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“The Rule of Opportunity”

An illustrative legal analysis of the use of armed drones by the United States of America and Israel

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Preface & Research Question

I launched my preliminary research on drones by reading articles, reports and literature, watching documentaries and discussing with university professors. I joined Ben Emmerson’s London based inquiry team for an internship as a research assistant during the winter term 2013/2014. Ben Emmerson holds the United Nations (UN) mandate as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, while countering terrorism. He launched in 2013 on request by several UN member states, an inquiry on the use of armed drones in counter terrorism. I was assigned the main tasks of writing and researching on the case studies contained in the second part of the report, which was released in 2014. Additionally to my activities with the UN report, I had the chance to engage with legal experts, journalists, NGO representatives and politicians. I further attended a trial at United Kingdom’s (UK) High Court concerning the involvement of UK intelligence agencies in United States (US) drone strikes and a speech by Ben Emmerson at UK’s Parliament.

Especially important sources for my research are the International Committee of the Red Cross, The Bureau of Investigative Journalism, the reports of the UN Special Rapporteur Ben Emmerson, the UN report of the Special Rapporteur on extrajudicial killings Christofer Heyns, the judgement of Israel’s supreme court on targeted killings, the US presidential guidelines, Amnesty International reports, Human Rights Watch reports, the Geneva Conventions, the International Covenant on Civil and Political Rights and various news sources used for assembling the case studies.

Research Question

What are relevant International Humanitarian Law (IHL) and International Human Rights Law (IHRL) principles, standards and requirements for lethal drone programmes, and what are critical issues in the drone policies of Israel and the United States?
“The drone should follow the law, not the law follow the drone” - Christofer Heyns
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Abstract

VI
1. INTRODUCTION

Remotely piloted aircrafts (RPAs), often referred to as drones (the terms will be used interchangeable), are unmanned remotely steered aircrafts. They find manifold application in civil and military purposes. The military application will however be the exclusive focus of this thesis, with a particular emphasis on armed drone systems.

Drones are capable of conducting airstrikes with high precision. Experts agree that RPAs could have the potential to reduce civilian casualties by allowing greater precision compared to ordinary aircrafts. Video feedback and the constant monitoring of operations could arguably also allow more accountability and transparency. The International Committee of the Red Cross (ICRC) noted: “any weapon that makes it possible to carry out more precise attacks, and helps avoid or minimise incidental loss of civilian life, injury to civilians, or damage to civilian objects, should be given preference over weapons that do not.” Consequently this may entail a preference of drone weapon systems over similar weapon systems. It is however not merely the ‘tool’ as such that matters, but rather how it is being used. Possible risks of the use of drones such as lowering the inhibition threshold to use lethal violence, resulting from no risk of loosing own troops, as well as psychological implications of distance to the battleground, may compromise the potential improvement by escalating the usage of lethal force.

Looking at the short history of the weapon system numerous cases of abuse have occurred. In certain strikes not a single combatant was killed but solely innocent civilians were struck (see e.g.: Radaa case study). The effect on the civilian population does not end with taking lives but includes severe psychological damage, an undermining of cultural practices and education. The two big players in drone warfare

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1 United Nations, Human Rights Council: Report of the Special Rapporteur on extrajudicial, summary or
2 A/68/382, 13 September 2013: para. 28.
3 Human Rights Council: Ensuring use of remotely piloted aircraft or armed drones in counterterrorism
and military operations in accordance with international law,
are the United States of America (US) and Israel. Both of them are involved in an asymmetrical fight against terrorist organizations and non-state armed groups. Their deployment of RPAs sets a precedent for following states acquiring drones. The United Nations (UN) Special Rapporteur on extra judicial killings, Christofer Heyns, pointed out: “The expansive use of armed drones by the first States to acquire them, if not challenged, can do structural damage to the cornerstones of international security and set precedents that undermine the protection of life across the globe in the longer term.”

Their practice must be met and challenged with tight regulation under the principles of international law. Criticism of drone strikes was fuelled by the lack of information, which stems from the involvement of non-transparent and unaccountable institutions like the Central Intelligence Agency (CIA).

1.1. Drone’s functionality, capabilities and implications

Drones are not an entirely new invention. The ‘Dennymite’, the first mass-produced unmanned airplane in history, was used for the training of anti-aircraft gunners during the Second World War. In the Vietnam War the reconnaissance drone ‘The Firefly’ was already successfully used by the US. Since 1971 Israel began using drones for surveillance purposes in Egypt. In a next stage RPAs were used for target acquisition when Israel deployed them in 1982 in the Second Lebanon War. The use of drones for delivering missiles or bombs is however relatively new. The first drone strike has probably been conducted by the US in course of the war in Afghanistan in 2001. The first Israeli drone strike is believed to have taken place in 2004 in Gaza. Israel operates its drones

4 A/68/382, 13 September 2013, para. 12.
in comparison to the US and the UK, which are the three nations using armed drones, under the strictest secrecy policy of not even officially confirming the use of RPAs. Thus it is possible that there were earlier Israeli drone strikes.  

Drones have a set of advantages over piloted aircrafts. With a high-resolution camera ball they allow persistent surveillance, reconnaissance, monitoring of the battleground and real-time intelligence gathering without putting a pilot at risk. The operators control them in safe distance away from combat or operation area via satellite link. Besides being controlled by a crew of sensor operators and pilots, drones like the ‘Predator’ can run autonomously to execute reconnaissance missions.  

Equipped with infrared camera and radar nighttime observance and targeting is possible. The time RPAs can stay in the air depends on their type and size. In case of the medium altitude long endurance platforms (MALE) like the Israeli ‘Heron’ and ‘Hermes’ as well as the US ‘Predator’ and ‘Reaper’, they are capable of staying in the air for around 20-36 hours (‘Heron’).  

Armed drones have a laser targeting system and additional sensors for surveillance. The actual strike with precision laser guided ammunition (e.i. hellfire missiles, GBU 12 etc.) can then be carried out directly from the drone or from other aircrafts. Thus drone systems greatly reduce the time between identification of a possible target and conducting a lethal strike. RPAs allow constant surveillance over large territories.

The economical advantages play certainly an important role for the increasing reliance on this weapon system. Compared to ordinary aircrafts the plane and the pilot training

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7 Dobbing & Cole, 2014, pp. 6-10.
10 Valdes, 1 April 2014.
11 A/68/382, 13 September 2013, para. 12.
are much cheaper. One F2 jet costs as much as 85 Predator drones including pilot training. Consequently they result in an economization of airstrikes.

1.2. Targeted killings in the context of counterterrorism

Terrorist acts are among the major threats to international peace, security and human rights. They are prohibited within and outside of armed conflicts. In times of armed conflict terrorist acts may constitute war crimes, while in peacetime they are criminal in nature and must be met with law enforcement measures. The UN addressed terrorism in several General Assembly (GA) and Security Council (SC) resolutions, like UN Security Council Resolution 1373 (28 September 2001), which for example requires states to criminalize terrorist acts as well as the financing of terrorism and to strengthen international cooperation in criminal matters. Measures to counter and to prevent terrorism simultaneously stipulate a threat to human rights, peace and security.

In course of the ‘Second Intifada’ the concept of targeted killings was widely used to debate Israel’s policy of ‘targeted frustration’ of terrorism, which involved targeted killings of alleged members of terrorist organizations fighting against Israel. After the attacks of 11 September 2001 the debate also reached the US. Especially under Obama’s administration drone strikes became the preferred means to conduct targeted killings in counterterrorism operations. Targeted killings are a broad concept referring to “the intentional killing by a state of an individual identified in advance and not on the state’s custody.” Such killing operations are among the harshest means in the repertoire of countering terrorism. The moral and legal justifications for killing

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12 Singer, 2009, p. 33.
suspected terrorists outside of the state’s territory are highly disputed. The so called “personality drone strikes”, where the identity of the target is most likely known, can be labelled to be targeted killings. The claimed legal justifications by states will be outlined throughout this paper.

When counter terrorism is not in compliance with human rights (and other relevant international law frameworks when applicable) it is arguably a short-lived strategy, which ultimately may improve the recruitment conditions for terrorist forces. An approach in strict compliance with international human rights law (IHRL) and international humanitarian law (IHL) may however have a lasting effect.

“In practical terms, moreover the case has compellingly been made that counter-terrorism measures grounded in a State’s respect for human rights and the rule of law improve the prospects for success against terrorism over the long term. As former Secretary-General Kofi Annan put it, violating human rights in counter-terrorism efforts cedes the high ground to terrorists and yields what they seek: a breakdown of order and improved conditions for recruitment.”

It is thus of utmost importance to ensure compliance with human rights while countering terrorism. Not only in the interest of civilians, but also in the interest of the nations ‘defending’, all measures of countering terrorism must be in compliance with the applicable legal framework. It is not an altruistic act to do everything possible to spare civilians and to obey rules and principle of international law as, but a mere necessity.

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2. LEGAL FRAMEWORK

When analysing drone strikes in their compliance with international law it is of crucial importance to determine whether a killing took place inside or outside of an armed conflict. This assessment clarifies if IHL is applicable. While the majority of drone strikes factually took place within armed conflicts (e.g. Afghanistan), we have seen also a significant number taking place outside of active hostilities in rather undefined or unclear conflict situations. This significantly complicates legal justifications and the assessment of the applicable framework. To render targeted killing operations in this context lawful it seems almost indispensable that states establish a war paradigm, which makes IHL applicable and allows the killing of combatants (see below).

The given complexity and the continuous development of the Israel - Palestine and US - al-Qaida conflict theatre makes it necessary to evaluate drone strikes case by case, based on period and place of each strike. The analysis and elaboration of the legal framework will therefore also focus on certain periods and regions. For Israel the focus will be on strikes in Gaza during Operation Cast Lead in 2008/09. Concerning the US selected drone strikes in Yemen, during the years 2011 and 2012 shall be analysed.

First it is however necessary to give an overview on the applicable legal regimes, norms and relevant legal challenges.

2.1. Applicable legal regimes

Two international law regimes are applicable, the international human rights law- (IHRL) and the international humanitarian law (IHL) regime. Particularly important treaties are the Geneva Conventions (plus additional protocols) and the International Covenant of Civil and Political Rights (ICCPR). While IHL may only be applied during
times of armed conflicts, the ICCPR has to be applied at all times. Consequently during armed conflicts both legal regimes have to be applied complementarily. In situations where the legal regimes conflict and IHL, which is “designed to regulate the conduct of hostilities”, provides the more specific regulation IHL complements the interpretation of IHRL (lex specialis). This is for example the case when a combatant is killed, which is an integral part of armed conflict and is specifically regulated under IHL.

Outside of an armed conflict when solely IHRL is applicable, the life of individuals is strongly protected under Article 6 ICCPR ‘The Right to Life’. A lethal drone strike can only rarely be lawful, “because only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the sole or primary objective of an operation.” During armed conflicts the right to life continues to apply. The killing of a combatant, as the primary objective of an operation, becomes however permissible, because the prohibition against arbitrary deprivation of life is interpreted in terms of IHL. The life of civilians and other protected persons remains still protected under IHL and principles like proportionality and distinction provide constraints on the use of lethal force.

Other potentially important IHRL norms under the ICCPR are Art. 7 (The Prohibition of Cruel, Inhumane, and Degrading Treatment or Punishment), Art. 9.1 (The Right to Liberty and Security), Art. 17 (The Right to Freedom from Arbitrary or Unlawful

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19 A/68/389, 18 September 2013, para. 60.
20 A/68/382, 13 September 2013, para. 40.
Interference with Privacy, Family, and Home) and Art. 21 (The Right to Peaceful Assembly). \(^{22}\)

The most relevant IHRL norm ‘The Right to Life’, circumstances to establish an armed conflict, applicable IHL norms and principles during times of armed conflicts shall in the following chapters be discussed.

2.2. The Right to Life

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” \(^{23}\)

The right to life encompasses most other human rights. It is international customary law, *ius cogens* and its foundational status faces no serious challenges. \(^{24}\) Today the right to life is enshrined in various international human rights documents (like in Article 6 ICCPR) including corresponding monitoring mechanisms that ensure this protection.

The right to life is not an absolute right and it thus allows exceptions. A list of those exceptions may most detailed be found in the European Convention on Human Rights Article 2/2 providing general guidance. Under those “very narrow and exceptional circumstances” \(^{25}\) deprivations of the right to life can be lawful: “(a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

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\(^{24}\) A/68/382, 13 September 2013, para. 29

The European Court of Human Rights established in the case *McCann and others vs the United Kingdom* that a counterterrorism operation amounts to a violation of the right to life, when it had not been controlled and planned to “minimize, to the greatest extent possible, recourse to lethal force”.\(^{26}\) The court held that the right to life does not define situations for the use of deadly force, but only permits the use of force in certain instances. However, the force might as an unintended outcome still result in a deprivation of life. A mere shoot to kill policy violates the right to life.\(^ {27}\) Pursuing force under the described exceptional aims might furthermore be justified when based on “honest believe which is perceived for good reason to be valid at the time, but subsequently turns out to be mistaken.”\(^ {28}\)

A possible scenario where it might be lawful to deprive someone of his life is a hostage situation where an intentional killing is the only way to protect the life of hostages.\(^ {29}\) It has however been argued, that a targeted killing might only be permissible, “when it was clear that an individual was about to kill someone (making lethal force proportionate) and there was no other means of detaining the suspect (making lethal force necessary)”.\(^ {30}\) To render a lethal attack in defence of a person justified the threat to life must be immediate, about to materialize and it has to be the only means to prevent that threat. These requirements are formulated in the principle of proportionality and necessity.

The interplay between the principles of proportionality and necessity imposes a maximum permissible level of force corresponding to the threat, while necessity obliges to minimize the used force as much as possible, irrelevant how much force might have been proportionate.\(^ {31}\)


\(^{28}\) Melzer, 2008, p. 106.

\(^{29}\) A/68/382, 13 September 2013, para. 35.

\(^{30}\) A/68/382, 13 September 2013, para. 33.

Proportionality

“The proportionality requirement implies that it is only legal to kill a person in self-defence or in defence of others against dead or serious injury.”

The use of lethal force cannot be conducted to punish an earlier committed act (except lawful application of the death penalty), but it has to respond to an actual on-going danger for others in order to be in compliance with IHRL. The ‘mere’ membership to a terrorist organization is not sufficient to make an individual targetable. Under IHRL a killing can never be the sole objective of an operation. “The use of lethal force must be a strictly unavoidable consequence of an operation pursuing a legal purpose e.g. effecting an arrest.”

Necessity

The requirement of necessity consists of two elements: “The future threat must be imminent, and the least harmful means of power e.g. arrest must be used before the use of deadly force.” Regarding self-defence the concept of imminence requires that an individual is temporarily about to attack and manifests the future aggression.

It can be concluded that a targeted killing operation, when being evaluated outside of an armed conflict, is most likely violating the right to life.

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33 ibid.
34 ibid.
### 2.3. Existence of an Armed Conflict

The existence of an armed conflict is the deciding element for the applicability of IHL. In international humanitarian law there is no full definition of an armed conflict.\(^{36}\) The International Criminal Tribunal for the former Yugoslavia (ICTY) however proposed in its judgement *Prosecutor vs. Tadic* a commonly referred definition: "we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." \(^{37}\)

The judgement furthermore addresses the temporal and regional applicability of IHL during armed conflicts:

"International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."\(^{38}\) IHL establishes a distinction between non-international and international armed conflicts. One type of armed conflict can evolve in the other type.

The ICRC provides two definitions for these types of armed conflicts:

1. “International armed conflicts exist whenever there is resort to armed force

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\(^{36}\) Vité, Sylvain: *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations* in International Review of the Red Cross Vol. 91 number 873, March 2009, p. 70.


\(^{38}\) ICTY, 1996, para. 70.
between two or more states."³⁹

2. “Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [Party to the Geneva conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization.”⁴⁰

Regardless of whether the armed conflict is of international or non-international nature, customary international humanitarian law applies and imposes basic humanitarian law obligations on all parties to the conflict like proportionality and distinction.⁴¹ It has furthermore been suggested that due to a rise of non-international armed conflicts (NIAC) with connected brutality, as well as conflicts that are of a not easily classifiable nature rules of international armed conflicts (IAC), shall also be applied to NIACs.⁴² Generally the deciding question is whether or not the criteria for an armed conflict are satisfied. A further qualification of NIACs and IACs is mainly relevant in terms of a different distinction between civilians and combatants.⁴³ Especially the legal framework for NIAC can provide important insights for the conflicts in question, as it deals with non-state actors, who were the primary targets of drone strikes.

⁴⁰ ICRC, 2008, p. 5
2.3.1. International armed conflicts

International armed conflicts occur when one or more states use armed force against other state, regardless of intensity and reason. There is no formal declaration of war or recognition of the situation required, but an IAC is established by factual conditions. It is furthermore not necessary that the opposing parties acknowledge each other’s government. With ‘Additional Protocol I’ the definition of IACs is extended to “include armed conflicts in which people are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation).”\footnote{ICRC, 2008, pp. 1-3.}

Israel claims to be involved in an international armed conflict with the Hamas. Another point of view is that due to Israel’s on-going long-term occupation of Palestinian territories, the conflict parties and the missing ratification of Geneva Convention’s ‘Additional Protocol I’ the conflict is of non-international nature.\footnote{Naftaly, Orna Ben & Keren, Michaeli: Public Committe against Torture in Israel v. Government of Israel Case No. HCJ 769/02, pp. 459-456 in The American Journal of International Law, Vol. 101 No. 2, 2007, p. 460.} Israel’s ministry of external affairs consequently decided that rules governing IAC and NIAC complemented by customary IHL must be applied, because of the \textit{sui generis} nature of the conflict.\footnote{Israel Ministry of Foreign Affairs: The Operation in Gaza -Factual and Legal Aspects, 29 July 2009, para. 30 available at \url{http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/operation_in_gaza-factual_and_legal_aspects.aspx} (consulted on: 4 June 2014).}

2.3.2. Non international armed conflicts

Today most armed conflicts fall in the category of non-international armed conflicts.\footnote{ICRC: Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts, Geneva, 2008 available at \url{http://www.icrc.org/eng/resources/documents/publication/p0923.htm} (consulted on 25 March 2014).} A major part of drone strikes have been conducted against members of non-state armed

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\item \footnote{Israel Ministry of Foreign Affairs: The Operation in Gaza -Factual and Legal Aspects, 29 July 2009, para. 30 available at \url{http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/operation_in_gaza-factual_and_legal_aspects.aspx} (consulted on: 4 June 2014).}
\item \footnote{ICRC: Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts, Geneva, 2008 available at \url{http://www.icrc.org/eng/resources/documents/publication/p0923.htm} (consulted on 25 March 2014).}
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groups. The United States also declared to be involved in an armed conflict of non-international nature with al-Qaida and associated forces.\(^48\)

Geneva Convention’s ‘Common Article 3’ covered armed conflicts not of international nature, which are taking place within a state’s territory and established a fundamental (or minimum) set of rules for this type of conflict. It is the only article of the Geneva Conventions that applies to NIACs, which makes it to a sort of “convention miniature”.\(^49\) Common Article 3 is not based on reciprocity, but applies automatically to the conflict partners and is international customary law. The article comprises fundamental rights or ‘rules of humanity’ like the prohibition of murder, torture and execution without a judgment by a “regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”\(^50\) ‘Additional Protocol II’ on the protection of victims in NIACs supplements and develops Common Article 3 “without modifying its existing conditions of application.”\(^51\) The definition in ‘Additional Protocol II’ is in two aspects narrower than the notion of NIAC under common Article 3:

“Firstly, it [Additional Protocol II] introduces a requirement of territorial control, by providing that non-governmental parties must exercise such territorial control "as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Secondly, ‘Additional Protocol II’ expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organised armed groups. Contrary to common Article 3, the Protocol does not apply to armed conflicts occurring only between non-State armed groups.”\(^52\)

\(^{48}\) A/68/389, 18 September 2013, para. 62.
\(^{51}\) ICRC, 2008, p. 4.
\(^{52}\) Ibid.
In practice the criterion that the armed conflict takes place within the borders of a state has lost its importance. Any armed conflict that arises between governmental armed forces and non-governmental armed groups or only among non-governmental armed groups, can be defined to be a NIAC.\(^{53}\)

There are more possible constellations of the parties to a NIAC. One relevant situation is when a state fights on the side of the government against terrorist groups operating on the ‘host’ states territory:

“Over the past decade other situations that may be classified as NIACs, in which the non state side has likewise been called ‘terrorist’, have also occurred. In this category would fall armed conflicts involving multinational or foreign forces fighting in the territory of a ‘host’ state -with the host government’s consent-against one or more organized armed groups.”\(^{54}\)

The situation complicates significantly when the fight against terrorists happens on another states territory without the host states consent. The resulting tension would then not only be a hostile act against an armed group, but also against the host state and its sovereignty. Consequently the directed force against the host state was argued to stipulate the law regulating IACs.\(^{55}\) An operation against an individual inside the territory of another state can, however, even without state consent be lawful in justified self-defence as long as the host state is unable or unwilling to act.

There are two cumulative criteria that need to be fulfilled in order to establish an armed conflict of non-international nature, which also distinguish NIACs from less serious forms of violence: “the intensity of the conflict and the organization of the parties of the

\(^{53}\) ICRC, 2008, p. 3.

\(^{54}\) Pejic, Jelena: *Armed Conflict and Terrorism: There is a (Big) Difference*, pp. 171-204 in Salinas de Frias, Ana Maria & Samuel, Katja & White Nigel (eds.): *Counter-Terrorism, International Law and Practice*, Oxford University Press, 2012, p.181.

\(^{55}\) A/68/382, 13 September 2013, para. 54.
Unless the potential conflict does not fulfil these criteria it cannot amount to be a NIAC.

**Intensity and Parties to the conflict**

The intensity threshold to qualify a NIAC is higher than internal disturbances, tensions, riots and acts of banditry. The armed violence should not be “sporadic and isolated but protracted” (protracted refers more to intensity than duration). It remains controversial whether the actions of a transnationally operating armed group can be aggregated to one conflict to satisfy the intensity threshold.

The second criterion concerning the organization of the parties to the conflict requires a potential party to a NIAC to be sufficiently organized: “International jurisprudence has determined the relevant indicative criteria, which include the existence of a command structure, of headquarters and of a group’s ability to plan and carry out military operations.”

The US government has argued that force may also be used against co-belligerents (associates) of an acknowledged organized armed group, an argument that was met with resistance. The established legal opinion is that each group has to be evaluated individually. It remains questionable whether Al-Qaeda’s activities can still satisfy the criteria of organization and intensity, as the system got scattered and weaker in organizational structure, but generally al-Qaeda remains a threat.

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56 A/68/382, 13 September 2013, para. 55.
57 ICRC, 2008: p. 3.
58 A/68/382, 13 September 2013, para. 57.
60 A/68/382, 13 September 2013, para. 56.
61 A/68/382, 13 September 2013, para. 59.
2.3.3. Asymmetrical armed conflicts

“Drones come from the sky, but leave the heavy footprint of war on the communities they target.”

The characteristics of asymmetrical conflicts are vast disparities between the competing parties. The differences can be in military capabilities or/and tactics. So far drone strikes took place in asymmetrical conflicts with the States combating non-state armed groups or/and terrorist organizations. In those conflicts the state armed forces have better technological systems and are better organized, while the opposing groups try to encounter their disadvantages by blending into the civilian population. The disadvantage in military capacity however, does not free from obligations under IHL and IHRL: “the military capacity of the conflicting parties is irrelevant to their duty, under international humanitarian law [and IHRL], to take all feasible measures to avoid loss among civilians and damage to civilian property.”

Unlike State armed forces, members of armed groups often do not wear insignia or uniforms. This lack in distinguishing from the civilian population poses a breach of humanitarian law, which could potentially amount to be a war crime and the process of identifying legitimate targets becomes complicated.

“The failure of a combatant to distinguish himself from the civilian population is certainly a breach of the law of war, but may even constitute perfidy. In particular, the

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*63 A/68/382, 13 September 2013: para. 75.


*65 Ibid.

wearing of civilian clothes as a disguise to kill, wound or capture the enemy is considered perfidious. Acts of perfidy may moreover be punished as war crimes.\textsuperscript{67}

In case of terrorist organizations the tactics involve not only a refuse to distinguish ‘passively’ by not wearing uniforms, but also ‘actively’ by deliberate attacks on the civilians. Consequently the civilian population is especially vulnerable and suffering in these types of conflicts.

For drone strikes two relevant points relating to the nature of an asymmetrical conflict can be noted. Firstly, the current generation of drones is not equipped to defend against attacks, which makes them for states primarily effective in these asymmetrical situations, where the opposing party to the conflict has no proper means of defence like interceptor planes. Secondly, the accumulation of reliable targeting information is particularly challenging in these asymmetrical conflict situations.

\textbf{2.3.4. United States of America - Al-Qaida}

The US claims to be involved in a non-international armed conflict with al-Qaida, Taliban and associated forces that are transnationally operating.\textsuperscript{68} US drone strikes conducted in Yemen are part of this conflict constellation.

The conflict definition is questionable, because of the undefined geographical scope and the following possible violation of the sovereignty of states. Furthermore it remains a central question, whether the different transnational conflicts can be legally aggregated to one conflict to fulfil the intensity threshold. It is also not agreed if it is viable to engage in a non-international armed conflict with a transnationally operating group, which could imply that the conflict has no territorial boundaries.\textsuperscript{69} Additionally the

\textsuperscript{68} A/68/389, 18 September 2013, para. 62.
\textsuperscript{69} A/HRC/25/59, 28 February 2014, para. 71.
armed groups have to be assessed individually and may not be subsumed under associated forces. The for this context relevant al-Qaida branch, al-Qaida in the Arab Peninsula (AQAP), poses with their regular attacks on security officials a continuing threat to the security situation in Yemen. A potential of international attacks persist even though their activities are at the moment confined mainly to Yemen, which makes them in certain periods a legitimate target for the Yemen government.\textsuperscript{70} If they can also be legitimately targeted by the US shall be assessed later.

2.3.5. Israel - Hamas

Israel claims to be involved in a continuing armed conflict with the Hamas.\textsuperscript{71} In the Case \textit{Public committee against torture in Israel vs. Israel} Israel’s high court of justice rules that the conflict is characterized to be of international nature as it crosses the border of a state. The conflict was decided to be not only against the Hamas, but also against various terrorist organizations active in Judea, Samaria and the Gaza Strip.\textsuperscript{72} Israel has relied on their right to self-defence as well as preventive self-defence and referred to their obligation to protect its citizens from terrorism to justify military operations.\textsuperscript{73} The judgement by Israel’s Supreme Court seems in its argumentation flawed. The crossing of the border as outlined by the court cannot establish an IAC, but it is rather necessary to assess the conflict parties.\textsuperscript{74}

The criticism of this conflict definition surrounds among other issues Israel’s role in having effective control over the Gaza Strip for certain periods, which made Israel an occupying power. It is the prevalent position of international organizations like the UN, that the Gaza Strip is under military occupation by Israel, which has been affirmed by the Security Council, the Human Rights Committee and the General Assembly. The

\textsuperscript{70} S/2014/41, 23 January 2014, para. 17.
\textsuperscript{72} Naftaly & Keren, 2007, p. 460; Supreme Court of Israel (sitting as the High Court of Justice): \textit{Public Committee of Torture in Israel vs. Government of Israel}, HCJ 769/02, 13 December 2006, para. 16.
\textsuperscript{73} Israel Ministry of Foreign Affairs, 2009, para. 15-17.
\textsuperscript{74} Naftaly & Keren, 2007, p. 464.
applicable legal framework is thus belligerent occupation relying on the 4th Geneva Convention, the Hague Regulations and IHRL. Additionally customary international humanitarian law is obligatory for all parties to the conflict.\textsuperscript{75}

In course of the Israel’s UPR in 2013 the delegates made clear that in their view: “the Gaza Strip had not been under Israeli control since 2005, following the implementation by Israel of the disengagement initiative. Since then, Israel could clearly be said to have no effective control in the Gaza Strip.”\textsuperscript{76} While the disengagement took place to a great extent, Israel maintained control over important fields like Gaza’s air space, territorial waters, as well as over the flow of goods and persons into/from Gaza. It has thus been argued that after 2005 Gaza remained under effective control and occupation of Israel (criteria: effective control and non by sovereign state approved intervention)\textsuperscript{77}.\textsuperscript{78} The 4th Geneva Convention includes prohibitions (e.g.: prohibition of targeted killings) for the occupying powers, but also positive obligations to ensure satisfaction of basic needs and necessities.\textsuperscript{79}

Violent acts by the Hamas and military operations of Israel did for confined periods transform the situation of occupation into an armed conflict, when violence was protracted, organized and met the required intensity threshold.

“Situations of military occupation can amount to an armed conflict if organized and protracted armed violence rises to the required intensity in the area. While it is questionable whether this level was reached in the Occupied Palestinian Territories for

\textsuperscript{76} A/HRC/25/15, 29 December 2013, para. 122.
\textsuperscript{77} Vité 2009, p. 74
\textsuperscript{79} A/HRC/12/37, 19 August 2009, para. 5.
most of the time since 2000, it has been recognized that this had ‘at times’ been the case.”

Geneva Conventions ‘Additional Protocol I’ would suggest that the resulting conflict is indeed of an international nature, being a conflict against alien occupation.\(^\text{81}\) Israel has not ratified ‘Additional Protocol I’. The government however still confirms without naming concrete articles, that certain provision of the protocol are international customary law.\(^\text{82}\) When ‘Additional Protocol I’ would not be applied, long-term occupation and the conflict parties would suggest the conflict to be of non-international nature.\(^\text{83}\) The complex and evolving conflict situation makes it necessary to pay a close look to confined time periods to assess whether IHL is applicable alongside IHRL, which will be evaluated later.

### 2.4. Substantial International Humanitarian Law Standards

In the following chapter some of the crucial IHL standards, applying to drone strikes shall be outlined. They can be applied on the case studies, which will be elaborated in the country sections and form part of a set of standards that must be applied on drone strikes within armed conflicts.

#### 2.4.1. Distinction

In times of an armed conflict it is necessary to determine who deserves the protection of a civilian and who is a legitimate target. The principle of distinction is international customary law and applies not to persons, but also to objects. It states that:

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\(^\text{80}\) Nolte, 2011, p. 3.

\(^\text{81}\) Naftaly & Keren, 2007, p. 460.

\(^\text{82}\) Israel Ministry of Foreign Affairs, 2009, para. 16.

\(^\text{83}\) Naftaly & Keren, 2007, p. 460
“The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”

In case of doubt over the nature of a potential target there is currently no clear consensus which standard has to be applied. For IACs Article 50 (1) of ‘Additional Protocol I’ prescribes that “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” State parties have raised reservations about this standard. For NIACs the issue of doubt has not properly been addressed in state practice. The ICRC concludes that: “when there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious.”

In IACs all individuals who are not members of the armed forces of a party to the conflict (or participants of a levée en masse) are civilians and enjoy protection unless and for such time as they take a direct part in hostilities.

In NIACs according to ICRC’s Interpretive Guidance on Direct Participation in Hostilities legitimate targets in NIACs are members of armed groups whose continuous function is to take a direct part in hostilities, civilians directly participating in hostilities and members of state armed forces. Civilians “will loose their protection from direct attack based on conduct when, and only for such time as, they engage in specific acts of direct participation.” This means that civilians who take a “direct part in hostilities” keep their protected status, but “for such time” as they engage in specific acts they

86 Ibid.
88 A/68/382, 13 September 2013, para. 69; Melzer, 2009, p. 27.
become legitimate targets of an attack.\textsuperscript{89} During their engagement they must respect IHL alike state armed forces.\textsuperscript{90} This critical step of withdrawing civilian protection must be taken with “all feasible precautions”.\textsuperscript{91} When ceasing direct participation “IHL restores the civilian’s protection against direct attack each time his or her engagement in a hostile act ends”.\textsuperscript{92} Members of armed groups with a continuous combat function must openly declare their disengagement or express it through “conclusive behaviour, such as lasting physical distancing from the group and reintegration into civilian life”.\textsuperscript{93} Members of armed groups with a continuous combat function and civilians directly participating in hostilities do not enjoy combatant privileges, as they remain civilians and are not immune of prosecution under national criminal law.\textsuperscript{94}

Weapons and means of warfare must be chosen to avoid or minimize incidental loss and injury of civilians and civilian objects.\textsuperscript{95} The killing of a pre-identified combatant in an established armed conflict, may be regarded as the application of the humanitarian law principle of distinction:

“In a situation qualifying as an armed conflict, the adoption of a pre-identified list on individual military targets is not unlawful; if based upon reliable intelligence it is paradigm application of the principle of distinction.”\textsuperscript{96}

The capabilities of drones including the possibility to deviate missiles to prearranged areas till shortly before impact, live surveillance and improved situational awareness, are technological advantages for complying with the principle of distinction.

\textsuperscript{89} Naftaly & Keren, 2007, p. 461.
\textsuperscript{90} Melzer, 2009, p. 85.
\textsuperscript{91} Melzer, 2009, p. 74.
\textsuperscript{92} Melzer, 2009, p. 71.
\textsuperscript{93} Melzer, 2009, p. 72.
\textsuperscript{94} Melzer, 2009, p. 85.


\textsuperscript{96} A/68/389, 18 September 2013, para. 24.
“If used in strict compliance with the principles of humanitarian law, they [Drones] can reduce the risk of civilian casualties by significantly improving overall situational awareness. The ability of drones to loiter and gather intelligence for long periods before a strike, coupled with the use of precision-guided munitions, is therefore a positive advantage from a humanitarian law perspective.”97

Still a drone strike to be distinctive would need to be based on reliable intelligence and further humanitarian law principles need to be equally complied with. Shrapnel injuries and wrong targeting information remain serious threats to the life of civilians and protection of civilian objects.98 Without official reliable data on strikes it is not possible to draw final conclusions on whether drone strikes are factually more precise than conventional airstrikes. One of the currently most reliable source for US drone strike victim estimates, ‘The Bureau of Investigative Journalism’ indicates in July 2014 that: in Yemen 339-494 were killed including 64-83 civilians, in Pakistan 2,342-3,785 were killed including 416-957 civilians and in Somalia 10-24 total including 0-1 civilian.99

**Direct Participation in Hostilities**

In order to determine if a civilian is taking a direct part in hostilities ICRC has suggested a cumulative three step test: “(1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.”100

The interpretation of the ICRC remains not uncontested. It has been argued that with this interpretation an unequal burden is placed on states action, while terrorist armed

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97 A/68/389, 18 September 2013, para. 28.
98 A/68/382, 13 September 2013, para. 71.
100 Melzer, 2009, p. 46.
groups themselves do not obey international law. The ‘direct participation in hostilities criterion’ was criticised that it is not necessary to prove this link regarding state armed forces. The mere membership to an armed state force is enough to collectively render included individuals legitimate targets. On the contrary an individual assessment is proposed to render members of armed groups targetable and individuals merely indirectly participating in hostilities retain their civilian status. The three-step test was furthermore criticised to be not workable and practical.\textsuperscript{101}

(1) Threshold of Harm

According to the ICRC guidance the threshold of harm necessary to establish direct participation can be reached in two ways: “This threshold can be reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack.”\textsuperscript{102} It is however, not required that this harm is materialized, but only that there is a likelihood that the act in question will result in this harm. In regards to acts of military nature any act affecting the military capacity or operation adversely, is sufficient to satisfy this criterion. Besides death, injury etc. of military personnel these negative effects might be “sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications.”\textsuperscript{103} However, when a civilian refuses to collaborate with the military, this would not satisfy the threshold of harm. Although they might be prohibited under IHL for example roadblocks, interruption of supplies even deportation would not satisfy the threshold of harm.\textsuperscript{104}

\textsuperscript{101} Maxwell, 2012, pp. 52-54.
\textsuperscript{102} Melzer, 2009, p. 47.
\textsuperscript{103} Ibid.
\textsuperscript{104} Melzer, 2009, pp. 49-50.
(2) Direct Causation

 Civilians may only be targetable when the direct causation criteria is satisfied: “direct causation should be understood as meaning that the harm in question must be brought about in one causal step.” ¹⁰⁵ Members of the military wing of a non-state group can thus be targeted like state armed forces, however, only as long as they have the continuous function to take a direct part in hostilities. Melzer explains that the assembling and storing of an improvised explosive device (IED) in a workshop, as well as smuggling or purchasing its components would still be an indirect participation, while the planting of the IED clearly constitutes the direct causal link. ¹⁰⁶ Weapons and equipment transport, production, design and research “unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm” ¹⁰⁷ do not constitute a direct causation. In collective dimensions an act that is not directly causing harm, but “constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm” ¹⁰⁸ it would still fulfil the requirement of direct causation, this would include instructions and assistance to troops as well as target marking. Driving an ammunition truck to an active firing position at the front line, would then also be an integral part of combat operations and fulfil the direct participation requirement. ¹⁰⁹ An operator of an al-Qaida trainings camp, who is not member of an armed group, would be targetable during training or in close proximity of his training camp. To make him targetable outside of his activities connected to the training camp there must be additional evidence about him being member of al-Qaida. ¹¹⁰ Other forms of aiding or supporting armed groups like providing food to armed forces are indirect participation. ¹¹¹

¹⁰⁵ Melzer, 2009, p. 53.
¹⁰⁶ Melzer, 2009, p. 54.
¹⁰⁷ Melzer, 2009, p. 53.
¹⁰⁸ Melzer, 2009, pp. 54-55.
¹⁰⁹ Melzer, 2009, p. 52.
¹¹⁰ Melzer, 2009, p. 53.
¹¹¹ Melzer, 2009, p. 56.
(3) Belligerent Nexus

The third criterion that needs to be fulfilled is that of Belligerent Nexus. It means that: “an act must specifically be designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.” Melzer, 2009, p. 58. When an act is not designed to be of support to a conflict party, it cannot be part of the conflict and must be addressed with law enforcement measures. Melzer, 2009, p. 59.

2.4.2. Proportionality

The alleged ability of drone strikes to reduce civilian casualties is one of the frequent arguments to support the usage of laser guided precision ammunition fired from RPAs. However, past drone strikes show that non-proportionate civilian casualties are not at all a matter of the past, but concerns about proportionality are among the most important issues surrounding drone strikes.

The principle of proportionality, which is established to be a norm with customary law status, prescribes to wage the military advantage against the expected loss of civilian life or objects:

“Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”

The military advantage must be substantial and relatively close in time. It has been differently interpreted whether the military advantage refers to the isolated attack or to

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112 Melzer, 2009, p. 58.
115 Ibid.
the overall anticipated advantage. In any case all information from available sources has to be assessed to plan, decide and execute an attack.\textsuperscript{116}

\textbf{2.4.3. Precautions}

The ICRC identifies consistent with judgements of the ICTY, the customary law status of the rule of precautions in attacks. The rule of precautions in attack state that:

\begin{quote}
„In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.“\textsuperscript{117}
\end{quote}

The term feasible has been interpreted to mean practicable or practically possible while taking into account all circumstances. Decision makers have to obtain “best possible intelligence, including information on concentrations of civilian persons, important civilian objects, specifically protected objects, the natural environment and the civilian environment of military objectives.”\textsuperscript{118} According to the ICRC in case of slightest doubt on the nature of a target additional information must be acquired before proceeding with an attack. ICRC’s interpretation is not universally shared, for Israel significant doubt is required to make further investigations necessary. In conventional IHL different objects also correspond to different standards of proof. An object that is by nature military would be met with less scrutiny than an object that is normally of civilian nature (schools etc.).\textsuperscript{119} Special Rapporteur, Christofer Heyns mentions in his report that with

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\textsuperscript{117} Ibid.
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\textsuperscript{119} Heller, Kevin Jon (a): ’One Hell of a Killing Machine’ Signature Strikes and International Law, pp. 89-119 in Journal of International Criminal Justice 11, 2013, pp. 103-104.
\end{flushleft}
drone’s capacity to extensive surveillance there comes “greater concomitant responsibility to take precautions.”

More substantial content to the rule is given in specific precautions norms, which prescribe standards on: proper target verification, choice of means and methods of warfare, prior assessments of the effects of an attack, advance warnings of attacks that may effect the civilian population (unless not feasible) and preference of targets with the least civilian damages.

2.4.4. Accountability & Transparency

Both IHRL and IHL require states to provide mechanisms for conducting effective remedies and investigations into alleged violations of IHL and IHRL:

IHRL obliges states to hold individuals responsible for human rights violations. An absence of investigations with adequate measures of reparation in face of allegations constitutes a violation of the human rights norm itself. IHL obliges states to provide for accountability of rights violations committed by its organs, persons and entities exercising governmental authority. Customary IHL norms prescribe that: “A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.” The effects of a lack of accountability are dramatic. For counterterrorism operations it is ultimately also counterproductive not to provide accountability, as terrorists or armed groups can easily gain ground in absence of an accountable and transparent state authority.

120 A/68/382, 13 September 2013, para. 71.
122 A/68/382, 13 September 2013, para. 90.
UN Special Rapporteur, Ben Emmerson, concluded in his investigations that: “in any case in which civilians have been, or appear to have been, killed, the State responsible is under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation. This obligation is triggered whenever there is a plausible indication from any source that civilian casualties may have been sustained, including where the facts are unclear or the information is partial or circumstantial.”

States are under the obligations to conduct sufficient investigations and provide public explanations responding to plausible indications of civilian casualties. When allegations are confirmed states have to allow for accountability.

The major obstacle for accountability of US drone strikes, is non-transparency. This stems for a major part from the involvement of non-transparent agencies like the CIA, which works under the policy of neither confirming nor denying its operations. In case of the US this led in combination with claimed security concerns to a policy of withholding basic data like civilian casualty numbers, providing no reparations and rare acknowledgment of responsibility. The void such a policy leaves behind invites other actors to step in. Armed groups can easily gain popularity among the population by providing aid or reparations (see Radaa Case Study).

However, in 2013 the US government announced plans to move the control over lethal-counter terrorism programs outside of active hostilities to the Department of Defense (DOD) to increase transparency and accountability. The effect of this institutional change remains to be awaited (announced completion of the transmission in the end of 2014).

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125 A/68/389, 18 September 2013, para. 78.
126 A/68/389, 18 September 2013, paras. 41-50.
127 A/68/389, 18 September 2013, para. 48.
Israel has never officially acknowledged the use of drones and the censorship was reported to prohibit any reference to strikes by drones.\textsuperscript{128} Therefore it remains little known when and how Israel uses drones, but what seems clear is that drones play a major role in surveillance and most likely target acquisition.

The Israel Defence Forces (IDF) provides reports on military operations and individuals can bring forward allegations to an investigation system on IDF’s military operations, which will then conduct inquiries to decide whether to initiate further proceedings.\textsuperscript{129} The Israeli government set up the Turkel Commission in 2010 to assess the adequacy of Israel’s system of investigations in complaints and claims of violations of IHL. The commission concluded in its second report in 2013 that the Israeli system is in general in line with IHL, but needs to be improved mainly regarding transparency, speed of proceedings, independence and impartiality.\textsuperscript{130} Israel’s supreme court confirmed that the government must undertake independent thorough post strike investigations conducted by a “specially appointed commission concerning the identification of the target and the circumstances in which the attack was carried out, which would itself be subject to judicial review.”\textsuperscript{131}

\textbf{2.4.5. International Humanitarian Law - & International Human Rights Law Criteria for evaluating cast studies}

The following conditions for the compliance of drone strikes with international law can be concluded and summarized from the above-elaborated legal outline. These conditions may help analysing the selected case studies. They do not intend to be exhaustive, but provide a good overview of the key issues.

\begin{itemize}
\item \textsuperscript{128} Rovera, Donatella: \textit{Faulty intelligence, wanton recklessness, or a combination of the two}, Amnesty’s global human rights blog, 2 February 2009 available at \url{http://livewire.amnesty.org/2009/02/02/faulty-intelligence-wanton-recklessness-or-a-combination-of-the-two/} (consulted on: 29 June 2014).
\item \textsuperscript{129} Israel Ministry of Foreign Affairs, 2009, para. 288-297.
\item \textsuperscript{131} A/68/389, 18 September 2013, para. 50.
\end{itemize}
Without an established armed conflict (fulfilling criteria and thresholds), when solely IHRL would be applicable, a drone strike could only rarely be in compliance with the right to life. The most relevant possible situation is self-defence from unlawful violence. It can be briefly subsumed that for a legitimate situation of self-defence: there must be a legitimate purpose of the operation (e.g.: arrest); an operation hast to be planed to minimize regress to lethal force; self-defence must be proportionate (in case of a deprivation of life responding to an on-going imminent - about to materialize - threat to life or serious injury) and necessary (least harmful means, imminence).

Anticipatory self-defence (see below) may only be evoked in rather special situations of self-defence against an anticipated imminent armed attack where “the necessity of self-defence is instant, overwhelming, leaving no choice of means, and no moment of deliberation”132; self-defending action must be designed to halt a concrete impending attack; be again proportionate and necessary.

Accountability and transparency over an act of self-defence resulting in the injury or deprivation of the target’s life must be provided.

When the existence of an armed conflict is confirmed, following (non exhaustive) criteria have to be applied:

I. **Before the strike**
   - Precautions: Target verification; proper choice of means and methods of warfare; assessments of the effects of an attack; advance warnings; preference of targets sparing the civilian population; the best possible intelligence on civilian risks and the target must be obtained; in case of (slightest) doubt over the nature of the target no proceeding is allowed.
   - Distinction - Legitimate target: Members of state armed forces; members of armed groups with a continuous combat function; civilians directly participating

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132 A/68/389, 18 September 2013, para. 57.
in hostilities and military objects; constant care must be taken to prevent incidental loss.

- Proportionality assessment

II. **During the strike**

- Distinction: Drones surveillance and targeting capabilities (e.g.: Deviation) can be positively used.
- Proportionality

III. **After the strike**

- Independent post strike investigations must be conducted providing adequate transparency
- Effective accountability (prompt, transparent, independent, impartial etc.)

**2.5. Challenges**

The legal system faces multiple challenges. Among them are the two selected issues: anticipatory self-defence and extraterritorial application of IHRL.

**2.5.1. Anticipatory self-defence**

The customary law principle of anticipatory self-defence is usually traced back to the ‘Caroline Incident in 1837’ and presumably founded in the states inherent right to collective self-defence (UN Chater Art. 51). Article 51 refers to the states right to self-defence in response to an armed attack. However, states claimed that it must also be legitimate to defend in anticipation of a direct and immediate armed attack.\(^{133}\)

“The principle of anticipatory self-defence is usually traced back to the *Caroline* formula, under which a State may act defensively when the necessity of self-defence is “instant, overwhelming, leaving no choice of means, and no moment for deliberation”. This might be thought to imply that the right to use force would be confined to the period immediately before an attack.”134

It is not allowed to act defensively “to prevent the development of potential future threats, or to punish past attacks.”135 Consequently the use of force in self-defence persists only as long as necessary to halt an imminent attack and the measures taken must be proportionate and necessary.136

The principle of imminence thus plays a central role, and it appears that there is no clear consensus on its interpretation.137 When drone strikes are primarily relying on electronic surveillance or signal intelligence (telephone taps, satellite imagery, drone cameras etc.), as the major source for assessing the imminence of an armed attack and locating individuals,138 it will most often be difficult to prove self-defence to be overwhelmingly necessary. More likely, suspected terrorists would be attacked in different phases of planning an attack. They then would be rather eliminated while being asleep or at dinner, which would make the killing of a ‘terrorist’ in this scenario not a permissible self-defence.139 The US provides respectively also a broader interpretation and concept of imminence. In supporting a broad concept of imminence, considerations over the window of opportunity, stating that there is only a short time period where the potential target might be attacked, the possibility of reducing civilian casualties and the likelihood of a future attack were included. With this interpretation it is not necessary
that a specific attack will take place in the near future.\textsuperscript{140} The alleged terrorist is rendered to pose an on-going threat of unlawful attack. This interpretation is in conflict with the self-defence framework.

It is a matter of debate, whether the principle of imminence is in conventional interpretation adequate to deal with contemporary conflict situations, or should be replaced or abolished. Allegedly it renders self-defence ineffective, because it asks the self defending power to wait for a first substantially aggressive move in order to be allowed to respond, which gives the aggressor a head start that might result in situations where it is too late to effectively use self-defence and prevent danger.\textsuperscript{141} The potential danger of a pre-crime paradigm implies strong constraints on a looser concept of imminence and in face of strong state power monopolies ultimately must override concerns over the effectiveness of self-defence.

\textbf{2.5.2. Extraterritorial application of the Right to Life and the International Covenant of Civil and Political Rights}

The only scenario we have seen so far, were drone strikes taking place outside the boundaries of the conducting nation. Therefore the states recognition of the extraterritorial application of human rights is of importance. As the right to life is a general principle of international law and a customary norm, it follows that “irrespective of the applicability of treaty provisions recognizing the right to life, States are bound to ensure the realization of the right to life when they use force, whether inside or outside their borders.”\textsuperscript{142}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{140} A/68/389, 18 September 2013, para. 58.
\item\textsuperscript{141} Russell, 2012, p. 256.
\item\textsuperscript{142} A/68/382, 2013, para. 43.
\end{itemize}
\end{footnotesize}
The ICCPR applies to all individuals within a state party’s territory and (or\textsuperscript{143}) subject to its jurisdiction.\textsuperscript{144} “The term ‘jurisdiction’ has been interpreted by the Human Rights Committee to mean within \textit{the power or effective control} of the State Party. This principle also applies to those within the power or effective control of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.”\textsuperscript{145} The International Court of Justice (ICJ) confirms: “The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.”\textsuperscript{146} While territorial jurisdiction would be triggered by effective control over a territory, “personal jurisdiction is established where a State has physical power, authority or control over individuals.”\textsuperscript{147}

The practise of current drone programs with extensive surveillance and targeted killings can be interpreted as bringing individuals under the physical power and control of the conducting nations. It follows that, when a state deliberately kills selected individuals outside of its territory, those would fall under its jurisdiction and human rights treaty law obligations are applicable.\textsuperscript{148} However, it has been argued that when a state acts outside its territory it has not automatically the same human rights obligations (protect, fulfil and respect) like on its own territory, but at a minimum the obligation to respect the rights of affected individuals. Any positive action must therefore be in compliance with the human rights of the individuals.\textsuperscript{149}

\textsuperscript{144} ICCPR, 1966, Art. 2/1.
\textsuperscript{145} Kessing, 2014, p. 371.
\textsuperscript{147} A/68/382, 13 September 2013: para. 46.
\textsuperscript{148} A/68/382, 13 September 2013: para. 49.
\textsuperscript{149} A/68/382, 13 September 2013: paras. 47-51.
2.5.2.1. The United States

Up to now the US maintains its criticized position that, human rights treaties are only applicable on their own territory. Recently the US reconfirmed their position in the state report to the Human Rights Committee, which was perceived as a great disappointment, as there were first signs of an opening of the current stand. Two leaked documents written by Harold Koh, who was then legal adviser to the State Department, urged the US government to change its position on the geographical scope of the ICCPR and the Convention against torture. Koh argues that in the end “it wouldn’t require dramatic changes in existing practices, which largely already comply with the relevant standards as a matter of policy.”\textsuperscript{150} Regarding the potential impact on targeting rules he rejects that, by referring to the \textit{lex specialis} derogation of the ICCPR. Nevertheless, “the Administration decided not to abandon the previous US position, simply because it fears (or at least a sufficient number of its component parts do) that accepting that human rights treaties apply extraterritorially would make its collective life more difficult, as everything from extraterritorial drone strikes to NSA surveillance could fall within the purview of the ICCPR.”\textsuperscript{151} When the US pronounced their position, the Human Rights Committee responded:

“The Committee regrets that the State party continues to maintain its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, despite the contrary interpretation of article 2(1) supported by the Committee’s established jurisprudence, the jurisprudence of the International Court of Justice and state practice.”\textsuperscript{152}

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\textsuperscript{150} Milanovic, 2014: p.2 \\
\textsuperscript{151} Milanovic, 2014: p.1 \\
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It remains to be awaited whether or not the US reconsiders its position. In the end the right to life remains applicable even without the acceptance of the extraterritorial application of the ICCPR.

2.5.2.2. Israel

Regarding the question of application and regulation of IHRL on the extraterritorial use of armed drones the Human Rights Committee confirmed, in the assessment of Israel’s third periodic review, the responsibility of Israel under ICCPR: “In the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party’s authorities or agents in those territories that affect the enjoyment of right enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.”

Israel maintains a position similar to the US and raised objections on the extraterritoriality of the ICCPR.

3. COUNTRY SECTION

In this chapter targeting standards, country specific issues and grounds for evaluating three selected case studies shall be elaborated. The case studies mainly rely on media sources and information from NGO’s, which is at the moment the only viable possibility. Confidentiality of relevant information provides constraints to analyses. The section of targeting standards does not intend to be exhaustive, but to bring an overview and describe selected practices that were reported in connection to the specific countries and case studies.

It is important to note, that the case studies are selected due to their critical nature and involved allegations over civilian deaths. States are consequently at a minimum obliged to conduct independent, impartial inquiries and provide public explanations. The case studies, however, do not intend to be representative for the entirety of airstrikes conducted with drones.

3.1. United States of America: Country specific issues and case studies

Since President Obama’s inauguration in 2009, more than 390 drone strikes (2014) with around 2,400 casualties have been conducted in Pakistan, Yemen and Somalia (not including Afghanistan), eight times as many as under Bush’s administration. At least 58 strikes have been conducted in Yemen. The average of civilians killed in drone strikes has reportedly dropped during Obama’s administration from 3 to 1.43, possibly due to further improvements in weapons technology.\(^{155}\) The reliance on drone strikes in the fight against terrorism may also be a result of a change in policy, which abandoned detention and interrogation following Guantanamo.

3.1.1. Targeting standards

The criteria used to identify legitimate targets are important to assess the overall lawfulness of the US drone program. Many of the key issues remain confidential or unclear. However, responding to critics on 23 May 2013 President Obama addressed the US drone programme and targeted killing policy in his speech at the National Defence University. Building on his speech the White House released policy guidelines on the use of lethal force in counter terrorism “outside areas of active hostilities”\(^{156}\). The

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\(^{156}\) The White House Office of the Press Secretary: *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, 23 May
importance of these policy guidelines is confirmed in the review of the United State’s report to the Human Rights Committee in 2014. The outline has to be read in conjunction with the claimed conflict definition.

The policy guidelines line out two preconditions before a strike can take place: There must be a legal basis and only targets posing a “continuing imminent threat to U.S. persons” might be targeted, additionally capture is a preferred means. If the preconditions are confirmed five criteria have to be satisfied to allow a strike:

“1) Near certainty that the terrorist target is present;
2) Near certainty that non-combatants will not be injured or killed;
3) An assessment that capture is not feasible at the time of the operation;
4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and
5) An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.”

The policy guidelines further note that international legal principles, like the sovereignty of the “host state” and the law of armed conflict, constrain the way of using lethal force and acting unilaterally. In case of targeting US citizens it was lined out that “[...] the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States.” Ultimately the President reserves his authority to act in exceptional circumstances to protect the US and allies, then these policy guidelines would not impose constraints on his ability to act.

157 CCPR/C/USA/4, 2014, para. 9.
158 The White House Office of the Press Secretary, 23 May 2013.
159 Ibid.
160 Ibid.
161 Ibid.
The targeting criteria are a rather strange mix of IHL and IHRL standards. The set standards apparently lay in between the two international legal frameworks, neither satisfying limitations on the use of force posed by IHRL, nor applying IHL standards to their full extent. The idea of a continuing imminent threat would not be a necessity for targeting a combatant during the claimed NIAC as he poses always an imminent threat. Furthermore the US interpretation of the precondition of an imminent threat was in practice troubling, because it was interpreted so expansively, that there needs to be no clear evidence of an imminent threat to justify a targeted killing (also see above preventive self-defence). Mere involvement in planning past attacks to establish imminence, as it was outlined in a recently leaked US department of justice white paper, can not satisfy the principle. In IHL there is also no duty to capture a legitimate target, while IHRL would prescribe to use the least harmful means. Past practice also raises doubt if near certainty that “non-combatants” will be harmed is a practically applied standard.

Kevin Jon Heller described these targeting standards as a complete retreat from IHL. He assumed that this might result from the US anticipating that in future the armed conflict definition cannot persist and any US action in countering terrorism would merely rely on the principle of self-defence.

It is liable to conclude that these standards bear testimony of an attempt to apply rules of combat or IHL to areas where no armed conflict can be established, as for example the intensity threshold can not be satisfied. For these situations the US seems to rely on a set of standards that is in the end neither in compliance with IHL nor with IHRL.

163 A/68/382, 13 September 2013, para. 37.
3.1.1.1. Signature strikes

One of the most troubling rumours concerns the US conducting lethal drone strikes based on “pattern of behaviour/life” analysis, which are the opposite of personality strikes. A signature strike is “[…] a drone attack that targets ‘groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren’t known.”\(^{165}\) It is believed that the majority of the drone strikes ordered by the CIA were signature strikes.\(^{166}\)

Ben Emmerson raised in an interview concerns over the potential danger of signature strikes, but truly referred to the lack of information. When being without official explanation or definite acknowledgement, this may also result in exaggerations:

“Signature strikes are the biggest danger in terms of civilian casualties and error. […] This is an area in which it’s possible to imagine nightmares, in the absence of some truth, and I think greater clarity whether such strikes exist and what it means may well dispel some of the exaggerated myths and risks that are involved.”\(^{167}\)

To have more clarity it would thus be necessary that the US release information.

In the end the lawfulness of signature strikes in an armed conflict would depend on the level of evidence found sufficient to verify a pattern of behaviour and the signatures as such, which remains confidential.\(^{168}\) Heller elaborated probable signatures mainly through statements by government officials that make it possible to get an idea of how these signatures may look like. According to Heller following signatures, which must be read in context of the above elaborated section on direct participation, would be legally adequate under IHL: planning attacks, transporting weapons, handling explosives, Al-

\(^{165}\) Heller (a), 2013, p. 90.
\(^{166}\) Heller (a), 2013, p. 94.
\(^{168}\) Heller (a), 2013, p. 94.
Qaeda compound and Al-Qaeda training camp. Inadequate signatures would be: military-age male in an area of known terrorist activity, consorting with known militants, armed men travelling in trucks in AQAP controlled area, suspicious camp in Al-Qaeda controlled area. Heller also identifies some possibly adequate signatures: groups of armed men travelling towards conflict (see in the following chapter: first recorded double tap strike), operating an al-Qaida trainings camp, training to join al-Qaida, facilitators (can only partly be lawful for example: gathering military intelligence in enemy territory and providing ammunition to fighters during hostilities, but unlawful signatures would be for example: financing terrorism, supplying food and propagandizing) and rest areas (depending on definition).

Wrong identifications of signatures, flawed by insufficient evidence and not enough pre-investigations, may have devastating effects like the alleged US drone attack in Pakistan on a Madrassa on 30 October 2006, where up to 82 people died, among them 69 children. The level of certainty or evidence being regarded as sufficient to conduct a strike plays a crucial role. It must be set as high as possible to avoid fatal mistakes, which supports ICRC’s position that the slightest doubt on the nature of a target must lead to further investigations (see above).

### 3.1.1.2. Double taps

A double-tap, or rescuer strike, refers to the tactic of first bombing a group of alleged militants and then returning within a short time period to deliberately target those engaged in rescue work. In the affected regions fear of getting close to a strike scene arose and people refused to help wounded. According to UN Special Rapporteur on extrajudicial summary and arbitrary executions, Christofer Heyns, the deliberate
targeting of rescuers would clearly pose a war crime (see: Customary IHL Rule 47: Attacks against Persons Hors de Combat available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter15_rule47).\textsuperscript{173}

The first recorded double tap strike by the US was on 16 May 2009\textsuperscript{174} in Pakistan, in the village of Khaisor, North Waziristan.\textsuperscript{175} Among 25-40 overall casualties nine were confirmed to have been civilians.\textsuperscript{176} \textit{Dawn} reported that, in a first strike missiles were fired at the house of Hikmat Roshan, killing 29 in total and damaging a nearby religious cemetery.\textsuperscript{177} According to a local militant speaking to \textit{The News} in a follow-up attack about twelve minutes later more missiles were fired at the rescuers.\textsuperscript{178} Journalists described the events in the following manner:

“After praying at the local mosque, they were preparing to cross the nearby border into Afghanistan to launch an attack on US forces. But the US struck first. A CIA drone fired its missiles into the Taliban group, killing at least a dozen people. Villagers joined surviving Taliban as they tried to retrieve the dead and injured. But as rescuers clambered through the demolished house the drones struck again.”\textsuperscript{179}

The identity of the target of this strike (if indeed a specific individual(s) were targeted) is unknown. It appears it may have been a signature strike. According to AFP, no high-

\textsuperscript{177} Dawn, 16 May 2009.
value targets were reported killed.\textsuperscript{180} When it would be confirmed to have been a
signature strike, the signature would within an established armed conflict probably not
be problematic. A strike on rescuers can however never be lawful.

3.1.2. Introduction to the relevant time period in Yemen

In the civil war in Yemen in 1994 armed groups with an Islamist ideology fought on the
side of the former Yemen Arab Republic forces. In acceptance of the authorities, former
fighters converted after the war to a sort of religious police, that tried to enforce its view
of Islamic morality.\textsuperscript{181}

In 2000 the ‘USS Cole’ was attacked in Aden by suicide bombers, killing 17 US sailors
and injuring a further 39. Al-Qaida claimed responsibility for the attack. Even though it
was probably a Yemeni al-Qaida cell that carried out the attack on the navy ship, it
appeared to have attracted other Yemenis to join forces with al-Qaida and similar armed
groups (e.g.: Yemeni Islamic Jihad, Ansar al-Sharia). Since 2000 attacks by Yemeni
terrorist organizations (suicide bombings, kidnappings etc.) targeted governmental
officials, embassies and tourists, which resulted in numerous civilian deaths. The
believed leader of al-Qaida in Yemen, Qa’id Sinan al-Harithi, who was also alleged to
have been responsible for the attack on the ‘USS Cole’, was killed in 2002 in the first
drone strike in Yemen.\textsuperscript{182} For the US there is in Yemen no clear geographical link to an
area of active combat, unlike FATA in Pakistan, which is adjacent to Afghanistan. Still
many Yemenis fought on the side of al-Qaida in Iraq after the US invasion in 2003 and
it appears they have reportedly been trained in remote mountain areas of Yemen.\textsuperscript{183}

\textsuperscript{180} Dawn: \textit{Drone Slaughters 29}, 17 May 2009 available at
\textsuperscript{181} Amnesty International: \textit{Conflict in Yemen Abyan’s darkest hour}, MDE 30/010/2012, London, 2012,
pp. 8-11.
\textsuperscript{182} A/HRC/14/24/Add. 6, 2010, para. 19.
\textsuperscript{183} Amnesty International, 2012, pp. 8-11.
In 2008 al-Qaida in Yemen (AQY) claimed responsibility for an attack against the US embassy in Sana’a. In 2009 reports emerged on a fusion of AQY with its Saudi Arabian counterpart forming together al-Qaida in the Arab Peninsula (AQAP). In 2010 AQAP was listed on the UN Security Council al-Qaida sanctions list, as a regional affiliate of al-Qaida that primarily operates in the Arabian Peninsula. The Yemeni government was often alleged to be incapable of countering the terrorist threats, which included attempts to carry out attacks on US soil.\textsuperscript{184} Before 2011 the US Department of Defence’s Central Command (CENTCOM) took together with the elite force Joint Special Operations Command (JSOC) the primary role over operations in Yemen. After 2011 the CIA took reportedly a more aggressive role.\textsuperscript{185}

In mid-2011 Ansar al-Sharia, an armed group associated with AQAP managed to get control over most towns and villages of Abyan province with Ja’ar as its main basis. It was a time when the Yemeni government oppressed protests against then president Ali Abdullah Saleh. Ansar al-Sharia’s rule over Abyan included a wide range of severe human rights violations like discrimination, infringements in education as well as health care, summary killings, amputations and crucifixions. A high number of people from the affected regions were internally displaced.\textsuperscript{186} The situation in Yemen became at that time a situation of armed conflict: “By the middle of 2011-and certainly by June of that year when Ansar al-Shari’a took control of Zinjbar-the fighting between governmental forces and Ansar al-Shari’a reached the minimum level of intensity and the parties to it had the level of organization required for the existence of an armed conflict of a non-international character.”\textsuperscript{187} The governmental response included disproportionate and indiscriminate attacks in violation of IHL.\textsuperscript{188} By the end of June 2012 the government of Yemen managed with assistance of the US including drone strikes to drive out Ansar

\textsuperscript{184} Amnesty International, 2012, pp. 8-11.
\textsuperscript{186} Amnesty International, 2012, pp. 4-5.
\textsuperscript{188} Amnesty International, 2012, p. 33.
Al-Sharia. In 2012 the UN SC added Ansar al-Sharia on the al-Qaida sanctions list as an alias for AQAP.¹⁸⁹

The Yemeni government cooperates with the US in combating terrorism, ranging from the US providing assistance in establishing a Yemeni counterterrorism unit to Yemen covering up and consenting to US drone strikes (possibly involving intense cooperation of intelligence agencies).¹⁹⁰ Yemen’s policy of covering up US strikes makes it often not easy to attribute certain strikes to the responsible nation, but certain indications like precision night time strikes or strikes at moving vehicles can likely be attributed to the US forces as they possess the necessary technology to conduct such attacks.¹⁹¹

Special Rapporteur, Ben Emmerson, reported:

“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, and that where consent is withheld, a strike will not go ahead. […] specific drone strikes are not pre-approved, but instead such strikes are “generally permitted” pursuant to an unwritten agreement concluded between the United States and former President Abdullah Saleh, which remains binding.”¹⁹²

Yemen’s current President Hadi stated in an interview with Washington Post in 2012 that he approves every drone strike personally.¹⁹³ Additionally there seems to be an

unwritten agreement between the U.S. and the former President, which generally permitted specific drone strikes.

In Yemen there is also opposition to US drone strikes and Yemen’s population frequently protests and demonstrates. Many people live in constant fear of the strikes. The Yemeni Parliament passed in late 2013 a non-binding recommendation to the government to ban the drone strikes because of the civilian losses in former strikes specifically corresponding to the drone strike in Rada. The ban would however need confirmation of the President.\footnote{Israel’s Homeland Security Home: Yemeni Parliament votes to ban U.S. drone strikes, 20 December 2013 available at \url{http://i-hls.com/2013/12/yemeni-parliament-votes-to-ban-u-s-drones/?utm_source=rss&utm_medium=rss&utm_campaign=yemeni-parliament-votes-to-ban-u-s-drones&utm_source=iHLS&utm_medium=Guy&utm_campaign=RSS&goback=gde_65623_member_5819810313272336386#} (consulted on: 24 July 2014).

It can be concluded that US drone strikes in the years 2011 and 2012 took place in an armed conflict of non-international nature. The non-state armed group was however primarily fighting the Yemeni government, even though there seem to have been plans to carry out international attacks, and few attacks were directly conducted against the US. The Yemeni territory was reportedly also place for training of militants then fighting in Iraq. While the frequency of AQAP attacks against the US can probably not satisfy the intensity threshold of an armed conflict, the US can only rely on self-defence where there is a direct imminent impending attack or past attack. When AQAP’s conduct would however be aggregated with al-Qaida the intensity threshold might be satisfied. At the moment it shall be presupposed that the US can at the relevant time not claim to have been involved in a NIAC in Yemen. The fact that Yemen consented and claimed responsibility of US drone strikes must however also be taken into account. When drone strikes remained however under authority and control of the US the strikes
also remain an exercise of the US’s governmental authority. Whether the conduct might be attributable to both states would need additional in-depth legal analyses.\textsuperscript{195}

3.1.3. Abdulrahman Al-Awlaki - Case Study

3.1.3.1. Introduction

The killing of the 16-year-old US citizen Abdulrahman al-Awlaki in a drone strike is one of the key cases that raised serious concerns over the legality of the US drone campaign. It was reported that even President Obama was “surprised and upset and wanted an explanation” when he was confronted with the outcome of this drone strike. A former White House US official called the strike a “mistake, a bad mistake”.\textsuperscript{196} Ultimately litigation over this drone strike as well as over the killing of Abdulrahman’s father resulted in a courts decision, which obliged the US Department of Justice to disclose the requested legal rationale for drone strikes of US citizens. Consequently on 23 June 2014 the government released a legal memo containing the justification of the strike on Abdulrahman’s father.

When the strike occurred the Yemeni Government was involved in a NIAC with AQAP and Ansar al-Sharia. AQAP gained ground during the period of the strike. The armed conflict subsequently spread to the Shabwa province, and the town Azzan, where the strike was conducted had eventually been taken over by Ansar al-Sharia.\textsuperscript{197}


3.1.3.2. The Case

On 14 October 2011 at approximately 9 pm in Azzan, Shabwa Province, Yemen, Abdulrahman al-Awlaki, and his cousins had gathered for an outdoor meal when missiles fired from a U.S. drone struck them.\textsuperscript{198} Abdulrahman, a U.S. citizen and the son of radical cleric Anwar al-Awlaki, who was killed in an earlier drone strike on 30 September 2011,\textsuperscript{199} was 16 years old at the time of his death.\textsuperscript{200} Six to nine people died in the strike.

Abdulrahman spent the first half of his life in the U.S. before moving with his family\textsuperscript{201} in 2002 to Yemen, when his father left the United States of America.\textsuperscript{202} He was living with his grandfather in Sana’a when, one day in September 2011, he sneaked out of the house to go looking for his father, who had been gone for two years.\textsuperscript{203} He took a bus to Shabwa province in the South where his cousin lived, and remained there until he was killed.\textsuperscript{204} Initial reports identified Abdulrahman as being 21 years old,\textsuperscript{205} causing his

\textsuperscript{200} Upstate Drone Action, 23 November 2011.
\textsuperscript{202} Upstate Drone Action, 23 November 2011.
\textsuperscript{203} Krever, CNN, 5 December 2012.
\textsuperscript{205} Scahill, The Nation, 24 April 2013; Shephard, The Toronto Star, 14 April 2012.
grandfather to release his birth certificate.\textsuperscript{206} It showed that he was born 26 August 1995 in Denver Colorado.\textsuperscript{207}

The strike was one of a series of attacks that day. According to \textit{The Guardian} referring to security officials it was one of five strikes on suspected Al-Qaeda positions carried out overnight by U.S. drones.\textsuperscript{208} According to relatives the strike occurred when Abdulrahman, his cousins and a group of friends gathered for an outdoor meal.\textsuperscript{209}

The precise number of victims killed is unclear. An early report from Reuters cited unnamed Yemeni officials as saying that “about 24 people” had lost their lives.\textsuperscript{210} Most other reports ranged from about six\textsuperscript{211} to nine\textsuperscript{212} victims: Abdulrahman, his cousin and four to seven others. Regarding the identity of the victims, it has also been reported that:

- The Al-Awlaki cousin who was killed was his grandfather’s brother’s grandson.\textsuperscript{213} His name was Ahmed Abdulrahman al-Awlaki and he was 17 years of age.\textsuperscript{214}

\textsuperscript{206}Siddiqui, Huffington Post, 23 April 2013.
\textsuperscript{207}American Civil Liberties Union (ACLU): ACLU and CCR Lawsuit, 18 July 2012 available at \url{http://www.youtube.com/watch?feature=player_embedded&v=xSwoRP-Y3a8 - !} (consulted on: 24 July 2014); Scahill, 24 April 2013 (JS was shown the birth cert, which also features in the ACLU video).
\textsuperscript{210}Reuters: Two Awlaki teenage relatives killed in Yemen attack: family, 18 October 2011 available at \url{www.reuters.com/assets/print?aid=USTRE79H71E20111018} (consulted on: 25 May 2014).
\textsuperscript{211}Reuters (a), 15 October 2011.
\textsuperscript{213}Finn, Tom & Browning, Noah: \textit{An American Teenager in Yemen: Paying for the Sinns of His Father?}, Time Magazin, 27 October 2011 available at \url{www.time.com/time/world/article/0,8599,2097899,00.html} (consulted on: 25 May 2014).
\textsuperscript{214}Reuters, 18 October 2011.
• According to an Awlaqi tribesman cited by AFP “Sarhan al-Quss’a’a, brother of Fahd al-Quss’a’a a leader of AQAP, who was on a US wanted list,” was also killed.\footnote{AFP, 17 October 2011.}

• In addition to Abdulrahman and Ahmed, “four other members of the al-Awlaki clan and another local militant” were among the dead, according to AP.\footnote{Al-Haj, AP Foreign, 15 October 2011.}

The family maintains that Abdulrahman was not a militant.\footnote{Upstate Drone Action, 23 November 2011.} However, Bill Roggio of the Long War Journal reported that an AQAP-sympathetic journalist said that Abdulrahman had expressed his hope to attain martyrdom like his father just the day before he was killed in the strike.\footnote{Roggio, Bill: \textit{Anwar al Awlaki's son hoped to attain martyrdom as my father attained it}, Long War Journal, 8 December 2011 available at http://www.longwarjournal.org/archives/2011/12/anwar_al_awlakis_son.php# (consulted on: 25 May 2014).} Reuters reported that, according to Sheikh Abu Bakr, a leader of their tribe who spoke to Reuters by telephone, two members of the al-Awlaki tribe killed in the strike had been preparing to denounce al-Qaeda and return to mainstream Islam.\footnote{Reuters (b), 15 October 2011.} The report does not give the identities of the tribesmen who were reportedly preparing to leave AQAP.

It appears that Ibrahim al-Banna, AQAP media chief who is allegedly involved in planning of terrorist acts, was the intended target of the strike,\footnote{Shephard, The Torronto Star, 14 April 2012; Roggio, Bill: \textit{Fighters seize control of Yemeni town, swear allegiance to Zawahiri}, Long War Journal, 16 January 2012 available at http://www.longwarjournal.org/archives/2012/01/aqap_fighters_seize.php (consulted on: 25 May 2014); 16 January 2012; Yemen Post: \textit{Yemen extremist group claims al banna alive}, 29 October 2011 available at www.yemenpost.net/Detail123456789.aspx?ID=3&SubID=4244&MainCat=3 (consulted on: 25 May 2014).} according to unnamed US officials\footnote{Finn & Browning, Time Magazine, 27 October 2011; Dilanian, LA Times, 19 October 2011.} and a statement by the Yemeni Defence Minister.\footnote{Finn & Browning, Time Magazine, 27 October 2011; Dilanian, LA Times, 19 October 2011.} Initially it was reported that the strike had successfully eliminated Banna.\footnote{Finn & Browning, Time Magazine, 27 October 2011; Dilanian, LA Times, 19 October 2011.}
The day after the attack, Al-Jazeera reported Yemen’s Defence Minister as stating: “The media chief for al-Qaeda in the Arabian Peninsula has been killed along with eight other people in an air strike in southern Yemen.” But two weeks after the strike, the Yemen Post reported that Ansar al-Sharia had distributed a leaflet in Shabwa province, denying that Ibrahim Banna had been killed in the attack. The Yemen Post commented, “This is not the first time Banna has been announced dead, while experts believe the regime fabricated his story to receive more International support at a time when opposition forces are calling for change.”

Greg Miller of the Washington Post reported that unnamed US officials told him that JSOC (not the CIA) carried out the operation “because the main target of the Oct. 14 attack, an Egyptian named Ibrahim al-Banna, was not on the agency’s kill list.” Jeremy Scahill was told by an unnamed JSOC official that the target was not killed in the strike but would not say who the target was. Miller further reported that Abdulrahman was an “unintended casualty.” According to LA Times an anonymous US official said that they “had no idea” Abdul-Rahman was with Banna but a senior

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226 Yemen Post: 29 October 2011.
229 Ibid.
230 Dilanian, LA Times: 19 October 2011.
Obama administration official told them that “this was a military-aged male traveling with a high-value target.”²³¹

Abdulrahman’s grandfather, Nasser al-Awlaki, former Yemeni Minister for Agriculture²³² says that then-President Saleh “sent me a message through the former prime minister that said, ‘Tell Dr. Nasser I swear to God that I have nothing to do with the killing of his son.’” He added, “Whether this is true or not I don’t know, but I am sure some part of Yemen’s government, especially the national security organization that is headed by his nephew, had something to do (with the strike).”²³³

The US has now officially acknowledged responsibility for the operation that killed Abdulrahman al-Awlaki²³⁴, which is significant. On 22 May 2013, US Attorney General, Eric Holder, wrote a letter to Patrick Leahy Chairman of the Senate Judiciary Committee acknowledging that Abdulrahman was killed in a “US counterterrorism operation” and that he was not specifically targeted by the United States.²³⁵ The following day, President Obama made a speech in which he stated that there had been only one instance in which a US citizen was targeted, and that was the killing of Abdulrahman’s father, Anwar al-Awlaki.²³⁶

Statements made by officials in the immediate aftermath of the strike on Abdulrahman, were troubling. National Security Council spokesman Tommy Vietor stated that they were aware of reports saying that Ibrahim al-Banna and Abdulrahman al-Awlaki had been killed, noting that “[f]or over the past year, the Department of State has publicly urged US citizens not to travel to Yemen and has encouraged those already in Yemen to

²³¹ Ibid.
²³³ Ibid.
²³⁵ Letter from Eric H. Holder to Patrick J. Leahy: 22 May 2013. Holder also acknowledged that three other US citizens had been killed: Jude Kenan Mohammed, Anwar al-Awlaki in Yemen, and Samir Khan. Only Anwar al-Awlaki was targeted intentionally.
²³⁶ Text of speech is available at http://yemen.usembassy.gov/obamactu.html.
leave because of the continuing threat of violence and the presence of terrorist organizations, including AQAP, throughout the country.”

Senate majority leader Harry Reid said on CNN “the American citizens who have been killed overseas…are terrorists, and, frankly, if anyone in the world deserved to be killed, those three did deserve to be killed.” And Robert Gibbs famously said: “I would suggest that you should have a far more responsible father if they are truly concerned about the well-being of their children. I don’t think becoming an Al Qaeda jihadist terrorist is the best way to go about doing your business.”

The ACLU has filed three lawsuits in connection with the killing of Anwar and Abdulrahman al-Awlaki:

In Al-Aulaqi v. Obama, Nasser Al-Awlaki was denied an injunction to prevent his son, Anwar, from being killed. The court found that the petitioner “lacks standing and his claims are non-justiciable.”

In Al-Aulaqi v. Panetta, filed in July 2012, the petitioner asked for damages and any other relief that the court sees fit to grant on the basis that the government violated the 4th and 5th amendments and the constitution’s bill of attainder clause by killing Anwar, Abdulrahman and Samir Khan – a third US citizen who was killed with Anwar. The Case was dismissed in April 2014.

In NY Times & ACLU v. DOJ, the district court denied the plaintiff’s “Freedom of Information Act” (FOIA), which included a request for documents relating to the legal

238 Ibid.
239 We are Change: Obama’s Top Adviser Robert Gibbs Justifies Murder of 16 Year Old American, 23 October 2011 available at http://www.youtube.com/watch?v=7MwB2znBZ1g (consulted on: 25 May 2014).
and factual bases of the killing of U.S. citizens in drone strikes. \(^{243}\) This case was appealed on 15 April 2013. \(^{244}\) The US legal memo brief argues against access to the files. \(^{245}\) However, the Court of Appeal ruled in April 2014 that despite governmental national security concerns the DOJ must disclose information on the legal rationale behind targeted killings operations against U.S. citizens. \(^{246}\) Earlier a white paper of the DOJ on the “Lawfulness of a Lethal Operation Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa’ida or An Associated Force” was leaked, which establishes some key elements of the DOJ justification on the case of the killing of Abulrahman’s father.

Following the appeals court decision the Office of Legal Counsel (OLC) released a legal memorandum written in July 2010 outlining the government’s legal rationale of targeted killings against U.S. citizens including the governmental authorisation to the DoD and the CIA to kill Anwar al-Awlaki. \(^{247}\) The memo particularly refers to the killing of Anwar al-Awlaki who was an officially designated high value target as he took a high operational role in AQAP. Following a failed attempt to attack him and a delayed operation due to the presence of children, he was finally killed on 30 September 2011 along with three other alleged militants in a complex drone strike including four drones, one only to check the surrounding for civilians. \(^{248}\) The release is a significant step towards more transparency. The ACLU addressed five issues that remain however unanswered in the memorandum: it contains no explanation of the government’s

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concept of imminence; the understanding of infeasibility of capture is not explained; key facts remain unmentioned by referring to “the facts represented to us [OLC]”. It however clearly refers to the CIA having an operational role in the targeted killings program, and mentions additional OLC memo’s, which likely have to be released as well.\(^\text{249}\)

### 3.1.3.3. Conclusion

Like in many other incidents a final judgement on this case is hampered by the lack of information or uncertainty on some of the key issues like the identities of all deceased. At the moment I will, however, conclude from the most likely scenario: The indented target was the AQAP media chief and operative al-Banna or/and other rather high-ranking AQAP members. The participated military advantage of possibly killing two high rank AQAP members must be set considerably high. It remains, however, uncertain whether al-Banna was among the deceased, or is still alive. Persistent rumours on al-Banna being alive raised doubts on his actual killing. Additionally one year before the attack al-Banna was arrested and interrogated by Yemeni security officials. This is meaningful, as he could have been captured as a non-lethal alternative. The US was probably not aware of the identity of most bystanders, but it has to be assumed that the drone operators were aware of their general presence. Unless they were not sure that they were legitimate targets they must be presumed civilians. An attack with almost certainty to attack civilians would clearly be in conflict with the presidential guidelines which state that there need to be “near certainty” not to injure or kill non-combatants. Whether there was “near certainty” about the presence of the target is questionable, but cannot be definitely assessed. The case reveals how civilians are attacked in everyday life situations away from zones of combat. The impact on the civilian population of

\(^{249}\) Kaufman, ACLU: 23 June 2014.
such attacks is dramatic. Drone strikes were described to cause mass traumatization among the civilian population.\textsuperscript{250}

Abdulrahman must be regarded to have had civilian status, and any considerations over him stating that he wants to become a martyr like his father would even if proved true clearly not provide sufficient grounds to make him a legitimate target (see direct participation criteria). Additionally he and his cousin were under 18 years old and thus enjoy special protections. At the moment it cannot be assured whether he was an intended target as claimed by his grandfather\textsuperscript{251} or an unintended casualty. The crucial point regarding the US citizenship of Abdulrahman seems to be, that information must be released and accountability provided, as there is a particular high public interest to understand what were the circumstances of his decease.

Under the current circumstances with many uncertain variables a definite legal assessment is not possible. When following the presumption of non-existence of an armed conflict the attack is clearly a serious violation of the right to life (and other IHRL norms) of the victims. When evaluated in this paradigm probably even the attack on al-Banna could not be justified. The operation was further probably not designed to minimize, to the greatest extent possible, recourse to lethal force. However, also inside an armed conflict the conduct could be questionable being maybe non proportionate or not in compliance with the principle of distinction.

\textsuperscript{250} Dodd, Vikram: \textit{Four years in Guantanamo - The man who said no to MI5}, The Guardian, 4 April 2007 available at \url{http://www.theguardian.com/uk/2007/apr/04/topstories3.guantanamo} (consulted on: 24 July 2014).

\textsuperscript{251} Junod, Tom: \textit{Obama's administration killed a 16-year-old American and didn't say anything about it. this is justice?}, Esquire, 9 July 2012 available at \url{http://www.esquire.com/blogs/politics/abdulrahman-al-awlaki-death-10470891} (consulted on: 04 July 2014).
3.1.4. Radaa - Case study

3.1.4.1. Introduction

The Radaa case had with its dramatic civilian death toll serious consequences on the Yemeni civilian population, politics and public perceptions of US drone strikes. It was acknowledged by anonymous officials to be one of the rare instances were the target was completely missed.

3.1.4.2. The Case

On 2 September 2012, at approximately 4 pm\(^{252}\), missiles allegedly fired by a US drone hit a Toyota Land Cruiser, functioning as a civilian shuttle bus, at an intersection where the roads to the villages of Sabool and Manasseh meet outside the city of Radaa in Walad Rabi district of al-Bayda province.\(^{253}\) 11 reportedly died immediately; a twelfth later succumbed to his injuries, all of them civilians.\(^{254}\) It is alleged that three of the victims were children and one woman was pregnant.\(^{255}\) Abdelrauf al-Dahab, an al-Qaeda militant,\(^{256}\) footnote at end of sentence. was the supposed target of the strike and


\(^{253}\) Tayler Letta: Anatomy of an Airstrike Gone wrong, Foreign Policy, 26 December 2012 available at www.foreignpolicy.com/articles/2012/12/26/yemen_air_attack_civilians_dead?print=yes&hidecomments
= YES&PAGE= FULL (consulted on 23 March 2014).


may have been travelling on the same road at the time of the strike.\footnote{Raghavan, Washington Post, 25 December 2012.} An anonymous provincial official said that al-Dahab “survived the attack as his car was far from the scene.”\footnote{Xinhua: US Drone Strike Kills 13 Civilians in Central Yemen, 2 September 2012 available at \url{http://news.xinhuanet.com/english/world/2012-09/02/c_131823003.htm} (consulted on 23 March 2014).}

It seems there was an initial attempt to cover up the strikes and claim the dead where all militants linked to AQ\footnote{Reuters, AFP and Al Jazeera all reported on the day that at least 5 suspected militants and 3 women travelling with them had been killed in a drone or air strike.} and it is only after the local villagers threatened to take the bodies to the president’s palace in Sanaa that the civilian deaths were acknowledged.\footnote{Tayler, Foreign Policy, 26 December 2012.}

On 4 September, CNN reported that an anonymous senior Yemeni Defense Ministry official told them that “This was one of the very few times when our target was completely missed. It was a mistake, but we hope it will not hurt our anti-terror efforts in the region.”\footnote{Almasmari, Hakim: Suspected U.S. drone strike kills civilians in Yemen, officials say, 4 September 2012 available at \url{edition.cnn.com/2012/09/03/world/meast/yemen-drone-strike/?hpt=hp_t3} (consulted on: 2 June 2014).} The next day, the Yemeni State news agency, SABA, released an English language statement citing an “official source at the Supreme Security Committee” who called the incident an “accident.”\footnote{SABA: President Hadi Directs to Investigate Over Baidah Incident, 5 September 2012 available at \url{http://www.sabanews.net/en/news279858.htm} (consulted on 23 March 2014).}

The reasons for the botched strike are unclear. It is widely believed that the target of the strike was Abdelrauf al-Dahab, who is closely related to the Qaeda leaders in Radda.\footnote{Raghavan, Washington Post, 25 December 2012; Tayler, Foreign Policy, 26 December 2012; Xinhua: 2 September 2012.}

Al Jazeera reported that “military officials” – whose names and nationality are not given, but would appear to be Yemeni - said that the airstrikes were based on the “faulty intelligence that the passengers were al-Qaeda members.” CNN was told by a senior Defence Ministry official (unnamed), that the militants that were supposed to be targeted were in a nearby vehicle but fled unharmed. Xinhua, quoting an unnamed Yemeni provincial official who their journalist spoke to, reported that the target was on the road at that time but escaped without being struck.

Multiple credible sources report that 12 people – all of whom were civilians – died as a result of the strike. Most of the passengers of the targeted vehicle were reported to have been local farmers. However, the only complete list of victim names comes from Arabic news site Al Masdar. They provide the following information:

- Three children: Mabrook Mouqbal Al Dagari, aged 13; Abedal Ghani Mohammed Mabkhout, aged 12; Daolah Nasser, aged 10
- The Salah family: Nasser Salah, aged 60, his wife Raselah Ali, aged 55, parents of Daolah referred to above.
- And six others: Abdullah Muhammad Al Dagari, aged 25; Abdullah Ahmed Abed Rabbo Robich, aged 28; Saddam Hussein Mohamed

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265 Al Jazeera: 2 September 2012.
266 Almasmari, CNN: 15 October 2011.
267 Xinhua: 2 September 2012.
268 Tayler, Foreign Policy, 26 December 2012; Craig The (London) Times, 4 January 2013; Adam Baron, McClatchy, 20 June 2013; SABA, 5 September 2012.
269 But see Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, 23 April 2013, where her name is translated as Dalwat Nasir and which states that she is aged 12, and Raghavan, Washington Post, 25 December 2012, where she is said to be 7 years-old.
Massad, aged 28; Ismail Mabkhout Mohamed, aged 30; Masoud Ali Ahmed Mouqbal, aged 45; Jamal Mohammed Abad, aged 30.

Three of the injured civilians, according to Al Masdar news site, are: Nasser Mabkhout Mohammed al-Sabooly, 45; Mohammed Abdo Jarallah (age unknown); and Sultan Ahmed Mohammed Sarhan, 27. Mohammed Abdo Jarallah later died of his wounds. Both the survivors lost their ability to walk.

Human Rights Watch collected statements of witnesses and relatives, who were present at the shocking scene.

“About four people were without heads. Many lost their hands and legs,” said Nawaf Massoud Awadh, a sheikh from Sabool. “These were our relatives and friends.”

Two victims were a woman and girl, clutched in a lifeless embrace. “The bodies were charred like coal. I could not recognize the faces,” said Ahmad al-Sabooli, a 23-year-old farmer. Moving in closer, al-Sabooli realized that the woman and girl were his mother and 10-year-old sister. He also saw his father among the dead. “That is when I put my head in my hands and I cried,” he said.

Because of the tremendous human loss relatives lost major bread earners of entire families putting reportedly more than 50 people in severe economic hardship.

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271 Tayler, Foreign Policy: 26 December 2012. The extent of injuries suffered by the wounded is unclear: note Nasser Mabkhout Mohammed al-Sabooly is reported as having “suffered burns and bruises” and saying he would “hijack a pickup” and “fight along al Qaeda’s side” if no compensation was given, statements which are inconsistent with having lost the ability to walk.
273 Ibid.
274 Ibid.
Based on reports from the Washington Post and The Times, it appears that two missiles were fired. According to The Times “The first missile hit the vehicle, flipping it over. A second was aimed at survivors as they scrambled from the wreckage.” Two of Letta Tayler’s four eye-witnesses told her they saw a black tail fin near the burning vehicle which she says would be consistent with a Hellfire missile, but these can be fired from drones or manned jets.

Accounts differ as to the number and appearance of aircraft involved in the strike. Letta Tayler reported, based on witness statements, that for more than a year, drones had been circling the area and that one or two were present on the morning of the attack. Three witnesses told her that just before 4 pm two warplanes “swooped into the area.” One of the witnesses – who was in his field in Sabool at the time – told her that he “heard a very loud noise, like thunder,” and that he “looked up and saw two warplanes. One was firing missiles.” Letta Tayler also concludes from the shrapnel collected from the scene and which she was shown that it was a manned strike because it was “more consistent with the type of damage caused by a bomb.”

The US Senate Subcommittee report by HOOD et. al states that there were two planes. Witnesses that spoke to HOOD or Alkarama researchers on 4 September 2012 stated that one plane came very close – close enough, said one witness, to “confirm to them that we were civilians and that we had children and women with us.”

Neither the US government nor the Yemeni government has officially taken responsibility for the incident. US officials speaking to the Washington Post on condition of anonymity reportedly stated that the plane [that fired the missile] belonged to the “Department of Defence” but did not specify whether it was manned or

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275 Craig The (London) Times, 4 January 2013.
276 Tayler, Foreign Policy, 26 December 2012.
277 Ibid.
278 Ibid.
279 Ibid.
280 Ibid.
unmanned. 281 Abdel-Karim al-Iryani, a former Yemeni prime minister who is a senior adviser to Hadi, told the Washington Post, that “If you say it wasn’t a U.S. drone, nobody will believe you, […] A Yemeni pilot to be able to hit a specific vehicle that’s moving? Impossible.” 282

In December 2012, the Washington Post reported that:

In response to questions, U.S. officials in Washington, who spoke on the condition of anonymity because of the sensitivity of the matter, said it was a Defense Department aircraft, either a drone or a fixed-wing warplane, that fired on the truck. The Pentagon declined to comment on the incident, as did senior U.S. officials in Yemen and senior counterterrorism officials in Washington. 283

Other media outlets report the presence of three (not two) planes at the time of the strike. Sudarasan Raghavan (Washington Post) reported that there were three planes present. He cites “some witnesses” who said that they “saw three planes in the sky, two black and one white, and that the black ones were Yemeni jets. But both missiles struck the moving vehicle directly, and the terrain surrounding the truck was not scorched.” 284 Raghavan notes that these are “hallmarks of a precision strike from a sophisticated American aircraft.” Alsahwa 285 reported that “according to the sources, three US drones flew over Walad Rabia area located in Rada, singling out that they raised fears among population.” 286 Iona Craig (The Times), reported that “One witnesses [sic] told how the aircraft looked ‘like an arrow’, as he drew the silhouette of a fighter jet.” 287

282 Ibid.
283 Ibid.
284 Ibid.
285 It should be noted that the reliability of this publication is currently unknown, and the English version of this article is poorly translated and must be checked against the original for precise meaning – see investigative actions, infra.
287 Craig The (London) Times, 4 January 2013.
Political parties, civil society organizations and tribal leaders publicly condemned the strike. The parliament reportedly summoned Interior Minister Mohammed Qahtan to an emergency meeting to clarify the matter, and Xinhua reported that “Minister of Human Rights Houria Mash’hour and several members of the parliament condemned the ‘U.S. meddling’ in the Yemeni internal affairs, saying that most casualties of the U.S. drones were civilians and calling for an immediate end to the U.S. interference and drone strikes, local media reported.” The Yemen Post cited local sources saying that, tribal leaders and other figures agreed to hold a meeting the day after the strike to discuss strikes launched against their areas. Yemeni NGO Seyaj Organization for Childhood Protection (Seyaj) also made a statement strongly condemning the strike and calling for investigation, compensation and other actions.

Burial money and guns, forms of compensation, seem to have been given to the victims’ families, though Washington Post reported that no money was ever provided. The government seems to have sent about a hundred guns to tribal leaders as a symbolic gesture – in Yemeni culture, an admission of guilt, whereas HRW’s Letta Tayler reported that within hours, Sheikh Sinan Garoon, the deputy governor of al-Bayda provided about $70,000 in “burial money” along with 95 Kalashnikovs but that further compensation was “stalled.” The Washington Post also reported that AQAP had offered compensation to the victim’s families, “seeking to fill the void left by the government” and that the strike has led to significant radicalization in the Radda area. Money also seems to have been promised for the reopening of the main road to Sanaa, which had been blocked by the villagers in protest. It is unclear whether it was ever

289 Ibid; see also Ezzi, Alsahwa, 5 September 2012.
290 Yemen Post, 4 September 2012.
292 Foreign Policy reported 95 Kalashnikovs; Washington Post reported 101 guns.
294 Tayler, Foreign Policy: 26 December 2012.
given. AFP reported that a delegation led by Tawfic al-Jahmi (not Sheikh Sinan Garoon) “received an undertaking to reopen the highway in return for a promise of 20 million rials (nearly 100,000 dollars) in compensation.”\footnote{Agence France-Presse (AFP): Yemen probes civilian deaths in apparent US drone strike, 4 September 2012 available at www.google.com/hostednews/afp/article/ALeqM5g-lcy97e1q00-ocw0WVO2B1J2AQ?docid=CNG.addf2dcbfc9b931ff7fc97a6c01cf101.6d1 (consulted on: 7 June 2014).} Xinhua reported that the government sent a “tribal mediator” to convince the victims’ families that the vehicles had been close to an Al Qaeda target, and successfully persuaded them to re-open the roads in exchange for a promise of compensation.\footnote{Xinhua: 5 September 2012.} Neither the AFP nor the Xinhua report states, whether compensation was received.

It appears that efforts to investigate the incident were never brought to a decisive conclusion. On 5 September 2012, SABA, the State news agency, cited “An official source at the Supreme Security Committee,” as stating that President Hadi had ordered the formation of a specialized committee to investigate the incident.\footnote{President Hadi directs to investigate over Baidah incident, SABA, 5 September 2013.} Xinhua reported that this announcement occurred just hours after speaking with John Brennan on the phone.\footnote{Xinhua, 5 September 2012.} However, almost four months after the incident in late December, the Yemeni government had still not stated who was responsible for the case, leading to speculation in the western media that the government was trying to “kill the case” to protect its relationship with the US.\footnote{Raghavan, Washington Post: 25 December 2012. See also, Tayler, Foreign Policy: 26 December 2012.} And although on 12 September, the National Organization for Defending Rights and Freedoms (HOOD) asked the prosecutor to investigate the strike, as of 23 April 2013, the Prosecutor had declined to do so.\footnote{Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, 23 April 2013, p. 10.}
3.1.4.3. Conclusion

The nature of the airstrike on a moving vehicle strongly indicates that US planes capable of such attacks were being involved. The recognized presence of RPAs on the same day, indicate an involvement of drones. Hellfire missile fragments do not exclusively point towards a drone strike, but are still a signature of drones.

The strike was a serious violation of the right to life. Even during an established armed conflict it would have been a fundamental rights violation of the IHL principles of distinction, proportionality, precautions in attack. With the facts at hand the strike would be most likely considered a war crime. With not one combatant but 12 civilians killed the claimed high precision of drone programmes is challenged. We can only speculate on how this disaster happened, as long as there is no official explanation, but recorded reactions by officials quite clearly indicate that this was a mistake. The governments attempt to cover up the strike and disclaim that the killed were civilians are a shocking testimony of governmental policy. In the Radaa case study the void of accountability for civilian losses is obvious and even the consequences in further radicalization are visible.

The strike is a serious breach of the obligation to respect, protect and fulfil the Right to Life. The involved states are obliged to conduct transparent in depth investigations, allow for accountability and provide sufficient reparations.

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3.2. Israel: Country specific issues and case study

Israel uses drones since the 1970’s (initially for surveillance over Egypt), and is believed to be the pioneer of armed drones. When investigating Israeli airstrikes it can however often not be assured whether or not drones were involved in the operations, due to Israel’s strict secrecy policy in this regard. In 2004 first evidence for an airstrike with an Israeli drone emerged. Already in 2012 during Operation Pillar of Defence, a complete military operation, reportedly involving a high number of drone strikes, happened without ground soldiers and the Gaza Strip is under constant surveillance by RPAs.

3.2.1. Targeting standards

The case Public Committee against torture v. Government of Israel is one of the recently most meaningful decisions of Israel’s authorities. It shall be outlined, to provide an insight to Israel’s legal rationale of targeted killings. The existence of this judgement is an important step towards transparency.

Israel’s Supreme Court described in the case Public Committee against torture v. Government of Israel key elements of the courts interpretation of legitimate targets (armed conflict definition see above). The petitioners alleged Israel’s targeted killing policy to be unlawful, because its policy killed civilians, who were not taking a direct part in hostilities, caused non-proportional civilian damage, violated the principle of due process, has no independent judicial overview and should adhere the law of occupation. The government responded that Israel is involved in a novel kind of war

303 Dobbing, Mary & Cole, Chris: Israel and the drone wars Examining Israel’s production, use and proliferation of UAV’s, Drone Wars UK, 2014, p. 7.
against terrorist organizations of international nature in which Israel can rely on self-defence under UN Charter Article 51 making IHL applicable. It is thus allegedly legitimate to target members of terrorist organizations at all times as they take an active part in hostilities. Due to their violations of IHL the government argued, they belong to a category of “unlawful combatants”, which denies them the enjoyment of combatant privileges and civilian immunities. The government further “considers the planning, launching and commanding of terrorist attacks to be direct participation in hostilities.”

The court confirms the conflict in a somehow flawed way (see above) to be of international nature and in the end decides that targeted killing is neither lawful nor unlawful by nature. One of the most critical issues in the judgement surrounds the categorization of the Palestinian militants. While the court rejects a category of unlawful combatants and mentions that terrorists still posses their human dignity and enjoy a minimum of legal protections, provided by customary international law, the court, however, does not confirm Palestinian militants to be combatants, due to lacking insignia and relying on terrorist methods, but defines them as civilians directly participating in armed conflict. When providing interpretation of direct participation in hostilities and the following loss of civilian immunity for such time as individuals take a direct part in hostilities, the judgement refers to “active member[s] of a terrorist organizations for whom the rest between hostilities is but preparation for the next hostilities.” They supposedly loose their civilian immunity not only for such times as they take a direct part in hostilities. Ultimately those individuals are moved in the same legal grey zone like in the beforehand by the court itself rejected category of unlawful combatants. They neither enjoy rights of civilians nor of combatants. ‘Additional Protocol I’ Article 44 (3), which arguably has customary law status, provides that in an armed conflict against belligerent occupation a broader concept of combatants has to be

307 Lesh, 2007, para. I/B.
310 Naftaly & Keren, 2007, p. 461
311 Ibid.
applied due to the nature of the hostilities. The mere fail of Palestinian militants to wear insignia would not justify a withdrawal of a combatant status (additional criteria like carrying the arms openly must still be complied with to establish the status of a combatant).\textsuperscript{312} The established category of members of terrorist organizations, which seems close to the status of an unlawful combatant, is worrying and carries potential dangers of a deprivation of the most fundamental rights, which the interrogation and detaining excesses of the concerned persons under Bush’s administration has shown.\textsuperscript{313}

The judgement furthermore suggests a case-by-case evaluation for withdrawing civilian immunity.\textsuperscript{314} To render a targeted killing legal four conditions must be met:

1. Well-based information on all conditions of direct participation in hostilities is needed to consequently withdraw civilian immunity.
2. The least harmful means must be used, unless an alternative poses a too high risk to the life of soldiers.
3. Post strike investigations must be conducted. When appropriate, accountability must be provided.
4. A proportionality assessment must be undertaken and civilian harm must be minimized.\textsuperscript{315}

During an international armed conflict these criteria would be in compliance with IHL. While the judgement provides this interesting insight, its fail to refer to the adequate normative framework compromises its potential improvement. It has furthermore been

\textsuperscript{312} Naftaly & Keren, 2007, pp. 464-465.
\textsuperscript{314} Naftaly & Keren, 2007, p. 461.
\textsuperscript{315} Supreme Court of Israel (sitting as the High Court of Justice): \textit{Public Committee of Torture in Israel vs. Government of Israel}, HCJ 769/02, 13 December 2006, para. 40.
reported that after the judgement targeted killings in violation of the courts judgement were conducted.\textsuperscript{316}

Nevertheless following the judgement Israel set up procedures and systems for independent review of targeting decisions and accountability reviews.\textsuperscript{317}

### 3.2.2. Precaution attack warnings

The IDF stated to invest “enormous efforts and resources”\textsuperscript{318} in measures to minimize civilian casualties. These measures include different forms of attack warnings that can potentially fall under the IHL requirement of precautions in attack. These tactics responds to the dangerous close merge between civilians and the Hamas as well as other Palestinian militant groups.\textsuperscript{319} Additionally the density of the Gaza Strip poses a particularly difficult environment for proportionate and distinctive attacks.

Two practices shall be outlined to illustrate efforts by the IDF to warn civilians from impending attacks.

**“Roof-Knock”**

The “Roof-Knock” is a warning tactic applied by IDF that was reportedly first used during Operation Cast Lead. The tactic consists of firing first a light precision guided missile, however still strong enough to blast the roof of a house, to warn away


\textsuperscript{319} Amnesty International, 2009, p. 55.
inhabitants from the impending destruction of the building. After a few minutes a
second strike follows with heavier ammunition.\textsuperscript{320}

Unless the targeted buildings are used for military purposes making its destruction a
definite military advantage,\textsuperscript{321} these attacks are not an incidental but a deliberate attack
of civilian objects. The time interval between the warning shot and the following attack
was in several cases reported to have been too short to evacuate the buildings especially
in dense populated areas where it is also necessary to evacuate the neighbouring houses
(also see below: case study Israel).\textsuperscript{322} While the application of this tactics pre-assumes a
high likelihood that civilians inhabit the targeted building, the legality of such attacks
still depends on the specific circumstances and the object of attack.

**Leaflets, Messages and Phone Calls**

IDF’s tactics of warning from attacks includes calls to evacuate via dropped leaflets,
telephone calls, radio and television broadcasts. They contain messages like the
following: “For your own safety, you are required to leave your homes immediately and
move to the city centres”\textsuperscript{323} or urge the population to stay away from the Hamas and
terrorist organization facilities and locations.\textsuperscript{324}

While Israeli officials referred to these advance warnings when confronted with
allegations over civilian deaths,\textsuperscript{325} they were criticized by NGO’s to have been
ineffective; also the Human Rights Council questions their effectiveness.\textsuperscript{326} Without
more concrete instructions the very broad random spreading of the warning calls often
rendered these measures of pre warnings ineffective.\textsuperscript{327}

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\textsuperscript{320} Al-Mezan Center for Human Rights, 2009, p. 40.
\textsuperscript{321} A/HRC/22/35/Add. 1, 2013, para. 16.
\textsuperscript{322} A/HRC/22/35/Add. 1, 2013, para. 18.
\textsuperscript{324} A/HRC/22/35/Add. 1, 2013: para. 46.
\textsuperscript{325} Human Rights Watch, 2009: p. 7.
\textsuperscript{326} A/HRC/22/35/Add. 1, 2013: para. 46.
\textsuperscript{327} Human Rights Watch, 2009: p. 7. a
“Randomly placed telephone calls with recorded warning messages, radio broadcasts and leaflets dropped by the Israeli army all over Gaza telling people to leave their homes and neighbourhoods caused widespread panic but offered little protection. In some areas residents were trapped in their homes, hearing the Israeli army broadcasts warning people to leave but unable to do so because Israeli forces in the area were not allowing any movement and therefore anyone who went out risked coming under fire.”\textsuperscript{328}

Nevertheless the attempt to comply with the requirement of precautions in attack can be seen positive under IHL. Even if they would have been effective they can not be viewed as freeing the attacking nation from other IHL requirements and obligations like distinction or proportionality in attack.

3.2.3. Introduction to the relevant time period in the Gaza Strip

The long lasting conflict with between Israel and the Hamas (plus other armed groups) is probably one of the most complex and devastating conflicts in modern history. The civilian population of both nations is heavily suffering from devastating effects of the conflict. The Gaza Strip suffers particularly under economic consequences and preservative hostilities. Despite numerous attempts to pacify the conflict there is no end in sight.

The conflict will be briefly outlined with a focus on the relevant time period to contextualize the case studies:

Since the Six Day War in 1967 Gaza had been more or less all the time under Israeli occupation. Israel’s disengagement plan in 2005 raised hope for an end of the conflict. The disengagement initiative also known as ‘Sharon Plan’ included a redeployment of

\textsuperscript{328} Amnesty International, 2009: p. 3.
Israeli troops and settlements, but as already mentioned airspace, territorial waters, electricity, telecommunications, water, flow of goods and persons remained, due to security concerns mainly under control of Israel’s army.\textsuperscript{329} The anticipated benefits for Gaza and Israel failed to materialize, neither the economic situation of Gaza improved nor the security environment of Israel.\textsuperscript{330} Rocket and mortar attacks on Israel did not stop nor Israel’s military operations in Gaza.

In 2006 Hamas got the upper hand in internal power struggles after winning the parliamentary elections and took partly control over Gaza. Effective power remained however mainly with the political party ‘Fatah’ (M. Abbas). The Hamas government was internationally rejected particularly because they did not agree to comply with the three conditions to recognize Israel, to acknowledge previous agreements between the Palestinian Authority (PA) and Israel as well as to cease all terrorism. The Hamas, being still a branded terrorist organization, taking part in elections was allegedly a strategic move to save their military wing from concerted international efforts of combating terrorism. In the same year of their election indiscriminate rocket and mortar attacks on Israel increased. The Hamas allowed groups like Islamic Jihad to resume rocket attacks, and the Israeli soldier Gilad Schalid was captured. Israel responded with tightening sanctions on Gaza, capture of Hamas ministers and parliamentarians as well as with bombardments of infrastructure and targeted killings (Operation Summer Rain).\textsuperscript{331} The international community ceased financial support for the PA. Additionally taxes controlled by Israel were frozen, which cut both main sources for public functioning.\textsuperscript{332}

In 2007 the Hamas became the sole ruling power in Gaza when they defeated ‘Fatah’ after the failure of the Mecca Agreements that funded the national unity government,

\textsuperscript{329} \textit{Amnesty International}, 2009, pp. 80-81.
\textsuperscript{331} \textit{Amnesty International}, 2009, pp. 80-81.
but did not succeed in merging the security branches. In June 2008 the Hamas and Israel agreed on a six-month ceasefire including an ease of Israel’s blockade. After the expiration of the ceasefire the situation worsened rapidly, initially with rocket and mortar attacks on Israel followed by Operation Cast Lead.\textsuperscript{333} The conflict involves complex relations between the Hamas and other armed groups affiliated with political Palestinian fractions, which occasionally fight against the Hamas or conduct joint operations.\textsuperscript{334} While Gaza was under de facto administration of the Hamas, Israel only recognized the Palestinian Authority as the administration. The whole Hamas is by Israel regarded to be a legitimate target, including civilian institutions and not only the military wing (Qassam Brigades).\textsuperscript{335}

3.2.4. ‘Roof Knock’ - Case study

3.2.4.1. Introduction

The strike happened in January 2009 during Operation Cast Lead. Operation Cast Lead began on 27 December 2008 with a large-scale aerial (consisting of conventional aircrafts and drones) and naval offensive, on Gaza, which is “one of the most densely populated places on the planet”.\textsuperscript{336} The stated aim was to stop rocket and mortar attacks on Israel.\textsuperscript{337} The ‘Heron TP Eitan’ being Israel’s largest and most enduring drone surveillance platform was first used during Operation Cast Lead. The main attack drone was the ‘Hermes 450’.\textsuperscript{338} A ground offensive followed in January 2009, which was “the first time Israeli infantry commanders on the ground were allowed to direct drones, helicopters, and warplanes independently of the air force.”\textsuperscript{339} On 17 January 2009 Israel claimed a unilateral ceasefire and withdrew subsequently their troops. The Hamas and
other Palestinian fractions also declared unilateral ceasefire. The 22 day military offensive is reported to have been the most destructive of all Israeli military campaigns with around 1,400 killed Palestinians including 300 children, numerous civilians, and grave damage to civilian infrastructure and property. The intense violence occurring on both sides established the existence of an armed conflict and applicability of IHL during Operation Cast Lead.

The case illustrates how IDF’s ‘Roof Knock’ tactics fails and resulted in dramatic civilian loss.

3.2.4.2. The Case

On 9 January 2009, an IDF strike allegedly hit a house in the Beit Lahia Housing Project (Mashru’a Beit Lahia), Gaza, using a spike missile, a hellfire missile, and a 500lb bomb. It was further alleged that the house was only occupied by women and children, and that they made up the entirety of those killed: Randa Salha (34); four of her children: Roula (1), Baha al-Din (4 - Amnesty/7 - al Mezan), Rana (12), Diya’ al-Din (14); as well as her sister, Fatma (22).

Al-Mezan Center for Human Rights reported based on witness statements that at 03:15 am a spike missile fired by an Israeli drone blasted the roof of Fayiz Salha’s house. The spike missile then entered a room, and exited through its floor. The family of Fayiz, who was at work, was at home, together with some relatives who had to leave their homes because of Israeli Military Operations. Fayiz’s wife after consulting with the other present persons called her husband to seek his advice. He urged them to immediately evacuate the house. After three minutes all were ready to leave. The group

however, decided to split up into two, as they feared they could be targeted when they appeared in a large group on the streets. While the first split group left immediately the house, the second remained. After ten minutes another bomb, later identified as a GBU-38 500lb GPS-guided JDAM, struck the house as Fayiz Salha’s wife, four of her children, and her sister were walking down the stairs. It remains unclear who the IDF intended to target in this strike.

Amnesty International adds in their report, which is based on a site visit, that a third missile (Hellfire missile) hit the first floor of the house in between the bomb dropped by a F-16 fighter jet and the first smaller missile used as a warning. According to Amnesty the bomb exploding near the front door killed the victims.

In relation to this strike, al-Mezan indicated both that they have a detailed file and that they had initiated legal proceedings in the Israeli Courts, but that these were dismissed.

### 3.2.4.3. Conclusion

There are currently no clear indications about what the target was. Even if the house would have been a legitimate target it was most likely a disproportionate attack. From this case and other similar incidents (see Amnesty International: *Israel/Gaza Operation Cast Lead: 22 Days of Death and Destruction*) it can be concluded that the ‘Roof Knock’ attacks carry a high likelihood of attacking civilians. The general legality of these attacks under the described conditions with a too short time period to evacuate is highly questionable as likely violating the principle of distinction.

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With the current state of information it is not viable to draw coherent legal conclusions. In any case the involved states are obliged to conduct in depth investigations, allow for accountability and provide sufficient reparations.

4. GENERAL CONCLUSIONS

Drone programmes must be in compliance with the legal principles and standards elaborated in course of this thesis. Self-defence and countering of terrorism can only truly be effective, when complying with international law and the inherent moral.

The challenges for an armed drone policy compatible with IHL and IHRL begin with the major obstacles of inadequate or at least unsettled conflict definitions and targeting criteria. A clear geographical, temporal scope and sufficient satisfaction of the required thresholds for armed conflicts, as well as a rejection of concepts of unlawful combatants are of utmost importance to counter an abuse of IHL standards. A coherent application of legal frameworks must be maintained, to avoid an undermining of the applicable legal protections. At the moment the policy of the analysed states can be described as compiling legal framework to justify practice. Astonishing is the fact that even already problematic legal justifications are at least not strictly followed. This may be interpreted as an indication that public available legal justifications, present a ‘face lifted version’ of actually applied policy.

The strong involvement of secret agencies is problematic and entails multiple problems regarding accountability and transparency. Positive signs in recent developments point however towards a trend to more transparency. In 2013 US officials confirmed that internal investigations are carried out responding to serious allegations on civilian deaths in a drone strike on a wedding in Yemen. It is one of the few times US internal investigations are publicly known and in conjunction with similar developments it can
be interpreted to be a change in communications policy. Another sign for an opening of the US drone program is the recent release of legal memos over the killing of US citizens written in 2010 following the judgement of a federal appeals court. It remains however to be awaited if these are signs of a genuine improvement or mere politic moves to silence criticism. Israel’s policy provides compared to the US more accountability, but does at the moment not include explanations over the general reliance on drones and its accountability system fails to be transparent to applicants.

The factors of a diminished risk for personnel, cheap conduct, enabling technological capabilities result together with ‘self-compiled legal frameworks’ in an expansive use of deadly force applied with drones. It is unacceptable that possibilities provided by new technology rule over standards of international law. Armed drones create multiple new opportunities of countering alleged threats of unlawful violence, where a drone strike is the single feasible possibility of involvement. In absence of an armed conflict these opportunities are clearly not justifiable settings for defence operations. Non-lethal alternatives must already be the first priority in setting up a possible operation. Not the ‘the rule of opportunity’, but the rule of law must prevail.

To avoid further undermining and practicability of legal regimes, it is necessary to find consensus on several legal issues like the threshold of violence to establish a NIAC and the interpretation of imminence. Other central issues surrounding the use of armed drones in armed conflicts are the level of certainty and intelligence viewed as sufficient to allow a killing as well as the level of doubt over the nature of a target to abort a mission.

In July 2014 the Hamas reportedly operated their first drone over Israel’s territory. In this incident the drone was shot down the ‘Iron Dome Air Defence System’. This is a

348 Eglash, Ruth & Witte, Griff: Iron Dome, Israel’s antimissile system, changes calculus of fight with Hamas, 14 July 2014 available at http://www.washingtonpost.com/world/middle_east/israel-shoots-
sign of the beginning of an era of non-state actors using RPAs, which comes with a new ‘front’ of challenges.
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Abstract

“Drones are here to stay” - Armed drones are the potentially most discriminate air weapon system. With their technological capabilities they have the potential to reduce civilian casualties. This entails under the humanitarian law principle of distinction a preference over conventional aircrafts. In the short history of this weapons system however numerous cases of abuse occurred. Drone strikes were frequently conducted under questionable legal constellations and in certain incidents not a single combatant was killed, but solely innocent individuals were struck.

The two big players in drone warfare are the United States and Israel. Both nations are interwoven in an asymmetrical fight against ‘terrorism’, making drone strikes one of the preferred methods of counterterrorism operations. Their practice sets precedents for following states acquiring drones. Current application of armed drones bears testimony of states compiling legal justifications that are not in compliance with international law. Ultimately those already problematic standards are even not strictly followed by the nations themselves. To avoid fundamental damage to international law protections of life, it is necessary to establish tight legal regulation on the use of lethal drone strikes.

In the first part of the paper the core legal framework and norms for discussing armed drones are analysed. This outline concludes in a set of International Humanitarian Law and International Human Rights Law standards that need to be complied with. In the following country specific section important sources on the targeted killings policy of the two nations in focus like the Judgement of the Supreme Court of Israel on targeted killings (Public Committee of Torture in Israel vs. Government of Israel, HCJ 769/02) and the Presidential Policy Guidelines on the use of force in counterterrorism are analysed. In three selected critical case studies in Yemen and the Gaza Strip practical insight and illustration into the use of armed drones is provided.
Abstract (Deutsch)


Im ersten Teil der Thesis wird der zu Grunde liegende rechtliche Rahmen und fundamentale Normen für die Diskussion von bewaffneten Drohnen analysiert. Diese Ausarbeitung resultiert in einem Set von Internationalen Humanitäär- wie Menschenrechtlichen Standards die anzuwenden sind. Im folgenden länderspezifischen Abschnitt werden wichtige Quellen zu Richtlinien von gezielten Tötung der Vereinigten Staaten von Amerika und Israel wie das Urteil des obersten Gerichtshof von Israel (Public Committee of Torture in Israel vs. Government of Israel, HCJ 769/02) und die “Presidential Policy Guidelines on the use of force in counterterrorism” analysiert. In
drei ausgewählten kritischen Fallstudien in Jemen und Gaza Streifen wird ein praktischer Einblick wie eine Illustration des Gebrauchs bewaffneter Drohnen geboten.
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