdiction, is a court without power, no matter how appealing the case is”. 296 The outcome of Nasser Al-Awlaki is that the case was dismissed, and he was not allowed to bring the case before the Court, on behalf of his son. This give an indication that most likely government officials cannot be held personally liable for IHL-violations, because the bereaved lacks interest to seek access to the U.S. judicial system.

Even if a plaintiff establishes standing for a lawsuit, the doctrine regarding political question will obstruct the access to justice for targeted killing. The doctrine dictates that a case is excluded from judicial overview, if it concerns issues regarding politics or national security, and is supported by the notion regarding separation of powers. 297 In turn questions regarding targeted killings will be in the center of questions regarding political doctrine, because it is the

295 Nasser Al-Awlaki v. The United States.
296 Bailey v. Sharp.
President and/or Congress who authorizes use of force as well as sanctions targets being killed.
5 Closing remarks

As far as international law is concerned, the use of drones does not exist in a legal vacuum, because there are well established principles and rules under IHL which regulate such use. However, the application of these rules to a new domain raises both ethical and legal questions. This regards in particular the increasingly broader definitions of anticipatory self-defense, in combination with the continuous technological advantages.

In order for the practice of targeted killings to be in accordance with IHL, drone pilots must be trained and taught in both IHL and just war-traditions. The U.S. must ensure that drone pilots do not make discriminatory decisions based on insufficient intelligence, which would contradict the fundamental principle of distinction. This will be secured by ensuring that the provided intelligence is reliable, as well as assessing that the targeted person poses an actual threat to U.S. citizens, or national interests.

The increased use of drone strikes by several States, especially by the U.S., is a worrying development because it can have an impact on how future AC’s are fought. It can create an incentive to resort to force, since it will be easier to resort to armed violence, instead of seeking peaceful solutions. The U.S. not being held accountable for their actions can cause resentment amongst the civilian population, which can further lead to a counterproductive combat against counterterrorism. This is supported by the abovementioned case studies, where HRW mentions that the Yemeni population resents the U.S. since the U.S. are seemingly unaware of the widespread destruction these strikes causes.

To publicly disclose the numbers and identities of the harmed civilians, and create independent, judicial organs where civilians can seek reparation for harm caused by drone strikes, will contribute to a further separation of powers as these organs will be able to give binding decisions. This can prevent poorly grounded actions from the authorities in the future.

There is also a need to disclose the full legal basis for targeted killings, since it is of importance that States adopt necessary legal safeguards and adequate monitoring and legal mechanisms. Drones are here to stay, and as this thesis has shown it will be crucial that States cooperate in order to minimize civilian harm in a NIAC, while at the same time effectively fighting terrorism.

Based on considerations regarding national security it will be challenging to assess ex gratia-payments, due to the risk of releasing information regarding military activity, weapons systems or intelligence provided for by agencies. As this thesis has shown, there is a need for an adequate level of transparency the State’s part in regard to targeted killings. Such
transparency will ensure that the current operations are in compliance with IHL, and can be accomplished if States create effective and independent legal mechanisms that will oversee perpetrated drone strikes, as well as being competent to make binding decisions in regard to serious breaches of IHL. Proper legal consequences contribute to States being held accountable for their violations, which in turn increases public confidence in the State’s authorities.
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