

PERMANENT PRESENCE OF ARMED DRONES AND THE ELUSIVE
CONCEPT OF PSYCHOLOGICAL HARM

by

Matija Renčelj

A THESIS SUBMITTED TO MCGILL UNIVERSITY
IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS OF THE DEGREE OF
MASTER OF LAWS (LL.M. IN AIR AND SPACE LAW)

Institute of Air and Space Law
Faculty of Law
McGill University
Montreal, Québec
February 2018

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Mladi verujejo vate, Pravica
The young believe in you, Justice

Srečko Kosovel

Acknowledgments

I wish to express my gratitude to each and every individual who shaped my thoughts and ideas throughout my life. First and foremost my parents who enabled and encouraged me to study in Montréal. Their influence is however much deeper. I will never forget two events, which shaped my understanding of the world. On the night of the NATO bombing of Belgrade in May 1999, CNN broadcasted pictures of the air raid. My mom, with her everlasting pacifist mindset said: "Take a look at these fools, dropping bombs on civilians". About two years later, in 2001, only days after the 9/11 attacks, my father came home from a business trip in the Middle East. He gave an account of factory workers in a small town on the Arabian Peninsula who were perplexed and terrified when they saw people jumping out the flaming towers. These events clearly shaped my views of the world as I began learning that the usual good vs. evil dichotomy often misrepresents reality.

I would like to thank my supervisor, prof. Armand de Mestral for his contribution to this thesis, his insightful commentary and sharp ideas. Prof. Frédéric Mégret for guiding us through the research process and always posing the right questions, which enhanced my research. Prof. Richard Janda for having a profound influence on my ideas, research and appreciation of academia.

Further I would like to thank all those who permeated my life in Montréal with friendliness and warmth. Hélène, who re-ignited my spark to believe in change and is a day-to-day inspiration for my intellectual development. My IASL family who were always willing to help, laugh and debate on topical questions, especially Branislav, Aram, Ross, Maria M., Maria D., Aleksandra and Tanveer. My awesome roommates: Camille, Agatha, Auguste, Kayla and Thalia, I will never forget our laughs, debates and banter. Finally, I acknowledge that I had lived on Kanien'kehá:ka territory for a year and truly respect everyone in Montréal fighting for social justice. You are making a change. ♥

Résumé

Entre Juin 2002 et Décembre 2017, un minimum de 792 tirs de drones a frappé le Pakistan, le Yémen et la Somalie, tuant entre 3992 et 6038 personnes. Ces attaques, souvent entreprises dans des régions isolées et en difficulté, éloignées du gouvernement central, sont devenues la signature du mode opératoire des forces armées des Etats-Unis dans leur dénommée guerre contre Al Qaeda, les Talibans et autres forces associées. Les attaques de drone ont récemment fait l'objet d'examens approfondis à la fois de la part des médias et du monde académique. Très souvent, ce dernier se penche sur des questions qui ne sont en réalité nullement spécifiques aux drones armés mais qui servent plutôt d'indice pour faciliter d'autres débats théoriques et pratiques relatifs au droit international humanitaire. Indéniablement, grand nombre d'exemples démontre que les drones armés fascinent nos sociétés, notamment parce qu'il ressort de leurs opérations quelque chose d'énigmatique, soulevant doutes, interrogations et inquiétudes. De mon point de vue, la réponse à ces interrogations repose dans le préjudice moral/psychologique causé par la perpétuelle présence de ces drones dans le ciel de communautés humaines. Divers rapports suggèrent que les populations habitant les régions les plus touchées par les attaques de drones souffrent de PTSD, anxiété et grave stress, dans la mesure où elles voient et entendent de manière constante ces drones au-dessus de leurs villages sans savoir quand (ni si) de prochains tirs auront lieu.

Il n'existe aucun régime juridique réglementant spécifiquement les opérations des drones armés. Toutefois, il pourrait être défendu que les traités de droit international humanitaire en vigueur qui interdisent les attaques indiscriminées ont pour but, justement, d'éviter le préjudice moral dont pourraient souffrir les populations civiles. En revanche, la communauté internationale ne fait aucunement

d'une priorité le débat sur les drones armés, malgré les rapports troublants soumis par deux Rapporteurs Spéciaux des Nations Unies, une multitude d'organisations non gouvernementales et un certain nombre d'académiciens réputés. Les effets psychologiques des drones sur la personne humaine ne sont peut-être pas immédiatement quantifiables, mais ils seront pourtant durables et sévères.

Abstract

Between June 2002 and December 2017 a minimum of 792 drone strikes took place in Pakistan, Yemen and Somalia killing between 3992 - 6038 people. These strikes, often undertaken in remote and rugged regions far away from central government became the signature modus operandi of the United States armed forces in their so-called war with Al Qaeda, the Taliban and associated forces. Drone strikes have fallen under scrutiny of both the general media as well as academics. The latter however often dwell on questions, which in fact have nothing specific to do with armed drones - rather they are often used as proxies to facilitate other theoretical and practical debates arising from the International Humanitarian Law framework. Undeniably however there is a plethora of examples proving that armed drones fascinate our societies, as there is something inherently enigmatic about their operations, raising doubts, questions and concerns. In my view the answer lies in the psychological harm caused by the perpetual presence of armed drones above communities. Reports suggest that people in regions most hit by drone strikes suffer from PTSD, anxiety and severe stress as armed drones are perpetually seen and heard above their villages without knowing when (or if) they will strike next.

There is no legal framework directly touching upon the operations of armed drones, one could however argue that currently applicable IHL treaties preventing indiscriminate harm aims to prevent psychological suffering of the civilian population. Nevertheless, the international community is not prioritizing the debate on armed drones in any form despite concerning reports from two UN Special Rapporteurs, a host of NGO's and a number of respected academics. The effects of the caused psychological harm may not be instantly measurable, they will however be long lasting and severe.

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1

Prolegomena

The interplay between the presence of armed drones, state sovereignty and psychological harm under IHL gives rise to many independent questions which need to be taken into account and tackled with separately. The use of armed drones although often justified as precise and efficient seems to have much wider effects both on the traditional notion of state sovereignty but perhaps more importantly on the local populations who claim to suffer psychological harm caused by the presence of armed drones.

1.1. Under the shadow of the drone¹

In October 2011 a group of Pashtun tribal elders, families of drone victims and activists met in Islamabad with Pakistani and British lawyers to discuss how they could use law in order to help their communities seek justice. One of the ideas was to set up mechanisms for people in areas where drone strikes take place to document them.² Amongst those present at the meeting was a 16 year old man going by the name of Tariq Aziz, stating he saw a drone between ten and fifteen times a day.³ He must have been especially prudent since only 18 months earlier his cousin was killed by a drone in the Pakistani village of Norak (نورک) while riding his motorcycle.⁴ Tariq Aziz travelled to Islamabad on October 27, after Shahzad Akbar, a lawyer who runs the Foundation for Fundamental Rights in Pakistan and works with families who have lost relatives to drone strikes, invited him to come in order to become part of a project organized by Reprieve, a British legal charity, which intended to document outcomes of military drone strikes.

Tariq Aziz was motivated to make a change, to prevent his family and his community from future harm. Tariq stepped forward. He volunteered to gather proof despite the implications and risks this might bring to his life in the tribal areas of the Pakistani-Afghan border, where extremists could target him if he was cooperating

¹ Inspired by: Bridle James, "Under the Shadow of the Drone", online: Lighthouse <<http://lighthouse.org.uk/programme/james-bridle-under-the-shadow-of-the-drone>>.

² Benjamin Medea, "The Grim Toll Drones Take on Innocent Lives" in *Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues* (Northampton, MA: Interlink Publishing Group, 2014) at 93.

³ Ibid; Pratap Chatterjee, "Bureau reporter meets 16-year-old three days before US drone kills him", (4 November 2011), online: The Bureau of Investigative Journalism <<https://www.thebureauinvestigates.com/stories/2011-11-04/bureau-reporter-meets-16-year-old-three-days-before-us-drone-kills-him>>.

⁴ Medea, *supra* note 2 at 93; Chatterjee, *supra* note 3.

with western activists.⁵ Besides the obvious physical damage drone strikes cause Tariq Aziz emphasized the often overlooked psychological factor, stating that once night falls time were making him crazy as he couldn't sleep because of their presence above the village.⁶



Location of Norak (نورک) within the Federally Administered Tribal Areas, Pakistan⁷

It came as a shock to those present at the meeting that the first documented death caused by a drone strike would be that of Tariq Aziz himself. Three days after the meeting he was picking up his aunt along with his 12-year-old cousin, Waheed Khan. Their lives were ended by a hellfire missile launched from a US operated drone while only 200 yards away from their aunt's house.⁸

⁵ Clive Stafford Smith, "Opinion | In Pakistan, Drones Kill Our Innocent Allies", The New York Times (3 November 2011), online: <<https://www.nytimes.com/2011/11/04/opinion/in-pakistan-drones-kill-our-innocent-allies.html>>.

⁶ Medea, supra note 2 at 95.

⁷ "Google Maps - Location of Norak (نورک) within the Federally Administered Tribal Areas, Pakistan", online: Google Maps <<https://www.google.ca/maps/place/Naurak,+Pakistan/@31.9196499,64.0712746,6.43z/data=!4m5!3m4!1s0x38d7e4752299a117:0x3506b9cf37404109!8m2!3d32.9801588!4d70.1708833?hl=en>>.

⁸ Smith, supra note 5; Medea, supra note 2 at 93; Pratap Chatterjee, "The CIA's unaccountable drone war claims another casualty", (7 November 2011), online: The

The attack was confirmed by an US official, stating that it was not a mistake and that the target was chosen by the CIA as the two individuals were supposedly militants and that neither of them was a 12 year old.⁹ Pratap Chatterje a journalist who met Tariq Aziz at this very meeting quotes the words of Shahzad Akbar, a lawyer running the Foundation for Fundamental Rights which helps families who have lost relatives to drone strikes, saying that the CIA had an opportunity to meet with Tariq, if they wanted to, when he was in Islamabad.¹⁰ Or being more blunt, as was Shahzad Akbar, "If they were terrorists, why weren't they arrested in Islamabad, interrogated, charged or tried?"¹¹

Guardian <<https://www.theguardian.com/commentisfree/cifamerica/2011/nov/07/cia-unaccountable-drone-war>>.

⁹ Nick Schifrin, "Was Teen Killed By CIA Drone a Militant - or Innocent Victim?", (30 December 2011), online: abc news <<http://abcnews.go.com/Blotter/tariq-khan-killed-cia-drone/story?id=15258659>>.

¹⁰ Chatterjee, supra note 3.

¹¹ Ibid.

2

National Airspace and enforcement of airspace sovereignty

Sovereignty is one of the key concepts of public international law from its early beginnings. However how a breach of sovereignty is dealt with is often grounded on Realpolitik rather than legal principles. A number of historic cases does however exist where airspace sovereignty had been enforced which suggests that states do have an inherent right to administer and protect their sovereignty. When such (defensive) maneuvers are legal, legitimate and proportionate, must however be analysed on a case-by-case basis as no clear procedures or guidelines seem to be in place.

2.1 Sovereignty

One of the first authors to theorize on the concept of sovereignty was the 16th century French philosopher Jean Bodin, who discussed notions of sovereignty in his 1576 work titled "Les Six livres de la République", where he defines it as "the absolute and perpetual power" within a state.¹² As noted by Lassa Oppenheim at the turn of the 20th century, there is a distinction between sovereignty of the State and sovereignty of the organ exercising powers of the State.¹³ Accordingly it is neither the Monarch, Parliament nor People where sovereignty derives from.¹⁴ It is rather the State itself - hence bringing us to a double abstraction.¹⁵ The principle of sovereignty i.e. "the supreme authority within a territory" is a crucial element of modern international law.¹⁶

In today's conceptualization of international law the Montevideo Convention on Rights and Duties of States of 1933 provides the most widely accepted requirements for statehood.¹⁷ Any state, in order to be accepted as a person of international law must possess the following qualifications: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states".¹⁸ As Shaw notes, the The Arbitration Commission of the European Conference on Yugoslavia emphasized that "... a state is characterised by

¹² Jean Bodin, *Bodin: On Sovereignty*, Julian H. Franklin, ed. (Cambridge University Press, 1992) at 345.

¹³ Lassa Oppenheim, *International Law: A Treatise* (London: Longmans, Green, 1905) at 106.

¹⁴ *Ibid* at 107.

¹⁵ *Ibid*.

¹⁶ Samantha Besson, "Sovereignty" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (New York: Oxford University Press, 2014) at 1.

¹⁷ Malcolm N Shaw, *International Law*, sixth edition ed (Cambridge: Cambridge University Press, 2008) at 198.

¹⁸ Montevideo Convention on the Rights and Duties of States, 26 December 1934, 165 LNTS 19 [Montevideo Convention on the Rights and Duties of States] at Article 1.

sovereignty".¹⁹ Accordingly the United Nations charter recognizes sovereignty as a key principle of modern-day international relations. Article 2 of the United Charter states: "*The Organization is based on the principle of the sovereign equality of all its Members*".²⁰

2.2 Airspace Sovereignty

The roman private law maxim *Cuius est solum, eius est usque ad coelum et ad inferos* (translated as "To whomsoever it belongs, it is his all the way to heavens and all the way to hell") represents one of the first legal rules providing that the air above a certain piece of land belongs to the owner of that land.²¹ If the said applies to the concept of property it must *a fortiori* apply to the concept of sovereignty as it represents absolute and perpetual power (See Section 2.1).

It is generally accepted that the first law - albeit municipal - with direct relation to air transport was adopted in Paris on 23 April 1784, where an ordinance of Lenoir, a "*lieutenant de police*" prohibited balloon flights without them obtaining a special permit.²² This is early proof that airspace above a state's territory was a matter of sovereignty, as the police, an organ exercising public authority (or the so called "*absolute and perpetual power of the state*" (see 2.1.)) felt it had the need (as well as the power) to regulate airborne activities.²³

One of the first international claims to airspace sovereign is considered to be the letter dated 19 November 1870 in which the Prussian/German statesman Otto

¹⁹ Shaw, *supra* note 17 at 198.

²⁰ Charter of the United Nations, 24 October 1945, 1 UNTS XVI [Charter of the United Nations] at Article 2.

²¹ Aaron Xavier Fellmeth & Maurice Horwitz, *Guide to Latin in International Law* (New York: Oxford University Press, 2009) at 69; Janez Kranjc, *Rimsko pravo* (Ljubljana: GV založba, 2010) at 407.

²² Peter H Sand, Jorge de Sousa Freitas & Geoffrey N Pratt, "An Historical Survey of International Air Law before the Second World War" (1960) 7 McGill L J 24 at 25.

²³ Olivier Corten, *The law against war: the prohibition on the use of force in contemporary international law* (Oxford; Portland, Or.: Hart Publishing, 2010) at 60–66.

von Bismarck notified the French government that people captured when overflying territory occupied by German troops in balloons would be treated as operating behind battle lines.²⁴ However not all early laws with regards to air transport, including those containing an international element, focused on the notion of airspace sovereignty but rather (most probably for practical reasons) imposed power only upon touchdown to the states territory. In 1909 the French Prime Minister, Clemenceau, issued a circular that imposed duties on foreign balloons, however this only happened when touching upon French territory ("*chaque fois qu'un ballon étranger descendra sur le territoire français...*").²⁵

It was early in balloon-flight history that an international flight already took place, when Jean-Pierre Blanchard and John Jeffries flew from Dover, England, to Calais, France. However it was not until the early 20th century that the international community wished to regulate such activities.²⁶ In 1910 the French government, following its concerns on the increasing number of international flights, invited states to hold a conference on the regulation of air navigation. Despite no formal agreement being concluded in the 1910 conference in Paris, it was during that conference that a states first agreed that usable space above the lands and waters of a State is part of

²⁴ Sand, Freitas & Pratt, supra note 22 at 29; Ernest Nys, "Rapport de M. Nys, second rapporteur sur le régime, juridique des aérostats" (1902) XIX Annuaire de l'Institut de droit international, online: <<http://gallica.bnf.fr/ark:/12148/bpt6k57209485>> at 109.

²⁵ Sand, Freitas & Pratt, supra note 22 at 25; Bulletin Officiel du Ministre de l'Intérieur; Direction de la sûreté générale: Contrôle des étrangers - Au sujet des ballons étrangers atterrissant en France, Ministère de l'intérieur, 12 March 1909 [Bulletin Officiel du Ministre de l'Intérieur; Direction de la sûreté générale: Contrôle des étrangers - Au sujet des ballons étrangers atterrissant en France] at 127.

²⁶ Richard Gillespie, "Ballooning in France and Britain, 1783-1786: Aerostation and Adventurism" (1984) 75:2 Isis 249 at 249; "Across the English Channel in a balloon", (2010), online: History.com <<http://www.history.com/this-day-in-history/across-the-english-channel-in-a-balloon>>.

the territory of that State.²⁷ The conference was attended by Austria-Hungary, Belgium, Bulgaria, Denmark, France, Germany, Great Britain, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Romania, Russia, Spain, Sweden, Switzerland and Turkey.²⁸

Despite no multilateral convention in place, the practice of states in the early 20th century indeed showed that they accepted, enforced and respected the principle of airspace sovereignty. In 1910 Russian guards fired at aeronauts passing over the Russian border.²⁹ Further during the First World War Netherlands prohibited flying above its territory and shot down several airplanes, which failed to comply with this prohibition.³⁰ Later in time Switzerland, Sweden, Denmark, Norway, Greece, Spain, Italy, Romania, Bulgaria and China also protested against any violation of their airspace by foreign aircraft, and thus affirmed their acceptance of airspace sovereignty.³¹

By the end of the First World War certain states recognized the potential in air transport, as they owned hundreds or even thousands of aircraft, which were used during the war. With the first trans-Atlantic flight in June of 1919, protecting airspace sovereignty became imminent and an international agreement was soon to be in place to safeguard the future of the air transport industry.³²

²⁷ John Cobb Cooper, "The International Air Navigation Conference, Paris 1910" (1952) 19 J Air L & Com 127 at 127.

²⁸ Ibid at 129.

²⁹ Sand, Freitas & Pratt, *supra* note 22 at 32.

³⁰ Ibid.

³¹ Ibid.

³² "Alcock and Brown fly safely to Ireland; Span 1,932 miles over sea in 972 minutes; 'Journey a terrible one,' says Alcock; could not see the sun, moon or stars", The Sun (16 June 1919), online: <<http://chroniclingamerica.loc.gov/lccn/sn83030431/1919-06-16/ed-1/seq-1/>>.

Consequently, and once again on the initiative of the French government, aviation was under the limelight during the 1919 Paris Peace Conference, where a Commission on International Air Navigation was established.³³ The commission consisted of Belgium, Brazil, the British Empire, Cuba, France, Greece, Italy, Japan, Portugal, Romania, the Kingdom of the Serbs, Croats and Slovenes, and the United States.³⁴ The parties present at the sub-committee agreed to the first draft of a multilateral convention and followed the principles of the 1910 Paris conference (pages 14-15), and dismissing the theories proposed by then-prominent legal scholars such as Paul Auguste Joseph Fauchille, who advocated for total freedom of the air.³⁵ Article 1 of the 1919 Paris Convention determined that: *"The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto."*³⁶

Interestingly enough, in relation to future development of international air law (see discussion on The Convention on International Civil Aviation below) the 1910 Convention also included the right of innocent passage, similar to that known from the law of the sea. *"Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting*

³³ Arthur K Kuhn, "International Aerial Navigation and the Peace Conference" (1920) 14:3 The American Journal of International Law 369 at 370.

³⁴ "The Postal History of ICAO: The 1919 Paris Convention: The starting point for the regulation of air navigation", online: <https://www.icao.int/secretariat/PostalHistory/1919_the_paris_convention.htm>.

³⁵ Jan Piet Honig, The Legal Status of Aircraft (Den Haag: Martinus Nijhoff, 1956) at 10.

³⁶ Convention Relating to the Regulation of Aerial Navigation, 1 June 1922 [Convention Relating to the Regulation of Aerial Navigation] at Article 1.

States, provided that the conditions laid down in the present Convention are observed. Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality."³⁷ These principles were also followed in the Ibero-American Convention of 1926 and the Havana Convention of 1928.³⁸

Despite accepting the afore quoted principles during the 1919 Peace Conference, some scholars at the time argued for a more strict approach to airspace sovereignty (so called absolute sovereignty) where innocent passage would not be allowed.³⁹ Over time practice followed these considerations, as the right to establish and operate scheduled air services most often required prior permissions of the concerned state in a way that *"there was nothing left of the principle of freedom of innocent passage."*⁴⁰

During the Second World War aerial power proved decisive for the final outcome.⁴¹ Recognizing the potential of aviation in the post WW2 period, the Government of the United States of America sent an invitation to all allied countries to attend a conference during which new regulations for international civil aviation would be drafted.⁴² The conference would take place in Chicago during November and December of 1944.⁴³

³⁷ Ibid at Article 2.

³⁸ Honig, supra note 35 at 19.

³⁹ Blewett Lee, "The International Flying Convention and the Freedom of the Air" (1919) 33:1 Harvard Law Review 23 at 31; H D Hazeltine, "The Law of Civil Aerial Transport" (1919) 1:1 Journal of Comparative Legislation and International Law 76 at 83.

⁴⁰ Honig, supra note 35 at 18.

⁴¹ Brian Mahoney, James Mahoney & Robin Olds, Reluctant Witness: Memoirs from the Last Year of the European Air War 1944-45 (Bloomington, IN: Trafford Publishing, 2005) at 786.

⁴² Honig, supra note 35 at 20.

⁴³ Harry A Bowen, "Chicago International Civil Aviation Conference" (1944) 13 Geo Wash L Rev 308 at 308; ICAO, "The History of ICAO and the Chicago Convention", online: <<https://www.icao.int/about-icao/History/Pages/default.aspx>>.

Following the realities of the Second World War, the previously accepted concept of airspace sovereignty was further strengthened. Absolute state sovereignty over airspace above state territory, similarly to the 1919 Paris Convention, is manifested through Article 1 of the 1944 Convention on International Civil Aviation.⁴⁴ *"The contracting States recognize that every State has complete and exclusive sovereignty over the air-space above its territory."*⁴⁵

Noticeably, in contrast to the 1919 Convention Relating to the Regulation of Aerial Navigation there was no explicit right of so-called innocent passage. Despite the US agenda, which pushed for a multilateral recognition of the so-called five freedoms of the air, only certain provision within Article 5 give rise to rights akin to those spurring out of the aforementioned concept of innocent passage:⁴⁶ *"Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights. Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7,*

⁴⁴ Fellmeth & Horwitz, supra note 21 at 69.

⁴⁵ Convention on International Civil Aviation, 4 April 1947, 15 UNTS 295 [Convention on International Civil Aviation] at Article 1.

⁴⁶ Paul Stephen Dempsey & Lauren E Gesell, Aviation and the Law, fifth ed (Chandler, AZ: Coast Aire Publications, 2011) at 877.

have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."⁴⁷

In conclusion, we have to highlight that any freedoms granted within the Chicago Convention as well as the adjacent (i) Transport Agreement and (ii) Transit agreement only apply to civil aircraft, and state aircraft, explicitly military aircraft, are excluded from any freedoms granted by the Convention on International Civil Aviation:⁴⁸ *"(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft. (b) Aircraft used in military, customs and police services shall be deemed to be state aircraft. (c) No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof. (d) The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.*"⁴⁹

In accordance any flight over a foreign state's territory by military aircraft should be held under higher scrutiny and is only allowed if the overflown state explicitly agrees to such flight(s) in a separate (bilateral or multilateral) agreement.

2.3 Shooting down of foreign aircraft

Today, short-term breaches of airspace sovereignty are a daily reality, however in most cases the only consequences take form of diplomatic notes or

⁴⁷ Convention on International Civil Aviation, supra note 45 at Article 5.

⁴⁸ International Air Services Transit Agreement, 30 January 1945, 84 UNTS 389 [International Air Services Transit Agreement]; International Air Transport Agreement, 8 February 1945, 171 UNTS 387 [International Air Transport Agreement].

⁴⁹ Convention on International Civil Aviation, supra note 45 at Article 3.

public warnings.⁵⁰ In other situations, especially where tensions are high and where hostilities between states already take place, military aircraft might eventually be even shot down for breach of sovereignty.⁵¹ The latter doesn't only apply to manned military jets; logically drones might suffer the same fate when breaching airspace sovereignty.⁵² The legality and proportionality of such actions is of course to be discussed with the specifics of the individual case in mind.

In the 1986 Nicaragua case, the International Court of Justice also held that any unauthorized overflight over territory of another state infringes upon that states sovereignty: *"The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State."*⁵³

However nothing in this paragraph gives rise to any rights of the overflown state to shoot down an aircraft that is operating within its airspace. In order to analyse the legality or the proportionality of shooting down an aircraft we must consult the rules on the use of force stipulated by the UN Charter, whereas: *"All*

⁵⁰ Sarantis Michalopoulos, "EU warns Turkey after it violates Greek airspace 141 times in one day", (16 May 2017), online: EURACTIV.com <<https://www.euractiv.com/section/enlargement/news/eu-warns-turkey-after-it-violates-greek-airspace-141-times-in-one-day/>>; Ministry of Foreign Affairs of the Republic of Lithuania, "Lithuania extends a diplomatic note to Belarus over airspace violation", (12 August 2016), online: <<https://www.urm.lt/default/en/news/lithuania-extends-a-diplomatic-note-to-belarus-over-airspace-violation->>.

⁵¹ Ambassador Yaşar Halit Çevik, Letter of the Permanent Mission of Turkey to the United Nations (2015); Ministry of Defence of the Russian Federation, "Commander-in-Chief of the Russian Aerospace Forces presents facts of the attack on the Russian Su-24M aircraft carried out by the Turkish F-16 fighter in the sky over Syria on November 24", (27 November 2015), online: [eng.mil.ru <http://eng.mil.ru/en/news_page/country/more.htm?id=12066900@egNews>](http://eng.mil.ru/en/news_page/country/more.htm?id=12066900@egNews); H Said & Manar Al-Frieh, "Russian Foreign Ministry summons Israel's Ambassador over Israeli attack on Syrian territory", online: Syrian Arab News Agency <<http://sana.sy/en/?p=102488>>.

⁵² Gili Cohen, "Israel Shoots Down Syrian Drone Over Golan Heights", Haaretz (27 April 2017), online: <<http://www.haaretz.com/israel-news/1.786119>>.

⁵³ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America); Merits, 1986 International Court of Justice (ICJ) (available on <http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>) at para 251.

*Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"*⁵⁴

States are however still left their right to self-defend when specific conditions are met: *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."*⁵⁵

Historic events show that states whose (airspace) sovereignty is breached by foreign airplane on a hostile mission (hostile in relation to the state whose sovereignty is breached) have a legal (or at least legitimate) right under international law to shoot them down.⁵⁶ Two historic events show that this is generally accepted under international law and most probably falls under the self-defense context of Article 51 of the UN Charter. The first such event is the downing of the U2 Lockheed spy plane, flying over the Soviet Union in May 1960. As the Soviet Union shot the plane down the United States did not protest the actions.⁵⁷ Interestingly president Eisenhower temporarily suspended spy plane flights over the USSR and later on

⁵⁴ Charter of the United Nations, supra note 20 at Article 2(4).

⁵⁵ Ibid at Article 51.

⁵⁶ Kubo Mačák, "Was the Downing of the Russian Jet by Turkey Illegal?", (26 November 2015), online: EJIL: Talk! <<https://www.ejiltalk.org/was-the-downing-of-the-russian-jet-by-turkey-illegal/>>.

⁵⁷ Oliver J Lissitzyn, "Some Legal Implications of the U-2 and RB-47 Incidents" (1962) 56:1 American Journal of International Law at 135.

president Kennedy ordered that they shouldn't be resumed.⁵⁸ Similarly, during the 1999 NATO bombing of Yugoslavia a United States Air Force F-117A stealth attack aircraft was shot down by Yugoslav forces, however no protest seemed to have been issued (publicly) neither by the United States Secretary of State, the United States Department of Defense nor other parts of the US government.⁵⁹ Yugoslav statements at the time suggested, that Yugoslavia felt its sovereignty is being breached by the presence of hostile aircraft within their airspace and consequent airstrikes that followed.⁶⁰ The United States Department of defense only issued an informative press release on the incident, without any condemnation of the (seemingly legal) Yugoslav air defense maneuver.⁶¹

This suggests that permanent and hostile (or unfriendly) presence in a foreign airspace can expectedly result in a hostile reply from the state whose airspace sovereignty is breached. There are no clear guidelines in place on how such situations should be dealt with. ICAO does provide a Manual concerning Interception

⁵⁸ Ibid.

⁵⁹ "U.S. Secretary of State Archive", (1999), online: 1997-2001.state.gov <https://1997-2001.state.gov/www/statements/1999_index.html>; "Department of Defense", (1999), online: archive.defense.gov <<http://archive.defense.gov/news/articles.aspx?m=4&y=1999&SectionID=0>>; A thorough search through the United States National Archives does not produce any proof of condemnation.

⁶⁰ RTS, RTS 1 - Vesti, 24. mart 1999 (Radio Television Serbia 1 - News, 24 March 1999) (Belgrade, 1999) at at 8:30 min-9:30 min. A press release of the Yugoslav Army General Staff aired on the national news channel stated: "Vojne snage Severnoatlanske alijanse, po diktatu i interesu svetskog policajca, Sjedinjenih Americkih Drzava, a za racun siptarskih separatista i terorista, grubo su narusile teritoriju suverene Jugoslavije i brutalno ugrozile zivote njenih gradjana." translated as "Armed forces of the NATO alliance, under the dictate and interest of the world police officer, USA, on the account of Shqiptar separatists and terrorists, have grossly violated the territory of sovereign Yugoslavia and brutally threatened the lives of its citizens"

⁶¹ American Forces Press Service & Linda D Kozaryn, "Stealth Fighter Down in Yugoslavia, Pilot Rescued", (28 March 1999), online: archive.defense.gov <<http://archive.defense.gov/news/newsarticle.aspx?id=41992>>.

of Civil Aircraft.⁶² With state or military aircraft these rules however do not apply directly, it is therefore in the discretion of the overflown state on what measures to take when a foreign military aircraft enters its territory. Looking at the aftermath of the Turkish-Russian incident involving the shoot down of the Russian Sukhoi Su-24 bomber, it seems that when no clear hostility is manifested and especially when the intrusion is short term, shooting down of a plane might be illegal or at least disproportionate and "*inconsistent with the Purposes of the United Nations*".⁶³ The fact that both Russian and Turkish officials dwelled on the existence of prior communication with the downed Su-24 bomber, seems to suggest that it is indeed expected that prior warnings to a non-hostile aircraft should be given before any further measures are to be taken.⁶⁴ As Turkey later publicly apologized for shooting down the Russian aircraft it seems that it has accepted the disproportionality of its actions.⁶⁵ On the other hand, the sudden shift in tone from both sides might also suggest this has more to do with realpolitik than proportionality and legality under international law.⁶⁶ In conclusion, the above analysis suggests the below formulation with regards to foreign military aircraft intruding a sovereign airspace is to be relied upon when assessing actions against unauthorized foreign aircraft within a sovereign airspace:

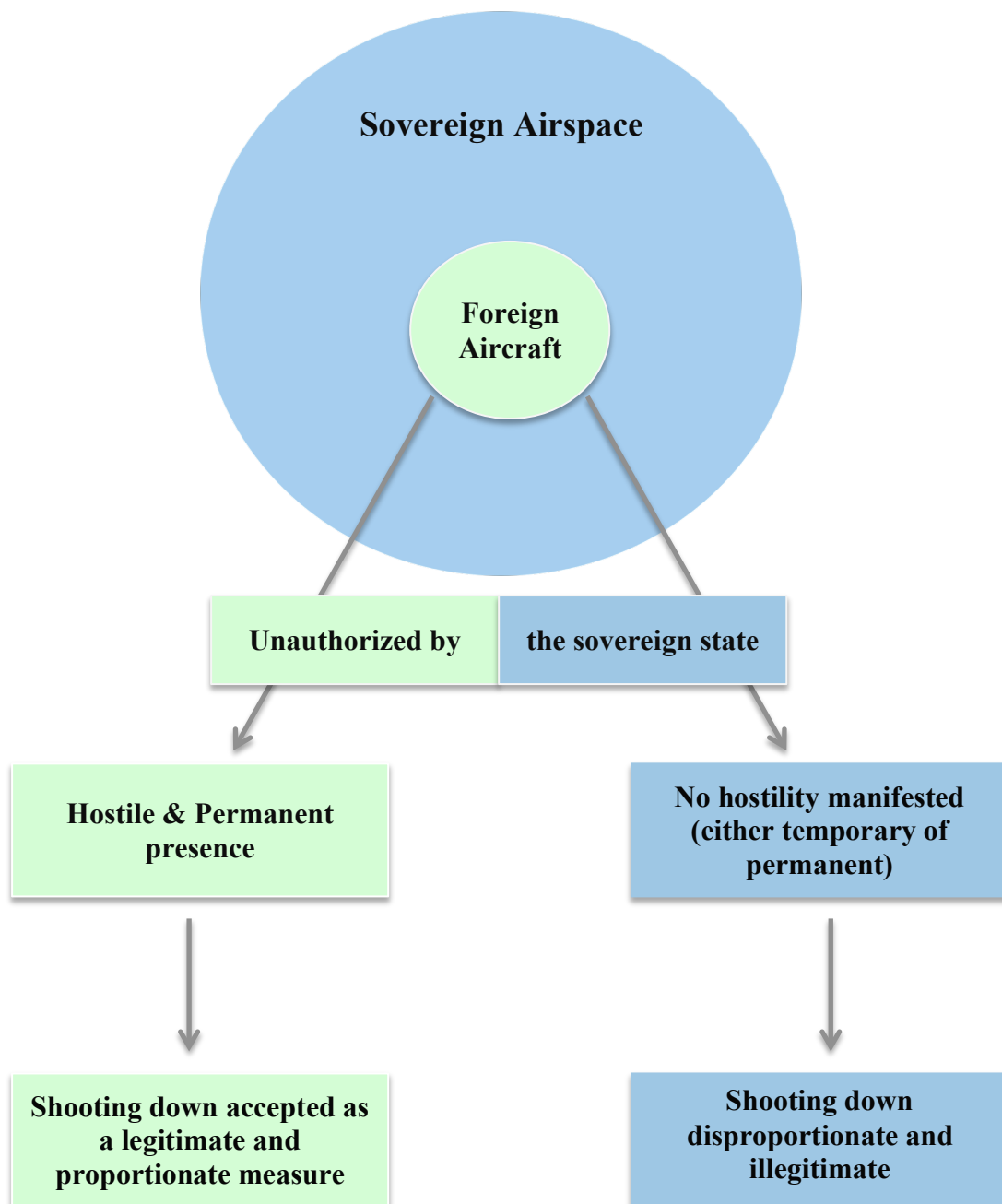
⁶² International Civil Aviation Organization, Manual Concerning Interception Of Civil Aircraft (Doc 9433) (ICAO, 1990).

⁶³ Charter of the United Nations, *supra* note 20 at Article 2.

⁶⁴ Ministry of Defence of the Russian Federation, *supra* note 51; Shaun Walker & Kareem Shaheen, "Turkish military releases recording of warning to Russian jet", *The Guardian* (25 November 2015), online: <<http://www.theguardian.com/world/2015/nov/25/second-russian-pilot-shot-down-turkey-alive-ambassador>>.

⁶⁵ Official Website of the President of Russia, "Vladimir Putin received a letter from President of Turkey Recep Tayyip Erdogan", (27 June 2016), online: President of Russia <<http://en.kremlin.ru/events/president/news/52282>>.

⁶⁶ Hasan Selim Özerter, "Turkey and Russia: A Fragile Friendship" (2017) 15:4 *Turkish Policy Quarterly* 121; Mike Woods, "Turkey-Russia pipeline plan sign of diplomatic shift", (10 October 2016), online: RFI <<http://en.rfi.fr/middle-east/20161010-turkey-russia-pipeline-pledges-mark-shift-orientation>>.



3

Permanent presence of armed drones: Beyond physical harm and injury

Armed drones are not as novel as often perceived, and it would be foolish to say the technology itself is sinister or cannot be used in a way that is legal and humane. However the use of armed drones is at times indeed questionable and often lacks transparency, which raises many doubts when connected with personal accounts of people living under their permanent presence.

3.1 The permanent presence of armed drones

Unmanned aerial vehicles encompass a wide range of technologies, applications and implications, however this thesis specifically deals with unmanned aerial vehicles used for military purposes particularly those which possess attack capabilities. The terms interchangeably used to name such unmanned aerial vehicles within this thesis are "drones" and "armed drones". The history of unmanned aerial vehicles is not as novel as today's discourse often suggests. Unmanned aerial vehicles have been used over centuries, with one of the earliest known example being the 1849 air bombing of Venice by Austria using unmanned balloons.⁶⁷ In comparison, the first bomb dropped out of an airplane operated by a pilot occurred about 60 years later, on November 1st 1911, just outside Tripoli in modern day Libya.⁶⁸

Later in history so called "target drones" were used by the US military during the Second World War.⁶⁹ During the Vietnam War, other applications for unmanned aerial vehicles were tested, including missile launch, but were at the time not used in combat.⁷⁰ As technology evolved armed drones are now well capable to fly long geographic distances, and stay in flight up to 40 hours.⁷¹ In relation, a modern day fighter jet has an average flight time between two and three hours.⁷²

Since 2012 Pakistan claims presence of US armed drones and their consequent drone strikes are breaching Pakistan's sovereignty. On 12 April 2012

⁶⁷ Ron Bartsch, James Coyne & Katherine Gray, *Drones in Society: Exploring the strange new world of unmanned aircraft*, 1st ed (New York: Routledge, 2016) at 20.

⁶⁸ Alan Johnston, "The first ever air raid - Libya 1911", BBC News (10 May 2011), online: <<http://www.bbc.com/news/world-europe-13294524>>.

⁶⁹ Adam Rothstein, *Drone*, 1st ed (New York: Bloomsbury Publishing USA, 2015) at 27.

⁷⁰ *Ibid* at 30.

⁷¹ "MQ-9B RPA", online: General Atomics Aeronautical Systems Inc <<http://www.ga-asi.com/mq-9b>>.

⁷² Bartsch, Coyne & Gray, *supra* note 67 at 19.

day both houses of Pakistani parliament declared all further drone strikes illegal and demanded that they cease immediately - overturning any oral consent for drone strikes on Pakistani territory and no such oral consent would be sufficient to authorize further strikes.⁷³

Under International law a state can give consent for a foreign state to operate aircraft or even use force on its territory.⁷⁴ In case of United States drone strikes in Yemen this seems to be the *modus operandi* as noted by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: "*The Government of Yemen has informed the Special Rapporteur that the United States routinely seeks prior consent, on a case-by-case basis, for lethal remotely piloted aircraft operations on its territory through recognized channels. Where consent is withheld, a strike will not go ahead.*"⁷⁵

However, Pakistan, at least since 2012, has not given any consent to drone presence and drone strikes over its territory. To the contrary, this was explicitly prohibited. Only two hours after the Pakistani parliament ban on any foreign drones the United States carried out a new drone strike in Waziristan.⁷⁶ As noted by the UN Special Rapporteur Mr. Ben Emmerson, this resolution was put in place in order to:

⁷³ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/68/389 (United Nations, 2013), para 53; Louis Charbonneau, "U.S. drone strikes violate Pakistan's sovereignty: U.N.", Reuters (16 March 2013), online: <<http://www.reuters.com/article/us-un-drones-idUSBRE92E0Y320130316>>; Tom Reifer, "A Global Assassination Program" in Marjorie Cohn, ed, Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues (Northampton, MA: Interlink Publishing, 2014) at 80; Farooq Yousaf & Rahmanullah, "Drone Strikes in FATA: A Violation of Pakistan's Sovereignty" (2014) V A Journal of Peace and Development, online: <<http://frc.org.pk/breaking/tigah-a-journal-of-peace-and-development-volume-v-june-2014/>>.

⁷⁴ For further analysis see Ashley Deeks, "Consent to the Use of Force and International Law Supremacy" (2013) 54:1 Harvard International Law Journal at 1-33.

⁷⁵ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 73 at para 52.

⁷⁶ Reifer, *supra* note 73 at 81; Yousaf & Rahmanullah, *supra* note 73 at 120.

"...clarify the process by which consent may lawfully be given in Pakistan for the deployment of another State's military assets on its territory or in its airspace."⁷⁷ The superseding Administration in Pakistan has informed the UN Special Rapporteur in 2013 that: *"It adopts the same position as its predecessor, namely that drone strikes on its territory are counterproductive, contrary to international law, a violation of Pakistani sovereignty and territorial integrity, and should cease immediately."*⁷⁸ E-mails published by Wikileaks show that the U.S. administration (namely the Secretary of State along with her aides) at the time was well aware of Pakistani opposition to drone strikes as early as 2011 but had never publicly commented on the perpetual breach of airspace sovereignty carried out by their armed drones.⁷⁹ In 2013 the Pakistani Prime Minister Nawaz Sharif held face-to-face discussions with president Barack Obama and reminded him of the need to respect Pakistan's "sovereignty and territorial integrity".⁸⁰

With this in mind the UN Special Rapporteur deems the continued use of drones in the Federally Administered Tribal Areas amounts to a violation of Pakistani sovereignty if not performing self-defense allowed by Article 51 of the UN Charter.⁸¹ The United States consider that they are allowed to cross a border of another state, and deploy their armed force on its territory in order to undertake effective military operations in self-defense, against non-state actors, if the other state fails to

⁷⁷ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 73 at para 54.

⁷⁸ *Ibid.*

⁷⁹ Wikileaks, "Pakistan spy chief asked US to end drone strikes in tribal areas - paper", (31 July 2011), online: Wikileaks <https://wikileaks.org/gifiles/docs/29/2981337_-os-us-pakistan-ct-pakistan-spy-chief-asked-us-to-end-drone.html>.

⁸⁰ Dan Roberts, "Pakistani PM pleads with Obama to put an end to drone strikes", *The Guardian* (23 October 2013), online: <<http://www.theguardian.com/world/2013/oct/23/pakistani-pm-obama-end-drone-strikes>>.

⁸¹ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 73 at para 54.

neutralize the threat by itself.⁸² This however goes against the 2004 ICJ Advisory Opinion, which deems any right of self-defense against non-state actors should be imputable to the foreign state.⁸³ Article 27 of the Vienna Convention on the Law of Treaties sets out that in relation to international treaties, a party may not invoke the provisions of its internal law as justification for its failure to carry out an international agreement.⁸⁴

Despite a suggestion in 2013 by the then Secretary of State John Kerry, that drone strikes in Pakistan might end soon, this does not seem to be the case.⁸⁵ Reports suggest that at least 45 drone strikes were conducted in Pakistan between January 2014 and July 2017.⁸⁶ In early 2017 there were in fact opposite reports - the new administration of the United States is apparently preparing a set of rules, which are making it easier for U.S. drone strikes to take place and are less concerned with minimizing civilian casualties.⁸⁷

Internationally, recent years have seen a big spike in the number of countries,

⁸² Ibid at para 56; Authorization for Use of Military Force, Congress of the United States, 18 September 2001, PubL 107-40 [AUMF].

⁸³ for

⁸⁴ Vienna Convention on the Law of Treaties, United Nations, 23 May 1969, United Nations, Treaty Series, vol 1155, p 331 [Vienna Convention on the Law of Treaties] at Article 27 (With regards to the applicability of the VCLT see p. 54); Shaw, supra note 17 at 134.

⁸⁵ Associated Press, "John Kerry says Pakistan drone strikes could end as bilateral talks resume", The Guardian (1 August 2013), online: <<https://www.theguardian.com/world/2013/aug/01/john-kerry-us-pakistan-talks-drones>>.

⁸⁶ "Drone Strikes in Pakistan (January 2014 - July 2017)", (16 July 2017), online: The Bureau of Investigative Journalism <https://www.thebureauinvestigates.com/projects/drone-war/charts?show_casualties=1&show_injuries=1&show_strikes=1&location=pakistan&from=2014-1-1&to=now>. Four of the 45 strikes have been undertaken between January and July 2014.

⁸⁷ Ken Dilanian, Hans Nichols & Courtney Kube, "Trump admin ups drone strikes, tolerates higher civilian casualties", (14 March 2017), online: NBC News <<http://www.nbcnews.com/news/us-news/trump-admin-ups-drone-strikes-tolerates-more-civilian-deaths-n733336>>.

which possess armed drones.⁸⁸ Up until 2015 only three UN Member States have used armed drones in Combat: The United States of America, Israel and the United Kingdom.⁸⁹ Since 2015 however several new players have joined the armed drone race and use armed drones in combat according.⁹⁰ Armed drones have been used in combat by the armed forces (or other state-related security forces) of Pakistan, Nigeria, Iran, Azerbaijan, Iraq and Turkey.⁹¹ A host of other UN Member States is also in possession of armed drones, those (in addition to the aforementioned) include: United Arab Emirates, North Korea, China, South Africa, Italy, Spain, Egypt, Georgia, Kazakhstan, India, Greece, Sweden, Switzerland, Ukraine, France, Turkmenistan, Saudi Arabia, Poland and Republic of China/Taiwan (with the latter not having status of a UN Member State).⁹² In addition there are reports or indications that Jordan, South Korea and Australia are developing their own armed drones.⁹³

In the domain of non-state actors, over-the-counter drones are increasingly used and modified into armed drones (capable on inflicting damage in combat) by attaching explosives to widely available quadcopters and small fixed-wing drones.⁹⁴ In January 2017 ISIS reportedly formed a group responsible for such operations

⁸⁸ Peter Bergen et al, "World of Drones: 3. Who Has What: Countries with Armed Drones", online: New America </in-depth/world-of-drones/3-who-has-what-countries-armed-drones/>.

⁸⁹ Peter Bergen et al, "World of Drones: 2. Who Has What: Countries with Drones Used in Combat", (23 August 2017), online: New America </in-depth/world-of-drones/2-who-has-what-countries-drones-used-combat/>.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Bergen et al, supra note 88.

⁹³ Peter Bergen et al, "World of Drones: 4. Who Has What: Countries Developing Armed Drones", online: New America </in-depth/world-of-drones/4-who-has-what-countries-developing-armed-drones/>.

⁹⁴ Peter Bergen et al, "World of Drones: 5. Non-State Actors with Drone Capabilities", (23 August 2017), online: New America </in-depth/world-of-drones/5-non-state-actors-drone-capabilities/>.

called the Unmanned Aircraft of the Mujahideen.⁹⁵ In January 2018 the Russian Ministry of Defense claimed its military bases in Syria are being attacked by "home made" armed drones with a range of more than 50 km.⁹⁶ Besides ISIS, other non-state actors had reportedly used armed drones: the Houthi rebels in Yemen, Hezbollah in Lebanon (operating their drone into the neighboring airspace of Israel) and Hamas in the occupied Gaza strip.⁹⁷ Other non-state actors increasingly use drones for surveillance (according to the research conducted by New America these include: Libyan rebels, the Donetsk People's Republic, the Kurdish Peshmerga, Jabhat al-Nusra, Faylaq al-Sham, Saraya al-Khorani and FARC).⁹⁸ As the process to modify an over-the-counter drone into one that can be used in combat or to inflict damage upon civil population it is reasonable to expect such use to increase in the coming years.⁹⁹

As more and more UN Member States are procuring or developing armed drones since 2010 (and even more increasingly since 2015) we must conclude that future armed conflicts and geopolitical disputes will increasingly rely on remote operated armed drones. In as much as it is true that drones are present in the skies for decades, we are now entering a new phase where the sheer availability and capacity of drones might change the tactics of armed conflicts. It will not end there, as discussed in Chapter 6, relying on these technologies gives rise to social rupture

⁹⁵ Ibid; Joby Warrick, "Use of weaponized drones by ISIS spurs terrorism fears", Washington Post (21 February 2017), online: <https://www.washingtonpost.com/world/national-security/use-of-weaponized-drones-by-isis-spurs-terrorism-fears/2017/02/21/9d83d51e-f382-11e6-8d72-263470bf0401_story.html>.

⁹⁶ Tom Embury-Dennis, "Russian bases being attacked by mysterious swarms of armed drones", (10 January 2018), online: *The Independent* <<http://www.independent.co.uk/news/world/middle-east/russia-military-bases-drones-syria-armed-attacks-tartus-uavs-latakia-a8151066.html>>.

⁹⁷ Bergen et al, *supra* note 94.

⁹⁸ Ibid.

⁹⁹ Tamir Eshel, "Hacked Drones Become the Ultimate IEDs | Defense Update", (Match 2017), online: Defense update <http://defense-update.com/20170306_drone_ieds.html>.

as their presence and conduct impacts lives of individuals and communities who reportedly suffer from psychological trauma.¹⁰⁰

3.2 Missing link: armed drones and international humanitarian law

The United States, by far the biggest operator of armed drones and drone strikes are justifying drone strikes under the pretext of self-defense and deem that International Humanitarian Law ("IHL" or law of armed conflict) applies to drone strikes even when they are conducted outside of a so-called theatre of combat.¹⁰¹

One of the most known justifications of the United States was given by John O. Brennan in 2012: *"As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat."*¹⁰²

As noted by the UN Special rapporteur Mr. Ben Emmerson *"lethal remotely piloted aircraft attacks will rarely be lawful outside a situation of armed conflict"*

¹⁰⁰ For a general introduction see Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (Stanford International Human Rights & Conflict Resolution Clinic, 2012); Akbar S Ahmed, *The Thistle and the Drone: How America's War on Terror Became a Global War on Tribal Islam* (Washington D.C.: Brookings Institution Press, 2013); Ullah Mati et al, "Impact of stress on students' Mental, Physical Health and Academic achievement at secondary level due to U.S. drone strikes in North Waziristan Agency" (2016) 8:2 *Isra Medical Journal* 110.

¹⁰¹ Office of the Assistant Attorney General, MEMORANDUM FOR THE ATTORNEY GENERAL Re: Applicability of Federal Criminal laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (United States Department of Justice, 2010) at 24–26; Ari Shapiro, "U.S. Drone Strikes Are Justified, Legal Adviser Says", online: NPR.org <<http://www.npr.org/templates/story/story.php?storyId=125206000>>.

¹⁰² John O Brennan, Remarks by John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, "The Ethics and Efficacy of the President's Counterterrorism Strategy" (Woodrow Wilson International Center for Scholars, Washington, DC, 2012).

where international human rights law would be the appropriate governing framework.¹⁰³ Most analysis of the issue has focused on three specific with regards to legality of drone strikes: (i) the right of self-defense, (ii) the geographical scope of the non-international armed conflict with regards to the applicability of international humanitarian law and (iii) targeting rules and the differentiation between combatants and non-combatants.¹⁰⁴

3.2.1. The right to self-defense

With regards to self-defense, the most common consideration has been the imminence of a drone strike, whereas necessity and proportionality have also been discussed in several publication.¹⁰⁵ I share the view however, that the aforementioned standards can only be applied on a case-by-case basis and cannot be broadly applied to the phenomenon of drone strikes.¹⁰⁶ In other words - the use of drones brings nothing new to the over-discussed notion of self-defense under the UN Charter. In effect, I believe theoretical discussions on drones should limit themselves from these questions, except when dealing with analysis of concrete (or concretized hypothetical scenarios), which is not the aim of this thesis.

3.2.2. Applicability of International Humanitarian Law

The framework of International humanitarian law however would seem to regulate drone strikes undertaken above and on foreign territory, either in

¹⁰³ See for example: Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 73 at para 60; Jelena Pejic, "Extraterritorial targeting by means of armed drones: Some legal implications" (2014) 96:893 *International Review of the Red Cross* 67 at 74.

¹⁰⁴ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 73 at paras 55-72; Pejic, *supra* note 103.

¹⁰⁵ Amongst others: Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *supra* note 73 at paras 53-58; Pejic, *supra* note 103 at 72; Ezio Di Nucci & Filippo Santoni de Sio, "Drones and Responsibility: Mapping the Field" in *Drones and Responsibility* (New York and London: Routledge, 2016) at 8.

¹⁰⁶ Pejic, *supra* note 103 at 72.

international ("IACs") as well as non-international armed conflicts ("NIACs"), should we accept the justification given by the United States (see Page 32). Whether the threshold of an armed conflict, triggering applicability of IHL, is indeed met is a valid and important question, which has been dealt with extensively.¹⁰⁷ Despite compelling arguments against the validity of the justification given by the United States, we will (solely for the purposes of further analysis) accept it and consider that an armed conflict between the United States and the aforementioned forces indeed exists, as suggested by the United States, and therefore IHL should apply instead of international human rights law.¹⁰⁸

3.2.2.1 Targeting in an armed conflict

It is generally accepted that an ongoing armed conflict also brings an extent of suffering, death and other forms of injury to individuals and the society. With regards to rules on targeting under IHL, we must acknowledge the comprehensive study undertaken by the International Committee of the Red Cross ("ICRC") in 2009.¹⁰⁹ The ICRC came to the conclusion that during during a NIAC under the current IHL regime civilians benefit from protection "*unless and for such time as they directly participate in hostilities*".¹¹⁰ Individuals who "*continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities*"

¹⁰⁷ Ibid at 75–84; Jeanne Mirer, "US Policy of Targeted Killing With Drones: Illegal at Any Speed" in Marjorie Cohn, ed, *Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues* (Northampton, MA: Interlink Publishing, 2014) at 151–152.

¹⁰⁸ John O. Brennan, *supra* note 102; President Barack Obama, "Remarks by the President at the National Defense University", (23 May 2013), online: [whitehouse.gov <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>](https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university).

¹⁰⁹ Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (International Committee of the Red Cross, 2009).

¹¹⁰ Ibid at 35; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), International Committee of the Red Cross (ICRC), 7 December 1978 [Protocol II] at Article 13(3).

do not fall under the definition of a member of an armed group.¹¹¹ *"Recruiters, trainers, financiers and propagandists"* as well as individuals *"purchasing, smuggling, manufacturing and maintaining of weapons and other equipment"* are therefore recognized as civilians under IHL.¹¹² Further if any doubt occurs as to whether a person is indeed a civilian, the person must be considered a civilian.¹¹³ The rules of targeting are therefore strict and epitomize the goal of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("4th Geneva Convention") by giving the broadest possible protection to civilians during an armed conflict.

3.2.2.2 Geographical scope of an armed conflict

Another debate, often connected with drones, is the geographical scope of an armed conflict and the geographical limits to which IHL applies.¹¹⁴ Generally, IHL applies to all territories of a state that is taking part in an armed conflict. The ICTR as well as the ICTY confirmed this by stating that IHL rules *"apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities"* and *"without limitation to the "war front" or to the "narrow geographical context of the actual theatre of combat operations"*.¹¹⁵

¹¹¹ note 109 at 34.

¹¹² Ibid at 34–35.

¹¹³ Pejic, supra note 87 at 86; As to the existence of a customary norm which applies to NIAC refer to Jean-Marie Henckaerts, Louise Doswald-Beck & International Committee of the Red Cross, Customary International Humanitarian Law: Volume 1, Rules (Cambridge University Press, 2005) at 23–24.

¹¹⁴ Noam Lubell & Nathan Derejko, "A Global Battlefield? Drones and the Geographical Scope of Armed Conflict" (2013) 11:1 J Int Criminal Justice 65.

¹¹⁵ ICTR, 05/15/2003, ICTR-97-20-T, The Prosecutor v Laurent Semanza (Judgement and Sentence) (available on <http://www.refworld.org/cases,ICTR,48abd5a30.html>) at para 367; ICTY, 10/02/1995, IT-94-1, Prosecutor v Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (available on </cases,ICTY,47fd520.html>) at para 68.

The question arises though, when an individual, who would be a legitimate target within a state party to an armed conflict, leaves its territory, or in another hypothesis commands troops on a battlefield via a satellite-link from his top floor office in a North American metropolis.¹¹⁶ Does this individual still remain a legitimate target due to his nexus to the armed conflict? There seem to be two prevalent theories, which both veer off into various separate directions once analyzed in detail. Roughly, the first theory deems an individual is a legitimate target under IHL as long as he is in any way involved in the conflict or directly participates in hostility, wherever he is located at that moment in time. One interpretation of this theory, proposed by Prof. Noam Lubell, puts emphasis on the interplay between IHL and International Human Rights law ("IHR") by gradually limiting the application of IHL rules in favor of IHR rules, as the individual in question is moving away from the vicinity of the battlefield.¹¹⁷

The other base theory, which might bring the same conclusion as the interpretation of the first theory proposed by Prof. Lubell, deems that anyone who is out of the territory of a state involved in an IAC or a NIAC falls outside the scope of IHL and cannot be considered a legitimate target.¹¹⁸ Under this theory IHL does not apply as soon as someone is out of the territory of the state involved in an armed conflict. The threat such an individual represents may only be dealt with using the

¹¹⁶ Noam Lubell & Jelena Pejic, *Scope of the law in armed conflict. 3/4 IHL's applicability to extra-territorial drone strikes* (Geneva, 2015).

¹¹⁷ Jelena Pejic, Noam Lubell, *International Committee of the Red Cross (ICRC), Scope of the law in armed conflict. 3/4 IHL's applicability to extra-territorial drone strikes* (2015) at 15:15.

¹¹⁸ International Committee of the Red Cross (ICRC), *supra* note 117.

rules on the use of force in law enforcement of the state where the individual is located.¹¹⁹

Taking both of the above theories into account, we must conclude that the debate on the geographical scope of IHL application is not only limited to drone strikes. The use of armed drones can only be seen as one particular way to highlight the need for such a debate, however it should not be considered the focal point of future discussions on armed drones.

¹¹⁹ Pejic, *supra* note 103 at 103.

3.2.3. The missing link

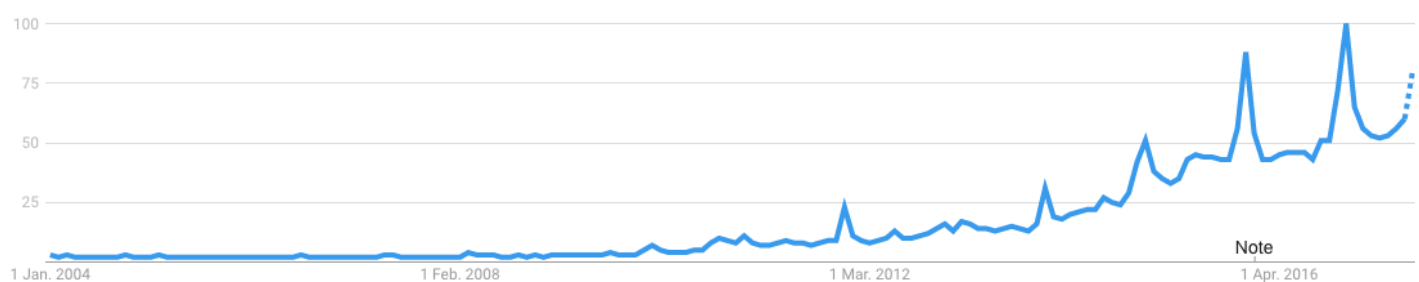
Despite the long history of unmanned aerial vehicles (Page 26), drones (both armed and unarmed) have recently fascinated human imagination:

Search term: Armed drone



Search volume statistics for the term "Armed drone" (2004 - 2017)¹²⁰

Search term: Drone



Search volume statistics for the term "Drone" (2004 - 2017)¹²¹

At first glance there is nothing in particular with relation to armed drones that would prohibit their use *per se* neither under any existing international treaty nor by customary law¹²² A compelling argument could actually be made that drones represent a more precise and humane way of dealing with hostile threats certain

¹²⁰ Google Trends, "Armed drone", (3 August 2017), online: Google Trends <<https://trends.google.com/trends/explore?date=all&q=armed%20drone>>. The Google Trends charts "represent search interest relative to the highest point on the chart for the given region and time. A value of 100 is the peak popularity for the term. A value of 50 means that the term is half as popular. Likewise a score of 0 means the term was less than 1% as popular as the peak."

¹²¹ Google Trends, "Drone", (3 August 2017), online: Google Trends <<https://trends.google.com/trends/explore?date=all&q=drone>>.

¹²² Pejic, *supra* note 95 at 69.

individuals might represent.¹²³ Moreover, drones could perhaps become the weapon of choice for targeting individuals in line with IHL rules.¹²⁴ Indeed this has been the argument put forward by the United States administration, stating that: *"It's this surgical precision - the ability with laser-like focus to eliminate the cancerous tumor called an al Qaida terrorist, while limiting damage to the tissue around it. That makes this counterterrorism tool so essential."*¹²⁵

However the sheer amount of scholarly and media discussion as well as artistic reactions, seems to suggest that there is something inconceivable about armed drones, something our society might not quite get our heads around, something that seems to challenge our perception of morality, legitimacy and fairness.¹²⁶ It could be argued that drone strikes and the presence of armed drones can be paralleled to "hyperobjects", things we consider as *"abstract ideas because we can't get our heads around them, but that are nevertheless as real as hammers."*¹²⁷ Timothy Morton describes them as objects which "just by existing affect

¹²³ Frédéric Mégret, "The Humanitarian Problem with Drones" (2013) 2013 Utah L Rev 1283 at 1284; Pejic, *supra* note 103 at 70.mu

¹²⁴ Mégret, *supra* note 123 at 1284; Pejic, *supra* note 103 at 70.

¹²⁵ John O. Brennan, *supra* note 102; Neal Conan, *John Brennan Delivers Speech On Drone Ethics* (Washington D.C.: NPR, 2012).

¹²⁶ See for instance Steven J Barela, *Legitimacy and Drones: Investigating the Legality, Morality and Efficacy of UCAVs* (Routledge, 2016); David Cortright, Rachel Fairhurst & Kristen Wall, *Drones and the Future of Armed Conflict: Ethical, Legal, and Strategic Implications* (University of Chicago Press, 2015); Bart Custers, *The Future of Drone Use: Opportunities and Threats from Ethical and Legal Perspectives* (Springer, 2016); Kenneth R Himes, *Drones and the Ethics of Targeted Killing* (Rowman & Littlefield, 2015); Bridle, *supra* note 1; Conor Friedersdorf, "Calling U.S. Drone Strikes 'Surgical' Is Orwellian Propaganda", *The Atlantic* (27 September 2012), online: <<https://www.theatlantic.com/politics/archive/2012/09/calling-us-drone-strikes-surgical-is-orwellian-propaganda/262920/>>; Drone strikes a terror-generating machine (Russia Today, 2013).

¹²⁷ Alex Blasdel, "'A reckoning for our species': the philosopher prophet of the Anthropocene", *The Guardian* (15 June 2017), online: <<http://www.theguardian.com/world/2017/jun/15/timothy-morton-anthropocene-philosopher>>.

living tissue" and "transcend our personal death".¹²⁸ In the same vein drone strikes represent "hyperrealities": their effects are broader than their immediate impact and their footprint on society reaches out to everything from law, sociology and medicine to contemporary art, literature and music.¹²⁹ This proves that drone strikes and the presence of armed drones will remain in our collective memories for generations to come - it is not a simple military operation or a new type of a rifle - it is a concept that holistically fascinates our society(ies). Only those who live under the presence and threat of armed drones however, can give us a glimpse into the consequences drones bring to communities and consequently to the world. *"Almost 54.35% students blame that their psychological and medical problems are due to Drone threats"* states a 2012 study undertaken in North Waziristan.¹³⁰ Similar reports and concerns are coming out of Gaza.¹³¹ Psychologist Dr. Peter Schaapveld, following his 2-week visit to Yemen says: *"What I saw in Yemen was deeply disturbing. Entire communities – including young children who are the next generation of Yemenis– are being traumatised and re-traumatised by drones"*.¹³² The doctor's account is only an abstract version of what Mohammed Tuaiman, a 13 year old Yemeni boy from the village of al-Zur village in Marib province told Guardian journalists in 2014: *"A lot of*

¹²⁸ Timothy Morton, *The Ecological Thought* (Cambridge, MA and London, UK: Harvard University Press, 2010) at 130.

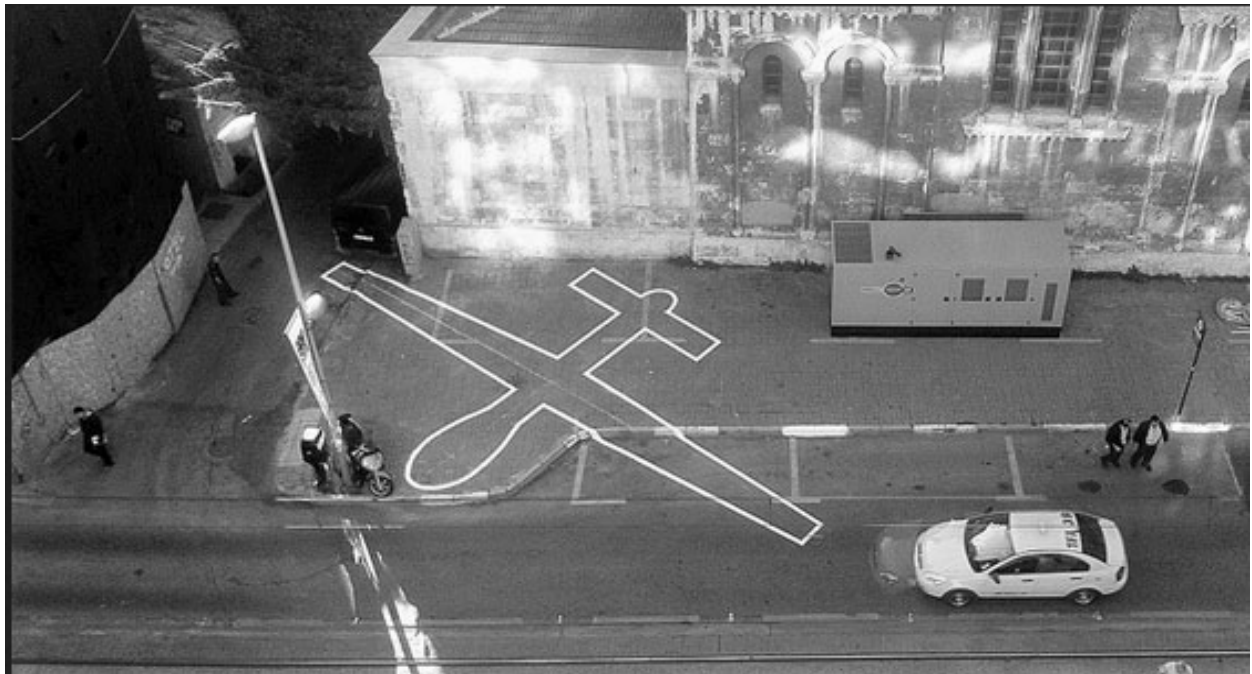
¹²⁹ Examples include: Ahmed, *supra* note 100; Mati et al, *supra* note 100; Zulfiqar Ahmed Bhutta, "Infectious disease: Polio eradication hinges on child health in Pakistan" (2014) 511:7509 *Nature News* 285; NotABugSplat, *#NotABugSplat* (2014); Bridle, *supra* note 1; Atef Abu Saif, *The Drone Eats with Me: A Gaza Diary* (Boston, MA: Beacon Press, 2016); Nabil Elderkin & Ricardo Tisci, *ANOONI - Drone Bomb Me* (2016); Oddisee, *Lifting Shadows* (Mello Music Group, 2016).

¹³⁰ Mati et al, *supra* note 100 at 110.

¹³¹ Marion Birch, Gay Lee & Tomasz Pierscionek, *Drones: The physical and psychological implications of a global theatre of war* (London: Medact, 2012) at 6.

¹³² Andrea Germanos, "Doctor: Children 'Traumatized and Re-Traumatized by Drones' in Yemen", online: Common Dreams <<https://www.commondreams.org/news/2013/03/06/doctor-children-traumatized-and-re-traumatized-drones-yemen>>.

the kids in this area wake up from sleeping because of nightmares from them and some now have mental problems. They turned our area into hell and continuous horror, day and night, we even dream of them in our sleep."¹³³



An art installation by James Bridle representing a shadow of an armed drone¹³⁴

The 4th Geneva Convention aims to protect civilians (and let us remind ourselves, under IHL rules a person is to be considered a civilian when there is doubt about his status) during an armed conflict and does so "in all circumstances."¹³⁵ But is psychological harm, which burdens civilians taken into account under IHL? Would states recognize this elusive category of injury as a legitimate consideration when discussing the legality of current armed drone

¹³³ a Madlena, Hannah Patchett & Adel Shamsan, "We dream about drones, said 13-year-old Yemeni before his death in a CIA strike", *The Guardian* (10 February 2015), online: <<http://www.theguardian.com/world/2015/feb/10/drones-dream-yemeni-teenager-mohammed-tuaiman-death-cia-strike>>.

¹³⁴ James Bridle, "Drone Shadow", (16 January 2014), online: [moma.org <http://designandviolence.moma.org/drone-shadow-james-bridle/>](http://designandviolence.moma.org/drone-shadow-james-bridle/).

¹³⁵ Henckaerts, Doswald-Beck & Cross, *supra* note 113 at 23–24; 1949 Geneva Convention (IV) *Relative to the Protection of Civilian Persons in Time of War*, Diplomatic Conference of Geneva of 1949, 21 October 1950, 75 UNTS 287 [1949 Geneva Convention (IV) *Relative to the Protection of Civilian Persons in Time of War*] at Article 1.

programmes? In my view this seems to be the missing link in today's debate on armed drones both in relation to International Humanitarian Law as well as in the broader picture of their legitimacy.

4

Psychological Harm and the use of Armed Drones under International Humanitarian Law

Emotional damages have long been an elusive concept in litigation throughout civil and common-law jurisdictions. On the contrary International Humanitarian Law is in essence an emotional response to the cruel realities of warfare. As there is growing evidence of psychological harm as a valid source of compensation in civil proceedings its status as a valid base for prohibition of certain acts through the IHL framework is additionally reinforced. Irrespective of the applicable body of law psychological wellbeing of civilians must be prioritized in any future development of civilian protection.

4.1. Emotions and Law

The legal milieu tends to (at least historically) acknowledged the concept of emotional harm as "hidden in the inner consciousness of the individual; an intangible, evanescent something too elusive for the hard-headed workaday common law to handle."¹³⁶ Some scholars however have long considered the way for law to progress was to admit harm to feelings and emotions as legally recoverable.¹³⁷

The historic lack of such admittance might seem unusual when we learn that most criminal law codifications acknowledge psychological or mental elements when defining crimes. For instance when defining different modalities of an act where one person kills another; murder, manslaughter, voluntary manslaughter and negligent homicide are often defined by the mental element hidden within the inner consciousness of the perpetrator.¹³⁸ These (psychological) elements have been widely debated in cases in front of International criminal tribunals, noting these tribunals have been set up specifically to prosecute individuals who have acted against the norms set out in the IHL framework.¹³⁹ As confirmed by the ICTY in the Delalić case, the concept of rape does not qualify as a mere physical attack, but is also a source of mental distress.¹⁴⁰ The importance of the mental element within the

¹³⁶ Herbert F Goodrich, "Emotional Disturbance as Legal Damage" (1922) 39 *Medico-Legal J* 129 at 129.; Summarizing Lord Wensleydale's famous dictum in *Lynch v. Knight*: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."

¹³⁷ *Ibid* at 135–137.

¹³⁸ Criminal Code, National Assembly of the Republic of Slovenia, 1 November 2008, KZ-1 [Criminal Code] at Article 115-118; 18 U.S.C. 51, Congress of the United States, Code of Laws of the United States of America [18 U.S.C. 51].

¹³⁹ Antonio Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" (1998) 9:1 *Eur J Int Law* 2 at 4.

¹⁴⁰ Steven Dewulf, *The signature of evil: (re)defining torture in international law* (Cambridge; Portland; Portland, OR: Intersentia; Distribution for the USA and Canada, International Specialized Book Services, 2011) at 181; International Criminal Tribunal for the former Yugoslavia, 11/16/1998, *Prosecutor v Zejnil Delalić, Zdravko Mucić also known as "Pavo"*,

perpetrator has even more weight in the Rome Statute where a person is criminally responsible only "if the material elements are committed with intent and knowledge."¹⁴¹

More recently, courts have been dwelling on the issue of (recoverable) emotional harm, more specifically with regards to the admissibility of Post Traumatic Stress Disorder ("PTSD") as a legitimate title for damages. PTSD was formally recognized by the American Psychiatric Association in 1980.¹⁴² Despite no clear-cut definition of what PTSD is, and a tendency to use it to describe a wide scope of situations, there seems to be broad consent that it is a psychiatric condition, which "results from exposure to trauma".¹⁴³ Due to its wide application, the legal profession has often been wary of PTSD claims (especially in civil proceedings) and pejorative labels such as "compensationitis" have caught on within some circles.¹⁴⁴ First court cases in the United States, where emotional harm in its various forms was used as a defense during proceedings seem to hail from the mid 1920's.¹⁴⁵ Only 5 years after the official recognition of PTSD by the American Psychiatric Association up to a million US veterans had been diagnosed with PTSD, and PTSD-based defense enabled 250 Vietnam veterans to obtain acquittals, sentence reductions, or diversion

Hazim Delić, Esad Landžo also known as "Zenga" - Trial Chamber Judgement (available on <http://www.icty.org/x/cases/mucic/tjug/en/>) at 964.

¹⁴¹ Rome Statute of the International Criminal Court, UN General Assembly, 17 July 1998 [Rome Statute of the International Criminal Court] at Article 30.

¹⁴² Richard L Newman & Rachel Yehuda, "PTSD in civil litigation: Recent scientific and legal developments" (1997) 37:3 *Jurimetrics*, online: <<http://www.jstor.org/stable/29762470>> at 257.

¹⁴³ R E Hales & D F Zatzick, "What is PTSD?" (1997) 154:2 *American Journal of Psychiatry*, online: <<https://ucdavis.pure.elsevier.com/en/publications/what-is-ptsd>> at 144; J Alexander Bodkin et al, "Is PTSD caused by traumatic stress?" (2007) 21:2 *Journal of Anxiety Disorders*, online: <<http://www.sciencedirect.com/science/article/pii/S0887618506001368>> at 176.

¹⁴⁴ Gerald Young & Eric Y Drogin, "Psychological Injury and Law I: Causality, Malingering, and PTSD" (2013) 3 *Mental Health L & Pol'y J* 373 at 410.

¹⁴⁵ Laurence Miller, *PTSD and forensic psychology: applications to civil and criminal law* (Cham: Springer, 2015) at 4.

to treatment programs in criminal cases.¹⁴⁶ In practice, most instances of PTSD however do not touch upon military personnel, but civilians and derive from a wide spectrum of sources ranging from terrorism and crime victim trauma to school violence.¹⁴⁷

In civil courts, PTSD is becoming one of the most commonly litigated mental health conditions.¹⁴⁸ In the United States, emotional damage has been recognized as a possible title for damages since about the 1950's when a number of state courts have admitted cases where actions were brought for intentional infliction of emotional distress.¹⁴⁹ For roughly the last 50 years some courts also allowed for actions related to mental distress for those who suffer from negligent infliction of emotional distress, for instance by witnessing a traumatic injury inflicted upon a loved one.¹⁵⁰ In Europe courts and legislators have been historically more conservative when addressing any sort of non-pecuniary damages (such as compensation for emotional suffering).¹⁵¹ Recently however a number of jurisdictions has moved towards recognizing moral damages as a legitimate title for compensation, with only a few, for instance Germany, remaining adamant that no compensation should be offered for emotional distress.¹⁵²

4.2. Forgotten implications of psychosocial harm under International Humanitarian Law

As acknowledged by the International Committee of the Red Cross one of the

¹⁴⁶ *Ibid* at 5.

¹⁴⁷ *Ibid* at 15–20.

¹⁴⁸ Barbara Bottalico & Tommaso Bruni, “Post traumatic stress disorder, neuroscience, and the law” (2012) 35:2 International Journal of Law and Psychiatry 112 at 116.

¹⁴⁹ Miller, *supra* note 142 at 48.

¹⁵⁰ *Ibid*; Bottalico & Bruni, *supra* note 148 at 116.

¹⁵¹ Ulrich von Jeinsen & Anna Konert, “The Recovery of Non-Pecuniary Damages in Europe: A comparative analysis” (2009) XXXIV Annals of Air and Space Law, online: <<http://www.flugundrecht.de/downloads/4-mcgill-university-annals-of-air-and-space-la.pdf>> at 316.

¹⁵² *Ibid* at 340–341.

founding principles of International Humanitarian Law ("IHL") is humanity.¹⁵³ The Meriam-Webster dictionary defines humanity as a state of being humane and parallels it to compassion and sympathy; interestingly, the suggested use comes from a situation depicting warfare: "Bespeaking humanity for the enemy in the midst of a bloody struggle".¹⁵⁴ One might argue that the concepts of warfare and humanity are opposite, however there is a number of examples where enemies (either those from the military or civil milieu) during a war (or in depictions of war) showed a humane face and treated each other with respect, sympathy and compassion.¹⁵⁵ With that in mind, even without considering Humanitarian Law, there seems to be an element of humanity within a wide spectrum of individuals during wartime - the aim of Humanitarian Law thus seems to be legitimized as a reaction to a resurfacing emotional state between enemy sides. Similarly, no one can deny the existence of compassion to unnecessary civilian (drone strike) victims - sympathy and condemnation of these deaths is even coming from drone operators themselves.¹⁵⁶ It seems that International Humanitarian Law is grounded in emotions, compassion, humanity and sympathy, as also noted by commentators when referring to the famous *A Memory of Solferino*, written by Henri Dunant, who is often considered the

¹⁵³ International Committee of the Red Cross, "What is IHL?", (18 September 2015), online: International Committee of the Red Cross <<https://www.icrc.org/en/document/what-ihl>>.

¹⁵⁴ "Humanity", online: Meriam-Webster Dictionary <<https://www.merriam-webster.com/dictionary/humanity>>.

¹⁵⁵ Mike Dash, "The Story of the WWI Christmas Truce", (23 December 2011), online: Smithsonian <<http://www.smithsonianmag.com/history/the-story-of-the-wwi-christmas-truce-11972213/>>; Jean-Jacques Annaud, *Enemy at the Gates* (2001); Richard Mills, "'The pitch itself was no man's land:' Siege, Željezničar Sarajevo Football Club and the Grbavica Stadium" (2016) 44:6 Nationalities Papers 877; Centropa Cinema, *Survival In Sarajevo - Friendship in a Time of War* (2013).

¹⁵⁶ "US ex-drone operators join Yemeni drone victim in court challenge", (8 September 2016), online: Reprieve US <<https://www.reprieve.org/2016/09/08/us-ex-drone-operators-join-yemeni-drone-victim-in-us-court-challenge/>>.

pioneer of modern day International Humanitarian Law.¹⁵⁷

Early international treaties of what we call International Humanitarian Law emphasized humanity as the backbone of this legal field; the 1864 Geneva Declaration for instance explicitly justified its adoption by referring to the laws of humanity.¹⁵⁸ As for the law in action, the ICTY in *Furundžija* asserted that human dignity is the paramount for the existence of international humanitarian law and that its aim is to protect individuals from "outrages upon their personal dignity...by...humiliating and debasing the mental well being of a person."¹⁵⁹

Despite its foundations in emotional reaction, humanity, harmony and compassion, the plethora of treaties comprising International Humanitarian law only recognize psychosocial harm and the mental well being of individuals in a few instances.¹⁶⁰ Non-physical suffering is usually only considered when dealing with individuals in hands of the enemy (for instance prisoners of war).¹⁶¹ It is however not the case when treaties are referring to the conduct of hostilities as such.¹⁶²

Development of modern warfare resurfaces the question of psychological harm, especially when assessing the regime of civilian protection under International Humanitarian Law. Reports and literature show that civilians living under the constant presence of armed drones suffer from psychological trauma, which often

¹⁵⁷ Nele Verlinden, "To feel or not to feel? Emotions and International Humanitarian Law - GGS Working Paper 178" (2016) Leuven Centre for Global Governance Studies, online: <<https://lirias.kuleuven.be/handle/123456789/561207>>.

¹⁵⁸ Saint Petersburg Declaration relating to Explosive Projectiles, International Military Commission, 11 December 1864 [Saint Petersburg Declaration relating to Explosive Projectiles] at Preamble.

¹⁵⁹ International Criminal Tribunal for the former Yugoslavia, 12/10/1998, IT-95-17/1-T, Prosecutor v Anto Furundžija - Judgment of the Trial Chamber (available on <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>) at para 183.

¹⁶⁰ International Conference for the Protection of War Victims, *Declaration of the International Conference for the Protection of War Victims* (1993); Verlinden, *supra* note 157 at 11.

¹⁶¹ Verlinden, *supra* note 157 at 11.

¹⁶² *Ibid.*

manifests in social disruption leading to terrorism and radicalization.¹⁶³ However when discussing the law, psychological harm is often brushed aside and viewed as a mere accompanying factor rather than a vital part of the discussion on International Humanitarian Law.¹⁶⁴ Should we consider mental harm, as equal to physical harm, there is then no doubt that *incidental* mental harm to civilians must be taken into consideration under the current IHL regime.¹⁶⁵ Should we however deny such a simple equation, clarification needs to be made in relation to instances when incidental harm can transform into intentional harm.

Of course those opposing a progressive approach to International (Humanitarian) law might disregard such conceptualizations as naive and disproportionate in relation to military objectives and that one suggesting such equations is a pacifist advocating for a total ban on warfare; an allegedly utopian dream which doesn't allow for military success.¹⁶⁶ These commentators often assert that the goals of "early 20th century humanitarian advocates have been achieved".¹⁶⁷ The latter however goes against the unanimously adopted declaration of the 1993 conference on International Conference for the Protection of War Victims, attended by 815 delegates from 160 states.¹⁶⁸ The attendees of the conference unanimously

¹⁶³ Ahmed, *supra* note 100; Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100.

¹⁶⁴ Eliav Lieblich, "Beyond Life and Limb: Exploring Incidental Mental Harm Under International Humanitarian Law" in *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (T.M.C. Asser Press, The Hague, 2014) 185 at 186.

¹⁶⁵ *Ibid* at 188.

¹⁶⁶ For such views see Dale Stephens & Michael W Lewis, "The Law of Armed Conflict - A Contemporary Critique" (2005) 6 *Melb J Int'l L* 55 at 85.

¹⁶⁷ *Ibid*.

¹⁶⁸ International Committee of the Red Cross, *International Review of the Red Cross*, No. 296 (Geneva: International Committee of the Red Cross, 1993) at 356. The delegates included 39 Ministers, 20 Deputy Ministers, 12 Secretaries of State, the United Nations Secretary-General, the High Commissioner for Refugees and the Under Secretary-General for Humanitarian Affairs, the International Red Cross and Red Crescent Movement, and all

refused to accept "that war, violence and hatred spread throughout the world, and fundamental rights of persons are violated in an increasingly grave and systematic fashion".¹⁶⁹ Attendees of this very same conference were also alarmed by the fact that civilians are "more and more frequently the principal victims of hostilities and acts of violence perpetrated in the course of armed conflicts".¹⁷⁰

Despite legitimate and convincing analyses, which have been made on the prohibition of warfare or *jus contra bellum*, my analysis will remain in the sociological realms of today's realities in armed conflict.¹⁷¹

4.2.1. Civilians and modern armed conflict

Historically, there has always been efforts for the civilian population, especially women, children and the old, to be precluded from warfare and its consequences; for instance Sun Tzu in his Art of War disapproved sieges of cities and advocated taking an enemies country "whole and intact" instead of destroying it.¹⁷² Undoubtedly, wars have always resulted in civilian casualties and in one way or another had impact on everyday lives of non-combatants, however we are now looking at a situation where soldiers stopped representing the bulk of the casualties - today the majority of the victims are civilians.¹⁷³

the major governmental and non-governmental organizations active in the sphere of armed conflict

¹⁶⁹ International Conference for the Protection of War Victims, *supra* note 160 at para 1.

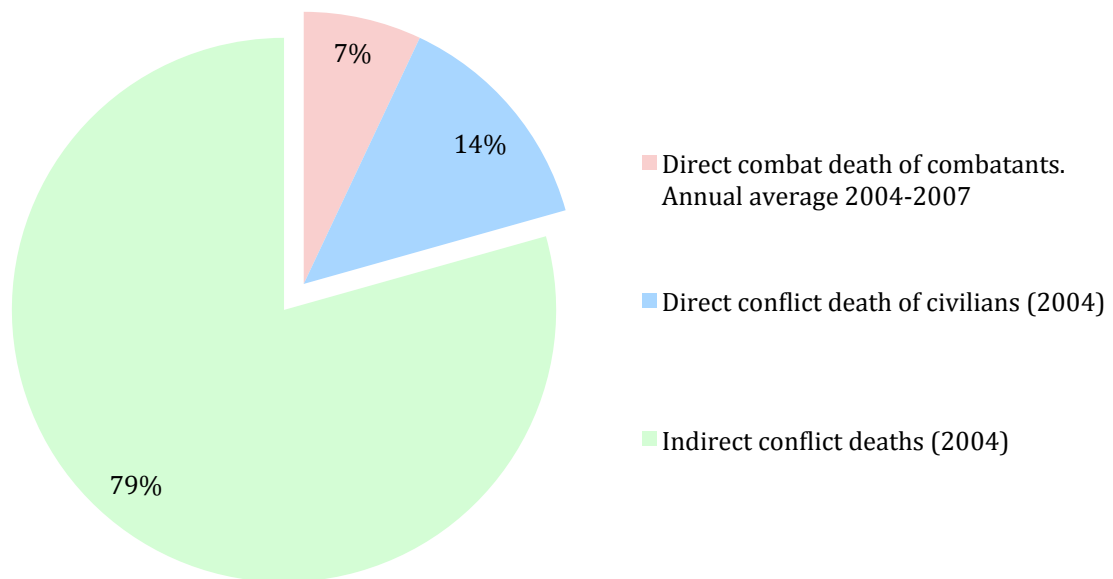
¹⁷⁰ *Ibid* at para 3.

¹⁷¹ Corten, *supra* note 23.

¹⁷² Sun Tzu, *The Art of War* (Oxford, U.K.; New York, NY: Oxford University Press, 1963) at 78; David R Meddings, "Civilians and war: A review and historical overview of the involvement of non-combatant populations in conflict situations" (2001) 17:1 *Medicine, Conflict and Survival* 6 at 7.

¹⁷³ Andreas Wenger & Simon Mason, "The Growing Importance of Civilians in Armed Conflict" (2008) 45 *CSS Analysis in Security Policy*, online: <<http://www.css.ethz.ch/en/services/digital-library/publications/publication.html/94537>> at 1.

Victims of armed conflict



One of the statistical estimates on casualties in armed conflict (CSS)¹⁷⁴

As a reminder, a number of well known medieval battles in Europe were battles on open fields and did not take place in cities - thus those not involved in combat had less contact with direct realities of war.¹⁷⁵ In more recent times, between the 18th and the 20th century, when International Humanitarian Law was in the process of conceptualization, open field battles still dominated the notion of armed conflict.¹⁷⁶ With World War II and its technological development in artillery and airpower, civilians became more at risk from the realities of war - resulting in a large percentage of civilian deaths.¹⁷⁷ A 2001 study undertaken in collaboration with the

¹⁷⁴ Ibid at 2.

¹⁷⁵ Richard Bean, "War and the Birth of the Nation State" (1973) 33:1 The Journal of Economic History 203 at 205.

¹⁷⁶ Louis A DiMarco, Concrete Hell: Urban Warfare From Stalingrad to Iraq (Bloomsbury Publishing, 2012).

¹⁷⁷ Valerie Epps, "Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule" (2014) 41:2 Georgia Journal of International & Comparative Law 307 at 309;

ICRC concluded that: "Civilians have, both intentionally and by accident, been moved to center stage in the theater of war, which was once fought primarily on battlefields. This fundamental shift in the character of war is illustrated by a stark statistic: in World War I, nine soldiers were killed for every civilian life lost. In today's wars, it is estimated that ten civilians die for every soldier or fighter killed in battle."¹⁷⁸ As noted by the ICRC in a separate study, changes following the Cold war have contributed to an environment, which results in high numbers of civilian casualties during armed conflicts.¹⁷⁹ A 1996 report published by the United Nations and UNICEF (conducted by Graça Machel) states that "Civilian fatalities in wartime have climbed from 5 per cent at the turn of the century ... to more than 90 per cent in the wars of the 1990s".¹⁸⁰ The European Council made a similar observation in 2003: "Since 1990, almost 4 million people have died in wars, 90% of them civilians."¹⁸¹ Iraq Body Count, a project devoted to provide a reliable public database on the death toll in Iraq suggests 268.000 deaths in total of which at least 178.503 (>66%) were civilian since 2003.¹⁸² In 2011 the United Nations Security Council has recognized that civilians continue to account for the vast majority of casualties in armed conflicts and that the importance of protecting civilians during conflicts is growing.¹⁸³ Admittedly there are some critiques to the statistical data in the above assertions,

Stanley B Greenberg & Robert O Boorstin, "People On War" (2001) 12:6 Public Perspective 19 at 19.

¹⁷⁸ Greenberg & Boorstin, *supra* note 177 at 19.

¹⁷⁹ International Committee of the Red Cross (ICRC), Arms availability and the situation of civilians in armed conflict (Geneva: International Committee of the Red Cross, 1999) at 2.

¹⁸⁰ Graça Machel, Impact of Armed Conflict on Children (United Nations, UNICEF, 1996) at 9.

¹⁸¹ European Council, A Secure Europe in a Better World: European Security Strategy (European Council, 2003) at 2.

¹⁸² "Iraq Body Count", (21 August 2017), online: <<https://www.iraqbodycount.org/>>.

¹⁸³ United Nations Security Council, Press Release SC/10147: Importance of Protecting Civilians during Armed Conflict Grows as Security Council Remains Active in Tackling Conflict-Related Crises Worldwide (2011).

however even those studies critical of the above put the civilian deaths at between 35-65% of the total death toll - a percentage which should not be overlooked.¹⁸⁴

To say that initial goals of the modern IHL have been achieved (*supra* note 166), one would not only be completely blind to the natural progression of ideas over time, but more importantly to the heightened suffering and trauma caused to civilian population with the advancement of weapons and tactics in the last century.

4.2.2. Modern day IHL treaties and mental well being

With the heightened involvement of civilians in armed conflict (Part 4.2.1.), the pursuit to limit the effect on civilians seems to be more important than ever. The 4th Geneva Convention, which specifically deals with the well being of civilians during an armed conflict, does not (unlike the Geneva Convention Relative to the Treatment of Prisoners of War) make any specific references to mental health.¹⁸⁵

Under Article 4 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II"): "violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal" and "collective punishments" "are and shall remain prohibited at any time and in any place whatsoever".¹⁸⁶ As noted by a preceding paragraph this applies to "all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted."¹⁸⁷

With relation to the United States drone strikes undertaken in Pakistan, one must

¹⁸⁴ Adam Roberts, "Lives and Statistics: Are 90% of War Victims Civilians?" (2010) 52:3 *Survival* 115; Meddings, *supra* note 172 at 6.

¹⁸⁵ 1949 Geneva Convention (III) on Prisoners of War, Diplomatic Conference of Geneva of 1949, 21 October 1950, 75 UNTS 135 [1949 Geneva Convention (III) on Prisoners of War] at Article 49; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *supra* note 135.

¹⁸⁶ Protocol II, *supra* note 110 at Article 4.

¹⁸⁷ *Ibid.*

note that neither the United States nor Pakistan are parties to Protocol II.¹⁸⁸ They both however are signatories.¹⁸⁹

What is also important is the fact that 168 countries out of 193 UN Member States (>87%) are parties to Protocol II.¹⁹⁰ This is especially noteworthy since most IHL Conventions in full or at least in part represent principles of customary international law.¹⁹¹

4.2.2.1 Obligations of signatories to international treaties

The Vienna Convention On The Law Of The Treaties ("VCLT") provides that parties are only bound to a treaty in three cases: *"When (a) The treaty provides that signature shall have that effect; when (b) It is otherwise established that the negotiating States were agreed that signature should have that effect; or when (c) The intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation."*¹⁹² It is generally clear that a mere signature to a treaty does not make that state bound by that treaty in the strict sense - the state is not a party of that treaty.¹⁹³ The state can

¹⁸⁸ International Committee of the Red Cross (ICRC), "Treaties, States parties, and Commentaries - Signatory States - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977." (6 August 2017), online: [icrc.org <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesSign&xp_treatySelected=475>](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesSign&xp_treatySelected=475).

¹⁸⁹ Ibid.

¹⁹⁰ International Committee of the Red Cross (ICRC), "Treaties, States parties, and Commentaries - States Parties - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977." (6 August 2017), online: [icrc.org <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475>](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475).

¹⁹¹ Shaw, *supra* note 17 at 1167.

¹⁹² Vienna Convention on the Law of Treaties, *supra* note 84 at Article 12.

¹⁹³ Curtis A Bradley, "Treaty Signature" in *The Oxford guide to treaties* (Oxford, U.K.: Oxford University Press, 2012) at 208.

refrain from ratifying a treaty for any possible reason.¹⁹⁴ However, Article 18 of the VCLT is clear in stating that a state: must "*...refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty...*"¹⁹⁵ Since this applies to situations when a treaty has not even entered into force, it must *a fortiori* apply to situations when a treaty is already in force, however not ratified by the signatory in question. Signing a treaty therefore does create obligations for a signatory state - specifically an obligation not to frustrate the purpose and object of the signed treaty.¹⁹⁶

Noting that the United States of America (as well as a number of other states) have not ratified the VCLT, we must however emphasize that the VCLT in a large part merely codified recognized rules of customary international law.¹⁹⁷ The International Law Commission suggests that even prior to the adoption of the VCLT in 1969, the "*obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attaches to a State which has signed a treaty subject to ratification appears to be generally accepted.*"¹⁹⁸ Even if taking into account the contrary considerations; that the provision at the time represented a rather progressive novelty, Article 18 of the VCLT has today been accepted as a norm of

¹⁹⁴ Martin A Rogoff, "The International Legal Obligations of Signatories to an Unratified Treaty" (1980) 32 Me L Rev 263 at 267.

¹⁹⁵ Vienna Convention on the Law of Treaties, *supra* note 84 at Article 18.

¹⁹⁶ A. Bradley, *supra* note 193 at 208; James Crawford & Ian Brownlie, *Brownlie's principles of public international law*, 8th ed (Oxford, United Kingdom: Oxford University Press, 2012) at 372.

¹⁹⁷ Oliver Dörr & Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: a commentary* (Heidelberg; New York: Springer-Verlag Berlin Heidelberg, 2012) at v; Crawford & Brownlie, *supra* note 196 at 396.

¹⁹⁸ International Law Commission, "Draft Articles on the Law of Treaties with commentaries" (1966) 2 Yearbook of the International Law Commission 248 at Article 15.

4.2.2.2 Applicability of Protocol II to U.S. drone strikes

In 1987, the President of the United States sent a message to the Senate, where he stated: "*The United-States has traditionally been in the forefront of efforts to codify-and improve the international rules of humanitarian law in armed conflict, with the objective of giving the greatest possible-protection to victims of such conflicts, consistent with legitimate military requirements.*"²⁰⁰ The Senate has however not ratified the treaty. The President's transmission to the Senate goes in line with Bradley's view that a signature of an international treaty can be interpreted in a way that the final outcome of the negotiations is approved by the executive powers of the state.²⁰¹ Let us also not forget that the executive branch in the United States, more specifically the President of the United States of America, shapes the drone warfare policies.²⁰²

A preamble to an international treaty does not make any concrete binding rules to which parties should conform. This does however not mean preambles are legally inconsequential.²⁰³ What a preamble does indicate however seems to be the purpose and object of the treaty - the preamble therefore through

¹⁹⁹ A. Bradley, *supra* note 193 at 215.

²⁰⁰ Ronald Reagan, Message from The President of the United States Transmitting The Protocol II Additional to the Geneva Conventions (U.S. Government Printing Office, 1987) at III.

²⁰¹ A. Bradley, *supra* note 193 at 213.

²⁰² Ben Jones, "Despite Obama's new executive order, U.S. drone policy may still violate international law", (7 July 2016), online: The Washington Post <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/07/obamas-new-executive-order-on-drones-means-the-u-s-may-still-violate-international-law/?utm_term=.296d6a89de01>; President Barack Obama, "Executive Order - United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force", (1 July 2016), online: whitehouse.gov <<https://obamawhitehouse.archives.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures>>.

²⁰³ Max H Hulme, "Preamble in Treaty Interpretation Comment" (2015) 164 U Pa L Rev 1281 at 1287.

the modern history of International law became the evident source of intent for anyone seeking interpretation of a treaty.²⁰⁴

Any signatory state of a treaty does have the obligation to refrain from acts, which would frustrate the object of the treaty (See 4.2.2.1.). In the case of Protocol II (of which as we have already stated the United States is a signatory, however not a party), the preamble states that there is a "*need to ensure a better protection for the victims of those armed conflicts*".²⁰⁵ In addition the preamble also provides that when not covered by the law in force: "*the human person remains under the protection of the principles of humanity and the dictates of the public conscience*".²⁰⁶ The crux of Protocol II (or its object and purpose for the sake of legal conformity) therefore seems to be: (i) heightened protection of any individual within an armed conflict and (ii) the importance of humanity in warfare. Titled "*Fundamental guarantees*", Article 4 of Protocol II (*inter alia* safeguarding mental well-being of civilians) seems to be the epitome of the treaty's object and purpose. Interpreted in both a strictly textual as well as a teleological manner its explicit wording manifests these provisions as central to the treaty - determining its essential structure and function.²⁰⁷ Going against so-called fundamentals of a treaty would clearly defeat its object and purpose.

4.2.3 Prohibitions of specific weapons under International Humanitarian Law

Modern International Humanitarian law encompasses prohibitions and

²⁰⁴ International Law Commission, *supra* note 198 at 221; Hulme, *supra* note 203 at 1342.

²⁰⁵ *Protocol II*, *supra* note 110 at Preamble.

²⁰⁶ *Ibid.*

²⁰⁷ "Fundamental", online: Merriam-Webster Dictionary <<https://www.merriam-webster.com/dictionary/fundamental>>.

restrictions on the use of specific weapons from its early beginnings.²⁰⁸ The Saint Petersburg declaration of 1868 for instance renounced "in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances."²⁰⁹ Based on laws of humanity, the conference wished to avoid use of such arms, which needlessly aggravate human suffering.²¹⁰ Treaties up to this day recognize the same rule of avoiding "means or methods, which are of a nature to cause superfluous injury or unnecessary suffering."²¹¹ The rule is also included in many national military manuals throughout the world; including those of the United States, Russia, Sweden, the United Kingdom, Canada, Germany, South Korea, Morocco and Argentina.²¹² This, alongside its historic inclusion in international treaties, United Nations General Assembly Resolutions and International Court of Justice Advisory opinions suggests the rule is a part of customary international law.²¹³ The ICJ was particularly explicit about the importance of this rule when, in it held in the *Nuclear Weapons* advisory opinion that it is one of the two "cardinal principles" of International Humanitarian Law.²¹⁴ The ICJ interpreted the term unnecessary suffering as: "a harm greater than that unavoidable to achieve legitimate military objectives".²¹⁵ There is nothing to suggest this rule doesn't apply to

²⁰⁸ Allan Rosas & Pär Stenbäck, "The Frontiers of International Humanitarian Law" (1987) 24:3 Journal of Peace Research 219 at 219; Henckaerts, Doswald-Beck & Cross, *supra* note 113 at 237.

²⁰⁹ *Saint Petersburg Declaration relating to Explosive Projectiles*, *supra* note 158.

²¹⁰ *Ibid* at Preamble.

²¹¹ Henckaerts, Doswald-Beck & Cross, *supra* note 113 at 237.

²¹² *Ibid* at 238.

²¹³ *Ibid*.

²¹⁴ ICJ, 07/08/1996, Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996 (available on <http://www.icj-cij.org/en/case/95>) at para 78.

²¹⁵ *Ibid* at 78.

Non-International armed conflicts.²¹⁶

The first "cardinal rule" of International Humanitarian law as suggested by the ICJ in the *Nuclear Weapons* advisory opinion is the protection of the civilian population. As the two aforementioned rules comprise the backbone of modern day IHL one must interpret them both separately as well as a whole, using the so called principle of integration, guided by interpretation rules laid down in the Vienna Convention on the Law of Treaties as well as the interpretation practice of the ICJ.²¹⁷ Using the *argumentum a simili* one must logically conclude that what is true for treaty interpretation must also be true for customary rules of the same legal field.²¹⁸ This suggests that the protection of civilians must necessary include any protection, which is given to armed combatants in an armed conflict.

The same outcome is also achieved should we use the *argumentum a minore ad maius*: if a certain weapon or method is prohibited to use against armed groups / combatants in an armed conflict, the same prohibition must be even stricter in relation to civilians - a group absolutely protected from any form of violence.²¹⁹

One contemporary treaty, The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects ("CCW") recognizes that parties to an armed conflict are not free to choose "methods or means of warfare" and bases this

²¹⁶ Henckaerts, Doswald-Beck & Cross, *supra* note 113 at 239.

²¹⁷ *Vienna Convention on the Law of Treaties*, *supra* note 84 at Article 31; "The Imco Opinion: A Study in Treaty Interpretation" (1961) 1961:2 Duke Law Journal 288 at 288; Dörr & Schmalenbach, *supra* note 197 at 527.

²¹⁸ Fellmeth & Horwitz, *supra* note 21 at 37.

²¹⁹ International Committee of the Red Cross (ICRC), *supra* note 188 at 37; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *supra* note 135 at Article 3.

on the rule prohibiting means which "cause superfluous injury or unnecessary suffering."²²⁰ Most militarily significant States are parties to the CCW.²²¹

4.2.4. Prohibition of Torture

The Rome Statute, the founding document of the ICC, defines "crimes against humanity" as "inhumane acts intentionally causing great suffering, or serious injury to body or to mental or physical health" if "committed as part of a widespread or systematic attack directed against any civilian population".²²² Similarly it defines torture as "intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused."²²³ The United States are a signatory, however not a party to the Rome Statute.²²⁴ In total 124 States out of 193 UN Member States (>64%) are parties to the Rome Statute.²²⁵ It is universally accepted that under the definition of the Rome Statute torture also includes mental torment.²²⁶ This equally applies to public display of torture instruments in order to scare victims.²²⁷ President Obama is well aware that armed drones in their very essence are an efficient tool not only to impair, but also scare

²²⁰ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 2 December 1983, 1342 UNTS 137 [Convention on Certain Conventional Weapons] at Preamble.

²²¹ United Nations Office for Disarmament Affairs, "CCW: States Parties and Signatories", (23 August 2017), online: un.org <<https://www.un.org/disarmament/geneva/ccw/states-parties-and-signatories/>>; Albeit not perfect this list undoubtedly pinpoints some of the most significant militaries in the world: Jeremy Bender, "The 11 Most Powerful Militaries In The World", (23 April 2014), online: Business Insider <<http://www.businessinsider.com/11-most-powerful-militaries-in-the-world-2014-4>>.

²²² *Rome Statute of the International Criminal Court*, *supra* note 141 at Article 7.

²²³ *Ibid.*

²²⁴ International Criminal Court, "The States Parties to the Rome Statute", (19 August 2017), online: <https://www.icc-cpi.int/> <https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.

²²⁵ *Ibid.*

²²⁶ Dewulf, *supra* note 140 at 178.

²²⁷ *Ibid.* at 181.

individuals.²²⁸ Albeit jokingly, he noted: "The Jonas Brothers are here. They're out there somewhere." continuing with a tasteless warning "Sasha and Malia are huge fans, but boys, don't get any ideas. I have two words for you: 'predator drones.' You will never see it coming. You think I'm joking?"²²⁹

Further, Continued exposure to intimidating and life threatening conditions is also considered as torture.²³⁰ As previously noted villagers in the FATA of Pakistan and in Yemen report of seeing a drone between ten and fifteen times a day and in turn have problems of sleeping at night due to their presence.²³¹

Certain elements resembling those within the definition of torture therefore undoubtedly exist, whether or not the perpetual presence of armed drones indeed qualifies, as torture however remains a topical question. Should international tribunals ever take such matter up for debate remains to be seen, they will however, surely, need to look into the lives of those affected by the presence of armed drones above their communities and not only those who operate drones and authorize their operations.

4.3. Future policies: Are we in for a domino effect?

Despite revised policies on drone operations being implemented under President Obama, even these (arguably inefficient) safeguards seem to have a hard time surviving under the current administration of the United States.²³² As reported in September 2017 the administrations plans to lower the threshold for who can be

²²⁸ Ahmed, *supra* note 100 at 1.

²²⁹ Ibid; Max Fisher, "Obama Finds Predator Drones Hilarious", The Atlantic (3 May 2010), online: <<https://www.theatlantic.com/international/archive/2010/05/obama-finds-predator-drones-hilarious/340949/>>.

²³⁰ Dewulf, *supra* note 140 at 185.

²³¹ Medea, *supra* note 2 at 93; Madlena, Patchett & Shamsan, *supra* note 133.

²³² Charlie May, "Trump plans to lift restraints on drone strikes", (22 September 2017), online: *Salon* <<https://www.salon.com/2017/09/22/trump-plans-to-lift-restraints-on-drone-strikes/>>; Jones, *supra* note 202.

targeted in missions and eliminate the vetting process established by its predecessors.²³³

With the grim prospects outlined above, the question remains how other countries, increasingly in possession of armed drones in their arsenal (see page 31) plan to undertake missions in future conflicts. In this case, leading by example might have detrimental consequences; some countries are closely following the U.S. example, both in terms of technological development and actual operations, with even less transparency and limited media attention.²³⁴ Others however are officially condemning such actions, in 2014, the European Parliament voted by a majority of 534 to 49 in support of a resolution demanding that EU Member States “do not perpetrate unlawful targeted killings or facilitate such killings by other states” “oppose and ban practices of extra judicial targeted killings.”²³⁵

²³³ May, *supra* note 232.

²³⁴ Burak Ege Bekdil, “Turkey’s increasing reliance on drone systems”, (8 August 2017), online: Defense News <<https://www.defensenews.com/air/2017/07/03/turkey-s-increasing-reliance-on-drone-systems/>>; Mikhail Khodarenok, “First Russian-made combat drone being tested”, (31 March 2017), online: <https://www.rbth.com/defence/2017/03/31/first-russian-made-combat-drone-being-tested_731956>.

²³⁵ Jessica Elgot, “‘Illegal’ Drone Strikes Condemned In Landslide Vote By European Politicians”, (27 February 2014), online: Huffington Post <http://www.huffingtonpost.co.uk/2014/02/27/europe-meps-vote-against-drone-strikes_n_4866217.html>.

5

An inherently incompatible relationship? Just war theory and the use of armed drones

Just war theory, in essence, sets out criteria for an armed conflict to be deemed just and legitimate. Armed drones however bring a new understanding to the debate as their use has two bipolar characteristics. On one end they are arguably one of the most precise weapons currently operated by armies around the world, on the other, they give rise to frustration and arguably radicalize societies. Some feel their use is inherently immoral since their characteristics are perceived as divine-like, possessing the "ability to see and not be seen and deliver death without warning, trial, or judgment."²³⁶

²³⁶ Ahmed, *supra* note 100 at 2.

5.1. Just war theory: *raison d'être*

In 1914, just before the beginning of the First World War, Andrew Carnegie made a speech where he deemed: "It is the killing of each other that stamps man still the savage. That this practice is not soon to pass away from civilized man is unthinkable..."²³⁷ This pacifist prophecy does however not seem likely to be fulfilled in the near future. As reported by the Peace Research Institute Oslo in 2014 (100 years following Carnegies New Years speech) "the number of people killed as a direct consequence of these conflicts passed 100 000 for the first time in more than 25 years."²³⁸ This shows that "killing each other" still seems to be part of human nature, whatever the underlying reasons or justifications may be. This leads us to analyze the progress of modern day wars (or armed conflicts, noting the two should, for the purpose of this chapter, convey the same meaning), under the auspices of just war theory, which (in simple terms) discuss the relation between the horrors of war on one side and the need to prevent even greater atrocities on the other.²³⁹

In one of the seminal works of modern day International law, Oppenheim opines, "The evils of war are so great that, even when caused by an international delinquency, war cannot be justified if the delinquency was comparatively unimportant and trifling".²⁴⁰ The idea of having just and unjust causes for going to war or an armed conflict, is however even older. Since the dawn of time people have

²³⁷ Daniel R Brunstetter & Cian O'Driscoll, *Just War Thinkers: From Cicero to the 21st Century* (Routledge, 2017) at xiv; Andrew Carnegie, "New Year Greeting", (4 January 1914), online: Carnegie Council for Ethics in International Affairs <https://www.carnegiecouncil.org/publications/100_for_100/001>.

²³⁸ Peace Research Institute Oslo, *Trends in Armed Conflict, 1946–2014* (Peace Research Institute Oslo, 2016) at 2.

²³⁹ Fritz Allhoff, Nicholas G Evans & Adam Henschke, eds, *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century* (New York: Routledge, 2013).

²⁴⁰ Oppenheim, *supra* note 13 at 71.

asked themselves the question whether or not taking part in a war is justified and if so in what way warfare should be undertaken.²⁴¹

The Hindu epic Mahabharata discusses the relation between the commitment not to inflict harm and unavoidable causing of pain in certain situations in much detail and is considered the source of the Hindu just war theory.²⁴² The era of Christianisation of the Roman Empire is however considered the chronological womb of the western just war doctrine.²⁴³ Later, one of the most notable western thinkers analysing this dilemma, Thomas Aquinas, held that in order for a war to be just (or in his words rather non-sinful as he was basing it on divine will) it must be based on three principles: sovereign (divine) authority, just cause, and rightful intention.²⁴⁴

It goes without saying that the theory of just war (*per se*) is not part of modern international law codifications.²⁴⁵ It became obsolete as a legal rule following the Peace of Westphalia in 1648.²⁴⁶ Just war, as a concept of legal theory however remains widely debated.²⁴⁷ Its *raison d'être* must therefore lie in mankind's inner self as magnificently described by Albert Camus: "*On the whole, men are more good than bad; that, however, isn't the real point. But they are more or less ignorant, and it*

²⁴¹ Brunstetter & O'Driscoll, *supra* note 237 at xiv.

²⁴² Paul Robinson, *Just War in Comparative Perspective* (Routledge, 2017) at 117.

²⁴³ Shaw, *supra* note 17 at 1119.

²⁴⁴ James Turner Johnson, "Aquinas and Luther on War and Peace: Sovereign Authority and the Use of Armed Force" (2003) 31:1 *Journal of Religious Ethics* 3 at 8; Allhoff, Evans, & Henschke, *supra* note 239 at 2.

²⁴⁵ Shaw, *supra* note 17 at 1120.

²⁴⁶ *Ibid.*

²⁴⁷ Amongst many others see Alejandro Chehtman, "The ad bellum Challenge of Drones: Recalibrating Permissible Use of Force" (2017) 28:1 *European Journal of International Law* 173; John W Lango, Michael W Brough & Harry Van Der Linden, eds, *Rethinking the Just War Tradition* (SUNY Press, 2012); Alex J Bellamy, *Just Wars: From Cicero to Iraq* (Wiley, 2006); Charles Guthrie & Michael Quinlan, *Just War: The Just War Tradition: Ethics in Modern Warfare* (A&C Black, 2010).

is this that we call vice or virtue; the most incorrigible vice being that of an ignorance that fancies it knows everything and therefore claims for itself the right to kill."²⁴⁸

In today's theory, the initial dilemma is still omnipresent and does not seem to fade with time. However, the parameters to perceive a war as just are more detailed, although no less open ended: "(i) it has a just cause, where a just cause consists in the violation, backed by the threat of lethal force, of some party's fundamental human rights; (ii) it is a proportionate response to the injustice that the belligerent is suffering or is about to suffer; (iii) it is not fought and won through the deliberate and indiscriminate targeting of innocent non-combatants; (iv) it stands a reasonable chance of succeeding by military means that do not breach the in bello requirements of proportionality and discrimination and (v) there is no less harmful way to pursue the just cause (ultima ratio)."²⁴⁹

I would like to note that this chapter will not go into the debate, whether the use of armed drones in battlefields such as those in Pakistan, Yemen and Somalia, indeed fall under the jus ad bellum or rather the recently proposed jus ad vim framework, as I believe the two do not offer different outcomes for the purposes of this chapter.²⁵⁰

5.2. Changing perspectives: the view from below

During the 17th century the question whether the cause of war is just or not became immaterial for the purposes of international law.²⁵¹ Despite the Kellogg-Briand pacts aim to prohibit the resort to war, which some consider a valid principle

²⁴⁸ Albert Camus, *The Plague* (Knopf Doubleday Publishing Group, 2012) at 131.

²⁴⁹ Chehtman, *supra* note 247 at 174.

²⁵⁰ Daniel Brunstetter & Megan Braun, "From Jus ad Bellum to Jus ad Vim: Recalibrating Our Understanding of the Moral Use of Force" (2013) 27:1 *Ethics & International Affairs* 87; Helen Frowe, "On the Redundancy of Jus ad Vim: A Response to Daniel Brunstetter and Megan Braun" (2016) 30:1 *Ethics & International Affairs* 117.

²⁵¹ Shaw, *supra* note 17 at 1121.

of international law, the use of force (in self-defense) is still a valid principle of International law as recognized by Article 51 of the UN Charter.²⁵²

The legally unenforceable aspect of just war is however not perceived as meaningless to the communities who live under the constant realities of armed conflict. The fact that drone operators sit thousands of miles away from the battlefield is perceived particularly unjust and dishonorable by tribal communities that live under their presence.²⁵³ From their perspective the element of justice behind the cause of war is essential, for them having honor and face is the paramount virtue of any individual and the basis for his identity in society.²⁵⁴ For instance, the war in Afghanistan, which was justified by the United States as a response to 9/11 was incomprehensible for tribal communities which were arguably hardest hit by the armed conflict.²⁵⁵ "92 percent of the people surveyed in the Pukhtun-dominated areas of Kandahar and Helmand a decade after the war began in Afghanistan had never heard of 9/11 and therefore had no idea of its significance for Americans."²⁵⁶ This manifests the importance of the just war concept for those living in communities most affected by conflicts. Additionally, the fact that drones possess an almost divine-like capability "to see and not be seen and deliver death without warning, trial, or judgment" further enrages the tribal communities, as trying to mimic the divine is by their understanding blasphemous.²⁵⁷ In short, tribesmen see the way of waging

²⁵² Ibid at 1122; Charter of the United Nations, *supra* note 20 at Article 51.

²⁵³ Ahmed, *supra* note 100 at 2.

²⁵⁴ Ibid at 5 and 24.

²⁵⁵ Ibid at 5; The Coalition Information Centers, "The Global War on Terrorism: The First 100 Days", (20 December 2001), online: US Department of State Archive <<https://2001-2009.state.gov/s/ct/rls/wh/6947.htm>>; United Nations Security Council, S/RES/1368 (2001) (United Nations Security Council, 2001).

²⁵⁶ Ahmed, *supra* note 100 at 5.

²⁵⁷ Ibid at 2.

war through drone strikes cowardly.²⁵⁸

It is true that drones, at least in theory, due to their longer flight autonomy in comparison to fighter jets offer their operators more intelligence, which should result in more, informed (and thus just) decision making.²⁵⁹ On the other hand, intelligence gathering and targeting processes reportedly suffer from many shortcomings, such as the so-called soda straw effect, where operators, as acknowledged themselves, are not aware of the wider area of the target.²⁶⁰

5.3. Elements of just war

As suggested, modern day just war theories suggest there are at least five elements for a war to be considered just. Since the first element, should be in my view discussed on a case by case basis, we shall closely analyze the latter four as set out above, namely: rules on targeting of non-combatants, proportionality, ultima ratio and likelihood of success.²⁶¹

5.3.1 Targeting of non-combatants

In order to deem an armed conflict just, it should not be won through the deliberate and indiscriminate targeting of innocent non-combatants. Drones might therefore, as often argued by official representatives, be the weapon most likely to minimize damage to civilians.²⁶² As put by President Obama in a 2016 interview: " ... there are a lot of situations where the use of a drone is going to result in much fewer

²⁵⁸ David Rohde, "Reuters Magazine: The drone wars", Reuters (26 January 2012), online: <<https://www.reuters.com/article/us-david-rohde-drone-wars/reuters-magazine-the-drone-wars-idUSTRE80P11I20120126>>.

²⁵⁹ Chehtman, *supra* note 247 at 176.

²⁶⁰ Avery Plaw, Matthew S Fricker & Carlos Colon, *The Drone Debate: A Primer on the U.S. Use of Unmanned Aircraft Outside Conventional Battlefields* (Rowman & Littlefield, 2015) at 169; Josh Begley, "The Drone Papers: A Visual Glossary", (15 October 2015), online: *The Intercept* <<https://theintercept.com/drone-papers/a-visual-glossary/>>.

²⁶¹ Chehtman, *supra* note 247 at 174.

²⁶² Department of Justice, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force* (United States Department of Justice, 2011) at 7.

civilian casualties and much less collateral damage than if I send in a battalion of marines."²⁶³ There is little doubt that in theory and under ideal circumstances drones do represent the weapon with unparalleled precision, which amounts in the least collateral (physical) damage.²⁶⁴ Therefore, under this sole element, the use of armed drones could indeed be one of the key cornerstones of conducting a just war.

5.3.2. Proportionality

The question of proportionality will be divided into two parts, the first dealing with the aspect of general proportionality, that is, whether going to war (or using force) is proportionate to the threat it aims to deter. The second aspect will analyze so-called individual proportionality - whether using force against a specific individual is proportionate to the threat he supposedly represents. In as far as this is not a debate on the validity of the proposed *jus ad vim* framework, the above made distinction might indeed manifest a need for a different interpretation of proportionality when it comes to the use of armed drones against individual militants.²⁶⁵

The basic premises of proportionality in terms of just war theory is whether the horrors of war are not out of proportion to the good the war aims to achieve - or put otherwise "that collateral killing of civilians is forbidden if the resulting civilian deaths are out of proportion to the relevant good one's act will do".²⁶⁶ On those grounds, the

²⁶³ Ta-Nehisi Coates, "'Better Is Good': Obama on Reparations, Civil Rights, and the Art of the Possible", *The Atlantic* (21 December 2016), online: <https://www.theatlantic.com/politics/archive/2016/12/ta-nehisi-coates-obama-transcript-ii/511133/?utm_source=feed>.

²⁶⁴ Chehtman, *supra* note 241 at 175; Daniel Byman, "Why Drones Work: The Case for Washington's Weapon of Choice" (2013) 92:4 *Foreign Affairs* 32 at 32.

²⁶⁵ Brunstetter & Braun, *supra* note 250.

²⁶⁶ Thomas Hurka, "Proportionality in the Morality of War" (2005) 33:1 *Philosophy & Public Affairs* 34 at 35.

precision offered by armed drones again suggests, they might indeed be the most appropriate weapon to satisfy the conditions of a just war.

On the latter aspect, using an armed drone against an individual who represents a threat (whereby imminence under the just war theory might arguably not be the necessary standard to judge the resort to use force) again seems to be the most appropriate way to undertake such operations. The fact that drones can source information on an individual for months before deciding whether to use force, be ready to deploy a missile at any given moment (and therefore, at least in theory, seek out for the right moment when the target is isolated) and connect the missile path to the signal of an individuals mobile phone indeed turns the cards in their favor.²⁶⁷

As we will see below however, these two elements (namely: appropriate targeting and satisfied proportionality) are not enough to satisfy the commonly acknowledged criteria of just war theories.

5.3.2.1 Unknowns in the equation: Psychological harm

Additionally the question of psychological harm must come into equation within the proportionality element of just war theory in the context of this thesis. The day-to-day fear of civilians living under the presence of armed drones in tribal areas of Pakistan, Yemen and Somalia must without doubt be included in the proportionality equation.²⁶⁸ The psychological harm suffered by individuals, even when such harm is produced incidentally, must be addressed as a serious question of legal nature, especially under the auspices of just war theory, where the moral

²⁶⁷ Begley, *supra* note 260.

²⁶⁸ Lieblich, *supra* note 164 at 186; Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100.

element is particularly prioritized.²⁶⁹ Psychological harm might therefore shake the balance of proportionality and render the use of armed drones as disproportionate, despite their positive sides discussed above.

5.3.3. Ultima Ratio

The ultima ratio (commonly translated as the last resort) element proposes that in order for a war to be deemed just, there must not exist a way to deter the threat in a less destructive or injurious way.²⁷⁰

Advocates of drone strikes argue that "Drones have done their job remarkably well: by killing key leaders and denying terrorists sanctuaries", thereby implying the point of drone strikes is indeed to kill and immobilize key leaders of terrorist organizations.²⁷¹ As key operational leaders, one must assume, they would be the ones moving around the most in order to gain information, meet other top tier representatives and also appear in front of their supporters. As further held by armed drone advocates, including the Former President of the United States Barack Obama, it is hard to "get at terrorists who are in countries that either are unwilling or unable to capture those terrorists or disable them themselves".²⁷² This assertion, at least in certain cases, seems to be far from reality.²⁷³ A British born Al-Qaeda affiliate Bilal el-Berjawi, formerly a UK citizen and known to the UK secret services under the code-name Objective Peckham was for instance in London in late 2009 (already under

²⁶⁹ Lieblich, *supra* note 164 at 181.

²⁷⁰ "Ultima ratio", online: *Merriam-Webster Dictionary* <<https://www.merriam-webster.com/dictionary/ultima+ratio>>; Chehtman, *supra* note 247 at 174.

²⁷¹ Byman, *supra* note 264 at 32.

²⁷² Coates, *supra* note 263.

²⁷³ Official Website of the President of Russia, *supra* note 65; Ryan Gallagher, "The Life and Death of Objective Peckham", (15 October 2015), online: The Intercept <<https://theintercept.com/drone-papers/the-life-and-death-of-objective-peckham/>>.

tight scrutiny of the authorities).²⁷⁴ In 2010 during his third stay in Somalia his UK passport was revoked.²⁷⁵ In January 2012 he was killed by a US drone strike northwest of Mogadishu.²⁷⁶ He could have been arrested in 2009, when in fact he was already in custody of the MI5 following his arrest in Kenya; instead he was killed about 2 and a half years later, only days after his wife in London gave birth to their third child.²⁷⁷

An even clearer example is Tarik Aziz from Chapter 1. He attended a meeting in Islamabad on 28 October 2011 where he met several human rights activists, journalists and lawyers and told them of his impressions of living under the perpetual presence of armed drones.²⁷⁸ He also talked about his love for soccer and volunteered to help NGOs and lawyers gather evidence after drone strikes would strike his local town and region.²⁷⁹ As already mentioned, only 72 hours after the meeting he was killed in a drone strike alongside his cousin.²⁸⁰ He too of course could have been easily arrested before the drone strike took place.²⁸¹ Most people who met him were shocked once the news about Tariq Aziz's death became public; one of them, Pratap Chatterjee invited US authorities to provide evidence that Tariq Aziz was indeed a terrorist.²⁸² What was instead made public however was only a short statement that the drone strike has eliminated two militants.²⁸³

²⁷⁴ Gallagher, *supra* note 273.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ Chatterjee, *supra* note 8.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Chatterjee, *supra* note 3.

²⁸² Chatterjee, *supra* note 8; "Teenage anti-drone protester killed by CIA strike in Pakistan", online: Reprieve <https://www.reprieve.org.uk/press/2011_11_06_tariq_cia_drone_waziristan/>.

²⁸³ Schiffrin, *supra* note 9.

What is clear is that the two drone strikes carried out by US forces in Pakistan and Somalia respectively were not used as Ultima ratio - less harmful and injurious ways to render Bilal el-Berjawi and Tariq Aziz inoperative were clearly available. One can only guess the fates and stories of the thousands of other drone strike victims. If it goes to judge by the silence reporters and activists meet when addressing authorities on the above cases (as well as on general drone strike policies) one must be at least mildly incredulous towards claims that drone strikes are only used in circumstances where local authorities are unwilling or unable to apprehend (suspected) terrorists.

5.3.4. Likelihood of success

The perhaps most important question, if we are to make a qualitative distinction between criteria set out under just war theory, is whether use of force will indeed result in success.²⁸⁴

The first and crucial question when it comes to the likelihood of success is what in fact represents success.²⁸⁵ In the situation of targeting militants using armed drones two possible answers would logically arise: (i) the question of success might begin and end when the single drone strike is carried out and when the individual target is incapacitated (ii) the other interpretation of success suggests that the aim of drone strikes is to minimize terrorist threat, prevent further radicalization and empower local communities. Under the first interpretation armed drones might again be the weapon platform of choice.²⁸⁶ The likelihood of success must however not

²⁸⁴ Richard Werner, "Just war theory: Going to war and collective self-deception" in Fritz Allhoff, Nicholas G Evans & Adam Henschke, eds, *Routledge handbook of ethics and war* (London: Routledge, 2013) 35 at 40.

²⁸⁵ Ibid at 35.

²⁸⁶ Michael V Hayden, "To Keep America Safe, Embrace Drone Warfare", *The New York Times* (19 February 2016), online:

only be measured in correlation to the successful military operations; such an approach is inherently shortsighted and does not account for the aftermath of armed conflicts.²⁸⁷

Concerning the second interpretation of the term, reports and studies suggest that success is getting further away with every undertaken drone strike.²⁸⁸ Even the studies claiming a positive outcome of drone strikes in Pakistan confirm that effects of drone strikes "on militant violence occur primarily at the tactical level, not the strategic level" while also admitting that no long-term beneficial effects were identified.²⁸⁹ Additionally the aforementioned study was not able to evaluate if drone strikes resulted in increased recruitment.²⁹⁰ A similar study by D.A. Jaeger and Z. Siddique also suggests that any effects drone strikes have on the intensity of terrorist activity are only minor and vary from a "positive vengeance effect in the first week following a drone strike to a negative deterrent/incapacitation effect in the second week following a drone strike."²⁹¹

Other comprehensive studies suggest that drone strikes are one of the most potent recruitment tools used by non-state actors. Commentators argue that drone

<<https://www.nytimes.com/2016/02/21/opinion/sunday/drone-warfare-precise-effective-imperfect.html>>; John O. Brennan, *supra* note 102.

²⁸⁷ Todd A Burkhardt, "Reasonable chance of success: Analyzing the postwar requirements of *jus ad bellum*" in Fritz Allhoff, Adam Henschke & Nicholas G Evans, eds, *Routledge Handbook of Ethics and War: Just War Theory in the 21st Century* (New York: Routledge, 2013) 120.

²⁸⁸ Ahmed, *supra* note 100 at 82; Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100; William Mayborn, "Creating More Turmoil: Why UAV strikes Will Be Counterproductive in Yemen" (2010) *Terrorism and Political Violence* 480; John Bernard Quigley, *Drone Strike Blowback*, SSRN Scholarly Paper ID 2436398 (Rochester, NY: Social Science Research Network, 2014).

²⁸⁹ Patrick B Johnston & Anoop K Sarbahi, "The impact of US drone strikes on terrorism in Pakistan" (2016) 60:2 *International Studies Quarterly* 203 at 1 and 14.

²⁹⁰ *Ibid* at 1.

²⁹¹ David A Jaeger & Zahra Siddique, "Are drone strikes effective in Afghanistan and Pakistan? On the dynamics of violence between the United States and the Taliban" (2011).

strikes in Pakistan have "led to the further radicalisation and destabilisation of Pakistani society."²⁹² Imran Khan, a member of the Pakistani national assembly and former champion cricketer, argues that drone strikes are "turning young men into angry Jihadis".²⁹³

Therefore, analyzing the likelihood of success broadly, and not only based on the direct military outcome of the operations, we must conclude that armed drones are in fact detrimental to pursued goals.

5.3.5. Inherent incompatibility?

Since the criteria as set out above must be fulfilled cumulatively in order for a war or an armed conflict to be considered just, we see that the current use of armed drones does indeed fall short of the required benchmarks. What is also clear however is that there is no inherent incompatibility between the use of armed drones and the just war theory. Should certain transparent safeguards be in place and if the drone strikes would follow very strict criteria within the framework of use of force in self-defense, they might indeed be the weapon platform of choice for the purposes of fulfilling the criteria set out in modern-day just war theories. Such safeguards should as their minimum incorporate: high standards of verification, no perpetual presence above inhabited areas, no vicinity of civilians when conducting a strike and heightened support by ground intelligence. Currently, the way drone strikes are being conducted is seemingly arbitrary and relies on subjective perceptions, which

²⁹² Vijay Luhan, "The New Guantanamo: The Psychological Impact of US Drone Strikes in Pakistan", (16 May 2015), online: *E-International Relations* <<http://www.e-ir.info/2015/05/16/the-new-guantanamo-the-psychological-impact-of-us-drone-strikes-in-pakistan/>>.

²⁹³ *Ibid*; Rob Crilly, "Imran Khan's anti-drone protest falls short of destination", (7 October 2012), online: <<http://www.telegraph.co.uk/news/worldnews/asia/pakistan/9592632/Imran-Khans-anti-drone-protest-falls-short-of-destination.html>>.

can change from one minute to the other and favor the tactical and strategic outcome of a strike as opposed to the civilian casualties which might ensue.²⁹⁴

²⁹⁴ Hayden, *supra* note 286.

6

Social disruption and psychological trauma: terrorism, isolation and bewilderment

Armed drones might perhaps in theory be unmatched in terms of precision however in certain communities the hatred towards their operations is equally unparalleled. People living under the drones in communities out of touch with our interpretation of "modernity" condemn their divine-like traits whereas psychiatrists note an increasing level of emotionally distressed individuals often suffering from PTSD, severe anxiety and other traumatic consequences.

6.1. The global war on terror and the use of armed drones

Only months before 11 September 2001 the now former CIA director George Tenet stated that "it would be a terrible mistake for the Director of the CIA to fire a weapon like this".²⁹⁵ In July 2011 the American Ambassador to Israel said, "The United States government is very clear on record against targeted assassinations ... They are extrajudicial killings and we do not support that."²⁹⁶ Today armed drones are increasingly being used as the weapon of choice in the fight of the United States against terrorism; between 2001 and 2008 (under President George W. Bush) a total of 57 drone strikes took place, whereas from 2008 - 2016 (under President Barack Obama) the number was almost 10-fold at 563.²⁹⁷ Despite the official terminology referring to surgical strikes and unparalleled precision, these claims have been debunked by several studies; between 8-24% of victims of drone strikes are believed to be civilians. This goes against the *carte blanche* justification given by John O. Brennan, President Obama's Deputy National Security Advisor for Homeland Security and Counterterrorism in 2011: "One of the things president Obama has been insistent upon is that we are very precise and surgical in terms of addressing the terrorist threat. And by that I mean if there are terrorists who are within an area where there are women and children or others, you know, we do not take such action that might put those innocent men, women and children in danger."²⁹⁸ This has

²⁹⁵ Daniel Benjamin & Steven Simon, *The Age of Sacred Terror* (Random House Publishing Group, 2002) at 345.

²⁹⁶ Jane Mayer, "The Predator war" in Marjorie Cohn, ed, *Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues* (Northampton, MA: Interlink Publishing, 2014) at 66.

²⁹⁷ Jessica Purkiss & Jack Serle, "Obama's covert drone war in numbers: ten times more strikes than Bush", (17 January 2017), online: The Bureau of Investigative Journalism <<https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>>; Pitch Interactive, "Out of Sight, Out of Mind", (2015), online: Out of Sight, Out of Mind <<http://drones.pitchinteractive.com>>.

²⁹⁸ John O Brennan, *Obama Administration Counterterrorism Strategy* (Washington D.C., 2011).

repeatedly been proven inaccurate, for instance in one reported approval procedure the conversation leading up to a drone strike followed the following pattern: "These guys are sure dead" comes the reply. "We think the family's O.K.", "You think they're O.K.?" "They should be", but the analyst confesses it is impossible to be sure.²⁹⁹ Other documents suggest that the so-called signature strikes are often used against "unknown individuals exhibiting suspicious behavior" and not necessarily high-ranking officials of non-state actors who the drone campaign is supposedly directed against.³⁰⁰ In 2002, a drone operator was supposedly targeting none other than Osama Bin Laden, after the strike, it however turned out to be a group of three local villagers gathering scrap metal.³⁰¹ More recently the death of the 16-year old Abdulrahman al-Awlaki in Yemen, a US citizen and son of the radical cleric Anwar al-Awlaki, was described as coincidental as Abdulrahman was a "bystander, in the wrong place at the wrong time."³⁰² Other occasions, such as the one of Tariq Aziz from Norak have already been described in detail.

It is therefore not surprising that reports suggest only around 2% of those killed in drone strikes in Pakistan until 2015 were high-profile (operational) leaders.³⁰³ The "no civilian casualties" narrative put forward by the US Government comes under further questioning, when some reports suggest that the method to count civilians follows that rule where "all military age men killed in a drone strike zone are

²⁹⁹ Hayden, *supra* note 286.

³⁰⁰ Cora Currier, "The Drone Papers: The Kill Chain", (15 October 2015), online: The Intercept <<https://theintercept.com/drone-papers/a-visual-glossary/>>.

³⁰¹ Mayer, *supra* note 296 at 68.

³⁰² Craig Whitlock, "U.S. airstrike that killed American teen in Yemen raises legal, ethical questions", Washington Post (22 October 2011), online: <https://www.washingtonpost.com/world/national-security/us-airstrike-that-killed-american-teen-in-yemen-raises-legal-ethical-questions/2011/10/20/gIQAAdvUY7L_story.html>.

³⁰³ Peter Bergen et al, "Drone Strikes: Pakistan", online: *New America* </in-depth/americas-counterterrorism-wars/pakistan/>; Pitch Interactive, *supra* note 297.

considered to be combatants unless there is explicit intelligence posthumously proving them innocent."³⁰⁴

It might be true that certain individual non-state actors have indeed been weakened through counterterrorist measures undertaken in the past two decades (often helped by internal power struggle, at least as much as external pressure), but recent history suggests that new terrorist threats will be born out of groups that ceased to exist.³⁰⁵ The aforementioned is confirmed by the fact that terrorism is on a steep rise since 2000, suggesting that strategies and methodologies to counter its encroachment on societies need to be reassessed based on tangible experience and accounts of those who hail from communities that are most at risk of radicalization.³⁰⁶ In 2013 the former State Department Legal Adviser Harold Koh, when advocating the legality of armed drone operations, argued that Al Qaeda militants who pose a direct threat to the United States are to be counted in "several hundred in all".³⁰⁷ Since 2004 reports show that 6,826-9,930 individuals have been killed in drone strikes.³⁰⁸

³⁰⁴ Marjorie Cohn, "Introduction: A Frightening New Way of War" in Marjorie Cohn, ed, *Drones and Targeted Killing: Legal, Moral, and Geopolitical Issues* (Northampton, MA: Interlink Publishing, 2014) at 13.

³⁰⁵ Dr Renad Mansour, "Iraq After the Fall of ISIS: The Struggle for the State", (4 July 2014), online: Chatham House <<https://www.chathamhouse.org/node/30483>>; Abrams Elliot et al, "What Comes After ISIS?", (10 July 2017), online: Foreign Policy <<https://foreignpolicy.com/2017/07/10/what-comes-after-isis-islamic-state-mosul-iraq-syria/>>; Rita Katz & Adam Raisman, Special Report on the Power Struggle Between al-Qaeda Branches and Leadership, SITE Special Report (2013).

³⁰⁶ Institute for Economics & Peace, *Global Terrorism Index 2016* (New York: Institute for Economics & Peace, 2016) at 16.

³⁰⁷ Harold Hongju Koh, *How to End the Forever War?* (Oxford, U.K., 2013).

³⁰⁸ Chris Woods, "Covert drone strikes and the fiction of zero civilian casualties" in Mike Aaronson et al, eds, *Precision Strike Warfare and International Intervention: Strategic, Ethico-Legal and Decisional Implications* (Routledge, 2014).

FIGURE 1.3 DEATHS FROM TERRORISM, 2000-2015

2015 saw the first reduction in terrorism since 2010, although it was still the second worst year recorded for terrorism.

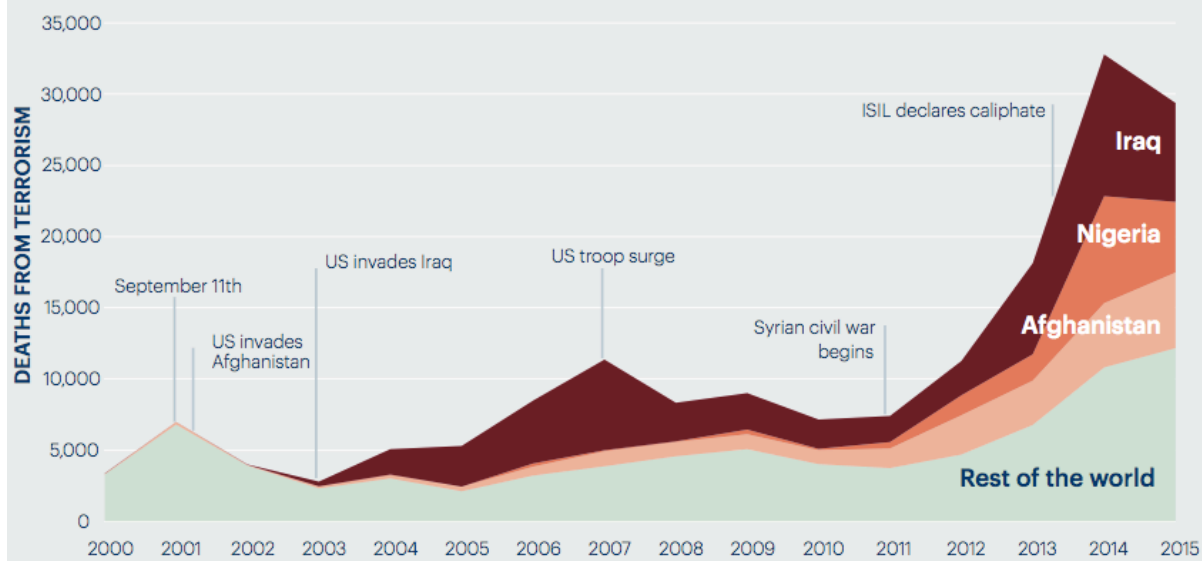


Figure showcasing the increase of deaths following terrorist attacks from 2000-2015³⁰⁹

The goal of the United States, which in the words of Harold Koh is to decimate the core of Al Qaeda, is therefore perhaps fulfilled, however, this "success" has arguably planted many seeds, which can flourish into terrorist threats in the near future.³¹⁰ It goes without saying that the rationale behind the Authorization for Use of Military Force Against Terrorists Act, to "prevent any future acts of international terrorism against the United States by such nations, organizations or persons" is far from achieved.³¹¹ As one example, Faisal Shahzad, while pleading guilty to his attempt of a Times Square car bombing reminded the audience what motivated him to carry out the attempt: "...until they stop drone strikes in Somalia, Pakistan, and Yemen, and stop attacking Muslim lands, we will attack the US and be out to get them. When drones hit they don't see children, they don't see anybody. They kill women, children, they kill everybody "³¹²

³⁰⁹ Institute for Economics & Peace, *supra* note 306 at 16.

³¹⁰ Koh, *supra* note 307.

³¹¹ AUMF, *supra* note 82.

³¹² Cohn, *supra* note 304 at 13; Lorraine Adams & Ayesha Nasir, "Inside the mind of the Times Square bomber", *The Observer* (19 September 2010), online: <<http://www.theguardian.com/world/2010/sep/19/times-square-bomber>>.

6.2. Sociological impact of drone strikes and the perpetual presence of drones

Drone strikes and their perpetual presence, as manifested throughout this thesis definitely cause a longstanding state of uncertainty, fear and confusion amongst communities who find themselves under their presence. Unsurprisingly drone strikes have brought severe financial hardship to communities where regular income is hard to come about.³¹³ In one account a farmer whose house was destroyed in a drone strike claimed he currently does not have more than 5,000 rupees (the equivalent of about 50 USD), whereas a new house would cost 1,000,000 rupees (the equivalent of about 10,000 USD).³¹⁴

More interestingly, armed drones have also caused big shifts in traditional tribal societies.³¹⁵ Armed drones alongside other military operations in the FATA regions in Pakistan and Afghanistan have for instance pushed the tribal communities in the area to revert to suicide bombing, something unimagined a few decades ago, as it is violating both tribal and Islamic traditions that categorically reject suicide and indiscriminate murder.³¹⁶ Around 80 percent of all suicide bombers in Pakistan came from one of the regions the most hit by the presence of armed drones, South Waziristan.³¹⁷

Metin Basoglu, a trauma psychiatrist and academic, explains that the presence of armed drones alongside the carried out strikes amounts to: "prolonged exposure to unpredictable and uncontrollable stressors in an inescapable

³¹³ Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 77.

³¹⁴ *Ibid.*

³¹⁵ Ahmed, *supra* note 100.

³¹⁶ *Ibid* at 36.

³¹⁷ *Ibid* at 74.

environment leading to intense fear-induced helplessness responses."³¹⁸ He further states "anticipation of a life-threatening event is among the most fear-evoking stressors in a war setting."³¹⁹ In general, people in these areas are "increasingly experiencing anticipatory anxiety, report having emotional breakdowns, run indoors for safety, hide during the day, have nightmares and other anxiety-related problems which dramatically affect their ability to live their lives".³²⁰ Specific examples and accounts from two areas most hit by these strikes, Yemen and the FATA regions in Pakistan will be presented below.

6.2.2. Sociological impact of drone strikes in Pakistan

Northwestern Pakistan is home to the tribes of Waziristan, a region most often described as rugged, isolated and desolate.³²¹ Names like the gorge of hell (Dozakh Tangi) give the general impression of the rough terrain generally found in Waziristan.³²² These hills and mountains are populated by two main tribal groups: the Wazir and the Mahsud, who have dwelled these mountains for centuries and have developed customs and social mechanisms still practiced to this day.³²³ The bedrock of socio-political development is formed through the jirga (the council of elders) based on lineage authority, whereas rules are enforced through the obedience of

³¹⁸ Metin Basoglu, "Drone strikes or mass torture? – A learning theory analysis", (25 November 2012), online: Mass Trauma, Mental Health & Human Rights <<https://metinbasoglu.wordpress.com/2012/11/25/drone-warfare-or-mass-torture-a-learning-theory-analysis/>>; Alaa Hijazi et al, "Psychological Dimensions of Drone Warfare" (2017) Curr Psychol 1 at 8.

³¹⁹ Metin Basoglu, *supra* note 318.

³²⁰ Taylor Owen, "Drones don't just kill. Their psychological effects are creating enemies", (13 March 2013), online: <<https://www.theglobeandmail.com/opinion/drones-dont-just-kill-their-psychological-effects-are-creating-enemies/article9707992/?arc404=true>>.

³²¹ Ahmed, *supra* note 100 at 48; Ibrāhīm Karawān, Wayne McCormack & Stephen E Reynolds, *Values and violence: intangible aspects of terrorism* (Dordrecht; London: Springer, 2008) at 99.

³²² Ahmed, *supra* note 100 at 55.

³²³ *Ibid.*

Pukhtunwali (their unique tribal code).³²⁴ Tribes in Waziristan are renowned for their egalitarian spirit and independent character as well as their generosity to guests.³²⁵ In the west however, this area was repeatedly described as the most "dangerous place in the world" following the 9/11 terrorist attacks in New York and Washington, DC.³²⁶ Interestingly none of the nineteen 9/11 hijackers hailed from these areas, but were in fact from Egypt, Yemen, Lebanon and the UAE.³²⁷

However, the FATA areas did represent a safe-haven for the TTP (The Tehrik-e-Taliban Pakistan), Al Qaeda and Uyghurs fleeing from China, as many of the tribal customs and traditions were similar to (or derived from) those of certain interpretations of Islam.³²⁸ Another factor playing in their favor was the fact that under the Wazir tribal code hospitality and the protection of guests is perceived as one of the paramount principles.³²⁹ Waziristan consequently became the focal point of one of the most intense and prolific drone campaigns on earth.³³⁰

Part of that drone campaign was also a strike that took place on March 17, 2011 and was initially reported to have hit a number of Taliban militants in a house

³²⁴ Ibid at 49; Hassan M Yousufzai & Ali Gohar, *Towards understanding Pukhtoon jirga: an indigenous way of peacebuilding* (Lahore: Sang-e-Meel Publications, 2012).

³²⁵ Ahmed, *supra* note 100 at 16; Evelyn Berkeley Howell, *Mizh: a monograph on government's relations with the Mahsud tribe* (Karachi: Oxford University Press, 1979) at vii; Abubakar Siddique, *The Pashtun question: the unresolved key to the future of Pakistan and Afghanistan* (2014) at 85; Syed Mazhar Ali Shah, *Waziristan Tribes* (Provincial Services Academy, 1991) at 193.

³²⁶ Harrison Akins, "Waziristan: 'The most dangerous place in the world'", online: <<http://www.aljazeera.com/indepth/opinion/2013/04/20134983149771365.html>>; Shuja Nawaz, *FATA- a Most Dangerous Place: Meeting the Challenge of Militancy and Terror in the Federally Administered Tribal Areas of Pakistan* (CSIS Press, 2009); CBC, *Waziristan: the most dangerous place in the world?* (2016).

³²⁷ Ahmed, *supra* note 100 at 107–108.

³²⁸ Ibid at 55 and 275.

³²⁹ Ibid at 22.

³³⁰ Ibid; Mark Mazzetti & Eric Schmitt, "C.I.A. Steps Up Drone Attacks on Taliban in Pakistan", *The New York Times* (27 September 2010), online: <<http://www.nytimes.com/2010/09/28/world/asia/28drones.html>>.

where they were meeting.³³¹ It however turned out that the strike had actually hit an open-air bus depot in the middle of Datta Khel where tribal elders were holding a traditional jirga settling a dispute settle a dispute concerning a local chromite mine.³³² According to Brigadier Abdullah Dogar of the Pakistani military, the jirga was pre-communicated and the military were aware of it 10 days in advance.³³³ It was also pre-sanctioned by the Pakistani government.³³⁴ In an interview given to the authors of the Living under the Drones study, Noor Khan, who was at a nearby bazaar when the drone strike took place and whose father was amongst the victims describes the sentiment of fear which spread throughout the region following the attack: "The community is now plagued with fear...The Tribal elders are now afraid to gather together in jirgas as has been the custom for more than a century. We are scared that if we get together we might be targeted again. The mothers and wives plead with the men to not congregate together for fear that they will be targeted. They do not want to lose any more of their husbands, sons, brothers, and nephews. We come from large families, some joined families, and people in the same family now sleep apart because they do not want their togetherness to be viewed suspiciously through the eye of the drone. They do not want to become the next target...The people of NWA are against these strikes. I am against these drone strikes."³³⁵ Lets not forget, it was through an all-tribal jirga consisting of around 200 elders that Muhammad Ali

³³¹ Salman Masood & Pir Zubair Shah, "C.I.A. Drones Kill Civilians in Pakistan", New York Times (17 March 2011), online: <<https://www.nytimes.com/2011/03/18/world/asia/18pakistan.html>>.

³³² Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 58.

³³³ Ahmed, *supra* note 100 at 86.

³³⁴ *Ibid*; Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 58.

³³⁵ Ahmed, *supra* note 100 at 84; Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 60.

Jinnah, the founder of Pakistan, reached tribal allegiance to the newly founded state of Pakistan.³³⁶

The effects of drone strikes however spill over to other areas of life in the FATA and result in a general backlash towards any drone operations in Pakistan.³³⁷

"Before the drone attacks, it was as if everyone was young. After the drone attacks, it is as if everyone is ill. Every person is afraid of the drones," says Ahmed Jan, who lost his leg due to the March 17 jirga strike.³³⁸ David Rohde, a U.S. journalist who was held under Taliban captivity in FATA vividly describes the drone presence from his experience: "The drones were terrifying. From the ground, it is impossible to determine who or what they are tracking as they circle overhead. The buzz of a distant propeller is a constant reminder of imminent death."³³⁹ People tell accounts of being constantly afraid of being hit: "When you can hear the drone circling in the sky, you think it might strike you. We're always scared. We always have this fear in our head."³⁴⁰ Not only those directly affected by drone strikes bear consequence, as seen in the example of Farah Kamal (anonymized) saying: "Because of the terror, we shut our eyes, hide under our scarves, put our hands over our ears."³⁴¹ Another account is given by a humanitarian worker from the Waziristan, who claims it feels like post 9/11 on an everyday basis and that "you wake up with a start to every noise."³⁴² Saeed Yayha, a survivor of the jirga drone strike, gives another personal account of the phenomenon: "I can't sleep at night because when the drones are

³³⁶ Nawaz, *supra* note 326 at 22.

³³⁷ *Ibid* at 15.

³³⁸ Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 82 and 94.

³³⁹ Rohde, *supra* note 258.

³⁴⁰ Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 81.

³⁴¹ *Ibid* at 82.

³⁴² *Ibid*.

there...I hear them making that sound, that noise. The drones are all over my brain, I can't sleep. When I hear the drones making that drone sound, I just turn on the light and sit there looking at the light. Whenever the drones are hovering over us, it just makes me so scared."³⁴³

Ateeq Razzaq (anonymized) and Sulayman Afraz (anonymized), both psychiatrists note increased mental health issues such as PTSD amongst tribal communities. In these communities, showing one is mentally or emotionally distressed is considered contrary to the people's proud characters.³⁴⁴ The toll is even bigger on children, especially considering the kind of environment they are growing up in and the long-term ramifications this might have on the society and their mental health.³⁴⁵ As told by Jennifer Gibson, an American researcher visiting the FATA, people's daily lives have been afflicted as "Parents are afraid to send their children to school. Women are afraid to meet in markets. Families are afraid to gather at funerals for people wrongly killed in earlier strikes."³⁴⁶ A survivor of the first drone strike carried out under President Obama used to be a prospective student, one of the best in his class, he now suffers cognitive and emotional difficulties which occurred after the strike which fractured his skull and impacted his eyesight, in his agony he says his mind has been diverted from studying.³⁴⁷

The helplessness to fight back has according to some authors also heartened these tribes to carry out suicide attacks, something that is in essence inhumane, un-

³⁴³ Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 84.

³⁴⁴ *Ibid* at 85.

³⁴⁵ *Ibid* at 87.

³⁴⁶ Ahmed, *supra* note 100 at 84; Chris Woods & Christina Lamb, "CIA tactics in Pakistan include targeting rescuers and funerals", online: *The Bureau of Investigative Journalism* <<https://www.thebureauinvestigates.com/stories/2012-02-04/cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals>>.

³⁴⁷ Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 91.

Islamic and dishonorable and goes against the beliefs of tribal societies in the FATA.³⁴⁸ A study carried out by local scholars in the FATA: Mati, Ahmadullah, Ishtiaq and Saqib provides that 53.09% of the 403 students included in their study have started favoring terrorism following the introduction of armed drones in the FATA.³⁴⁹ That is to say those that are lucky enough to go to school, as a father the FATA affirms: "We want our girls and boys to get [a] proper education. [We want] someone to become a doctor, someone to become an air pilot, but just because of drone attack[s] we can't take them to school, can't allow them."³⁵⁰ Brigadier Dogan affirms these accounts and states that drones are not helping the cause to eradicate terrorism from the FATA.³⁵¹ Syed Akhunzada Chittan, a political representative from North Waziristan, believes that "for every militant killed" new ones are born in multiplication.³⁵² In short, the drone strikes give terrorist recruiters the perfect narrative against "western oppressors" to further fuel militant activity in the area.³⁵³

Malala Yousafzai, a Nobel Peace Prize laureate, who herself survived Taliban attacks urged President Obama in 2014 to stop drone strikes saying "Drone attacks are fueling terrorism. Innocent victims are killed in these acts, and they lead to resentment among the Pakistani people. If we refocus efforts on education it will

³⁴⁸ Ahmed, *supra* note 100 at 80; Waseeb Zaeb Khan & Jamshed ur-Rehman, *US Drone Policy and Anti-American Sentiments in Pakistan* (New Delhi, India: EduPedia Publications Pvt. Ltd, 2014) at 64.

³⁴⁹ Avery Plaw, Matthew S Fricker & Carlos Colon, *The Drone Debate: A Primer on the U.S. Use of Unmanned Aircraft Outside Conventional Battlefields* (Rowman & Littlefield, 2015) at 169.

³⁵⁰ Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 92.

³⁵¹ Ahmed, *supra* note 100 at 82.

³⁵² Stanford University School of Law International Human Rights and Conflict Resolution Clinic & NYU School of Law Global Justice Clinic, *supra* note 100 at 134.

³⁵³ *Ibid*; Ismail Khan, *Understanding The Drone Campaign in FATA, Pakistan: An investigation of Pre-emptive and Preventive warfare* Centre for East and South-East Asian Studies, Lund University, 2016) [unpublished] at 13; Khalid Iqbal, "Futility of Drone Attacks" (2013) 16:10 Defence Journal 52 at 54.

make a big impact."³⁵⁴ In a similar tone, Colonel Andrew Roe British officer, who lived alongside tribal societies while on his mission in Afghanistan, believes peace and prosperity in the region can only be established by seeing everyday realities through the prism of these communities while undertaking cultural and political initiatives.³⁵⁵

6.2.1. Sociological impact of drone strikes in Yemen

Similarly to the terrain in Waziristan, a big part of Yemen is covered by land often compared to moonscape due to its arid surface, steep hillsides and barren mountain peaks.³⁵⁶ These mountains are, similarly to those of Waziristan, inhabited by tribal communities, which to this day give priority to Tribal Code rather than Islamic theology or rule of the central government.³⁵⁷ Similarly to the Wazir the tribes of these areas have great appreciation for independence and have never been completely subjugated to any central government rule - to the contrary, any ruler of Sana'a needed (at least tacit) support from the tribal areas.³⁵⁸

Since 2002, Yemen has been subject to at least 258 drone strikes.³⁵⁹ Of those 95 took place since 1st of January 2017 until 19 November 2017.³⁶⁰ Those strikes caused 85-132 deaths of which between 33-40 were civilians and 10-13 children.³⁶¹ These strikes continue despite by many warnings that they might in fact be

³⁵⁴ Zack Beauchamp, "Don't forget Malala Yousafzai's appeal to Obama: end the drone war", (10 October 2014), online: Vox <<https://www.vox.com/2014/10/10/6956747/nobel-peace-price-malala-drone-war>>.

³⁵⁵ Andrew M Roe, *Waging war in Waziristan: the British struggle in the land of Bin Laden, 1849-1947* (Lawrence: University Press of Kansas, 2010) at 236.

³⁵⁶ Ahmed, *supra* note 100 at 109; Uzi Rabi, *Yemen: revolution, civil war and unification* (New York: Palgrave Macmillan, 2015) at 7.

³⁵⁷ Ahmed, *supra* note 100 at 110.

³⁵⁸ *Ibid* at 109; Rabi, *supra* note 356 at 7.

³⁵⁹ "Drone Warfare", online: The Bureau of Investigative Journalism <<https://www.thebureauinvestigates.com/projects/drone-war>>.

³⁶⁰ *Ibid*.

³⁶¹ note 359.

counterproductive in the pursuit to neutralize terrorist threat in the region.³⁶²

Farea Al-Muslimi, a Yemeni journalist hailing from the village of Wessab who briefly studied in the United States during his childhood, gave the following insightful account during a testimony in front of the U.S. Senate: "In the past, What Wessab's villagers knew of the U.S. was based on my stories about my wonderful experiences here. The friendships and values I experienced and described to the villagers helped them understand the America that I know and that I love. Now, however, when they think of America, they think of the terror they feel from the drones that hover over their heads, ready to fire missiles at any time. What the violent militants had previously failed to achieve, one drone strike accomplished in an instant. There is now an intense anger against America in Wessab."³⁶³ Others agree with his sentiment. Will Picard, the executive director of the of the Yemen Peace Project believes "American strikes legitimize AQAP's primary narrative, which argues that the Mujahideen are fighting to defend the people of Yemen and the sacred land of Arabia from American invasion."³⁶⁴ A watered-down version of those beliefs is shared by Peter Salisbury, a project consultant at Chatham House's Yemen Forum in the UK, stating: "The drone strikes amplify the sense among ordinary Yemenis that the US is prioritizing its security interests over the wellbeing of Yemenis."³⁶⁵ Another observer noted that he "would not be surprised if 100 tribesmen joined the lines of al-Qaeda as a result of the latest drone strike mistake. This part of Yemen takes

³⁶² Mayborn, *supra* note 288; Daria Solovieva, "US Bombards Yemen With Drone Strikes, But the Policy Is Backfiring", (11 March 2014), online: *VICE News* <<https://news.vice.com/article/us-bombards-yemen-with-drone-strikes-but-the-policy-is-backfiring>>.

³⁶³ Farea Al-Muslimi & Senate Judiciary Subcommittee on Constitution, Civil rights & Human Rights, Testimony of Farea Al-Muslimi (Washington DC: U.S. Senate, 2013).

³⁶⁴ Solovieva, *supra* note 362.

³⁶⁵ Ben Knight, "Yemen drone strikes 'counterproductive'", (14 August 2013), online: DWCOM <<http://www.dw.com/en/yemen-drone-strikes-counterproductive/a-17017123>>.

revenge very seriously" following a 2013 drone strike killing 10 civilians.³⁶⁶

The above is the consequence of everyday realities similar to those described in Waziristan. For instance, reports show that people may be reluctant to attend funerals, since these might be targeted again, as was the case on 3 October 2015 in eastern Mareb.³⁶⁷ There are reports of fear, anxiety, post-traumatic stress disorder and other profound long time psychological effect.³⁶⁸ In February 2013, Dr. Peter Schaapveld, a clinical and forensic psychologist conducted one of the rare studies in Yemen that was published in the West and concluded that he saw "hollowed-out shells of children" who looked "sullen" and had "lost their spark".³⁶⁹ He reported of a girl, who lived next-door to a house hit by a drone, who by the account of her father "vomits every day, and also when she hears aircraft, or drones, or anything related" while she herself confirmed her fear of "things throwing missiles" and said that someone from above wishes to suffocate her.³⁷⁰ In another account, a mother of a then-18-year old, who became a victim after a so-called double-tap drone strike in 2011 says "American missile haunt her dreams at night" and compares herself to a blind person following the death of her son.³⁷¹ The fear remains there to this day and got especially potent when at least 50 drone strikes took place within a month in

³⁶⁶ Hijazi et al, *supra* note 318 at 10.

³⁶⁷ United Nations High Commissioner for Human Rights, Situation of human rights in Yemen: Report of the United Nations High Commissioner for Human Rights (A/HRC/33/38) (2016).

³⁶⁸ Vivian Salama, "Death From Above: How American Drone Strikes Are Devastating Yemen", (14 April 2014), online: Rolling Stone <<http://www.rollingstone.com/politics/news/death-from-above-how-american-drone-strikes-are-devastating-yemen-20140414>>.

³⁶⁹ David Doyle, "Drone attacks 'traumatising a generation of children'", online: Channel 4 News <<https://www.channel4.com/news/drone-attacks-traumatising-a-generation-of-children>>.

³⁷⁰ *Ibid.*

³⁷¹ Vivian Salama, "Living in Terror Under a Drone-Filled Sky in Yemen", *The Atlantic* (29 April 2013), online: <<https://www.theatlantic.com/international/archive/2013/04/living-in-terror-under-a-drone-filled-sky-in-yemen/275373/>>.

March 2017.³⁷² People increasingly believe they might be the next in line to be hit by a drone, especially in cases where their family members were killed whilst undertaking simple everyday tasks, such as searching for missing camels.³⁷³ This fear is heightened knowing the paradigm of the current head of the US administration who in 2015 famously stated "...and the other thing is with the terrorists, you have to take out their families."³⁷⁴ On the other end of the sword, a Yemeni lawyer called at President Obama through Twitter in 2012 saying: "Dear Obama, when a U.S. drone missile kills a child in Yemen, the father will go to war with you, guaranteed. Nothing to do with Al Qaeda."³⁷⁵

Yemen, currently finding itself amidst a Humanitarian crisis, seems to also be hit by long-term effects of the current armed conflict including the psychological harm caused by the perpetual armed presence of armed drones. These realities haunt and will continue to haunt generations currently growing up and play a big and decisive role in the Yemeni perception of the outside world.³⁷⁶

³⁷² Spencer Ackerman, "'They're going to kill me next': Yemen family fears drone strikes under Trump", *The Guardian* (30 March 2017), online: <<http://www.theguardian.com/world/2017/mar/30/yemen-drone-strikes-trump-escalate>>; note 359.

³⁷³ Spencer Ackerman, "US drone strikes more deadly to Afghan civilians than manned aircraft – adviser", *The Guardian* (2 July 2013), online: <<https://www.theguardian.com/world/2013/jul/02/us-drone-strikes-afghan-civilians>>.

³⁷⁴ Nick Gass, "Trump: We have to take out ISIL members' families", (2 December 2015), online: POLITICO <<https://www.politico.eu/article/trump-we-have-to-take-out-isil-members-families/>>.

³⁷⁵ Ibrahim Mothana, "Opinion | How Drones Help Al Qaeda", *The New York Times* (13 June 2012), online: <<https://www.nytimes.com/2012/06/14/opinion/how-drones-help-al-qaeda.html>>.

³⁷⁶ Doyle, *supra* note 369.

7

Epilogue

Armed drones are a new reality that will dominate military operations in the next decades. As more and more states are obtaining such capabilities it is important to work on common rules of engagement, which will consider civilian harm and make sure drone operations do not only seek military success but also follow rules set out under IHL

7.1 Epilogue: Why should we be concerned?

Let's hypothesize and suppose our long term-goal in areas where the majority of Drone Strikes takes place is to provide a future based on equal opportunity, peace, social inclusion and restorative justice. These concepts, far from omnipresent within our society, however don't have a monolith interpretation. We must therefore address global issues on a case-by-case basis, listen to communities try to understand the deeper causes behind acts of terrorism.

What we must undeniably acknowledge is that should we wish these concepts to be introduced and respected (in any relevant form and interpretation) we must first address the blatantly unjust mechanisms imposed upon the people living under the presence of armed drones as well as under other shadow of global inequality and injustice.

From a utilitarian perspective, we must understand that armed drones are becoming widely available to armies around the world and our skies might soon be crisscrossed with armed drones without any transparency as to their whereabouts and missions. It is therefore important to set out uniform rules on armed drone engagement, which considers all their particularities: both positive and negative. The United States (as well as other governments currently using armed drones) currently have no public policies in place which would be followed at all times and often give dubious justifications to the engagement of armed drones.

States currently in possession of armed drones must therefore make sure that their state practice follows rules, which they would consider lawful for any state to follow. When more and more states (as well as non-state actors) are developing and procuring armed drone capabilities the risk is growing and multiplying. One might argue that the US drone strikes are part of a wider campaign justified under the

concept of responsibility to protect framework.³⁷⁷ Using a weapon platform that can in theory be less discriminate cannot lower or minimize the thresholds put in place to justify the use of force. Therefore drone strikes can on one end help "operationalize R2P...and elsewhere...operationalize a counterterrorism-driven shift in conceptions of sovereignty."³⁷⁸ Compromising sovereignty without thoroughly convincing justification should, if we are to keep the current international law framework and the concept of the United Nations in place, be avoided at all costs. Additionally, we must disconnect the justification to use force from the consequences the distinct modality in question brings as set out in Chapters 4 and 5 above. On an admittedly trivial level, one must consider the implications of foreign drone attack on US soil and whether the justification to carry out such attacks as in Pakistan, Yemen and Somalia (targeting individuals and hovering above communities) would equally stand in the USA in a case where the use of force alone would be justified. Perhaps the executing state would also consider the targeted individual to be inapprehensible? Would such justification be accepted by the USA (or any other state currently executing unsolicited drone strikes in foreign airspace)?

The Geneva Conventions (widely perceived as the cornerstones of modern day IHL) adopted in 1949, have not had any substantive updates since 1977 when Protocols I and II were adopted, even though warfare has changed drastically since.³⁷⁹ The Conventions on Certain Conventional Weapons was also adopted in the aftermath of the Vietnam War in 1981, almost 40 years ago, whereby its last

³⁷⁷ Frank Sauer & Niklas Schörnig, "Killer drones: The 'silver bullet' of democratic warfare?" (2012) 43:4 Security Dialogue 363 at 373.

³⁷⁸ Rosa Brooks, "Lessons for International Law from the Arab Spring" (2012) 28 Am U Int'l L Rev 713 at 719.

³⁷⁹ "Protocols I and II additional to the Geneva Conventions - ICRC", (17:44:54.0), online: </eng/resources/documents/misc/additional-protocols-1977.htm>.

Protocol (Protocol V) was adopted almost 15 years ago.³⁸⁰ Civilians, as mentioned earlier, increasingly represent the majority of casualties in armed conflicts.³⁸¹ We are at a time when civilian populations visibly suffer from warfare in a shocking number of reports, documentaries and news clips, however not much has been done to address such suffering in terms of preventive measures - measures which would potentially decrease the need for humanitarian aid and impulsive actions of third parties. In order for International Humanitarian Law to survive and remain relevant it must follow (and regulate) the rapid technological advancement of remote and semi-autonomous weapon systems, and even more so with the looming potential of autonomous weapons being used in combat in sight.³⁸²

Drones are, we must conclude, not inherently unjust, they might however be rightfully perceived as such due to non-transparent rules of engagement based on impulse and sentiment rather than (i) prudence, (ii) vigilance and (iii) concern for the impact on civilians. If the civil society does however not actively pursue and demand the shift to more transparent policies in which the public can actively participate we must pose ourselves the famous question: "Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislation? Why has every man a conscience, then?"³⁸³

³⁸⁰ The United Nations Office at Geneva, "The Convention on Certain Conventional Weapons", [online: <https://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument>](https://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument).

³⁸¹ Wenger & Mason, *supra* note 173 at 1.

³⁸² Mark Smith, "Is 'killer robot' warfare closer than we think?", *BBC News* (25 August 2017), [online: <http://www.bbc.com/news/business-41035201>](http://www.bbc.com/news/business-41035201).

³⁸³ Henry David Thoreau, *Civil disobedience, and other essays* (New York: Dover Publications, 1993) at 2.

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