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UAV WARFARE AND THE LAW OF ARMED CONFLICT: A CASE OF LEGAL AND ETHICAL INTERREGNUM

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ABSTRACT

The aim of the Thesis is to turn the debate about UAVs and compliance with the LOAC back and to suggest that we need to reconsider UAV warfare and the law at a more fundamental level. Placing the discussion within a larger understanding of the LOAC as a regime that has its own logic and dynamic, the Thesis looks at how the law conceives of war in its attempt to regulate the conduct of hostilities and how it articulates its ethical vision thereof. The Thesis articulates compliance with the LOAC on the basis of the inherent normativity of the law, as this emanates from the ethical assumptions of an armed confrontation and the humanity of the adversary. It examines the factual and normative space of war/armed conflict in the law and suggests that this is premised on the element of confrontation and permeated by notions of fairness as a component of its normativity, thus capturing the adversaries' opportunity to fight back in response or in defence. Understanding the LOAC as an 'other-directed' normative regime, the Thesis examines the constraints and limitations relating to the conduct of hostilities, and the choice of means and methods of warfare, are laid down as obligations or duties owed to one's human adversary. The above provides the theoretical framework within which the Thesis considers the 'extraordinary situation' where UAV warfare disrupts the implicit assumptions within which the law is embedded while UAVs' technical capabilities for surveillance and precision targeting continue to be recruited in defence of the drone under the LOAC. The Thesis demonstrates that humanity is the irreducible core of the LOAC, which means that the 'relevance' of the law as weapon technology evolves and introduces new patterns of wartime behaviour is bound up with the understanding that the human adversary is to retain and 'benefit' from the law's protection.

ABBREVIATIONS

Air Force L. Rev.	Air Force Law Review
AISB Quarterly	Artificial Intelligence and Simulation Behaviour (Society for the Study of) Quarterly
AJIL	American Journal of International Law
B. U. Int'l L. J.	Boston University International Law Journal
Bost. Stud. Philos. Sci.	Boston Studies in the Philosophy of Science
BYBIL	British Yearbook of International Law
Case W. Res. J. Intl L.	Case Western Reserve Journal of International Law
Chi. J. Int'l L.	Chicago Journal of International Law
CICR	Comité International de la Croix-Rouge
CLP	Current Legal Problems
CUP	Cambridge University Press
Denv. J. Intl'l L. & Pol'y	Denver Journal of International Law and Policy
DoD	Department of Defense (US)
EJIL	European Journal of International Law
Ethics & Int'l Aff.	Ethics and International Affairs
European Rev.	European Review
Fla L. Rev.	Florida Law Review
Ga J. Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Geo. J. Int'l L.	Georgetown Journal of International Law
Harv. Int'l L. J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Harvard NSJ	Harvard National Security Journal
HRHW	Human Rights & Human Welfare
ICRC	International Committee of the Red Cross
IJHR	International Journal of Human Rights
Int'l Aff.	International Affairs
Int'l & Comp. L. Q.	International and Comparative Law Quarterly
Int'l L. & Pol'y	International Law and Policy
Int'l L. Stud.	International Law Studies
Int'l Sec.	International Security
Int'l Stud. Q.	International Studies Quarterly
IRRC	International Review of the Red Cross
Israel L. Rev.	Israel Law Review
J. Air L. & Com.	Journal of Air Law and Commerce
J. App. Phil.	Journal of Applied Philosophy

J. East Asia Int'l L.	Journal of East Asia and International Law
J. Hist. Int'l. L.	Journal of the History of International Law
J. L. Inf. & Sci.	Journal of Law, Information and Science
J. Legal Analysis	Journal of Legal Analysis
J. Mil. Ethics	Journal of Military Ethics
J. Pol. Phil.	Journal of Political Philosophy
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
LOAC	Law of Armed Conflict
Mich. L. Rev.	Michigan Law Review
Mil. L. & L. War Rev.	Military Law and Law of War Review
Mil. L. Rev.	Military Law Review
Minn. L. Rev.	Minnesota Law Review
MIT Press	Massachusetts Institute of Technology Press
NILR	Netherlands International Law Review
N.Y.U. J. Int'l L. Pol'y	N.Y.U. Journal of International Law and Politics
ORDC	Official Records of the Diplomatic Conference
OUP	Oxford University Press
Phil. & Pub. Aff.	Philosophy & Public Affairs
Phil. & Pub. Pol'y Q.	Philosophy and Public Policy Quarterly
Research in Phil. & Tech.	Research in Philosophy and Technology
Tech. Rev.	Technology Review
Technol. Forecast. Soc. Change	Technological Forecasting and Social Change
Tex. Int'l L. J.	Texas International Law Journal
UAV	Unmanned Aerial Vehicle
U. Chi. L. Rev.	University of Chicago Law Review
U. Ill. J. L. Tech. & Pol'y	University of Illinois Journal of Law and Technology and Policy
U. Pa J. Int'l L. U	University of Pennsylvania Journal of International Law
U. Rich. L. Rev.	University of Richmond Law Review
Utah L. Rev.	Utah Law Review
Va J. Int'l L.	Virginia Journal of International Law
Wash. U. L. Rev.	Washington University Law Review
YIHL	Yearbook of International Humanitarian Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

INTRODUCTION

'Assume that aliens come to visit our planet and think we are food. Are we obligated to apply our rules when we fight them?'.[1] In fact, there is no need to stretch our imagination to the eventuality of extraterrestrial visitation for questions to arise about the way we conceive of our obligations towards those we fight under the law of armed conflict (LOAC). The law is about humans. And so is this Thesis. However, the development of advanced weapon technologies with 'extra-human' capabilities, such as unmanned aerial vehicles (UAVs) or drones, has brought about a reality of warfare where the hostile relationship between the human adversaries has been radically reshaped. As UAV technology shields the UAV-using force from harm (and any risk thereof) and guarantees its invulnerability as it lethally targets individuals, the Thesis suggests that there are still questions to be asked about what it means to be 'obligated to apply our rules when we fight them'. To answer this, the Thesis enquires into the legal and ethical[2] challenges posed by the relationship between UAV warfare and the LOAC.

The LOAC and its norms have been invoked by the United States, the prominent user of UAVs,[3] and formed part of the official justification of the use of drone strikes in the pursuit of targeted killing operations. Seeking to

[1] This question is borrowed from Daniel Reisner, Proceedings of the Bruges Colloquium 'Technological Challenges for the Humanitarian Legal Framework' (11th Bruges Colloquium, 21-22 October 2010) (N° 41, Autumn/Automne 2011) p 111 and his contribution to the Panel Discussion 'How will technological development challenge IHL in the 21st century?'. As Reisner explained: 'This is a case I give to my students… I asked this question because I wanted to understand the boundaries when we think that our rules apply. I am using this to show you that we have a scope, which we look at all the time, and put it in the right context'.

[2] 'Ethical' relates generally to what is right and wrong, good and bad, appropriate and inappropriate, expressing an understanding of how we ought to act and behave in ways appropriate to a given circumstance. In the context of the Thesis the circumstance in which appropriate conduct is explored is the paradigm of warfare that the LOAC seeks to regulate through its rules, that is, a human armed interaction between opponents that have the opportunity to fight back in response or in defence (ethos of fighting and fighting fairly) and are entitled to the protections that the LOAC affords to the adversary as human (ethical standing of the adversary).

[3] The United States is not the only state known to have used armed UAVs to target individuals for death.

articulate the legal (and ethical) framework in which UAV strikes are conducted, the United States affirmed in 2010 that 'U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war',[4] and that 'these operations are conducted consistently with law of war principles, including the principle of distinction and the principle of proportionality'.[5] The US targeted strikes against individuals by means of UAVs continued to be publicly defended as legal, ethical and just, where ethical (and just) meant that they 'conform[ed] to the basic principles of the law of war that govern the use of force', namely 'the principle of necessity', 'the principle of distinction', 'the principle of proportionality' and 'the principle of humanity which requires us to use weapons that will not inflict unnecessary suffering'.[6]

Moreover, numerous law scholars have sought to address legal and ethical questions about UAVs and the LOAC. What transpires from the justifications offered is that the drone is presented to the law as a *fait accompli* and UAV *fundamental* compliance with the LOAC is taken for granted. In this context, the drone is regarded as a déjà vu and hence there is hardly any question that cannot be addressed by ready-made answers drawn from anywhere between stones or crossbows and air bombing. This latter, redolent of past widespread destruction, has been recruited for easy (and incomplete) comparisons, where the drone is conveniently presented in favourable light and its use is, why not, worthy of some celebration. But when the present turns to the past to fault it or to attract legitimacy,[7] it is already

[4] Harold Hongju Koh (US State Department Legal Advisor), 'The Obama Administration and International Law', Address at Annual Meeting of the American Society of International Law (25 March 2010) [hereinafter Koh ASIL Address] <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>.

[5] ibid.

[6] John O Brennan (Assistant to the President for Homeland Security and Counterterrorism, US), 'The efficacy and ethics of US counterterrorism strategy', Woodrow Wilson Center, Princeton University, Washington DC (30 April 2012) [hereinafter Brennan Remarks] <www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>. In a similar vein, Eric H Holder (Attorney General of the US), Address at Northwestern University School of Law (5 March 2012) [hereinafter Holder Address] (stating that '[the four fundamental law of war principles governing the use of force] do not forbid the use of stealth or technologically advanced weapons') <www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

[7] The Thesis critically uses 'legitimacy' to refer to how the mainstream legal argument (critically analysed in chapter 1) articulates the permissibility or/and the justifiability of the

accountable to the future. Therefore, the Thesis suggests that caution is needed when studying UAVs under the LOAC so that drone technology does not become the air-bombing argument for tomorrow, whereby the drone will be part of the future historical argument that rationalises and legitimises armed violence, while the reassuring progressivism implicit in technological optimism will welcome every new weapon technology as a hi-tech achievement of a legal and ethical project of 'humanising' weaponry and warfare and perhaps the law. The arguments advanced by scholars to provide answers, selective and on a narrow justificatory front though they may be, seem sometimes as though they are designed simply to pre-empt objections that concern fundamental ethical issues that remain disquietingly untouched, leaving the humanity of the targeted individual on the dark side of reasoning.

While these approaches have as a starting point that the UAVs as an advanced and sophisticated weapon technology are not beyond the pale, the aim of the Thesis is to turn the debate back and to suggest that we need to reconsider UAV warfare and the LOAC at a more fundamental level. This means that we need to reflect more deeply on the transformation of the landscape of conflict brought about by UAV technology, the ethical assumptions underpinning the LOAC and on, 'potentially, how [drones] strike at the very nature and content of international humanitarian law'.[8] Contesting the assumptions shared in the mainstream legal argumentation, the Thesis argues that the environment of violence manufactured by UAV technology, where the drone-using force reserves absolute safety for its own side while exposing the adversary to absolute vulnerability and targeting them for death, albeit with precision, poses a greater challenge to the LOAC

use of UAVs with legal and ethical connotations. Such articulations gloss over the particularities and peculiarities of UAV weapon technology and the model of violence it represents while they retain 'authoritativeness' through links with the law or reference to established (albeit not always normatively acceptable; nor normatively settled) practices. Thus understood the Thesis distinguishes it from legality in the sense of legal or formal validity as a matter of conformity, strictly speaking, with positive law and the letter of the law, as well as from lawfulness that in the Thesis is intended to capture the spirit of the law and refers to being in line with the normative substance of the law and the ethical considerations reflected therein.

[8] Frédéric Mégret, 'The Humanitarian Problem with Drones' (2013) 5 Utah L. Rev. 1283, 1303 (emphasis omitted).

than usually acknowledged in the debates about drones and the law. Perhaps this sounds to many as 'anti-drone advocacy', what is often uttered as a damning charge. Such a position is considered 'paradoxical since most experts agree that although drones, like all weapons, may be used in violation of the law of armed conflict, their unique characteristics, especially their sensor suite and ability to loiter over a proposed target, usually render them more discriminate than manned systems'.[9] In response, the Thesis suggests that the focus of the discussion needs to shift to the conduct of hostilities bringing face to face the LOAC with UAVs by focusing on the adversary found on the receiving end of UAV use. This is a largely neglected aspect in the discussions of UAV compliance with the LOAC,[10] which the Thesis addresses by looking at the paradigm of warfare that animates the current LOAC and the ethos of humanity that grounds rules on the means and methods of warfare and the conduct of hostilities.

1. PARADIGMS OF WARFARE

Historically, the landscape of conflict has undergone major changes with the advancement of warfare by virtue of the organisation and the professionalisation of armies, changes in fighting practices, battlefield technology and skill over time.[11] As the focus in warfare gradually shifted away from the individual towards the collective and Homeric-like single combat gave way to massed fighting between large armies of trained soldiers, the human person continued to be the central figure of the battlefield. Even with the advent of artillery and airpower, war did not cease

[9] Michael Schmitt, 'Foreword' in Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict* (TMC Asser 2014) v.

[10] Larry May, *War Crimes and Just War* (CUP 2007) 102 ('In my view, a properly humanitarian conception of war puts soldiers at the center of concern, since soldiers and combatants are those most directly affected by war and armed conflict.'); Gabriella Blum, 'The Dispensable Lives of Soldiers' (2010) 2 J. Legal Analysis 69, 96 ('Recent decades have seen the birth and growth of an international "humanitarian conscience" (or "universal benevolence"), which comprises various trends, including a growing general aversion to war, a lower tolerance for civilian casualties …, and an increased care for the well-being of others, including enemy nationals. But this trend, to the extent it exists, does not include, as of yet, a general aversion to enemy combatant casualties.').

[11] See generally e.g. Miguel A Centeno and Elaine Enriquez, *War & Society* (Polity Press 2016); Michael Howard, George J Andreopoulos and Mark R Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (Yale UP 1994).

to hinge on human effort, which entailed very real and severe consequences for the human person for all the parties involved. Those who practise warfare, warriors and soldiers, on both warring sides have long been an integral part of the physical and ethical reality of war. War as a reciprocal armed interaction captures mutual danger and vulnerability between the adversaries as the pragmatic *raison d'être* for the regulation of hostilities *in bello*. Hence, the efforts to keep war within legal and ethical bounds with a view to containing the consequences of destructive warfare violence have been inevitably grounded in an element of mutuality. The current LOAC seeks to regulate, through prohibitions and restrictions, the conduct of hostilities in armed conflicts between combatants who face the reciprocal risk of harm, regardless of asymmetry in terms of weapons capability. The implicit ethical assumptions within which the LOAC's rules are embedded capture the law's internal perspective on appropriate conduct between human opponents. UAV technology disrupts the space of mutual vulnerability that the law regulates. As UAVs place the adversaries in two extreme contradictory positions, the UAV-using force in absolute safety and the targeted individuals in absolute exposure to lethality, they introduce a paradigm of warfare that disables the ethical assumptions of the LOAC.

In the current debates about UAVs, the war semantics cannot and should not go unnoticed. The coinage of terms such as 'remote control war' or 'drone war' carries, if anything, significant symbolic value. It often serves as an external[12] recognition of phenomena that due to their relative newness or currency seem to merit attention and perhaps call for particular treatment. Drone wars have been largely associated with the United States' extensive reliance on UAVs in the pursuit of targeted killing operations.[13] War is often employed as a term that is beyond any need for explication, detail or

[12] Phillip Allott, *Eunomia: New Order for a New World* (rev edn, OUP 2001) xiii ('… words help to form conceptual horizons and … may be the outward signs of a real change').
[13] See e.g. Peter Bergen and Daniel Rothenberg (eds), *Drone Wars: Transforming Conflict, Law, and Policy* (CUP 2015).

consideration.[14] But even so it reveals particular understandings and perceptions of the concept, be it in real or ethical or legal terms. At one level, war may be said to refer to how the real consequences of drone violence very much feel (even if they do not look) like war as traditionally understood. Indeed, for all the elimination of risk on the UAV-using force's own side, unmanned violence entails death and destruction on the receiving end of the drone.[15] This is significant if one considers that the unmanning of violence has aspired to be a hi-tech part of low(er) visibility military violence and a tool of a 'light-footprint way of war'.[16] Having said that, in 2012, at a time when US drone strikes had reached a peak in Pakistan,[17] the concern was voiced that a drone operation 'can amount to roughly eight times the scale of the opening round of the Kosovo war, and yet no one conceives of it as a 'war''.[18] At a different level, the embrace of war invites a certain legal (and ethical) appreciation or interpretation of violent events. In the political discourse this is often met with distrust and wariness, and the fear that it aims at bringing military force within the ambit of permissible force that 'war' implies, thus creating a permissive, 'legal' or 'legitimate', atmosphere of armed violence.[19] In this context, the invocation of the rules and principles of the LOAC is usually viewed as part of assurances that military force is dealt within the matrix of the law.

As the focus of the Thesis is on fundamental compliance with the LOAC and the rules relating to the conduct of hostilities, the Thesis uses 'LOAC' and not 'International Humanitarian Law (IHL)' as the law relating to the conduct of

[14] Claude Levi-Strauss, *Structural Anthropology* (Penguin 1979) 217 ('… language continues to mould discourse beyond the consciousness of the individual, imposing on his thought conceptual schemes which are taken as objective categories').
[15] See e.g. The Intercept, 'The Drone Papers' <https://theintercept.com/drone-papers/>; The Bureau of Investigative Journalism (TBIJ), 'Drone Warfare' <www.thebureauinvestigates.com/projects/drone-war>.
[16] See e.g. Jack Goldsmith and Matthew Waxman, 'The Legal Legacy of Light-Footprint Warfare' (2016) 39 The Washington Quarterly 7.
[17] See n 15.
[18] Peter W Singer, 'Interview with Peter W Singer' (2012) 94(886) IRRC 467, 471.
[19] See e.g. Frédéric Mégret, ''War'? Legal Semantics and the Move to Violence' (2002) 13 EJIL 361.

hostilities including means and methods of warfare has not been traditionally viewed as 'humanitarian law' proper.[20]

2. METHODOLOGY AND SOURCES

The conception of war/armed conflict in the law and the provisions which include prohibitions relating to the conduct of hostilities are tracked closely through the 1949 Geneva Conventions[21] and their 1977 Additional Protocols,[22] employing textual, contextual and teleological methods.[23] Having as starting point of reference the text of the provisions, the Thesis traces their substance, conceptual and normative significance by placing them in their proper context in light of the object and purpose of the relevant instruments. The analysis relies on academic legal scholarship and academic commentaries, which is complemented by the interpretation provided in the International Committee of the Red Cross (ICRC) Commentaries on the Conventions and the Protocols,[24] as well as the study of the *travaux*

[20] See e.g. chapter 4, section 4.2.

[21] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 UNTS 31 [hereinafter 1949 Geneva Convention I (GCI)]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 75 UNTS 85 [hereinafter 1949 Geneva Convention II (GCII)]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 UNTS 135 [hereinafter 1949 Geneva Convention III (GCIII)]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 UNTS 287 [hereinafter 1949 Geneva Convention IV (GCIV)].

[22] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 [hereinafter 1977 Additional Protocol I (API)]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 609 [hereinafter 1977 Additional Protocol II (APII)].

[23] See Art 31 of Vienna Convention on the Law of Treaties.

[24] Commentary on the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Jean S Pictet ed, ICRC 1952) [hereinafter 1952 ICRC Commentary on GCI]; Commentary on the Geneva Convention IV Relative to the Protection of Civilians in Time of War (Jean S Pictet ed, ICRC 1958) [hereinafter 1958 ICRC Commentary on GCI]; Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz et al eds, ICRC 1987) [hereinafter 1987 ICRC Commentary on API/II]; Commentary on the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (ICRC 2016) <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> [hereinafter 2016 ICRC Commentary on GCI]. It is important to note that in the Foreword to the 1952 ICRC Commentary on GCI, p 7 the ICRC pointed out that '[a]lthough published by the International Committee, the Commentary is the personal work of its authors' and that 'the Committee … always takes care to emphasize that only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation

préparatoires. What follows is a brief explanation of how the ICRC Commentaries and the preparatory work are approached and employed in the Thesis.

ICRC Commentaries

The Thesis makes use of the ICRC Commentaries as an interpretative tool in the analysis of different points of law. The Commentaries are not employed uncritically, but rather they are critically discussed and challenged when this is necessary for the purposes of the analysis. Controversial claims or claims that have generated debate in the literature are highlighted in the analysis. While one can observe weaknesses[25] or silence[26] regarding certain issues, interpretative exercises that do not appreciate the contribution of the ICRC Commentaries to the interpretation of the law would risk being considered incomplete. Despite disagreement on important points (for example, military necessity), the reference to the Commentaries does not serve just and simply to ascertain the correct meaning of the treaty, but they evoke what in the Thesis is understood as the spirit of the LOAC, which on certain points is, still, if not in the same way as in the past, represented through the ICRC.

The interpretation offered in the ICRC Commentaries has been invoked and/or relied on in different quarters as 'authoritative'[27] or 'non-

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of an intergovernmental treaty'. In a similar vein, in the Foreword to the 1987 ICRC Commentary on API/II, p xiii the then President of the ICRC stated that 'the ICRC also allowed the authors their academic freedom, considering the Commentary above all as a scholarly work, and not as a work intended to disseminate the views of the ICRC', noting among others that '[t]he ICRC decided to support this undertaking and publish the Commentary because it is conscious of its role as a guardian of international humanitarian law …'. However, '[o]ver time, and in practice, the Commentaries have come to be seen as reflecting the ICRC's view', Sandesh Sivakumaran, 'Making and Shaping the Law of Armed Conflict' (2018) CLP 1, 9. It should also be noted that in the Foreword to the updated 2016 ICRC Commentary the ICRC confirms that '[the new Commentary] presents the ICRC's interpretation of the law, but it also indicates the main diverging views and issues requiring further discussion and clarification'.

[25] See e.g. Janina Dill and Henry Shue, 'Limiting the Killing in War: Military Necessity and the St. Petersburg Assumption' (2012) 26 Ethics & Int'l Aff. 311, 320 (observing that 'authoritative legal commentators write about these matters in ways that are unhelpful' mentioning as an example 'the 1987 Commentary on the Additional Protocols of 1977').

[26] See chapter 2, section 2.1.

[27] See e.g. Dino Kritsiotis, 'The War on Terror and the Problematique of the War Paradigm' (2009) 9 HRHW 11, 14 ('the authoritative International Committee of the Red Cross Commentary on common Art. 2'); Human Rights Watch, 'Civilian Deaths in the NATO Air Campaign' (2000) p 20 ('In its authoritative *Commentary* on the protocols, the International Committee of the Red Cross …') <www.hrw.org/sites/default/files/reports/natbm002.pdf>.

authoritative',[28] or as a basis of a judicial holding in relation to a particular provision[29] or 'noteworthy' of the way they address a particular question of law.[30] Sometimes a line is drawn between 'a work that is to be taken seriously' namely 'as an authority on a particular point' and 'a work that is determinative of the issue' and can be referred to as 'authoritative on the point'. In this respect, it has been claimed that 'the *ICRC Commentary* [on API] is an authority but is not authoritative on the interpretation on IHL'.[31] As recently stated by Jean-Marie Henckaerts, head of the ICRC's project to update the Commentaries on the 1949 Geneva Conventions and the Additional Protocols of 1977, through its commentary on the law the ICRC aspires to provide 'a leading interpretive compass', the 'ultimate *authority* [of which] will depend on its quality and relevance for practitioners and academics'.[32]

The special status often ascribed to the ICRC Commentaries is not only linked to the fact they provide important perspectives and expert guidance on how the law is to be interpreted; it also seems to be, and perhaps even more so, associated with the status of the ICRC and the authority of the institution itself on the international stage. The ICRC has carved out a distinctive international role for itself by virtue of the significant role it has played in the preparatory work and drafting of the conventions on

[28] *Legal Consequences of the Construction of a Wall in Occupied Territory* (Advisory Opinion) [2004] ICJ Rep 136, Separate Opinion of Judge Kooijmans, para 48 ('the ICRC in its (non-authoritative) commentaries on the 1949 Convention').
[29] See also *Prosecutor v Martić* (Judgement) IT-95-11-T (12 June 2007) para 71, n 137 (noting that in *Blaškić* '[t]he Appeals Chamber based its holding on the ICRC Commentary on Additional Protocols …').
[30] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Bosco Ntaganda* (Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9) ICC-01/04-02/06 (4 January 2017) para 50 ('The Chamber further considers it noteworthy that the ICRC, in its updated commentary to the First Geneva Convention of 1949, addresses the question of …').
[31] Ian Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff 2009) 20 (also noting that the ICRC 'does not claim authoritative status for itself').
[32] Jean-Marie Henckaerts, 'Locating the Geneva Conventions Commentaries in the International Legal Landscape' (*Humanitarian Law & Policy*, 29 June 2016) (the standard for the new Commentaries being Pictet's Commentaries, as noted) <http://blogs.icrc.org/law-and-policy/2016/06/29/locating-geneva-conventions-commentaries/>.

international humanitarian law,[33] in the area of humanitarian activities,[34] and also, pursuant to its institutional mandate, as the 'guardian of international humanitarian law',[35] committed to promoting, strengthening and working for a better understanding of the law and its principles.[36] In answering the question 'where the legitimacy of the ICRC to interpret the Conventions stem[s] from' on the occasion of the updated 2016 ICRC Commentary on GCI, Jean-Marie Henckaerts pointed to the following: 'First, the ICRC benefits from a legal legitimacy as guardian and promoter of IHL …'; '[s]econd, the ICRC possesses an operational legitimacy'; and '[t]hird, throughout the years, the ICRC has accumulated knowledge in material form…'.[37]

It is also worth noting that the International Law Commission (ILC) has referred to the ICRC and its potential role as a 'non-state actor'[38] in the interpretation of rules of treaty law and the determination of rules of customary law. This is in the context of its projects relating to the law of treaties and the Vienna Convention on the Law of Treaties (VCLT),[39] and in particular the interpretation of Article 31 and Article 32 VCLT. The ILC's work on the topics of Subsequent agreements and subsequent practice in relation to the interpretation of treaties (SASP), and of the Identification of

[33] See e.g. Theodore Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 AJIL 245; François Bugnion, 'The International Committee of the Red Cross and the Development of International Humanitarian Law' (2004-5) 5 Chi J. Int'l L. 191.
[34] See Geneva Conventions.
[35] Yves Sandoz, 'The International Committee of the Red Cross as guardian of international humanitarian law' (1998) <www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm>; Peter Maurer (ICRC president), 'Speech by ICRC president at International Conference on Islam and IHL' (2016) <www.icrc.org/en/document/speech-icrc-president-international-conference-islam-and-ihl>; Henckaerts, 'Locating the Commentaries'.
[36] ICRC's Mission Statement (2008) <www.icrc.org/eng/resources/documents/misc/icrc-mission-190608.htm>; Article 5(2)(c) and (g) of Statutes of the international red cross and red crescent Movement.
[37] Henckaerts, 'Locating the Commentaries'.
[38] See text below. The ICRC has been referred to as a 'state-empowered entity' in the 'making and shaping of the law of armed conflict, in particular, the interpretation and development of the law' through the interpretation of treaties, identification of custom and clarification of aspects of the law, Sivakumaran, 'Making and Shaping', 21-4, 42.
[39] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 133.

Customary International Law (CIL),[40] resulted in the Draft Conclusions on SASP and the Draft Conclusions on CIL respectively, which were adopted in 2016 on first reading and in 2018 on second reading completing the project.[41]

As Draft Conclusion 5(2) of the ILC Draft Conclusions on SASP states, the conduct of a 'non-state actor' such as the ICRC, distinguished from the practice of actors that 'constitute[s] subsequent practice under articles 31 and 32',[42] 'may, however, be relevant when assessing the subsequent practice of parties to a treaty'.[43] As has been observed, this is because 'it may serve as an important compilation of subsequent agreements or subsequent practice of Parties in interpreting the treaty, and may prompt reactions by Parties that constitute such agreements or practice'.[44] According to the ILC Commentary to the Draft Conclusion, the ICRC constitutes an example of 'non-State actors [that] may also play an important role in assessing subsequent practice of the parties in the application of a treaty',[45] taking note of the fact that the 'ICRC occasionally provides interpretative guidance on the 1949 Geneva Conventions and the Additional Protocols on the basis of a mandate from the Statutes of the Movement'.[46] As the Commission further notes, the ICRC is an example that 'show[s] that non-State actors can provide valuable information about subsequent practice of parties, contribute to assessing this information and even solicit its coming into being. However,

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[40] ILC, 'Report of the International Law Commission, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10 <http://legal.un.org/docs/?path=../ilc/reports/2016/english/a_71_10.pdf&lang=EFSRAC>

[41] ILC, 'Report of the International Law Commission', Seventieth session (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10 <http://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf>.

[42] Thus constituting a means of treaty interpretation.

[43] UN Doc A/73/10, p 41, para 15.

[44] Sean D Murphy, 'The role of the ICRC Commentaries in understanding international humanitarian law' (*Intrecross*, 6 July 2016) <http://blogs.icrc.org/law-and-policy/2016/07/07/joint-series-the-role-of-the-icrc-commentaries-in-understanding-international-humanitarian-law/>.

[45] UN Doc A/73/10, p 41, para 15. See also Meron, 'Custom', 245 (claiming that the ICRC Commentaries 'proved to be a leading source of interpretation affecting the practice of states and their *opinio juris*, and thus indirectly contribute to the formation of customary law').

[46] UN Doc A/73/10, p 41, para 15 (noting in the same breath 'that States have reaffirmed their primary role in the development of international humanitarian law. Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent (2011), while recalling "the important roles of the [ICRC]", "emphasiz[es] the primary role of States in the development of international humanitarian law"').

non-State actors can also pursue their own goals, which may be different from those of States parties. Their documentation and their assessments must thus be critically reviewed'.[47]

Furthermore, Draft Conclusion 4(3) of the ILC Draft Conclusions on CIL states that the conduct of 'non-state actors', which is not practice that contributes to the formation, or expression, of rules of customary international law, 'may be relevant when assessing the practice of states that contributes to the formation, or expression, of rules of customary international law'.[48] According to the Commentary to the Draft Conclusion, '[o]fficial statements of the International Committee of the Red Cross (ICRC), such as appeals for and memorandums on respect for international humanitarian law, may likewise play an important role in shaping the practice of States reacting to such statements; and publications of the ICRC may assist in identifying relevant practice. Such activities may thus contribute to the development and determination of customary international law, but they are not practice as such'.[49] In that respect, it has been observed that the Commentaries 'no doubt will play an important indirect role in identifying customary international law, either by providing a very high quality survey of State practice accepted as law (opinio juris) or by stimulating reactions from States (either in agreement or disagreement) which in turn reveals State practice accepted as law'.[50]

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[47] ibid.

[48] ibid.

[49] ibid p 132, para 9. See the ICRC, *Customary International Humanitarian Law - Volume I: Rules* (Jean-Marie Henckaerts and Louise Doswald-Beck eds, 2005, reprint. with corrections CUP 2009) [hereinafter ICRC Customary IHL Study] & *Volume II: Practice* (Jean-Marie Henckaerts and Louise Doswald-Beck eds, CUP 2005) and the ICRC Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> to which the Thesis makes reference in relation to the rules that the ICRC identifies as customary. See Sivakumaran, 'Making and Shaping', 42 concluding that the identification of a customary rule by actors such as the ICRC 'can crystallize it, rendering customary what was previously not customary or solidifying a rule that was previously in doubt. The identification of a customary rule can thus be constitutive of that rule'.

[50] Murphy, 'Role of Commentaries' (also claiming that '[i]n addition to the potential roles that the ICRC Commentaries play with respect to sources of law, treaty law and customary international law', the ICRC commentaries should be seen as falling within a subsidiary source of international law: the "teachings of the most highly qualified publicists"'). In a similar vein, Sivakumaran, 'Making and Shaping', 8 referring to the Pictet and the Sandoz et al Commentaries as '[s]ome of the most influential teachings of publicists on the law of armed conflict'.

At this point, it is appropriate to consider some of the objections to the use of the ICRC Commentaries.

It has been argued that '[i]t is important to avoid *Commentary*-fetish. They are, by definition, secondary interpretations of existing primary texts. Although sometime suggestive of scholarly consensus, their status as law is only as persuasive as the quality of the underlying legal analysis' and that 'it is true that the views of the experts are important insofar as they might provide an interpretive gloss on the text of a major international treaty. But in that case, the experts and commentaries are relevant not as scholarly opinion but only as evidence of legislative intent when a given treaty or protocol was being drafted by experts'.[51] The ICRC Commentaries may also be viewed as reverberating a very specific type of ethos and understanding of the history of the LOAC and the role of the ICRC, that envisioned by their authors and editors. For example, while the eminence of Jean Pictet, his contribution to the preparatory work leading to the adoption of the four Geneva Conventions in 1949 and the value of the Commentaries published under his general editorship are widely accepted,[52] one might caution that the Commentaries should be read against Pictet's views, such as those expressed in published papers that 'it is the duty of the Red Cross to assist in widening the scope of law, on the assumption that the most favorable circumstances will prevail–in other words, that law will retain its value'.[53]

With respect to the 2016 updated Commentary, for all the emphasis on the expertise of the ICRC authors and other contributors, it has been pointed out that they are 'neither infallible nor objective. On the contrary, both the experts and the ICRC as an institution have political and legal commitments

[51] Jens David Ohlin, 'Recapturing the Concept of Necessity' (2013) Cornell Legal Studies Research Paper No 13-90, pp 23-4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230486>.

[52] The Pictet Commentaries have been regarded as 'of historical value' albeit 'dated', see e.g. 2016 ICRC Commentary on GCI (Introduction) paras 4-5 ('The original Commentaries were based primarily on the negotiating history of these treaties, as observed at first hand by the authors, and on prior practice. In this respect, they retain their historic value. … However, with the passage of time and the development of practice, a genuine need was felt to update the Commentaries.'); Murphy, 'Role of Commentaries' ('the Pictet commentaries remain of continuing value, yet are now even more dated').

[53] Jean S Pictet, 'The New Geneva Conventions for the Protection of War Victims' (1951) 45 AJIL 462, 464.

that cannot help but influence how they interpret GC I'. It has been noted that 'IHL scholars should be willing to challenge the Commentary when they believe that the ICRC is wrong' rather than 'uncritically accept the ICRC's interpretation of GC I'.[54] Furthermore, the updating project has been criticised in relation to the geographic representation of the authors. In that respect, it has been stated that it is 'regrettable that the primary authors and reviewers of the Commentary are so geographically homogenous – especially given that the states they represent rarely if ever experience the kind of conflict that is subject to Common Article 3'.[55] With regard to a methodological point,[56] the fact that 'the ICRC's interpretation of GC I is based on evidence that cannot be subjected to scholarly criticism', that is, 'non-public information' about which the ICRC should be more open, has been regarded as 'somewhat troubling'.[57]

Travaux préparatoires

The Thesis also turns to the *travaux préparatoires* of relevant instruments, such as the 1899 Hague Convention[58] and the 1977 Additional Protocols to the 1949 Geneva Conventions,[59] but does not rely on them unreservedly and conclusively. According to the rules for treaty interpretation under the VCLT, the *travaux préparatoires* constitute a supplementary means of

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[54] Kevin Jon Heller, 'First Thoughts from Academia on the Updated GCI Commentary' (*Opinio Juris*, 22 July 2016) (albeit not suggesting that the ICRC interpretations 'should be discarded' or 'should always be viewed with a skeptical eye') <http://opiniojuris.org/2016/07/22/multi-blog-series-first-thoughts-on-the-updated-gci-commentary-from-academia/>.

[55] ibid (also noting that 'here is no escaping the fact that the members of the Editorial Committee, the ICRC Project Team, and the Reading Committee come exclusively from states in the Global North – most from states in Western Europe).

[56] 2016 ICRC Commentary on GCI (Introduction) para 10 ('… apart from other academic commentaries … the contributors were able to draw on research in the ICRC archives, while respecting their confidential nature, to assess the application and interpretation of the Conventions and Protocols since their adoption').

[57] Heller, 'First Thoughts'.

[58] The Proceedings *of the Hague Peace Conferences, translation* of the Official Texts (prepared under the Supervision of James Brown Scott) [hereinafter Hague Proceedings (1899)]; *The Conference of 1899* (OUP 1920) *and Conference of 1907,* vols I-III (OUP 1920-1).

[59] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva (1974-1977) [hereinafter ORDC].

interpretation.[60] However, the weight that has often been placed at the preparatory work is greater than that indicated by the status formally reserved for them, including that under the VCLT.[61]

In this Thesis the drafting history provides important insights on the dispositions prevailing at the historical time of negotiations and law-making,[62] which is useful for understanding the different perspectives that accompanied the adoption and formulation of rules. This will contribute to elucidating the concerns that surrounded the attempts to formulate or clarify certain provisions at the historical moment of creation, not only those that were widely shared and ultimately found expression in the text adopted, but also those that were voiced as part of objections, were met with disagreement during the debates[63] and were perhaps rejected in the end. While the Thesis does not seek definitive and decisive answers in the preparatory work,[64] the study of the *travaux* may prove helpful in the better understanding of certain provisions in relation to the meaning of certain terms, the inclusion of particular words and the absence of particular

[60] See Article 32 VCLT on 'Supplementary means of interpretation', whereby recourse to preparatory work is limited to 'when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable'.

[61] See e.g. Hersch Lauterpacht, 'Some Observations on Preparatory Work in the Interpretation of Treaties' (1935) 48 Harv. L. Rev. 549 (noting among others that 'practice is that in no circumstances ought preparatory work to be excluded on the ground that the treaty is clear in itself. Nothing is absolutely clear in itself. Most words and expressions have many meanings.'); Heller, 'First Thoughts' (noting in relation to the 2016 ICRC Commentary on GCI that 'one of the most encouraging aspects of the ICRC's methodology: its willingness to make liberal recourse to travaux preparatoires when interpreting provisions of GC I', and commending it as 'a refreshing deviation from 'VCLT orthodoxy about travaux preparatoires being unnecessary when the "ordinary meaning" of treaty terms is ostensibly clear').

[62] See e.g. Jens Klabbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) 50 NILR 267, 282 (arguing that the 'ambivalence when it comes to *travaux préparatoires* is but a reflection of a more general ambivalence towards history', pointing to the risk of historical analysis replacing 'theoretical or normative argumentation').

[63] See Philip Allott, 'The Concept of International Law' (1999) 10 EJIL 31, 43 famously observing that '[a] treaty is a disagreement reduced to writing …'.

[64] Indeed, to ascertain what the drafters had actually in mind would probably be an impossible exercise: see e.g. Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 82(837) IRRC 67, 69 (drawing a line between interpretation 'originally envisaged by the drafters' and what 'the negotiators at least bore in mind' as revealed by an examination of the *travaux préparatoires*; but as they claim '[t]his is nonetheless a minor consideration, since the historical interpretation of an international instrument can never prove decisive in identifying the current status of a legal norm').

expressions, as well as in giving us an idea of the humanitarian stakes which the delegates entertained and the possible readings to which the negotiations alerted the drafters. It should also be noted that the present study does not favour a strictly legalistic dependence on the *travaux préparatoires*.

The conferences that paved the way for the development of the law through codification, including the prohibitions that the Thesis examines, have taken place in markedly different historical contexts, which is reflected in their synthesis. A few words in this respect seem to be appropriate here.

The Saint Petersburg Declaration of 1868 Renouncing the Use, in Time of War, of certain Explosive Projectiles was the product of an International Military Commission representing 16 states regarded as major powers and 'civilized nations' at the time, including European powers, the Ottoman Empire and Persia.[65] In 1874 the Brussels Conference on the Rules of Military Warfare, which resulted in the non-ratified Project of an International Declaration concerning the Laws and Customs of War, convened among 15 European states that represented great powers and secondary powers.[66] Persia was invited to participate at both conferences, but attended only St Petersburg. The United States was not invited to St Petersburg as it was not considered a great power, but was invited to Brussels and declined. South American states were invited to attend the Brussels conference, but informally so and so they declined.[67] At The Hague Peace Conferences of 1899 and 1907 the codification of the law took place in a world of sovereign states and major powers of the time, as well as in a spirit of *si omnes* reciprocity. In 1899 out of the 26 states that participated only six were non-European, namely the United States, Mexico, Persia, China, Siam and Japan, while in 1907 the number of the states in attendance rose to 43, with 19 being South American. It is worth noting that 'no African states were independently represented at either Conference'; in 1899 'none of the six

[65] See Roberts and Guelff, p 53.
[66] See Schindler and Toman, p 25; also, *Actes de la Conférence de Bruxelles de 1874: Sur le projet d'une convention international concernant de la guerre* (Librairie des publications législatives 1874).
[67] ibid.

sovereign African states were invited' while in 1907 'Africa was entirely excluded'.[68]

The law seeking 'to provide the protection to which every human being is entitled', as contained in the (currently universally ratified) 1949 Geneva Conventions, emerged as the distillation of states' shocked conscience when dawned the realisation that 'everything is made subordinate to the overmastering dictates of war'.[69] Drafted in the wake of World War II, the 1949 Conventions are a product of a time that had experienced atrocities and excesses committed by and against all sides in the pursuit of victory.[70] As Michael Howard has remarked, the war signalled the 'beginning of the end' of an era in which prevailed the 'assumption of common values that would govern the conduct of … wars, whether or not these values were codified'.[71] The 'reaffirmation' of these values, at the 1974-1977 Diplomatic Conference, took place against the background of a process of decolonisation, which had been well under way and nearing its end. Mozambique achieved independence during the Diplomatic Conference, stating that 'Yesterday, we were freedom fighters; today, we are the representatives of a sovereign State'.[72] The number and range of participants brought diverse interests into the debates. The Conference benefitted from the contributions of newly independent states that were invited to participate fully and vote, national liberation movements that, albeit not entitled to vote formally, enjoyed full participation 'in the deliberations of the Conference and the main Committees' and were invited to sign the Final Act,[73] as well as

[68] Helen M Kinsella, 'Superfluous Injury and Unnecessary Suffering: National Liberation and the Laws of War' in Tarak Barkawi and George Lawson (eds), *International Origins of Social and Political Theory* (Emerald Publishing 2017) 211 (also 210 noting that '[i]n the meetings of those who gathered to formulate the 1899 and 1907 Hague Conventions, there was a clear demarcation between strategies and weapons to be allowed in wars against the civilized and those in wars against the uncivilized'); Arthur Eyffinger, 'Caught Between Tradition and Modernity: East Asia at the Hague Peace Conferences' (2008) 1 J. East Asia Int'l L. 1, 7.
[69] Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 1947, Judgment, p 227.
[70] See e.g. the remark that the law 'never before in history was so widely and so ruthlessly disregarded as in the Second World War' in Oppenheim's International Law (Hersch Lauterpacht ed, 6th edn, 1948) iii.
[71] Michael Howard, 'Constraints on Warfare' in Howard et al, *Laws of War*, 7-8.
[72] ORDC vol VII, p 277.
[73] ORDC vol I, p 55.

intergovernmental organisations. In that respect, it has been characterised as 'the largest and most diverse conference on the laws of war'.[74]

3. THE INTERACTION OF LAW AND TECHNOLOGY

The central question of the Thesis engages the interaction between law and technology. In that respect, the Thesis finds helpful the way in which Lyria Bennett Moses approaches technological change that generates legal dilemmas outside the context of war and military violence. As Bennett Moses argues, 'technological change is often the occasion for legal problems. The tension between law and technology … is often reflected in metaphors involving competitors in a race with law the inevitable loser',[75] and '[a]lthough law may not struggle with technology as such, many legal problems do arise in new technological contexts'.[76] This is due to 'the capacity of new technology to enable new forms of conduct, including alteration of the means by which similar ends are achieved',[77] and the fact that 'new technology carries with it new possibilities'.[78] As Bennett Moses claims, '[t]he introduction of such significant changes into a world of rules that govern what actions we *may* perform, what objects we *may* create and use, and what relationships will be *recognized* can create legal problems'.[79]

Bennett Moses categorises the 'legal problems that frequently follow technological change' into four types.[80] Of most relevance to the way in which the Thesis approaches the question it has posed about the UAV warfare and the LOAC is the one that captures 'uncertainty in the application of existing legal rules to new practices'.[81] This refers to the understanding that '[t]he law may be uncertain as it applies to new forms of conduct. In other words, it may not be clear whether such conduct is commanded, prohibited, or authorized.

[74] Kinsella, 'Superfluous Injury', 221.
[75] Lyria Bennett Moses, 'Recurring Dilemmas: The Law's Race to Keep up with Technological Change' (2007) 2 U. Ill. J. L. Tech. & Pol'y 239, 241.
[76] ibid 243.
[77] ibid 245.
[78] ibid 248.
[79] ibid 245.
[80] ibid 244.
[81] ibid.

Existing legal rules may need to be clarified'.[82] As explained, there are two different ways of conceiving of uncertainty; 'Legal Uncertainty as a Persistent Problem' and 'New Technology as a Cause of Legal Uncertainty'.

The former refers to already existing 'vagueness or contestability of word or expression in legal rules'[83] or the lack of clarity of a rule 'as a whole'[84] and to 'new ambiguities [that] can arise as a result of technological change'.[85] Interestingly, as noted, '[i]t is not sufficient to point out that when a technology is new, there may be no rules about that technology',[86] whereby 'existing laws are often capable of disposing of issues involving a new technology without controversy'.[87] The latter captures 'the problems of uncertainty [that] tend to be compounded when technological change gives rise to new forms of conduct'.[88] The 'permissibility' of such conduct 'will depend on the fit with existing legal categories and concepts',[89] which may 'become ambiguous in light of technological change.[90] As also noted, '[w]here technological change could not have been foreseen at the time a law was created … legal uncertainty caused by unforeseen technological change is more problematic than ordinary legal uncertainty'.[91]

In this light, the new form of conduct enabled by UAVs will be examined in relation to the rules of conduct of hostilities in which 'uncertainty' arises or is compounded in UAV warfare, namely the prohibition of superfluous injury or unnecessary suffering, the prohibition of attack against persons *hors de combat* and the prohibition of 'denial of quarter'. If the LOAC is to remain relevant as weapon technology evolves and introduces new patterns of wartime behaviour, then the question is what the meaning of such 'relevance' is and if it comes at the price of the violation of certain (crucial) aspects of the law and its legal and ethical limits.

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[82] ibid 248.
[83] ibid 251.
[84] ibid 252.
[85] ibid 251.
[86] ibid 252.
[87] ibid 253.
[88] ibid.
[89] ibid.
[90] ibid 257.
[91] ibid 258.

4. SUMMARY OF CHAPTERS

The summary of the chapters aims at offering a glimpse of the structure of the Thesis and into how the overall argument unfolds and develops in answering the question that the Thesis has posed.

Chapter 1 will present and critically analyse the mainstream legal argument, whereby UAVs represent another technological step further and forward towards better compliance with the LOAC. The chapter will explore the narrative that views UAVs as an advanced and sophisticated version or variation of manned weapons and places them on a continuum with other conventional technologies and weapons. This has important implications for the evaluation of UAVs as weapons of war for the purposes of the principle of superfluous injury/unnecessary suffering, an issue that is broached in but will be taken up in detail in chapter 4 on how UAVs challenge the prohibition of inevitable death. The drone in this narrative is approached as an incremental change to targeting and killing from increasingly safe distances, which provides a basis for legitimacy and for easy comparisons that seek to dispel legal and ethical concerns about UAVs as weapons under the LOAC. In view of the narrative's insistence on the purported similarities between UAVs reduced to mere airborne platforms and conventional aircraft, the chapter will offer a brief overview of the efforts to regulate and/or restrict the bombing from the air to suggest that this practice has never been uncontroversial or settled as this narrative assumes. Subsequently, the chapter will analyse the narrative that inscribes the use of UAVs in a legal and ethical argument for compliance with the LOAC on the basis of the drone's 'extraordinary' technical capabilities for surveillance and precision that are purported to offer the potential for better discrimination in targeting and the promise for the minimisation of civilian harm. The drone is thus presented as the epitome of high weapon technology and as such the unfailingly best option that is developed and is to be employed as a matter of ethical priority. The chapter aims at demonstrating the inadequacy of the arguments this narrative advances and submitting that to articulate issues of compliance

with the LOAC it is important that we turn to the inherent normativity of the law and the ethical assumptions of its constraints.

As the focus of the analysis in the Thesis is on the practice of hostilities, chapter 2 will examine the environment within which the LOAC's constraints on the conduct of hostilities were meant to operate. The chapter will examine how the LOAC itself conceives of war in its attempt to regulate its conduct at the level of the collective and at the level of individuals who practise warfare. It will do so through relevant provisions, including on the scope of applicability, the targetability of combatants and the humanitarian protections afforded to combatants. The analysis will result in a paradigm of warfare understood as an armed confrontation. This captures the understanding that hostilities take place between collective entities and are practised between individual human beings who are physically present on or in proximity to the battlefield, and are mutually exposed to danger and the attendant likelihood of harm. This reciprocal armed interaction is intimately bound up with the idea of fairness as a crucial component of normativity in an armed confrontation, which fosters the adversaries' opportunity to fight back in response or in defence, and the chance of good faith. The notion of fairness has long been linked with the use of means and methods of warfare. A brief foray into the past will reveal how at different points in time the choice of certain weapons or tactics was associated with appropriate behaviour and served as a criterion of 'fair' or 'unfair' fighting and, arguably, created the need for constraints and prohibitions. The vulnerability of the adversary will emerge as the crucial element of the relationship between fairness and weapons. The extreme vulnerability of the targeted individual on the receiving end of UAV violence will show that UAVs expunge the idea of fairness from the logic of violence they inflict. The importance of the above analysis lies in that it places the study of UAV warfare within a larger understanding of the LOAC, which will allow the Thesis to highlight how UAV warfare disrupts the factual and normative parameters of an armed confrontation, and disables the ethical assumptions of the law.

Chapter 3 will analyse the LOAC as an 'other-directed' normative regime, which captures the understanding that the law recognises the ethical standing of the adversary as human or human being in the context of the adversarial/hostile relationship between opponents. The chapter will suggest that humanity is to be understood as appropriate behaviour towards opponents not as a matter of benevolence or philanthropy but as a matter of law. In this context, the chapter will distinguish between humanity and humanitarian protection/treatment by drawing on insights of Cold War international lawyer Henri Meyrowitz and contemporary just war theorist Larry May. The chapter will argue that humanity is not to be contemplated as the counterweight to military necessity. Rather, in the Thesis humanity in the LOAC will be understood as a source of duties and obligations concerned with the protection of the dignity of the human adversary in war/armed conflict. The Thesis will focus on the law's prohibitions where humanity manifests itself as the fundamental guarantee of a reasonable chance to survive, as UAV warfare challenges the normative status that the law 'grants' to the adversary by virtue of humanity.

Taking into consideration the analysis of chapter 2 and chapter 3, the Thesis will bring UAV warfare face to face with fundamental prohibitions concerned with the choice of means and methods of warfare and the conduct of hostilities. Through these prohibitions, the Thesis will argue, the law envisages a set of normative arrangements and ethical possibilities that seek to ensure protection for the human adversary. Chapter 4 will examine how UAVs challenge the principle prohibiting of the use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering by focusing on the rationale of the 'inevitability of death' as part thereof. In this context, the chapter will look at the fault lines of the treatment of UAVs as weapons of war for the purposes of their lawfulness under the LOAC and trace 'ineluctable lethality' through historico-legal sources at milestone stages of international codification of the law, the 1868 St Petersburg Declaration, the Regulations annexed to the 1899 and 1907 Hague Conventions, and the 1977 Additional Protocol I. Considering that UAV warfare undermines the concept of *hors de combat* as provided in the LOAC,

chapter 5 will examine whether an interpretation that encompasses the notion of 'defenceless adversary' in the ambit of the *hors de combat* safeguard is at odds with the prohibition of attack against persons *hors de combat*. To this end, the chapter will analyse 'defencelessness' as essentially contingent on two conditions that reflect the philosophy of the *hors de combat* protection; first, that the opponent poses no meaningful or no threat at all to the attacker; and second, the unavailability of the other routes to gain *hors de combat* status through surrender, capture or incapacitation. Further reinforcing the arguments of the preceding chapters, chapter 6 will consider whether UAV targets could resort to the prohibition on conducting hostilities on a 'no survivors' basis to find protection against the model of conduct introduced by UAVs.

Ultimately, the Thesis aims at providing an answer to whether UAV warfare represents a model of violence that can comply with the fundamental legal and ethical premises of the LOAC. The tension between the technology and the basic tenets of the conduct of hostilities and the legal and ethical obligations towards the human adversary will recommend a negative finding.

CHAPTER 1

THE COMPATIBILITY OF UAVs WITH THE LOAC: A TYPOLOGY OF THE ARGUMENTS

This chapter scrutinises the narrative that argues for the compatibility and compliance of UAVs (and their use) with the law of armed conflict (LOAC).[1] It offers an analytical framework for understanding and appreciating the arguments *for* the conformity of UAVs with the law. To this end, the chapter uses as a framework two questions, namely 'are UAVs just another weapon?' and 'are UAVs a better weapon?', which reflect the two key and interdependent arguments put forth by the bulk of the legal literature that grapples with armed UAVs or drones under the LOAC, and are also echoed in the rhetoric of the United States. This allows to identify the assumptions and the thinking that undergird this narrative, and the implications they have, while taking note of the weaknesses that the arguments present.

As the weapon's technical capabilities are placed at the forefront of an (legal and ethical) argument of compliance with the LOAC, in this narrative one can detect elements of technological determinism and optimism. That is to say, the claims made seem to regard technological development as an 'autonomous' or 'independent' force, whereby UAV technology seems to be assigned a 'causal' or 'determining' role when addressing issues of compliance with the law.[2] As will become evident, the narrative reveals an understanding of the 'standard conception of technology [that] implies a technological deterministic view of the relation between technology and society',[3] whereby technology follows 'its own momentum, [or] a rational

[1] This will be referred to as 'narrative' hereinafter.
[2] See e.g. Wiebe E Bijker, 'Why and How Technology Matters' in Robert E Goodin and Charles Tilly (eds), *Contextual Political Analysis* (OUP 2006) 683 ('Technology … is an autonomous force in society and technology's working is an intrinsic property of technical machines and processes.' and 'Technological determinism, then, comprises two elements: it maintains that (1) technology develops autonomously, following an internal logic which is independent of external influences; and that (2) technology shapes society by having economic and social impacts.').
[3] ibid.

goal-directed, problem-solving path'.[4] It further evinces an optimistic viewpoint of technology, whereby technological advance is associated with progress.[5] In this narrative, this is reflected in the way UAVs as a manifestation of technological development are linked with improved compliance with the LOAC's principle of distinction and proportionality, which stands for legal and ethical progress. This also transpires from the manner in which it suggests that the problems relating to compliance with the LOAC can 'be met through the proper application' of advanced UAV technology, dismissing or discounting the need for considering the limitations of technology even if optimistic assumptions are conceded on the basis of certain objective technical advantages.[6]

The aim of this chapter is to present the arguments advanced in relation to the compatibility of UAVs with the LOAC, critically so, and expose the assumptions on which they are based, pointing to the dwindling fortunes of a defence of or a case for drones premised on claims which fail to situate the discussion of UAVs under the LOAC within a larger understanding of the normative regime of the law and its foundational, conceptual and normative (legal and ethical), underpinnings.

1.1 ARE UAVs JUST ANOTHER WEAPON?

In the narrative of the compatibility and compliance of UAVs with the current LOAC the drone represents simply another, a new(er) stage of technological advancement. As the line of technological evolutions lends an air of normalcy, familiarity and inevitability, UAVs are treated as an ineluctable part of what is presumed to be a well-established conventional reality of warfare.

[4] ibid 684.

[5] See e.g. James E Krier and Clayton P Gillette, 'The Un-Easy Case for Technological Optimism' (1985) 84 Mich. L. Rev. 405, 407 ('… technological growth means technological *advance;* it means breakthroughs … rather than simply more of an old technology'); Sheila Jasanoff, 'Technology as a Site and Object of Politics' in Goodin and Tilly, 758-9 ('… the virtually automatic coupling of technology with progress, a legacy of the Enlightenment, has come undone'); Leo Marx, 'Does Improved Technology Mean Progress?' (Jan 1987) Tech. Rev. 33 ('The initial Enlightenment belief in progress perceived science and technology to be in the service of liberation from political oppression. Over time that conception was transformed, or partly supplanted, by the now familiar view that innovations in science-based technologies are in themselves a sufficient and reliable basis for progress.').

[6] See e.g. David A Bella, 'Technological Constraints on Technological Optimism' (1979) 14 Technol. Forecast Soc. Change 15.

Presented as an advanced version or variation of conventional weapons, this narrative argues that there is hardly anything that makes the UAVs sufficiently, let alone fundamentally, different from other existing weapons currently in use. Consequently, the issues that UAV are purported to give rise to vis-à-vis the LOAC are not truly 'unique' or 'new', 'distinctive' or 'particular' for the LOAC, such that would make them merit particular attention and treatment under the law.[7]

The argument of semblance to conventional weapons

In the narrative under scrutiny the lawfulness of UAVs in and of themselves is generally considered unquestionable under the LOAC.

Firstly, UAVs are deemed legal on the ground that they are not expressly prohibited under the LOAC by means of treaty or international agreement.[8] To be sure, the drone is not specifically banned under international law. But, while this is a valid argument in that respect, it is hardly a compelling one in

[7] See e.g. Michael W Lewis, 'Drones and the Boundaries of the Battlefield' (2012) 47 Tex. Int'l L. J. 293, 295 ('… there is nothing legally unique about using unmanned drones as a weapons delivery platform that requires the creation of new or different laws to regulate their use. As with any other attack launched against enemy forces during an armed conflict, attacks launched from UCAVs are governed by IHL and must meet its requirements of military necessity and proportionality if those attacks are to be considered legal.'); Michael N Schmitt, 'Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate' (2012) 30 B. U. Int'l L. J. 595, 618 ('There are very few legal issues unique to the employment of UCAS. … it is not UCAS that lies at the heart of the matter. This is especially true with regard to application of international humanitarian law.'); Michael N Schmitt, 'Drone Attacks under the *Jus ad Bellum* And *Jus in Bello*: Clearing the "Fog of Law"' (2010) 13 YIHL 311, 313 (concluding that 'there is little reason to treat drones as distinct from other weapons systems with regard to the legal consequences of their employment'). See also United Kingdom Ministry of Defence, 'Joint Doctrine Note 2/11, The UK Approach to Unmanned Aircraft Systems' (30 March 2011) [hereinafter UK DoD Joint Doctrine] para 502 ('Most of the legal issues surrounding the use of existing and planned systems are well understood and are simply a variation of those associated with manned systems. An aircraft, whether manned or unmanned, is commanded and therefore its use is governed by the Law of Armed Conflict (LOAC) …'). This publication was withdrawn on 12 September 2017 and superseded by 'Unmanned Aircraft Systems', Joint Doctrine 0-30.2 (2017). Michael J Boyle, 'The Legal and Ethical Implications of Drone Warfare' (2015) 19 IJHR 105, 106 ('Although they do pose some new legal and ethical dilemmas, drones do not fundamentally undermine the applicability of traditional legal and ethical standards of armed conflict.').

[8] See e.g. William H Boothby, *Weapons and the Law of Armed Conflict* (2nd edn, OUP 2016) 246; Peter Maurer (ICRC President), 'The Use of Armed Drones Must Comply with the Law', Interview (ICRC, 10 May 2013) ('Under international humanitarian law – the rules of war, i.e. the set of laws governing armed conflicts – drones are not expressly prohibited, nor are they considered to be inherently indiscriminate or perfidious.') <www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>.

favour of UAVs' lawfulness and ethics or appropriateness as a weapon of war. This is not to understate the value of usually hard-won international consensus sealed with positive articulation. Rather, it is to suggest that it would seem somewhat disingenuous to seek to contain objections to or condemnation of the use of certain weapons by reliance on treaty law (or the absence thereof). Such an understanding is warranted especially in view of the difficulties that have traditionally surrounded efforts to outlaw or emplace some sort of constraint on particular means and methods of warfare, especially when a weapon or tactic ranks high in terms of military efficiency and utility. Having said that, only rarely have weapons been prohibited before the range of their catastrophic effects is experienced or before they become obsolete or before they cease to be the exclusive province of certain states.[9] Leila Sadat aptly captures states' reliance on treaty law in this area,

> States generally assume that unless a particular weapon is prohibited by treaty or a particular method of warfare has not been outlawed by treaty, it is lawful. Indeed, there is perhaps no area of international law more deeply dependent upon the application of the Lotus principle —which provides that restrictions on the sovereignty of states are not to be presumed— than questions involving the use of weaponry by a state. Although states may concede the application of the principles of distinction and proportionality, as Koh [then US State Department Legal Advisor] has done with respect to drone attacks, they typically do not concede any limitations upon their choice of weaponry or means of warfare.[10]

It is in this light that here it is claimed that the argument that there is no specific ban that the use of UAVs violates cannot convincingly disperse the concerns that UAVs generate or pre-empt a discussion of the challenges the drone poses to the LOAC.

Secondly, as, at least technically, lethal force by way of UAVs can be directed at specified targets, on the basis of which there have been made

[9] See e.g. The 1995 Protocol on Blinding Laser Weapons, Protocol IV of the 1980 Convention on Certain Conventional Weapons as an exception as blinding laser weapons had been rarely used in battlefield at the time of the adoption of the Protocol.
[10] Leila Nadya Sadat, 'America's Drone Wars' (2012) 45 Case W. Res. J. Intl L. 215, 228.

claims to drones' discriminatory potential,[11] UAVs are not considered to be inherently indiscriminate weapons 'at least in the sense of being "incapable of distinguishing between civilian and military targets"'.[12]

Thirdly, in this narrative, UAVs are not regarded as a means or method of warfare the use of which causes or is likely to cause superfluous injury or unnecessary suffering.[13] The Thesis questions this claim in chapter 4, which examines the challenges that UAVs qua tools of warfare pose to the LOAC by focusing on the rationale of 'rendering death inevitable' as part of the principle prohibiting the use of means or methods of warfare of a nature to cause of superfluous injury or unnecessary suffering, and on the basis of humanity. While this is explained in detail in chapter 4, what is important to note at this point for the purposes of the present discussion is that the narrative's claim that UAVs do not challenge the LOAC's prohibition of infliction of superfluous injury/unnecessary suffering is largely buttressed by an understanding that UAVs do not differ from other conventional weapons or weapon systems such as aircrafts armed with munitions. In this context, the drone is often reduced to the sum of its parts, analysed to a mere airborne surveillance platform fitted with missiles, and therefore casually identified with 'platforms' that carry and deliver missiles 'just like' manned and conventional aircrafts do.[14] As will be further discussed in chapter 4, this

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[11] Laurie R Blank, 'After 'Top Gun': How Drone Strikes Impact the Law of War' (2012) 33 U. Pa J. Int'l L. 675, 686 ('By both measures —indiscriminate weapon or effects and unnecessary suffering— armed drones pass muster.'); Oren Gross, 'The New Way of War? Is There a Duty to Use Drones?' (2016) 67 Fla L. Rev. 1, 26-7; Bradley Jay Strawser, 'More Heat Than Light: The Vexing Complexities of the Drone Debate' in Bradley Strawser, Lisa Hajjar, Steven Z Levine, Feisal H Naqvi, John Fabian Witt (eds), *Opposing Perspectives on the Drone Debate* (Palgrave Macmillan 2014) 10.

[12] Mégret, 'Humanitarian Problem', 1293 (citing *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [hereinafter *Nuclear Weapons Advisory Opinion*]). See also Frédéric Mégret, 'Non-Lethal Weapons and the Possibility of Radical New Horizons for the Laws of War: Why Kill, Wound and Hurt (Combatants) at All?' (July 1, 2008) 11 ('If, famously, nuclear weapons cannot be inherently in violation of IHL (because they can be small and used tactically in a desert for example against a deeply buried target that could not be destroyed in any other way), then it is hard to imagine what weapons might be, …') <https.//papers.ssrn.com/sol3/papers.cfm?abstract_id=1295348>.

[13] Blank, 'Top Gun', 686; Gross, 'Duty', 26-7.

[14] See e.g. Schmitt, 'Benighted Debate', 600; Maurer, 'Interview' ('In this respect, they are no different from weapons launched from manned aircraft such as helicopters or other combat aircraft.'); Kenneth Anderson, 'Written Testimony' in 'Rise of the Drones: Unmanned Systems and the Future of War, Hearing Before the Subcommittee on National Security and Foreign Affairs, US Congress (23 March 2010) (Rise of Drones I) p 3 ('… the use of drones is functionally identical to the use of missile fired from a standoff fighter plane that is many

also reflects the rationale behind the United States' approach to the lawfulness of UAVs like the Predator and the Reaper in the context of the obligation of legal review of new weapons under the LOAC.[15] The crucial (and problematic) aspect of this approach is that it fails to appreciate the drone on the basis of its salient features in its entirety and in its own right. This means that the lawfulness of UAVs as weapons under the LOAC (and the superfluous injury/unnecessary suffering principle) ends up being evaluated by reference to (and hence on loan from) conventional, manned weapons and in a way that ultimately boils down to the evaluation of the aircraft element and of the missiles or munitions (fired by the UAV) in isolation.[16] This further implies that the lawfulness of UAVs as a unified weapon system designed, developed and employed to locate and target individuals for death remains in essence undecided in this narrative.

Apart from the superfluous injury and unnecessary suffering question, it is worth noting that treating or referring to UAVs generally as similar to conventional manned aircraft for the purposes of the application of the LOAC is the standard approach in the bulk of the legal scholarship (including this

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miles from the target and frequently over-the-horizon.'); Kenneth Anderson, 'The Case for Drones' (June 2013) 135 Commentary 14, 16-7; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, *Study on Targeted Killings*, United Nations, General Assembly, Human Rights Council, UN DOC. A/HRC/14/24/Add6, May 28, 2010 [hereinafter Alston Report] para 79 ('… a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.'); See also the latest UK Joint Doctrine (2017) 24 ('...the effects we create with manned and unmanned aircraft are essentially the same, remotely piloted air systems change the way that we deliver air power rather than its more fundamental outputs or capabilities'). See also the HPCR Manual on International Law Applicable to Air and Missile Warfare, which claims to 'provide[] the most up-to-date restatement of existing international law applicable to air and missile warfare, as elaborated by an international Group of Experts' under the guidance of Yoram Dinstein, which equates weaponised UAVs with as conventional military aircraft (rule 1(d), (dd) and (ee)).

[15] Chapter 4, section 4.1.

[16] Blank, 'Top Gun', 686-7 ('These missiles are not banned by any international agreement and do not manifest any characteristics that cause superfluous injury as understood in international.'); Schmitt, 'Fog', 320 ('… the weapons employed by drones are generally as good as or better than those carried by manned aircraft.'); Hin-Yan Liu, 'Categorization and Legality of Autonomous and Remote Weapons Systems' (2012) 94(886) IRRC 627, 640; Stuart Casey-Maslen, 'The Use of Armed Drones' in Stuart Casey-Maslen (ed), *Weapons under International Human Rights Law* (CUP 2014) 400. See also Mégret, 'Humanitarian Problem', 1293 (Although he argues that '[d]rones do not seem to be doomed to cause "unnecessary suffering" any more than the various missiles and ammunition they use', he points out that '[n]otwithstanding, there could still be aspects inherent to drones that were problematic from a laws-of-war point of view short of this form of radical illegality.').

narrative). For example, Mary Ellen O'Connell, who has criticised US drone operations and the Obama administration's drone policies,[17] has asserted that 'combat drones are a battlefield weapon. They launch missiles and drop bombs, a significant kinetic force. Such weapons are permitted on the battlefield, but we do not permit our police to have missiles or bombs in their arsenals. They are not allowed to use that kind of firepower in carrying out law enforcement activities'.[18] What O'Connell grapples with here is the question of permissibility of military firepower in non-battlefield settings and the concern that UAVs, albeit a weapon of war with 'significant kinetic force', are employed outside the battlefield. It does not seem that the aim is to advance a claim about the lawfulness of UAVs as a weapon as such, but to emphasise that the military character or nature of UAV lethal force is not befitting the pursuit of law enforcement operations. However, given the way in which the argument is framed, that is, by making reference generally to 'such weapons' that 'launch missiles and drop bombs' that are 'permitted on the battlefield', it does not avoid reducing UAVs to the munitions they fire like the narrative under scrutiny does.

In this narrative, revealing and reinforcing of the outlook on UAVs as another conventional weapon of war is also the way in which the unmanned characteristic of UAVs is manipulated in terms of semantics. While UAVs commonly bear the moniker 'drone',[19] this has been appended to a weapon technology that has received in literature and policy documents different denominations, which sometimes (if not always) are indicative of intentions.

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[17] See e.g. Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009' in Simon Bronitt (ed), *Shooting To Kill: The Law Governing Lethal Force in Context* (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144; Mary Ellen O'Connell, 'Seductive Drones: Learning from a Decade of Lethal Operations' (2011) 21 J. L. Inf. & Sci. 116; Mary Ellen O'Connell, "The Future of Peace, Weapons, and War" (6 September 2016) <https://sg.tudelft.nl/2016/09/06/frans-van-hasselt-lecture-2015-the-future-of-peace-weapons-and-war/> (arguing that, '[j]udging by the situations in Libya, Yemen, Somalia, and to some extent Pakistan today, drone strikes have helped create far more dangerous situations than prior to their use'.).

[18] Mary Ellen O'Connell, 'Statement' in 'Rise of the Drones II: Examining the Legality of Unmanned Targeting', Hearing Before the Subcommittee on National Security & Foreign Affairs of the Committee on Oversight & Government Reform (111th Congress, 2nd session (28 April 2010) p 18.

[19] The term appeared in the US DoD Dictionary in its 1994/2000 and 2001/2007 versions but has been withdrawn from later versions.

In addition to Unmanned Aerial Vehicle (UAV) used in this Thesis, other terms include Unmanned Aircraft (UA), Unmanned Aerial System (UAS), Unmanned Combat Air Vehicle (UCAV), Remote Controlled or Remotely Piloted Aircraft (RCA or RPA). These terms have increasingly come to be used interchangeably but their usage still often indicates attempts to 'set the record straight' when it comes to the treatment of the drone technology under the LOAC.

Despite the plethora of terms, the inherent 'unmanned' element of drones is more often than not addressed swiftly as a terminological or definitional issue, which seemingly reflects a technical understanding of the weapon, its constituent parts and components. As illustrated by the US Department of Defense (DoD) Dictionary of Military and Associated Terms, the qualification 'unmanned' captures the element that an aerial vehicle or aircraft 'does not carry a human operator',[20] but what seems to truly count is the level or degree of human control in its operation, that is, whether the unmanned aerial vehicle or aircraft 'can fly autonomously or be piloted remotely'[21] or 'is capable of flight with or without human remote control'.[22]

This is also echoed in some approaches in the literature, which concede that UAVs are not inhabited by a human operator but remain unimpressed by the unmanned characteristic and ignore what it might mean for the LOAC normatively. As such, the 'unmanned' is trivialised in this narrative, which 'gets it over and done with' usually by claims that combine the juxtaposition of UAVs with autonomous weapons, the former still being 'human in the loop' weapons as opposed to the latter identified as 'out-of-the-loop' weapons;[23] and the assertion that UAVs are not truly 'unmanned, but rather remotely piloted'.[24] This latter label has proved especially suitable for rationalising the

[20] US DoD Dictionary (1994/2000) 473; US DoD Dictionary (2001/2007) 569; US DoD Dictionary 2010/2016) 252; US DoD Dictionary (2017) 242.
[21] US DoD Dictionary (1994/2000) 473; US DoD Dictionary (2001/2007) 569.
[22] US DoD Dictionary (2010/2016) 252; US DoD Dictionary (2017) 242.
[23] On this terminological distinction, see e.g. Yoram Dinstein, 'Autonomous Weapons and International Humanitarian Law' in Wolff Heintschel von Heinegg, Robert Frau, Tassilo Singer (eds), *Dehumanization of Warfare: Legal Implications of New Weapon Technologies* (Springer 2018) 18; Michael N Schmitt and Jeffrey S Thurnher, '"Out of the Loop": Autonomous Weapon Systems and the Law of Armed Conflict' (2013) 4 Harvard NSJ 231.
[24] Blank, 'Top Gun', 677.

unmanned element of UAVs on the grounds of human, if remote, involvement both in the operation of UAVs and the firing of Hellfires as well as in the design and planning of drone operations, and especially in targeting decision-making.[25] In that respect, Peter W Singer has rightly taken note of how 'people speak in such absolute terms and use the phrase "man will always stay in the loop" so often that it ends up sounding more like brainwashing than analysis'.[26]

In this narrative, conventional weapons, including the manned aircraft, seem to be resorted to automatically as the standard for comparison and evaluation of the (unconventional) UAVs. As it does not place them in a broader or deeper theoretical perspective, nor does it provide any theoretical, conceptual or normative link between the weapons employed and a certain conception of war/armed conflict and the law, the narrative seems to reflect an almost subliminal appreciation of conventional weapons as a defining characteristic of war/armed conflict and the conduct of hostilities. By referring us to conventional military technologies, including fighter planes, missiles and ground forces, for the purposes of establishing the lawfulness of UAVs under the law, this narrative seems to rely on the ties of 'conventional' kindred, thus reflecting an assumption or understanding that conventional weapons and their effects are generally, and perhaps unquestionably so, more consonant with lawfulness in war. This suggests that the similarities drawn between conventional weapons and UAVs are not only of descriptive value, but also to be accounted for as a conceptual and normative device whereby UAV technology is rationalised and legitimised on the basis of its association with the conventional. That is to say, the manned

[25] See e.g. ibid ('… the operation of drones involves more people than F-16s or other fighter planes piloted in-person') and 701 ('Drones are not automatons; they depend on human operators, analysts, and decision makers. As a result, the use of armed drones in compliance with the law also depends on these same categories of human participants.'); Anderson, 'Case', 16-7. Michael W Lewis and Emily Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones' (2013) 44 Geo. J. Int'l L. 1129 ('Armed drones offered the advantage of smaller weapons and greater command control over firing decisions'). But see Derek Gregory, 'Drone Geographies' (2014) 183 Radical Philosophy 7 (noting that, save for the Launch and Recovery crews, most of the personnel involved 'are located outside the combat zone and beyond immediate danger …. This is risk-transfer war with a vengeance, where virtually all the risks are transferred to populations overseas.').

[26] Peter W Singer, *Wired For War* (Penguin 2009) 123 (citing Noah Shachtman).

is recruited to invest the unmanned with the 'conventionality' needed to make potential (legal and ethical) concerns and unease melt into the familiarity and the legitimacy of the conventional. As UAV concerns are configured as conventional ones, for this narrative there are no questions about the UAVs that cannot be addressed by ready-made answers and explanations for conventional weapons.

As mentioned earlier,[27] this has a bearing on the way the UAVs are evaluated in relation to the principle prohibiting superfluous injury and unnecessary suffering. In this narrative, the fundamental and defining characteristic of UAVs, which indeed inherently distinguishes them from conventional weapons and the aircraft, disappears in easy comparisons with the latter, obscuring the significance of the unmanned element for the LOAC as a normative regime. By failing to acknowledge and appreciate UAVs for what they are, this narrative becomes entangled in what is essentially an argument about conventional weapons and not about UAVs, eventually ending up redeeming the manned without ever really vindicating the unmanned under the LOAC. At the same time, by thinking of UAVs as just another conventional weapon of war and treating them in the same way as manned aircraft, UAVs are placed on a continuum with other conventional technologies and weapons that have progressively enabled fighting and killing from a distance. It is to the continuum of distance as a key feature of this narrative that the analysis now turns.

The argument of a continuum of distance

In this narrative, UAVs represent the inevitability and the ordinariness or normality of technological development, constituting a reasonably expected step further in the evolutionary course of military technology and warfare. This is what makes drones 'just a tool of war, one among many: there are tanks, cannons, aircraft, submarines, and now there are also drones'.[28] In tracing the lines of 'conventional' descent the drone is presented as another

[27] And will be further analysed in chapter 4.
[28] Daniel Statman, 'Drones and Robots: On the Changing Practice of Warfare' in Seth Lazar and Helen Frowe (eds), *The Oxford Handbook of Ethics of War* (OUP 2018) 473.

important milestone in a long evolutionary line of military technologies, where the unmanned element constitutes a (relatively new or recent) manifestation of distancing in warfare and unmanned violence is rationalised or casualised as an incremental change to killing from a safe distance. From this perspective, the drone is largely viewed as an iteration of existing weapons in the long sweep of the history of ever-increasing distancing in warfare and part of the millennia-long quest for new weapons and the military opportunities they would afford to belligerents, speaking to the banal and obvious aspirations for superiority, effectiveness and invulnerability *in bello*.[29]

As captured by William Boothby,

> in a sense, man has sought to fight from a distance since the earliest times. Concerns as to the ethics of such developments also date from ancient history. The trebuchet, cannon, crossbow and longbow, artillery, bombardment from the air, and remotely piloted UAVs can all be regarded as technologically more refined methods of delivering offensive force against the enemy while incurring relatively less risk for one's own forces. This notion of seeking to protect oneself while placing the enemy at enhanced risk is of course central to many methods of warfare, which suggests that remoteness of the operator, per se, does not constitute a qualitative, and thus legally significant, change from what has gone before.[30]

In a similar vein, Bradley Strawser has argued that

> remotely controlled weapons systems are merely an extension of a long historical trajectory of removing a warrior even farther from his foe for the warrior's better protection. UAVs are only a difference in degree down this path; there is nothing about their remote use that puts them in a different ethical category.[31]

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[29] Boyle, 'Implications', 106 ('Drones are merely the latest iteration of a process of rapid technological change in warfare that has continued for much of the last one hundred years, and they are not the biggest technological change during this period. The challenges posed by drones are not larger than those posed by nuclear weapons or other twentieth-century innovations such as inter-continental ballistic missile systems (ICBM)').

[30] William Boothby, 'Some Legal Challenges Posed by Remote Attack' (2012) 94(886) IRRC 579, 593.

[31] Bradley Jay Strawser, 'Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles' (2010) 9 J. Mil. Eth. 342, 343.

As this narrative weaves drones into a trend of remote warfare that has been under way since time immemorial, the 'newness' or 'novelty'[32] of the UAVs is downplayed while unmanned violence with all its legal and ethical ambivalence under the LOAC is conveniently swallowed up in the unoriginality of targeting and killing from afar. As it has been argued,

> But if our current technology is new, the desire to take out one's enemies from a safe distance is anything but. There is nothing new about military leaders exploiting technology for this purpose. And, for that matter, there is nothing new about criticizing such technology as potentially immoral or dishonorable. In fact, both remote control warfare, and the queasy feelings it arouses in many observers, are best seen as parts of a classic, and very old history.[33]

However, a claim about the newness of the technology and the banality of a trend is just that. It is by no means a substitute for an argument about the lawfulness of a particular weapon technology, or an argument about the importance, the significance or the urgency of the considerations or the dilemmas it introduces.[34]

By locating the drone in the 'genealogy' or the 'genetic path' of its technological ancestors, this narrative subscribes the UAVs to the historical trajectory of constant technological development which captures not only the quantitative trend towards increasing distance, horizontal as well as vertical, but also the 'qualitative' trend towards increasingly 'better protection'[35] and 'less risk'[36] on one's own side while aggravating the

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[32] See e.g. Schmitt, 'Benighted Debate', 599 (cautioning that '[t]heir novelty, however, should not be exaggerated').

[33] David A Bell, 'In Defense of Drones: A Historical Argument' (*New Republic*, 27 January 2012) <https://newrepublic.com/article/100113/obama-military-foreign-policy-technology-drones>.

[34] See e.g. Christian Enemark, *Armed Drones and the Ethics of War: Military Virtue in a Post-Heroic Age* (Routledge 2014) 4 (rightly pointing out, although cautious to confine his assertion to ethical concerns, that 'Ethically speaking, any observation that 'there is nothing new' about drones is one that misses the point. Even if the use of armed drones does not introduce an entirely new form of killing, such use might still exacerbate or expand existing moral concerns about when and how force may be used. A moral concern need not be novel to be important, so it does not diffuse an ethical debate over the use of drones to argue that these are only as bad as, for example, B- 52 bombers.'). See also Rain Liivoja, 'Technological Change and the Evolution of the Law of War' (2015) 97(900) IRRC 1157, 1176 (referring to landmines as an example of military technology that while not 'new' became 'newly controversial' and ultimately banned).

[35] Boothby, 'Some Legal Challenges', 593.

[36] Strawser, 'Moral Predators', 343.

vulnerability on the adversary's side. If one isolates the aircraft element of UAVs, as this narrative often does as seen above, the closest 'relative' to UAVs, so to speak, is conventional air power,[37] which emerged largely through the visualisation of the aircraft as 'a weapon superlatively adapted to offensive purposes, because it strikes suddenly and gives the enemy no time to parry the blow',[38] holding the promise to bypass the battlefield[39] and 'circumvent the competition between two militaries'.[40] UAVs keep a foot in air war; however, they crucially defy the 'usual separations between above and below, air and ground, bomber and bombed'[41] that one encounters in other forms of airpower by virtue of the unique fusion of physical distance and virtual proximity,[42] whereby UAVs ultimately become a hi-tech unilaterally and overwhelmingly lethal weapon entirely safe for the UAV-using side.

In any case, the technological/genealogical continuum of distancing to which the narrative under scrutiny turns to find reason is neither a linear nor a simple story of acceptance of warfare practices and the weapon technologies enabling them. If UAVs are to be analysed and interpreted as part of the historical processes of distancing in warfare, then they also need to be placed in the trajectory of normative, legal and ethical, anxieties that have historically surrounded weapon technologies and the practice of hostilities from a distance including air bombing. Distance has always been a source of discomfort and concern, underscoring the need to place constraints upon the use of certain weapons whilst also leading to regulatory attempts

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[37] Grégoire Chamayou, *A Theory of the Drone* (Janet Llloyd tr, The New Press 2013) 140-1 ('Given that the drone is a flying object, one automatically compares it to the military flying machines that preceded it. … However, that type of comparison is erroneous.').
[38] Giulio Douhet, *The Command of the Air* (Dino Ferrari tr, U Alabama P 1988).
[39] Tami Davis Biddle, *Rhetoric and Reality in Air Warfare: The Evolution of British and American Ideas about Strategic Bombing, 1914-1945* (Princeton UP 2002) 11-2 ('The role aircraft might play beyond the battlefield had long been the subject of intense anticipation').
[40] Janina Dill, 'The American Way of Bombing and International Law: Two Logics of Warfare in Tension' in Matthew Evangelista and Henry Shue (eds), *The American Way of Bombing: Changing Ethical and Legal Norms, From Flying Fortresses to Drones* (Cornell UP 2014) 140 (noting also 'the desire to jump over battle lines, fielded forces, and military hardware to directly attack an enemy's centers of power').
[41] Derek Gregory, 'Doors into Nowhere: Dead Cities and the Natural History of Destruction' in Peter Meusburg, Michael Heffernan and Edward Wunder (eds), *Cultural Memories* (Springer 2011) 271.
[42] See Chamayou, *Theory*, 116-98; Derek Gregory, 'From a View to a Kill: Drones and Late Modern War' (2011) 28 Theory, Culture & Society 188; Hugh Gusterson, *Drone: Remote Control Warfare* (MIT Press 2016).

that go back to the remote past, such as in the case of the crossbow.[43] Importantly, such attempts include the codification efforts aiming at regulating and/or restricting air power and bombing from the air even before the development and advent of the aircraft and aircraft bombing.[44] A brief overview of these efforts is useful at this point.

Overview of efforts to regulate air bombing

The battlefield concerns that accompanied balloons and the advance of air weapon systems and platforms brought to the surface the need for restraints on warfare, and indeed so much so as to prompt international efforts for legal regulation at one of the early stages of the development of international law.

The Hague Peace Conference of 1899 first contemplated the prohibition of the discharging of projectiles or explosives of any kind from balloons and other methods of a similar nature, the framing of which reveals that its scope was not intended to be confined to 'balloons', but included 'other new methods of a similar nature'.[45] At a time when the future of technological innovation was revered because 'with the progress of science things which, yesterday even, appeared incredible, are realized to-day', the drafters of the 1899 Declaration did not seem to demur from extending the prohibition of an 'existing fact'[46] to 'new methods not yet invented and analogous to the use of balloons'.[47] This was important because the prohibition could potentially catch 'technology that is changing rapidly'[48] and even the aircraft. However, at the suggestion of a delegate of the United States, Captain William Crozier,

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[43] See chapter 2, section 2.2.

[44] Tami Davis Biddle, 'Air Power' in Howard et al, *Laws of War*, 140; Tami Davis Biddle, 'Strategic Bombardment: Expectation, Theory, and Practice in the Early Twentieth Century' in Evangelista and Shue, *American Way of Bombing*, 36; Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (3rd edn, OUP 2013) 117 ('The most serious problem of rapidly developing modern warfare soon proved to be the use of the air force'). See also generally W Hays Parks, 'Air War and the Law of War' (1990) 32 Air Force L. Rev. 1-225.

[45] The debate led to the Declaration Prohibiting Launching of Projectiles and Explosives from Balloons Hague, IV, 1 which was adopted unanimously (Plenary, Sixth Meeting (July 21, 1899) p 79).

[46] Hague Proceedings (1899) p 87 (Colonel Gilinsky) ('… launching projectiles from balloons is an existing fact, since it is under study in England and in several other countries …').

[47] ibid 287 (also 342 (Colonel Gross von Schwarzhoff).

[48] William H Boothby, *Weapons and the Law of Armed Conflict* (1st edn, OUP 2009) 15-6.

the proposal for a permanent ban was turned into a kind of moratorium, a prohibition limited to a period of five years.[49] While conceding that balloon bombing merited prohibition at the time for 'humanitarian reasons', being both indiscriminate and ineffective, he suggested in the same breath that this was not the most propitious moment to prohibit the employment of balloons 'forever' but rather opt for a temporary ban. In that respect, the US delegate invoked the lack of 'experience in the use' of these arms and the 'incomplete stage of development in which aerostation now is',[50] a consideration shared by other delegates too who concurred that '[i]t is impossible to foresee what the future has in reserve'.[51]

The Declaration was renewed in 1907 at the second Hague Peace Conference 'for a period extending to the close of the Third Peace Conference', which was never convened due to the outbreak of World War I.[52] But the lack of unanimity in 1907 already foreshadowed the reticence of states to regulate aspects of aerial warfare in view of the promising future of what they believed to be a powerful weapon of war.[53] The limited time-frame of the prohibition coupled with reference to what was soon to become an obsolete means ('balloons'), especially at a time of constant technological development and innovation in the realm of air power, certainly did not bode well for the future of the prohibition.[54] This was all the more so in a world of reciprocity where the recently promulgated legal commitments might well

[49] Hague Proceedings (1899) p 354 (Proposal of Captain Crozier on the subject of the prohibition of the discharge of projectiles from balloons); ibid 280.
[50] ibid Proposal of Captain Crozier.
[51] ibid p 280 (General Mounier).
[52] See Detlev F Vagts, 'The Hague Conventions and Arms Control' (2000) 94 AJIL 31, 35 ('As the outbreak of World War I precluded a third conference, that prohibition is theoretically still applicable'). In a similar vein, Schindler and Toman, p 201 ('… the Declaration of 1907 is still formally in force today').
[53] Wo-hiang Lin, 'Aeronautical Law in Time of War' (1932) 3 J. Air L. Com. 79, 82-4. Biddle, 'Air Power', 142 ('… commitment to a meaningful continuation of the 1899 prohibition was lacking, and therefore nothing of legal significance came out of the conference on this point'), 144 ('… a reflection of the lure of intriguing new technologies which tempted states away from categorical prohibitions that might eliminate a potential advantage in future warfare').
[54] Boothby, *Weapons* (2009) 16, n 28 (noting that '[t]he rule was redundant as little as 7 years after its most recent restatement, citing JM Spaight, *Aircraft in War* (MacMillan 1914) 30); W Hays Parks, 'Conventional Weapons and Weapons Reviews' (2005) 8 YIHL 55, 61 n 17 ('… the Declaration rapidly passed into obsolescence as a result of military aircraft development and state practice that began on 1 November 1911, with bombing from aircraft and dirigibles in Libya …' during the Turko-Italian War between 1911 and 1912).

have served, as Geoffrey Best has argued, not as limits on behaviour in war but rather as 'a handy aid to vilification' of enemies and an opportunity to 'la[y] the blame fair and square on the other side' for having broken them.[55]

After World War I the idea of regulating weapons of concern, including those that combined missile and aircraft technology, revived and was raised at the Washington Conference on the Limitation of Armaments in 1921. The Conference decided to establish a Commission of Jurists to formulate rules for the regulation of 'new methods of attack or defence' at a separate conference and to consider issues relating to aircraft in war as an offensive weapon.[56] The Commission met in December 1922 and a year later produced a set of rules which 'represented the best efforts of the delegates present … to articulate a code that would approximate fairness and humane behaviour'.[57] The central notion of the law of targeting, 'military objective', along with a list thereof, first appeared in the text of the Hague Rules,[58] which also included two of the most important rules that pertained to aerial bombardment and the protection of non-combatants.[59]

However, the 1923 Hague Draft Rules of Aerial Warfare were never ratified and did not make their way into an international convention.[60] As Tami Davis Biddle observes, 'as no state was yet fully prepared to commit itself to such general constraints on a largely untested weapons system, the air rules were never adopted by any nation and thus must be viewed as a legal and political failure',[61] conceding, however, their contribution 'as a basic normative standard' to 'erect[ing] a moral trellis that could not be entirely ignored and would not be entirely torn down, even in the midst of brutal combat yet to come'.[62] The fact that the Rules were not binding (and the citation to them as such) seemed to undermine the strength of the

[55] Geoffrey Best, *Law and Armed Conflict Since 1945* (OUP 1994) 47-8.
[56] General Report on the Revision of the Rules of Warfare, Part II, entitled Rules of Aerial Warfare (Draft Hague Rules) 1923), see Roberts and Guelff, pp 141ff.
[57] ibid.
[58] Draft Hague Rules, Art XXIV(1) and (2).
[59] Draft Hague Rules, Arts XXII and XXIV(3).
[60] Hamilton DeSaussure, 'The Laws of Air Warfare: Are There Any?' (1975) Mil. L. Rev. 287, 290.
[61] Biddle, 'Air Power', 148.
[62] Biddle, 'Strategic Bombardment', 37.

obligations that they were meant to impose,[63] indeed at a time where military aviation increasingly gained ground and states with strong aviation programmes were loath to restrict their deployment options and place themselves at a relative (perceived or real) disadvantage through international agreement, thus accentuating how competing interests and 'asymmetry of position' can serve as a hindrance in processes of regulation.[64] With respect to their status, the 1923 Hague Rules have been recognised as reflecting customary law,[65] or as constituting 'codified soft law',[66] and have been cited by the ICTY as an 'authoritative interpretation of the law'.[67]

If the prohibition originally proposed at The Hague Peace Conference of 1899 was an important first step towards the prohibition of aerial bombing, which indeed 'could have meant that air warfare as we know it today would have been stillborn, or at least strangled at birth',[68] the last chance to place constraints on aerial bombardment at an international level was recorded in 1932 at the Geneva World Disarmament Conference. As Biddle observes, '[i]n a last gasp effort at international cooperation, diplomats made an attempt to ban bomber aircraft… But an unpredictable political environment and technological momentum conspired against them'.[69]

Aircraft escaped specific regulation and air bombing has been a long-standing practice that dominated warfare in the twentieth and the twenty-

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[63] Biddle, *Rhetoric and Reality*, 133, 153, 181-2.

[64] See e.g. Eric A Posner, 'A Theory of the Laws of War' (2003) 70 U. Chi. L. Rev. 297, 310 ('Asymmetry of position is probably the most important factor limiting the laws of war, forcing peace conference delegates to produce vague standards rather than crisp rules. … because of the great heterogeneity among states - and particularly in their technological capacities and their strategic positions ….').

[65] See e.g. Roberts and Guelff, pp 139-41; 1987 ICRC Commentary on API (Art 42) p 495, para 1637, n 13.

[66] Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (CUP 2014) 153.

[67] *Prosecutor v Galić* (Judgment) IT-98-29-T (5 December 2003) para 57, n 103.

[68] Charles Garraway, 'The Law Applies, But Which Law? A Consumer Guide to the Laws of War' in Evangelista and Shue, *American Way of Bombing*, 99.

[69] Biddle, 'Air Power', 149; Biddle, 'Strategic Bombardment', 37 (noting that these were '… energetic and genuine efforts to grapple with the problem of aerial bombardment. Those efforts came to focus on "qualitative disarmament," the abolition of those weapons "whose character is the most specifically offensive or the most efficacious against national defence, or most threatening to civilians".'). See also Donald Cameron Watt, 'Restraints on War in the Air Before 1945' in Michael Howard (ed), *Restraints on War: Studies in the Limitation of Armed Conflict* (OUP 1979).

first century but has never been uncontroversial or unproblematic. However, for many there is a legally (if not morally) defensible 'modern practice of aerial bombardment' which should not be jeopardised by interpretations of the law that 'would require whole-sale revision of the very practice of warfare itself, and would therefore be radically inconsistent with current and past state practice since the advent of aerial warfare'.[70] This probably explains why UAV warfare is often favourably compared to the dramatically disastrous obliteration or carpet bombing of the past as follows: 'Drones . . . have the potential for tremendous moral improvement over the aerial bombardments of earlier eras';[71] or 'Look at the firebombing of Dresden and compare what we're doing today'.[72] The fallacy is aptly captured by Derek Gregory: '"This isn't Dresden", I've been told time and time again, as though that is the appropriate standard against which to judge the contemporary conduct of war'.[73]

Notwithstanding the fact that the legal and ethical concerns that have accompanied air warfare have not found expression in codified law, the practice of air bombing is hardly to be deemed a normatively settled or acceptable development in warfare. This is all the more so as the increasing subjection of air bombing to the rules of the LOAC by those who practise it and of decision-making about targeting to rigorous legal review does not necessarily translate into restraint in conduct or conduct perceived as

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[70] Jens David Ohlin, 'The Duty to Capture' (2013) 97 Minn. L. Rev. 1268, 1270.

[71] Bradley Strawser, 'The Morality of Drone Warfare Revisited' (*The Guardian*, 6 August 2012) <www.theguardian.com/commentisfree/2012/aug/06/morality-drone-warfare-revisited>.

[72] CIA agent quoted in Scott Shane , 'Drone Strikes Reveal Uncomfortable Truth: U.S. Is Often Unsure About Who Will Die' (*The New York Times*, 23 April 2015) <www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us-is-often-unsure-about-who-will-die.html>; See also Statman, 'Drones', 485 (claiming that '… compared with the grand battles of the past, with their shockingly high toll of casualties, drone-centered campaigns seem much more humane').

[73] Gregory, 'Geographies', 11. See also Chamayou, *Theory*, 141. Henri Meyrowitz, 'Le Bombardement Stratégique d'après le Protocol Additionnel aux Conventions de Genève' (1981) 41 ZaöRV 1, 66 ('La véritable question qu'avait résoudre la Conférence diplomatique était celle-ci: La prochaine guerre mondiale devra-t-elle commencer là où la dernière a fini? Le droit de la guerre doit-il -peut-il- sanctionner la forme de guerre aérienne qu'ont connue l'Allemagne et le Japon?'; trans: The true question that the diplomatic Conference had to resolve was this one: The next world war will have to start where the last one finished? The law of war should -can- sanction the form of air warfare that Germany and Japan experienced?). (Translation from French in the Thesis provided by Thesis' author; indicated by 'trans'.)

legitimate.[74] This is confirmed by every bombing campaign from the First World War onwards,[75] all the way through the infernal levels of strategic destruction during the Second World War, the Vietnam War, and still later on to the 1991 Gulf War, the so-called 'the most legalistic war … ever fought',[76] and the 'riskless' aircraft bombing campaigns pursued with precision-guided missiles and smart bombs.[77] In this light, if aerial bombardment were to be deemed a mistake, but one that has lasted for long –and hence assumed to have been accepted, if reluctantly–,[78] its longevity, albeit proof of its existence, and legalisation is by no means the way to normative redemption.

There is no doubt that the regulation of the aircraft and air bombing is not a success of international law. But attached to the failure of the efforts to impose meaningful constraints is a host of considerations that militate against invoking the practice of air bombing as a standard for comparison with other practices that involve killing from the air, or as a point of reference against which to measure improvement or advance in the conduct of war. To fully elaborate upon these considerations is beyond the scope of this chapter and this Thesis. Suffice it to note for the purposes of the present discussion that a key lesson is linked to the dynamic of the unwavering faith in the problem-solving capabilities promised by the imbrication of science and technology. This seemed to work against efforts to prohibit or regulate current versions of weapons, the powerful wartime potential of which (like

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[74] See e.g. Dill, *Legitimate Targets* (focusing on US air campaigns).
[75] See generally Yuri Tanaka and Marilyn B Young (eds), *Bombing Civilians: A Twentieth-Century History* (New Press 2010); Evangelista and Shue (eds), *American Way of Bombing*.
[76] Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harv. Int'l L. J. 49, 49 n1.
[77] Thomas W Smith, 'The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence' (2002) 46 Int'l Stud. Q. 355; Paul W Kahn, 'The Paradox of Riskless Warfare' (2002) 22 Phil. & Pub. Pol'y Q. 2 and 'War and Sacrifice in Kosovo' (1999) 19 Phil. & Pub. Pol'y Q. 1.
[78] See e.g. Final Report of Chief of Counsel for War Crimes at the Nuremberg War Crimes Trial under Control Council Law No 10, Telford Taylor (1949) 65: 'If the first badly bombed cities -Warsaw, Rotterdam, Belgrade, and London- suffered at the hands of the Germans and not the Allies, nonetheless the ruins of German and Japanese cities were the results not of reprisal but of deliberate policy', concluding that this '… bore eloquent witness that aerial bombardment of cities and factories has become a recognized part of modern warfare as carried on by all nations'. But see Meyrowitz, 'Bombardement Stratégique', 17 and n 41, '…il nous parait difficile de ne pas partager l'opinion du général' (trans: it seems to us difficult not to share the opinion of general') Telford Taylor, but noting that 'En revanche, nous récusons la conclusion que Taylor croyait devoir tirer de cette constatation, en terminant la phrase citée…' (trans: On the other hand, we challenge the conclusion that Taylor thought he had to draw from this observation, in concluding the cited sentence…').

in the case of the aircraft), while currently unknown or even unimagined, was anticipated in view of the promises of technological innovation. This meant that the concerns about certain weapons ended up being folded into the projected military efficiency and utility of certain weapons for one's own side, which in turn placed them beyond the reach of specific legal limitation or regulation.

Another important aspect of the historical continuum of killing from the safety of distance is military violence in asymmetric environments, which are compounded by adversaries' disparities in technological capability.[79] From this perspective, it has been suggested that UAVs become part and parcel of a narrative of asymmetry in a neo-colonial context, where 'the drone is continuous with a long tradition of colonial war-fighting technologies',[80] drone campaigns are 'successors' of colonial and irregular warfare,[81] and the drone is a reflection or extension of the way in which the aircraft became a fixture of counter-insurgency and 'terror', such as in the case of the British 'aerial control' in the colonial territories in the 1920s.[82]

The focus on the UAV-using force's own side

In this narrative the removal of risk for the drone-using side weighs as an important factor in legal and ethical arguments about the use of drones under the LOAC, usually figuring along with the assumption of greater civilian protection (as a potential corollary to the so-called precision-targeting) as crucial arguments in the humanitarian defence of the drone.

For example, Kenneth Anderson is categorical about the way drones provide a solution to what, he claims, is '[a]fter all, ordinarily the problem in the conduct of hostilities … that what is good for one side's military

[79] See e.g. Chamayou, *Theory*, ch 7.
[80] Hugh Gusterson, 'Toward and Anthropology of Drones: Remaking Space, Time, and Valor in Combat' in Evangelista and Shue, *American Way of Bombing*, 201.
[81] Samuel Moyn, 'Drones and Imagination: A Response to Paul Kahn' (2013) 24 EJIL 227, 229 ('a continuum, not a break, between the aesthetics, subjectivity, and morality of colonial warfare and its successors today, including in drone campaigns') and 231 ('it is not the loss of 'classic interstate war' as a real or imagined paradigm but the application of old and new humanitarian norms born in it to continuing irregular war that may mark the fundamental novelty').
[82] Priya Satia, 'Drones: A History from the British Middle East' (2014) 5 Humanity 1. On British air control and policing in Mesopotamia, see also Biddle, *Rhetoric and Reality,* ch 2.

operations is bad not just for the other side but for civilians as well'.[83] However, 'the other side' which refers to the adversary is sidestepped and what counts as 'bad' for that side of the divide is not explained. As claimed, drones 'remov[e] personal risk to attackers and reduc[e] civilian harm' and as such, '[f]rom the standpoint of the conduct of hostilities, *jus in bello*, this is a good thing', stressing that '[i]t is more than just a good thing—it is a double-plus good thing, so to speak'.[84] Furthermore, Oren Gross argues for a duty or obligation to use drones in the battlefield, which, despite the absence of a treaty or customary rule to that effect, 'may be derived from the cardinal principles of the law of armed conflict'.[85] The main premise is adumbrated in the proposition that drones 'combin[e] the remote, distant use of accurate force that reduces lethality both among friendly forces and innocent civilians',[86] 'increasing military efficiency while minimizing harm to civilians and civilian objects' and '[a]s such, they are arguably in line with the principles of LOAC and, indeed, offer the promise of more "humane" wars'.[87] Moreover, the moral value of keeping 'friends' out of harm's way has also served as the main buttress of a duty to use drones from a different perspective. For example, Bradley Strawser has made a strong argument for a military/just war ethics based on the so-called 'principle of unnecessary risk' for (just) soldiers, which in its 'stronger form', he suggests, could be taken to 'morally bar[] not only potentially lethal risk, but any risk of bodily harm whatsoever'.[88] He then goes on to argue that UAV technology is ethically permissible or defensible and certainly 'not suspicious'; more than that, he asserts that 'as a technology that better protects (presumably)

[83] Kenneth Anderson, 'Efficiency *in Bello* and *ad Bellum*: Making the Use of Force Too Easy?' in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World* (OUP 2012) 388.
[84] ibid. In a similar vein, Rosa Brooks, 'Drones and Cognitive Dissonance' in Bergen and Rothenberg, *Drone Wars*, 233 ('If drone strikes enable us to kill enemies without exposing our own personnel, this should presumably be considered a good thing, not a bad thing').
[85] Gross, 'Duty', 53.
[86] ibid.
[87] ibid 30; also 25-6, 56.
[88] Strawser, 'Moral Predators', 344.

justified warriors, UAV use is ethically obligatory', thus constituting a duty to use UAV technology.[89]

These approaches engage legitimate considerations concerning the security of the UAV-using forces and emphasise the own side avoidance of risk as a parameter of substantial legal and ethical import to the LOAC and the lawful conduct of hostilities. But the question we need to ask is how this fits within the normative armature of the LOAC and how it is reconciled with the 'other-directed' philosophy underpinning the law, which, as will be demonstrated in chapter 3, captures a normative regime that is aimed at encouraging lawful and ethical behaviour towards one's human adversary. Of course, this is not to suggest that the law demands compliance and restrained violence at the price of self-sacrifice or through acts and choices that demonstrate self-renunciation or self-denial, so to speak. The protection of one's own forces is doubtlessly important vis-à-vis those who represent a security risk. The point here is (and this will be further explained in chapter 3) that one would crucially lose any claim to advancing a legal and ethical argument under the LOAC in relation to the lawful conduct of hostilities if this has as a primary or main or exclusive focus one's own side avoidance of risk without any consideration about the adversary. Referring to 'a senior civil servant in the British Ministry of Defence who has been quoted as saying that "[t]he use of unmanned aircraft prevents the potential loss of aircrew lives and is thus in itself morally justified."', Jeremy Waldron remarks: 'But he can't mean that literally: he must have meant the avoiding loss of aircrew lives is *one element that might factor into a justification*, not that it is a complete justification in itself'.[90]

[89] ibid 343. It should be noted that Strawser's claim is tied up to just war concerns which the LOAC does not consider. Jeff McMahan, 'Foreword' in Bradley J Strawser (ed), *Killing by Remote Control: The Ethics of Unmanned Military* (OUP 2013) x (agreeing with those who argue that the fact that drones are riskless for the operator makes them 'unambiguously good in the hands of just combatants-that is, those who fight in a just war').

[90] Jeremy Waldron, 'Death Squads and Death Lists: Targeted Killing and the Character of the State' (2016) 23 Constellations 292, 299 (emphasis in original).

1.2 ARE UAVs A BETTER WEAPON?

In the familiar approach among international law experts that look at UAVs under the LOAC, the burden of lawfulness and appropriateness of UAVs is tilted from UAVs qua weapons to the evaluation of the use into which they are being put.[91] At times, the insistence that the drone is simply another advanced weapon, along with the reliance on the tenacity of the distinction between the weapon *per se* and its use, seems to verge on the dismissiveness of a claim that a discussion of UAVs as a specific weapon is not important because after all compliance with the LOAC is mainly a matter of how they are used. Notwithstanding the caveat that the law on targeting is not dependent on the weapon employed,[92] in this narrative compliance with the LOAC is framed around the drone, and the advanced and sophisticated capabilities it incorporates for increased precision, sustained surveillance and intelligence gathering. Not only is there nothing problematic about the weapon technology in and of itself, but in this narrative UAVs are endorsed as weapons which can actually facilitate the application of the existing rules and enhance compliance with the principles of distinction and proportionality, and the requirements of precautions in attack, thus outweighing potential legal implications under LOAC and overriding ethical concerns.[93]

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[91] See, for example, the US rhetoric such as Koh ASIL Address: '… there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict --such as pilotless aircraft or so-called smart bombs-- so long as they are employed in conformity with applicable laws of war'; Blank, 'Top Gun', 691 ('… armed drones, like any other weapon or weapon system, can be used to engage in deliberate or indiscriminate attacks against civilians or other protected individuals during armed conflict'); Alston Report ('The critical legal question is the same for each weapon: whether its specific use complies with IHL'); Maurer, 'Interview' ('It is important to emphasize, however, that while drones are not unlawful in themselves, their use is subject to international law').

[92] With respect to '*the very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations … the rules that govern targeting do not turn on the type of weapon system', Koh ASIL Address. See also Blank, 'Top Gun', 700 and Schmitt, 'Benighted Debate', 597, both citing Koh.

[93] In defence of US President Obama's drone programme and targeted killing policy, see Brennan Remarks (stating among others that 'targeted strikes are ethical' in support of which he considered how such strikes conform with the basic principles of the law; and that with 'the unprecedented ability of remotely piloted aircraft' to 'strike targets with astonishing precision' and 'with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft'); Holder Address. Blank, 'Top Gun', 680, 689, 691,

Liberated from the idea that the application of military force by means of new and advanced weapon technologies should be always fraught with the suspicion of serving purposes other than the humanitarian objectives of the LOAC, the US government and international law scholars have looked at UAVs as an unmatched technological advance representing a positive force for the 'good'. What transpires is that here the narrative moves beyond the logic of semblance that UAVs bear to conventional weapons, whereby the crucial differences and the distinct characteristics of UAVs are downplayed for the purposes of the lawfulness of the weapon as such, as discussed earlier. Indeed, the narrative switches to a logic that is centred on an understanding of technology as providing an objective basis for advancing a legal and ethical argument under the law. That is, in its inexorable march foreword towards better, smaller and more 'discriminating' means of delivering military force,[94] technology displays continuity and is grounded in reality, which reveals an ontological understanding of technological evolutions where advance denotes progress and this is provable and hence objective.[95] As technology is deemed a source for objectivity whilst also involving prescriptive assumptions and therefore serves as a source of values, the drone seems to hold onto a privileged position intrinsically and inevitably. Therefore, in this narrative UAVs emerge as a technological achievement and recognised as an instrument necessary for the achievement of wider,

701 716-7; Schmitt, 'Fog', 311-26 ('Nor is there a sound basis for heightened concern as to their [i.e. drones'] use. On the contrary, …'); Schmitt, 'Benighted Debate', 618.

[94] See e.g. the claim that 'drones are a major step forward towards much more discriminating use of violence in war and self-defence – a step forward in humanitarian technology', Kenneth Anderson, 'Written Testimony', 'Rise of the Drones: Unmanned Systems and the Future of War, Hearing Before the Subcommittee on National Security and Foreign Affairs, US Congress (23 March 2010) p 34; the claim that '[j]udged against bombers, cruise missiles—and, obviously, against various kinds of weapons of mass destruction—the drone may well be remembered in the annals of warfare as offering real promise for moral progress', Statman, 'Drones', 485. See also Lewis and Crawford, 'Drones'.

[95] See e.g. Friedrich Rapp, 'Analytical Philosophy of Technology' (1981) 63 Bost. Stud. Philos. Sci. 181: 'What cannot be verified, however, is the ontological thesis that the development of technology is a predetermined teleological process which leads irrevocably to an increase of technological perfection'; Albert Borgmann, 'Freedom and Determinism in a Technological Setting' (1979) 2 Research in Phil. & Tech. 79, 79: 'To begin with modem technology, let us note its unprecedented transformative power of which modem science is a necessary condition. Modem technology comes about when the rules of the arts and crafts are grounded in the scientifically articulated lawfulness of reality. That articulation constitutes an ontology which tells what there is in general, …').

humanitarian and ethical values, thus having indeed the potential to make a difference for behaviour in war. Put differently, UAVs are treated as weapons in the service of the law, elevated to an effective, an essential tool in leveraging compliance with legal and ethical constraints on the conduct of hostilities. But in this lurks the risk of nurturing an exaggerated sense or perception of the normative omnipotence or the 'virtuous' or ethical nature of the technology.

Compliance with the LOAC as a technical affair

Overlaid by a technological deterministic/optimistic viewpoint, this narrative parses the LOAC through the lens of the drone's 'extraordinary' technical capabilities and 'unique' technical characteristics. What is particularly highlighted is that UAVs are small and accurate weapons, equipped with small and precision-guided munitions,[96] and have unmatched capabilities linked to the intelligence, surveillance, reconnaissance (ISR) functions,[97] a combination which enables the targeting of individuals for death with 'surgical precision', 'laser-like focus' and 'pin-point accuracy'.[98]

By virtue of their capacity to loiter over targets for long periods, defying the limits of human endurance and ability,[99] and to generate real-time (less or more) high-resolution imagery and video feeds allowing an unprecedented inflow of purportedly high-quality information,[100] UAVs are praised in this narrative as having critical input into decision-making about targeting. As it is argued, the use of UAVs diffuses the proverbial 'fog of war' (the usual suspect in mistakes and errors in the heat of conventional conflict) and contributes to 'more refined assessments', 'more informed judgments'

[96] Schmitt, 'Fog', 314, 320; Lewis and Crawford, 'Drones', 1154.
[97] Blank, 'Top Gun', 687, 692.
[98] Schmitt, 'Fog', 320.
[99] Jack Beard, 'Law and War in the Virtual Era' (2009) 103 AJIL 409, 414.
[100] Schmitt, 'Fog' 314; Beard, 'Virtual', 417, 419, 435 (n 139); Blank, 'Top Gun' 697. See also ICRC Report, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflict' (Geneva, October 2011) p 39 ('Remote controlled drones … have greatly enhanced real-time aerial surveillance possibilities, thereby enlarging the toolbox of precautionary measures that may be taken in advance of an attack'). The heightened pre-attack knowledge is underlined often in tandem with the increased post-attack level of transparency and scrutiny, see e.g. Beard, 'Virtual', 410 ('creating unprecedented levels of transparency and are unexpectedly making international law more relevant than ever to armed conflicts').

and 'better understanding' as to the status of potential targets and potential risk of civilian casualties in the vicinity,[101] which in turn lead to more judicious decisions as to target identification and engagement while minimising civilian harm. In a bid to lend weight and perhaps credibility to the principled defence of the drone, the 'unmanned' characteristic of UAVs is here acknowledged as an important complement to immaculate targeting. As the argument goes, UAVs allow the UAV-using force to operate in conditions of absolute safety, entirely protected from danger and undistracted by the risks of the physical environment of conflict, providing an opportunity to shrink the likelihood of mistakes and errors that humans tend to make in armed conflict.[102] As such, the 'unmanned' becomes part of the argument of how UAVs help maximise the ability to discriminate and target with precision. In this context, by translating the radical separation between the adversaries into valuable emotional disconnect from the stresses and heat of violent conflict, this narrative repudiates the concerns that remoteness amounts to detachment or disjunct in the sense of an amoral or 'a desensitized attitude toward killing'.[103]

In building up a fascinating portrait of the drone as an 'essential' and 'critical' tool for compliance, short of a 'perfect weapon',[104] this narrative takes care not to riddle it with any doubts whatsoever.[105] While the Thesis does not rely on this debate to make an argument in favour of or against the lawfulness of

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[101] Brennan Remarks ('The unprecedented advances we have made in technology provide us greater proximity to target for a longer period of time, and as a result allow us to better understand what is happening in real time on the ground in ways that were previously impossible. We can be much more discriminating and we can make more informed judgments about factors that might contribute to collateral damage.'); Blank, 'Top Gun', 693-4, 697-8; Schmitt, 'Fog', 314, 320; Schmitt, 'Benighted Debate', 614-6, 618.

[102] See e.g. Schmitt, 'Fog', 320; Schmitt, 'Benighted Debate', 615; Singer, *Wired*, 394-5; Beard, 'Virtual', 430, 443. Anderson, 'Case', 15 ('Remoteness –the fact that the drone user is nowhere near the target, …– actually enables precision').

[103] Blank, 'Top Gun', 680, 701-2; Schmitt, 'Fog', 319-21; Anderson, 'Case'. But see Strawser, 'Moral Predators', 351 and 353 (arguing that '… there is good reason to think … that UAV technology actually *increases* a pilot's ability to discriminate' but conceding however that '… perhaps this is not the case. Maybe the distance and disjunct of this level of remote weaponry does create a significant and genuinely new kind of stress on warfighters that might compromise their abilities to behave justly.').

[104] 'There is, of course, no such thing as a perfect weapon, and remotely piloted aircraft are no exception', Brennan Remarks.

[105] See e.g. Schmitt, 'Benighted Debate', 597; Schmitt, 'Fog', 320.

UAVs under the LOAC, it is important to take note of some of the known limitations or potential problematic aspects of UAV technology and its use. This is because they reveal that UAVs' technical capabilities do not warrant this narrative's unmitigated enthusiasm and hence do not make it impervious to criticism.

Drawing from the context of US drone practice (which forms the narrative's background), the UAV's all-seeing and all-knowing omnipotence seemed to be neither as self-evident nor as feasible as the narrative under scrutiny and the US rhetoric claim on the basis of the UAVs' technical features. Rather than providing grounds for technological pessimism, the objections that have been raised suggest that even when optimistic assumptions are made about the weapon technology, one needs to appreciate the complexities and peculiarities of the interface between the human and the UAVs,[106] as well as be alert to the porous processes and interactions that define targeting and killing by way of UAVs,[107] which eventually end up casting into doubt what this narrative regards as advantages accruing from the use of UAVs. The aspiration of constant real-time air surveillance and coverage of areas and targets promised by the UAVs' 'persistent stare' and their ability to 'maintain[] an 'unblinking eye' 24/7 over targets' could not be technically achieved in fact,[108] the human ability to manage and process the massive influx of vast amounts of real-time feedback and ubiquitous information (information overload) was tested to the limit,[109] while the situational awareness at the time of the targeting of

[106] See e.g. Christopher Coker, 'Ethics, Drones, And Killer Robots' in Chris Brown, Robyn Eckersley (eds), *The Oxford Handbook of International Political Theory* (OUP 2018).

[107] This included the cognitive hurdles, potential bias and the challenges of collective deliberations in targeting decision-making through what was in the case of the US a Daedalian system of databases, personnel, bureaucracies, and chains of command in what is, after all, an apparatus which produced individuals-targets to target them for death. See e.g. Craig Martin, 'A Means-Methods Paradox and the Legality of Drone Strikes in Armed Conflict' (2015) 19 IJHR 142, 167 (Concluding that '[t]he very features that are most likely to make drones compliant with IHL – their ability to linger undetected and at little risk and low cost for protracted periods over potential targets, feeding large volumes of intelligence back to an operations team that can engage in decision-making in a relatively stress-free environment – may paradoxically facilitate and make more likely targeting errors caused by misperception and misinterpretation of the target data').

[108] The Intercept <https://theintercept.com/drone-papers/firing-blind/>.

[109] ICRC IHL and Challenges Report (2011) p 39 ('… leading to questions about the operator's ability to fully comply with the relevant rules of IHL in those circumstances'). See also Lt Gen.

individuals was compromised by the limited peripheral view of the area (soda straw effect).[110]

The way the technical features of UAVs are invoked in this narrative to argue that UAVs ostensibly address the human fallibility when it comes to targeting judgments may be said to reflect an exaggerated confidence in the infallibility of the weapon technology.[111] It seems that there is something contradictory in this narrative; on the one hand it relies on the human role in the operation of UAVs, the planning and the execution of drone strikes as a palliative consideration to pacify uneasy consciences, and on the other it reveals an understanding that 'simply being human is the weakest point in the kill chain, i.e., our biology works against us in complying with IHL'.[112] But perhaps this is not a matter of contradiction, but rather a reflection of what Roger Berkowitz captures as 'a profound human desire to replace human judgment with the more reliable, more efficient, and more rational judgment of machines',[113] that is, '[t]he desire to substitute machines for humans [that] is most intense precisely in those fields with the highest stakes' like war.[114]

Most importantly, this narrative's treatment of UAVs as a 'humanitarian' technological breakthrough, which states should pride themselves in (rather than being apologetic for) using, fuels rather than debunks the myth or

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David A Deptula, Air Force deputy chief of staff for intelligence, surveillance and reconnaissance who cautioned almost a decade ago: 'We're going to find ourselves in the not too distant future swimming in sensors and drowning in data, …', quoted in Stew Magnuson, 'Military "Swimming in Sensors and Drowning in Data"' (*National Defense*, 1 January 2010) <www.nationaldefensemagazine.org/articles/2009/12/31/2010january-military-swimming-in-sensors-and-drowning-in-data>. But see Schmitt, 'Benighted Debate', 618 (stating in response to ICRC's concern that '[i]f accurate, this would suggest that less taxing attack systems must be used in lieu of a UCAS [Unmanned Combat Aircraft System] if doing so would result is less collateral damage. Such an assertion is speculative at best, and in the vast majority of situations it is counter-factual. It must also be emphasized that the mere complexity of an attack system does not render it unlawful per se. (counterfactual criticism)'.

[110] See e.g. Naurren Shah, Written Statement For an Ad Hoc Hearing on Drones, 'Civilian Harm from Drone Strikes Assessing Limitations & Responding to Harm' (8 May 2013) 2-3.

[111] See e.g. David S Cloud, 'Anatomy of an Afghan War Tragedy' (Los Angeles Times, 10 April 2011) ('Technology can occasionally give you a false sense of security that you can see everything, that you can hear everything, that you know everything'. See also Danielle Keats Citron, 'Technological Due Process' (2008) 85 Wash. U. L. Rev. 1254, 1271.

[112] Ronald Arkin, 'Lethal Autonomous Systems and the Plight of the Non-combatant' (2013) 137 AISB Quarterly 2, 5.

[113] Roger Berkowitz, 'Drones and the Question of "The Human"' (2014) 28 Ethics & Int'l Aff. 159, 163 ('The rise of unmanned aerial vehicles', among others, '—without the perceived human weaknesses of distraction, emotion, exhaustion, quirkiness, risk, and unreliability—answers' this desire.).

[114] ibid 166.

illusion that technological progress in weapons of war translates into legal and ethical progress in the conduct of war.[115] As this narrative indefatigably praises the technical capabilities of the weapon and its alleged precision and accuracy, it seems to package compliance with the principle of distinction and proportionality as a technical affair. Such approaches risk being on the verge of the fallacy of fundamentally confounding statements of fact and claims of value[116] since compliance with the law depends on assessments and targeting determinations that are 'of a legal and ethical, rather than technological, nature'.[117] Sarah Kreps and John Kaag, who do not themselves deny the 'usefulness' of drones in 'upholding the principles of discrimination and proportionality', rightly caution 'that the mere use of particular technologies in military strikes cannot bestow on them legal and ethical legitimacy; it is individuals —rather than the technologies on their own— who make these assessments'.[118] In so doing, they emphasise the need to 'guard … against moral smugness that tends, rather ironically, to breed complacency' and 'a misplaced sense of moral legitimacy [that] can lead to a dangerous lack of vigilance about ethical and legal matters'. Finally, this narrative artfully conceals that 'the promise of a more discriminating form of warfare' which drones are purported to carry with them is just that – a promise; that is, 'a possible not an assured outcome of the use of drones'.[119]

The assumption that civilian harm is unavoidable part of warfare

The narrative under scrutiny offers the reassurance that the technological splendours of UAVs can be conducive to humanitarian outcomes by helping to minimise unintended civilian harm. This speculative assertion, however, at the same time constitutes an unsettling reminder that the civilian harm is

[115] See e.g. Marx, 'Progress'. Also, Sarah Kreps and John Kaag, 'The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis' (2012) 44 Polity 260, 284-5 (concluding that their arguments 'are meant to serve as warnings against overstating the legal and ethical progress that has been made in the conduct of war').
[116] Kreps and Kaag, 'UAVs', 284.
[117] ibid 261.
[118] John Kaag and Sarah Kreps, *Drone Warfare* (Polity Press 2014) 102-3.
[119] Gusterson, *Drone*, 115. See also Ioannis Kalpouzos, 'The Armed Drone' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects: Emergence, Encounter and Erasure through Object and Image* (OUP 2018) for a range of promises belied.

an unavoidable part in drone violence. This is because one would expect that this narrative would argue for the elimination of civilian harm. This would be consistent with what itself claims to be technologically feasible thanks to UAVs' much-lauded potential to be highly selective and precise and the ability to entirely protect the operator's life. However, this narrative relies on the law's tolerance towards civilian harm in the context of the principle of proportionality to escape an obligation for zero civilian casualties.[120] Such an obligation or duty would arguably be concomitant with the expectations created by UAV's 'extraordinary' technological ability for distinction.[121] In official statements and policy documents the US seemed to endorse the requirement that 'before any [drone] strike is taken, there must be near-certainty that no civilians will be killed or injured – the highest standard we can set'.[122] This notwithstanding, overwhelming data suggest, regrettably, that in the context of US drone warfare the minimisation of civilian injury and death was but a theoretical idea, if ever an intention.[123]

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[120] 'Zero casualties' has been resisted by drone advocates: See e.g. Blank, 'Top Gun', 713, 715, 717 (arguing that '[i]f using drones means that a party faces different legal standards and obligations than it would in the absence of drones, that party may opt for a less precise weapon in order to avoid such heightened standards' and that '… a military force held to such a zero casualty standard will either disregard the law entirely as unreasonable or will refrain from military operations altogether to avoid legal violations' and that 'such heightened standards' entail a 'potential risk[] to the development and interpretation of the law in ways that could endanger the central goal of protecting civilians and conducting hostilities in a lawful manner'); Gross, 'Duty', 65-8. On the concept of differential law based on the concept of 'Common-but-Differentiated Responsibilities', see Gabriella Blum, 'On a Differential Law of War' (2011) 52 Harv. Intl'l L. J. 164.

[121] Singer, *Wired*. Mégret, 'Humanitarian Problem', 1301 ('Drones … surely rank high as weapons that one would expect to be used very discriminately because they have that technological capacity.').

[122] Barack Obama (US President), State of the Union Address, 'Remarks by the President at the National Defense University', The White House (23 May 2013) [hereinafter Obama Address]. This reflected the US unclassified document 'Procedures For Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities' (May 22, 2013) (provided that there are no 'extraordinary circumstances') <https://fas.org/irp/offdocs/ppd/ppg-procedures.pdf>. See also John Brennan, 'Obama Administration Counterterrorism Strategy' (*C-SPAN*, 29 June 2011) (ostensibly subjecting US drone strikes to a 'zero-casualty' or 'single-digit' standard for civilian casualties). See also Jasanoff, 'Technology', 14 (arguing that '[t]he relationship between technology and standards has been variously conceived, but whatever the conception, the implications are always political').

[123] See The Intercept, 'The Drone Papers'; media reports, the titles of which are also telling of the scepticism and incredulity, see Savage and Shane (2016) 'U.S. Reveals Death Toll from Airstrikes Outside War Zones'; Shane (2015) 'Drone Strikes Reveal Uncomfortable Truth: U.S. Is Often Unsure About Who Will Die'; Pilkinglton (2013) 'Does Obama's 'single-digit' civilian death claim stand up to scrutiny?'; Ackerman (2014) '41 Men Targeted but 1,147 People Killed: US Drone Strikes–The Facts on the Ground'. See also 'Living under Drones:

What is not taken into account by this narrative is that civilian injury or death in the context of proportionality accounts for the quanta of pragmatism and compromises, including 'a tradeoff between the attacker's security and that of civilians in the vicinity of military targets',[124] which silently made their way into the law to ensure that it would not risk consigning itself to irrelevance in a traditional paradigm of war/armed conflict. As Frédéric Mégret observes,

> There is more to drones, however, than their technical ability to discriminate based on a greater ability to protect the operator's life. In particular, the safety of drone operators is not simply a factor that diminishes the potential for States' excuses, nor is it simply the case that this safety increases the number of measures that an attacking party can adopt to minimize collateral casualties. It is also the case that drone warfare will arguably more fundamentally affect the very moral compact that lies at the heart of the laws of war.[125]

In this light, he argues,

> it will be disingenuous to claim the benefit of collateral damage that is legally tolerated under Additional Protocol I in conditions that do not approximate the factual and normative scenario historically contemplated when Protocol I was adopted. It may be even more disingenuous in a context where there is already a lingering suspicion that armies only too willingly abuse the "collateral damage exception".[126]

UAVs as the best option

In seeking to establish the compatibility of UAVs with the LOAC, as explained above, this narrative invests heavily in the idea that drones bear strong similarities with other conventional weapons, such that UAVs are but an advanced and sophisticated version or variation thereof. In so doing, it sets up the abstract legal and ethical argument about UAVs. The dynamic of semblance to conventional weapons presents manned and unmanned

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Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan', Stanford/NUY Report.

[124] Mégret, 'Humanitarian Problem', 1319; and also 1305 ('at a deeper level the recognition of the inevitability of collateral civilian casualties acknowledges that there is some kind of tradeoff between the lives of one State's soldiers and another State's civilians').

[125] ibid 1303.

[126] ibid 1308.

weapons as almost equal alternatives or equally alternative options in the arsenal of belligerents who possess them. At the same time, at work is the underlying understanding that technology suggests progress, providing thus an objective basis for legal and ethical claims under the LOAC. As such, UAVs are highly technological instruments, 'extraordinary machines' the technological advantage of which is purported to maintain the objectivity of choice.[127] In this light, the drone is more often than not presented as the unfailingly best option among available alternatives and ultimately emerges as a weapon that is patently *optimum inter pares*.[128] Instilling a sense of urgency about the use of UAVs as weapons that (were not only developed[129] but also) should be employed as a matter of humanitarian or ethical priority,[130] the implication is that UAVs represent the default option (weapon and/or tactic) to be deployed anywhere and that drone use is assumed to comply with the LOAC in any given context.[131]

For former US President Obama, 'the primary alternative to targeted lethal action would be the use of conventional military options', such as 'ground troops, conventional airpower or missiles'. As he emphasised, these would be 'worse' from the vantage point of unintended consequences and reputational costs because they 'are far less precise than drones, and are likely to cause more civilian casualties and more local outrage'.[132] Similarly

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[127] This seems to reflect 'a technological determinist interpretation in which there [is] such a thing as a single best technology that should be adopted without political deliberation': Bijker, 'Technology Matters', 696.

[128] See e.g. Schmitt, 'Benighted Debate', 615 ('More practically significant is the option of using a UCAS versus other means of conducting the attack, such as a manned aircraft, artillery or ground operation. … It will seldom be the case that the requirement for selecting feasible means and methods of that warfare will necessitate selection of a ground force system other than the UCAS'); Schmitt, 'Fog', 320 ('Compared to attacks by manned aircraft or ground-based systems, the result is often a significantly reduced risk of misidentifying the target or causing collateral damage to civilians and civilian property').

[129] See following subsection.

[130] Statman, 'Drones', 474 ('In the real world, the alternative to drones would be artillery or bombers, which are either less precise or more destructive (or both)').

[131] See Michael J Boyle, 'The Costs and Consequences of Drone Warfare' (2013) 89 Int'l Aff. 1, 13 (arguing that we need to consider whether the other options are truly equally available alternatives in the circumstances of a particular situation; that is, whether they are 'plausible' or 'realistic' or even 'legally permitted' alternatives). Also, O'Connell, 'Seductive Drones', 117-8 (arguing that '... we have a decade of evidence of US presidents deploying military force where such force was unlikely to be used prior to the development of UCVs').

[132] Obama Address. The use of UAVs as the best option has also been framed around a lesser evil logic, see Strawser, 'Heat', 15 where UAVs are considered 'the least morally problematic option from among the list of bad options … at least in terms of traditional just war theory

worse than drones were, the US President claimed, '[e]ven small special operations [which] carry enormous risks'.[133] However, at the time of choice of the best weapon available to target Osama bin Laden for death, the best option was not drones – the weapon which owes much of its development to bin Laden himself[134] and was saluted a decade earlier as 'a tool that could kill bin Laden within minutes of finding him'.[135] Rather than a Predator strike, the 'weapon of choice' was a special forces operation consisting of a team of 23 Navy SEALs and two Black Hawk helicopters. According to the familiar account, what weighed in this decision was the imperative to ascertain that bin Laden would be killed,[136] to confirm that the right person had indeed been killed 'ideally by having a body, which would not be the case in the case of drone raid',[137] and to avoid a restrike in case the first one failed. It is also interesting to note that there is also an account different from the standard version of bin Laden's killing, which at least rhetorically would vindicate the advertised superiority of the drone. As claimed, in the initial plan the use of UAVs was contemplated only as part of 'a carefully constructed cover story' that would be issued after the fact; that is, the Obama administration would announce that bin Laden had been killed in a drone strike or drone raid somewhere in the mountains on the Pakistan/Afghanistan border and that, in the absence of a body to verify his death, his remains had been identified by DNA analysis and hence his death had been confirmed.[138] Realpolitik

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jus in bello proportionality considerations because they produce less harm to civilians than the harm predicted if other means of force were employed…'.

[133] Obama Address.

[134] The development of the Predator drone represented 'a technological solution to the problems that the Clinton administration faced when they were attempting to kill Osama bin Laden in the late 1990s by means of cruise missiles': Markus Gunneflo, *Targeted Killing: A Legal and Political History* (CUP 2016) 175 (163 'a new tool for targeted killing').

[135] Barton Gellman, 'A Strategy's Cautious Evolution' (*The Washington Post*, 20 January 2002) <www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060900885.html>.

[136] Charlie Savage, *Power Wars: Inside Obama's Post 9/11 Presidency* (Little, Brown & Co. 2015) 261-2.

[137] David E Sanger, *Confront and Conceal: Obama's Secret Wars and Surprising Use of American Power* (Crown 2012/Broadway 2013) 78.

[138] Seymour M Hersh, 'The Killing of Osama bin Laden' (2015) 37 London Review of Books 3-12. Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (OUP 2016) 284 (Referring to this, Watkin argues that contrary to 'the perception drones are the counterterrorism weapons of choice', 'drones are not a panacea weapons system and have definite operational limitations'. Additionally, he notes

considerations aside, there are two points worth noting in this story. First, it seems that the intention was more to promote UAVs as a superior weapon rather than using it as such, which arguably undermined the key argument about drone's discriminatory potential, as advanced by this narrative and the US rhetoric in defence of UAVs. And second, it makes disturbingly clear that the drone lethal violence to which individuals-targets are subjected is of such a destructive nature that there is no body but only remains to be identified post UAV attack.

UAVs as a humanitarian-motivated weapon

In a strand of the legal literature and the United States' rhetoric, the development and deployment of UAVs is inextricably bound up with humanitarian motives and ethical incentives, and often associated with the UAV-using side's ability and willingness to comply with the LOAC.

For example, for Yoram Dinstein the armed drone, epitomising technological superiority, 'has led civilized armed forces to pay greater —rather than lesser— attention to the detailed constraints of LOAC'.[139] For Michael Lewis and Emily Crawford the armed drone was devised by technologically advantaged states and 'entered the picture' as a technological solution 'to the problem posed by asymmetric warfare and the laws that govern it' and 'to better account for the modern interpretation of distinction' in asymmetric armed conflict without sacrificing 'much of the firepower advantage':[140]

> [T]here can be little question that the increasing use of drones has been a technological reaction of state militaries to the legal (and moral) requirements imposed by IHL. By taking the position that human shielding is illegal but legally effective, IHL imposed requirements for increasing intelligence accuracy and increasing control of weapons employment decisions upon state militaries wishing to comply with IHL and minimize civilian casualties. In response, state militaries have turned to technology to create smaller and more

that 'Drones also do not provide the operational flexibility of Special Forces assets, which can attempt to capture an enemy').

[139] Yoram Dinstein, 'Concluding Remarks: LOAC and Attempts to Abuse or Subvert it' (2011) 87 Int'l L. Stud. 483, 486. Schmitt, 'Benighted Debate', 600 ('On the contrary, UCAS represent an option available to commanders that may further their ability to achieve humanitarian law objectives').

[140] Lewis and Crawford, 'Drones', 1153.

> accurate weapons and to provide greater real-time intelligence and greater control over weapons employment decisions. That technology has come in the form of the armed drone.[141]

Moreover, for Kenneth Anderson the UAVs seem to serve as tools for enforcing respect for the law in reaction or response to an adversary's disinclination to comply with the LOAC or to violations thereof,[142] having emerged as 'technological counters', compensating for 'the loss of behavioural means to affect the behaviour of parties on the other side who do not follow the rules of war' and the 'loss of reprisal to enforce behaviour' (and the 'loss of reciprocity exploited by the other side').[143]

As UAVs are placed in the hands of states or state militaries able and willing to engage with the law, the use of UAV lethal force seems to be couched in this narrative as the hi-tech part of a humanitarian or ethical process centred on adherence and compliance with LOAC obligations. This reveals how this narrative's deterministic and optimistic viewpoint on drone technology seeks a crutch in considerations beyond the (objective) technical capabilities for precision and accuracy.[144] These considerations do, more or less silently, important ethical work in rationalising or legitimising drone lethal violence and reinforce the enthusiasm for the use of drone technology; this narrative, however, does not push them any further. At this point, it is worth noting that by implicitly attaching to the drone-using side the normative superiority that accompanies the disposition to respect the law's legal and ethical prescriptions and proscriptions, and/or by identifying the adversary on the receiving end of lethal violence, this narrative seems to

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[141] ibid 1165.

[142] Kenneth Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences' (2009) 20 EJIL 331, 345 claiming that 'the move to robotics is driven in part by concerns about the loss of behavioural means to affect the behaviour of parties on the other side who do not follow the rules of war– human shields, hiding among civilian populations, etc. The loss of reprisal to enforce behaviour has pushed the US to seek technological counters rather than behavioural ones'.

[143] ibid 344. Also, Anderson, 'Case', 15 ('The expansion into automated and robotic military equipment owes much to the ethical impulse to create new technologies of discrimination when fighting enemies for whom unwitting civilian shields were their main materiel of war').

[144] Krier and Gillette, 'Optimism', 426 ('Technological optimism is a necessarily contingent point of view. The optimistic outlook depends on a package of considerations none of which is sure to materialize and one of which - exponential technological growth - turns out to be not nearly so climactic as the optimists imagine.').

reverberate the following understanding; that is, '[i]nsisting on the need to continue to respect the laws of war is, paradoxically, one of the ways in which one can show that the other side is unworthy of them even as one continues to benefit from their considerable legitimization of the use of force'.[145]

If, as this narrative reveals, the promotion of UAVs is linked with the technologically advanced and (self-proclaimed) law-compliant world,[146] a pertinent question arises. This is how the positive correlation between the use of UAV weapon technology and humanitarian intentions, on which this narrative relies, would play out in cases in which what was thought of as a dire prediction would be fulfilled; that is, when UAVs cease to be 'the exclusive province of responsible nations'[147] and end up in the hands of a warring side that is known to violate systematically the law or is presumed to violate obligations, such as 'rogue groups or nations hostile to the United States … able to build or acquire their own drones and to use them to launch attacks on our soil or on our soldiers abroad'.[148] An interesting case[149] would be the use of micro-drones by the so-called Islamic State (IS) or Islamic State in Iraq and the Levant (ISIL), the most powerful jihadist group, (in)famous for its brutality and recognised as 'constitut[ing] a global and unprecedented threat to international peace and security'.[150] Having said that, the IS has proven adept at using cheap micro-drones in swarms against Iraqi troops in Mosul, Iraq, forcing them to take countermeasures against drones[151] and

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[145] Mégret, 'Humanitarian Problem', 1317.
[146] This is further served by accompanying the use of UAVs with notions of justice, see e.g. the hashtag #HuntersDeliverJustice used by the official Twitter account of the Creech US Air Force Base (@Creech AFB).
[147] John Villasenor, 'Cyber-Physical Attacks and Drone Strikes: The Next Homeland Security Threat' (The Brookings Institution, 5 July 2011) <www.brookings.edu/research/cyber-physical-attacks-and-drone-strikes-the-next-homeland-security-threat/>.
[148] ibid.
[149] An interesting, albeit not the only case.
[150] UN Doc S/RES/2249 (2015) (20 November 2015) ('its recruitment and training of foreign terrorist fighters whose threat affects all regions and Member States, even those far from conflict zones, the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), constitutes a global and unprecedented threat to international peace and security". UNSC Letter dated September from the Permanent Representative of the US of America to the United Nations addressed to the Secretary-General' (22 September 2014) UN Doc S/2014/691 Annex.
[151] Joby Warrick, 'Use of weaponized drones by ISIS spurs terrorism fears' (*The Washington Post*, 21 February 2017) <www.washingtonpost.com/world/national-security/use-of-weaponized-drones-by-isis-spurs-terrorism-fears/2017/02/21/9d83d51e-f382-11e6-8d72-263470bf0401_story.html?utm_term=.ac9c9237f206>.

against US Special Operations forces in Raqqa, Syria, disrupting the US ability to call in airstrikes.[152]

It could be argued that the very emphasis in this narrative on the *use* of UAVs (as opposed to UAVs as such) would probably aid it in weathering such considerations. That is to say, the focus on how a weapon is used allows one not to completely repudiate the idea that there could be negative implications for the law, whilst still enabling them to formulate these as independent of the lawfulness of UAVs and to strictly link them to the use into which the weapon technology is put. In this way, arguably, this narrative would reflect a technological deterministic understanding corollary to the 'standard conception of technology' whereby 'technology can be employed negatively, but in this view the users are to be blamed, not the technology'.[153]

1.3 CONCLUSION

The chapter demonstrated that in the mainstream legal argument UAVs are presented at once as mere versions of existing weapons and as improved versions thereof. Processed within the context of perpetual technological advancement over centuries of human warfare, the drone becomes part of a 'natural history' of military technology marked by more or less anticipated developments that might have even in fact foreshadowed its advent. In this narrative, the line of technological evolutions lends an air of normalcy, familiarity and inevitability, and UAVs are presented as an ineluctable part of a purportedly well-established conventional reality of war and as hardly any different from other conventional weapon technologies. At the same time, UAV technology is also a new(er) development perceived as the natural culmination of an inevitable history of great conventional advances upon

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[152] Thomas Gibbons-Neff, 'ISIS drones are attacking U.S. troops and disrupting airstrikes in Raqqa, officials say' (*The Washington Post*, 14 June 2017) <www.washingtonpost.com/news/checkpoint/wp/2017/06/14/isis-drones-are-attacking-u-s-troops-and-disrupting-airstrikes-in-raqqa-officials-say/?utm_term=.c4c35e257deb>; Pablo Chovil, 'Air Superiority Under 2000 Feet: Lessons from Waging Drone Warfare Against ISIL' (11 May 2018) <https://warontherocks.com/2018/05/air-superiority-under-2000-feet-lessons-from-waging-drone-warfare-against-isil>.

[153] Bijker, 'Technology Matters', 683 (noting in addition that '[s]ome of the implications of these standard images are positive and comforting. Thus, for example, scientific knowledge does appear as a prominent candidate for solving all kinds of problems.').

which drones as descendants improve.[154] In this context, the drone is approached as the spearhead of progress in weapon technologies, a better weapon. Lured by the dubious promises of the marvels of the technology, UAVs are viewed as 'humanitarian' instruments holding the answer to compliance with the principles of distinction and proportionality under the LOAC. In this respect, this narrative argues that UAVs present an opportunity or carry the potential for improved LOAC compliance by accentuating specific aspects of UAV technology that enable emphasis on the increased technological precision, persistent surveillance and information gathering capabilities that UAVs incorporate.

The chapter showed that in this narrative the distinct and distinctive characteristics that make UAVs a particularly offensive instrument which unilaterally subjects individuals-targets to overwhelming lethal direct fire are effectively muted and absorbed into assumptions about what war looks like and the law. Not only lethality and killing are taken for granted as the basic reality of warfare (for the other side of the divide), but also the fact that the infliction of lethal violence by way of UAVs occurs as the consequence of unidirectional offensive military force remains troublingly unchallenged. At the same time, the killing part of UAVs is embraced, reflecting a pervasive underlying understanding that war/armed conflict in the LOAC is exhausted to the infliction of lethal force and hinges on weapons (be it conventional or otherwise, manned or unmanned) that produce such lethality as being inevitably part thereof. However, and this is important, these assumptions reveal a disquieting lack of an appreciation of the factual and normative parameters within which the LOAC seeks to restrain warfare violence through its rules and constraints. It is in this light that the Thesis suggests that we need to turn the debate back and reconsider UAV warfare and compliance with the LOAC at a fundamental level.

[154] See e.g. Barton C Hacker, 'The Machines of War: Western Military Technology 1850–2000' (2005) 21 History and Technology 255, 272 (taking note of the understanding that 'Each new generation of weapon systems improved on the performance of its predecessor, …').

CHAPTER 2

ARMED CONFRONTATION AND THE NOTION OF FAIRNESS

As the Thesis aims at addressing the issues that arise in UAV warfare with respect to compliance with the LOAC, the chapter offers a normative account of the way in which the LOAC conceives of war/armed conflict in its attempt to regulate its conduct through its rules on the conduct of hostilities. To this end, it examines the paradigm of warfare that animates the current LOAC and suggests that it bears the marks of its background assumptions more than it is acknowledged today in the debates and arguments about UAVs and the law. The chapter aims at demonstrating that the law is built around a human armed interaction where the adversaries are mutually exposed to danger and the attendant likelihood of harm. Although this insight may seem on the face of it hardly revolutionary, it is of significant conceptual and normative import in that it provides a vital key to understanding the ethical assumptions within which the law and the rules relating to the conduct of hostilities are embedded. It is through this understanding, the chapter argues, that the idea of fairness emerges as a crucial normative component of an armed confrontation and captures the adversaries' opportunity to fight back in response or in defence, and the chance of good faith. Looking at the link between fairness and weapons in times past, the chapter shows that the choice of means and methods of warfare has long had a bearing on the characterisation of wartime behaviour as 'fair' or 'unfair'.

2.1 HOSTILITIES AT THE LEVEL OF THE COLLECTIVE

The LOAC is built around armed conflict understood as an armed confrontation.[1] The 1952 ICRC Commentary, which has been referred to as

[1] Armed conflict is not referred to as a legal term of art. Common Article 2 GCI-IV on international armed conflict provides that the Conventions apply 'to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. As Dino Kritsiotis observes, 'this provision which makes abundantly clear that war is no longer the trigger mechanism for the rules of warfare'. "War" remains a condition known to international law, it is true …,

authoritative on this point,[2] asserts in this respect that the applicability of the Conventions is directly linked to '[t]he occurrence of de facto hostilities', that is, the 'actual opening of hostilities'.[3]

While the text neither of the Conventions nor of the Protocols offers a definition of armed conflict, it is incontrovertible that the notion of armed conflict assumes the hostile resort to armed force or armed violence between entities.[4] Indeed, the bulk of the law suggests that an armed conflict, international or non-international, is about hostilities. Hostilities is another word for warfare, which also appears in codified law, albeit only occasionally,[5] and hence the very object of regulation and the reason for establishing the system of protections for combatants and non-combatants. The notion of hostilities captures the armed violence that is collectively exercised by the parties to a conflict and comprises the range of hostile acts and activities as a result of resort to means of injuring the enemy,[6] including attacks, bombardment, military operations.[7] The armed violence which the law seeks to regulate is referred to in the 1952 and 2016 ICRC Commentaries on the 1949 Geneva Conventions (GC) as armed confrontation,[8] hostilities[9]

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but common Art. 2 ensures that it is subsumed as part of a much broader normative phenomenon—that of an international armed conflict': Kritsiotis, 'Problematique', 13. Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36 Int'l & Comp. L. Q. 283.

[2] Kritsiotis, 'Problematique', 14.

[3] 1958 ICRC Commentary on GCIV (Art 2) p 20 and 1952 ICRC Commentary on GCI (Art 2) p 32 respectively. See also 2016 ICRC Commentary on GCI (Art 2) para 210.

[4] See the definitions proposed by the ICRC, which, as the ICRC claimed, 'reflect the strong prevailing legal opinion': '1. International armed conflicts exist whenever there is resort to armed force between two or more States' in ICRC, 'How Is the Term "Armed Conflict" Defined in International Humanitarian Law', Opinion Paper 5 (March 2008) p 5 <www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>; 2016 ICRC Commentary on GCI (Art 2) paras 218-9 (citing *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-AR72, Appeals Chamber (2 October 1995) para 70 and ICRC Opinion Paper (2008) p 1).

[5] Art 28 GCII; Title of part III of API and section I of API (methods and means of warfare), Arts 35(1) and (3), 36, 37 49(3), 54(1), 55.

[6] See identical Art 22 Regulations concerning the Laws and Customs of War on Land, Annexed to the Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, July 29, 1899 and to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907, see Roberts and Guelff, p 69.

[7] Arts 19, 22, 23, 36, 37 GCI; Arts 22, 23, 39, 40, 75 GCII; Arts 6, 18, 20, 22, 28, 40, 51, 95, 101 GCIV; Arts 3, 28, 29, 44, 48, 49, 51(1), (4) and (5), 54, 55, 56, 57, 58, 59, 60 API; Arts 1 and 13(1) APII.

[8] 2016 ICRC Commentary on GCI (Art 2) paras 206, 213, 218, 225-6, (section ii: intensity of the armed confrontation), 243, 264, 281, 283.

[9] ibid para 210.

or open hostilities,[10] fighting,[11] hostile military activities, active battlefield.[12] In a similar vein, the 1987 ICRC Commentary on Additional Protocol I (API) refers to 'combat action',[13] the 'confusion of the battlefield', 'front lines' and the 'firing line'.[14] Having said that, the hostilities between the adversaries are conducive to the temporalisation and spatialisation of an armed conflict by binding it in time and space. Explicit references to hostilities in the Conventions and the Protocols are numerous and provide the temporal coordinates of an armed conflict in a way that restricts it by pinpointing its beginning, regulating its course and anticipating its end. In a number of provisions hostilities serve as the point of reference, indicating when certain rules are to take effect, namely at the commencement, upon or from the outbreak of hostilities[15], before or after the beginning of hostilities,[16] during/throughout hostilities,[17] at/until the close or after the close/cessation of hostilities.[18] Additionally, references to hostilities and the battlefield may be also said to reflect the effort of the law to separate the military lifeworld from the civilian sphere by delineating to the extent possible the zone of violent conflict.[19] What is more, the law does not seem to envisage armed conflict as a violent activity that is temporally unlimited and geographically unbounded.[20] Importantly, hostilities situate the

[10] ibid para 208.
[11] ibid para 206.
[12] ibid para 209.
[13] 1987 ICRC Commentary on API (Art 49) p 603, para 1880.
[14] ibid (Art 41) p 483, para 1608.
[15] Arts 26, 28, 31, 36, 40 GCI; Arts 21, 33, 43, 58, 112 GCIII; Art 14 GCIV.
[16] Art 62 GCI; Art 141 GCIII.
[17] Arts 23, 26, 28, 36, 48 GCI; Arts 4B, 33, 109 to 117, 128, 132 GCIII; Art 14 GCIV.
[18] Art 17 GCI (at the latest at the end); Section II Release and Repatriation of Prisoners of War of GCIII; Arts 67, 118, 119, 133 GCIII on the release and repatriation of prisoners; Title of Section II GCIII; Arts 45, 46 GCIV.
[19] Drawing the line between civilian and military is crucial considering that the combatant/civilian distinction is fundamental as regards targeting in the law.
[20] It is beyond the boundaries of this study to elaborate on this point. But see e.g. recent US scholarship in favour of a 'perpetual war' paradigm: Rosa Brooks, 'There's No Such Thing as Peacetime' (*Foreign Policy*, 13 March 2015) <http://foreignpolicy.com/2015/03/13/theres-no-such-thing-as-peacetime-forever-war-terror-civil-liberties/> and also Rosa Brooks, *How Everything Became War and the Military Became Everything* (Simon & Schuster 2016). See also e.g. Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 JICJ 65; Mary Ellen O'Connell, 'Combatants and the Combat Zone' (2008) 43 U. Rich. L. Rev. 845; Laurie R Blank, 'Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat' (2010) 39 Ga J. Int'l & Comp. L. 1.

adversaries on a –less or more– identifiable battlefield, which 'denotes both a physical space and a normative space'.[21]

In seeking to clarify the concept of international armed conflict, the ICRC Commentaries on common Article 2 GCI-IV identify the 'intervention' or 'involvement' of armed forces as the element that signals the transition from a 'difference arising between two states' to an 'armed conflict', activating thus the application of the law.[22] As the 1952 ICRC Commentaries suggest, the law envisages a kind of conflict that is consistent with the classical notion of warfare and a traditional understanding of hostilities as a set of offensive and defensive military operations, the conduct of which involves the mobilisation of a state's main military resources. This would in principle require the deployment of the military, ground forces and/or conventional air power of a state. This is reminiscent of Lassa Oppenheim's understanding that '[w]ar is a contention between two or more States through their armed forces, for the purposes of overpowering each other and imposing such conditions of peace as the victor pleases'.[23]

The 2016 ICRC Commentary on GCI –drafted more than sixty years after the 1952 ICRC Commentary and with '[t]he main aim … to give people an understanding of the law as it is interpreted today, so that it is applied effectively in today's armed conflicts'–[24] echoes a similar, albeit more detailed, understanding of war/armed conflict and articulates some of the key aspects of the paradigm of warfare behind the law. The way in which it does so arguably provides important illumination on the degree of the influence that the traditional understanding of warfare has had on the shaping of the law. The relevant passage of the 2016 Commentary reads as follows:

> The existence of an international armed conflict presupposes the involvement of the armed forces of at least one of the opposing States. Indeed, armed conflict presumes the deployment of military means in order to overcome the enemy

[21] Gregory, 'Geographies', 11.
[22] 1952 ICRC Commentary on GCI (Art 2) p 32; 1958 ICRC Commentary on GCIV (Art 2) p 20; 2016 ICRC Commentary on GCI (Art 2) paras 222-6.
[23] Lassa Oppenheim, *International Law* (Hersch Lauterpacht ed, 7th edn, 1952) 202.
[24] See <www.icrc.org/en/document/updated-commentaries-first-geneva-convention>.

> or force it into submission, to eradicate the threat it represents or to force it to change its course of action. When classic means and methods of warfare – such as the deployment of troops on the enemy's territory, the use of artillery or the resort to jetfighters or combat helicopters – come into play, it is uncontroversial that they amount to an armed confrontation between States and that the application of the Geneva Conventions is triggered.[25]

The updated Commentary further indicates that an armed conflict exists when an armed confrontation exists, which, if not employed as a synonymous expression, is recognised at least as its core element.[26]

The element of confrontation is also reflected in the notion of 'armed resistance'. The law explicitly distinguishes between war/armed conflict (Article 2(1) GCI-IV) and 'occupation which meets with no armed resistance' (Article 2(2) GCI-IV), thus linking 'armed resistance' with 'armed conflict'. As the 2016 ICRC Commentary explains, express reference to occupation that 'meets with no armed resistance' was intended 'to ensure that the law of occupation applies even … [in] cases of occupation established without hostilities and fills a gap left by Article 2(1)'.[27] The latter refers expressly to armed conflict and also covers 'occupation occurring during or as a result of hostilities in the context of declared war or armed conflict'.[28] It becomes evident that the notion of armed resistance as an element of armed conflict (and hence hostilities) implies that for an armed conflict to exist there must at least be the possibility of military reaction against the attacking side. This means that the attacked side must at least have a chance to repel the attacker. In effect, such a possibility can be meaningful only if the attacking side can be actually 'resisted', which perforce presupposes that the attacker is physically within the reach of the party subject to attack, that is within conditions of an armed confrontation. The understanding of an armed conflict as an armed confrontation is not diluted in the case that the side subject to attack is unwilling or unable to respond militarily to the side that initially resorts to armed force. As the Commentary affirms, an 'armed confrontation' exists

[25] 2016 ICRC Commentary on GCI (Art 2) para 225.
[26] See n 4 and n 8 above; 1952 ICRC Commentary on GCI (Art 2) p 32.
[27] 2016 ICRC Commentary on GCI (Art 2) para 286.
[28] ibid paras 285-6.

even in the absence of reaction by the targeted side, which might result for example from the disparity in military capability between the adversaries and the ensued inability to respond effectively.[29] Indeed, the logic of a reciprocal armed interaction is not withdrawn or lost so long as the attacker remains -more or less- exposed to the risk of counterattack and hence 'the hostile use of military force' can conceptually and pragmatically be defended against or met with armed resistance.[30] Moreover, the 1952 ICRC Commentary interestingly links military resistance with victims in the context of an armed conflict, which seems to assume the presence of combatants in the field of battle, further reinforcing the idea that hostilities in the law are thought of as an armed confrontation and indeed an armed interaction where adversaries on both sides face the danger of the battlefield and the ensued risk of being killed, wounded and hurt.[31]

The above analysis applies equally to non-international armed conflicts, which have also been referred to as armed confrontations[32] and contests. Against this background, an armed confrontation is to be understood almost in quite a precise sense of the word in its ordinary meaning,[33] that is, the hostile meeting of the opposing forces, an armed encounter between the adversaries.

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[29] ibid para 222 ('The unilateral use of armed force presupposes a plurality of actors and still reflects an armed confrontation involving two or more States, the attacking State and the State(s) subject to the attack, therefore satisfying the requirement of Article 2(1)'; also stating that the 'intervention of armed forces' of the 1952 Commentary should not be taken to mean that the law requires the 'simultaneous involvement of at least two opposing [parties] through their armed forces' for an armed conflict to exist').

[30] ibid para 223 ('An armed conflict can arise when one State unilaterally uses armed force against another State even if the latter does not or cannot respond by military means. … The fact that a State resorts to armed force against another suffices to qualify the situation as an armed conflict within the meaning of the Geneva Conventions'. As the Commentary further specifies, '[i]n this perspective, the declaration, establishment and enforcement of an effective naval or air blockade, as an 'act of war', may suffice to initiate an international armed conflict to which humanitarian law would also apply' and '[i]n a similar vein, an unconsented-to invasion or deployment of a State's armed forces on the territory of another State – even if it does not meet with armed resistance – could constitute a unilateral and hostile use of armed force by one State against another, meeting the conditions for an international armed conflict under Article 2(1)'.).

[31] 1952 ICRC Commentary on GCI (Art 2) pp 32-3.

[32] See e.g. ICRC proposed definition '2: Non-international armed conflicts are *protracted armed confrontations* …', ICRC Opinion Paper (2008).

[33] See e.g. Oxford English Dictionary: 1. A hostile or argumentative situation or meeting between opposing parties. 1.1 A situation where two players or sides compete to win a sporting contest.

In this light, the understanding of war/armed conflict as an armed confrontation harks back to the idea of an armed *agon*, that is, a kind of armed contest that establishes a world of regulated interactions.[34] As such, it conjures up the manner in which war was articulated in the Just War tradition and beyond, revolving around the idea of a public 'contest of arms'[35] or a 'contention by force'[36] between groups of armed men implicated by the opportunity to 'inflict[] or repel[] injuries'[37] against each other. It is also reminiscent of the famous definition of war offered by Carl von Clausewitz in the opening of his work *On War*, drawing on his experience as regimental officer in the Napoleonic wars, which was couched in terms of a contest or a tournament between 'two wrestlers' – a kind of *Zweikampf*, in which each one of the two *Kämpfer* 'strives by physical force to compel the other to submit to his will'.[38] Further, it reflects the non-technical definitions of war that have been advanced at different points in time and reveal, the state-centric focus aside, that war has always been associated with the model of armed violence that occurs in the context of an armed struggle between opposing forces that confront each other in the field of battle in the same conditions. As Yoram Dinstein notes, '[o]ne element seems common to all definitions of war… War is a contest between states'[39] and that 'in the material sense is generated by actual use of armed force, which must be

[34] See e.g. Klem Ryan, 'What is Wrong with Drones' in Evangelista and Shue, *American Way of Bombing* (discussing the regular war paradigm).
[35] Francisco Suarez, 'On War' [1621] (Disputation XIII, De Triplici Virtue Theologica: Charitate) in *Selections from Three Works* (Gladys L Williams, Ammi Brown and John Waldron trs, Clarendon Press 1944) 800 ('An external contest at arms which is incompatible with external peace is properly called war, when carried on between two sovereign princes or between two states.'; Alberico Gentili, *The Law of War* (*De Jure Belli*) [1612] (John C Rolfe tr, Clarendon Press 1933) 12 ('War is a just and public contest of arms. In fact war is nothing if not a contest, and it is a contest of arms…').
[36] Hugo Grotius, *On the Law of War and Peace* (*De Jure Belli ac Pacis, Libri Tres*) [1625] Bk I, Ch 1, Sec 2 ('Cicero defined war as a contending by force. A usage has gained currency, however, which designates by the word not a contest but a condition; thus war is the condition of those contending by force, viewed simply as such.').
[37] Samuel Pufendorf, *On the Law of Nature and Nations* (De Jure Naturae et Gentium) [1716] (Charles H Oldfather and William A Oldfather trs, Clarendon Press 1932) 9 ('War, however, is a state of men who are naturally inflicting or repelling injuries or are striving to extort by force what is due to them.').
[38] Carl von Clausewitz, *On War* (Michael Howard and Peter Paret eds and trs, Princeton UP 1976) 75 (As rendered, 'War is nothing but a duel [zweikampf] on a larger scale' – this was 'the element of the thing itself').
[39] Yoram Dinstein, *War, Aggression and Self Defence* (4th edn, CUP 2006) 5.

comprehensive on the part of at least one party to the conflict'.[40] Moreover, Frédéric Mégret has observed that '[t]he 'idea of "war as contest" is in a sense the unformulated assumption of the laws of war – an idea that one would struggle to find in the Geneva Conventions, but which historically undergirds the entire idea of warfare'.[41] This is crucial for our understanding of the paradigm of warfare within the LOAC. It underlines that the opposing sides have at the very least the possibility of trying to resist the attacking force, allowing for a construction of conflict where the adversaries have a chance to employ armed force against each other both in offence and in defence.

The conception of war/armed conflict has a bearing on the weapons and tactics used by the warring sides. Interestingly, the 2016 ICRC Commentary explicitly locates the confrontational element that an armed conflict necessitates, and indeed in an 'uncontroversial' manner, in conventional military assets; that is, the use of 'classic' means and methods of warfare, such as 'the deployment of troops on the enemy's territory, the use of artillery or the resort to jetfighters or combat helicopters'.[42] At this point the 2016 Commentary is in sync with its 1952 counterpart which, as noted above, seems to assume the deployment of a state's ground forces and/or conventional airpower. In this way, the Commentary highlights the link between the concept of armed conflict within the LOAC and means and methods of warfare that require the physical presence or proximity of members of armed forces on or to the battlefield, such as soldiers on the ground and pilots in the air. Conventional air power, which is the paradigmatic technological manifestation of conventional asymmetry of risk in warfare, retains the element of confrontation and reciprocity in vulnerability between the warring sides. This does not mean that objectionable tactics of warfare such as, for example, high-altitude aerial bombing have not at times stretched the paradigm of warfare.[43] However,

[40] ibid 15.
[41] Mégret, 'Humanitarian Problem', 1310; Enemark, *Armed Drones*, 60 ('… arguably [war] needs to be a *fight*. Where there is no contest *per se* going on, there is no war. And where there is no war, so defined, there is only unidirectional politically motivated violence.').
[42] 2016 ICRC Commentary on GCI (Art 2) para 225.
[43] See e.g. the high-altitude NATO bombing campaign in Yugoslavia in 1990.

conventional aircraft is inhabited by a human pilot who is exposed to the likelihood of harm, even if pilots are considered to be less vulnerable due to the safety of distance.[44] This is not the case with UAVs that impose the radical separation between the adversaries and make it virtually impossible for the targeted individual to resort to armed force in defence, diluting thus the unassailable core of war and armed conflict.

At this juncture, it is worth noting that the project of updating the Commentaries on the Conventions[45] offered a tremendous opportunity to the ICRC to address the use of armed UAVs, which would probably fit squarely into a category of means and methods of warfare that would not be regarded as classic in the sense that, borrowing the Commentary's wording, they do not involve 'the deployment of troops on the enemy's territory, the use of artillery or the resort to jetfighters or combat helicopters'.[46] The updated Commentary conveniently chose not to consider less 'uncontroversial' situations where means of warfare that could be dubbed 'non-classic' would be employed and the element of confrontation would be absent. This arguably reveals the deeper difficulties in accommodating UAV warfare within the implicit assumptions of the conception of war/armed conflict in the law.

2.2 HOSTILITIES AT THE LEVEL OF THE INDIVIDUAL

As discussed, the normative system of warfare is built around an armed confrontation between opposing forces. As participants in an armed confrontation, all warring sides have a share of the conflictual violence. This is also reflected in the manner in which the law envisages the exercise of armed violence at the level of individuals. The rules on the scope of targetability, including the prohibition of attacks on persons *hors de combat* and the rules on the behaviour towards the injured, captured and dead,

[44] See below in relation to Art 42 API.
[45] See n 24 above.
[46] 2016 ICRC Commentary on GCI (Art 2) para 225. The 2016 ICRC Commentary, ibid para 244, also notes that the existence of an armed conflict does not necessitate 'the intervention of cumbersome machinery', reiterating the view of the 1952 ICRC Commentary, p 32 ('Nor … does the application of the Convention necessarily involve the intervention of cumbrous machinery.').

suggest that armed violence between opponents in the law is conceived of as fighting in the context of a reciprocal violent affair. Indeed, the LOAC 'contemplates armed conflicts between combatants who open themselves up to the reciprocal risk of killing'.[47]

The targetability of combatants

In the LOAC combat activity or fighting is to be found in the concept of 'taking part' or 'participating' in hostilities. Participation in hostilities captures broadly the involvement of a person as an individual in hostile activity and includes the exercise of armed violence at the level of the individual in the context of the collective resort to military force by the parties to the conflict.[48] When hostilities take place on a state's (own or foreign) territory, fighting, as a manifestation of participation in hostilities in the LOAC, is as much about lawfully attacking the enemy as it is about being lawfully attacked by the enemy.[49] It is important to note that 'attack' is a technical term, a term of art, which carries a meaning that is particular and unique within the legal regulation of warfare. Indeed, Additional Protocol I devotes an article on the definition of 'attacks' and the scope of its application. According to Article 49(1) API, '"[a]ttacks" means acts of violence against the adversary, whether in offence or in defence'. As the plain text of the Article indicates, 'attacks' comprise armed violence directed against the adversary. Furthermore, the 1987 ICRC Commentary makes clear that the law intends to cover both attacks in the sense of offensive acts and 'counter-attacks' in the sense of defensive acts, highlighting that 'in other words, the term "attack" means "combat action"'.[50] It becomes evident that the tacit assumption of the law is that warfare violence is not a one-sided or unilateral affair.

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[47] Jens David Ohlin, 'Targeting Co-Belligerents' in Finkelstein et al, *Targeted Killings*, 60.
[48] ICRC, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (Nils Melzer ed, ICRC 2009) [hereinafter ICRC Interpretive Guidance] p 43 ('… "participation" in hostilities refers to the (individual) involvement of a person in these hostilities').
[49] 1987 ICRC Commentary on API (Art 43) p 515, para 1677 ('participate directly in hostilities' means 'attack and be attacked').
[50] ibid (Art 49) p 603, para 1880 ('… it –justifiably– covers defensive acts (particularly "counter-attacks" as well as offensive acts').

This has much resonance with the traditional notion of war, which revolves around battle and 'combat *corps à corps*'[51] as its defining experience and is characterised by 'actual fighting with all its dangers and its heavy costs'.[52] More significantly, it reveals that the assumption of the law is that warfare is not only about inflicting injury on the adversary but also about repelling injury and defending oneself against the adversary, which captures the essence of conflict as an armed interaction with all the opportunity for those involved to use armed force both in offence and in defence within the same adverse conditions.

Whether as a matter of right by virtue of status (or function) or as a matter of fact by virtue of activity (or conduct), participation in hostilities entails the risk of harm, namely the risk of being killed and wounded as a result of fighting. In international armed conflict, participation in hostilities is principally linked to combatant status.[53] The law expects that hostilities are to be practised as a general rule by combatants who are in principle trained (professional) soldiers. According to Article 43(2) API, combatants are '[m]embers of the armed forces of a Party to a conflict'[54] and are identified as the persons who 'have the right to participate in hostilities'. The medical personnel, military chaplains and civil defence units that belong to the armed forces, despite their status as members thereof, do not have the status of combatant and are therefore protected as non-combatants.[55] Even if not all combatants are assigned a combat function and may never be engaged in fighting, combatants are assumed to be continuously participating in hostilities and having the potential to inflict harm,[56] thus

[51] John Keegan, *The Face of Battle* (Penguin 1978) 28.
[52] John A Lynn, *Battle: A History of Combat and Culture* (Westview Press 2003).
[53] Art 13(1), (2), (3) and (6) GCI; Art 4(1), (2), (3) and (6) GCIII.
[54] These are members of the regular armed forces of a state. Combatants also include persons who qualify for prisoner of war status, such as members of irregular armed forces and volunteer groups, see Art 4A GCIII; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, CUP 2016) 49-51.
[55] Art 43(2) API; Art 33 GCIII; Art 61(a) API.
[56] Art 50(1) API; ICRC Customary IHL Study, Rules 3-6. See e.g. Henderson, *Targeting*, 86-7 ('[I]t is always permissible due to military necessity to attack the enemy's combatants. This is so because an individual soldier will always be adding to the military capacity of the enemy.'); Yoram Dinstein, 'The System of Groups in International Humanitarian Law' in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges. Symposium in the Honour of Knut Ipsen* (Springer 2007) 148 ('As far as ordinary combatants are concerned, it must be perceived that they are running a *risque*

representing a constant (even if not actual) threat to the adversary. Civilians constitute the antipode of combatants. The concept of civilian is articulated in a negative way in the law (Article 50(1)).[57] According to Additional Protocol I, a civilian is any person that does not belong to any of the categories of persons that qualify as combatants under LOAC.[58] Defined in juxtaposition to combatants, civilians are by definition non-combatants and therefore they do not have the right to participate in hostilities. As a result, in principle, civilians are not expected to pose a threat to the adversary and hence are immune from direct attack. Indeed, civilian status entails a *de jure* entitlement to rigorous protection. As the 1987 ICRC Commentary observes, '[i]n protecting civilians against the dangers of war, the important aspect is … the inoffensive character to be spared and the situation in which they find themselves'.[59] Under the LOAC, civilians enjoy general protection against the effects of hostilities (Article 51(1)), and are not to be subjected to direct and deliberate attacks (Article 51(2)).[60]

The commitment of the law to rigorously protect from warfare violence civilians caught in the midst of hostilities is also evinced by the benefit of the doubt that the law gives to a person who has not committed hostile acts but whose status cannot be determined in a conclusive manner (and is thus 'doubtful').[61] However, the law does not completely preclude the possibility of civilians acquiring 'offensive character' and emerge as a threat to the adversary. For this reason, the LOAC explicitly lifts the protection accorded

du métier.'); Blum, 'Dispensable Lives' (pointing out the weaknesses of a status-based approach and suggesting a threat-based approach to the targeting of combatants); Adil Ahmad Haque, *Law and Morality at War* (OUP 2017) 86 (arguing 'that international law should prohibit targeting a combatant *if it becomes apparent* that he or she performs a noncombat function').

[57] 1987 ICRC Commentary on API (Art 50) p 610, paras 1913-4 ('Thus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces.' and 'This definition has the great advantage of being 'ne varietur'. Its negative character is justified by the fact that the concepts of the civilian population and the armed forces are only conceived in opposition to each other.').

[58] ibid. On this basis the concepts of civilian and armed forces have been referred to as mutually exclusive, see ICRC Interpretive Guidance, pp 20-1.

[59] 1987 ICRC Commentary on API (Art 50) p 610, para 1909.

[60] See also the general prohibition of indiscriminate warfare which is expressly postulated in a specific rule in Art 50(4) of API.

[61] Art 51(1) API ('In case of doubt whether a person is a civilian, that person shall be considered to be a civilian').

to civilians if and for such time as they take a direct part in hostilities (Article 51(3)). Noting 'the trend towards increased civilian participation in hostilities' and 'the circumstances prevailing in contemporary conflicts', the 2009 ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law sought to delineate and clarify the concept of direct participation in hostilities (DPH).[62] It ascertained that the notion of DPH does not refer to 'a person's status, function, or affiliation but to his or her engagement in specific hostile acts';[63] rather it is intended to capture the 'temporary, activity-based loss of protection' as opposed to the 'continuous, status or function-based loss of protection (due to combatant status or continuous combat function)'. With respect to the latter, the Interpretive Guidance introduced the controversial criterion whereby individuals-members of an organised armed group of a non-state party to a non-international armed conflict who exercise a 'continuous combat function' become targetable at any time.[64] However, in that regard, it clarifies that DPH 'remains a legal concept of limited elasticity', which 'must be interpreted as restricted to specific hostile acts'.[65] The Guidance also set forth three requirements that must be cumulatively satisfied in order for a specific act to amount to DPH for the purposes of the law as follows: a certain threshold of harm; a direct causal link between the act and the harm; and belligerent nexus.[66] The Interpretive Guidance has stirred debates on various aspects of its interpretation of DPH which, however, are beyond the scope of this chapter and the Thesis.[67] What merits attention for the purposes of the present discussion is the centrality of the element of threatened harm to conduct amounting to DPH. The ICRC Guidance makes clear that a hostile act constituting DPH does not necessarily lead to harm but rather creates the possibility of harm. What counts is not the 'materialisation' of that harm but

[62] ICRC Interpretive Guidance, p 5.
[63] ibid pp 43-4.
[64] ibid pp 31, 33-4. *Cf* e.g. Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 N.Y.U. J. Int'l L. & Pol'y 641, 659-60.
[65] ICRC Interpretive Guidance, p 42.
[66] ibid pp 46-7.
[67] These include the 'one causal step approach', 'direct' and 'indirect' participation, the duration of loss of protection ('revolving door' theory).

'merely the objective likelihood that an act will result in such harm'; put differently, the Guidance is interested in '"likely" harm, that is to say, harm which may reasonably be expected to result from [that] act in the prevailing circumstances'.[68]

'Combatant' as a technical term and a legal qualification that entitles a person to prisoner-of-war status upon capture by the enemy (and the attendant special treatment in accordance with Geneva Convention IV[69]) is recognised only in international armed conflicts. The term is used neither in Common Article 3 GCI-IV nor in Additional Protocol II (APII) on non-international armed conflict. However, as the *a contrario* reading of Article 3 GCI-IV and Article 13(3) APII implies, the essence of 'combatants' is encapsulated in the concept of taking 'an active part in hostilities' or 'a direct part in hostilities' respectively, which is relevant to any armed conflict, international or non-international, for the purposes of lawful attack.[70] Persons taking an active or direct part in hostilities in non-international armed conflict represent a military threat and constitute lawful targets for direct attack. As Common Article 3 and Protocol II make reference to 'armed forces' and 'armed groups',[71] they seem to suggest that members thereof whose continuous function is to take a direct part in hostilities ('continuous combat function')[72] can be made the direct object of attack as they are assumed to engage in threatening conduct on a continuous basis, akin to 'combatants'. As such, they may be referred to as combatants in the ordinary

[68] ICRC Interpretive Guidance, p 47 (and also pp 41-64). See, in a similar vein, ICTY, *Prosecutor v Galić* (Judgment) IT-98-29-T (5 December 2003) para 48 ('acts of war which by their nature or purpose are likely to cause actual harm to the personnel or materiel of the enemy armed forces').

[69] See Art 45 GCIV on the protection of person who have taken part in hostilities; Art 45 API; Art 99 GCIII. Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/-V/II.116 Doc 5 rev 1 corr (22 October 2002), para 68. See eg Arts 43(2), 51(3), 67(1)(e) API; 13(3) APII. Louise Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?' (2006) 88(864) IRRC 881, 889 ('... thus protecting them from trial for having taken part in hostilities').

[70] 1987 ICRC Commentary on API (Art 50), para 1910. Art 3 GCI-IV. Arts 51(3) API; 43(2) API; Arts 67(1)(e) API and 13(3) APII.

[71] Art 3 GCI-IV ('members of armed forces'); Art 1 APII ('dissident armed forces or other organized armed groups').

[72] ICRC Interpretive Guidance, pp 26-36.

or 'generic' meaning of the term or 'fighters' as they are often labelled.[73] According to other interpretations, individuals in non-international armed conflict may be targeted as civilians for such time as they take direct part in hostilities, which hinges on the criteria employed to interpret 'direct participation in hostilities'.[74] Civilians in non-international armed conflict enjoy the protection of the law from direct attack but lose their immunity from direct targeting under the law unless and for such time as they directly participate in hostilities.[75]

The law suggests that a person who participates in hostilities, irrespective of combatant status legally construed, is an individual who fights or otherwise engages in combat and military activities risking injury and death. In the system of warfare established by the Geneva Conventions and Additional Protocols, exposure to the danger of death, casualty and pain seems to be embedded in the concept of participation in hostilities. The law envisages the likelihood of harm for those who represent a threat and are likely to inflict harm to the enemy.[76]

At the same time, the law aims at ruling out the possibility of harm for those who no longer engage in threatening behaviour by placing them under its protective umbrella, such as persons *hors de* combat, namely combatants that are put voluntarily or involuntarily out of action and rendered immune from harm.[77] The 'hors de combat' is an exception to the targetability of combatants. As the 1952 ICRC Commentary explains, 'it is only the soldier

[73] See ICRC Customary IHL Study, Rule 3; Marco Sassòli and Laura M Olson, 'The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90(871) IRRC 599, 606. See also 1987 ICRC Commentary on API, para 4789.

[74] See e.g. *The Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v The Government of Israel and Others*, Judgment, Case HCJ 769/02 (13 December 2006) paras 34-5; *Hamdi v Rumsfeld*, 542 US 507, 518 (2004) (relying on *Ex parte Quirin*, 317 US 28, 30 (1942)).

[75] See above.

[76] See e.g. Paul W Kahn, 'Imagining Warfare' (2013) 24 EJIL 199, 219 (arguing that '[t]he ethos of reciprocity is given formal expression in IHL's rule that those who expose themselves to a reciprocal risk of injury are legally protected for their own acts of violence').

[77] 1987 ICRC Commentary on API (Art 41) p 482, para 1605 ('It is a fundamental principle of the law of war that those who do not participate in the hostilities shall not be attacked', noting that '[i]n this respect harmless civilians and soldiers 'hors de combat' are a priori on the same footing').

who is himself seeking to kill who may be killed. The abandonment of all aggressiveness should put an end to aggression'.[78] It is not only the term 'hors de combat' (or 'out of combat' in its English version) which itself reveals that the law took into account the reality of conflict construed as combat or fighting when creating this system of protection. The 1987 ICRC Commentary interestingly locates this rule in a classical battlefield setting, which is marked by open hostilities and active engagements,[79] and links the difficulties in implementing this rule with the characteristics of war in its traditional understanding, namely 'the heat of action and … the pressure of events',[80] 'the confusion of the battlefield' or being 'in the front line, i.e., in the firing line, [where] combatants fall or reveal their intention of surrendering'.[81] The logic behind the *hors de combat* protection may be condensed to the following; when a person is *hors de combat* and ceases to pose a military threat, then their adversary is *hors de danger*. Here, contrary to the presumption of dangerousness that comes with combatant status, the threat of harm between the opponents is actual and immediate.[82] The law seeks to ensure humanitarian protection for those opponents who, for the reasons detailed in the law, no longer present a threat to their enemies and at the same time takes care to withdraw that protection if the protected persons continue to represent a threat, as Article 41(2) API indicates ('provided that … [they] abstain[] from any hostile act and do[] not attempt to escape'). It is important to note that the *hors de combat* protection manifests the law's treatment of armed confrontation as a world of interaction and reciprocity. This remains so in the case of conventional air power. The law affords the *hors de combat* safeguard in Article 42 API to 'occupants of aircraft' in view of the possibility that an aircraft can be

[78] 1952 ICRC Commentary on GCI (Art 12) p 136.
[79] 1987 ICRC Commentary on API (Art 41) pp 480 and 483, paras 1601, 1607 and 1608.
[80] ibid p 480, para 1601.
[81] ibid p 483, para 1608.
[82] See the example provided in the 1987 ICRC Commentary on API (Art 41) p 487, para 1620 ('On the other hand, there is no obligation to abstain from attacking a wounded or sick person who is preparing to fire, or who is actually firing, regardless of the severity of his wounds or sickness.'). In *hors de combat* the presumption about combatants' hostility and thus targetability is fundamentally threat-dependent, see Blum, 'Dispensable Lives', 80 ('… the exception of *hors de combat* is the only manner by which the class-based distinction is supplemented by a threat-based analysis.'). See also chapter 5, section 5.3.

rendered in distress by being shot down or otherwise disabled. The LOAC as codified in the Protocol was formulated at a time when air power and conventional aircraft had already shown its warlike potential. Interestingly, the rule has been associated on the one hand with the 'spirit of chivalry and camaraderie', reminiscent of a conception of airmen as 'knights of the air' engaged in air-tournaments and jousting,[83] and on the other with the guarantees needed for shipwrecked seamen.[84]

The humanitarian protection of combatants

In regulating the conduct of hostilities, the LOAC is motivated by the traditional concern that surrounds an armed confrontation, an open military engagement. That is, armed violence that is directed at the individuals who fight and confront each other in the field of battle. As adversaries are assumed to be physically present on or in proximity to the battlefield and put to the rude test of conflict, they are exposed to the grave danger of injury and death. As Michael Walzer put it, war is 'a moral condition that comes into existence only when armies of victims meet'.[85] Having said that, as noted above, the ICRC Commentaries make reference to victims in the context of an armed conflict, and indeed not in isolation but in conjunction with 'armed resistance', capturing the likelihood of harm for those who practise hostilities.[86] As the danger of the battlefield and the risks that accompany

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[83] See e.g. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, Basic Books 2015) 35-6 ('Whenever the game of war is revived, the elaborate courtesies of the chivalric age are revived with it— as among aviators in World War I, for example, who imagined themselves (and who have survived in the popular imagination) as airborne knights. Compared to the serfs on the ground, these were aristocrats indeed: …'). 1987 ICRC Commentary on API (Art 42) p 494, para 1633.

[84] 1987 ICRC Commentary on API (Art 42) pp 497-8, paras 1641-2. See chapter 5.

[85] Walzer, *Just Wars*, 45.

[86] 1952 ICRC Commentary on GCI (Art 2) pp 32-3 ('It makes no difference … how much slaughter takes place. The respect due to human personality is not measured by the number of victims. … If there is only at [sic] single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended, the provisions of Article 12 observed in his case, and his identity notified to the Power on which he depends. All that can be done by anyone: it is merely a case of taking the trouble to save a human life!.'); also reiterated in the 2016 ICRC Commentary, para 244 ('In the case of the First Convention, for example, if only one person is wounded as a result of the conflict, the Convention will have been applied as soon as that person has been collected and tended to, the provisions of Article 12 observed, and his or her identity notified to the Power on which he or she depends.'). In a similar vein, Pictet defined international armed conflict as 'any opposition between two states involving the intervention of their armed forces and the

combatants' presence in the field of battle, as captured by reference to 'victims', is intertwined with the element of interaction between opposing forces, captured by 'armed resistance', the Commentary seems to indicate that the risk of injury and death that combatants face is reciprocal and therefore a burden that is not to be imposed unilaterally on one side to the conflict.[87] Also, it is anticipated as a corollary of the conflictual violence and concerns all the adversaries partaking in the conflict.

As such, war/armed conflict is viewed as the realm in which human life is at stake and where the likelihood of harm is considered to be probably unquestionable. This is not to say that the law requires the actual killing of combatants but rather that it conceives of it as a possibility in a context where the potentiality for violence is pervasive and the likelihood of harm is imminent and constant. One could hardly deny the violent nature of war/armed conflict as the *raison d'être* of the law. Inflicting pain on others in the course of combat has been a central feature of war. Having said that, the current LOAC acknowledges that harm in the form of injury, death and/or destruction is likely to occur and that such a likelihood can perhaps be even unavoidable in a realm where weapons are used, and violence and force are the prevailing elements. Indeed, the entire system of protection of combatants established by the Geneva Conventions of 1949 and the Additional Protocols of 1977, drafted nearly thirty years after the Diplomatic Conference of 1949, confirms that war/armed conflict within the LOAC continues to be 'the province of danger', as Clausewitz described it, and is heavily influenced by a paradigm of warfare where those who practise hostilities on both sides are likely to face the danger of death, injury and pain.

The first Geneva Convention, entitled Convention (I) for the Amelioration of the Condition of the Wounded and Sick of Armed Forces,[88] and Additional Protocol I[89] provide detailed rules governing the protection

existence of victims', in Jean S Pictet, *Humanitarian Law and the Protection of War Victims* (Henry Dunant Institute 1975) 52 quoted in the 2016 ICRC Commentary on GCI (Art 2) para 222, n 49.

[87] 1952 ICRC Commentary on GCI (Art 2) pp 32-3.

[88] Arts 12, 14-7 GCI. See also Arts 16, 19 of the fourth Geneva Convention, namely Convention (IV) relative to the Protection of Civilian Persons in Times of War.

[89] Part II of API entitled 'Wounded, Sick and Shipwrecked'.

of, care for and treatment of those who are wounded and sick, as well as missing and dead persons, and those who might have fallen into the hands of the adverse party. These protections include the search for, collection, removal, exchange or transport of, ensuring care for the wounded and sick, their protection against pillage and ill-treatment, the search for dead persons and their protection against despoilment, the burial or cremation of the dead, recording and forwarding of information concerning the protected persons when falling into enemy hands. Article 12, the opening article of the 'wounded and sick' chapter of GCI, specifies the persons who benefit from such protections. The formulation encompasses the 'members of the armed forces' to whom explicit reference is made, as well as those persons who are classified as combatants for the purposes of targeting and the rule of distinction (and are thus entitled to prisoner-of-war status under the third Geneva Convention, namely the Convention (III) relative to the Treatment of Prisoners of War).[90] The overlap of those who are placed under the protective umbrella of the Geneva Conventions as 'wounded and sick'[91] with the persons who have the right to lawfully participate in hostilities and can be lawfully targeted (combatants) clearly indicates that this protective scheme forms part of a regime in which the active battlefield and fighting, with the attendant danger of being killed, wounded and hurt among combatants, is the point of reference, if not one of its defining features. Article 15 of the Convention which 'fleshes out the general obligation laid down in Article 12 to protect the wounded and sick in all circumstances'[92] provides that states shall discharge these obligations 'at all times, and particularly after an engagement',[93] and also foresees that arrangements such as a 'suspension of fire' may be required to facilitate the fulfilment of the protections.

The 2016 ICRC Commentary explains that the main consideration regarding the wounded and the sick is to 'remove them from the immediate

[90] See Arts 12-4 GCI and Art 4(A) GCIII.
[91] ibid.
[92] 2016 ICRC Commentary on GCI (Art 15) paras 1476, 1483.
[93] Art 15 GCI. This wording also appears in Art 8 APII.

danger zone' so that they can receive the necessary medical treatment,[94] the standard of which depends on whether or not the wounded and sick persons are found in 'close proximity to the combat zone'.[95] What is worth noting is that persons who are 'in need for medical treatment' do not qualify as wounded or sick persons for the purposes of the 1977 Additional Protocol I if they do not 'refrain from any act of hostility'.[96] While this requirement is not expressly mentioned in the 1949 Geneva Convention I, it is implicit in the conceptual linkages between the 'protected persons' status and the categories of persons who can lawfully resort to violence (and constitute lawful targets of attacks) on the basis of combatants status. On this point, the 2016 ICRC Commentary notes that 'given that Article 12 only applies to categories of persons, who, as a general rule, may lawfully be targeted, this limitation must form part of the definition of 'wounded and sick' for the purposes of the article'.[97] This being said, 'persons who continue to engage in hostilities' fall outside the purview of the legal protections accorded to the wounded and the sick.[98] The underlying concern of the law is that such persons continue to be dangerous, posing a threat of injury and death to enemy combatants – reciprocity of risk in its most explicit manifestation. This is also captured in an obvious way by the example that the 1987 Commentary on Additional Protocol I employs to illustrate 'an act of hostility' in this context, that is, of '[a] person who has broken his leg' but 'continues to shoot'.[99]

In a similar vein, the sole article devoted to non-international armed conflict in the lopsided, state-centred Geneva law of 1949 further attests to the understanding developed above in relation to international armed conflicts. Qualifying for the kind of protection attached to the 'protected

[94] 2016 ICRC Commentary on GCI (Ch II) para 1315.
[95] ibid (Art 15) para 1482.
[96] Art 8(a) API; 1987 ICRC Commentary on API.
[97] 2016 ICRC Commentary on GCI para 1345 (And it goes on to say: 'Otherwise every combatant who is in need of medical care would automatically be entitled to be respected and protected and could thus no longer lawfully be attacked. Such far-reaching protection for combatants would be unrealistic and impossible to uphold in the context of an armed conflict'.).
[98] ibid.
[99] 1987 ICRC Commentary on API (Art 8) para 306.

person' status and being worthy of the 'wounded and sick' and the 'hors de combat' protection as provided in Geneva Convention I and Additional Protocol I goes hand in hand with the risks that individuals who directly participate in hostilities face. That said, Common Article 3 to the four Geneva Conventions details minimum fundamental protections for 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause'. In so doing, it reflects the way in which Geneva Convention I provides the 'protected persons' protections in international armed conflict exclusively to those who may be in principle lawfully targeted by virtue of their status as combatants but no longer participate in fighting.

In this light, it becomes clear that the protections that the 1949 Geneva Conventions and the 1977 Additional Protocols afford to combatants are part and parcel of a legal regime which seeks to regulate hostilities in a space of mutual vulnerability.

2.3 THE NOTION OF FAIRNESS IN ARMED CONFRONTATION

A brief foray into the past

The notion of fairness in relation to wartime behaviour has been inextricably bound up with the weapons and tactics employed by the adversaries. As Geoffrey Best has noted, '[t]he history of warfare has been repeatedly punctuated by allegations that certain new weapons are "unlawful", because in some way "unfair" by the prevailing criteria of honour, fairness and so on, or because nastier their action than they need be'.[100] A brief foray into the past across different warrior cultures and traditions of battle offers much-needed insight to the discussion of what has been traditionally understood to be 'fair' as part of the ethics of warfare. A prominent aspect of fairness in war-fighting has traditionally been found in the requirement to employ fair means in combat. The moral opprobrium that, at different points in history, has accompanied the use of new long-ranged or concealed or poisoned weapons may well have been found, at least to an extent, behind the idea of

[100] Geoffrey Best, *Humanity in Warfare* (Columbia UP 1983) 62.

imposing constraints on their use. In its evolutionary course, warfare progressively incorporated such weapons, which indicated the growing appreciation throughout time for the decisive edge that they would provide to those who bore and used them.[101] This notwithstanding, efforts to lay down rules that would prescribe or proscribe their use reach far back into antiquity.

Ancient Greek sources make reference to agreements between belligerents that sought to proscribe before the commencement of hostilities (in a manner reminiscent of a duel) the use of missiles and projectile weapons[102] or 'secret weapons [or] those discharged from a distance',[103] which were considered to be *kakomechanein*, a pejorative verb that denotes malign intent (kako-) and suggests fraud or deceptiveness.[104] Setting aside issues of historicity of the conventions or agreements that were purported to constitute such bans,[105] it could be argued that claims to their existence reflected the uneasiness that surrounded the idea of fighting and killing from

[101] Such an appreciation can be traced far back into antiquity, see Euripides, *Heracles*, where bows are referred to as a 'clever invention' (185-190) and archery as 'the wisest course in battle', which allows one 'to harm the enemy and keep safe oneself, independent of chance' (194-204): '[...] or, if he breaks his spear, he cannot defend his body from death, having only one means of defence; whereas all who are armed with the trusty bow, though they have but one weapon, yet is it the best; for a man, after discharging countless arrows, still has others with which to defend himself from death, and standing at a distance keeps off the enemy, wounding them for all their watchfulness with invisible shafts, and never exposing himself to the foe, but keeping under cover; and this is by far the wisest course in battle, to harm the enemy and keep safe oneself, independent of chance'. With respect to warfare in ancient China, Sawyer has noted, 'bows, and later crossbows, were especially emphasized for their long-range capabilities and withering firepower' in Ralph D Sawyer, 'Chinese Warfare: The Paradox of the Unlearned Lesson' (1999) <www.unc.edu/depts/diplomat/AD_Issues/amdipl_13/china_sawyer.html>.

[102] Strabo, *Geography*, 10.1.12 (referring to the contending parties in the Lelantine War between 710 and 650 BCE agreeing the conditions under which they were to conduct the fight, as evidenced by the inscription he saw on a stele in Amarynthus/Eretria).

[103] Polybios, *Histories*, 13.3 (referring to this as a custom of the 'ancients' with a wistful tone of nostalgia. Polybios regarded that it was only hand to hand battle at close quarters that was truly decisive).

[104] See e.g. Everett L Wheeler, *Stratagem and the Vocabulary of Military Trickery* (E J Brill 1988) 104.

[105] The authenticity both of the treaty mentioned by Polybios and the inscription mentioned by Strabo has been cast into doubt by Everett L Wheeler who has convincingly argued that in all likelihood Polybios and Strabo relied on the construction of the historian Ephoros who 'invented it as a protest against the catapult, a frightening new distance weapon in his day in an attempt to provide a precedent for a ban on missile fire': Everett Wheeler, 'Ephorus and the Prohibition of Missiles' (1987) 117 Transactions of the American Philological Association 157 (According to Everett, Ephoros was 'a proponent of limited warfare … who idealized the chivalrous agonal warfare of a distant past').

afar, pointing to the need for restraints in warfare. In addition, they seemed to indicate that prohibitions or restrictions on certain weapons were part and parcel of war as a contained affair and an important parameter of the duty of fighting fairly owed to the enemy, which mandated the employment of fair weapons of war.[106]

The Hindu epic Mahabharatha refers to the prohibition of the use of 'hyper-destructive' weapons such as the mythical *pasupathastra* 'because when the fight was restricted to ordinary conventional weapons, the use of extraordinary or unconventional weapons was not even moral, let alone in conformity with religion or recognized rules of warfare'.[107] What would count as unfair here seemed to be tied not only to the maximisation of the advantage gained by the use of a powerful weapon; it was also linked to the understanding that such an overpowering superiority was accrued in a manner that belied the expectations that the adversary reasonably had in the context of a conventional struggle, such that would deprive the opponent not only of any chance to pursue victory but of any conceivable opportunity to survive.

Furthermore, in the medieval chivalric tradition fairness and restraint in combat between men of the knightly order[108] was strongly associated with weapons and tactics that exposed the attacker to the risk of counter-attack. The crossbow, a forceful projectile weapon, which was used in the battle of Hastings both in mounted and unmounted combat, and dominated medieval warfare until about 1500 CE, is the classic example in that respect. In the early twelfth century, the Medieval Church sought to ban the use of bows of all sorts, and especially crossbows, as well as siege machines, albeit solely among Christian opponents (and not against the 'infidels' or heretics). The limitations imposed on weapons constituted one of the three canonical

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[106] See e.g. Josiah Ober, 'Classical Greek Times' in Howard et al, *Laws of War*, 12-26.
[107] *Mahabharatha, Udvog Parva,* 194.12 (ca 200 BC-200 AD) cited in Nagendra Singh, 'The Distinguishable Characteristics of the Concept of Law as It Developed in Ancient India' in Maarten Bos and Ian Brownlie (eds), *Liber Amicorum for the Right Honorable Lord Wilberforce* (1987) 93; See also Section XL ('… this weapon should not be hurled without adequate cause; for if hurled at any foe of little might it may destroy the whole universe. …', <www.sacred-texts.com/hin/m03/m03040.htm>).
[108] Geoffrey Parker, *Empire, War and Faith in Early Modern Europe* (Penguin 2002).

attempts to restrain war. Pope Innocent II and the Second Lateran Council in 1139 (Canon 29), upholding an earlier ban on crossbows imposed by Pope Urban II in 1096, banned crossbows under anathema as follows: 'We prohibit under anathema that murderous art of crossbowmen and archers, which is hateful to God, to be employed against Christians and Catholics from now on'.[109]

The fact that crossbows were particularly cruel or barbarous weapons because of their capability of penetrating knights' armour might have arguably motivated the 'humanitarian concern at the injuries which crossbow bolts could cause'[110] and a ban thereof. However, a more plausible rationale behind the ban was probably their effectiveness as they released more kinetic energy than the ordinary bows as well as the fact that they were easy to master, hence accessible to amateurs, the common foot soldier, infantryman or archer, men that did not belong to the orders of knighthood, and even to the 'boorish peasant'.[111] What appeared to be ethically dubious about crossbows was the fact that they were long-distance weapons that gave one the opportunity to strike and 'kill a knight from a safe distance behind his protecting stake'.[112] As such, in chivalric fighting their use was regarded dishonourable and ignoble by noble men-at arms and was thus vehemently castigated not least on the basis of ethical considerations. As Gerald IAD Draper has remarked, 'To the Church these weapons were hateful to God. To the knights they were weapons whereby men not of the knightly order could fell a knight', importantly adding 'Worse, they were weapons that enabled a man to strike without the risk of being struck'.[113] Indeed, it was

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[109] Bernard Brodie and Fawn M Brodie, *From Crossbow to H-Bomb: The Evolution of the Weapons and Tactics of Warfare* (1962, rev & enl edn, Indiana UP 1973) 35-7. Although the ban was intended to apply solely within the Christian world (and not against the 'infidels' or heretics), in practice, however, crossbows continued to be widely used, despite the prohibition, even against fellow Christians, such as for example by the armies of the Crusaders. See Philippe Contamine, *La Guerre au Moyen Age* (1980, 6th edn, Presses Universitaires de France 2003).

[110] Christopher Greenwood, ''Historical Development and Legal Bases' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2009) 18.

[111] Sir Ralph Payne-Gallwey, *The Book of the Crossbow* (Dover Publications, Inc. 1995) [Originally published as *The Crossbow* (Longmans, Green, and Co. 1903)].

[112] GIAD Draper, 'The Interaction of Christianity and Chivalry in the Historical Development of the Law of War' (1965) 5(46) IRRC 3, 19.

[113] ibid.

'personal and equal combat', enabled by weapons which engaged the adversaries in a kind of one-for-one armed exchange, that was considered appropriate and befitting valorous recognised knights; that is to say, a mode of warfare in the context of which gallant knights faced at least the kind of risk and incurred the kind of costs to which they subjected their opponents. As Draper put it, 'sword to sword, lance to lance, battle-axe to battle-axe, shield to shield, with all the skill and opportunity for restraint and fairness, both in offence and defence that these methods allowed, were the crucial tests of courage and honour'.[114]

Moreover, the use of poison or poisoned weapons has traditionally been considered as running afoul considerations of fairness – from Homer where the use of arrows smeared with poisons was considered to be behaviour unfit for valorous warriors,[115] to the prohibition thereof in the non-binding 1880 Oxford Manual on the basis that 'the struggle must be honourable',[116] to the binding prohibition in the 1899 and 1907 Hague Regulations[117] until its recognition as war crime in the Rome Statute almost a century later.[118] Importantly, killing by means of poisoning was taken up by Hugo Grotius in his work *De Jure Belli ac Pacis* where he asserted that killing an enemy by means of poison was not prohibited by the law of nature since when it is permissible to take one's life 'it signifies not much, whether you kill him by the sword or by poison'.[119] However, in his exposition, the use of poison or poisoned weapons was contrary to the 'Law of Nations, if not all, yet of the better part of them' because 'it is far more generous to attempt another Man's Life in such a manner, as to give him an Opportunity of Defending himself,

[114] ibid ('The sparing of an unhorsed knight by his opponent, the forbearance to strike when the opponent was without his weapons, the avoidance of stealth, of stratagem; these were the rules of knightly combat.').
[115] Homer, *Odyssey*, 1.260-2; *The Iliad*, 7.242-3.
[116] Art 8(a) Manual of The Laws of War on Land, Prepared by the Institute of International Law, and Unanimously Adopted at Its Meeting at Oxford on 9th September 1880 (Oxford Manual), see Schindler and Toman, p 36.
[117] Identical Art 23(a) Regulations concerning the Laws and Customs of War on Land, Annexed to the 1899 Hague Convention (II) and the 1907 Hague Convention (IV).
[118] Art 8(2)(b)(xvii) and Art 8(2)(e)(xiii) Rome Statute of the International Criminal Court.
[119] Hugo Grotius, *Of the Rights of War and Peace* (*De Jure Belli ac Pacis, Libri Tres*) (1625) Bk III, Ch IV, Sec XV.I, p 76.

yet this is not allowed to those who deserve to die'.[120] As Grotius observed, this reflected a

> Custom … introduced for a general Benefit, lest Dangers, which are very common in War, should be multiplied beyond Measure. And it is probable, that it was first made by Kings, whose Life being chiefly defended by Arms, is more in Danger of Poison, than that of other Men, unless it were secured by the Severity of the Law, … and fear of Disgrace and Infamy.[121]

Although internally grounded in notions of honour, as the 'more generous' phraseology denotes, and imbued with quanta of pragmatism of the socio-historical context, considerations of fairness, as reflected in the framing of the relevant prohibition, have an external focus as well; that is, the enemy combatants and the effect of 'caus[ing] one party not to have a proper chance to defend against them [i.e. poisons]'.[122]

The ethos of battle as bound up with the effect on the adversary is particularly emphasised by American diplomat Henry Wheaton in his treatise *Elements of International Law*, where is formulated the 'test' on the basis of which weapons may be permissible or impermissible in warfare. The relevant passage deserves full quotation as follows:

> As war will avail itself of science in all departments, for offense and defense, perhaps the only test, in case of open contests between acknowledged combatants is, that the material shall not owe its efficacy, or the fear it may inspire, to a distinct quality of producing pain, or of causing or increasing the chances of death to individuals, or spreading death or disability, if this quality is something other than the application of direct force, and of a kind that cannot be met by countervailing force, or remedied by the usual medical and surgical applications for forcible injuries, or averted by retreat or surrender.[123]

For Larry May, '[t]he most hopeful part of Wheaton's test has to do with the business about the ''application of the direct use of force''', claiming that

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[120] ibid.

[121] ibid.

[122] May, *War Crimes*, 129 (arguing also, 'Indeed, there seems to be little basis for condemning a form of weapon that is merely more efficient than another form, unless one believes that great disparities in the efficiency of weapons will make wars into unfair contests': ibid 128).

[123] Henry Wheaton, *Elements of International Law* [1836] (Richard Hendry Dana, Jr, ed with notes, 8th edn, Sampson, Low Son, and Co & Little, Brown, And Co 1866) Pt IV, Ch II, para 343, p 428.

'com[ing] to the main idea behind the ''fair contest'' issue', '[p]oisons are problematic because … they operate in an indirect way by circumventing the struggle between two people, in a duel or on the battlefield'.[124]

UAV warfare and the notion of fairness

The notion of fairness has been invoked (and contested) in relation to the use of UAVs to express the concern that there is something repugnant, callous, unfair in the conduct of attacks by means of drone; that 'there's something about pilotless drones that doesn't strike me as an honorable way of warfare'[125] and eclipses the ethical considerations surrounding fighting.

Fair fight or fighting fairly

The question of the ethical permissibility of the use of UAVs to target individuals for death has been addressed in the literature as being linked to an understanding of 'fair fight' in the sense of symmetry and a demand to 'equal the playing field'.

According to Strawser, one 'commonly heard argument' refers to asymmetry in the combat abilities between the UAV-using force and an opposing force 'that does not have similar technology', 'cross[ing] an asymmetry threshold that makes the combat inherently ignoble' and whereby 'the fight is intrinsically unfair',[126] and even more so as 'one side literally does not take *any* life-or-death risks whatsoever (or nearly so, since its warfighters are not even present in the primary theater of combat) whereas the opposing side carries all the risk of combat'.[127] For Strawser, '[i]f there is a moral problem here due to asymmetry, it seems to have occurred long before UAV implementation and is not endemic to them', adding that 'even *if* the actual removal of the warrior from the theatre of combat

[124] May, *War Crimes*, 129.
[125] Andrew Exum, a former Army Ranger who has advised General Stanley McChrystal in Afghanistan, quoted in Jane Mayer, 'The Predator War -What are the risks of the C.I.A.'s covert drone program?' (*The New Yorker*, 26 October 2009) <www.newyorker.com/magazine/2009/10/26/the-predator-war>.
[126] Strawser, 'Moral Predators', 355-6.
[127] ibid 356.

represents a truly new level of asymmetry in combat (and perhaps it does), this alone is still no argument against doing it'.[128] As he argues,

> the argument for a 'fair fight' fails on two counts. First, it is already overcome by earlier technological advancements because present military operations are already far from fair even without the asymmetry of UAV weapon systems and thus the issue here is not with UAVs properly speaking. … And, second, the desire for a 'fair fight' is simply a weak claim in the first place; something akin to an archaic demand of military commanders in eighteenth century warfare to line up their troops across from one another for a "dignified battle".[129]

The soothing argument that the history of warfare abounds with similar questions and dilemmas posed by technology that enabled riskless warfare, and hence there is no reason for concern, is well-rehearsed in the literature:

> A core objection, then as now, was that they disrupted the prevailing norms of warfare by radically and illegitimately reducing combat risk to the party using them—an objection to "remoteness," joined to a claim (sometimes ethical, sometimes legal, and sometimes almost aesthetic) that it is unfair, dishonorable, cowardly, or not sporting to attack from a safe distance, whether with aircraft, submarines, or, today, a cruise missile, drone, or conceivably an autonomous weapon operating on its own.[130]

The treatment of fairness in war/armed conflict as part of an argument that revolves around asymmetry and the disparities in the opposing sides' weapon capabilities has been elaborated by Frédéric Mégret. As Mégret argues,

> The use of drones in a context where only one side has access to that far superior technology renders war essentially meaningless as a concept. Rather, drone attacks become more like a continuous, one-sided imposition of violence in which one side pays with their lives and limbs, whilst the other side pays, at best, with economic costs. … there is theoretically no escaping the fact that the real humanitarian cost of drone warfare is in terms of the irremediable

[128] ibid (Strawser overcomes this by distinguishing between a fair fight and a just fight).
[129] Strawser, 'Moral Predators', 357.
[130] Kenneth Anderson and Matthew Waxman, 'Law and Ethics for Autonomous Weapon Systems Why a Ban Won't Work and How the Laws of War Can' (2013) (Stanford University, The Hoover Institution) 8. See also chapter 1, section 1.1.

> normative breakdown of what it means to be at war, and the corollary understanding that war has moral bounds.[131]

But for Mégret, what he calls a 'decline of war' argument is to be distinguished from a 'putting up a fair fight' claim that comes with the 'suggestion that the technologically superior army should take greater risk and fight on the battlefield', arguing that '[t]here is certainly no normative principle that says one ought to "expose oneself to a good fight," and refrain from killing enemies at no risk to oneself even though one can'.[132] In this light, Mégret emphasises that '[t]he point is precisely that the superior party cannot be asked to change anything it is doing from within the tradition of the laws of war', but concedes that '[t]his does not mean, however, that the argument about the unfairness of drone war is entirely beside the point':

> Rather, it suggests a difference between behavior that is *in violation* of the laws of war and behavior that, whilst entirely legal, might be said to be more generally *destructive* of the laws of war through the disabling of the sort of implicit assumptions within which war is embedded. These are two different notions and failure to distinguish them risks obscuring the debate. The point about drones, then, is not that their use is illegal but that their use belies the relevance of a model of violence historically incarnated by the idea of war, which is quite a different argument.[133]

To illustrate the distinction between 'violating the rules' and 'achieving such crushing superiority', Mégret employs what he calls a 'useful analogy' of the game of tennis between a top player who 'uses a top-notch, state of the art racket' and an average player who 'has to use a 1930s-style wooden racket'.[134] This provides an example of asymmetry in skill and technology between opponents who are both present on the terrain (that is, the battlefield) and both use a racket (that is, the same genre of weapon, albeit technologically different versions thereof). However, the 'weaker' opponent is not entirely deprived of the possibility of attempting a response or defence,

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[131] Mégret, 'Humanitarian Problem', 1310 (emphasis in original). See also ibid 1311 (noting that drone warfare '*destroys the idea of war as a contest that, while potentially uneven, is essentially still a contest between (humanitarian) equals, indeed a contest tout court.*' (emphasis in original)).
[132] ibid 1313.
[133] ibid 1314 (emphasis in original).
[134] ibid.

even if this may prove unsuccessful. In that respect, this example seems to fail to account for the 'insurmountable, asymmetrical relationship to the other'[135] and the radical separation between the opposing sides encountered in UAV warfare. As such, hardly could an analogy be drawn between the situation described in the example, which implies a conventional, albeit asymmetrical, confrontation between present opponents, and an unconventional model of violence where one side is absent from the battlefield and out of reach whereas, in Mégret's own words, '[t]hose on the receiving side of drones have few defensive options if any, except to go into more or less permanent hiding'.[136]

What makes UAV warfare legally and ethically problematic for the LOAC, and which may be also described as 'unfair', the Thesis argues, is neither the asymmetry as such, in terms of weapons capability or access to the same weaponry, nor the superiority as such, as expressed in the fact that one side seeks to maximise its technological advantage. But rather it is the unilateral imposition of lethal violence[137] against an adversary that is put into a position of extreme vulnerability. In this light, it is not made clear in Mégret's account how wartime behaviour can be entirely legal, in line with rules of law that are in tandem rules of warfare, while at the same time it destroys the law of war (by destroying the assumptions of war).

Certainly, the LOAC does not suggest symmetry or equality in technological capability. As has been argued, 'it would be impossible to restrict wars to equally matched opponents',[138] and '[t]he law, to be sure, makes no requirement that sides limit themselves to the weapons available to the other side; …'.[139] From bows and crossbows to air power, belligerents faced at every turn the asymmetries imposed by new weapons on the battlefield. The law does not imply any requirement that would appeal to an *in bello* version

[135] Kahn, 'Imaging Warfare', 219, 220-1.
[136] Mégret, 'Humanitarian Problem', 1310.
[137] Chamayou, *Theory*, 13 ('Warfare, from being possibly asymmetrical, becomes absolutely unilateral.').
[138] Henry Shue, *Fighting Hurt: Rule and Exception in Torture and War* (OUP 2016) 43 (also in Henry Shue, 'Torture' (1978) 7 Phil. & Pub. Aff. 124)
[139] Anderson and Waxman, 'Law and Ethics', 8 (adding that 'weapons superiority is perfectly lawful and indeed assumed as part of military necessity').

of an 'additional principle of just war, proscribing military engagement on other than an equal footing';[140] nor does it dictate the conduct of hostilities in conditions of, using the oft invoked image, chessboard-like symmetries,[141] whereby a 'fair fight' is to be understood as 'a rough equality of capabilities, symmetrically and reciprocally deployed'.[142] The law is not intended to serve as a legal and ethical device to facilitate any of the adversaries to achieve the ends sought, let alone 'equalise the chances of success among combatants'.[143] Put differently, it is not interested in rectifying one side's potential weaknesses in terms of military capabilities and tactics, and does not require that adversaries forfeit the advantage of technological superiority they may bear with a view to restoring a kind of even balance between technologically mismatched adversaries. Rather the LOAC is concerned with providing them with a fair chance to pursue their ends within a regulated environment.

A 'fair fight' is often distinguished from 'fighting fairly'. While the former is charged with connotations of symmetry and equality which the LOAC does not require, the latter is about adherence to the law and captures the requirement to act in line with the prevailing rules. As argued, '[w]hat the law does require is that parties to a conflict adhere to the fundamental obligations the law sets forth –rather than a 'fair fight' where 'you can fight your enemy only with the same set of tactics, manpower, weapons or other tools that he has'.[144] This is reminiscent of the understanding, as Theodor Meron put it, that '[t]he law of armed conflict … guarantees a modicum of fair play'. Using a sports analogy, Meron went on to add, '[a]s in a boxing match,

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[140] Suzy Killmister, 'Remote Weaponry: The Ethical Implications' (2008) 25 J. App. Phil. 121, 131.

[141] The chess metaphor has been used mainly in juxtaposition to war. See, for example, Dinstein, *Conduct*, xv ('Some people, no doubt animated by the noblest humanitarian impulses, would like to see warfare without bloodshed. However, this is an impossible dream. War is not a game of chess. Almost by definition, it entails human losses, suffering and pain, as well as destruction and devastation.'); David Rodin, 'The Ethics of Asymmetric War' in Richard Sorabji and David Rodin (eds), *The Ethics of War: Shared Problems in Different Traditions* (Ashgate 2006) 153 and 159.

[142] Rodin, 'Ethics', 159; Citing Rodin, Enemark, *Armed Drones*, 160 argues that '[t]he use of force by opponents in war should be necessary, discriminate and proportionate, but there is no ethical requirement for war to be 'fair' in the sense of being evenly balanced'.

[143] Rodin, 'Ethics', 159.

[144] Laurie Blank in Kenneth Anderson, 'Laurie Blank on Mark Mazzetti's 'The Drone Zone' - Last in Series from Lewis, Dunlap, Rona, Corn, and Anderson' (*Lawfare*, 21 July 2012). Mégret, 'Humanitarian Problem', 1313 (quoting Blank in agreement).

pummeling the opponent's upper body is fine; hitting below the belt is proscribed. As long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death'.[145] In this regard, 'fair play' or 'fighting fairly' is grounded in the idea that a certain activity, whether in the sport or war context, cannot be what it *should* be or is supposed to be without adherence to the rules which regulate it.

Fighting fairly and the LOAC

There is a crucial distinction between fighting to win and fighting *fairly* to win. The notion of fighting fairly runs deep in the law and could be understood as reflecting the embedded intuition of the LOAC as a normative regime that denies belligerents *carte blanche* to achieve the ends pursued. The law constrains the freedom as to the choice of weapons and tactics in the practice of hostilities, and, for all the likelihood of harm in a context where armed violence is the order of the day, killing, wounding and suffering in the law does not go unchallenged. The first paragraph of Article 35 of Additional Protocol I (API), which details the 'basic rules' of the conduct of hostilities, provides that '[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited'.[146] The law further lays down detailed provisions which seek to prohibit, restrict or limit the targeting of opponents in certain situations and under certain circumstances, including the prohibition of superfluous injury/unnecessary suffering, the prohibition of denial of quarter and the prohibition of attacks against persons *hors de combat*.[147] Fighting fairly in the law may be thought of as a sort of adversarial ethic, which underlies appropriate conduct during hostilities.

[145] Theodor Meron, *The Humanization of International Law* (Hague Academy, Martinus Nijhoff 2006) 8.
[146] See also the principle in Art 22 of the Regulations annexed to 1899 Hague Convention II and 1907 Hague Convention IV, strengthened by the specific prohibitions laid down in Art 23.
[147] See chapters 4, 5 and 6.

Chance to survive

Tied up with the law's conception of war/armed conflict as a reciprocal armed interaction, explored in the previous sections of this chapter, the notion of fairness factors into the range of considerations that are central to the understanding that armed violence in the law is tolerated and restrained within the normative space of an armed confrontation. Consistent with the element of confrontation, the rules associated with human targetability and the use of lethal force are constrained by the assumption that in the normative system of warfare of the law killing ensues from fighting and the rules of offence are in tandem rules of defence. By placing the fulcrum of armed force essentially in a realm of mutual danger and vulnerability, the law provides combatants on all warring sides with the opportunity to use force against each other, resist the adversary and repel the injury. This is especially evident in the threat-based *hors de combat* protection. Both when afforded and when withdrawn for the reasons detailed in the law, the prohibition takes care to protect an adversary who is placed at a distinct disadvantage because of incapacitation or who wishes to withdraw from combat and no longer participates in hostilities indicated through surrender, without however doing so to the disadvantage of the other side.[148]

As such, fighting fairly is a matter of reciprocity deriving from the idea of mutually experiencing at least some of the dangers ensued from inhabiting the violent realm of hostilities. In traditional terms, it is best exemplified by the direct, open and straightforward confrontation that occurred in the context of a battle and indeed fighting in combat at close quarters,[149] and which finds its paradigmatic expression in the idea of an armed contest where the adversaries mutually face adversity.[150] Conceptualising fighting in war/armed conflict within the LOAC in a manner that is not outwardly dissimilar to a contest to capture the spirit of a circumscribed armed struggle where the antagonists have a fair chance not only to inflict injury on but also try to resist each other is not without merit. For Henry Shue, '[t]he fairness

[148] Arts 41 and 42 API. ICRC Customary IHL, Rules 47 and 48.
[149] Draper, 'Interaction', 20 ('The fairness in offence and defence during close personal combat can, I think, be traced to the rules of the tourney and the joust.').
[150] See chapter 1.

may be perceived to lie in this fact: that those who are killed had a reasonable chance to survive … It was kill or be killed for both parties, and each had his or her opportunity to survive'.[151] Shue also importantly asserts that 'one of the moral bases' of the law of war is 'that it allows for a 'fair fight' by means of protecting the utterly defenceless from assault'.[152] A similar understanding is to be found in Paul Kahn's articulation of 'the fundamental principle that establishes the internal morality of warfare: self-defense within conditions of reciprocal imposition of risk. Without the imposition of mutual risk, warfare is not war at all'.[153] The 'reciprocal risk', which Kahn links to 'what had traditionally been seen as fair' in war,[154] suggests not only the mutual susceptibility to attack but is also in reverse the reciprocal opportunity to defend oneself against the adversary, which may be said to capture a reciprocal opportunity to survive.

Fighting fairly arguably captures the overriding ethical concern to keep behaviour, as might be shaped by the relative weapons and tactics used by opponents, within the parameters that demarcate the normative space within which armed violence is regulated through the law's rules and constraints. This means that the adversaries are required to behave not only in consonance with the rules but also in line with the spirit of a normative regime that was devised to operate, irrespective of asymmetries and disparities in weapons capabilities, as a two-sided reciprocal (if violent) affair between combatants who 'stand in a relationship of mutual risk'[155] and are at least not actively deprived of a reasonable chance to survive.

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[151] Shue, *Fighting Hurt*, 43 (importantly noting that 'No doubt the opportunities may not have been anywhere near equal—it would be impossible to restrict wars to equally matched opponents. But at least none of the parties to the combat were defenceless.').
[152] ibid.
[153] Kahn, 'Paradox', 4. For a similar understanding from different perspectives, see Michael Ignatieff, *Virtual War: Kosovo and Beyond* (Chatto & Windus 2000) 161 ('The tacit contract of combat throughout the ages has always assumed a basic equality of moral risk: kill or be killed'. '… But this contract is void when one side begins killing with impunity. Put another way, a war ceases to be just when it becomes a turkey shoot.'); Michael Walzer, *Arguing about War* (Yale UP 2004) 101 ('You can't kill unless you are prepared to die.').
[154] Kahn, 'Paradox', 6.
[155] ibid 4.

Good faith

Considerations of fighting fairly are linked with good faith conduct of hostilities, which is 'critical to humane combat and to sustaining the law-of-war as a trusted means of communication and interaction between belligerents'.[156]

As provided in the LOAC, good faith is intertwined with prohibitions of acts and practices that amount to deception, involve betrayal of the adversary's trust and undermine respect between the adversaries. The rules that 'appeal to the good faith of the combatant which is a fundamental condition for the existence of law'[157] include the prohibition on killing or wounding the enemy treacherously (perfidy)[158] and cover a range of various acts aimed at deceiving the adversary that are deemed unfair.

As Christopher Greenwood observes, 'the prohibition of perfidy, which has implications for the choice of methods of warfare (if not the weapons themselves), is designed to serve two very different objectives', that is, 'to preserve core humanitarian values by prohibiting the feigning of surrender, protected status, or wounds, because such feints endanger those who genuinely seek to surrender, possess protected status, …' and 'to protect able-bodied combatants from attacks which endanger no one else but which are seen as somehow "unfair"'. For example, as Greenwood notes,

> the prohibition on making use of the emblems or uniforms of an adversary while engaging in attacks or in order to assist military operations serves no humanitarian purpose whatsoever; rather, it seeks to ensure that one party to a conflict does not treat the other in a way which is perceived to be contrary to concepts of fair dealing.[159]

Treacherous perfidy, which breaches good faith between adversaries in a reciprocal armed interaction, epitomises 'unfair' behaviour. Seeking to regulate a paradigm of confrontational armed violence where individual

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[156] Sean Watts, 'Law-of-War Perfidy' (2014) 219 Mil. L. Rev. 106, 108.
[157] 1987 ICRC Commentary on API (Art 40) p 473, para 1588. Also ibid (Part III -- Methods and means of warfare-Combatant and prisoner-of-war status) p 382, para 1366.
[158] Art 37 API; ICRC Customary IHL Study, Rule 65.
[159] Christopher Greenwood, 'Law of Weaponry at the Start of the New Millennium' (1998) 7 Int'l L. Stud. 185, 190. See Arts 38, 39 API; 1987 ICRC Commentary (Arts 38, 39) pp 446-60, 462-71 and paras 1526-61, 1562-87; ICRC Customary IHL, Rules 58-62.

combatants are mutually exposed to injury and death, the law relies on mutual trust and respect between opponents, confidence in the adversary, faith in the rules and confidence that the law is able to play its protective and regulative role.[160] The law prohibits killing, injuring or capturing an adversary by resort to perfidy, which is defined as '[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence ...'.[161] While it is no wonder why perfidy is regarded as drawing inspiration from notions of honour found in chivalric fighting and jousting of the knighthood of medieval times,[162] in the current law '[p]erfidious betrayals inflict systemic harm on the law of war as a guarantee of minimally humane interaction'.[163] More than a side-constraint on the conduct of combatants, the duty to fight the adverse party with good faith seems to provide an independent basis for establishing the adversaries' responsibility to fight fairly. Through considerations of fairness the law seeks to guard against practices aimed at assuring some advantage for oneself by means of denying the adversary what is due to them

[160] 1987 ICRC Commentary on API (Art 37) p 434, paras 1497 ('The essential concept of perfidy is not difficult to grasp: a broken word, dishonesty, unfaithful breaking of promises, deliberate deception, covert threats -- these are only a few aspects of this spectre to which the fundamental rule of laws 'pacta sunt servanda' or 'fides etiam hosti servanda' is opposed.') and 1501 (pp 435-6); Watts, 'Perfidy', 107 ('The prohibition of perfidy became much more than a general sanction of underhanded or dishonorable conduct. Law prohibiting perfidy proved an essential buttress to the law of war as a medium of exchange between combatants-a pledge of minimum respect and trust between belligerents even in the turmoil of war.'); Ian Henderson, Jordan den Dulk and Angeline Lewis, 'Emerging Technology and Perfidy in Armed Conflict' (2015) 91 Int'l L. Stud. 468, 472 ('… the killing, injuring and capture in API of an adversary by resort to perfidy betrays the social order of war and will undoubtedly lead to decreased respect for the law of armed conflict.').

[161] Art 37(1) API.

[162] Draper, 'Interaction', 20 ('Good faith entailed that trust should be kept even with an enemy. … For a chivalrous knight, however, perfidy was a disgrace that no act of valour could redeem.'). Michael Bothe, Karl Joseph Partsch and Waldemar A Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) 202 (perfidy is 'derived from the principle of chivalry'). David Whetham, *Just Wars and Moral Victories. Surprise, Deception and the Normative Framework of European War in the Later Middle Ages* (Brill 2009) 5 ('The laws on perfidy can be seen as a vestigial sense of chivalry, demanding a minimum level of fairness in attack and defence, based upon the idea of a mutual respect between antagonists.').

[163] Watts, 'Perfidy', 106.

by law or by exploiting detrimentally the adversary's duty to afford the protection to which one is entitled under the law.[164]

2.4 CONCLUSION

The chapter demonstrated that the conception of armed confrontation sets up the normative environment within which the law tolerates and seeks to restrain armed violence. The element of confrontation captures the infliction of bi-directional armed force, both at the level of the collective and at the level of individual opponents, in the context of which the adversaries have the opportunity to use force against each other both in offence and in defence; that is, the opportunity not only to inflict harm but more importantly to repel harm and defend themselves against the opposing side. As such, the law essentially 'institutionalises' war/armed conflict as the realm of common danger and mutual vulnerability, a world of interaction and reciprocity between the adversaries. This revealed that the paradigm of warfare in the LOAC is to be thought of as a reciprocal armed interaction permeated by notions of fighting fairly. The importance of the analysis of the chapter lies in that it places the study of UAV warfare and the LOAC within a broader understanding of the law, which allows the Thesis to capture how UAV warfare disrupts the factual and normative parameters of an armed confrontation, as well as the ethical assumptions of the law.

[164] See e.g. Dinstein, *Conduct*, 264 (linking perfidy to 'foul play' and arguing that 'LOIAC is striving to ensure that measures of protection will be respected by the opposing sides').

CHAPTER 3

THE LOAC AS AN 'OTHER-DIRECTED' NORMATIVE REGIME

The LOAC and the ethical assumptions underpinning its rules have been moulded within a paradigm of warfare in which the adversaries practise hostilities in the environment of mutual vulnerability of an armed confrontation, as demonstrated in chapter 2. This captures an important normative aspect of the law; that is, the human adversaries are assumed to have a reasonable chance to fight back in response or in defence, and indeed a reasonable chance to survive. This understanding stands in stark contrast with the mainstream legal argument, critically analysed in chapter 1, where UAV compliance with the LOAC was reduced to a questionable ethos of the technological promise for targeting and killing with precision. Understanding the LOAC as an 'other-directed' normative regime, the chapter looks at the place that the adversary occupies in the law and the rationale for that standing or status, and the bearing that this has on wartime behaviour. In so doing, the chapter aims at demonstrating that the law recognises the humanity of opponents and imposes obligations and duties to the 'benefit' of one's human adversary. Distinguishing between the notions of 'humanity' and 'humanitarian/humane treatment', the chapter argues that respect for the human dignity of the adversary in the course of hostilities is a matter of law and not only a matter of humanitarian sentiment. In this light, the chapter suggests that the 'other-directedness' of the LOAC and the ethos of humanity are instrumental to understanding the essence of the law's rules on the conduct of hostilities and to capturing the fundamental tension between UAV warfare and the LOAC.

3.1 THE FOCUS OF THE LOAC ON THE ADVERSARY

The 'other-directedness' of the law

The LOAC does not give the adversaries free rein to practise hostilities and use lethal force in the course of conflict in whatever way they see fit as they would wish to or could do so.[1] The law limits the freedom as to the choice of means and methods of warfare, and it seeks to do so through well-established rules that incorporate prohibitions and restrictions. As the ICRC Commentary has observed, '… the law relating to the conduct of hostilities is primarily a law of prohibition: it does not authorize, but prohibits certain things'.[2] Through prohibitions and provisions of obligatory character that reflect age-old rules imposing restraints on the conduct of hostilities, the law aims at guiding a warring side's actions[3] and encouraging lawful and ethical behaviour towards the adversary. The law's constraints and limitations on wartime behaviour, including those relating to the choice of means and methods of warfare and the conduct of hostilities, are laid down as obligations and/or duties towards one's adversary.[4]

A significant part of the law is devoted to rules which provide for the humane treatment of one's opponents, namely persons who have fallen into the hands of the adversary and are entitled to protection, care and treatment as wounded and sick, prisoners of war, as well as missing and dead persons.[5]

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[1] See e.g. Henri Meyrowitz, 'Réflexions sur le Fondement du Droit de la Guerre' en Christophe Swinarski et Jean Simon Pictet (eds), *Etudes et Essais sur le Droit International Humanitaire et sur les Principes de la Croix-Rouge en l'Honneur de Jean Pictet* (CICR 1984) 428 ('… le droit de la guerre retient les Etats belligérants de faire la guerre comme ils voudraient et comme ils pourraient la faire.').

[2] 1986 ICRC Commentary on API (Art 57) p 689, para 2238 ('The law relating to the conduct of hostilities is primarily a law of prohibition: it does not authorize, but prohibits certain things.'); *United States v List (Wilhelm) and ors* (1949) 8 LRTWC 34, 59, 63, 66 ('International Law is prohibitive law'); Haque, *Morality*, 55 ('The law of armed conflict is prohibitive, not permissive …'); Richard R Baxter 'So- Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs' (1951) 28 BYBIL 323, 324 (noting that the LOAC is '"prohibitive law" in the sense that it forbids rather than authorizes certain manifestations of force').

[3] See e.g. Jeremy Waldron, 'Vagueness and the Guidance of Action' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 61 ('… *guiding action* (or *guiding conduct* or *guiding behaviour*) is the mode of governance distinctive to law.').

[4] See below.

[5] See Geneva Convention I on the wounded and sick (e.g. Arts 12, 13, 14-17 GCI); API, Part II on wounded, sick and shipwrecked; Common Art 3 GCI-IV; Geneva Convention IV on civilians.

As '[t]he commonly held view is that references to the obligation to protect presupposed that a party would take care of its own forces and that the aim of international humanitarian law in this regard was to ensure that the party would also take care of the other side',[6] the ICRC Commentary has sought to delineate the scope of the obligation imposed by Article 12 GCI on the basis of the term 'in all circumstances' so that the protection, care and humane treatment of the wounded and sick are also extended to one's own forces.[7]

Moreover, the LOAC consists of rules, which focus on behaviour towards one's opponents and relate to the fundamental principle limiting the freedom of choice of means and methods of warfare. Relevant rules include the prohibition to cause superfluous injury, unnecessary suffering and inevitable death; the obligation to refrain from making the object of attack an individual placed *hors de* combat, including a person who has expressed an intention to surrender; the prohibition to pursue hostilities on the basis that there shall be no survivors, namely an all-out annihilation policy; as well as the obligation of good faith (or honourable) conduct prohibiting perfidy.[8] The LOAC is a fundamentally 'other-directed' regime, which captures the understanding that its normativity is primarily directed towards the 'other' that represents the adversary as opposed to one's own side in the situated violent armed encounter in war/armed conflict. The 'other' stands for the opposing side in the armed confrontation both at the collective level where there is a contest between states and/or other collective entities and at the individual level where individual persons are implicated as opponents by violent claims upon each other's life and (physical and emotional) integrity. Mapped onto the hostile relation which an armed confrontation entails, the 'other-directedness' suggests the ethical orientation of the focus of the law by translating the descriptive status of being one's opponent into the

[6] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 247.
[7] 1952 ICRC Commentary on GCI (Art 12) p 135 ('The wounded are to be respected just as much when they are with their own army or in no man's land as when they have fallen into the hands of the enemy.'); In a similar vein, 2016 ICRC Commentary on GCI (Art 12) para 1368. See also Sivakumaran, *Non-International*, 248 (arguing that '[a]lthough it is not always made clear that the provisions were intended to address the issue of intra-party protection, what is clear is that states were not assumed to look after their own forces leaving only their treatment of the other side in need of regulation.').
[8] See Arts 35, 40, 41, 42 API. ICRC Customary IHL Study, Rules 46, 47, 48, 70.

normative status of being entitled to the benefit of norms and to the protections that the LOAC affords to the human adversary. In this light, the LOAC is to be understood as the 'law of the enemy', as it were, in the sense that the adversary is the law's object of concern and to 'benefit' from one's appropriate behaviour in line with the law's prescriptions and proscriptions relating to the use of force.[9]

It should be made clear that otherness here does not denote exclusivity. Anyone can be one's 'other' and have the status of the adversary, including one's own self vis-à-vis another opposing side. The use of the lower-case 'other' is precisely intended to dissociate the 'other-directedness' of the law, as articulated here, from moral calibrations of the capitalised Other that may be potentially entangled in considerations about which the law is agnostic. Such considerations have historically been related to various perceptions (or prejudices) and judgments of who the enemy is,[10] or convictions about the justness of our cause for war and/or the unjustness of the enemy that is not waging a just war and is not justified in fighting us.[11] These have traditionally revealed or helped manufacture rigid dichotomies between a (normatively and ethically superior) self and the Other in an 'us' versus 'them' manner, ending up having a bearing on the conduct of war usually by shrinking the scope and reach of one's obligations and duties in the sense that 'the force of

[9] See Hersch Lauterpacht, 'The Limits of the Operation of the Law of War' (1953) 30 BYBIL 206, 212.

[10] These are linked to values and attributes which at different points in history manufactured affinities, forged ties and conferred a certain shared identity, which seemed to reflect commonly felt understandings about limits of warfare and provide 'a vital framework of expectations concerning the conduct of others' [Geoffrey Parker, 'Early Modern Europe' in Howard et al, *Laws of War*, 42), including, for example, professional custom and martial values, religion, culture, justice, civilisation, sovereignty, etc., see e.g. Robert C Stacey, 'The Age of Chivalry' in Michael Howard et al, *Laws of War*, 36; James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton UP 1981); Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Law's "Other"' in Anne Orford (ed), *International Law and Its Others* (CUP 2006]. With respect to the importance of the way in which the enemy is coloured, see e.g. Barrie Paskins and Michael Dockrill, *The Ethics of War* (Duckworth1979) 204 (in the context of the US experience in Vietnam, 'Once grant the enemy are 'gooks', subhuman, and you have already given away all moral restraint.'). See also Best, *Humanity*, 218-9.

[11] See e.g. Jeff McMahan, 'On the Moral Equality of Combatants' (2006) 14 J. Pol. Phil. 377.

"us" is, typically, contrastive … it contrasts with a "they"' which is also made up of human beings – the wrong sort of human beings'.[12]

The adversary in the LOAC

The 'other-directedness' of the LOAC is tied with the ethos of humanity, which permeates the law. Humanity is understood both ontologically, referring to the human being as such, and axiologically, referring to norms of conduct.[13]

Contemplating war's horrors as human costs, the LOAC has sought to regulate war/armed conflict as a violent adversary setting but one that retains an intensely human dimension; that is, as an armed confrontation which occurs between entities and is carried out by human individuals whom the law ultimately seeks to protect.[14] Indeed, the LOAC acknowledges that the adversary in war/armed conflict does not lose their human hypostasis and recognises that fighting and participating in hostilities does not strip combatants of their humanity. Therefore, compliance with the LOAC is not conceivable without the realisation of the ethical standing or normative

[12] Richard Rorty, *Contingency, Irony, and Solidarity* (CUP 1989) 190. The way in which the denial of adversary's humanity runs the risk of backfiring on 'us' is captured by Jonathan Shay, *Achilles in Vietnam: Combat Trauma and the Undoing of Character* (Atheneum 1994) 203, 'Chaplains would better serve the troops by reminding them that enemy soldiers are extremely dangerous *because they are human just like us*, rather than perpetuating the image of the enemy as God-hated vermin who hardly know they're alive and "don't value human life like we do".' (emphasis in original).

[13] Chamayou, *Theory*, 209. Coker, 'Ethics', 256.

[14] René Provost, *International Human Rights and Humanitarian Law* (CUP 2002)133. See also Meron, *Humanization*, 5 ('The law of war, while focusing on the interests of States and their sovereignty, also contains a prominent component of human beings' protection.'); Rodin, 'Ethics', 159 (referring to 'the intrinsic moral value of soldiers and civilians as human beings that is the proper focus of the rules of war'); GIAD Draper, 'Military Necessity and Humanitarian Imperatives' (1973) 12 Mil. L. & L. War Rev. 131 (pointing out that 'the content of these rules, and the emphasis in their rationale, was dominantly humanitarian, a new form of secular morality based on the merit and value of the individual human being as such.'); Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 BIBYL 360, 379; Terry Gill, 'Chivalry, A Principle of the Law of Armed Conflict?' in Marcel Brus and Brigit Toebes (eds), *Armed Conflict and International Law: In search of the Human Face - Liber Amicorum in Memory of Avril McDonald* (Asser Press 2013) 40-1 (referring to humanity as 'the need and objective to limit the suffering and devastation caused by war and provide protection to those most vulnerable …'). Even the Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, which famously suggested that '[t]he more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief' (Art XXIX), also acknowledged that 'Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God' (Art XV).

status that the law 'grants' or 'recognises' to the adversary by virtue of humanity. In the LOAC's other-directed normative regime, the opponents are a *human* other, described in this chapter and Thesis collectively as the human adversary.

There are no other terms in which the adversary is to be understood and treated in accordance with the law. This is why, for the adversary to remain human and for that to be reflected in the way hostilities are conducted, including the choice of means and methods of warfare, it is important that opponents are not perceived or identified as outlaws, dangerous criminals, terrorists, unjust enemies. Appealing to the essence of the human, the LOAC seeks to set bounds to belligerent practice by requiring the kind of wartime behaviour that is ethically demanded or expected from a human towards the adversary as human primarily. Before turning to the discussion of how ethical behaviour towards the human adversary in the course of an armed confrontation is to be understood in the LOAC, it is necessary that some clarifications be made in view of the different terms used in the literature to delineate appropriate behaviour towards the adversary in war/armed conflict on the basis of humanity; humanity and humane or humanitarian treatment.

Humanity and humane or humanitarian treatment

This section looks at the way Henri Meyrowitz, a Cold War international lawyer, and Larry May, a contemporary just war theorist, have articulated humanity in war/armed conflict and the law, providing important insights for our understanding of humanity in the LOAC, which will allow us to clarify the notions of 'humanity' and 'humanitarian/humane treatment', and explain further below the preference for the term humanity in the Thesis.

For Henri Meyrowitz, humanity in the law of war is to be understood in two different senses, which 'while distinct they are indissociable':[15] le sens 'de sentiment and de comportement humains' et le sens 'de genre humain'.[16] The first one captures 'le sentiment de pitié active, de compassion'

[15] Meyrowitz, 'Réflexions', 430.
[16] ibid 430.

(*Menschlichkeit*), to which applies 'l'adjectif *humanitaire*' in use today and to which is also attached 'la notion de dignité humaine'.[17] As Meyrowitz claims, not only does this not cover but a half of the significance and the notional terrain of the word humanity but even with respect to the part that it claims to cover it is a very narrow meaning: 'Il vise uniquement la protection, dans leur vie, leur intégrité physique, leur personnalité et leur dignité, des nationaux ennemies *victimes* éventuelles d'actes inhumains'.[18] The second one is broader and refers to '[la signification de] *genre humain'*, which has both a spatial and temporal dimension (*Menschheit*).[19] Meyrowitz goes on to argue, '[c]'est par l'humanité-*Menschlichkeit* que l'humanité-*Menschheit* est sauvegardée; l'humanité-*Menschheit* présuppose, nécessite, exige, ordonne l'humanité-*Menschlichkeit.* Le droit de la guerre peut donc être vu comme une stratégie pour la sauvegarde de l'humanité-*Menschheit* par le moyen de l'humanité-*Menschlichkeit*, stratégie contre la déshumanisation, …'.[20] As René Provost explains,

> Meyrowitz suggests the … distinction that, while human rights law derives from humanity understood as the defining characteristic of the human race (*menschheit*), humanitarian law is coloured not only by that aspect of humanity, but also by humanity understood as a feeling of compassion towards other human beings (*menschlichkeit*), so that in humanitarian law humanity–*menschheit* is safeguarded through humanity–*menschlichkeit*.[21]

Humanity is, Larry May writes, 'a value and an ideal. Humanity is often referred to as a kind of principle, where the principle of humanity is the principle that all humans are deserving of respect because of the dignity that is found in each member of humanity'.[22] Distinguishing between the broader

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[17] ibid 428.
[18] ibid (trans: 'It aims only at the protection, in their life, their physical integrity, their personality and their dignity, of national enemies potential *victims* of inhuman acts.').
[19] ibid.
[20] ibid 430 (trans: 'It is through the humanity-*Menschlichkeit* that the humanity-*Menschheit* is safeguarded; the humanity-*Menschheit* presupposes, necessitates, demands, orders the humanity-*Menschheit*. The law of war can hence be viewed as a strategy to safeguard the humanity-*Menschheit* by means of the humanity-*Menschlichkeit*, a strategy against dehumanisation.').
[21] René Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 5 citing Meyrowitz, 'Réflexions'.
[22] Larry May, 'Humanity, Necessity, and the Rights of Soldiers' in Jens David Ohlin, Larry May and Claire Finkelstein (eds), *Weighing Lives in War* (OUP 2017) 78. In an earlier work, May,

concept of humanity and the narrower humane treatment that is associated with the idea of 'humaneness',[23] '[h]umane treatment is the cornerstone of humanitarian law in that minimal suffering, mercy, and honor are indeed the main ingredients in the normative conceptualization of the various traditionally recognized restraints on war'.[24] According to May, '[t]he principle of humane treatment is a principle that calls both for the minimizing of suffering and for merciful treatment, as a way of displaying honor'.[25] As such, '[n]ot only does [it] operate to undergird the obvious restraints on how prisoners of war are to be treated, but it also makes sense of restraints on the use of weapons and even on the way that civilians are to be treated during war'.[26] While '[a]t its core, it is related to humanity that involves treating another person as a fellow human, as a member of the same group, the human race, rather than in any number of other ways that take account of his or her otherness',[27] humanitarian treatment is deemed more appropriate because it is highly context-specific. As May explains, it 'calls for sensitivity to context, not so that we can disregard our common humanity, but rather so that we can identify how a fellow human should be treated in a situation of vulnerability, …'.[28] For May, linked with humanitarian treatment is 'humaneness', that is, 'the idea that people should act toward one another with restraint, especially with the restraint that would come from being compassionate or having sympathy for another person's plight' and which 'was especially significant in the development of the laws of war that would restrain activities that could bring suffering to soldiers and civilians alike'.[29]

War Crimes, 67 wrote that the principle of humanity 'involves treating another person as a fellow human, as a member of the same group, the human race, rather than in any number of other ways that take account of his or her otherness. What it means in any particular situation to treat another person as a fellow human is not always easy to see.'.

[23] May, *War Crimes*, ch 4. Also, May, 'Humanity', 78-86.

[24] May, *War Crimes*, 85.

[25] ibid 67.

[26] ibid 85.

[27] ibid 67.

[28] ibid 68; ibid 72 (advancing '[a] minimalist principle of humane treatment provides the least controversial way to understand the norms governing appropriate behaviour during war. When we speak of humane treatment, we refer to greater restraint than that which is called for due to considerations of justice and what we strictly owe to each other.').

[29] May, 'Humanity', 79.

Notwithstanding overlaps as to the scope and extent of coverage, May further distinguishes between human rights properly understood as the more general rights of all humans and dignity of all fellow humans in a rather unrestricted way[30] and the special rights of humans who occupy various specific roles, such as that of being a soldier. The latter are, according to May, '[t]he rights of soldiers [that] are often described in international law as humanitarian rights'[31], understood as '[t]he rights and dignity afforded to fellow soldiers, as soldiers' and which '[t]he principle of humanity in wartime carries with it', but which are 'not yet full-scale human rights'.[32] Such an understanding takes into account soldiers' unique and increased vulnerabilities in an armed conflict and the fact that 'while it is possible to forfeit one's basic rights, at least temporarily, one cannot forfeit one's dignity without ceasing to be human'.[33] Importantly, Larry May argues, '[h]owever, since those who occupy the role of soldiers are humans, that they are humans sets a minimal standard for how they are to be treated as soldiers. The standard is that soldiers must be treated in a way that respects their dignity as humans'.[34]

Notions of compassion (or empathy/sympathy) bound up with the vulnerability of one's opponents can also be found in Michael Walzer's approach to the humanity of the adversary in the course of war/armed conflict. In the context of what Walzer calls 'a recurrent incident in military history in which soldiers, simply by not fighting, appear to regain their right to life', famously referred to as 'naked soldiers',[35] where 'a soldier on patrol or on sniper duty catches an enemy soldier unaware, holds him in his gunsight, easy to kill',[36] we encounter a sort of intermittent humanity. While the 'human standing' and the 'underlying humanity' of opponent soldiers is not denied,[37] soldiers seem to 'forfeit their rights to life'. For Walzer, '[an

[30] ibid 85, 109.
[31] ibid 82.
[32] ibid 85; also, ibid 108 (In this sense, 'Soldiers, qua soldiers, do not have human rights').
[33] ibid 108.
[34] ibid.
[35] Walzer, *Just Wars*, 138.
[36] ibid 138-9.
[37] ibid.

enemy] alienates himself from me when he tries to kill me, and from our common humanity. But the alienation is temporary, the humanity imminent. It is restored, as it were, by the prosaic acts …', transforming 'my enemy into a man. "A man!"'.[38] Here the enemy is viewed as 'men and soldiers like us',[39] 'the crucial feature is the discovery of a man "similar to yourself," doing "as we had been doing"'.[40] The enemy's right to life 'is regained' or better 'is held'[41] because 'even in the most unpromising circumstances of war, humanity can often quite surprisingly break through'.[42] Feeling with the adversary and let the opportunity to kill them pass is 'to recognize a fellow creature, who is not threatening me, whose activities have the savor of peace and camaraderie, whose person is as valuable as my own'.[43]

Human adversary and humanity

The chapter and the Thesis refer to the *human adversary* to capture the way in which in the LOAC human status is inextricably interwoven with military/hostile status as opponents practise warfare. Being one's adversary and being human are not mutually exclusive statuses in the law. And this is not a matter of a less or more appropriate or acceptable or welcome intrusion of human rights and import of human rights-centred conceptions into the LOAC,[44] but reflects the development of an ethical understanding in relation to the individual humanity and human dignity, which can be traced back to Grotius, who in a crucial transitional period of human history advanced the individual as a respected subject in international law.[45] The human adversary does not admit of any abstractions that may be thought to be unlikely or unrealistic or implausible in the context of an

[38] ibid 143.
[39] ibid 142.
[40] ibid 141.
[41] ibid 138.
[42] Best, *Humanity*, 2.
[43] ibid 142.
[44] It should be noted that this is not to underestimate the fact that the development of human rights law was of great importance in the increasing emphasis on the individual and human dignity, see e.g. Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239; David Luban, 'Human Rights Thinking and the Laws of War' in Jens David Ohlin (ed), *Theoretical Boundaries of Human Rights and Armed Conflict* (OUP 2016).
[45] Grotius [1625] (1925).

adversarial/hostile relationship between the warring sides, which is usually defined by opponents' loyalties, military allegiance and affiliations, but importantly aims at keeping humanity within sight in the rough terrain of an armed confrontation.

The preference for the term humanity rather than humanitarian or humane protection or treatment is not only of terminological importance but it indicates the understanding that appropriate behaviour towards opponents as humans or human beings is a matter of compliance with the LOAC. It does not imply lack of sensitivity to the context of war/armed conflict, but rather seeks to dissociate compliance with the obligations and duties imposed by the law by virtue of humanity from reliance on one's compassion, pity and mercy. Be it a matter of principle or policy, or even as a grudging concession,[46] humanity is a duty that one owes to the adversary and no less to oneself as we shall see below. In so doing, it discharges the duties stemming from the law from connotations of voluntarism and detaches the effectuation of humanity from the humanitarian sentiment as a token of benevolence and philanthropy. At the same time, humanity suggests that appropriate conduct towards the human adversary is not reserved only for those enemy individuals once they obtained the status of victim and hence confined to the (humane) treatment and/or the protection of those who have already been rendered *hors de combat*, as wounded, sick, or otherwise incapacitated, and of the prisoners of war,[47] which is often called 'humanitarian'; nor is it limited to the 'suffering' or 'injury' (as opposed to the 'killing' or 'death') of combatants as aspects of the human dignity of combatants. Rather, it reaches beyond the more limited scope of concern about opponents who are already victims and no longer engage in hostilities to encompass wartime behaviour during the conduct of hostilities that strikes at the adversary's very existence.

[46] 'To remain 'ethical', war requires one to see it through the eyes of the enemy. One does not have to sympathise or identify with the other side, …', Coker, 'Ethics', 160.
[47] See e.g. Sivakumaran, *Non-International*, 255 ('The principle of humane treatment is the basic principle that informs international humanitarian law relating to the treatment of persons in the power of the adversary, whether civilians or persons *hors de combat*.').

The Thesis' understanding of humanity in the LOAC is that it represents the law's nod to the inherent human dignity of the individuals who practise hostilities as members of the collective (state or other entities) and continue to exist as humans or human beings in the course of war/armed conflict[48] in parallel with their status as combatants. This is a crucial point when trying to decipher what humanity means and how it manifests itself in terms of conduct towards the adversary during hostilities. As the chapter explains in the following section, this suggests that conduct contrary to the obligations and duties imposed by the law is to be deemed a violation of the law and in tandem an affront to the dignity of the human adversary.

Humanity and reciprocity

Humanity in the LOAC stands for an enduring hidden necessity for respect for the adversary as human which can or should continue to work towards compliance with the law even when the expectation of reciprocity is belied or when there is little hope for reciprocal behaviour in war/armed conflict. Humanity should not be entrapped in the contingencies and vagaries of traditional reciprocity, whereby restraint was deemed a matter of mutually beneficial reciprocity and a realistic prospect among adversaries that were expected to appreciate the advantages of commitment to the accepted rules of conduct, and be able and willing to reciprocate.[49] The adversary need not be 'one of us' to be deemed worthy of restrained violence; otherwise, the binary thinking and the mire of divisions, which confines the adversary to their 'Otherness' and in which reciprocity has traditionally operated,[50] would

[48] See e.g. Meron, 'Humanization'; David Luban, 'Military Necessity and the Cultures of Military Law' (2013) 26 LJIL 315, 316 (referring to 'the law an indispensable instrument for advancing human dignity'); The ICTY has held that '[t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of human dignity in every person. … The general principle of respect for human dignity is … the very raison d'être of international humanitarian law and human rights law': *Prosecutor v Furundžija* (Judgement) IT-95-17/1-T (10 December 1998) para 183. See Haque, *Morality*, 43 (emphasising the recognition of opponents as individuals in the St Petersburg Declaration the purpose of which 'was to prevent unnecessary individual suffering, not to prevent unnecessary aggregate suffering').

[49] See e.g. Lauterpacht, 'Limits of Operation', 212 ('… it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them').

[50] See above.

be perpetuated, thus curtailing the purview of humanity or even rationalising inhumanity.

Geoffrey Best speaks tellingly of the coexistence of reciprocity and humanity to which we turn for restraint,

> the whole IHL enterprise is objectively paradoxical …: war on the one hand, human nature on the other. Yet the enterprise is not abandoned. … And just as some life and credibility is kept in it at one end of the scale by the purposeful prudence which works with calculations of reciprocity and consequences, so at the other end does it depend on the potentially imprudent principles of humanity and honour which decline to believe in the total, unrecognizable alienness, the nonhumanity of the enemy, …[51]

Humanity should not be contingent on the law-abiding tendencies of the enemy.[52] In the face of disappointments of expectations of reciprocal behaviour, humanity continues to be the unassailable nucleus of the law. In that respect, Adil Haque suggests that 'if it can be shown that the law provides combatants with sound moral guidance, then combatants may be more willing to obey the law even when their adversaries do not'.[53]

One's own behaviour reflects one's own humanity

Compliance with the LOAC, as manifested in one's choice as to the weapons and tactics employed in an attempt to uphold values and respect norms rooted in humanity, necessarily implicates one's own self in the sense that our choices and actions that synthesise our wartime conduct are ultimately a reflection of how one conceives of one's own self, of what one stands for, and of the authenticity of one's (human/humanitarian) motives and intentions. As such, it is one's behaviour towards the human adversary that defines one's own humanity.

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[51] Best, *Law*, 291.

[52] See e.g. Michael Ignatieff, 'It's War - But it Doesn't Have to Be Dirty' (*The Guardian*, 1 October 2001) ('We owe them [i.e. the enemy] nothing other than the mercy that all human life has a right to claim. But we owe ourselves much more. We retain obligations in combat even when those we fight do not reciprocate. The obligations we owe are to ourselves alone, …') <www.theguardian.com/world/2001/oct/01/afghanistan.terrorism9>.

[53] Haque, *Morality*, 3. See also e.g. *Prosecutor v Kupreškić et al* (Judgement) IT-95-16-T (14 January 2000) paras 511 ('The defining characteristic of modern international humanitarian law is … the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants.') and 517-8.

The link between one's own humanity with the adversary's humanity is encountered in approaches that appeal to the humanity that one shares with the adversary and where the adversary is a fellow human.[54] For example, Geoffrey Best articulates respect for the law's constraints in terms of 'residual fellow feeling and common humanity':

> The warrior is required to refrain from doing such-and-such a thing to his opponent in time of armed conflict because of the fundamental principle that, after all, that opponent is a fellow human-being with whom certain fundamental interests and values are shared, and towards whom therefore there should be no wish to behave more hurtfully than last-resort recourse to violence has required.[55]

Through this lens, humanity may be said to hope to provide a degree of common shared ground and perhaps a modicum of shared understanding among belligerents, which is expected to morph into moderation and restraint in their practice. Arguably, the adversaries' mutual experiencing of danger and risk as a core component of the ethical reality of war is perhaps to serve as a normative reminder of the humanity of the adversary and a vestigial sense of what is essentially a human (albeit hostile) relationship;[56] or to suggest the tacit and mutual understanding of common fate and humanity.

From a different perspective, the LOAC may be regarded as seeking to protect oneself from their own inhumanity through the respect for the

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[54] See also May, 'Humanity', 109 ('… humanity, a principle that calls for people, especially during war or armed conflict, to exercise special vigilance in how fellow humans are treated.'). But see Walzer, *Just Wars* (for the idea of 'a fellow-creature, similar to yourself' whereby the adversary's humanity re-emerges temporarily.).

[55] Best, *Law*, 290 ('… decent human beings are presumed to be willing to submit even in wartime to the restraints suggested by conscience and imposed by law, restraints doubly binding at the point where those residual ties pull hardest.').

[56] See Best, *Law*, 53; Ryan, 'Drones', 213, 219 (noting that '[t]he idea of a shared battlefield' is important from the regular war perspective because 'it … implies a direct relationship between belligerents….'). *Cf* Walzer, *Just Wars*, 36 ('poor sods, just like me') and 145 ('The theoretical problem is not to describe how immunity is gained, but how it is lost. We are all immune to start with; our right not to be attacked is a feature of normal human relationships.'). See also Singer, *Wired*, 383 ('It is this recognition of each other's humanity through the law that redeems war. If you follow these laws, war becomes not merely blowing up things, but, as Michael Walzer argued, "a rule-governed activity of equals, or victims, who despite their individual national or tribal allegiances, have the same human standing".').

protections that the law affords to the human adversary. Such an understanding is encountered in Henri Meyrowitz's suggestion as follows:

> Or, le droit de la guerre fonction de protéger également les *agents* potentiels d'actes inhumains, de les protéger contre leur propre inhumanité. C'est l'*acte inhumain* qui avilit l'humanité, et il l'avilit dans la personne de l'agent avant que de la blesser dans la personne de la victime.[57]

It could be argued that Meyrowitz introduces the understanding that the law seeks to 'enforce' humanity, which would mean that fulfilling the legal and ethical obligations that one owes to the adversary as a matter of commitment to the LOAC is a duty that one owes to one's own self as well. This approach is reminiscent of insights that we find in the philosophical thinking of Emmanuel Levinas and Karl Jaspers. Recalling that for Levinas one's humanity is not self-referential, but rather resides in the responsibility that one has to others,[58] one could think of humanity in the law as speaking to one's responsibility over the violence inflicted against the adversary, rather than a right to it, as it were. The notion of responsibility was also central to Jaspers' 'demand for reason, a new ethos of peace, and a world order based on laws and agreements',[59] where we also find notions of intersubjectivity and transcendence that, setting aside the metaphysical elements, could offer an interesting perspective on the issue. If extrapolated to humanity in the LOAC, it could be understood as providing an opportunity to transcend oneself in order to achieve something more or higher.[60]

Notwithstanding the nuances of the different conceptualisations of how one's own self is implicated in commitment to the LOAC, the above approaches share the implication that when one fails to acknowledge and to treat the adversary as human and denies them the protections to which the

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[57] Meyrowitz, 'Réflexions', 428 (trans: Yet, the law of war functions to protect equally the *agents* of potential inhuman acts, to protect them against their own inhumanity. It is the *inhuman act* that debases humanity, and it debases it in the person of the agent before s/he inflicts it on the person of the victim.').

[58] See Alan Finkielkraut, *In the Name of Humanity: Reflections on the 20th Century* (Pimlico 2001).

[59] Mats Andrén, 'Nihilism and Responsibility in the Writings of Karl Jaspers' (2014) 22 European Rev. 209.

[60] Karl Jaspers, *The Way to Wisdom: An Introduction to Philosophy* (Ralph Manheim tr, Yale UP 1954).

law entitles them by virtue of humanity, one also betrays one's own self as human.

Such considerations are also encountered in attempts to rebut objections about the 'dehumanisation' of the individuals targeted for death by way of UAVs on the basis of claims of the 'humanisation' of the drone-using side. In the context of US drone practice, defenders of UAVs have sought to assuage concerns by invoking the intimacy between the drone operators and potential targets, which is purportedly guaranteed by being away 'only "eighteen inches from the battlefield": the distance between the eye and the screen'[61] and 'by constant, close-up surveillance'.[62] With respect to killing that 'is not only projected onto but also executed *through* a screen',[63] Derek Gregory argues that 'proximity not distance becomes the problem, …' in the context of which 'high-resolution imagery is not a uniquely technical capacity but part of a techno-*cultural* system that renders 'our' space familiar even in 'their' space which remains obdurately Other'.[64] In a similar vein, Priya Satia has pointed out that '[t]his "intimacy" is … [the result] of one-way surveillance; its purpose is not empathy (which would render killing an ethical impossibility) but greater confidence in the target's presumptive otherness'.[65] Taking note of a 'discursive U-turn', whereby '… given that they [i.e. UAV operators] kill with sensitivity and even with "care," they can continue to do so with our blessing', Grégoire Chamayou observes that '[w]hereas empathy for the enemy was classically understood as a ferment of possible resistance to murder, as a possible premise for a refusal to kill, in the discourse that we are now considering it serves to apply a layer of humanity to an instrument of mechanized homicide'.[66] This exercise in

[61] Gregory, 'View', 197 (referring to this as 'a constant refrain of those working from Nevada').
[62] Satia, 'Drones' 13 (referring to this as 'the primary message the USAF wanted to put out').
[63] Gregory, 'Geographies', 9.
[64] Gregory, 'View', 201.
[65] Satia, 'Drones', 13.
[66] Chamayou, *Theory*, 108; also, ibid 107 noting that '[t]he emphasis placed on the supposed traumas suffered by drone operators made it possible to assimilate them, via a common psychic vulnerability, to classic soldiers (fighters suffer from the stress of fighting and so do drone operators, so drone operators must be fighters too) and to humanize them as agents of armed violence (despite the technical nature of their weapon, they were not just cold killers'.

empathy or humanisation, however forced or disingenuous, seemed to be an effort to achieve moral worth, which revealing that UAV warfare could not in fact make any claim to 'honour', 'face' or 'dignity' as potential routes leading to 'self-worth'.[67]

3.2 HUMANITY IN THE LOAC

Elements of humanity in treaty texts

Humanity is a thread running through the codifications of the law of war and never ceased to inform the rules that have sought to prescribe restraint. From the early stages of international law of war there can be found direct references to humanity, albeit within the context of (*de jure*) reciprocity[68] and in a world of states as sovereign equals and 'civilised' nations infused with their own versions of normative ethos *in bello*.[69] In treaty texts humanity has appeared as part of variously worded constructs, including as requirements, rights, laws and principles of humanity.

Addressing the concerns concomitant with the development of military technology in 1868, the Saint Petersburg Declaration sought to ban the use of explosive and/or inflammable light projectiles. It was the first formal international agreement to outlaw weaponry that could be employed in battle and risked uselessly aggravating the suffering and inflicting the death of opposing combatants in an inevitable way. The importance of the Declaration is to be found not just in the operative paragraphs that detailed

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[67] On these three logics of self-worth, see Jörg Friedrichs, 'An Intercultural Theory of International Relations: How Self-Worth Underlies Politics Among Nations' (2016) 8 International Theory 63.

[68] This refers to the understanding that the law applies solely *inter partes*. In the Saint Petersburg Declaration of 1868, the reach of the obligations agreed was clearly limited to the belligerent relations between the contracting 'civilized nations'. Later, in the 1899 Hague Convention II and the 1907 Hague Convention IV on the Laws and Customs of War on Land, the inclusion of the *clausula si omnes* restricted the application and the binding effect of the provisions thereof solely to conflicts to which all belligerents involved were also parties to the treaties. The (in)famous *si omnes* reciprocity, which proved to undercut restraint, was abandoned in later codifications of the law of war and the unduly contractual character of wartime obligations gradually faded away into the growing emphasis on the humanitarian dimension of the law.

[69] See e.g. in relation to references to 'civilisation', Johnson, *Just War*; Kinsella, 'Superfluous Injury', 210; Meyrowitz, 'Réflexions', 428-30.

the specific prohibition but also, and more significantly so, in the preamble that articulated the rationale behind the ban:

> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war; that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; that the employment of such arms would therefore be contrary to the laws of humanity; …[70]

The principle of humanity aims at 'alleviating as much as possible the calamities of war'.[71] For all the 'circularity' that one can discern in the framing of the prohibition and allusion to military objectives and humanity in tandem,[72] the authors of the 1868 St Petersburg Declaration importantly linked the specific prohibition to the laws of humanity, thus stamping it with the normative weight of a rule of customary international law.[73] On the one hand, the Declaration referred to the need to 'conciliate the necessities of war with the laws of humanity', which has been referred to as 'terminology reflect[ing] the Faustian pact'.[74] On the other, seeking to '[fix] the technical limits at which the necessities of war ought to yield to the requirements of humanity', the Declaration 'would appear to indicate that there are limits where even military necessity, however great, cannot outweigh the interests of humanity'.[75]

In 1874 the Brussels Conference on the Rules of Military Warfare considered a number of issues of international law and resulted in a Project of an International Declaration concerning the Laws and Customs of War,

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[70] Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles, Saint Petersburg, 29 November/11 December 1868.
[71] See also Hague Convention IV of 1907 that was 'inspired by the desire to diminish the evils of war, as far as military requirements permit'.
[72] Michael L Gross, 'The Deaths of Combatants: Superfluous Injury and Unnecessary Suffering in Contemporary Warfare' in Ohlin et al, *Weighing Lives*, 114-5.
[73] Boothby, *Weapons* (2016) 47 (thus 'asserting the customary status of that rule which would make it binding on all states and on all participants in a conflict').
[74] Charles Garraway, 'The Law Applies, But Which Law? A Consumer Guide to the Laws of War' in Evangelista and Shue, *American Way of Bombing,* 89.
[75] ibid.

known as the Brussels Declaration, which was not ratified and did not enter into force, and *inter alia* included the prohibition of the St Petersburg Declaration.[76] Six years later, in 1880, the Institute of International Law at its Oxford session prepared the Manual of the Laws and Customs of War, known as the Oxford Manual of 1880. Like the 1874 Brussels Declaration, the Oxford Manual was not legally binding;[77] but, as it stated, it aspired to serve as 'the basis for national legislation'. In the preface, the Institute of International Law recognised the importance of laying down 'a positive set of rules' which would serve, among others, to 'keep [soldiers] within the limits of respect due to the rights of humanity', and sought to assist in 'stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable to this end'.[78]

The later 1899 and 1907 Hague Conventions included in their Preamble the so-called Martens clause,[79] which affirmed that belligerents' obligations were not to be exhausted to *lex scripta* and tied the idea of restraint in war to 'the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. The clause arose out of disagreement during the debates at the Conference,[80] and seemed to be the outcome of 'diplomatic manoeuvring designed to overcome political difficulties' rather than 'humanitarian motivations'.[81] While, arguably, this might well have pointed

[76] Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874 (Brussels Declaration). See also the 'General Principles' which among others renounced 'either treachery towards the enemy, or declaring him an outlaw, or the employment of violence and cruelty towards him' and made reference to 'the duties of humanity'; these 'appear at the head of the original project, [but] were not brought forward for discussion, and do not find any place in the modified text' [of the final Brussels Declaration]. The principles themselves, however, had necessarily to be considered in the course of the Conference, as they form the groundwork of several articles of the project', Sir A. Horsford, the delegate on the part of Great Britain to Lord Derby, 'Report on the Proceedings of the Brussels Conference on the Rules of Military Warfare' (4 September 1874) in James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, vol II (William Blackwood and Sons 1884) pp 342-3.
[77] Roberts and Guelff, p 68.
[78] Manual of The Laws of War on Land, Oxford, 9 September 1880.
[79] Hague Convention (II) with Respect to the Laws and Customs of War on Land and Hague Convention (IV) Respecting the Laws and Customs of War on Land respectively.
[80] See Hague Proceedings (1899).
[81] Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 EJIL 187, 216.

to the dwindling fortunes of the clause in terms of its constraining force, it does not detract from the importance of the clause itself (and its inclusion in a treaty text). Not only did the clause recognise customary law as part and parcel of international law, but it also left room for inroads of humanity on positive law, appealing to norms beyond the boundaries of the latter, thus suggesting that appropriate conduct in wartime was also a matter of non-positive law and indeed humanity. While the concept of 'the laws of humanity' has been criticised as 'read[ing] as an oblique reference to human nature – a tacit bow to the natural law tradition',[82] the clause aspired to the import and weight of having 'approached the question of the laws of humanity for the first time not as a *moral* issue but from a *positivist* (or, to put it more accurately, from an *apparently positivist*) perspective'.[83] The Martens clause or versions thereof have made their way in the operative parts of LOAC treaties, such as the denunciation provisions in the 1949 Geneva Conventions,[84] as well as Article1(2) of Additional Protocol I which replaced, among others, the '*laws* of humanity' with '*principles* of humanity'.[85] An 'emasculated version of the clause'[86] is included in the Preamble of Additional Protocol II on non-international armed conflicts, in which reference is made only to 'the principles of humanity and the dictates of the public conscience', while 'recalling' that the human person remains the direct beneficiary of the protections thereof.[87]

The International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* referred to the Martens clause, 'which has proved to be an effective means of addressing the rapid evolution

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[82] Itamar Mann, *Humanity at Sea* (CUP 2016) 220; see also ibid 216 (referring to the Martens clause as '[a] famous example in which an appeal to non-positive law was "codified" in the context of war').

[83] Cassese, 'Martens Clause', 188 (emphasis in original). See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (CUP 2001) 87 ('The Martens clause … plays on the continuing intuition that restraint in warfare is an intrinsic part of European conscience.').

[84] Articles 63/62/142/158 GCI-IV. See also references to "humanity" in Art 108 GCIII; Art 5 (Derogations) GCIV.

[85] It is argued that this semantic change did not seem to indicate any normative difference: Theodor Meron, 'The Martens Clause, Principles of Humanity, and the Dictates of Public Conscience' (2000) 94 AJIL 78.

[86] ibid 81.

[87] Cassese, 'Martens Clause', 209 ('a reference not to the *legal principles* deriving from the laws of humanity …, but to the *principles of morals*').

of military technology'.[88] In this context the Court 'point[ed] to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons',[89] and affirmed that the clause was an 'expression' of customary international law'.[90] The clause has been invoked in relation to means and methods of warfare to support the claim that weapons and tactics that are not forbidden by means of express prohibitions in the law are not to be considered to be implicitly permissible or lawful.[91] However, the 'usefulness' of the clause has been called into question on grounds of practicality and realism by reference to its shortcomings in terms of lack of clarity and ambiguity.[92] In any case, it is worth noting that the clause has provided the buttress for specific prohibitions of weapons, such as the recent Treaty on the Prohibition of Nuclear Weapons, adopted in 2017 by a group of 122 States.[93] It is also interesting to note that the Martens clause, with particular reference to 'the dictates of public conscience' and 'to a lesser extent, 'the principles of humanity',[94] has served as a basis for legal and ethical arguments about autonomous weapons. Referring to the clause as part of the evaluation of weapons under the LOAC in the context of the review of new weapons,[95] Human Rights Watch has claimed that '… fully

[88] *Nuclear Weapons Advisory Opinion*, p 257, para 78. See also e.g. *Prosecutor v Martić* (Decision) IT-95-11-R61 (8 March 1996) para 13 ('… the general principle limiting the means and methods of warfare also derive[s] form the "Martens Clause"' and '… also emanate[s] from the elementary consideration of humanity').
[89] ibid p 260, para 87.
[90] ibid p 259, para 84.
[91] See e.g. Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 37(317) IRRC 125; Meron, 'Martens Clause', 79-80.
[92] See e.g. Reisner, 2010 Bruges Colloquium, p 110 arguing that 'No one would accept a general statement written a long time ago with obvious ambiguity and lack of clarity as a legal basis to say that a certain new technology cannot be used, specifically after billions have been spent on developing it'. But see also Cassese, 'Martens Clause', 187-9, 212 who has pointed out the importance of the clause, taking note of the 'very loosely worded', 'particularly ambiguous', and 'evasive' clause of 'undefinable purport'; Meron, 'Martens Clause', 79 referring to its 'somewhat vague and indeterminate legal content'.
[93] See e.g. UN General Assembly, Treaty on the Prohibition of Nuclear Weapons, Preamble, A/CONF.229/2017/8, 7 July 2017 ('*Reaffirming* that any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience').
[94] Robert Sparrow, 'Ethics as a source of law: The Martens clause and autonomous weapons' (*ICRC Humanitarian Law & Policy Blog*, 14 November 2017) <http://blogs.icrc.org/law-and-policy/2017/11/14/ethics-source-law-martens-clause-autonomous-weapons/>.
[95] Human Rights Watch, 'Losing Humanity: The Case against Killer Robots' 24 -5, citing ICRC, 'A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977' (Geneva, January 2006) p 17.

autonomous weapons would likely contravene the Martens Clause, which prohibits weapons that run counter to the "dictates of public conscience"',[96] and thus 'raise serious concerns under the … clause, which encompasses rules beyond those found in treaties, requires that means of warfare be evaluated according to the "principles of humanity" and the "dictates of public conscience"'.[97]

As Henri Meyrowitz argues, 'at the centre of the different formulations that refer to the concept of humanity is found the idea of human kind' (l'idée de genre humain').[98] Humanity is an abiding element in the law and suggests the human constant. It refers to the human, which is the unquestionable continuity amidst changes *in bello* and offers a compelling argument for restraint.[99]

Humanity in opposition to military necessity

Humanity is largely recognised as a foundational principle of the LOAC and is referred to as 'principle of humanity'. As such, it is thought of as the counterweight to the principle of military necessity. This understanding can be traced to the Age of the Enlightenment, which marked a key shift in the attitude of states as to the conduct of war, with the concept of humanity initially emerging as a force capable of compensating for the failures of military necessity to impose restraint on belligerent behaviour.[100] The LOAC is largely imagined as 'represent[ing] a carefully thought out balance between the principles of military necessity and humanity' where '[e]very one of its rules constitutes a dialectical compromise between these two opposing forces';[101] or as 'the result of an equitable balance between the

[96] ibid 4, 24-6.
[97] ibid 35-6 (36, '… any review of fully autonomous weapons should recognize that for many people these weapons are unacceptable under the principles laid out in the Martens Clause').
[98] Meyrowitz, 'Réflexions', 427.
[99] See Philip Allott, 'International Law and the Idea of History' (1999) 1 J. Hist. Int'l. L. 1, 1 ('Law is a real presence of the social past. International law is a real presence of the human past. Law is an actual potentiality of the social future. International law is an actual potentiality of the human future.').
[100] Michael Howard, 'Constraints on Warfare' in Howard et al, *Laws of War*, 6 ('A consensus was growing that, although war might still be a necessary element in international politics … it should be waged, so far as possible, with humanity.').
[101] Michael N Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50 Va J. Int'l L. 795, 798.

necessities of war and humanitarian requirements';[102] or a legal regime '[e]very single norm [of which] is moulded by a parallelogram of forces: it confronts an inveterate tension between the demands of military necessity and humanitarian considerations, working out a compromise formula', '[w]hile the outlines of the compromise vary from one LOIAC norm to another…'.[103]

In the Thesis, however, it is deemed highly doubtful that humanity in the law can be properly understood in the context of attempts to strike a balance or resolve what seems to be an uneasy arrangement between demands of military necessity and humanitarian considerations, which are conceptualised as antithetical constructions that stand for conflicting interests pulling in opposing directions and 'prompt the law in the same direction' only rarely.[104] Embarking on a balancing, reconciliatory or compromising exercise would in fact prove untenable as it would mean that every time that military action is contemplated humanity would have to be pitted against military necessity and finally succumb to it unless there is a lack of necessity. This is all the more so in view of the persistence of understandings where reducing the adversary to killing in war/armed conflict is deemed presumptively lawful and understood as the basic reality of warfare,[105] and where military imperatives are always prioritised over humanitarian considerations.[106]

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[102] 1987 ICRC Commentary on API I, p 683, para 2206; ICRC, 'What is International Humanitarian Law?' (Advisory Service on International Humanitarian Law, Legal Fact Sheet 2004) (IHL seeks 'a balance between humanitarian concerns and the military requirements of States').

[103] Dinstein, *Conduct*, 16-7 ('While the outlines of the compromise vary from one LOIAC norm to another, it can be categorically stated that no part of LOIAC overlooks military requirements, just as no part of LOIAC loses sight of humanitarian considerations. All segments of this body of law are animated by a pragmatic (as distinct from a purely idealistic) approach to armed conflict.').

[104] Yoram Dinstein, 'Military Necessity', *Max Planck Encyclopedia of Public International Law* (September 2015).

[105] See e.g. Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (OUP 2010) 109-10 ('We have worked too long with a model that assumes that the default position is that you can kill anyone you like in wartime …'); May, 'Humanity', 85 (referring to 'the traditional idea that soldiers' right to life counts for very little') and 104 ('having no right, of any sort, not to be killed'); Blum, 'Dispensable Lives'.

[106] Haque, *Morality*, 38 ('… the rhetoric of balancing [military and humanitarian considerations] often proves empty. When military and humanitarian considerations directly and broadly conflict, military considerations always seem to prevail.').

Military necessity looks at warfare as a military activity that inevitably involves the use of armed violence with the purpose of weakening the adverse party to secure victory. In some approaches, military necessity seeks to restrict violence to what is strictly necessary to advance the cause of war and not otherwise prohibited by the law. As such, it is intended to 'operate[] as an additional level of restraint by prohibiting acts which are not otherwise illegal, as long as they are not necessary for the achievement of legitimate goals';[107] or suggests that '[m]ilitary action is fully permissible legally only if it is *both* militarily necessary and not otherwise in violation of international law. Military necessity cannot override international law and is itself bounded by independent considerations of legality, …'.[108]

Nevertheless, military necessity has remained susceptible to broad interpretations and relaxed understandings of what counts as acceptable goals of war or what counts as militarily necessary or required in war. These in turn not only prevent necessity from being able to play a restrictive role, rendering it instead 'enabling' or 'permissive'[109] and with 'relatively little constraining bite',[110] but also end up eliminating or ignoring humanity altogether. For example, some approaches accommodate considerations of 'military convenience' which would 'justify cost-cutting and quickness as transcendent values on a par with human life',[111] or argue for the killing as many of the adversary as possible rather than rendering them 'hors de combat'[112] or include the avoidance of risk on one's side as a predominant concern. In this latter respect, it is important to keep in mind that '[i]f one believed that states have a right to demand zero risk, there would be no justification for a strict body of jus in bello that was not subordinate to considerations of military necessity'.[113]

[107] Greenwood, 'Historical Development', 38.
[108] Dill and Shue, 'Limiting Killing', 320.
[109] Luban, 'Military Necessity', 315.
[110] Dill and Shue, 'Limiting Killing', 322.
[111] Luban, 'Military Necessity', 342.
[112] See e.g. Ohlin, 'Duty to Capture', 1300 (referring to Lieber code as providing 'the principle of necessity's codified birth').
[113] Gabriella Blum and David Luban, 'Unsatisfying Wars: Degrees of Risk and the Jus ex Bello' (2015) 125 Ethics 751, 754.

In the Thesis the understanding of humanity outside the conceptualisation of a balancing exercise or compromise is an attempt to keep the meaning, content and reach of humanity independent of the contingent content of military necessity. This is particularly important in UAV warfare where the choice of UAVs seems to stand for, as the narrative analysed in chapter 1 suggested, interest-guided behaviour and self-centred considerations of military utility.[114] At the same time, this allows us to approach humanity as a source of duty and obligations, and prohibitions. Thus, the Thesis moves away from the idea that humanity is an expression of idealistic sentiment standing in tension with the dispassionate pragmatism of military considerations, which remain more relevant to coping with the messy and harsh realities of war/armed conflict, and which thus sidestep humanity as illusionary or utopian or as carrying possible pernicious effects by jeopardising the existence of war itself and adherence to the law.[115] For Yoram Dinstein

> Humanity is not an obligation (or a set of obligations) incorporated per se in positive IHL. There is no overarching, binding, norm of humanity that tells us what we must do (or not do) in wartime. What we actually encounter are humanitarian considerations, which pave the road to the creation of legal norms and thus explain the evolution of IHL. While impacting on the law, these considerations do not by themselves amount to law: they are meta-juridical in nature.
>
> Considerations of humanity are inspiring and instrumental, yet they are no more than considerations. And they do not monopolize the field. If benevolent humanitarianism were the only factor to be weighed in hostilities, war would have entailed no bloodshed, no human suffering and no destruction of property; in short, war would not be war.[116]

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[114] See e.g. Vattel, Law of Nations, book III, §173.

[115] See e.g. Schmitt, 'Military Necessity', 837 ('… if humanitarianism reigned supreme, war would not exist. Since the tragic reality is that war does, states must be reasonably free to conduct their military operations effectively.').

[116] Yoram Dinstein, 'The Principle of Proportionality' in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a 'Principle of Humanity' in International Humanitarian Law* (CUP 2012) 73. See also ICJ, *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22 ('… certain general and well-recognized principles, namely: elementary considerations of humanity, …"); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14, 112; *Nuclear Weapons Advisory Opinion*, p 257. See also ICTY, e.g. *Prosecutor v Kupreškić et al* (Judgement) IT-95-16-T (14

The Thesis is in agreement with Henri Meyrowitz who eschews the notion of humanity as traditionally understood in doctrine as 'principle of humanity' confined to 'the meaning of an inspiring general principle of the law of war' ('le sens d'idée inspiratrice générale du droit de la guerre'), often cited in association with, but in opposition to the principle of necessity,[117] and reflecting neither the spirit of the Martens clause nor any higher principles.

Conduct towards the human adversary

Humanity encapsulates the normative expectations that the status or standing of the human adversary sets limits to the way one is to conduct hostilities. The crucial question then is how the LOAC as an 'other-directed' normative regime addresses such expectations and translates them into rules which seek to restrict violence by limiting the choice of means and methods of warfare.

In the LOAC humanity, as a legal as much as an ethical imperative, is manifested in the rules that speak to the concern for the heavy consequences that war/armed conflict entails for the human individuals who carry out the armed confrontation and face the grave danger of injury, suffering and death in the context of a contest between collective entities. It provides the basis for advancing claims to humanitarian protection and treatment, and for imposing minimal duties owed to the military adversary qua human, by virtue of the inherent human dignity of opponents while they are actively engaged in hostilities. Appealing to the adversary's dignity as human, the LOAC in the rules that pertain to the choice of means and methods of warfare[118] is concerned about the two main aspects of human dignity, the

January 2000) paras 524-5 ('… [the "elementary considerations of humanity"] are illustrative of a general principle of international law'); *Martić* (1996) para 13 ('… the elementary considerations of humanity which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts').

[117] Meyrowitz, Réflexions', 427.

[118] See 1987 ICRC Commentary on API (Art 35) p 392, para 1388, asserting that 'the negation of this principle is incompatible with the preservation of civilisation and humanity, and this is in fact the real issue'. This affirmation resonates closely with Sir Hersch Lauterpacht's famous reference to 'more compelling considerations of humanity, of the survival of

one relating to life and existence, and the other relating to dignified life and dignified existence.[119] This is also captured by Larry May, who observes 'there are at least two major dignity considerations that would seem to apply to armed conflict. The first is how a soldier is treated in terms of his or her suffering', while 'the second aspect of the dignity of soldiers concerns how the right to life is regarded'.[120]

With respect to suffering, May argues that soldiers have 'the right to be treated humanely – where a soldier is not supposed to be subjected to unnecessary or overly severe treatment',[121] and that 'the rules or laws of war have addressed this directly with what [he] consider[s] to be proper restraints on tactics and weapons used during war'.[122] However, for May this does not seem to be the case with respect to the right to life. This is because, as he claims, it is 'generally acknowledged that in many situations soldiers can be killed without violating their rights'[123] and 'traditionally a soldier in armed conflict is thought to have a much more heightened right not to suffer than a right to life'.[124] With that in mind, May argues 'that the notion of humanitarian rights should extend beyond what is called for from the concern that people are humanely treated, in the narrow sense of not suffering unnecessarily'.[125] That is, 'humanitarian rights of soldiers should be expanded from the traditional model of understanding humanitarian law',[126] where 'soldiers' right to life counts for very little' and that 'a minimum of dignity should be afforded to [humans] who occupy the role of soldier'.[127] For May,

> recognizing the right of soldiers not to be killed unnecessarily is one of the best ways to respect the dignity of soldiers. It is not sufficient that soldiers be

civilization, and of the sanctity of the individual human being' which also shape the law on the conduct of hostilities', Lauterpacht, 'Problems of Revision', 379.

[119] As such, it captures the two notions of 'life' in Greek, namely *zoe* (ζωή) that refers to life in a biological sense and *bios* (βίος) that refers to life as a way of life and presupposes biological existence.

[120] May, 'Humanity', 83.

[121] ibid 82.

[122] ibid.

[123] ibid.

[124] ibid 83

[125] ibid.

[126] ibid 85.

[127] ibid; and also ibid 77.

> recognized as having the right not to be made to suffer unnecessarily, which is the traditional way to understand the humanitarian rights of soldiers. This is not sufficient, given the vulnerabilities that soldiers face …[128]

And such vulnerabilities are both to suffering and to being killed, that is, to death. Vulnerability is central to Larry May's articulation of the scope of soldiers' 'humanitarian rights', arguing that '[h]umane treatment is a duty when humans have rendered other humans vulnerable'.[129] It is the factor that determines 'what is morally required' and shapes the circumstances where compassion and mercy as a matter of humaneness is transformed from what is 'simply a matter of charity, in most situations'[130] to 'a duty, the violation of which counts as a war crime, only in special circumstances of vulnerability'.[131] As May claims, special circumstances or such a special status of vulnerability are created in 'the most obvious case [that] concerns confinement' and 'the less obvious cases [that] concern other statuses that a person has been thrust into, such as the vulnerable status of not having a weapon at all when others do, or of not having a certain type of weapon when others do'.[132] Interestingly, for May the moral equality of soldiers 'turns on this issue of soldiers' heightened status as vulnerable to both suffering and death due to the nature of their role'.[133]

On the issue of injury and/or suffering of opponents, this Thesis agrees with Larry May that this is directly addressed by the LOAC through restraints on weapons and tactics. Indeed, the principle which prohibits the use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is well-established both in customary and treaty law. However, the Thesis approaches humanity as expressed in the protective role that the law can play in safeguarding the human adversary's reasonable chance to survive. This is of most relevance to the Thesis which focuses on

[128] ibid 108.
[129] May, *War Crimes*, 89.
[130] ibid 71.
[131] ibid 73.
[132] ibid.
[133] May, 'Humanity', 109.

UAV warfare where adversary is placed in a violent environment of extreme vulnerability.

Humanity is entrenched in the LOAC. It is not an abstract idea that relates more to a utopian and idealistic sentiment that fails to understand the pragmatism or is in denial of the reality of armed conflict. Humanity infuses prohibitory and protective force into the law, and thus it is to be thought of as part of independent considerations of legality and of 'l'action régulatrice exercée par le droit de la guerre, action qui consiste dans la limitation quantitative and qualitative de la violence'.[134] As such, humanity can ground rules for the conduct of hostilities, including those that aim at limiting lethality as the effect of means and methods of warfare and killing between opponents. As such, it is to be found in one of the most significant efforts to 'humanise' and 'regulate' warfare by reducing harm, minimising suffering and prohibiting inevitable death for those who practise warfare. As mentioned, this is the principle that prohibits the use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, which was first enshrined in the St Petersburg Declaration of 1868, was later restated at the Hague Peace Conferences in 1899 and 1907, and reaffirmed almost a century later at the 1974-77 Diplomatic Conference and in Additional Protocol I to the four 1949 Geneva Conventions. Furthermore, it can be found in the prohibition of attacks against persons *hors de combat* and the routes that lead to *hors de combat* status and render the human adversary immune from direct attack, creating a sphere of protection for individual opponents found in situations of vulnerability in the midst of conflict. Moreover, it can be found in the prohibition of the denial of quarter, which prohibits to conduct hostilities on the basis of a no survivors (or no-quarter) policy or threaten that there shall be no survivors, and militates against annihilating or exterminatory violence against the adversary.

[134] Meyrowitz, 'Réflexions', 428 (trans: 'the regulatory action exercised by the law of war, action that consists of the quantitative and qualitative limitation of violence').

The common thread among these rules is that they form part of customary law[135] and that they all reflect the deep reservations of the law about the use of means and methods of warfare that enable violence in the course of hostilities between opposing forces of such a nature, degree and/or extent and in such a way that denies the human adversary a reasonable chance to survive. Indeed, they capture how the law can safeguard human dignity at the fundamental level of existence and as such, as the Thesis argues in subsequent chapters, they constitute the three fundamental prohibitions in which the challenges that UAVs pose to the LOAC most starkly manifest themselves. As technology evolves and 'the transformation of humans by technology accompanied by the implosion of technology and the human'[136] is at work, the legal and ethical challenge is to try to ensure the ethical standing that the LOAC acknowledges to adversaries by virtue of humanity. With that in mind, it is important to reflect on Henri Meyrowitz's words,

> la nécessite humaine. Autrement dit, la nécessite du droit. Référentiel que ne nie aucunement les impératifs légitimes de la nécessite militaire, mais qui veille aussi à ce que cette nécessite militaire ne se laisse pas imposer ses impératifs par les possibilités illimites de la technique, et qui rappelle qu'il ne faut pas confondre nécessite militaire et hybris technico-militaire.[137]

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[135] See e.g. Report of the Secretary-General pursuant to Paragraph 2 of Security Council resolution 808 (1993) UN Doc S/25704, para 35 ('The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; 3/ the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; …'); ICRC IHL Customary Law Study.

[136] Douglas Kellner, 'The Ideology of High-Tech/Postmodern War vs. the Reality of Messy Wars', Preface to Aki Huhtinen and Jari Rantapelkonen, *Messy Wars* (Finn Lectura 2008) 17. See also 1987 ICRC Commentary on API (Art 36) (asserting that '… all predictions agree that if man does not master technology, but allows it to master him, he will be destroyed by technology').

[137] Meyrowitz, 'Bombardement Stratégique', 66 (trans: '… the human necessity. Put differently, the necessity of the law. Point of reference that in no way denies the legitimate imperatives of military necessity, but which also makes sure that this military necessity does not let itself impose its imperatives through the unlimited possibilities of the technique, and which recalls that we must not confound military necessity and technico-military hubris.').

3.3 CONCLUSION

Understanding the LOAC as an 'other-directed' normative regime is necessary for framing issues of compliance with the LOAC regarding the legal and ethical constraints it imposes through its rules on the conduct of hostilities. The chapter demonstrated that the law recognises the ethical standing of adversary as human and establishes duties and obligations that are orientated towards the protection of the human adversary. Humanity does not negate the adversarial/hostile relationship between opponents in an armed confrontation but expresses the normative expectation for behaviour that respects the dignity of the adversary in the context of a human armed interaction defined by mutual danger and vulnerability. In UAV warfare the question is whether it is possible for the human individual-target of UAV attack ever to obtain the normative status of human adversary, which entitles them to the law's protections. The importance of the analysis of this chapter lies in that it brought to the forefront an understanding of the LOAC that allows the Thesis to examine whether in the model of violence introduced by UAVs humanity can play a meaningful role and is able to extricate the 'other', namely the adversary, from their 'Otherness'. Put differently, the question is whether humanity in UAV warfare can open up the world of ethical possibilities envisaged in the LOAC, which prohibits the use of means and methods of a nature to render death inevitable, which carves out a basis for immunity from direct attack in the context of *hors de combat* protection linked to the vulnerability of the adversary, and which prohibits the conduct of hostilities on a 'no survivors' basis.

CHAPTER 4

HOW UAVs CHALLENGE THE PROTECTION FROM INEVITABLE DEATH

Taking into consideration the analysis of chapter 2 and chapter 3, the present chapter examines how the use of UAVs challenges the principle which prohibits superfluous injury and unnecessary suffering. The chapter begins by suggesting that UAVs are to be thought of as tools of warfare designed, developed and employed to strike targeted individuals and render their death inevitable. By turning to the United States' approach to UAVs in relation to the obligation of legal review of new weapons under the LOAC, the chapter looks at the difficulties encountered in treating UAVs as a weapon of war, and hence of relevance to the prohibition of superfluous injury and unnecessary suffering. Focusing on the rationale of the 'inevitability of death' as part of the principle prohibiting superfluous injury/unnecessary suffering, the chapter aims at demonstrating that, by leaving no chance of survival for the adversary, UAVs challenge the principle of superfluous injury/unnecessary suffering. To this end, the chapter addresses the absence of an express reference to death or loss of life in Article 35(2) of Additional Protocol I (API). In doing so, it traces the development of the principle that prohibits superfluous injury and unnecessary suffering through historical-legal sources and follows the changes that the principle underwent in terms of its formulation until its most recent codification in Article 35(2) API, while taking note of its symbiosis with concerns attendant to the development of weapon technologies.

4.1 UAVs AS A TOOL OF WARFARE OF A NATURE TO CAUSE INEVITABLE DEATH

For the purposes of the principle prohibiting to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, as included in Article 35(2) API, the chapter (and

the Thesis) approaches armed UAVs or drones as a means of warfare, a weapons technology designed and developed to be employed to track, locate and strike targeted individuals, blending intelligence, reconnaissance and surveillance (IRS) capabilities with target acquisition and attack capabilities. Means of warfare refer to the weapons used in hostilities,[1] the tools or instruments of war,[2] integrating 'offensive capability' to be applied against enemy combatants,[3] and 'consist of all weapons, weapons platforms and associated equipment used directly to deliver force during hostilities',[4] while methods of warfare denote 'the ways in which' weapons are used in hostilities.[5]

As the United States (US) has been the dominant user of armed UAVs and has most actively undertaken real-world UAV targeting, it is useful to have a look at the US drone practice and the 'ways' and/or 'categories of operations' in which drones have been employed.

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[1] 1987 ICRC Commentary on API (Art 35) p 398, para 1402 (methods and means are defined to 'include weapons in the widest sense, as well as the way in which they are used'); para 1957 (the term 'means of combat' or 'means of warfare' generally refers to the weapons being used, while the expression 'methods of combat' generally refers to the way in which such weapons are used'); William H Boothby, *The Law of Targeting* (OUP 2012) 256 ('So, methods and means of warfare mean, respectively, tactics, whether lawful or unlawful, and weapons types and usage' (citing McCoubrey H, *International Humanitarian Law* (2nd edn, Ashgate 1998) 211 clarifying the notion of methods of warfare as relating to 'the conduct of military operations, including such matters as deception and the distinction between legitimate ruses of war and unlawful perfidy, forbidden practices such as Orders of "No Quarter", and practices of bombardment, including in particular bans on indiscriminate bombardment.').

[2] Boothby, *Weapons* (2016) 1 (referring to weapons as 'tools of warfare, of killing, maiming, and destruction'; ICRC Guide to Legal Review (2006) p 3, n 1 ('The 'terms "means and methods of warfare" designate the tools of war and the ways in which they are used.'). See also HPCR Manual, Rule 1(t): '"Means of warfare" mean weapons, weapon systems or platforms employed for the purposes of attack'.

[3] Justin McClelland, 'The Review of Weapons in accordance with Article 36 of Additional Protocol I' (2003) 85(850) IRRC 404, 404 ('… connotes an offensive capability that can be applied to a military object or enemy combatant').

[4] William H Boothby, 'Methods and Means of Cyber Warfare' (2013) 89 Int'l L. Stud. 387, 387; Boothby, *Targeting*, 256 ('Frequently, that military operation will consist quite simply of killing or injuring the enemy's armed forces personnel or damaging or destroying military objectives. The term weapon does, however, include for our purposes other platforms and equipment which may not of themselves cause injury or damage to anyone or anything, but which form part of the system for inflicting those effects.').

[5] See n 2. According to the HPCR Manual, Rule 1(v): '"Methods of warfare" mean attacks and other activities designed to adversely affect the enemy's military operations or military capacity, as distinct from the means of warfare used during military operations, such as weapons'. In military terms, methods of warfare consist of the various general categories of operations, such as bombing, as well as the specific tactics used for attack, such as high altitude bombing'.

The UAVs that have featured prominently in the US arsenal are the (iconic but now officially retired from the US Air Force inventory)[6] MQ-1B Predator, which 'ushered in a new era of unmanned air warfare – most notably the ability to rain down precision death',[7] and the MQ-9A Reaper, the two most famous representatives of drone technology. The MQ-1B Predator's primary function is 'armed reconnaissance, airborne surveillance, and target acquisition'.[8] It is equipped with two Air-to-Ground Missile (AGM)-114 Hellfire missiles, flies at approximately up to 135 miles per hour and is 'used in typical twenty-four-hour missions'.[9] The MQ-9A Reaper's primary function is to 'find, fix, and finish targets'.[10] It is much larger in size, with a loitering capability of thirty hours, and capable of carrying and firing heavier ordnance. The lethal ordnance it carries is more varied and can amount up to 230 kg, consisting of four AGM-114 Hellfire missiles or a combination of Hellfire missiles, laser-guided Guided Bomb Unit (GBU)-12 Paveway II munitions, and GBU-38 Joint Direct Attack Munition (JDAM).[11] Moreover, the sophistication of the offensive capabilities of UAVs enables the use of lethal force in different types of attack categorised by Michael Schmitt as follows: '"deliberate targeting," that is, preplanned attacks on fixed targets …';[12] '"time sensitive" attack [that] refers to a situation in which a target must be struck in less time than available in the normal targeting cycle (typically

[6] To mark the occasion the Air Force held 'an official retirement ceremony at Creech AFB, Nev., the headquarters of Air Force remotely piloted aircraft operations', see e.g. Brian Everstine, 'USAF's Predator Set to End Its Era at Creech' (*Air Force Magazine*, 9 March 2018) <www.airforcemag.com/Features/Pages/2018/March%202018/USAFs-Predator-Set-to-End-Its-Era-at-Creech.aspx>. The MQ-1's retirement also had a dedicated hashtag on Twitter: #MQ1SunSet.

[7] Tyler Rogoway, 'USAF Officially Retires MQ-1 Predator While MQ-9 Reaper Set To Gain Air-To-Air Missiles' (*The Drive*, 9 March 2018) (noting that '[t]he decision to pull the Predator fleet is a previously preempted and controversial one, but its legacy is secured in the form of its super-sized cousin, the MQ-9 Reaper, an aircraft that will become the backbone of USAF drone operations') <www.thedrive.com/the-war-zone/19122/usaf-officially-retires-mq-1-predator-while-mq-9-reaper-set-to-gain-air-to-air-missiles>.

[8] <www.af.mil/About-Us/Fact-Sheets/Display/Article/104469/mq-1b-predator/>.

[9] Schmitt, 'Benighted Debate', 598-9.

[10] <www.af.mil/About-Us/Fact-Sheets/Display/Article/104470/mq-9-reaper/>.

[11] ibid; Schmitt, 'Benighted Debate', 599 ('Its weapons options give the Reaper greater flexibility than the Predator when engaging targets. For instance, the Paveway can be used when a high degree of accuracy is required and the JDAM results in a greater blast effect than a Hellfire.').

[12] Schmitt, 'Benighted Debate', 600.

forty-eight hours) …';[13] and '"target of opportunity" attack [that] usually involves a situation in which the operations center identifies a target based on real time imagery from a UCAS or other airborne platform or ground forces'.[14]

While initially developed for IRS missions,[15] the drone became the emblem of targeted killing. The original spy platform was later equipped with the purposefully developed anti-personnel version of the original anti-armour Hellfire missiles to be adjusted, with its 'enhanced effects radius', to the intended use of the drone,[16] namely to strike individuals in targeted killing operations[17] and 'undertake dull, dirty and dangerous' missions.[18] '"The Reaper represents a significant evolution in UAV technology and employment,"' a US Air Force general noted, adding that '"We've moved from using UAVs primarily in intelligence, surveillance, and reconnaissance roles before Operation Iraqi Freedom, to a true hunter-killer role with the Reaper"' – a name that was chosen because of the fact that '"[i]t's fitting as it captures the lethal nature of this new weapon system"'.[19] At this point, it is useful to recall Markus Gunneflo's account of the emergence and development of the Predator Drone in the context the United States as 'a new tool for targeted killing',[20] providing 'a technological solution to the problems that the Clinton

[13] ibid 601.
[14] ibid.
[15] See e.g. Richard Whittle, *Predator: The Secret Origins of the Drone Revolution* (Henry Holt and Company 2014) 194.
[16] Schmitt, 'Benighted Debate', 599 ('Originally designed for antivehicle attacks, the Hellfire has a very limited effects radius since its explosive force is designed to penetrate forward into the target it is attacking. This factor hindered its use against individuals, who often escaped harm when located only a short distance from the point of impact. In response, an anti-personnel version of the weapon is now available with enhanced effects radius.').
[17] National Commission on Terrorist Attacks upon the United States, 'The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States' (Official Government Edition) pp 189-90, 210-1 <https://fas.org/irp/offdocs/911comm.html>.
[18] US DoD, 'Unmanned Aircraft System Roadmap 2007-2032' (10 December 2007) p 19 <www.hsdl.org/?abstract&did=481851>.
[19] General T Michael Moseley, quoted in Air Force Print News, 'Reaper' Moniker Given to MQ-9 Unmanned Aerial Vehicle (*US Air Force*, 14 September 2006) <www.af.mil/News/Article-Display/Article/129780/reaper-moniker-given-to-mq-9-unmanned-aerial-vehicle/>. See also Kurt Volker, 'We Need a Rule Book for Drones' (*The Washington Post*, 26 October 2012) ('U.S. reliance on drone strikes allows our opponents to cast our country as a distant, high-tech, amoral purveyor of death') <www.washingtonpost.com/opinions/we-need-a-rule-book-for-drones/2012/10/26/957312ae-1f8d-11e2-9cd5-b55c38388962_story.html?noredirect=on&utm_term=.92d7b283476d>.
[20] Gunneflo, *Targeted Killing*, 163.

administration faced when they were attempting to kill Osama bin Laden in the late 1990s by means of cruise missiles'.[21] Taking note of the 'purpose-made Hellfire missiles' attached to the drone,[22] Gunneflo underscores the 'merging of the efforts of arming the predator and killing bin Laden' and 'additional worthwhile targets, such as other al-Qaeda leaders'.[23] This importantly reveals the remarkable confluence of the development of a weapons technology, the use into which it is intended to be put and the effects it was designed to produce.

As has been claimed, '[d]rones should be treated as a distinct class of weapons. They have unique properties that lead them to be used, and defended against …'.[24] What makes UAVs distinct and distinctive weapons are the inherent advantages accrued from the 'unmanning' of the weapon; that is, the persistence over targets in defiance of the limitations of human physiology and endurance, unmatched reaction and responsiveness to targets enabled by a 'fast-reaction strike system designed to hit targets within 5 min. of their being detected',[25] and possibly real-time targeting in the near future within seconds from identification,[26] the offensive and aggressive lethal violence inflicted by striking enemy targets who 'never hear[] the missile that kills [them]', 'hurtling at them … at hundreds of miles an hour',[27] and with missiles like 'the AGM-114 Hellfire fired by the Predator

[21] ibid 175; and also ibid 176.
[22] ibid 165.
[23] ibid.
[24] Micah Zenko and Sarah Kreps, 'Limiting Armed Drone Proliferation', Council Special Report No 69 June 2014 (Council on Foreign Relations 2014) p 8 (and p 9); US Air Force, 'Unmanned Aircraft Systems Flight Plan 2009-2047' (18 May 2009); Beard, 'Virtual', 414 ('Drones —now not only perform persistent surveillance to identify and track targets—on missions that may exceed the limited endurance and skills of human pilots—but also constitute lethal weapons platforms with a continuous presence, enabling attacks on more targets in more situations than ever before.').
[25] David A Fulghum, 'More UAVs Shift to Afghan Duty' (2001) 155 Aviation Week and Space Technology 28, 44. Also Barton Gellman, 'A Strategy's Cautious Evolution' (*The Washington Post*, 20 January 2002) ('… "the holy grail" of a three-year quest by the U.S. government – a tool that could kill bin Laden within minutes of finding him') www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060900885.html?noredirect=on>.
[26] Julian C Cheater, 'Accelerating the Kill Chain via Future – Unmanned Aircraft' (Blue Horizons Paper, Center for Strategy and Technology, Air War College, April 2007) 6 <www.au.af.mil/au/awc/awcgate/cst/bh_cheater.pdf>.
[27] David Rohde, 'The Drone War' (*Reuters*, 26 January 2012) <www.reuters.com/article/us-david-rohde-drone-wars-idUSTRE80P11I20120126> and Gusterson, *Drone*, 46 respectively.

drone [that] has a "kill zone" of 15 meters—which means that all those who happen to be within a radius of 15 meters around the point of impact, even if they are not the designated target, will die together with the target'.[28]

UAVs are weapons of war designed and developed to deliver unilateral overwhelming lethal force against individual targets in an absolute and catastrophic way that renders their death inevitable. The legally and ethically problematic nature of UAVs and the way it inflicts lethal force to the adversary seems to have been most boldly captured in the following understandings. As Paul Kahn put it, 'gone is an idea of combat as reciprocal risk. The drone is the technological equivalent of the assassin; it does the assassin's work but without the risk of personal presence'.[29] Grégoire Chamayou has described the 'killing by drones' as 'crushing the enemy without ever risking one's own skin'[30] or 'dronized homicide',[31] whereby '[w]ar degenerates into a putting-to-death. This is the situation introduced by the exclusive use of drones in asymmetrical warfare'.[32]

As Article 35(2) API indicates, the injury or suffering that the law prohibits is tied up with the 'nature' of the weapons and tactics employed, which bears on the effects ensued from the use thereof related to the design of the weapon and its intended purpose.[33] Arguably, in this way, the Protocol emphasises 'the objective character of the armament, and not … the subjective intention of whoever is using it',[34] by opting for 'a less subjective expression than that contained in the 1907 translation' of the Hague counterpart,[35] 'that is, calculated to cause'. As the 1987 ICRC Commentary asserts, Article 35(2) API 'lays down a prohibition relating to the results produced, though not directly a prohibition on the means'.[36] The lawfulness of the weapon turns on its

[28] Chamayou, *Theory*, 141-2.
[29] Kahn, 'Imaging Warfare', 200.
[30] Chamayou, *Theory*, 99.
[31] ibid 104.
[32] ibid 162.
[33] See ICRC Guide to Legal Review (2006).
[34] Dinstein, *Conduct*, 74 (citing Hans Blix, 'Means and Methods of Combat' in *International Dimensions of Humanitarian Law* (Geneva: UNESCO, 1988) at 135, 138).
[35] Roberts and Guelff, p 77, n 3. See also Bothe et al, *Commentary*, 195; 1987 ICRC Commentary on API (Art 35) pp 406-7, para 1426.
[36] 1987 ICRC Commentary on API (Art 35) p 409, para 1430.

nature as defining of the effects of its 'normal or expected use',[37] namely the effects of the use of a weapon in the sense of 'what invariably happens when it is used'.[38] According to William Boothby, '[t]he customary principle is … linked to the consequences that will inevitably follow from the employment of the weapon, being consequences which will usually have been intended when the weapon was being developed'.[39] Considering that the inevitable death of the target is both the intended consequence of the development of UAVs and the ineluctable consequence of their intended (normal or expected or typical) use, namely the targeting of individuals for death, UAVs are to be deemed 'of a nature' to inflict 'inevitable death'. As such, the chapter argues, their lawfulness is cast into doubt vis-à-vis the principle prohibiting the use of means and methods of warfare of a nature to cause of 'superfluous injury or unnecessary suffering' and the inevitability of death poses the strongest case for challenging UAVs against it.

United States and legal review of UAVs

Whether UAVs qualify as weapons or means of warfare for the purposes of the LOAC and the principle of superfluous injury/unnecessary suffering under consideration has been less straightforward than the UAV weapon technology would itself suggest. This is not only a theoretical matter, but also, importantly, one with practical implications. Indeed, the logic of classifying UAVs as weapons of war as such, in and of themselves, in order to evaluate their lawfulness under the LOAC has been challenged by the United States. This was manifested in the way in which the US approached the obligation for the legal review of the armed Predator MQ-1 and MQ-9, including the determination both of the need for the legal review of the drone as a 'new

[37] ibid p 424, para 1469 ('… analyse whether the employment of a weapon for its normal or expected use would be prohibited under some or all circumstances. A State is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited.'). But see Conference of Government Experts on the Use of Certain Conventional Weapons (Lucerne, 24.9–18.10.1974): Report (ICRC, Geneva 1975) pp 9-10, para 28 (distinguishing between ''inevitably' cause unnecessary suffering or are of a nature to cause unnecessary suffering, on the one hand; or because they 'normally or typically' do so, on the other').
[38] Boothby, *Weapons* (2016) 49.
[39] ibid.

weapon, means and method of warfare' under Article 36 API,[40] and of whether UAVs cause 'superfluous injury or unnecessary suffering' under Article 35(2) API, which is also part of the legal review test.[41] As became evident, the lawfulness of UAVs was situated in the fault lines of the categorisation of drones as a platform or a weapon/weapon system. An illustration of this is exemplified by the approach of the US Navy Judge Advocate General's Office (JAG) and of the US Air Force. In this respect, Commander John Canning claimed in his report that 'the determination of the need for a specific armed UXV to undergo a legal review may be somewhat arbitrary'.[42]

With respect to the JAG Office, '"Under the accepted Navy JAG definition of what constitutes a weapon or weapon system, 'platforms' such as aircraft and ships are not themselves 'weapons or weapon systems'"'.[43] This means that UAVs are 'platforms' and not 'weapons', thus circumventing the need for legal review[44] while rendering redundant an evaluation of whether they cause superfluous injury/unnecessary suffering, both relevant to 'weapons'. It further suggests that, even in the case of legal review, the drone is not appreciated for what it is as an ensemble, but rather reduced to the sum of its parts; that is, 'platforms' that casually deploy missiles like manned and conventional aircrafts. The paradox (and problem) in this approach is that the weaponised UAVs like the Predator and the Reaper end up being categorised and evaluated by reference to the initial IRS unarmed version of

[40] Art 36 API entitled 'New Weapons' reads as follows: 'In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party'.

[41] 1987 ICRC Commentary on API (Art 36), p 423, para 1466 ('… it is only in Article 36 that the Protocol establishes a link between its provisions, including those laid down in Article 35 '(Basic rules)' and the introduction of a new weapon by States.'); ibid pp 421-2, para 1463 ('There was a need for a link between the principles laid down in Article 35 '(Basic rules)' and the concrete prohibitions or the effective restrictions on arms which cause superfluous injury or unnecessary suffering, or have indiscriminate effects.').

[42] John S Canning, 'A Definitive Work on Factors Impacting the Arming of Unmanned Vehicles' (May 2005) (US Navy) p 19 <www.dtic.mil/dtic/tr/fulltext/u2/a436214.pdf>.

[43] ibid p 20 (quoting '[e]-mailed remarks from Major G. William (Bill) Riggs, United States Marine Corps (USMC), of the Navy's JAG Office (International and Operational Law Division) on this topic').

[44] ibid p 19.

the armed UAV and hence independently of the missiles and munitions attached to the platform. This is also reflected in the approach taken by the US Air Force, where the weaponised Predator was subjected to legal review not as a 'weapon' but as an 'aircraft'. This meant that, although the review was not required,[45] according to the Air Force, it was undertaken in a bid to '"address[] international law considerations, to include the law of war, associated with employment of the subject *aircraft*' as '"deployment of weapons from unmanned aerial vehicles is a new initiative for the U.S. Air Force …"'.[46] In this way, the issues linked with the deployment of armed UAVs as such, as a whole, were not addressed. Furthermore, according to the US Navy JAG Office, UAVs do not qualify for classification as a 'weapon system' either,[47] because this would require that 'the AI, the weapon and platform they are delivered on … be so integrated as a whole'.[48] The JAG conceded that the categorisation of the range of UAVs was neither easy nor clear-cut: '"We'll have to look at each UAV as the technology is: a) still emerging; b) will/may differ from system to system"'.[49] However, as Commander Canning explains, in contrast to 'more autonomous UAVs that have an AI capability',[50] '[i]n the case of the armed Predator, it is a tele-operated vehicle with weapons on it, not an integrated-weapon system, so no review was really required, even though one was done'.[51]

The approach identified above seems to be devised to bypass questions concerning the lawfulness and permissibility of UAVs as weapons or weapon systems *proper* under the LOAC, including the prohibition of superfluous injury/injury suffering. Leading robotics expert Noel Sharkey expressly referred to the US approach as a source of concern in relation to both existing

[45] ibid p 19 ('… the governing Air Force Instruction, "…excludes aircraft from the definition of 'weapon,' …).
[46] ibid pp 19-20.
[47] ibid p 19.
[48] ibid p 20.
[49] ibid.
[50] ibid p 19.
[51] ibid (adding that '[f]or fully-autonomous armed vehicles, it seems fairly clear that they will likely require a legal weapons review' and cautioning that [t]here is a large gray-area, however, concerning the need for a legal review of armed, semi-autonomous vehicles, and where the line gets drawn may be somewhat arbitrary').

armed UAVs and autonomous weapons with a view to underscoring how the future of weapons is foreshadowed. Sharkey observed that

> Another concern is the question of what constitutes a new weapon. Take the case of the Predator UCAV [i.e. Unmanned Combat Air Vehicle]. It was first passed for surveillance missions. Then, when it was armed with Hellfire missiles, the Judge Advocate General's office said that because both Predators and Hellfires had previously been passed, their combination did not need to be. Thus, if we have a previously used autonomous robot and a previously used weapon, it may be possible to combine them without further permission.[52]

It is important to note that this concern is not shared by the academic legal literature in which the question of whether UAVs constitute lawful means and/or method of warfare for the purposes of the LOAC and the principle of superfluous injury/unnecessary suffering is largely considered a non-issue. When the issue is touched upon, it is resolved rather swiftly along the following lines.

Firstly, it is argued that UAVs are not specifically prohibited as such by an international treaty or agreement.[53] This is true, but, as discussed in chapters 1 and 3, hardly an argument that can convincingly disperse doubts about the lawfulness of the use of weapons and tactics with respect to the principle prohibiting superfluous injury or unnecessary suffering.

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[52] Noel Sharkey, 'Killing Made Easy: From Joysticks to Politics' in Patrick Lin, Keith Abney, George A Bekey (eds), *Robot Ethics: The Ethical and Social Implications of Robotics* (MIT Press 2012) 119 (citing John Canning, G W Riggs, O T Holland, and C J Blakelock, 2004. A concept for the operation of armed autonomous systems on the battlefield. Paper presented at the Association for Unmanned Vehicle Systems International conference, Anaheim, CA, August 17) [also in Noel Sharkey, 'Cassandra or False Prophet of Doom: AI robots and war' (July/August 2008) 23 IEEE Intelligent Systems 14, 17; Liu, 'Categorization', 640 ('While this type of reasoning may be appropriate for the legal review of other combinations of weapons and weapons systems, applying such an approach to both autonomous and remote weapons systems fails to recognize the potential for radical transformation in the conduct of armed hostilities raised in this specific context') and ibid n 60 ('… because the Predator is strictly a remote weapons system, combining the review may not be problematic since it may not significantly alter the means and methods of warfare that previously passed the legal review test. By contrast, autonomous weapons systems may significantly alter the legality review.').

[53] Boothby, *Weapons* (2016) 246 ('There is no ad hoc treaty or customary weapons law rule that prohibits or restricts the use of remotely controlled platforms for undertaking attacks.'). William H Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors* (Springer 2014) 101 ('… the law of armed conflict contains no specific treaty or customary law provision either prohibiting or restricting the circumstances in which RPA [i.e. Remotely Piloted Aircraft] technology may be used in attack').

Secondly, the legal (and ethical) concerns relating to unmanned weapon technology as a means or method of warfare are dismissed on the basis of the main arguments that buttress the 'technological' narrative, which was critically discussed and unravelled in chapter 1. It is worth recalling that this narrative suggests that the drone is just another weapon combining aircraft and missile technology.[54] Analysed into their constituent parts, UAVs are regarded essentially as nothing more than a (smaller or larger) airborne surveillance platform that has been retrofitted with missiles and other munitions. In other words, UAVs do not differ from other aircrafts armed with munitions. By downplaying the distinctiveness of UAVs and drawing similarities with other existing permissible (even if not incontrovertibly lawful or ethical) conventional weapons technologies, this line of argument results in failing to evaluate UAVs for what they are as a whole in terms of their normal and expected use, the purpose they have been designed and developed to serve and the effects they invariably produce. As the unmanned platform is conceptually separated from the missiles attached thereto, the drone is regarded as unarmed and hence not a weapon in and of itself, which in turn implies that it is of no or marginal relevance or interest to the prohibition of superfluous injury or unnecessary suffering. What is left then from the drone to be considered and hence evaluated as a weapon proper is the munitions it carries and fires.[55] This logic is aptly captured by Peter Asaro as follows: '[i]nsofar as they deploy weapons or munitions that are

[54] See also HPCR Manual, Rule 1(ee): '"Unmanned Combat Aerial Vehicle (UCAV)" means an unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target'.

[55] Boothby, *Weapons* (2016) 245-6 ('If the remotely controlled system is designed to undertake attack missions, it will generally be the munition that the system controls that will cause the injurious damaging effect and that must be judged against the established weapons law criteria. The remotely controlled nature of the carrying platform is unlikely to have relevance to the application of these rules.'); Boothby, *Weapons* (2009) 230 (With respect to 'the unmanned nature of the weapon-guiding vehicle', '[t]he weapon that is being carried on and used by, or guided by, the UCV will need to be the subject of separate legal review. … superfluous injury/unnecessary suffering issues do not seem to be particularly relevant.'); Blank, 'Top Gun', 686-7; Casey-Maslen, 'Armed Drones', 400 (noting that 'a cautionary note is warranted where potential use of thermobaric Hellfire missiles is concerned'); Liu, 'Categorization', 641.

considered morally and legally legitimate in other contexts, there is no *prima facie* reason to think that this might be problematic'.[56]

These approaches reveal how what is different and unique about UAVs is swallowed by the technicalities and acrobatics of categorisation, which tend to obscure or sidestep important aspects of UAVs as a unified weapon technology, thus pre-empting more profound questions that UAVs pose and preventing a discussion of what is at stake in UAV warfare. By contrast, the Thesis' approach brings into sharper focus the challenges that UAVs pose to the LOAC in relation to the principle of superfluous injury/unnecessary suffering on the basis of the salient features of a lethal weapon technology which is superiorly offensive given its inherent unmanned characteristics and the attack capabilities it incorporates.

4.2 THE INELUCTABLE LETHALITY IN THE LOAC

The prohibition on the use of weapons and tactics that cause superfluous injury/unnecessary suffering or death in an ineluctable way represents an effort to make war more humane by reducing the harm and minimising the suffering for those who practise warfare as a result of the effects of the means and methods employed by the adversaries.[57] The prohibition has been reaffirmed and reinstated at milestone stages of the international codification of the law of war, which allowed superfluous injury and unnecessary suffering to graduate from a preambular imperative in the 1868 St Petersburg Declaration to a normative (legal and ethical) principle. These do not include the four 1949 Geneva Conventions due to the understanding of the prohibition as a rule relating to the conduct of hostilities, hence of the Hague tradition, falling outside the 'domaine réservé' of the so-called Geneva law that centred on civilians and prisoners of war as protected persons and

[56] Peter Asaro, 'Moral and Ethical Perspectives' in Ray Acheson, Matthew Bolton, Elizabeth Minor, and Allison Pytlak (eds), *The Humanitarian Impact of Drones* (Women's International League for Peace and Freedom; International Disarmament Institute, Pace University 2017) 146. But see Blank, 'Top Gun', 686; Gross, 'Duty', 26-7; Strawser, 'Heat', 10.

[57] The prohibition may be said to be situated at the intersection of the 'regulating' and 'humanising' impact of the LOAC.

victims of war, humanitarian law proper.[58] Although sharing an 'inextricable connection',[59] the principle of superfluous injury/unnecessary suffering and inevitable death, the evolution of warfare and the development of weaponry have been in an uneasy relationship, as it were. As the debates at the two Hague Peace Conferences of 1899 and 1907,[60] and the Geneva Diplomatic Conference for the 1977 Additional Protocols reveal, the concerns about military technological advances have served as a motivation behind the reinstatement of the principle prohibiting superfluous injury, unnecessary suffering and inevitable death. However, one cannot fail to notice the reluctance to respond to the range of legal and ethical dilemmas generated by weapons and tactics. This has often been reflected in the insistence that the net of prohibitions or restrictions catch only the use of weapons already in existence at the time of negotiations and should not extend to cover new weapons lining up over the horizon which, albeit likely candidates for prohibition or restriction in the future, 'have not shown their real effects and consequences'.[61]

'render death inevitable'

Tracing its origins in codified law, the prohibition first appeared in the Saint Petersburg Declaration of 1868, enshrined in the preamble as part of the rationale of what in fact constituted a specific ban agreed at the international level, which prohibited the use of one kind of deadly weapon, that is, the so-called 'rifle shells', projectiles under 400 grammes in weight that were explosive or charged with fulminating or inflammable substances catching fire on impact. In the preamble the Declaration considered

[58] See e.g. Richard R Baxter, 'Conventional Weapons under Legal Prohibitions' (1977) 1 Int'l Sec. 42, 48-50.
[59] Kinsella, 'Superfluous Injury', 213 ('Weapon development, and superfluous injury and unnecessary suffering were inextricably connected and, consequently, efforts to further address inevitably stalled in debates over state security and sovereignty, and the configuration of threat.').
[60] Cassese, 'Unnecessary Suffering', 200-1.
[61] Andrea Bianchi and Delphine Hayim, 'Unmanned Warfare Devices and the Laws of War: The Challenge of Regulation' (2013) 31 Security and Peace 93, 93 (taking note in n 6 of the 1995 Protocol on Blinding Laser Weapons, Protocol IV of the 1980 Convention on Certain Conventional Weapons as 'represent[ing] an exception').

> that this object [i.e. to weaken the military forces of the enemy by disabling the greatest possible number of men] would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; that the employment of such arms would therefore be contrary to the laws of humanity; …[62]

At the same time, the contracting parties agreed to 'reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops'.[63] The Declaration is viewed as 'a response to the development of a new weapon because it was contrary to the "progress of civilization"'[64] and the 'laws of humanity'.[65] As such, it has been described 'as a glimmer of light [that] eventually appeared in the murky process of the development of weapons'[66] and as 'a watershed in the development of humanitarian law' where 'the delegates tied condemnation of certain weapons to an enlightened view of humanity, dignity, and necessity'.[67]

The 'spirit' and 'sentiment' of St Petersburg did not cease to be invoked in later codification efforts, such as the Project of an International Declaration concerning the Laws and Customs of War of 1874 and the Oxford Manual of the Laws and Customs of War of 1880. Of interest and significance for the purposes of the present discussion are in particular the rules regarding means and methods of warfare. Under the heading 'the means of injuring the enemy',[68] the Brussels Declaration, as is known, recognised as a principle that '[t]he laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy'[69] and provided, *inter alia*, that '[a]ccording to this principle are especially "forbidden": '(e) The employment of arms, projectiles or material calculated to cause unnecessary

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[62] Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles, Saint Petersburg, 29 November/11 December 1868.
[63] ibid.
[64] Robin Coupland, 'Humanity: What Is It and How Does It Influence International Law?' (2001) 83(844) IRRC 969, 974.
[65] Boothby, *Weapons* (2016) 56 ('… by linking their notion of "useless aggravation" of suffering to the laws of humanity, the commissioners were asserting the customary status of that rule which would make it binding on all states and on all participants in a conflict').
[66] 1987 ICRC Commentary on API (Art 35) p 401, para 1414.
[67] Gross, 'Deaths of Combatants', 112.
[68] Consisting of three articles, Arts 12, 13, 14.
[69] Art 12.

suffering, as well as the use of projectiles prohibited by the Declaration of St Petersburg of 1868'.[70] Henri Meyrowitz has observed in relation to the St Petersburg and Brussels Declarations , '[i]t is remarkable to note that these two documents were not the work of a diplomatic conference but of a Military Commission. It would therefore be difficult to term them "idealistic"'.[71] The Oxford Manual, prepared by the Institute of International Law, was drafted in the spirit of the St Petersburg Declaration and the similarly non-binding Brussels Declaration, and reiterated many of the provisions and pronouncements found in the said documents. It is worth noting that it acknowledged as a general principle that 'the laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy' and on this basis it went on to enjoin that 'they [i.e. belligerents] are to abstain especially from all needless severity, as well as from all perfidious, unjust, or tyrannical acts'.[72] The authors of the Manual interestingly linked the limitations placed on the employment of certain means and methods of combat, like poison and treachery, to 'honourable struggle'.[73]

'causer des maux superflus'

Early Hague law remained within the orbit of the codification efforts of mid-nineteenth century onwards and drew largely from the St Petersburg Declaration, the Brussels Declaration and the Oxford Manual. Indeed, the main idea, which motivated the St Petersburg specific ban and was then included in a preambular promulgation, would now be codified as (and hence upgraded to) a rule by the Hague Conferences of 1899 and then of 1907,[74] forming part of the Regulations annexed to the 1899 Hague Convention II and the 1907 Hague Convention IV on the Laws and Customs of Land Warfare.[75]

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[70] Art 13(e).
[71] Henri Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol 1 of 1977' (1994) 34(299) IRRC 98, 100.
[72] Art 4.
[73] Art 8.
[74] Hague Proceedings (1899).
[75] Antonio Cassese, 'Weapons Causing Unnecessary Suffering: Are They Prohibited?' in Antonio Cassese, Paola Gaeta, and Salvatore Zappalà (eds), *The Human Dimension of*

Following Article 22, which confirmed that 'the right of belligerents to adopt means of injuring the enemy is not unlimited', Article 23(e) laid down the prohibition against the infliction of *maux superflus*. According to the authentic French version, the text of Article 23 of the 1899 Hague Regulations, which was reiterated *mot à mot* in Article 23(e) of the revised Hague Regulations of 1907, read: 'il est notamment interdit: … (*e*) d'employer des armes, des projectiles ou des matières propres à causer des maux superflus'.[76] As rendered 'in the non-binding (yet commonly used) English translation',[77] according to the 1899 formulation of the prohibition: 'it is especially forbidden: … (e) to employ arms, projectiles, or material of a nature to cause superfluous injury'.[78] The 1907 translation was recast in a slightly different version: 'To employ arms, projectiles, or material calculated to cause unnecessary suffering'.[79] As Henri Meyrowitz has argued, the influential English (and German) translations which continued to hold on to injury or suffering in isolation from each other 'fail[ed] to render the additional meanings of superfluous deaths'.[80] Moreover, for Antonio Cassese, 'the test for determining whether a weapon causes unnecessary suffering is whether in its normal use, such weapon inevitably (i.e. in whatever circumstances) inflicts on persons who are struck by it either death or disabilities which are permanent (or at any rate exceed the length of belligerent hostilities)…'.[81] In that respect, in order to 'mak[e] less pointless the provision' and not to 'disrupt[] the whole scope of Article 23(e)' Cassese suggested that we 'rule out' 'a construction relying upon the notion of 'military advantage' (to the effect that suffering is 'necessary' whenever it is

International Law: Selected Papers of Antonio Cassese (OUP 2008) 195 [Originally published in *Riviste di diritto internazionale* (1975) 12] ('In Article 23(e) this rationale has been turned into a rule. Mention is no longer made of the objective characteristics that a weapon must possess for being prohibited. What in the 'specific' provisions lay behind the prohibitions, that is to say the motives which prompted States to agree upon such prohibitions, is now elevated to the rank of a purportedly self-sufficient rule of international law.').

[76] Hague Conventions II and IV.

[77] Dinstein, *Conduct*, 73.

[78] Hague Convention II.

[79] Hague Convention IV.

[80] Meyrowitz, 'Superfluous Injury', 104.

[81] Cassese, 'Unnecessary Suffering', 211-2.

not out of proportion to the military gain obtained by the use of a weapon)' due to its 'highly subjective character'.[82]

For Cassese, Article 23(e) of the Hague Regulations was 'one of the most unclear and controversial rules of warfare'.[83] However, he conceded that it 'serves as a very significant source of inspiration inasmuch as it sets forth the general humanitarian ground on which States should endeavour either to refrain from developing new weapons or at least to ban them',[84] and emphasised the need to 'restate Article 23(e), provided of course that by so doing they will elaborate its meaning and expand its ambit'.[85] Partially responding to Cassese and seeking to reinstate the normative value and weight of the principle prohibiting *maux superflus*, Meyrowitz asserted that '[t]he authors of the Declaration assigned it the status and role of a directing principle requiring that the lawfulness of means and (since Article 35 [2]) of methods of warfare shall be judged according to the criterion represented by the principle itself' and pointed out that '[s]uch a concept of the principle expressed in 1868 goes beyond that of a "source of inspiration" suggested by Professor Cassese, whose opinion the ICRC in its Commentary would appear to share'.[86]

The 1899 Hague Peace Conference 'was convoked in the best interests of humanity'[87] and with a view to 'limiting the progressive development of existing armaments',[88] motivated by, among others, '[t]he concern about the impact of various technical developments on warfare'. The focus of specific regulation was placed mainly on existing weapon technologies, which seemed to reveal the disinclination to regulate future military technological inventions and innovation. This was evident in the discussions of the prohibition of the discharging of projectiles or explosives of any kind from

[82] ibid 216.
[83] ibid 194.
[84] ibid 214.
[85] ibid 217.
[86] Meyrowitz, 'Superfluous Injury', 117.
[87] Final Act of the International Peace Conference, The Hague, 29 July 1899.
[88] Russian note of 30 December 1898/11 January 1899 (Czar Nicholas II of Russia) cited in Schindler and Toman, p 49, '… seeking the most effective means of ensuring to all peoples the benefits of a real and lasting peace, and, above all, of limiting the progressive development of existing armaments'.

balloons and other methods of a similar nature, as seen in chapter 1.[89] Furthermore, illustrative in that respect were the statements of delegates who were in favour of prohibiting, as of 'useless' or 'great' cruelty,[90] 'a certain category of bullets, which have already been manufactured' and known, likewise the St Petersburg Declaration, on the premise that '[w]e do not know what is going to be invented. The inventions of the future will perhaps render a new prohibition necessary',[91] taking care to 'have the advantage of reserving the right of invention' intact.[92] In a similar vein, one of the reasons of the only 'nay' vote regarding the unanimously accepted prohibition to employ projectiles the sole purpose of which was to spread asphyxiating or deleterious gases[93] was that '[t]he question of asphyxiating gases is still intangible, since projectiles of this kind do not really exist'.[94] The United States was eager to sacrifice the 'keen desire to render war more humane' at the altar of efficiency.[95] Having stated that 'it does not seem demonstrated that projectiles containing asphyxiating gases would be an inhuman or cruel device without being decisive', the US delegate claimed that 'represent[ing] a nation which may be compelled to wage war, … it is therefore necessary not to deprive one's self, by means of hastily adopted resolutions of means which might later on be usefully employed' like projectiles filled with asphyxiating gases.[96]

During the debates at the Hague Peace Conferences the effect of the inevitability of death or loss of life of enemy combatants emerged as a factor

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[89] See chapter 1, section 1.
[90] Hague Proceedings (1899) p 82.
[91] ibid p 83 (Colonel Gilinsky) ('At St. Petersburg in 1868, something already in existence was under contemplation. It was desired to prohibit bullets which really existed. We desire to do the same here: …') and p 84 ('As to bullets which may be invented in the future, let them be taken up when the time comes.').
[92] ibid p 279.
[93] ibid p 284.
[94] ibid p 283 (Captain Mahan) ('having been the only one to express himself in the negative, wishes to explain the ground on which he based his action …'). Similarly, with respect to guns, ibid p 82 (Captain Crozier) ('the United States … do not like to see any hindrance placed in the way of inventive genius …').
[95] ibid p 296 (Mr Mahan); also, ibid pp 366-7. See also Antonio Cassese, 'Means of Warfare: The Traditional and the New Law' in Cassese et al, *Human Dimension*, 222-4 [Originally published in Cassese A (ed), *The New Humanitarian Law of Armed Conflict* (Napoli, Editoriale Scientifica 1979) 161].
[96] Hague Proceedings (1899) ibid.

that weighed in determining the need for prohibiting the use of certain weapons (as opposed to others). The discussions in the context of the prohibition of the use of projectiles the sole object or purpose of which was the diffusion asphyxiating or deleterious gases, which led to the relevant Declaration itself 'inspired by the sentiments which found expression' in the St Petersburg Declaration,[97] illuminate the link between allowing a reasonable chance to survive and the prohibition of weapons that render death inevitable. Arguing against the prohibition, the delegate of the United States juxtaposed asphyxiating gases, which were under consideration for the purposes the prohibition, with diving or submarine torpedo boats which, despite some objections, were not to be banned. The US delegate claimed that 'from a humane standpoint it is no more cruel to asphyxiate one's enemies by means of deleterious gases than with water, that is to say, by drowning them, as happens when a vessel is sunk by the torpedo of a torpedo-boat'.[98] This has been a recurrent point when the lawfulness of lethal weapons and tactics is contemplated. After all, does the weapon make any difference when death is inflicted? Is loss of life not always (less or more) inhumane or cruel?

As was pointed out in the debates in that respect, the matter did not revolve around the idea of banning or permitting weapons on the basis of lethality as such. The delegate of Russia remarked in response to the US observation that the differential treatment of these two weapons for the purposes of a ban was justified by their character, which was defined by reference to their respective effects on opponents and located in the prospect of survival which the respective weapons would allow once employed against them. As he argued,

> no comparison can be made between the effect produced by torpedoes and that of asphyxiating gases. The latter may as a matter of fact be compared rather to the poisoning of a river, which Mr. MAHAN [i.e. the US delegate] did not wish to allow. Many persons may be saved even if they have been wounded or placed out of action, in case a vessel is sunk by a torpedo. Asphyxiating gases, on the contrary, would exterminate the whole crew. This procedure would therefore

[97] Declaration (IV,2) concerning Asphyxiating Gases, The Hague, 29 July 1899.
[98] Hague Proceedings (1899) p 283.

be contrary to the humane idea which ought to guide us, namely, that of finding means of putting enemies out of action without putting them out of the world.[99]

The Russian delegate further claimed that 'as it is the task of the Conference to limit the means of destruction, it is logical to prohibit new means, especially when, like the one in question, they are barbarous in character'.[100] As Antonio Cassese put it, commenting on the exchange, 'weapons are to be deemed unlawful when they are such as to produce death whenever and in whatever manner they hit the enemy. … it is not in keeping with international law if it *always* results in *killing all* persons who in some way happen to be struck by it'.[101]

Article 35(2) API and maux superlfus

The most recent positive reverberation of the normative acquis of St Petersburg and the Hague is to be found in Additional Protocol I. Detailing the fundamental principle that the belligerents' right to choose means and methods of warfare is not unlimited,[102] the current LOAC, in Article 35 API entitled 'Basic Rules', prohibits the employment of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.[103] Article 35 belongs to 'Part III: Methods and means of warfare -- Combatant and prisoner-of-war status' and in particular forms part of 'Section I -- Methods and means of warfare'.

At the 1974-77 Diplomatic Conference for the 1977 Protocols, the need to 'reaffirm' and 'develop' existing international humanitarian law, which was the stated goal of the conference, was associated with the 'development of methods and means of combat'.[104] The context in which the debates took

[99] ibid (Captain Scheine). In a similar vein, the delegate of Portugal (Count de Mecado) claimed 'that in case of a shock by a torpedo there would always be means of saving a large number of persons; therefore the comparison made by Captain MAHAN between the baneful effect of torpedoes and of asphyxiating gases does not appear to him admissible', ibid pp 283-4.
[100] ibid p 366 (Captain Scheine).
[101] Cassese, 'Unnecessary Suffering', 197 (emphasis in original).
[102] Article 35(1) API.
[103] 1987 ICRC Commentary on API (Part III, Section I - Methods and means of warfare) p 387, para 1380.
[104] ORDC vol V, p 8 (President).

place was shaped by the concerns relating to the understanding that 'the constant development of new armaments had led to an extension of human suffering',[105] both in interstate and internal armed conflicts, including the Vietnam war, the ICRC's efforts to convene meetings where states would discuss limitations of specific weapons,[106] and indeed at a time marked by the advancement of human rights.[107] The Conference reaffirmed the principle of superfluous injury and unnecessary suffering in Article 35(2), which was adopted by consensus but was not put to the vote.[108] It is interesting to note that 'the French delegation, while it had not opposed the adoption of Article 33 [i.e. current Article 35(2)] by consensus, wished to make it clear that it would have abstained if a vote had been taken'. The reason offered was indicative of a sentiment that prevailed in the Conference more generally. As stated by the French delegate,

> Article 33, which set forth the basic rules of Part IlI on methods and means of warfare, was the first of a series of articles which went beyond the strict confines of humanitarian law and in fact regulated the law of war. Although the general provisions of Article 33 had been formulated with a humanitarian aim, they had direct implications for the defence and security of States.[109]

This divide between humanising and regulating war reflected a focal point of disagreement which emerged during the debates in the attempts to delineate the restraining impact of the principle.[110] Those who had a strong interest in the regulation of warfare highlighted the risk of the principle being 'general' or 'abstract' and pointed out the need for the 'crystallization of the principle'[111] in the hope to confer formidable constraining force on the

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[105] ibid.

[106] See e.g. Frits Kalshoven, 'Arms, Armaments and International Law' in *Recueil des Cours. Collected Courses of the Hague Academy of International Law* (1985-II) (Martinus Nijhoff 1986) 191, 226-7; 1987 ICRC Commentary on API (Art 35) p 400, para 1410; Eitan Barak, *Deadly Metal Rain: The Legality of Flechette Weapons in International Law - A Reappraisal Following Israel's Use in the Gaza Strip (2001-2009)* (Martinus Nijhoff 2011) 60-2.

[107] See e.g. the 1968 United Nations Conference on Human Rights in Teheran (UNGA, 'Final Act of the International Conference on Human Rights' (Teheran, 22 April to 13 May 1968) UN Doc A/CONF.32/41).

[108] ORDC vol VI, p 101.

[109] ibid.

[110] Frits Kalshoven, *Reflections on the Law of War: Collected Essays* (Martinus Nijhoff 2007) 154-5.

[111] See e.g. ORDC vol VI, p 302 (Mozambique); ibid p 100 (Yugoslavia) ('… to be put into concrete form. It should specify which were the weapons which caused superfluous injury

prohibition. As such, restrictions or prohibitions of specific weapons, such as conventional weapons, were considered a matter of humanitarian law and hence a task of the Conference.[112] At the other end of the spectrum were those who contested the Conference's competence to deal with specific weapon restrictions or prohibitions, which were regarded not as issues of humanitarian character or nature but rather issues with political, military, strategic overtones falling within the competence of other international disarmament fora.[113] In that respect, the discussions seemed to be caught in a tug of war between technologically challenged states that saw in technical advances the potential for destruction and technologically advanced states who saw the possibilities that weapon development opened up,[114] with the latter 'vigorously object[ing]'[115] the claims advanced by the former that were 'trying to make war less cruel'.[116]

The prohibition of the infliction of inevitable death did not seem to cease to be part of the philosophy underlying the current prohibition, which clearly drew inspiration from the Saint Petersburg Declaration of 1868 and the Hague law. It is worth noting that before making its way to the Protocol as

for otherwise the rule would be of very limited value.'); ORDC vol VII, p 20 (Switzerland) (emphasising that '… Article 33 was too general. The serious and urgent problem of the banning or restriction of the use of certain conventional weapons called for much more specific provisions.'); ibid p 44 (Italy) ('… pointed out that the provisions of the Protocol concerning the use of methods and means of combat constitute general principles requiring definition and development through specific agreements which it is outside the competence of purely humanitarian authorities to prepare.').

[112] ORDC vol VII, pp 20 (Sudan), 30 (Mexico), 29 (Ecuador).

[113] See e.g. ORDC vol VI, p 101 ('went beyond the strict confines of humanitarian law and in fact regulated the law of war' encroaching into issues reserved for states); ORDC vol VII, pp 18-9 ('it was impossible to approach the matter from a purely humanitarian point of view leaving aside political and military considerations and matters of State security') (Soviet Union); p 25 (France); p 22 (Germany); p 27 (United Kingdom) ('… failed to take account of' factors of obvious importance, such as the considerations of a military and political character to which States must have regard'); p 44 (Italy) (pertained to 'national defence and security requirements').

[114] ORDC vol VII, p 26 (Kuwait) ('the small countries which were all too often used as fields of experimentation [and] the great Powers which had unlimited military power and resource'); ibid p 31 (Algeria) ('a distinction between the powerful States and those who believed in humanitarian law'); p 32 (Nigeria) (referring to Great Powers); ORDC vol XIV, p 236 (Democratic Republic of Viet-Nam) ('… on the one hand, there was the imperialist aggressor, supplied with all the latest and most cruel methods and means of war, bent on overcoming as quickly as possible the resistance of ill-armed and economically undeveloped peoples'); Baxter, 'Conventional Weapons', 51; Kinsella, 'Superfluous Injury', 225.

[115] ORDC vol VI, p 302 (Mozambique).

[116] ORDC vol VII, p 29 (Ecuador).

Article 35(2), the prohibition was initially proposed by the ICRC at the Diplomatic Conference as Article 33(2) of the Draft Additional Protocol I, which was entitled 'Prohibition of unnecessary injury' and explicitly referred to the 'inevitability of death'. The language of the draft article reveals the obvious link to St Petersburg: 'It is forbidden to employ weapons, projectiles, substances, methods and means which uselessly aggravate the sufferings of disabled adversaries or render their death inevitable in all circumstances'.[117] In introducing the draft text, Jean de Preux, on behalf of the ICRC, explained: 'Paragraph 2 was based on Article 23 of The Hague Regulations and on the Declaration of St. Petersburg. Its purpose was, in substance, to prohibit unnecessary injury, a concept which was well known but difficult to define. The text referred to methods and means which aggravated suffering or caused death'.[118]

The more laconic formulations or shorter formulas, such as 'unnecessary suffering or superfluous injury'[119] or 'unnecessary suffering' simpliciter,[120] or even 'unnecessary suffering or other particularly cruel means and methods',[121] were suggested by some delegates mainly as 'short' or 'simplified' versions of the wording of the draft article. These did not arise out of any explicit disagreement with nor revealed any fundamental objection to the inclusion of 'inevitable death' in the scope of the prohibition.[122] Some states proposed language that not only retained

[117] Article 33(2) of Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, ORDC vol I.
[118] ORDC vol XIV, p 233.
[119] Finland, ORDC vol III, p 155 and vol XIV, p 234.
[120] Australia, ORDC vol III, p 157 and vol XIV, p 235.
[121] German Democratic Republic, ORDC vol III, p 155 and vol XIV, p 235.
[122] ORDC vol XIV, p 235 ('The purpose of paragraph 2 of the amendment was to prevent "unnecessary suffering" or the use of "particularly cruel means and methods" of combat. The term "unnecessary suffering" was used in The Hague Regulations annexed to The Hague Convention No. IV of 1907 concerning the Laws and Customs of War on Land and also appeared in the Australian amendment (CDDH/III/237) and the Finnish amendment (CDDH/III/91); ibid (Australia) ('… its purpose was to replace article 33 by a new and shorter text. The scope of The Hague Regulations and the St. Petersburg Declaration was, in his view, limited. The reference to means and methods of combat in the ICRC text represented a considerable extension of the law and it was essential to develop that instrument to give it greater clarity'); ORDC vol XIV, p 242 (Cyprus) ('… was in full agreement with the ICRC text. Certain ideas embodied in the various amendments could only be accepted to the extent that they complemented that text and broadened its field of application'); ibid (Brazil) ('… considered that article 33 should be limited to the general rules related to the prohibition of unnecessary injuries. The text submitted by the ICRC

'inevitable death' but aimed at broadening the purview of the article. For example, the delegate of Uruguay sought to expressly dissociate the prohibition from the concept of *hors de combat* by suggesting the deletion of the notion 'disabled adversaries' 'in order to extend the scope of the article'.[123] At this point, it is also worth noting that the prohibition was drafted against the anxieties about the destructive effects of weapons, including death. For example, the amendment submitted by the delegate of Pakistan sought to add a provision urging the parties to 'meet under the auspices of the ICRC to prohibit weapons and tactics with a view to prohibiting particularly cruel methods and means of warfare' as '[t]he prohibition of weapons which caused unnecessary suffering should be a continuing process', an amendment which 'was designed to supplement the ICRC text'.[124] Other delegates suggested that the prohibition be extended to cover weapons and methods of warfare likely to affect combatants and civilians indiscriminately.[125] Furthermore, there were also amendments

presented a good basis for discussion, and perhaps for adoption by the Conference as it stood, as a compromise solution.'); ibid (Switzerland) ('said that he considered article 33 to be of particular importance, since it was designed to limit certain evils and abuses which would make the return to peace and reconciliation more difficult. … Consequently, he considered that the Committee should adopt the text proposed by the ICRC, which had the merit of being clear and well-balanced.'); p 245 (Union of Soviet Socialist Republics) ('It had no objections to raise, but wished to suggest that it would be useful to improve the form of the article in order to achieve a compromise that would be acceptable to all. The principles set out in the ICRC text should be made more specific; the expression "means which uselessly aggravate the sufferings", appearing in paragraph 2, was particularly vague. Moreover, Committee IV had been confronted by the same problem. It was not clear where the limits of "unnecessary sufferings" should be drawn, and a term must therefore be found to strengthen the prohibition to use weapons or means which were likely to aggravate sufferings unnecessarily.'); p 246 (Uganda) ('said that, although the ICRC draft text constituted an excellent basis for discussion, article 33 in its existing form did not cover all situations and was limited in its application'); p 247 (Madagascar) said that his delegation could accept article 33 as it appeared in draft Protocol I although that article envisaged a conventional war situation'); ibid, Romania supported the Finnish amendment 'designed to simplify the text'; p 248 (Lesotho) ('… was in favour of the ICRC text and of the amendments designed to improve the substance and form of article 33'). See also ibid p 241 (United Kingdom) ('In paragraph 2, it would be better to follow The Hague Regulations of 1907 which had become the expression of customary international law, rather than the Declaration of St. Petersburg; that indeed was what the authors of the United Kingdom Manual of Military Law had done. …').

[123] See ORDC vol III, p 154 and vol XIV, p 233; ORDC vol XIV, p 243 (Switzerland) ('… thought that the Uruguayan amendment (CDDH/III/7) could usefully be considered by the Working Group').

[124] ORDC vol III, p 154 and vol XIV, p 234.

[125] ibid (Pakistan); ORDC vol III, p 155 and vol XIV, p 234 (Finland); ORDC vol III, pp 155, 156 and vol XIV, p 235 (German Democratic Republic); ORDC vol XIV, pp 245-6 (Union of Soviet Socialist Republics).

suggesting the inclusion of a prohibition of 'methods and means of combat which cause mass extermination or the destruction of entire regions'.[126] Finally, significant support received the suggestion of the delegate of Finland, who emphasised 'that article 33 was of fundamental importance in that it established the basic principles governing the conduct of combats, which affected not only the combatants, but also the civilian population …' and proposed that '[t]he title of the article should be changed to "Basic Rule"'.[127]

Notwithstanding the absence of an explicit reference to that effect in Article 35(2) API,[128] the principle prohibiting superfluous injury and unnecessary suffering seems to encompass the infliction of inevitable death of enemy combatants. While the term 'maux superflus' remained in the official French version of the prohibition, in the official English version of the text of Article 35(2) API the Protocol clearly adopted the more inclusive term 'superfluous injury or unnecessary suffering'. In so doing, it combined the two expressions which appeared in the differing 1899 (superfluous injury) and 1907 (unnecessary suffering) English renderings of 'maux superflus'. The phraseological merger signalled a significant textual development, whereby, it was hoped, 'the historical divergence of translation would have lost its significance',[129] and the undue 'confusion [that] did not assist in clarifying the concept …'[130] would finally be dispelled. More significantly, this semantic construct was to be attributed normative valence. It contributed to redirecting the provision towards the broader remit implicit in the authentic

[126] ORDC vol III, p 157 (Democratic Republic of Viet-Nam, Uganda) and vol XIV, p 237 (Democratic Republic of Viet-Nam) ('That question should be included in Part III, as it constituted a general rule with respect to methods and means of combat.'); The amendment was supported by Mongolia as 'particularly important' noting that '… it was clear that it had a lofty aim in that it tried to avoid a repetition of the suffering experienced by the Vietnamese people and also to avoid other peoples experiencing similar suffering', ORDC vol XIV, p 240 (Mongolia). Also supported, ibid, p 246 (Uganda); p 247 (Romania); ibid (Madagascar).
[127] ORDC vol XIV, p 234. Also, ibid pp 239-40, para 24 (Greece) and p 247 (Romania).
[128] This is of note to the extent that in the context of civilian harm, the Protocol refers to injury and 'loss of life or death as discreet concepts, see Article 57(2)(ii) and (iii) API ('incidental loss of civilian life, injury to civilians and damage to civilian objects'), Article 85(3) API ('causing death or serious injury to body or health'), Article 85(3)(c) API ('excessive loss of life, injury to civilians or damage').
[129] Boothby, *Weapons* (2016) 58; Dinstein, *Conduct*, 74 ('… (iii) to be on the safe side, [Article 35(2)] enmeshes the two alternative English coinages of 'superfluous injury' and 'unnecessary suffering' (while retaining the single French idiom 'maux superflus'.').
[130] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (CUP 2004) 67.

French term *maux superflus* which Article 35(2) retained. As Henry Meyrowitz has pointed out, '[i]n the English version of Protocol I, which is not a translation, this mistake was corrected as far as the language allowed by using the term 'superfluous injury or unnecessary suffering' to convey the meaning of "*maux superflus*"',[131] which arguably is a term that 'conveys the further notion of superfluous deaths expressed in the fourth preambular paragraph of the Declaration of 1868'.[132] The fourth paragraph of the Preamble to St Petersburg Declaration is the locus where the inevitability of death of disabled men as an effect of certain means of warfare was first ever given expression and was forbidden for the first time, as seen above. In that respect, as Frits Kalshoven observed, '[u]nnecessary suffering, inevitable death: such things were "contrary to the laws of humanity" and beyond the "necessities of war". Weapons entailing such evil consequences ought to be banned from use'.[133]

Moreover, if it is accepted that the St Petersburg Declaration as far as this part of the prohibition is concerned has been crystallised as customary law, including due to the link to humanity,[134] the inevitability of death may have been part of customary law independent of an explicit agreement on a definition of 'maux superflus' and indeed before Article 35(2) API was drafted. The customary international law status of the prohibition is not contested.[135] The International Court of Justice has recognised the prohibition as a 'cardinal principle[] contained in the texts constituting the fabric of humanitarian law' and an 'intransgressible principle[] of

[131] Meyrowitz, 'Superfluous Injury', 101; Gardam, *Necessity*, 63 (thus reflecting 'the true import of the French phrase 'maux superflus'). See also Best, *Law*, 294-5, n 37 (''Famous' … also, among *cognoscenti,* for the mileage which commentators have got out of reading significance into the differences between its English and French versions'); Kalshoven, *Reflections*, 244 ('… it is a particularly felicitous solution that both terms have now been included on an equal footing in the (this time also authentic) English version … This is one problem of international law … definitively removed from the list.').
[132] Meyrowitz, 'Superfluous Injury', 101. Cassese, 'Unnecessary Suffering', 211-2 ('… the test for determining whether a weapon causes unnecessary suffering is whether in its normal use, such weapon inevitably (i.e. in whatever circumstances) inflicts on persons who are struck by it either death or disabilities …').
[133] Kalshoven*, Reflections*, 206.
[134] Boothby, *Weapons* (2016) 47.
[135] See e.g. Boothby, *Targeting*, 259 ('This is now a customary rule of law that binds all States in all types of armed conflict. It is central in importance to the law of weaponry, and should be applied by States when they assess the legality of new weapons under article 36 of API.').

international customary law'.[136] What is more, the ICRC Customary International Humanitarian Law Study considers Article 35(2) API a rule of customary law, notwithstanding the ambiguity and uncertainty which surrounds the exact scope of the prohibition, and how to determine that a weapon causes superfluous injury or unnecessary suffering.[137] Citing 'numerous military manuals [that] include the rule' and state statements in national instruments and at different international fora as evidence of national practice,[138] Rule 70 of the study asserts that the rule prohibiting the use of means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is a norm of customary international law applicable during international and non-international armed conflict.[139] On the list of military manuals and official statements are found those that explicitly prohibit the use of weapons that render death 'inevitable' or 'unavoidable'.[140] Importantly, these include the United States, which is not a party to Additional Protocol I, and its military manuals, which reflect US military doctrine in operational law.[141] Indeed, the updated US Department of Defense Law of War Manual also refers to 'weapons that may cause great injury or suffering or inevitable death'.[142]

Humanity and inevitable death

Reading Article 35(2) API in a way that embraces the prohibition of the use of means and methods of warfare of a nature to render death inevitable is more than a tribute to the provenance of the principle of superfluous injury/unnecessary suffering and its possible customary law status. The

[136] *Nuclear Weapons Advisory Opinion*, p 257, paras 78, 79 (the other being the principle of distinction between combatants and non-combatants).
[137] ICRC Customary IHL Study, Rule 70.
[138] ibid. See e.g. the ICTY in *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-AR72, Appeals Chamber (2 October 1995) para 99, explaining that due to inherent difficulties '[w]hen attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle … reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions'.
[139] ICRC Customary IHL Study, Rule 70.
[140] ibid p 241 and ibid n 31.
[141] ICRC Customary IHL Database (Practice) Rule 70 (United States of America) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule70>.
[142] US DoD Law of War Manual (2015/2016) p 358.

'inevitability of death' delineates the meaning of the rule in terms of the LOAC's broader conception of war/armed conflict as an armed interaction, whereby the adversaries can fight back, resist, defend themselves in an attempt (however hopeless) to survive. That is, the prohibition of the inevitability of death is a manifestation of the understanding that in the normative space of an armed confrontation, as explained in chapter 2, the law does not admit of military force that leaves no chance of survival for the human adversary.

The importance of this approach lies in that it 'focuses on the effects of the weapons'[143] on the human adversary. The infliction of inevitable death is prohibited on the very ground of inevitability caused by a certain weapon, notwithstanding the potential contribution of the inevitable death of an opponent (however significant or minimal) to a military goal or military advantage. This understanding can also be found in Larry May's proposed reading of *maux superflus* of the 1907 Hague Convention IV as 'a baseline beyond which the creation of suffering is prohibited because of the *character* of the suffering, not because of what it is, or is not, offset by'.[144] Guarding against the inevitability of death does not mean that the prohibition negates the likelihood of death of lawful targets as a possible consequence of fighting; nor does it imply a general ban on weapons capable of delivering lethal force. Put differently, the claim here is not that Article 35(2) encapsulates the law's aspiration to eliminate the possibility of death altogether, which would risk sounding to some international law scholars as an overly idealistic or unduly optimistic and hence implausible take on the prohibition and perhaps the law itself.[145] Rather, what is suggested here is that the law seeks to withstand (and not succumb to) the pressures of warfare violence which may result in the death and loss of life of opponents, and that it does so by prohibiting the

[143] Meron, *Humanization*, 71 ('The second test, also derived from the Saint-Petersburg Declaration, focuses on the effects of weapons. In the wording of the Declaration, weapons causing unnecessary suffering are weapons that render death inevitable.').
[144] May, *War Crimes*, 78 (emphasis added).
[145] Dinstein, *Conduct*, xv (considering that '[a]lmost by definition, it [i.e. war] entails human losses, suffering and pain, as well as destruction and devastation. As long as war is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities.'). But see Meyrowitz, 'Superfluous Injury', 100.

use of means and methods which preclude *ab initio* the prospect of survival for the adversary.

In this light, it becomes clear that the crux of the matter rests on the relationship between the principle of superfluous injury/unnecessary suffering and humanity, and the understanding that humanity in the law is geared towards allowing the adversary[146] a reasonable chance to survive, as analysed in chapter 3. By focusing attention on the link between Article 35(2) and humanity, we are able to reinstate the status of the rule as a prohibition (rather than a licence or a permission) and reclaim the restraining weight of humanity. This rescues the prohibition from formulations in which the principle of superfluous injury/unnecessary suffering is presented as patently dependent upon military necessity and in which humanity is hardly ever acknowledged as the inherent normative element to which superfluous injury/unnecessary suffering foundationally appeals. Interestingly, even when the principle of superfluous injury or unnecessary suffering is identified with the principle of humanity,[147] it ends up being defined solely in terms of military necessity, whereby humanity becomes only nominal in value.

It is questionable whether military necessity could ever be invoked (not to restrict lethal force and killing more generally,[148] but) to prohibit the infliction of inevitable death. The way in which military necessity or

[146] See Haque, *Morality*, 42-3 (pointing out that '[i]n fact, the St Petersburg Declaration prohibited the use of a particular weapon— exploding bullets— thought to inflict suffering on *each* individual combatant unnecessary to incapacitate *him*' in response to Luban, 'Human Rights', 52 who 'argues that '"humanitarianism in war is plainly a form of negative benthamism" aimed at reducing aggregate suffering', citing 'the preamble to the St Petersburg Declaration as evidence that the historical aim of IHL was "alleviating as much as possible the calamities of war"'.).

[147] See e.g. Blank, 'Top Gun', 682 ('… the principle of humanity, also commonly referred to as the principle of unnecessary suffering, and aims to minimize suffering in armed conflict'); US DoD Law of War Manual (June 2015, Updated December 2016) p 59 ('*Humanity* animates certain law of war rules, including … prohibitions on weapons that are calculated to cause superfluous injury'), p 359 ('The superfluous injury rule is an application of the principle of humanity in the context of weapons').

[148] See e.g. Ryan Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 EJIL 819.

effectiveness is to be interpreted is itself controversial[149] and usually barely supportive of the prohibition of inevitable death.[150] What constitutes a legitimate military objective may reflect a narrower conception of placing the opposing combatants *hors de combat*[151] by incapacitating or capturing opponents. The *hors de combat* concept is however, as will be explained in detail in the following chapter, of limited relevance to UAV warfare exactly on the ground that, by rendering their death inevitable, UAVs strip targeted individuals off the opportunity to surrender or otherwise be placed 'out of combat' without placing them 'out of the world'. A military objective may also be amenable to open-ended understandings where the intended inevitable killing could be deemed to contribute, in one way or another, to the war effort and 'generally serve[] a military goal',[152] or to a broadest view dictated by military utility and efficiency,[153] or even political objectives. More often than not, humanity (and hence superfluous injury, unnecessary suffering and inevitable death) is engulfed by determinations of whether inevitable death is 'excessively' or 'manifestly' disproportionate to a military advantage,[154] or whether inevitable death is 'avoidable', which entail a comparative exercise between available military means and an evaluation of military imperatives, taking into account the given battlefield circumstances and constraints of a

[149] Gardam, *Necessity*, 70 ('It has been very difficult to achieve consensus over the years as to the military effectiveness or necessity part of the equation. Necessary is a relative term and requires a determination of 'necessary for what'.').
[150] See e.g. written statement submitted by the United Kingdom to the ICJ in the Nuclear Weapons case in 1995: 'The more effective the weapon is from the military point of view, the less likely that the suffering which its use causes will be characterized as unnecessary' in ICRC Customary IHL Database (Practice) Rule 70 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule70>.
[151] See e.g. 1987 ICRC Commentary on API (Art 35) p 403, para 1417 (citing the Report of Committee III on Conventional Weapons of the Diplomatic Conference that adopted Protocol I, ORDC vol XV, p 267, 'several representatives wished to have it recorded that they understood the injuries covered by that phrase to be limited to those which were more severe than would be necessary to render an adversary hors de combat" to state that 'this corresponds to the position of the ICRC and to the intent of the original rule').
[152] Oeter, 'Methods and Means', 125-6.
[153] See e.g. *United States v List (Wilhelm) and ors* (1949) 8 LRTWC 34, 66 ('… any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money …').
[154] 1987 ICRC Commentary on API (Art 40) p 477, para 1598; ibid (Art 35) p 403, para 1417; Bill Boothby, 'How Will Weapons Reviews Address the Challenges Posed by New Technologies' (2013) 52 Mil. L. & L. War Rev. 37, 42. Oeter, 'Methods and Means', 125-6. See also Jean de Preux, in introducing the draft article, explaining that 'The "inevitable death" referred to in the text was a question of proportionality', ORDC vol XIV, p 233.

particular situation.[155] For example, Yoram Dinstein argues that '[c]ontrary to what certain scholars maintain, resort to weapons that leave no chance of survival (such as fuel air explosives) does not automatically qualify as a breach of the cardinal principle'.[156] While the infliction of inevitable death as part of the concept of superfluous injury/unnecessary suffering seems to be accepted, this approach ostracises humanity which would inevitably lead to the 'automatic qualification' of the use of weapons that rule out any chance of survival as a violation of the principle on the basis of the effect and the character of the harm, inevitable death as such.

As long as the prohibition is left clinging on considerations which, '[n]eedless to say, … leave a very ample margin of discretion to the only subjects who are ultimately called upon to apply them — belligerents',[157] the inevitability of death caused as a consequence of the use of a certain weapon is sidestepped. The lawfulness of the use of weapons that render death inevitable should not be entrapped in the manipulable considerations and 'the situational relativism of military necessity'.[158] This unacceptably assimilates humanity into necessity and renders humanity virtually redundant to such an extent that the principle of superfluous injury/unnecessary suffering is not distinguished from military necessity and the prohibition becomes toothless. Having said that, for all its contribution to the codification of the principle of superfluous injury/unnecessary, one of the legacies of St Petersburg has arguably been the circularity that has beset efforts to decipher the meaning of 'uselessly aggravating the sufferings of disabled men and render their death inevitable', considered both to exceed the legitimate military goal and to be contrary to humanity. As Michael Gross has argued, this 'circularity undermines any attempt to formulate an independent criterion of humanity that could govern

[155] Dinstein, *Conduct*, 60; *Nuclear Weapons Advisory Opinion*, p 257, para 78; See e.g. Lucerne Conference Report (1975) p 9, para 25. Christopher Greenwood, 'Command and the Laws of Armed Conflict' (1993) 4 The Occasional 24; Bothe et al, *Commentary*, 196.
[156] Dinstein, *Conduct*, 75 (the scholar cited is Kolb R, *Ius in Bello: Le Droit International des Conflits Armes* (2003) 139).
[157] Cassese, 'Unnecessary Suffering', 206.
[158] Gross, 'Deaths of Combatants', 114-5.

superfluous injury and unnecessary suffering'.[159] In this light, Gross is right in claiming that

> placing unnecessary suffering and superfluous injury in the context of force beyond that which is required to disable the enemy, as nineteenth- and twentieth- century commentators do, *subordinates* suffering to military necessity. Yet, … the principle of humanity does not derive its force from military necessity but sits atop it. It is no wonder then that a measure of injury and suffering that springs from military necessity cannot serve IHL's purpose of regulating weaponry. To shore up the rule prohibiting superfluous injury and unnecessary suffering, the norms of war require an absolute criterion to proscribe all weapons in a particular class. To this end, attention turns to "great" or "horrendous" suffering that is impermissible regardless of necessity.[160]

It would be absurd to read the law to tolerate the infliction of inevitable death regardless of the inhumanity of its inevitability as long as the death can be justified as necessary (or convenient or useful or proportional or unavoidable) depending on the circumstances. The use of weapons that inflict inevitable death and actively deny any chance of survival amounts to a complete disregard of humanity and runs counter to the other-directed nature of the law, which is concerned with the effects of violence on the human adversary and which '-especially in those rules based on the principle of superfluous injury or unnecessary suffering …- aims at limiting the losses and damage inflicted on the enemy'.[161] In this light, it is suggested that UAVs, which are designed, developed and employed to put to death targeted human individuals, challenge the prohibition of superfluous injury/unnecessary suffering.

[159] ibid.
[160] ibid 114.
[161] Meyrowitz, 'Superfluous Injury', 111. Boothby, *Weapons* (2009) 386-7 ('while minimizing the suffering that is caused to participants in the conflict and those unhappily affected by it').

Death in doubt in Article 35(2) API

While the inclusion of death or loss of life of enemy combatants in the prohibition is generally accepted in the literature,[162] the scope of Article 35(2) API has not been uncontroversial, with positions ranging from a narrow view that excludes death from the definition of injury and suffering to an extreme interpretation of the rule as 'licence to kill'.

For example, Kevin Heller categorically argues that the prohibition does not extend to cover death.[163] He points to the wording of the provision and the semantic limits of the drafters' choice of 'two words ("injury" and "suffering") that focus solely on non-fatal wounds' to claim that '[d]ead combatants are not injured and do not suffer'. He asserts that Article 35(2) API is 'a prohibition that –as has long been assumed by scholars– deals solely with preventing superfluous injury or unnecessary suffering to combatants who survive an attack with a particular weapon', emphasising that '[p]roperly understood, Art. 35(2) is limited to combatants who survive an attack; it says nothing about combatants who don't, …'. In response, Ryan Goodman states that 'Heller has a considerable burden to show that 'injury' does not include this subset (and most severe form) of injury',[164] deadly injury indeed. The prohibition on superfluous injury/unnecessary suffering

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[162] See e.g. Greenwood, 'Law of Weaponry', 189-90 ('… the principle that belligerents may not employ weapons or methods of warfare of a nature to cause unnecessary suffering serves the objective of protecting even combatants from suffering and death, which is not necessary for the achievement of legitimate military goals'); Goodman, 'Kill or Capture'; Bothe et al, *Commentary*.

[163] Kevin Heller, 'The Capture-or-Kill Debate #8: Kevin Heller Joins the Conversation' (*Lawfare*, 4 March 2013) (adding 'Indeed, a basic canon of statutory interpretation, *ejusdem generis*, suggests that "unnecessary killing" is not included within "superfluous injury" or "unnecessary suffering"') <www.lawfareblog.com/capture-or-kill-debate-8-kevin-heller-joins-conversation>.

[164] Ryan Goodman, 'The Capture-or-Kill Debate #10: Goodman Responds to Heller' (*Lawfare*, 12 March 2013) <www.lawfareblog.com/capture-or-kill-debate-10-goodman-responds-heller>. See also the mortality criterion, referring to '(2) Field mortality of more than 25 per cent, or (3) Hospital mortality of more than 5 per cent' as part of the ICRC's health-focused attempt to quantify or objectify superfluous injury and unnecessary suffering: ICRC, 'The SIrUS Project: Towards a Determination of Which Weapons Cause "Superfluous Injury or Unnecessary Suffering"' (Robin M Coupland ed, ICRC 1997) 23; Robin M Coupland, 'The SIrUS Project: Progress Report on 'Superfluous Injury or Unnecessary Suffering' in Relation to the Legality of Weapons"' (1999) 835 IRRC 583. This is referred to as 'inevitable or virtually inevitable death', Steven Haines, 'The Developing Law of Weapons' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 285.

refers to both injury and suffering covering the wide spectrum of physical harm and psychological or emotional pain caused by the means and methods of warfare employed by the warring sides.[165] It would not be unreasonable to argue that death or loss of life amounts to physical harm in its ultimate manifestation and as such it is implicit in the notion of injury and/or suffering.

The danger of excluding death from the purview of the prohibition was highlighted at the 1974-77 Diplomatic Conference and was tied to the fear of leaving the door open to deeply disquieting arguments whereby 'quick' or 'clean' killing, purportedly enabled by advanced and sophisticated technology, would be deemed more humane (and hence lawful) for the purposes of the law than aggravated or increased injury and suffering. This would in turn risk ending up encouraging practice that favours the use of means and methods that inflict the former over those that cause the latter. The concern was voiced by the Vietnamese delegate who stated that 'technical advances in certain imperialist countries enabled them to justify their barbarous crimes in the Viet-Nam war by using arms which were said to "cause less unnecessary suffering by killing more quickly!'!'.[166] The importance of this statement lies in that it embodied the anxiety about the threat posed by evolutions of weaponry as experienced by 'the people who really had firsthand knowledge, although mostly as victims, of the effects of modern conventional weaponry'.[167] In a similar vein, the Australian representative cautioned against such approaches and urged the 1974

[165] Injury clearly denotes physical harm, while suffering has more often than not been associated with psychological or emotional harm. See Oeter, 'Methods and Means', 126; Dinstein, *Conduct*, 74; Boothby, *Weapons* (2016) 58-9.
[166] ORDC vol IV, p 184 (Democratic Republic of Vietnam).
[167] Kalshoven, *Reflections*, 158; See also e.g. ORDC vol XVI, pp 108-9 (Democratic Republic of Viet-Nam) (referring to the 'atrocious reality' of the Vietnam War and casting into doubt 'the conclusions of certain experts' about the destructive effects of certain weapons); ORDC vol VI, p 303 ('While this Conference is meeting here, the people of Mozambique are being bombed by the illegal and racist regime of Ian Smith, which is using napalm and other materials causing superfluous injury.'); ORDC vol XIV, p 240 (Mongolia) (Viet-Nam's amendment regarding mass extermination was deemed 'a worthy contribution to the future development of international humanitarian law. That amendment was far closer to the realities of life than the theories of experts and it made an indispensable contribution to humanitarian law.').

intergovernmental Ad Hoc Committee on Conventional Weapons to consider what he termed 'false humanitarianism' as follows:

> His delegation felt that there might have been a tendency in recent studies to place undue emphasis on unnecessary suffering as manifested in wounds of a complex or serious nature, and perhaps in that way to lose sight of the initial and basic St. Petersburg principle that it was better to wound than to kill an enemy combatant. The Committee should consider whether, from the point of view of the soldier involved, it was doing him a service if it fell into the error of giving preference to weapons that tended to kill cleanly, rather than to weapons that wounded, but did not kill. That would seem to be false humanitarianism.[168]

Almost half a century later, an illustration of such concerns can be found in the following readings of Article 35(2) API, as suggested by US leading international law experts. Without precluding death from the scope of the prohibition but heading down the path of the highly contestable question of the type of death in terms of the degree of pain and pernicious effects that the law is deemed to prohibit, Geoffrey Corn, Laurie Blank, Chris Jenks and Eric Talbot Jensen have argued: 'the principle prohibits employing methods or means of warfare that cause death in a way considered by the international community to be unnecessarily painful or pernicious (for example, chemical weapons), or that needlessly aggravate the suffering of an opponent who survives attack but is rendered hors de combat'.[169] From a different perspective, Jens David Ohlin does not shy away from accepting the understanding that 'Article 35 … gives attacking forces license to quickly and cleanly kill enemy combatants, and prohibits them from inflicting injuries that needlessly prolong their pain',[170] emphasising that '[t]he prohibition applies to weapons that cause suffering to their victims but as to weapons

[168] ORDC vol XVI, pp 16. In a similar vein, New Zealand, ibid p 18 ('One should not fall into the error of giving preference to weapons that killed cleanly rather than to weapons that wounded but did not kill.'); also included in the Report of the Ad Hoc Committee on Conventional Weapons (1st session, 1974), ibid p 458.
[169] Geoffrey S Corn, Laurie R Blank., Chris Jenks and Eric Talbot Jensen, 'Belligerent Targeting and the Invalidity of a Least Harmful Means Rule' (2013) 89 Int'l L. Stud. 536, 555. But see Dinstein, *Conduct*, 75 asserting that 'In any event, there must be no mistaking of 'superfluous injury or unnecessary suffering' as an indication of the lethality of the weapon employed'.
[170] Ohlin, 'Recapturing', 26.

that kill quickly the rule is silent – and this result is telling'.[171] Casting an air of pessimism over the intended humanitarian contribution of the prohibition, he claims that '[w]hile it may be true that one diplomat referred to this as "false humanitarianism," it is the only humanitarianism that the Additional Protocol has left us with'.[172] At the same time, this approach reads into the prohibition an arbitrary trade-off between 'painless killing'[173] (whatever painless would mean)[174] and the 'needless prolongation of pain'.

The problem with this approach is the derivation of a strong affirmative permission, a 'license to kill quickly and cleanly', from an explicit *prohibition* to inflict injury/suffering, distorting the prohibitory import of the rule[175] and the philosophy of a principle that was moulded within and drafted against the backdrop of concerns about the physical death caused by weapons and indeed inevitable death. More than that, Ohlin's approach could provide one with the cynicism necessary to go so far as to interpret Article 35(2) API as a proper 'licence' to employ certain weapons on the basis of an (assumed) cleanness and swiftness in killing. Going as far back as the 1899 Hague Peace Conference, this is reminiscent of the United States delegate's argument with respect to the question of projectiles charged with explosives that spread asphyxiating and deleterious gases. As stated, '[s]uch projectiles might even be considered as more humane than those which kill or cripple in a much more cruel manner, by tearing the body with pieces of metal', and claimed that 'the use of those projectiles ought therefore to be considered as a lawful means of waging war.[176] This should give serious pause for thought when examining the prohibition of inevitable death in relation to UAVs. According

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[171] ibid 28.
[172] ibid.
[173] ibid 27.
[174] In relation to the complexity of the criteria of pain and mortality, see e.g. Conference of Government Experts on the Use of Certain Conventional Weapons (Second Session–Lugano, 28.1-26.2.1976): Report (ICRC, Geneva 1976) p 140; Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects: Report on the Work of Experts (ICRC, Geneva 1973) pp 27, 29.
[175] See e.g. Joseph Raz, *Practical Reason and Norms* (OUP 1999) 86, '… an act is strongly permitted only if its being permitted is entailed by a norm. It is permitted in the weak sense if the permission … is simply a consequence of there being no norms prohibiting the performance of the action.'. See also Luban, 'Military Necessity', 320 ('I disagree that LOAC's licensing function is as fundamental as its constraining function.').
[176] Hague Proceedings (1899) p 366 (Captain Mahan).

to disturbing descriptions, UAV firepower 'incinerates' or 'liquifies' targets or makes them 'evaporate' swiftly and instantaneously within minutes.[177] Bodily damage caused by UAVs is of such an extensive nature that the body virtually dissolves[178] so that there is no body to be buried but only remains to be identified by DNA analysis.[179] It is highly doubtful (and hardly 'telling' as Ohlin suggests) that Article 35(2) API could be relied on to sanction the ineluctable lethality caused by drone violence in the case that such violence would be considered by some to be clean, quick and/or painless.[180] Similar concerns about compliance with the principle of superfluous injury/unnecessary suffering, especially in view of the absence of an explicit reference to inevitable death in Additional Protocol I, could be raised with respect to the use of lethal micro-drones or small Unmanned Aircraft Systems (sUAS), which can fly autonomously and in swarms, and inflict inevitable death with only three grams of explosives.[181]

4.3 CONCLUSION

The chapter demonstrated that in an analysis that takes up the challenges that UAVs pose to the principle prohibiting superfluous injury and unnecessary suffering under the LOAC, UAVs are to be considered tools of warfare that render the death of targeted individuals inevitable. In so doing, the chapter argued that superfluous injury/unnecessary suffering is not to be exhausted in the question of whether UAVs qualify as 'means or methods of warfare' for the purposes of the law and pointed out the artificiality of approaches that are too vested in the idea that UAVs are not weapons or weapons systems and therefore when it comes to Article 35(2) API they 'pass muster'. This was illustrated by the way in which the United States deals with

[177] Gusterson, *Drone*, 40.
[178] ibid 40.
[179] ibid 42. See also chapter 1, section 1.2.
[180] ibid 4 ('Seen from Virginia the drone strike is quick, clean, and bloodless. [The] death is instant.').
[181] See e.g. CBS, 'Capturing the Swarm' (20 August 2017) <www.cbsnews.com/news/60-minutes-capturing-the-perdix-drone-swarm/>; US DoD News Release, 'Department of Defense Announces Successful Micro-Drone Demonstration Release No. NR-008-17 (9 January 2017) <www.defense.gov/News/News-Releases/News-Release-View/Article/1044811/department-of-defense-announces-successful-micro-drone-demonstration/>.

UAVs in relation to the obligation of legal review. The chapter showed that the prohibition of the inevitability of death can be read as part of the principle of superfluous injury and unnecessary suffering, which originates in the 1868 St Petersburg Declaration and has arguably crystallised as customary law. Such a reading is tied to the ethos of the LOAC as a normative regime committed to a vision of war as a world of regulated human armed interactions and is inextricably bound up with humanity understood as guarding against warfare practices that rule out any reasonable chance of survival for the adversary. Disrupting the factual and normative assumptions of the law, UAV warfare imposes unilateral violence on individual opponents, enabled by a weapons technology that produces ineluctable lethality as the effect that invariably results from its expected, normal or typical use, namely to locate and target individuals for death.

CHAPTER 5

HOW UAVs CHALLENGE THE PROTECTION OF PERSONS *HORS DE COMBAT*

The chapter aims at demonstrating how, if at all, the prohibition of attacks against persons *hors de combat* can extend protection to the individuals targeted by UAVs. Beginning with a brief overview of the said prohibition, the chapter examines the options whereby the human adversary can gain *hors de combat* status and immunity from attack. In this context, the chapter looks at how the concept of defenceless adversary can fit within the scope of the *hors de combat* safeguard and the opponent's corresponding obligation to refrain from direct attack, as well as the option to surrender. As UAV targets do not pose a realistic threat to the UAV attacker and are placed in extreme vulnerability, the chapter examines whether the individuals targeted by means of UAVs can qualify for *hors de combat* protection as defenceless persons.

5.1 THE PROHIBITION OF ATTACKS AGAINST PERSONS *HORS DE COMBAT*

Under the existing rules of the LOAC, the notion of *hors de combat* is an essential pillar of the law's protective and regulatory regime. The prohibition of attacks against persons *hors de combat* is enshrined in Article 41 API. While the *hors de combat* safeguard was proposed by the ICRC at the 1974-77 Diplomatic Conference as the first paragraph to Article 38 of the 1973 draft Protocol entitled 'Safeguard of an enemy hors de combat and giving quarter',[1] the current prohibition is preceded by the rule on quarter, which

[1] ORDC vol I, Part Three: Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (Geneva 1973) p 13: 1. It is forbidden to kill, injure, ill-treat or torture an enemy *hors de combat*. An enemy *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:
(a) is unable to express himself, or
(b) has surrendered or has clearly expressed an intention to surrender,
(c) and abstains from any hostile act and does not attempt to escape.

prohibits, *inter alia*, the conduct of hostilities on a 'no survivors' basis.[2] Article 41 API builds on the Hague Regulations concerning the laws and customs of war on land annexed to the 1899 and 1907 Hague Conventions II and IV respectively, which specifically forbade in identical Article 23, in a limb prior to the prohibition of denial of quarter: '(c) To kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion'.[3]

Reaffirming the Hague Convention IV of 1907, Article 41(1) API provides that '[a] person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack'. Broadening the protective scope of the *hors de combat* safeguard as included in the Hague Conventions, under Article 41(2) API *hors de combat* is to be considered a person who (a) 'is in the power of an adverse Party', or (b) 'clearly expresses an intention to surrender', or (c) 'has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself'.[4] Importantly, immunity from direct attack is provided only for as long as the person who could otherwise benefit from the *hors de combat* protection abstains from any hostile act and does not attempt to escape, and hence does not represent a threat to the opposing side. Despite its close connection with the web of rules prescribing certain behaviour towards the 'wounded, sick and shipwrecked' falling under the homonymous part of the Protocol (Part II: Wounded, Sick and Shipwrecked), the *hors de combat* safeguard does not form part thereof. It constitutes one of the rules of Part III on the methods and means of warfare and is situated in Section I together with other rules of conduct. As the ICRC

[2] However, this has not always been the case. The 1874 Brussels Declaration in Article 13 provided for the prohibition of '(c) Murder of an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion' as part of the list of 'means of injuring the enemy' which were 'especially forbidden' preceding the prohibition of giving no quarter (Art 13(d)). The 1880 Oxford Manual in Article 19(b) prohibited 'to injure or kill an enemy who has surrendered at discretion or is disabled' in the same article Art 9(b). The current prohibition, which was separated from quarter during the negotiations, was adopted by consensus (ORDC vol VI, p 104) and codified as Article 41 API.

[3] Art 23(2).

[4] 1987 ICRC Commentary on API (Art 41) p 482, para 1605 ('It is specifically prohibited to deliberately make persons 'hors de combat' a target'); Art 85(3)(e) API which provides as a grave breach 'making a person the object of attack in the knowledge that he is 'hors de combat…''.

Commentary emphasises, '[i]n practice [the rule] is one of the most important rules of the Protocol'.[5]

Furthermore, Article 3 common to the four Geneva Conventions[6] and Additional Protocol II[7] on non-international armed conflicts make explicit reference to *hors de combat*. Here, the 'hors de combat' protection is formulated as part of the obligation of 'humane treatment' and non-discrimination of '[p]ersons taking no active part in the hostilities'.[8] In Common Article 3 'members of the armed forces who have laid down their arms' are referred to separately from 'those placed "hors de combat" by sickness, wounds, detention, or any other cause', and both categories are included in the article to further clarify the scope of 'persons taking no active part in hostilities' for the purposes of 'fundamental guarantees'. As the 2017 ICRC Commentary explains,

> Other causes of being *hors de combat* could, for example, be shipwreck, parachuting from an aircraft in distress, or falling or otherwise being in the power of a Party to the conflict –for example at a checkpoint– even if the situation may not yet be regarded as amounting to detention. The addition of

[5] 1987 ICRC Commentary on API (Art 41) p 480, para 1601.
[6] Art 3 GCI-IV: '… shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'.
[7] Art 7 APII.
[8] It is worth noting that at the Diplomatic Conference the 'safeguard of an enemy hors de combat' was discussed for inclusion as a separate article on the basis of Article 7 of Additional Protocol II as proposed by the ICRC (ORDC vol I (n 1), p 39). The prohibition was phrased in a manner almost identical to that of Protocol I, but was suggested as part of the provisions on 'humane treatment of persons in the power of the parties to the conflict'. The ICRC representative explained that '[t]he ICRC had placed article 7 in Part II rather than in Part IV - "Methods and Means of Combat" - draft Protocol II because it had appeared logical to recall clearly the moment starting from which the combatant who had ceased to take part in hostilities was entitled to benefit from the protection of Part II of draft Protocol II' (ORDC, vol VIII, p 332). The article was put to the vote and rejected (ORDC vol IV, pp 128-9 (by 22 votes to 15, with 42 abstentions). This seemed to reflect a concern about the inclusion of what were considered 'humanitarian provisions' into parts concerned with 'rules governing the means and methods of combat', which has been expressed in relation to Additional Protocol I as well [See e.g. ORDC vol V, pp 183-4 (Canada) (183, '[t]he rules governing the conduct of combatants inter se and the rules governing the protection of those who were hors de combat should be kept quite separate'; 184: 'There was no need to mirror the provisions of draft Protocol I' and that Common article 3 'provided a good measure of protection for those who were hors de combat')]. However, 'the disappearance of purely humanitarian provisions - adopted, after all, in Committee - such as safeguard of an enemy hors de combat, … prohibition of unnecessary injury', among others, was deplored by some delegates [ORDC vol VII, pp 321-2 (Holy See)]. See Sivakumaran, *Non-International*, 255-335.

"any other cause" indicates that the notion of "hors de combat" in common Article 3 should not be interpreted in a narrow sense.[9]

According to the ICRC customary international humanitarian law study, attacks against *hors de combat* (Rule 47) are prohibited as part of customary international law during international and non-international armed conflicts.[10]

Moreover, it is worth noting that Additional Protocol I indicates that upon gaining the protected status of 'hors de combat' under the conditions laid down therein an enemy combatant (including an occupant parachuting from an aircraft in distress) ceases to be an 'enemy' and becomes a 'person',[11] who is regarded as 'only a human being'.[12] In that respect, it should be kept in mind that the *hors de combat* protection would not be conceivable if one's behaviour during the conduct of hostilities, as reflected in the means and methods of warfare used, did not acknowledge the adversary as human. In other words, the adversary is a human being whether *dans le combat* or *hors de combat*.

5.2 ROUTES LEADING TO *HORS DE COMBAT* PROTECTION

As transpires from the text of Article 41 API, the drafting history of the provision and the ICRC Commentary, as well as relevant literature, discussed below, the LOAC seeks to construct a comprehensive system of protection for opponents. To this end, the law provides for different criteria or conditions rendering combatants and fighters *hors de combat*, presenting thus a viable possibility of a possible world of protection against direct enemy attack. Through surrender, capture or incapacitation opponents can overturn the

[9] 2016 ICRC Commentary on GC1 (Art 3) para 539.
[10] ICRC Customary IHL Study, Rule 47. See also ICC Statute prohibiting the 'killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion' as a war crime in international armed conflicts (Art 8(2)(b)(vi)).
[11] 1987 ICRC Commentary on API (Art 41) p 482, para 1606 (which also compares it with the wording of Art 23(c) of the Hague Regulations).
[12] ORDC vol V, p 18. See also the ICRC President noting that 'The instruments, which had to be adapted to developments in types of conflicts, must uphold the unswerving principle of absolute and unconditional respect for the enemy hors de combat the wounded, the prisoner or the civilian - who was no longer an enemy, but only a human being', ibid p 11.

presumption of dangerousness and hence targetability[13] by indicating that they no longer pose a military threat to the opposing side, thus becoming *hors de combat*. It is the synergistic interactions of all the options to protection that synthesise the *hors de combat* safeguard and transform it into a coherent whole.

Be in the power of the adverse party

The discussions during the Diplomatic Conference resulted in the inclusion for the purposes of *hors de combat* protection of persons who are 'in the power of the Adverse Party', as provided in the first limb (a) of Article 41(2) API. By extending the prohibition against direct attack to this category of persons Article 41 sought to be 'more inclusive',[14] with a view to addressing situations in which a combatant had not yet the opportunity to lay down their arms, which would indicate the intention to surrender, but still were unable or unwilling to defend themselves, such as the 'special situation in which a soldier was no longer a combatant and not yet a prisoner of war',[15] or, for example, when a combatant is 'taken by surprise' still bearing arms while having the chance to surrender.[16]

There are obvious similarities that can be drawn as to the phraseology 'in the power of an adversary', which is also employed in the Conventions and the Protocol with respect to prisoners of war and the wounded and the sick.[17] This notwithstanding, the Commentary observes, there seems to be a 'subtle

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[13] Corn et al, 'Belligerent Targeting', 588-9 ('… Article 41 essentially provides information on how an individual can overcome that presumption of targetability and obtain the humanitarian protection derived from the alternate status of *hors de combat*') and 591 ('combatants and fighters are presumptively targetable, but can signal to attacking forces that they are *hors de combat*, and thereby overcome that presumption, by surrendering or otherwise indicating clearly that they are unable or unwilling to continue engaging in combat').

[14] Corn et al, 'Belligerent Targeting', 586.

[15] ORDC vol XIV, p 284 (Sweden). This reflected the amendment introduced by the UK. Also, ibid p 279 (Algeria) ('… no distinction must be drawn between combatants who were not yet in the hands of the adverse Party and those who were already prisoners, …').

[16] ibid p 278 (United Kingdom) ('… a combatant could surrender without having laid down his arms. If taken by surprise he could put his hands up as a sign of surrender while he was still bearing arm').

[17] See Art 1 of 1929 Geneva Convention; Art 4 GCIII (Prisoners of War); API: Section III 'Treatment of persons in the power of a Party to the conflict; Art 11; 'have fallen into the power of' in Arts 41(3), 44-5.

distinction' between '*having fallen* into the power' and '*being* in the power' of the adversary, which 'could' indicate 'a significant difference' as to the time-frame of the applicability of the protection.[18] With a view to 'avoid[ing] any gap in the protection' that could potentially flow from interpretative uncertainty,[19] the Commentary explains that the 'be in the power of' language is meant to extend the *hors de combat* protection and therefore the prohibition of direct attack to cover opponents who are not required to be 'captured' in the sense of having 'been taken into custody' or been 'apprehended'.[20] In this way, Article 41(2)(a) API, in which the 'be in the power of' criterion appears, would complement the protective scheme already in place for the wounded and the sick by virtue of the Geneva Conventions, even if this entails an overlapping clause, by ensuring coverage on the *hors de* combat basis for all individuals who were no longer combatants but had not been yet 'captured' or 'apprehended' by the enemy force (and therefore were not prisoners of war yet).[21]

Elaborating on the scope of the 'in the power of' criterion and seeking to address situations where 'falling into enemy hands, i.e. having been apprehended' is virtually impossible, the 1987 ICRC Commentary suggests that Article 41(2)(a) API could provide a basis for the 'defenceless adversary'. According to the Commentary, such an understanding is, arguably, bound up with the overall purpose of the rule and that of the inclusion of the class of

[18] 1987 ICRC Commentary on API (Art 41) p 481, para 1602.
[19] ibid ('The expression adopted in 1949, "fallen into the power", seems to have a wider scope, but it remains subject to interpretation as regards the precise moment that his event takes place'). This is reminiscent of Kalshoven's 'gap' when stating that Article 23(c) and Article 23(d) of the Hague Regulations 'are not simply identical to the rule, found in the law of Geneva, prohibiting the killing of prisoners of war: while they may be interpreted to include that prohibition, they also, and more importantly, bridge the gap which may lie between the moment a combatant *becomes hors de combat* (by laying down his arms or from any other cause) and the moment he is effectively taken prisoner', Frits Kalshoven, *Constraints on the Waging of War* (ICRC, Martinus Nijhoff 1987).
[20] 1987 ICRC Commentary (Art 41) pp 481 and 484, paras 1602 and 1612. This would be the case per the 1899 and 1907 Hague Conventions II and IV respectively, and the 1929 Geneva Convention (Art 1), an understanding which, according to the Commentary, was echoed in the 'fallen into the power' wording in the 1949 Geneva Convention III (Arts 3 and 4).
[21] 1987 ICRC Commentary ibid; see also ibid (Art 40), para 1592 (clarifying the commonality and the difference between Article 41 and Article 42 is that the latter 'is equally concerned with persons who are already in the power of the adverse Party, as with those who are defenceless on the battlefield, or on the point of surrender …').

persons who '*are* in the power of an Adverse Party'.[22] The Commentary's approach to 'defencelessness' for the purposes of the *hors de combat* protection against direct attack is worthy of attention because, as discussed below, it effectively seeks to circumscribe some of the normative (legal and ethical) problematics of technological developments, such as air and artillery attacks, and emphasises the concerns regarding the realistic prospects of application of the LOAC.

References to 'defenceless adversary'

Explicit reference to the 'defencelessness' of a person *hors de combat* is made only in the third limb (c) of Article 41(2) of API, where a defenceless adversary is explicitly intertwined with persons who are incapable of defending themselves due to physical incapacity, exemplified by unconsciousness or other incapacitation as a result of disabling injury or sickness.[23] There is no disagreement in the literature that this class of individuals includes defenceless persons only in cases where such defencelessness ensues from incapacitation, and therefore Article 41(2)(c) API does not provide for 'defencelessness as an independent *hors de combat* basis'.[24] As there is no other express reference to the defencelessness of the adversary in Article 41 API, reliance on the text of Additional Protocol I itself only gets us so far.

However, the idea of defenceless adversary has been no stranger to the *hors de combat* safeguard. In that respect, the influence of the Hague

[22] 1987 ICRC Commentary on API (Art 41) p 484, para 1611.
[23] ibid p 488, para 1620 ('In fact, it is not only because a person of the adverse Party is wounded, or partially handicapped, that this obligation arises, but because he is incapable of defending himself.').
[24] See e.g. Michael N Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's *'The Power to Kill or Capture Enemy Combatants*' (2013) 24 EJIL 855, 858 ('… appearance of the phrase only in the subparagraph dealing with the wounded augurs against interpreting it as applicable when the fighter is not wounded. Additionally, its inclusion served a specific purpose – making clear that an individual must be wounded in a manner that renders him incapable of fighting before the belligerent right to attack is extinguished.'); Ryan Goodman, 'The Capture-or-Kill Debate #11: Goodman Responds to Ohlin' (*Lawfare*, 20 March 2013) <www.lawfareblog.com/capture-or-kill-debate-11-goodman-responds-ohlin>; See also HPCR Manual, Rule 15(b) and HPCR Commentary to Rule 15(b), p 104, para 3 ('The notion of incapacitation is contingent on the combatant (or the civilian taking direct part in hostilities) (i) not continuing to commit any act of hostility; and (ii) not trying to escape. Incapacitation ought not to be confused with lack of capability for defense.').

Regulations, in which this rule originates, also reflected in the draft Protocol, could hardly be overstated.[25] Additional Protocol I's Hague counterpart envisaged the combatant's 'laying down arms' or 'having no longer means of defence' as *preludia* to surrender.[26] While the draft Protocol proposed by the ICRC at the Diplomatic Conference retained this language, it provided disjunctively for the opponent who 'no longer has any means of defence' *or* 'has surrendered' as separate conditions corollary of 'having laid down his arms'.[27] Currently the prohibition covers surrendering opponents in the second limb (b) of Article 41(2) API, which is, however, dissociated, at least by the article's express terms as we shall see below, from the said specific conditions.

Introducing the *hors de combat* protection at the Diplomatic Conference, the ICRC representative, Jean de Preux, explained that

> article 38, which was based on Article 23 c) of The Hague Regulations of 1907, was concerned with the safeguard of an enemy hors de combat, whether or not he was actually a prisoner. Paragraph 1 defined the meaning of the expression hors de combat in a general clause and provided a number of specific examples. The general clause derived from Article 23 c) of The Hague Regulations; but differed from it to some extent, since that article obviously could not be applied to aerial warfare. The determining factor was abstention from hostile acts of any kind, either because the means of combat were lacking or because the person in question had laid down his arms. It was therefore necessary that there should be an objective cause, the destruction of means of combat, or a subjective cause, surrender.[28]

Likewise, defencelessness as a circumstance in which an opponent could become *hors de combat* independently of surrender was explicitly mentioned by the Brazilian representative as follows:

> An enemy was hors de combat when he no longer had any possibility of defending himself or when he had surrendered. The former situation might arise in a variety of situations which it would be very difficult to describe. Only

[25] 1987 ICRC Commentary on API (Art 41) p 488, para 1620.
[26] See above section 5.1.
[27] See above section 5.1 and n 1.
[28] ORDC vol XIV, p 276.

> combatants facing such an enemy could decide whether or not he had any possibility of defending himself.[29]

Furthermore, the delegate of Belgium, having identified that 'the wording was clearly derived from' the Hague Regulations and the Brussels Declaration, suggested that '[t]he Drafting Committee might perhaps improve the text, for instance, by using the expression "unable to defend himself" instead of "... is unconscious or (a) is wounded or sick ..." in paragraph 1'.[30] From a different perspective, the representative of Uruguay proposed the deletion of 'the words "no longer has any means of defence" in paragraph 1',[31] explaining that

> In view of recent events, it was clear that if an enemy was hors de combat, it was because he had laid down his arms and had thereby lost his status as a combatant. He should therefore be regarded from that moment as a non-combatant and be treated as such. None of the measures provided for in paragraph 1 could be taken against him.[32]

For the delegate of Uruguay '[t]hat specification seemed to be illogical, for the fact that an enemy had surrendered or had laid down his arms implied that he no longer had any means of defence'.[33] Other delegates sought to restrict the *hors de combat* protection only to unconscious, wounded and sick persons,[34] or link the condition of 'ha[ving] no longer means of defence' to surrender.[35]

Defencelessness, ICRC Commentary and approaches in the literature

For the ICRC Commentary, as noted above, the idea of 'defenceless person' is not to be exhausted only to situations of combatants being physically incapable of defending themselves (Art 41(2)(c) API). Rather, it argues that

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[29] ibid p 277, para 34 (also supported by Venezuela and Finland, ibid pp 280 and 283 respectively.
[30] ibid p 281 (Netherlands).
[31] ORDC vol III, p 169.
[32] ORDC vol XIV, p 276.
[33] ORDC vol V, p 96.
[34] ORDC vol XIV, p 278 (United Kingdom).
[35] ibid p 284 (Spain) (suggesting that the phrase be 'replaced by the words "or having no longer means of defence," the comma implying a condition. Otherwise he would rather the phrase was deleted Otherwise he would rather the phrase was deleted').

'defencelessness' can be read as part of the 'being' in the power of criterion (Art 41(2)(c)(a) API), which is to be distinguished from 'having fallen' in the power of the enemy. To this end, the ICRC Commentary employs air attacks and the use of overwhelmingly superior firepower to provide the context within which it situates 'defencelessness' as a manifestation of 'being in the power' of the adverse party. With respect to air operations against ground forces, the Commentary adds the qualification that the attacking force conducts attacks 'without being able, or wishing, to take them into custody or accept a surrender (for example, in the case of an attack by helicopters)'.[36] In this context the Commentary states that 'falling into enemy hands, i.e. having been apprehended' is 'virtually never the case', suggesting that a reading of the 'in the power of' criterion to refer only to situations where the adversary combatant or fighter has been 'apprehended' would be too narrow a construction for the purposes of granting *hors de combat* protection. The Commentary also refers to land operations where forces 'might have the adversary at their mercy by means of overwhelmingly superior firing power to the point where they can force the adversary to cease combat'.[37] In that respect, the Commentary notes that '[a] formal surrender is not always realistically possible, as the rules of some armies purely and simply prohibit any form of surrender, even when all means of defence have been exhausted'.[38] In this context it goes on to state that '[a] defenceless adversary is "hors de combat" whether or not he has laid down arms'.[39]

Ryan Goodman concurs that '[c]ontemporary LOAC includes a relatively broad definition of *hors de combat*'.[40] On the basis of the text of the Protocol and the *travaux préparatoires*,[41] he argues that '… the drafters of Article 41 appear to have opted for a more general category –'in the power of an adverse Party'– with the potential to include the more specific situations identified in the Secretary-General's Report (a combatant 'who has obviously no longer any weapons, without need for any expression of surrender on his

[36] 1987 ICRC Commentary on API (Art 41) p 484, para 1612.
[37] ibid.
[38] ibid.
[39] ibid.
[40] Goodman, 'Kill or Capture', 831.
[41] ibid 830-6.

part') and in the Draft Protocol (an individual who 'no longer has any means of defence)'.[42] Considering that 'the general support for the 1973 Draft Protocol was significant' and that 'the drafters finally opted for a broad, independent class of combatants who are "in the power of an adverse Party" in addition to the class of combatants who are wounded, sick, or surrender', Goodman claims, '[i]f anything, the negotiations alerted the drafters to the substantial support for the idea that defencelessness might independently render an individual *hors de combat* – which could be covered under the breadth of Article 41(2)(a)'.[43] In this light, he 'conclude[s], more tentatively, that this category [i.e. 'in the power of an adverse Party'] includes combatants who are defenseless and at the complete mercy of an attacking party'.[44]

However, this is not a widely shared view. Whether 'defencelessness' can provide a basis for *hors de combat* protection under the LOAC has been hardly straightforward and proved to be a vexed issue, which has received consideration in the literature and has given rise to controversy among scholars.[45] Indeed, the inclusion of 'defencelessness' as a ground for *hors de combat* protection has been criticised by eminent voices as a reading of the provision in a way which 'sweep[s] so broadly',[46] or which unduly expands the scope of the protection and, in particular, the 'in the power of the adversary' criterion,[47] seeking to establish defencelessness (and, indeed, in an unconditional, unqualified and open-ended manner) as an independent basis for *hors de combat* protection.[48]

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[42] ibid 834-6.
[43] ibid 835.
[44] Goodman, 'Response to Ohlin'. See also, Goodman, 'Kill or Capture', 836 ('The understanding reached in the 1970s codification effort was that combatants who no longer have the means to defend themselves – who are at the mercy of their adversary – are, indeed, covered by this more direct and, in some cases, more protective framework.').
[45] Most scholarship tends to focus on 'defencelessness' in relation to the *hors de combat* as part of an enquiry into the existence of a capture rather than kill obligation imposed on the attacking force when capture is feasible, or, in other words, of a 'least harmful means rule' on the basis of *hors de combat*. This discussion is, however, outside the scope of this chapter.
[46] Haque, *Morality*, 102.
[47] See e.g. Corn et al, 'Belligerent Targeting', 587 ('a broad conception of "in the power of" which is reflected in 'neither the Protocol itself nor the *travaux préparatoires*'; 'an expansive interpretation of "in the power" and 'a tactically incoherent interpretation of a LOAC concept whose meaning has been settled for centuries'); Ohlin, 'Recapturing', 19-20.
[48] Schmitt, 'Wound', 858-61.

For Michael Schmitt, who 'do[es] not accept the premise that defencelessness alone shields enemy forces or civilian direct participants from attack', 'Article 41(2)(a) simply clarifies, rather than modifies, the existing rule; "in the power" refers … to individuals who have been captured or otherwise detained'.[49] He notes, however, that 'capture (and detention) does not necessarily require taking the fighters into "custody"' and that '[i]n some circumstances, an individual has effectively been captured without an affirmative act on either the captor's or prisoner's part, …'.[50] Regarding the ambit of the 'in the power of' category, he argues that

> The crucial question is whether an individual is unambiguously in the captors' control, such that he poses no risk to the captors or civilians (e.g., a risk of suicide bombing) and taking custody would be operationally feasible in the attendant circumstances. In other words, the *hors de combat* rule prohibits an attack that is nothing but an execution because the individual concerned has already been captured.[51]

Furthermore, Yoram Dinstein refers to '[t]he phrase "in the power of an adverse Party" in subparagraph (a) of Article 41(2) [that] has led to a certain degree of confusion: some commentators claim that any combatant who is unable to defend himself is *hors de combat*',[52] emphasising '[b]ut the ability of a combatant to defend himself is not the real issue here. A combatant is in the power of an adverse Party only once he has been actually captured by the enemy'.[53] Furthermore, Ian Henderson concedes that 'while the principle of humanity may dictate that where feasible a defenceless combatant should be captured rather than killed', but claims that 'this is not a strict rule of IHL' and, therefore, '[a]ccordingly, a combatant is not *hors de combat* merely due to being no longer capable of offering effective resistance'.[54] Reading Article 41(2)(a) API to apply to 'an overwhelmed enemy and unarmed combatants', he argues, 'is overreaching the natural meaning of the words used in the

[49] ibid 860.
[50] ibid.
[51] ibid (adding that this was 'a point made, as Professor Goodman notes, by Professor Howard Levie decades ago').
[52] Dinstein, *Conduct*, 190.
[53] ibid.
[54] Henderson, *Targeting*, 84-5.

article',[55] and claims that equating 'a disarmed combatant unable to defend himself' with one 'having fallen into the power of an enemy' is a 'definition [that] is not reflected in API'.[56]

Clearly express an intention to surrender

According to Article 41(2)(b) API, *hors de combat* is a person who 'clearly expresses an intention to surrender'. Surrender is a recognised and well-established legal and ethical guarantee leading to protection from direct attack; a fundamental rule of the LOAC, the customary standing of which is incontrovertible. Surrender requires a 'positive act'[57] or 'affirmative signals',[58] whereby 'the intention to surrender is indicated in an absolutely clear manner'[59] and the intent to no longer participate in hostilities and disengage from combat is 'communicate[d] effectively'[60] to the adversary. As Robert Sparrow has observed, 'recognizing surrender is fundamentally a question of recognizing an intention'.[61] Actions that traditionally signal surrender include laying down arms, raising hands, putting hands behind the head, raising white flags.[62] Corollary to a clear expression of the intention of surrender is the adversary's obligation to accept the offer of surrender and refrain from targeting the surrendering individual.[63]

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[55] ibid 85.
[56] ibid.
[57] Hilaire McCoubrey and Nigel D White, *International Humanitarian Law: The Regulation of Armed Conflict* (Dartmouth 1992) 227.
[58] Corn et al, 'Belligerent Targeting', 589.
[59] 1987 ICRC Commentary on API (Art 41) p 487, para 1619.
[60] Dinstein, *Conduct*, 193.
[61] Robert Sparrow, 'Twenty Seconds to Comply: Autonomous Weapon Systems and the Recognition of Surrender' (2015) 91 Int'l L. Stud. 699, 707.
[62] See 1987 ICRC Commentary on API (Art 41) p 487, para 1619; Dinstein, *Conduct*, 193; Sivakumaran, *Non-International*, 413; Russell Buchan, 'The Rule of Surrender in International Humanitarian Law' (2018) 51 Israel L. Rev. 3, 19-22 and 26 (concluding that '[c]ontrary to popular belief, the waving of a white flag is not a legally recognised method of expressing an intention to surrender under either conventional or customary international humanitarian law').
[63] 1987 ICRC Commentary on API (Art 41) p 487, para 1619 ('If the intention to surrender is indicated in an absolutely clear manner, the adversary must cease fire immediately; it is prohibited to refuse unconditional surrender…'). Dinstein, *Conduct*, 193 ('LOIAC imposes a general obligation to accept the surrender of enemy combatants who clearly express an intention to do so.'); Buchan, 'Surrender', 23 ('… the opposing force is legally obligated to accept that offer of surrender and refrain from making such a person the object of attack').

While surrender remains theoretically an option, it becomes less and less realistic and relevant in warfare settings that disrupt the factual and normative space of a reciprocal armed interaction. While surrender does not legally require capture, the difficulties that surround the *hors de combat* rule in air attacks are often linked with the understanding that surrender is to be accompanied by capture.[64] The problems besetting surrender in the context of conventional air attacks against ground targets are illustrated by an incident which took place in 2007 in Iraq. The leaked classified US military logs released in 2010 by whistle-blower website Wikileaks revealed the details of an attack that involved a US Apache helicopter that was 'cleared to engage' a truck with two Iraqi insurgents inside, identified as 'Anti-Iraqi Forces' (AIF).[65] After opening fire and destroying the truck, the US pilots radioed to the headquarters that 'AIF got into a dumptruck headed north, engaged and then they came out wanting to surrender'.[66] The fact that the intention to surrender was understood as such by the pilots allows to infer that the two insurgents had clearly expressed their intention to surrender. In response, according to the log, 'Lawyer states they cannot surrender to aircraft and are still valid targets'.[67] Cleared to engage, the helicopter opened fire again and when the Hellfire missed it 'actively chased down' the two insurgents and killed them by destroying the shack into which they ran to seek refuge.[68]

In relation to this incident, Director of Humanitarian Policy and Conflict Research at Harvard University, Claude Bruderlein, remarked that '[s]urrendering is a fundamental principle of the law of armed conflict and you can surrender to aircraft. You cannot attack those that surrender'.[69] Moreover, commenting on the incident, Professor Adam Roberts pointed out that, while '[s]urrender is not always a simple matter', the US understanding

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[64] Dinstein, *Conduct*, 193.
[65] Wikileaks, <https://wardiaries.wikileaks.org/id/E8DE9B9F-E468-B587-E4B332C09FF48BE2/>.
[66] ibid.
[67] ibid.
[68] ibid.
[69] Quoted in TBIJ, 'US Apache Guns Down Surrendering Insurgents' (23 May 2011) <www.thebureauinvestigates.com/stories/2011-05-23/us-apache-guns-down-surrendering-insurgents>.

of the rule on surrender was 'dogmatic and wrong'. In that respect, Roberts emphasised that '[t]he issue is not that ground forces simply cannot surrender to aircraft. The issue is that ground forces in such circumstances need to surrender in ways that are clear and unequivocal'.[70] 'The question remains', the ICRC customary IHL study has observed, 'as to how to surrender when physical distance may make it difficult to indicate an intention to surrender'.[71]

More than a 'legal exchange constituted by a valid offer and its subsequent acceptance',[72] offering and accepting surrender suggests a normative/ethical exchange between adversaries in a reciprocal armed interaction. As Robert Sparrow points out, '[t]he institution of surrender is so long established and fundamental to the ethics of war that it is actually under-represented in the law of war'.[73] Surrender relies on good faith on both warring sides. On the one side, it manifests the surrendering side's trust and faith both in the law and in the adversary; that is, that the law accords protection from attack and creates the attendant adversary's duty to afford the protection, and that the adversary will accept surrender and refrain from attack in accordance with the law. Adil Haque claims that 'the act of surrender … [is] morally significant. A surrendering combatant places her trust in her adversary. She gives up her power to protect herself —making herself utterly vulnerable and completely defenseless— and entrusts her adversary with total power over her fate. To kill such a combatant betrays that trust, exploits that vulnerability, and abuses that power'.[74] In a similar vein, as Terry Gill has put it, '[n]ot only is attacking persons who have surrendered a violation of basic humanity, it is no less a violation of trust and

[70] Quoted in David Leigh, 'Iraq War Logs: Apache Crew Killed Insurgents Who Tried to Surrender' (*The Guardian*, 22 October 2010) ('However, he added: "If the insurgents did indeed get back into the truck and drove off in the same direction as previously, then they probably acted unwisely, in a way that called into question their act of surrender … The US airmen might legitimately reckon that the truck contained weapons and that the men could be intending to rejoin the fight sooner or later".') <www.theguardian.com/world/2010/oct/22/iraq-war-logs-apache-insurgents-surrender>.
[71] ICRC Customary IHL Study, Rule 47, p 168.
[72] Buchan, 'Surrender', 22.
[73] Sparrow, 'Twenty Seconds to Comply', 703.
[74] Haque, *Morality*, 97.

dishonourable conduct to attack a person who has yielded and placed himself at the disposal of the opponent'.[75] On the other end, the acceptance of surrender manifests the opponent's trust and faith that the entitlement to protection that the law provides will not be detrimentally exploited by the surrendering adversary.[76] It is the betrayal of this trust that underlies the prohibition of the infliction of harm as a result of feigning of surrender which is prohibited as an act of perfidy.[77]

There is no doubt that the 'burden' or 'onus' to indicate the intention to surrender falls on those opponents who wish to place themselves out of combat. However, it seems doubtful whether the opponents' clear and unequivocal expression of intention to surrender remains 'the issue' in technological contexts where the attacking force relies on the superiorly destructive capability of certain weapon technologies, which portends a model of military violence that hardly allows space for surrender and casts into doubt the attacker's ability and/or intention to accept surrender as provided in the law. This becomes clear in UAV warfare. UAVs are tools of warfare, which are designed, developed and employed to locate and strike targets, with their fast-moving and fast-striking capabilities that enable the UAV-using force to subject the targeted individuals to overwhelming lethal violence whilst leaving them with no realistic opportunity to surrender.[78]

At this juncture, it is worth noting that Eliav Lieblich and Eyal Benvenisti have claimed that 'at least in some situations, the advent of smart technology can potentially reverse this trend [i.e. 'for centuries, the battlefield scenarios in which surrender has remained a viable possibility have decreased in line with the development of technology'], since weapons (and delivery platforms) can be controlled almost until final impact'.[79] In defence of this, they cite '[a] famous example [of] a 1991 incident where Iraqi soldiers

[75] Gill, 'Chivalry', 42.
[76] See chapter 2, section 2.2.
[77] Art 37(1)(a) API. See also chapter 2, section 2.2.
[78] See chapter 4, section 4.1.
[79] Eliav Lieblich and Eyal Benvenisti, 'The Obligation to Exercise Discretion in Warfare: Why Autonomous Weapon Systems are Unlawful' in Nehal Bhuta, Susanne Beck, Robin Geiss, Hin-Yan Liu and Claus Kress (eds), *Autonomous Weapons Systems: Law, Ethics, Policy* (CUP 2016) 281.

surrendered to an American drone'.[80] This is an oft-cited incident, which reportedly took place in the final days of the First Gulf War in 1991 when Iraqis surrendered in thousands, following the US-led coalition sustained and extensive aerial bombing campaign that counted almost a hundred thousand sorties and tons of bombs. It involved Iraqi soldiers 'waving any white material they could lay their hands upon in a desperate bid to surrender prior -they assumed- to the arrival of yet more sixteen-inch shells from the battleships'.[81] The incident has been referred to as '[o]ne of the most unusual surrenders … It was the first time in history that men surrendered to a robot',[82] or as 'the first recorded surrender of enemy troops to an unmanned vehicle',[83] or as 'the first time in history that human soldiers surrendered to an unmanned system'.[84] However, it is important to note that this incident does not capture a surrender to an armed UAV, a 'weapon' or a 'delivery platform', because the protagonist, the Pioneer, did not carry any weapons[85] and was not designed, developed and employed to locate *and* strike targets, like the Reaper and the Predator. Indeed, this incident occurred almost a decade before the arming of the drone was technologically achieved, and with almost 18 years elapsing from the arming of UAVs it is telling that no example can be found of an armed drone in the context of surrender. As the Thesis argues, UAV weapon technology has introduced a model of unilateral lethal violence that denies the adversary the opportunity to surrender. The blurring of a surveillance drone and an armed drone, as noted above, seems to miss the point about the current state of UAV weapon technology and

[80] ibid n 169.
[81] Royal Air Force, 'Air Power: UAVs The Wider Context' (Owen Barnes ed, 2009) 31.
[82] James P Coyne, *Airpower in the Gulf* (Aerospace Education Foundation 1992) 123.
[83] Norman Polmar and Thomas B Allen, *Spy Book: The Encyclopedia of Espionage* (Random House 1998) 466.
[84] Peter W Singer, 'Military Robots and the Laws of War' (Winter 2009) The New Atlantis 23, 28.
[85] US DoD, 'Final Report to Congress: Conduct of the Persian Gulf War' (April 1992) 722. Its mission was to 'provide near-real time (NRT) … reconnaissance, surveillance, target acquisition (RSTA); that is, it was designed and employed 'to collect information via pre-planned reconnaissance and surveillance, detect, recognize, and identify targets' mainly in support of naval gunfire. It was also tasked with 'battle damage assessment (BDA)'; that is, after an attack, it loitered over the area and sent back NRT video footage of the damage inflicted, on the basis of which there would be taken further 'decisions on whether additional attacks were required', ibid 721-3.

seems to continue to provide (inadequate) arguments in favour of UAVs vis-à-vis the law.

What is also interesting to note at this point is that this incident can help illustrate problems relating to the control of UAVs, at least at that early stage of their development. As a Royal Air Force (RAF) Report explains, the Pioneer 'launched from the USS battleship *Wisconsin*, became uncontrollable and headed off over Iraqi positions on Faylaka Island, which had already been subjected to heavy bombardment by the Wisconsin and its sister-ship, the USS Missouri'.[86] According to the RAF Report, '[o]ne account has it that the Pioneer operators had lost flight control over the UAV, and that after a while, adding to the impression that the little UAV had developed a mind of its own, the Pioneer seemed to tire of the situation and flew off, later crashing when it ran out of fuel'.[87] Importantly, the point that can be made here in relation to the incident in question is that the fact that the Iraqi soldiers attempted to surrender to the Pioneer drone (whether or not they knew that it was a drone) highlights the combatants' confidence and faith in the rule of surrender as an opportunity for protection from direct attack. This may be said to demonstrate in turn that, notwithstanding the transformation of weapons' capabilities, the adversaries do not give up the expectation for surrender and that surrender continues to be understood as a fundamental guarantee embedded in the law and ethics of war.[88]

In new technological contexts, the discussion would need to be shifted to whether surrender establishes a legal and/or ethical obligation to be shouldered by the warring sides in relation to the choice of means and methods of warfare and how the weapons and tactics chosen shape the adversary's opportunity or option to surrender that could lead to *hors de combat* status. For example, in UAV warfare surrender is less an issue of UAV targets' intention to surrender and more a question of the UAV-using force's

[86] RAF Report (2009) 31.
[87] ibid.
[88] It is interesting to note another incident of soldiers 'surrendering' to American reporters: see Dan Fesperman, '10 Tired Iraqis Surrender to Reporters War in the Gulf' (The Baltimore Sun, 27 February 1991) <http://articles.baltimoresun.com/1991-02-27/news/1991058040_1_kuwait-iraqi-army-surrender>.

ability and/or intention to accept surrender and indeed of the logic behind the model of UAV lethal violence itself. Such considerations are encountered in the debates about autonomous weapons systems (AWS). Robert Sparrow considers the ethical permissibility of the use of certain AWS by inquiring into the enemy force's opportunity to surrender as shaped by the opposing side's weapons' capacity to 'accept' or 'recognize' surrender. In that respect, Sparrow discusses the requirement 'to safeguard the opportunity to surrender' or 'merely not to intentionally deny it absolutely', albeit as part of the prohibition on ordering that no quarter should be given.[89] Of course, this is not to be equated with a, strictly speaking, legal requirement or obligation to *offer* to opposing forces the opportunity to surrender. Under the LOAC such an obligation is recognised only with respect to persons 'parachuting from an aircraft in distress' who are shielded from direct attack during their descent and, upon reaching enemy territory, they must be given a 'reasonable opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act'.[90]

With respect to AWS, Lieblich and Benvenisti suggest that we 'reconsider the seemingly well-established notion of "surrender" as consisting not only of a duty to afford quarter once a combatant has clearly surrendered but also, perhaps, of an obligation to leave open, or at least not to actively narrow down, the option to surrender'.[91] They take care to emphasise that 'the obligation to allow surrender can by no means be an absolute positive duty under IHL – as such a demand will virtually replace the doctrine of targeting under the hostilities paradigm, with the use of force continuum entrenched in IHRL'.[92] 'However', they go on to add, 'bearing in mind the human rights of combatants, it is still worthwhile to consider the effect of technological advancements on the feasibility of the option to surrender'.[93]

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[89] Sparrow, 'Twenty Seconds to Comply', 722. See also Lieblich and Benvenisti, 'Obligation', 281 ('Assuming that AWS would be deployed as a replacement for ground forces, the question arises whether they will increase or decrease surrender opportunities.').
[90] Art 42 API; Art 3 GCI-IV; ICRC IHL Customary Study, Rule 48. See following section.
[91] Lieblich and Benvenisti, 'Obligation', 281.
[92] ibid.
[93] ibid 282.

In any case, the offer of the opportunity to surrender is regarded by Terry Gill as reflecting 'a long tradition of offering surrender as an ''honourable alternative'' to hopeless resistance in situations of overwhelming superiority'.[94] In a similar vein, Adil Haque argues that 'one may be in such a dominant tactical position that even armed opponents pose no realistic threat and can be attacked just as easily with or without warning', such that '[t]here is no obvious moral reason not to offer such opposing combatants the opportunity to surrender'.[95] Indeed, in cases where the adversary represents no or no realistic threat and surrender could be the only available route to *hors de combat* protection, the requirement that warring sides conduct hostilities in a way that allows or does not *ab initio* preclude the adversary's possibility of surrender is in consonance with an understanding of the LOAC as a normative regime which is fundamentally other-directed, as explained in chapter 3.

Returning to UAVs in focus here, the legal and ethical problem with UAV warfare is that it introduces a model of warfare violence that does not incorporate any ethical consideration about the adversary, other than unilaterally targeting individuals for death with an increasingly fast-strike system and with technical precision. The extreme vulnerability of UAV targets is the very motivation and goal behind the development and use of UAV technology, as discussed in chapter 4.[96] Given the current state of the technology, UAVs are developed and proliferate as tools of warfare 'wired' for locating and striking individuals, enabling behaviour in which one cannot discern the UAV-using side's intention to recognise the status of the adversary as a human person for whom the law reserves protection on the basis of surrender.

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[94] Gill, 'Chivalry', 45-6 (arguing that the question of offering a chance to surrender to an adversary who has no feasible chance of successful resistance or is incapable of effective resistance can be found in the notion of chivalry as a guiding principle which takes account of extra-legal considerations based on ethical considerations and a long-standing military practice and tradition). See also Corn et al, 'Belligerent Targeting', 597 (denying the existence of 'an obligation to *offer* an enemy suspected of a practical inability to effectively resist the opportunity to surrender' on the basis of the rule on quarter, but conceding that 'as a matter of policy this will often be done').

[95] Haque, *Morality*, 96.

[96] Until now there have not come to light projects that contemplate the development of UAVs with capabilities of surrender and/or capture.

Special 'hors de combat' protection in a situation of special vulnerability

To better understand the *hors de combat* protection, it is important that we also look at another rule included in Additional Protocol I relating to the prohibition of attack against persons *hors de combat*. This is Article 42 API, which sought to tailor the *hors de combat* protection to pilots and other aircrew that have bailed out and parachute from an aircraft in distress. The provenance of the rule is Article 20 of the Hague Rules of Air Warfare,[97] World War I and a romanticised spirit surrounding airmen.[98] The prohibition of attacks against 'occupants of aircraft' entails (i) the absolute prohibition of attacks against a person parachuting during their descent even if it is obvious that they will land in friendly territory, controlled either by the party to which they belong or by an ally of that party (Art 42(1)); and (ii) the obligation that upon landing on enemy territory the person that has parachuted should 'be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act' (Art 42(2)).[99]

As Jean de Preux asserted in 1975 on behalf of the ICRC, the article 'had no equivalent in The Hague Regulations … since air warfare had been unknown when [The Hague Convention No. IV of 1907] had been drawn up', underscoring that '[a]n airman in distress could, strictly speaking, be covered by paragraph 1(a) of article 38, but the importance of aviation in modern conflicts warranted the adoption of a special provision to ensure the normal functioning of air operations and the protection of airmen'.[100] It is interesting to note that in the debates at the Diplomatic Conference an analogy was drawn between aircrews and the shipwrecked to reflect the urgency of the

[97] ARTICLE XX 'When an aircraft has been disabled, the occupants when endeavoring to escape by means of parachute must not be attacked in the course of their descent'.
[98] See 1987 ICRC Commentary on API (Art 42) p 494, para 1633 ('The novelty of this weapon, the spirit of adventure of its devotees, the prestige of its missions, and the sharing of risks created a sort of fraternity between the airmen of the two camps at that time, which was characterized by a spirit of cameraderie [sic] and by practices which are suggestive of chivalry. The adversary who had been brought down in flames was entitled, not to bullets, but to a salute as he went down, to wishes for his recovery if he were wounded, and flowers if he were dead').
[99] ibid pp 497-501, paras 1644-51.
[100] ORDC vol XIV, p 287.

need for heightened protection of pilots in such a situation of special vulnerability, which would ensure that the 'crews in distress were not left to their fate because … they were exposed to serious and perhaps mortal dangers'.[101] In Jean Pictet's words in 1977, '[t]he serviceman who, to save his life, parachuted from an aircraft in distress was a victim, shipwrecked as it were in the air, and that was the idea which should have precedence,' emphasising that '[w]hether an airman landed in friendly or hostile territory, whether he rejoined his unit or was taken prisoner, should remain secondary considerations. A shipwrecked person was a victim of the conflict and should be protected in all circumstances'.[102] Such an understanding, he claimed, was in line with the spirit of the Geneva Conventions, which 'had contained only provisions to protect the victims of conflicts; they had not given States any rights against those victims', and '[t]he ICRC would be dismayed to see a provision making it lawful to kill an unarmed enemy who was not himself in a position to kill introduced into law which had hitherto been purely humanitarian'.[103]

Not all delegates at the Diplomatic Conference were in favour of the inclusion of this special prohibition. This was because the enhanced protection, both during descent and upon reaching the ground, was reserved only for those who, while admittedly exposed to risks in the air, were already availing themselves of the great warlike potential of the aircraft and were perceived to be in an advantageous position militarily. As such, the provision was criticised as 'one-way humanism'[104] and as 'a privilege for aircraft which

[101] ibid p 290 (Uruguay) (suggesting that 'the criteria already established for the shipwrecked should … be applied to air crews, excluding airborne troops').
[102] ORDC vol VI, p 107; ibid p 108, Federal Republic of Germany ('.., those who parachuted from an aircraft should be regarded as shipwrecked in conformity with the second Geneva Convention of 1949. That was, moreover, confirmed by the existing rules of aerial warfare which appeared in military manuals and were becoming increasingly customary').
[103] ibid p 107. In agreement with the ICRC, ibid pp 108-9, see German Democratic Republic; Federal Republic of Germany; Sweden; United Kingdom (fully shared the humanitarian concern expressed by the ICRC); United States of America (endorsed the ICRC view); Sweden, Austria; Belgium; Canada; Switzerland ('welcomed the explanations given by the ICRC representatives and said that humanitarian considerations should take precedence over military ones. In any event, those who carried the gravest responsibilities were not the pilots but the men who give them orders" and especially the Governments. What was more, the elimination of a few pilots was not a decisive way of winning a war.').
[104] ORDC vol VI, p 108 Iraq ('… was glad to hear the humanist's voice, but feared that their lofty sentiments were one-way. … Even todays whole populations lived under the threat of

might also be accorded in principle to any other kind of military transport'.[105] Some delegates objected to what seemed to be an 'absolute immunity from attack [that] was granted to a person parachuting from an aircraft in distress, even if that person committed a hostile act during the descent',[106] pointing out 'that the Conference was now making laws for one or more decades to come and that all legislation should be worked out against the background of the technical advances which might be made in the future and which might create situations in which a parachutist could commit hostile acts'.[107] Others noted the potential risk of abuse of the protection by airmen feigning a situation of distress, thus inviting acts of perfidy[108] and surprise attacks where the 'unconditional protection' would not be warranted.[109]

A main point of contention was also the fact that 'the situation provided for in Article 39 [current Article 42] was analogous to that envisaged in Article 38 bis [current Article 41], and therefore there existed 'different regulations for identical situations',[110] which created a lack of 'balance and fairness in dealing with two identical situations' that needed to be restored.[111] The Syrian delegate warned of what seemed to be 'a double standard'; a danger lurking in comparing (and equating) 'a person who had simply been shipwrecked … with an aviator trying to return to his territory, for the aviator was not hors de combat and was attempting to escape', which amounted to more privileged treatment than that provided '[u]nder Article

fierce bombing; and that was the moment chosen to prohibited shooting of the airmen who dropped the bombs.'). See also Sudan, ibid p 117 (pointing out the 'absurdity').

[105] OCDR vol XIV, p 291 (Cuba).

[106] See ORDC vol VI, pp 104-6 (Philippines). There was disagreement as to whether the person parachuting from an aircraft could become threatening by using their weapons 'during the descent' (see e.g. ibid p 105 (France) (Jordan)) or 'immediately after landing' (see e.g. ORDC vol VI, pp 105, 109 (Libyan Arab Jamahiriya). See also ibid p 104 (Syria conceding that 'it was very hard to determine whether a person descending by parachute had hostile intentions or not.').

[107] ORDC vol VI, p 106 (Syrian Arab Republic).

[108] ORDC vol XIV, p 291 (Cuba).

[109] ORDC vol VI, pp 104-5 (Syrian Arab Republic) (noting that 'technical advances in aviation gave aircraft crews advantages out of all proportion to the devastation they could wreak, and consequently protection could not be granted in the case of operations that might be turned into surprise attacks').

[110] ibid p 104.

[111] ibid p 105 (Syrian Arab Republic) (in relation to amendment submitted by sixteen Arab States (CDDH/414)).

38 bis, … [whereby] anyone attempting to escape could not be given protection'.[112] As explained by the delegate,

> If Article 38 bis deprived a person in the field of the protection envisaged and of immunity from attack if he attempted to escape, why should more privileged treatment be given to a person descending by parachute who was obviously trying to escape to a territory controlled by his country, or by a friendly country? It was difficult to see what humanitarian considerations justified protection in one situation, and deprivation of such protection in another, completely analogous, situation.[113]

The special protection afforded by Article 42 API reveals the understanding that pilots are contemplated in the Protocol as part of the environment of armed confrontation, that is, within a space of mutual risk and vulnerability, if asymmetrical, between the adversaries. Article 42 contains a technology-specific version of the general *hors de combat* protection, the importance of which lies in that humanitarian concerns are articulated in relation to the increased vulnerability as a corollary of the use of certain military technology, here the conventional aircraft. While it is true that 'inhabited military aircraft would come to be used in a seemingly ungallant and highly asymmetric fashion (in Iraq in 1991 and in Kosovo in 1999)', Christian Enemark is right in observing 'but even this involved some physical risk to the pilots themselves',[114] in contradistinction to UAVs.

5.3 UAVs AND THE CONCEPT OF DEFENCELESS ADVERSARY

The *hors de combat* safeguard encompasses a range of possible situations, motivated or created by objective and/or subjective reasons, whereby a combatant is put out of the fight and is indeed at a clear disadvantage in terms of the possibility of posing a threat to the adversary by using defensive combat power against the attacking force. As Bothe, Partsch and Solf in their

[112] ibid p 109 (replying to the ICRC Representative; also stating '[i]n reply to the representative of the Federal Republic of Germany, he recalled that Oppenheim in his treatise entitled "International Law" (Longman Group Ltd., London) 'recalls' a number of other writers and affirmed that practices arising from the Second World War gave a right to shoot at a pilot trying to escape.').
[113] ibid p 104 (Syrian Arab Republic).
[114] Enemark, *Armed Drones*, 87.

Commentary on Article 41 API assert, 'under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless'.[115] With that in mind and in light of the foregoing analysis, the chapter returns to the concept of 'defencelessness' by looking at two parameters that underlie the philosophy of the *hors de combat* safeguard with a view to addressing the question whether UAV targets could gain *hors de combat* status as defenceless persons under the LOAC.

Actual threat to the adversary

The concept of 'defencelessness' resonates closely with the rationale behind the *hors de combat* safeguard. A person who is recognised to be 'out of combat', whether because of injury, surrender or capture, is an opponent who is placed (voluntarily or involuntarily) in such a position that they are no longer able or willing to participate in hostilities and pose a threat. When a person is *hors de combat*, thus ceasing to be 'threatening' or 'dangerous', then the opposing side is *hors de danger* and therefore should refrain from making that adversary the object of attack. The *hors de combat* safeguard constitutes an exception or qualification to the status-based presumption of hostility and targetability of combatants, as mentioned in chapter 2. As Gabriella Blum explains, '[t]he broadest exception to the general right to kill enemy combatants is the category of combatants who are *hors de combat* (in French, "outside the fight")—those who have been rendered incapable of fighting, through surrender, capture, or injury'.[116] Blum points out that '[t]he rules about *hors de combat* all share one underlying principle: Once soldiers are incapacitated —through surrender, capture, or injury— they no longer pose a threat,[117] and asserts that 'the exception of *hors de combat* is the only manner by which the class-based distinction is supplemented by a threat-

[115] Bothe et al, *Commentary*, 219.
[116] Blum, 'Dispensable Lives', 79.
[117] ibid 80.

based analysis'.[118] The law makes clear that when the threat of harm returns the immunity from attack is terminated. This means that individuals who would otherwise qualify for *hors de combat* protection under the law automatically forfeit the safeguard if they engage in a hostile act or resume combat.[119]

The philosophy underlying the *hors de combat* safeguard, as described above, is not fully conveyed by the claim advanced by Corn, Blank, Jenks and Jensen, who seek to address the question: 'if an enemy belligerent is surrounded by an overwhelming number of friendly forces, and he can be subdued with no meaningful risk to those forces, isn't he functionally "in their power" and therefore *hors de combat*?'.[120] Answering in the negative, Corn et al state that they 'believe that the positive LOAC and the intent of the drafters, as exemplified in the *Commentary*'*s* reminder that an enemy who is preparing to fire, can still fire, or is still firing, regardless of the hopelessness of his situation, is not *hors de combat*, …'.[121] It is worth recalling that, in its own words, the Commentary observed that 'there is no obligation to abstain from attacking a wounded or sick person who is preparing to fire, or who is actually firing, regardless of the severity of his wounds or sickness'.[122] 'This telling statement', Corn et al argue, 'serves as an important reminder of a fundamental premise of military operations during armed conflict: the enemy is presumed hostile and offensive until such presumption is clearly rebutted'.[123] What this claim fails to capture is that the said statement is not only a reminder that '[a]n essential underlying foundation to Article 41 is the presumption that a combatant is targetable based on their status'.[124] It is also an illustrative example of the 'threat-focused' approach that the prohibition of attacks against persons *hors de combat* introduces to 'status-based' targeting.

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[118] ibid.
[119] Art 41(2) API; 1987 ICRC Commentary on API (Art 41) pp 487-8, para 1620-1.
[120] Corn et al, 'Belligerent Targeting', 587 (also adding that 'the historical foundation for the inclusion of the term "in the power of" rebuts their assertion').
[121] ibid.
[122] 1987 ICRC Commentary on API (Art 40) p 488, para 1620.
[123] Corn et al, 'Belligerent Targeting', 585.
[124] ibid 588.

In the context of the *hors de combat* safeguard, targeting is effectively appreciated in terms of an actual, realistic and meaningful threat to the opponent. The concept of *hors de combat* attributes 'actuality' or 'imminence' to the presumptive 'dangerousness' that in principle allows targeting in war/armed conflict in the LOAC. A clear expression of an intention of surrender, capture, incapacitation lifts the presumption of dangerousness associated with combatant status and creates a rebuttable presumption that a surrendering or surrendered, captured, wounded or sick adversary does not engage or no longer engages in threatening conduct and hence does not represent an actual threat to their opponent. It is on this basis that the adversary achieves *hors de combat* status and should not be made the object of attack. At the same time, the exemption from direct attack is neither unconditional nor absolute. The protection from targeting is withdrawn when the individual adversary, who would otherwise qualify for *hors de combat* status, re-emerges as a threat to their opponent; and indeed, as an actual or imminent threat, as indicated by the language of Article 41 API 'provided that in any of these cases he abstains from any hostile act and does not attempt to escape'. This is also reflected in the Commentary's statement, which Corn et al invoke to reject defencelessness.[125] While the locution 'attacking a wounded or sick *person*' seems to imply the change to the status of an adversary from 'enemy' to 'person', triggered by injury or sickness, the subsequent phrase 'is preparing to fire or is actually firing' seems to suggest that immunity from attack is removed in the face of a present and actual threat; arguably in a way that brings targeting closer to an understanding of the use of lethal force between adversaries in an armed confrontation as self-defence actions[126] between opponents that can *actually* harm one another.

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[125] See above.

[126] See e.g. Kahn, 'Paradox', 2-8. See also Roland Otto, *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law* (Springer 2010) 259 ('This group of persons is especially relevant in the field of targeted killings, as it does not only include persons who surrender, but also persons who do not pose any immediate threat to their adversaries either any more – due to exhaustion of their means of defence – or at the moment they are targeted – due to being guileless and defenceless at such a time. While the immediacy of a threat posed by a combatant usually is not a criterion in deciding whether this person may be targeted under international humanitarian law, it rises at least in situations in which the threat is so marginal or even non-existing that the person has to be regarded *hors de combat*.').

It is worth noting, at this point, that the ICRC Commentary's approach to 'defenceless person' seems to suggest that defencelessness is not an acontextual condition or status, but one that relates primarily to situations in which the adversary combatant cannot possibly fight back in response or in defence and therefore cannot pose any meaningful threat to the attacking force. As seen above, the Commentary locates it in the context of the deployment of air power to conduct attacks against ground targets or the employment of overwhelmingly superior military force, such that leaves the adversary combatant or fighter 'at the mercy of' the attacking force and 'force[s] the adversary to cease combat'.[127]

The threat-based understanding of the *hors de combat* safeguard and prohibition of direct targeting is arguably likely to be able to answer the concerns validly raised regarding the spectrum of dangerousness of the defenceless adversary. For example, Adil Haque has noted that 'combatants who are currently defenceless are unlikely to remain so for long. Indeed, combatants may be defenceless against air or artillery attack while deploying to attack opposing ground forces'.[128] In a similar vein, Ohlin warns of the risk of 'conflat[ing] soldiers who might be defenseless in the future with soldiers who are presently defenseless (two completely different scenarios)', arguing that '[t]he former are hors de combat while the latter are not'.[129] However, such concerns do not arise in UAV warfare. Considering that the motivation and intention behind the development and deployment of UAVs is to attack individuals while keeping one's own force out of harm's way, as the Thesis has demonstrated, UAV targets are rendered from the beginning defenceless (and 'harmless' for that matter) and remain so in the face of UAV strikes, not representing a threat *vis-à-vis* the drone-using force at any given point. Moreover, it is important to note that the *hors de combat* protection is not afforded on the basis of an assessment or determination of whether the opponent who could qualify for *hors de combat* protection and immunity from attack will at some point in time return to combat and resume fighting.

[127] 1987 ICRC Commentary on API (Art 41) p 484, para 1612.
[128] Haque, *Morality*, 102.
[129] Ohlin, 'Recapturing', 17.

As seen above, this was also emphasised in the context of the debate at the Diplomatic Conference about the prohibition of attack against airmen in distress, where Jean Pictet emphasised that '[w]hether an airman landed in friendly or hostile territory, whether he rejoined his unit or was taken prisoner, should remain secondary considerations'.[130]

In considering defencelessness in the context of the prohibition of attacks against persons *hors de combat*, it is also important to recall the centrality of the concept of *hors de combat* to articulating the understanding that the LOAC's logic is to regulate a kind of war/armed conflict where armed violence is anticipated to occur in the context of an armed interaction. As demonstrated in chapter 2, the *hors de combat* protection is a crucial parameter of delimitating the scope of targetability of opponents. Indeed, the law's focus on the threat of actual harm that opponents pose to each other in order to grant and withdraw the immunity from attack contributed to highlighting the normative features of the LOAC as a regime (i) where the adversaries are assumed to have the opportunity to use force in offence and in defence against enemy firepower, a condition which is absent in UAV warfare violence; and (ii) where, accordingly, warfare violence is contemplated as combat power and, as such, bi-directional, as opposed to the imposition of unilateral power in the sense of unidirectional military force that characterises UAV warfare. This understanding brought to the surface the considerations of humanity and fighting fairly that run deep in the law which seeks to regulate conduct in an armed confrontation and capture the broader normative dynamic whereby opponents are assumed to have a reasonable chance to survive.

On this account, the appeal of the idea 'defencelessness' as a route that opens up the possibility of *hors de combat* protection in UAV warfare is conspicuous. The understanding of 'defencelessness' as implicit in the

[130] ORDC vol VI, p 107 (He also noted that '[i]n 1864, in agreeing to protect the war-wounded although those same wounded might return to the fight once they were well again, the States which had signed the Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field had agreed to give up a small fraction of their rights for the benefit of mankind and in response to the dictates of humanity. In so doing, they had committed themselves once and for all.'). See also Arts 7, 12, 109 GCIII.

concept *hors de combat*, this chapter suggests, foregrounds the analogies between persons *hors de combat*, who are virtually individuals who do not pose a threat to their opponent as they are caught in a situation which deprives them of the ability to respond to or defend themselves against the enemy, and UAV targets. One could argue that it may be too much of a stretch to think that otherwise lawful UAV targets are individuals who can obtain the legal and ethical status of 'persons' who are 'out of combat' and, as such, should not be made the object of attack regardless of surrender, capture or incapacitation (which are not however available to UAV targets as the Thesis demonstrates). However, it is important to remember that surrender, injury and capture constitute conditions or circumstances which in the normative environment of an armed confrontation shaped by opponents' mutual susceptibility to attack and hence the mutual vulnerability to the dangers thereof serve as indicators that provide the indications necessary to one's opponent, whereby the latter can 'recognise' that the adversary is transformed (albeit not in an irrefutable way) into an individual who does not actually represent a threat. But in UAV warfare, which departs from the factual and normative conditions of an armed interaction, the actual dangerousness of the target is lacking *ab initio* and never returns. That UAV targets are placed into such a position that they cannot fight back in response or in defence and hence pose no actual threat to the drone-using force is a given in this kind of UAV violence. In fact, this is exactly the philosophy of the 'unmanning' of military violence by means of UAVs; UAV warfare capitalises on targets' extreme vulnerability that itself creates by rendering the targeted individuals defenceless in the face of 'absolutely unilaterally'[131] overwhelming lethal force.

Availability of options to *hors de combat* protection

The (un)availability of the options that could possibly render combatants *hors de combat* and therefore immune from direct attack, as provided in the law, is crucial to the concept of defenceless adversary. In line with the

[131] Chamayou, *Theory*, 13.

mechanics of the *hors de combat* rule, the different routes leading to *hors de combat* protection under the law are to be thought of as equal alternatives available to combatants during hostilities. This is implicit in the approaches where the notion of 'defencelessness' as part of the *hors de combat* safeguard is discarded. On the basis of, among others, the mere existence (and thus the objective availability in the law) of the options that the law affords to combatants, such as surrender, defencelessness has been dismissed as a redundant basis for protection because it is deemed a functional overlap with or a duplicate of surrender.

For example, for J. D. Ohlin,

> Defenselessness might be caused by other factors – such as overwhelming firepower or an imbalance in military strength – but this type of defenceless is not covered by the prohibitions regarding killing soldiers hors de combat. This might seem unnecessarily harsh, though it is important to remember that soldiers in such a situation are protected by another provision, i.e. the prohibition against killing soldiers who have effectively communicated their decision to surrender.[132]

As he argues, accepting defencelessness 'effectively replicates this result [i.e. 'that the soldier regains protected status], except it skips over the step where the soldier actually needs to surrender'.[133] In this way, 'the expansive interpretation of the *hors de combat* argument is problematic because it infringes on the conceptual territory of the prohibition on targeting surrendered soldiers'.[134] He further notes that 'the wide hors de combat argument infringes on the surrender rule, but without requiring the actual requirements of that rule, i.e. the requirement that the soldier *actually* communicate his surrender', adding that it may in turn end up introducing 'an impermissible end-run around the surrender rule'.[135]

In a similar vein, Michael Schmitt, in rejecting 'a capture rather than kill rule', explains that '[his] opposition … is also based on the fact that the enemy fighter generally has the means to achieve the same result [i.e. being captured

[132] Ohlin, 'Recapturing', 19.
[133] ibid 19-20.
[134] ibid 19.
[135] ibid 19-20.

rather than being killed] by surrendering, since those who surrender are hors de combat and cannot be attacked; in other words, IHL already addresses the situation'.[136] Moreover, the Commentary on the Harvard Manual on the International Law Applicable to Air and Missile Warfare cautions that '[i]ncapacitation ought not to be confused with lack of capability for defense. For instance, during an aerial attack, enemy forces may have no defensive means of warfare within range of the attacking aircraft. This does not render them *hors de combat*. If they wish to be exempt from attack, they must validly communicate an intention to surrender'.[137] Still, Gary Solis argues that

> in an ongoing battle, there is not a point at which, seeing that the enemy is being overcome, the other side must cease fire, or stop to ascertain the current combat capability of the opponent. If the enemy is no longer capable of resisting he may indicate a desire to cease resisting – by surrendering and becoming *hors de combat*. The stronger opponent is not tasked with divining when that point is reached.[138]

He concedes, however, that '[t]he principle of humanity *may*, at some point, suggest a situation on which an enemy is so unable to defend himself that the attacker *may* cease firing and initiate surrender negotiations, but that is not a LOAC/IHL requirement'.[139]

Surrender is treated by scholars who reject defencelessness as the default option for overpowered and vanquished opponents to gain *hors de combat* and protection from attack. Such approaches give up 'defencelessness' on the assumption that the other 'conditions' or 'options' or 'means' that can potentially lead to the *hors de combat* protected status are perforce always available to the adversary by virtue of the fact that the law provides for them. It is at this point that the ICRC Commentary's perspective towards defencelessness serves as an important reminder that the humanitarian protection on the basis of *hors de combat* is not to be taken for granted – and rightly so. It holds true that the LOAC does impose the

[136] Schmitt, 'Wound', 858.
[137] HPCR Manual Commentary to Rule 15(b), p 104.
[138] Garry Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, CUP 2016) 303.
[139] ibid (emphasis in original).

obligation to safeguard and not attack those who are *hors de combat*, thus allowing the possibility of protection against direct targeting. However, such a possibility is meaningful only when the 'options' or 'means' or 'routes' unlocking that protection are realistic and feasible, hence truly available to the human adversary.

As the language of Article 41 API indicates, the availability of the *hors de combat* protection is a matter of the adversaries' interaction. On the one side, 'attackers must be aware of and be alert for indications from enemy fighters that they are no longer in combat in order to overcome that presumption [i.e. presumption of targetability]',[140] which in turn implicates the adversary's opportunity, as shaped by the attacker's choice of means and methods, to indicate that they are in such a position that they are no longer able or willing to participate in hostilities and hence do not represent a threat. While surrender and capture are conceivable and viable in conditions that retain the factual and normative parameters of an armed confrontation, *hors de combat* protection through surrender has been challenged, as explained above, by the development of weapon technologies that have imposed ever greater physical distance between the opposing forces. In that respect, the use of UAV technology to conduct targeting operations against individuals is a case in point.

The challenges involved in achieving *hors de combat* status are particularly pronounced in the context of air attacks if one adopts a narrow interpretation of the 'in the power of the Adverse Party' criterion (Article 41(2)(a) API), which would extend protection to individual opponents only once 'actually captured by the enemy'[141] or when capture is 'operationally feasible'.[142] This would deprive the adversary of the opportunity to benefit from immunity from attack when 'apprehension is virtually never the case',[143] and indeed as a result of the weapon technologies and tactics employed by the attacking force. This became evident in the way in which

[140] Corn et al, 'Belligerent Targeting', 589.
[141] Dinstein, *Conduct*, 190.
[142] See Schmitt, 'Wound', 860.
[143] 1987 ICRC Commentary on API (Art 41) p 484, para 1612.

the HPCR Manual configured the *hors combat* safeguard for the purposes of its version of the 'international law applicable to air and missile warfare'.[144] Albeit not uncontroversially, the Harvard Manual chose to strike the 'be in the power of the adverse party' off the list of bases or conditions, which would allow opponents to gain protected status and immunity from air attack, 'in view of the fact that such category is irrelevant in aerial warfare'.[145] This approach stands in stark contrast with the ICRC Commentary's interpretation of 'in the power of'. As discussed above, in a bid to rescue *hors de combat* from being enfeebled or rendered irrelevant, the Commentary sought to cover 'defenceless' opponents placed at a distinct tactical disadvantage and in an inferior position militarily *vis-à-vis* the enemy force, such that it makes it practically impossible for them to effectively resist and present a realistic threat to the attacker because of the attacking force's inability to capture opponents and place them physically under its control. This is what the Commentary calls being 'at the mercy' of the opposing force, which it deems to be, in essence, tantamount to being 'in the power of' the enemy force (which, as seen above, in the Commentary's view does not require that the adversary be 'captured').[146] Despite the obvious and significant differences as to the kind and degree of control that defines the captor-captive relationship,[147] the prohibition of attacking an opponent when 'at the adversary's mercy' is not very dissimilar to an understanding of the *hors de combat* rule as 'prohibit[ing] an attack that is nothing but an execution' of an individual who 'has already been captured', namely an individual who is 'unambiguously in the captors' control, …'.[148] These considerations are particularly pertinent to UAV violence, which has been described as amounting to 'a putting-to-death'.[149]

[144] HPCR Manual, Rule 15(b) (the rule retained surrender and incapacitation).
[145] HPCR Commentary to Rule 15, p 102 (noting that '[u]pon due consideration, the majority of the Group of Experts decided not to retain the separate category of Art. 41 (a) of AP/I, i.e., persons "in the power of an adverse Party …').
[146] 1987 ICRC Commentary on API (Art 40) p 484, para 1612.
[147] See e.g. May, *War Crimes*, 140-54.
[148] Schmitt, 'Wound', 860 (footnotes omitted).
[149] Chamayou, *Theory*, 162.

UAV targets are individuals who are targeted for death by a physically absent opponent. The targeted individuals are put in a position of extreme vulnerability as the use of UAVs renders them effectively unable to resist and defend themselves, and therefore they cannot pose realistically any threat to an opponent who is physically out of reach. This is all the more so in the face of UAV firepower, which is overwhelmingly lethal and closes off any opportunity for the targeted individuals to gain *hors de combat* status through surrender, capture or incapacitation.

5.4 CONCLUSION

UAV warfare has added new layers of complexity to the *hors de combat* protection as it has introduced a kind of warfare where the targets have the opportunity to gain protected status virtually closed off. The chapter drew the connection between defenceless adversary and UAV targets, and demonstrated that the concept of 'defencelessness' may be the only way in which the fundamental protection against direct attacks that the law affords to opponents through the *hors de combat* safeguard could remain meaningful and relevant in UAV warfare. The legal and ethical argument for thinking that UAV targets could qualify for *hors de combat* status hinges on targets' vulnerability, and the fact that such vulnerability is brought about by the way the UAV-using force practises warfare, as reflected in the choice to deploy a particular weapon technology, namely UAVs. Importantly, the vulnerability of the UAV target reaches a new extreme and consists in that the UAV-using side excludes the target from the sphere of protection that the law carves out for the human adversary and deprives them of what is due to them by law. That is, UAVs make it virtually impossible for the target to fight back in response or in defence, and hence to realistically represent a threat to the UAV-using side, whilst precluding any opportunity for surrender or capture as provided in the law. In this light, UAVs cannot find any purchase on any of the ethical considerations that breathe meaning into the prohibition on attacks against persons *hors de combat*. However, even if one is reluctant to endorse defencelessness as suggested in this chapter as a basis for *hors de combat* protection due to the fact that *hors de combat* status entails a blanket

prohibition of direct attacks against lawful targets, there is still the prohibition on conducting hostilities on a 'no survivors' basis, which is the subject matter of the following chapter.

CHAPTER 6

HOW UAVs CHALLENGE THE PROHIBITION OF THE CONDUCT OF HOSTILITIES ON THE BASIS OF 'NO SURVIVORS'

Having analysed how UAVs challenge the prohibition of inevitable death and the prohibition of attacks against persons *hors de combat*, the aim of this chapter is to examine the last bastion for the survival of the human adversary under the LOAC. To this end, it examines whether the prohibition of the 'denial of 'quarter' can continue to support in UAV warfare the law's expectation that there shall be survivors during the conduct of hostilities in the context of an armed confrontation understood as a human armed interaction. In so doing, the chapter follows the development of the rule through historical-legal sources and demonstrates that the prohibition on conducting hostilities on a 'no survivors' basis is a rule of conduct, which is linked to the other two prohibitions concerned with leaving the adversary with a reasonable chance of survival, and as such suggests that it has a bearing on the choice of means and methods of warfare.

6.1 QUARTER

Closely related to the prohibition of attacks against individuals who are *hors de combat* is the prohibition of ordering or threatening that there shall be no survivors and conducting hostilities on such a basis. The prohibition of the denial of quarter is a fundamental rule of the conduct of hostilities,[1] forming part of the web of rules intended to guard against extreme warfare violence and to preclude practices that leave no possibility of survival to the adversary.

All the major efforts of the mid-nineteenth century onwards which sought to codify and systematise the law of war devoted a rule to the

[1] Mary Ellen O'Connell, 'Historical Development and Legal Basis' in Fleck, *Handbook* (2013) 20 (referring to 'the requirement … that quarter must be given' as a 'pillar[] of modern humanitarian law').

prohibition of the denial of quarter. Together with other prohibitions, including that of the infliction of *maux superflus* examined in chapter 4, the prohibition of the refusal of quarter has traditionally specified the principle that limits the freedom of the choice of means and methods of warfare. As has been argued, 'by about 1900, most publicists recognised a customary rule which made it unlawful to refuse quarter or to wound or kill those who unconditionally offered to surrender'.[2] The prohibition can be traced back to the so-called 'Lieber Code' or 'Lieber Instructions' of 1863 prepared by jurist Francis Lieber on behalf of US President Abraham Lincoln.[3] It provided that '[i]t is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter'.[4] Many of the provisions of the Lieber Code, including quarter, continued to reverberate through later codification efforts of the law of war. The 1874 Brussels Declaration, which was never ratified, provided under the rubric of 'means of injuring the enemy' that 'especially forbidden' is (d) '[t]he declaration that no quarter will be given',[5] while the legally non-binding 1880 Oxford Manual produced by the Institute of International Law stated that '[i]t is forbidden: … (b) To injure or kill an enemy who has surrendered at discretion or is disabled, and to declare in advance that quarter will not be given, even by those who do not ask it for themselves'.[6] Influenced by these efforts, both the 1899 and 1907 Hague Regulations, annexed to Hague Conventions II and IV respectively, provided that 'it is especially forbidden (d) To declare that no quarter will be given'.[7]

In its more recent treaty expression the prohibition of the denial of quarter is laid down in the two 1977 Protocols Additional to the Geneva

[2] Horace Robertson, 'The Obligation to Accept Surrender' (1995) 68 Int'l L. Stud. 541, 545.
[3] Instructions for the Government of Armies of the United States in the Field, Prepared by Francis Lieber promulgated as General Orders No 100 by Lincoln, 24 April 1863, see Schindler and Toman, p 3. They were intended for the Union Army, on which they were only binding, regulating the Union's conduct towards the Confederate Army during the American Civil War.
[4] ibid; Art 60 also provided 'but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible to cumber himself with prisoners'.
[5] Art 13(d).
[6] Art 9(b).
[7] Art 23(d).

Conventions. Article 40 of Additional Protocol I provides that '[i]t is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis'. Interestingly, before becoming Article 40 API, the current prohibition originally formed part of Article 38 of the 1973 ICRC draft Additional Protocol, entitled 'Safeguard of an enemy hors de combat and giving quarter',[8] which also covered the *hors de combat* safeguard[9] that is currently the object of Article 41 API. As proposed by the ICRC, quarter was worded in the same way as the current version, but appeared as the third paragraph to draft Article 38. The prohibition of denial of quarter was adopted by consensus.[10] As the drafting history of Additional Protocol I and the 1987 ICRC Commentary indicate, the upgrade from a third (and last) paragraph of the draft article to the inclusion of the prohibition in a separate article upon agreement of a number of delegations reflects the 'fundamental importance of the principle it contains'.[11] Moreover, the fact that it precedes rather than follows the rule on *hors de combat* of Article 41 API further attests to its significance as a principle.[12] In concluding the Commentary on Article 40 API, Jean de Preux

[8] ORDC vol I, Part Three: Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (Geneva 1973) p 13.
[9] ibid.
[10] ORDC vol VI, p 103.
[11] 1987 ICRC Commentary on API (Art 40) p 475, para 1593. See ORDC vol XIV, p 277 (Afghanistan) ('Paragraph 3 of article 38 was of such importance that his delegation had considered it desirable to submit an amendment (CDDH/III/241) whereby paragraph 3 would become article 38 bis. … It was to give more force to the prohibition in paragraph 3 that the Afghan delegation had submitted its amendment'). In support of such an amendment, see ibid, p 280 (Ukrainian Soviet Socialist Republic) ('His delegation endorsed the Afghan amendment (CDDH/III/241) for it was logical that a provision of a general character such as that contained in the paragraph in question should constitute a separate article'; p 280 (Venezuela); p 282 (Belgium) (in favour of a separate but one that precedes the hors de combat rule); p 283 (Union of Soviet Socialist Republics) ('His delegation considered that the provisions of the ICRC text of paragraph 3 were of a general nature which justified its constituting a separate article'); p 284 (Yugoslavia) (noting that such an amendment is 'of great value from the humanitarian point of view'); p 284 (United Kingdom); p 284 (Czechoslovakia).
[12] See ORDC vol XIV, p 280 (Netherlands) ('With regard to the order of the paragraphs, … the article's basic principle was set forth in paragraph 3, from which the first two paragraphs derived. That fundamental principle established that an enemy hors de combat must not be killed but taken prisoner, and that enemies who could not be held as prisoners, must be released. Logically, therefore, paragraph 3 should become paragraph 1'); p 282 (Belgium) (in favour of a separate article but one that precedes the hors de combat rule); p 284 (Spain) ('… supported the delegations which would like paragraph 3 of the ICRC text of article 38 to become either paragraph 1 of that article or else a separate article').

states that '[i]t is always prohibited to declare that the adversary is outside the law, and to treat him as such on the battlefield'.[13]

The prohibition of denial of quarter is also to be found in Additional Protocol II applicable to non-international armed conflicts. The prohibition was originally proposed as a separate article, that is, Article 22 of the Draft Additional Protocol II entitled 'quarter', and was part of Part IV on 'methods and means of combat'.[14] Jean de Preux on behalf of the ICRC

> pointed out that article 22 repeated word for word paragraph 3 of article 38 of draft Protocol I. The idea of "combat" and rules of combat implied that the conflict ceased when the military objective had been achieved and the adversary disarmed. It therefore excluded the outlawing of the adversary or acts of desperadoes.[15]

While the importance of the prohibition and its contribution to the 'humanization' of warfare was noted by some delegates,[16] the article was deleted by consensus.[17] The prohibition, however, was not expunged from the Protocol. Currently, it belongs to Part II on 'humane treatment' and is formulated in a different, more succinct way than that of Additional Protocol I. In particular, it is listed as one of the 'fundamental guarantees' of Article 4(1) APII which provides that [i]t is prohibited to order that there shall be no survivors'.

The ICRC Study on Customary International Humanitarian Law explains that the rule that prohibits to declare that no quarter will be given (Rule 46) is as a norm of customary international law applicable in both international and non-international armed conflicts.[18] It is also worth noting that under the Rome Statute establishing the International Criminal Court the refusal to give quarter constitutes a war crime both in international and non-international armed conflicts.[19]

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[13] 1987 ICRC Commentary on API (Art 40) p 477, para 1600.
[14] ORDC vol I (n 8) p 39.
[15] ORDC vol XIV, p 313.
[16] ibid p 314 (Union of Soviet Socialist Republics).
[17] ORDC vol VII, p 128; ibid p 200 (Syrian Arab Republic) (noting in that respect that 'the plenary conference mutilated the draft Protocol').
[18] ICRC Customary IHL Study, Rule 46, pp 161-3 and Introduction, p xlv.
[19] Arts 8(2)(b)(xii) and 8(2)(e)(x) respectively, both entitled 'war crime of denying quarter'.

Quarter and *hors de combat*

Historically, quarter was associated with the idea of pity or mercy shown towards the 'conquered enemy' and has for long continued to reflect the duty to spare the lives of those who have surrendered or are in one's power.[20] Currently, quarter is not completely detached from this idea, albeit not confined to it. Henri Meyrowitz captures aptly this point,

> To declare that it is unlawful, for example, to shower bombs and shells on troops that are completely defeated, encircled or retreating, and in any case practically defenceless, thereby not even affording them the opportunity to surrender, the principle of superfluous injury or unnecessary suffering expressed in HR, Article 23 *e),* and PI, Article 35 (2), or else PI, Article 40, may exceptionally be invoked.[21]

Quarter has much resonance with the respect the LOAC reserves for adversaries who are wounded and sick, or wish to surrender. Indeed, as shown above, the genealogy of the prohibition and the negotiating history of the article[22] confirms the link with the prohibition of attacks against combatants who are *hors de combat.* While the term 'quarter' does not appear in the text of Article 40 API, its meaning as derived from the 1907 Hague rule on quarter is still relevant in the current LOAC. The Commentary explains that Article 40 'confirms in the first place the Hague rule',[23] where the term 'quarter', translating the authentic French 'quartier', 'mean[t] that the conquered enemy's life is spared, or that he is treated favourably' and was 'also used to designate the quartering or encampment of a body of troops; thus to give quarter means to provide accommodation, security and by implication, life. This derivation is considered to be the most likely. It was

[20] 1987 ICRC Commentary on API (Art 40) p 474, paras 1589-90. See also Gill, 'Chivalry', 49 (referring to chivalry 'as a foundation for positive legal obligations prohibiting denial of quarter and the duty to not conduct hostilities in a manner which precludes survivors being taken prisoner').

[21] Meyrowitz, 'Superfluous Injury', 116. For a completely different understanding of the law, see Dinstein, *Conduct*, 116 arguing that it 'is a serious misconception' that '[i]t is sometimes contended that when an enemy army has been routed, and its soldiers are retreating in disarray – as did the Iraqi armed forces pulling out of Kuwait in 1991 – they should not be further attacked. … The only way for combatants to immunize themselves from further attack is to surrender, thereby becoming *hors de combat* …. Otherwise, the fleeing soldiers of today are liable to regroup tomorrow as viable military units'.

[22] See discussion above.

[23] 1987 ICRC Commentary on API (Art 40) p 475, para 1594.

confirmed in plenary meeting that the rule of Article 40 is perfectly in accordance with the term "quarter" used in the title'.[24]

It has been argued that 'the denial of quarter provision is concerned solely with the treatment of captured adversaries, not with either the determination of who is *hors de combat* or with the use of combat power against enemy belligerents'.[25] In that respect, the approach taken by the ICRC's customary international humanitarian law study should be noted. It treats both the prohibition of 'orders or threats that no quarter will be given' (Rule 46), which in fact reproduces verbatim Article 40 API, and the prohibition of 'attacks against persons hors de combat' (Rule 48) as exemplifying the chapeau 'denial of quarter'. In a note, the Study explicitly states that 'the duty to grant quarter' is a well-established 'basic rule of international customary law 'that prohibits attacking a person recognized as hors de combat in combat situations on the battlefield'.[26] However, even if one accepts that 'the main aim of the prohibition on denial of quarter is to protect combatants when they fall into enemy hands by ensuring that they will not be killed',[27] this is not the sole aim of Article 40 API, as will be demonstrated below.

Quarter and conduct of hostilities until *hors de combat* status

The overlap between the rule on quarter and the *hors de combat* obligation does not suggest that persons *hors de combat* is the exclusive focus of the prohibition of denial of quarter as articulated in Article 40 API. Indeed, the prohibition reflects the very fabric of a rule that is undoubtedly protective/humanitarian at its core but also regulatory, that is, assigned to perform a fundamental constraining mission as part of the law concerned

[24] 1987 ICRC Commentary on API (Art 40) p 474, para 1591, n 8. See also ORDC vol XIV, p 277 (Afghanistan) (noting that 'The delegations to the Conference, who were seeking means to lessen the injuries and reduce unnecessary suffering in armed conflicts could not tolerate the idea that combatants who went on defending themselves to the limit of their strength and finally surrendered and laid down their arms, should be exterminated').
[25] Corn et al, 'Belligerent Targeting', 597.
[26] ICRC Customary IHL Study, p 161.
[27] ICRC, 'How Does Law Protect in War?' (Marco Sassòli, Antoine A Bouvier and Anne Quintin eds) (16 March 2011) vol I, p 45 (adding that 'The objective is to prevent the following acts: to order that there shall be no survivors, to threaten the adversary therewith, or to conduct hostilities on this basis').

with the conduct of hostilities. These two aspects of quarter were also captured in the discussions at the Diplomatic Conference, where the delegates emphasised 'the extreme importance of article 38 for humanizing the means and methods of combat',[28] 'the vital importance of protecting human beings in the event of armed conflict',[29] while it was also observed that the prohibition on quarter 'related not so much to the safeguarding of combatants as to the conduct of military operations'.[30] In this latter respect, the ICRC Commentary notes that this 'does not detract from the humanitarian importance in any way'.[31] At the same time, the issue of whether quarter shields only those who are out of action does not arise with respect to the relevant rule of Additional Protocol II which is included, as mentioned above, in the part devoted to 'humane treatment', as opposed to quarter in Additional Protocol I, which is part of the rules on 'methods and means of warfare' (Part III). In particular, Article 4 of APII provides for quarter as a 'fundamental guarantee' afforded to '[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted'.

While the somewhat outdated term 'quarter' survived in the current prohibition, it did so only in the title of the Article 40 API. This, along with the language in which the prohibition of 'denial of quarter' was couched, differing from its codified predecessors, indicated that Article 40 API was intended to be no relic of the early twentieth century. The language of Article 40 API 'it is prohibited … to conduct hostilities on the basis that there shall be no survivors' strongly suggests that the prohibition is intended to encompass all enemy combatants, including those who are actively engaged in combat and constitute lawful targets (and not only those who have been placed out of combat or before capture). As Ryan Goodman argues, '[t]he prohibition on denial of quarter might appear to protect combatants only after they are *hors de combat*. LOAC, however, prohibits not only the act of denying quarter once the fight is over. It also prohibits a declaration or threat

[28] ORDC vol XIV, p 283 (Union of Soviet Socialist Republics).
[29] ibid p 284 (Yugoslavia).
[30] ibid p 279 (Afghanistan).
[31] 1987 ICRC Commentary on API (Art 40) pp 476-7, para 1598.

to deny quarter to enemy combatants who are engaged in hostilities'.[32] Moreover, the Harvard Manual includes a rule on 'denial of quarter' in two different sections and makes it expressly both a part of rules on 'attacks'[33] and a part of rules on 'surrender'.[34] In the former case, the Manual repeats verbatim the prohibition as included in Additional Protocol I,[35] while in the context of surrender the Manual enjoins that '[i]t is prohibited to deny quarter to those manifesting the intent to surrender'.[36] As the Commentary explains, '[t]he majority of the Group of Experts felt, however, that the issue of denial of quarter – and what is equally important, the threat thereof – is wider in scope and must therefore also be incorporated in Section D [i.e. Attacks]'.[37] As further explained, '[t]he emphasis in Rule 15 (a) is on the fact that a policy of "take no prisoners" is entirely inadmissible, and it cannot be threatened, even in advance of any fighting and, therefore, before the issue of surrender becomes relevant'.[38] Also, the ICRC representative, Jean de Preux, explained at the Diplomatic Conference, '[t]he statement that "to declare that no quarter will be given" was prohibited, seemed rather inexplicit, and it had been replaced by a different wording which prohibited not only the threat but also any attack that was intended to leave no survivors'.[39]

Conversely, if this were not the case, the parts of the LOAC that are devoted to the protection owed to sick, wounded or shipwrecked enemy combatants, as well as prisoners of war and their treatment by the adverse party, would risk being thrown into irrelevance. The ICRC Commentary rightly notes, '[i]t is obvious that if there is no quarter, in other words, no survivors, there will be no wounded to be retrieved and cared for, no shipwrecked persons to be rescued, and no prisoners to respect and treat

[32] Goodman, 'Kill or Capture', 850, n 136 (noting also for the purposes of his argument that '[t]hat prohibition is similar to RUF at a general level. That is, both rules regulate the kind or degree of violence that can be used against enemy fighters').
[33] Section D entitled 'Attacks'.
[34] Section S entitled 'Surrender'.
[35] Rule 15(a).
[36] Rule 126.
[37] HPCR Commentary to Rule 15, p 102.
[38] ibid.
[39] ORDC vol XIV, p 276.

humanely'.[40] Article 40 API certainly shares the concern about persons *hors de combat*, which is the focus of Article 41 API examined in chapter 5.[41] If hostilities are conducted in such a way that precludes the possibility of survival for opponents and no survivors are left, there will be no opponents to be recognised as *hors de combat* and be immunised from direct attack. That is, there will be no individual opponents to be captured (whether taken in custody or not), no individuals to surrender or express their intention to do so, and no wounded or sick or otherwise incapacitated and defenceless individuals. In other words, without a limit to violence while hostilities are practised as the conflict unfolds, such that prohibits exterminatory or destructive military force that deprives the adversary of a reasonable chance to survive, the *hors de combat* obligation to refrain from direct attack and the corresponding protection from direct targeting risk being rendered immaterial.

Opportunity to surrender and the prohibition of ineluctable lethality

The above explicates why the rule prohibiting the conduct of hostilities on a 'no survivors' basis is often intertwined with opponents' opportunity to surrender and concerned with how such an opportunity is shaped by the way the attacking force practises hostilities and which is linked to the weapons and tactics employed.

The prohibition of denial of quarter thus understood may entail the prohibition of orders that no prisoners be taken[42] or provide the basis for the attacking force's duty to offer to the adversary the opportunity to

[40] 1987 ICRC Commentary on AP1 (Art 40) p 475, para 1591.
[41] See e.g. 1987 ICRC Commentary on API (Art 40) p 475, para 1592 ('In fact, Article 41 '(Safeguard of an enemy hors de combat)' is equally concerned with persons who are already in the power of the adverse Party, as with those who are defenceless on the battlefield, or on the point of surrender… The principle that it is prohibited to refuse quarter is covered by that provision.').
[42] See e.g. Australia's Commanders' Guide (1994), Australia's Defence Force Manual (1994), Australia's LOAC Manual (2006); Canada's LOAC Manual (1999), Canada's Code of Conduct (2001); Côte d'Ivoire's Teaching Manual (2007); France's LOAC Summary Note (1992); Hellenic Navy's International Law Manual (1995) ('[T]he prohibition … that there shall be no mercy for those captured during the hostilities or threats that none shall be captured alive; New Zealand's Military Manual (1992); South Africa's LOAC Manual (1996), see ICRC Customary IHL Database (Practice) Rule 46 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule46>.

surrender,[43] or establish a duty to passively safeguard or not actively deny the adversary's opportunity to surrender. In this latter respect, for Lieblich and Benvenisti, '… the well-established prohibition on ordering that no quarter will be given is essentially a duty to leave open – at least passively – the option of surrender, when clearly expressed'.[44]

Quarter more often than not comes to rescue in the face of gaps in protection arising in the context of surrender as a condition that leads to *hors de combat* protection and immunity from direct attack. Nils Melzer has argued that '[t]he method of targeted killing is problematic under this rule because it aims specifically at the killing of the targeted person'.[45] 'With regard to targeted killings', he asserts, 'the prohibition of denial of quarter simply requires that the operating forces remain receptive to a declaration of surrender should the opportunity arise and that they must imperatively suspend any attack against persons who have fallen *hors de combat*, even if the chosen means and methods or other circumstances do not permit their capture or evacuation'.[46] It is important to point out that we are talking about either killing or taking prisoners insofar as the incapacitation of the enemy is a given, which means that the option to abort the mission or not shoot the targeted individual is not relevant in UAV warfare. This is because the logic of UAV warfare is centred on the killing and the death of individual targets. Indeed, this becomes evident when technical precision (in the sense that the missiles can be directed against specified targets) becomes part of UAVs' 'success story' of achieving the intended result of a drone mission, namely to

[43] See e.g. The Military Manual (2005) of the Netherlands: 0408. Quarter means that an opponent must be given the opportunity to surrender and thereby survive. It is thus forbidden to order that no one shall survive, to threaten an opponent with this, or to wage war on this basis'. … 0709. Granting quarter (see also points 0408 ff.): An adversary should be given the opportunity to surrender, even if there is doubt whether the person concerned is a combatant.; Mexico's IHL Guidelines (2009), in a section entitled "Basic rules of conduct in armed conflict": 'Give the enemy the opportunity to surrender', see ICRC Customary IHL Database (Practice) Rule 46 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule46>.

[44] Lieblich and Benvenisti, 'Obligation', 280.

[45] Nils Melzer, 'Targeted Killings in Operational Law Perspective' in Terry D Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (OUP 2010) 294 [Also in Nils Melzer, *Targeted Killings in International Law* (OUP 2008) 371].

[46] ibid 295.

inflict ineluctable lethality, without the need for a restrike.[47] A glimpse into the US drone experience reveals that when the initial strike failed to kill the target then a restrike or a second strike was employed to destroy the targeted individual, reverberating a 'no survivors' logic in the conduct of drone operations and eliminating any consideration of incapacitation (which could potentially lead to *hors de combat* protection).[48]

Moreover, Robert Sparrow claims that the use of certain autonomous weapon systems (AWS) 'might be thought to run afoul of the prohibition on issuing orders that there should be "no quarter" given', an 'objection [which] seems especially compelling if one believes that enemy forces *cannot* surrender to an AWS because the AWS has no means of "accepting" surrender'.[49] He further argues that, in view of the prohibition on ordering that there shall be no survivors, the use of certain AWS to which 'enemy forces who wish to surrender may have no opportunity to do so because the AWS fails to recognize their attempt' may be rendered 'morally problematic' and therefore those deploying such weapons may be 'guilty of employing a means of warfare that fails to safeguard the opportunity to surrender'.[50] The force of this objection, Sparrow states, 'depend[s] on whether the prohibition on ordering that no quarter should be given is understood as requiring combatants to safeguard the opportunity to surrender or merely not to intentionally deny it absolutely'.[51]

Such an understanding of the prohibition would necessarily weigh in the choice of means and methods of warfare, requiring the employment of weapons and tactics that do not foreclose the chance of survival for the enemy. Already in the late 1980s the ICRC Commentary expressed concern with respect to the development of deadly weapons, and their potential impact on the constraints on lethal violence, especially as regards the

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[47] See e.g. Schmitt, 'Fog', 314 (observing 'the fact that armed drones employ very accurate weapons enhances the likelihood of a successful strike, thereby limiting the need for a restrike on the target, …').
[48] See e.g. Stanford/NYU Report; TBIJ, 'Get the Data: The Return of Double-tap Drone Strikes' (1 August 2013) <www.thebureauinvestigates.com/stories/2013-08-01/get-the-data-the-return-of-double-tap-drone-strikes>.
[49] Sparrow, 'Twenty Seconds to Comply', 722.
[50] ibid.
[51] ibid.

limitation in Article 40 API. In the words of the 1987 Commentary, 'there is no doubt that in our age of extraordinary technical achievements with a proliferation of the most lethal weapons throughout the world, this article also raises a problem with regard to weapons, both conventional and others. It is not by any means the only article in the Protocol to raise this question, either in Part II, Part III or Part IV, but the problem is particularly relevant in Article 40. … Article 40 does not imply that the Parties to the conflict abandon the use of a particular weapon, but that they forgo using it in such a way that it would amount to a refusal to give quarter'.[52] The Commentary takes care to clarify that the rule on quarter is not be regarded as tantamount to an implied limitation on weapons themselves. But by framing the normative implications of the rule on quarter in terms of weapons usage it recognises the link between weapons and opponents' chance of survival, a concern which is also reflected in the prohibition of means and methods of warfare of a nature to render death inevitable as part of the principle against the infliction of superfluous injury/unnecessary,[53] as discussed in chapter 4.

As Henri Meyrowitz suggests, 'this rule should be seen as an application both of the principle of humanity and of that of superfluous injury or unnecessary suffering'.[54] In war/armed conflict contemplated in the LOAC as an armed confrontation, the warring sides are not expected to fight relentlessly to the finish, to the bitter end, and hostilities are expected to be conducted in a way that safeguards the prospect of survival of the human adversary. In a reciprocal armed interaction, it is understandable why the 'sparing of the lives' on the adversary's side as part of the rule on quarter has been thought to be inextricably connected with the 'saving of lives' on one's own side, fending off an escalating spiral of death and destruction.[55]

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[52] 1987 ICRC Commentary on API (Art 40) p 477, para 1598 (also paras 1599-600).
[53] ibid para 1598. The Commentary identifies the link between Article 40 and Article 35(2) API ('The prohibition of refusing quarter therefore complements the principle expressed in Article 35 (Basic rules), paragraph 2, which prohibits methods of warfare of a nature to cause superfluous injury or unnecessary suffering), but on the basis of military necessity and an 'in-built requirement of proportionality' which relegates the prohibition to an understanding that '[t]he deliberate and pointless extermination of the defending enemy constitutes disproportionate damage as compared with the concrete and direct advantage that the attacker has the right to achieve'.
[54] Meyrowitz, 'Superfluous Injury', 116.
[55] Sparrow,' Twenty Seconds to Comply', 703. See also Bothe et al, *Commentary*, 249.

However, such considerations found behind the prohibition to conduct hostilities on a 'no survivors' basis are not relevant in UAV warfare. Although waging UAV warfare, where the death of individual targets is rendered inevitable, is tantamount to conducting warfare on a 'no survivors' policy and refusing to give quarter, the UAV-using side has already removed itself from the mutual vulnerability, which within conditions of an armed confrontation, the law assumes, could potentially play a role in motivating restraint.

The LOAC's proscription to conduct hostilities on the basis that no survivors will be left essentially manifests a concern centred on humanity understood as geared towards the survival of the adversary.[56] The prohibition suggests that the survival of the adversary is not a matter of the outcome of an attack as such, which involving the infliction of lethal force may thus result in leaving no survivors.[57] It is a question of intention; that is, not to conduct hostilities with the aim to leave the adversary with no chance of survival,[58] as may (or not) be reflected in the opportunity to surrender that the employment of certain weapons and/or tactics allow to opponents.

6.2 CONCLUSION

What makes UAVs profoundly problematic for the current LOAC vis-à-vis the prohibition to conduct hostilities on the basis of 'no survivors' is not the lethality they produce as such, but that they represent a model of violence which is about the killing and dying of targeted individuals. By imposing lethal violence on the target in such a way that there is no escape from the overwhelming direct lethal firepower employed and no alternative to death on the receiving end of the UAV, UAV warfare is not a far cry from an enterprise strewn with the inhumanity of unilateral 'annihilating' force,[59] which is reminiscent of 'a putting-to-death'.[60] As such, the chapter suggests that it runs counter to the core idea of the prohibition on 'denial of quarter'.

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[56] See chapter 3. But see 1987 ICRC Commentary on API (Art 35) p 403, para 1417 and Oeter, 'Methods and Means', 125-6, both grounding the rule on military necessity.
[57] See e.g. Dinstein, *Conduct,* 194 ('A no-quarter threat is banned irrespective of actual results or of implementation of a threat').
[58] See e.g. Jean de Preux (n 39 above and accompanying text).
[59] Gusterson, *Drone*, 40.
[60] Chamayou, *Theory*, 162.

CONCLUSION

In the Thesis the concept of interregnum sought to capture the 'extraordinary situation'[1] generated by UAVs. UAV warfare disrupts the implicit assumptions within which the law is embedded while the drone's technical capabilities for surveillance and precision targeting continue to be recruited in defence of the drone and in arguments for improved compliance with the existing LOAC. The question concerns the interplay between law and the conduct enabled by new weapon technology, and focuses on the obligations and duties imposed by the LOAC on the adversaries through prohibitions relating to the use of means and methods of warfare and the conduct of hostilities. Placing the prohibitions in an 'other-directed' normative regime moulded within a paradigm of an armed confrontation, the Thesis considered how humanity, as the irreducible core of the LOAC, is confronted with weapons technology.

The Thesis began with a critical analysis of the arguments in defence of UAVs under the LOAC as developed in the legal literature over the course of eighteen years since the first United States drone strike. This highlighted that what was required to articulate issues of compliance with the LOAC was a shift in focus, such that could correspond to the essence of the LOAC and could capture the change in the model of violence brought about by UAV technology. In their effort to make UAV warfare legally and ethically intelligible under the LOAC, drone advocates became increasingly fluent in specific aspects of the technology to 'simplify the oft benighted debate' on the

[1] This idea draws on Zygmunt Bauman, 'Times of Interregnum' (2012) 5 Ethics & Global Politics 49, 49, who explains Antonio Gramsci's insight that 'The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear' [(in Quaderni del carcere; here quoted from Antonio Gramsci *Selections from the Prison Notebooks* (Quintin Hoare and Geoffrey Nowell Smith eds and trs, Lawrence & Wishart 1971) 276]. As Bauman argues, Gramsci 'attached it to the extraordinary situations in which the extant legal frame of social order loses its grip and can hold no longer, whereas a new frame, made to the measure of newly emerged conditions responsible for making the old frame useless, is still at the designing stage, has not yet been fully assembled, or is not strong enough to be put in its place'.

basis of drone's technical capabilities for surveillance and precision targeting. The constant reminder that UAVs are in the service of the ethical duty for absolute force protection and the recurring reassuring promise for the minimisation of civilian harm as a corollary of technical precision, however speculative and disingenuous,[2] has enabled a narrative in the legal scholarship that speaks of 'hunter-killer' drones like Reapers and Predators as 'humanitarian weapons', links them to the promise of 'humane warfare' and the opportunity for improved compliance with the LOAC. Kenneth Anderson's words illustrate how the mainstream legal argument has set the tone in the debates about UAVs and the LOAC:

> After all, everything in the *jus in bello* category here works together, not against each other. The technology provides force protection to (one side's) combatants; it provides greater protection to civilians through precision targeting. What's not to like? No weighing up of perplexing values need to take place, because everything is on the plus side, win-win.[3]

Taking up the gauntlet – a fitting phrase in our context, the Thesis argued that for all the technological advance that enables the UAV-using side to direct lethal force to specified targets and to eliminate risk for its own side, UAVs introduced a model of violence that could hardly represent an advance in the conduct of warfare in line with the duties and obligations that the LOAC imposes, which are both legal and ethical. And this claim is not reducible to a question of the 'what is not to like about UAVs?' sort.

The Thesis demonstrated that the LOAC's rules on the conduct of hostilities have shaped and have been shaped by the paradigm of an armed confrontation. This assumes the factual and normative environment of a reciprocal human armed interaction, and captures the conception of war/armed conflict in the LOAC as a world of mutual danger and vulnerability. Through relevant provisions it was shown that the law expects warfare violence to occur within the context of an armed encounter, an *agon*

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[2] Mégret, 'Humanitarian Problem', 1308 ('… it will be disingenuous to claim the benefit of collateral damage that is legally tolerated under Additional Protocol I in conditions that do not approximate the factual and normative scenario historically contemplated when Protocol I was adopted.').
[3] Anderson, 'Efficiency', 388.

or a contest as it were, that occurs at the level of collective entities and practised between individual human beings implicated as opponents. There might be the risk of this being misread as an obstinate or passé insistence on a paradigm of warfare violence that requires the loss of life on all sides to the conflict and is inimical to the idea of 'sparing lives' on one's own side, whereby compliance with the LOAC would only be conceivable at the price of self-sacrifice or perhaps self-renunciation. However, such an understanding would be facile and misplaced. The Thesis, scratching the surface of the law, brought to the forefront the logic behind the law's rules on appropriate conduct and showed that it is tied with the ethos of fighting and the notion of fighting fairly. This is a normatively essential component of war/armed conflict in the LOAC in that it assumes that the law is meant to operate against a normative background where, irrespective of asymmetries and disparities in the opposing sides' weapon capabilities, the human adversary has an opportunity to fight back in response or in defence, and hence a reasonable chance to survive. As UAV warfare disrupts the assumptions of war within which the LOAC is embedded and places the individual on the receiving end of UAVs in extreme vulnerability, the Thesis examined what the model of 'absolutely unilateral' imposition of lethal force on targeted individuals means for the law. In so doing, the Thesis demonstrated that, by reducing the adversary to a target, wartime behaviour as shaped by UAV technology disregards the humanity of the adversary and upsets the ethical orientation of a legal regime that is fundamentally 'other-directed'.

This provided the context for the analysis of well-established prohibitions relating to the law on means and methods of warfare and the conduct of hostilities; namely the prohibition of the use of means and methods of warfare of a nature to cause inevitable death, the prohibition of attacks against persons *hors de combat* and the prohibition to conduct hostilities on a 'no survivors' basis. The Thesis' focus on this aspect of the LOAC put emphasis on obligations that accrue to the human adversary and are geared towards safeguarding a reasonable chance to survive. This was particularly important because it enabled the Thesis to approach compliance

with the law from a wholly different premise. The Thesis brought the law's prohibitions face to face with the new form of conduct enabled by UAV technology, and captured a profound moment of a fundamental and irresolvable tension, legally and ethically.

The Thesis demonstrated that there is a strong case to be made that the use of UAVs could be deemed in violation of the prohibition of the use of means and methods of warfare of a nature to render inevitable death as part of the principle prohibiting the infliction of superfluous injury or unnecessary suffering. In this prohibition, it was shown, the law acknowledges the humanity of the adversary and protects them from ineluctable lethality. This is the effect that ensues invariably from UAVs' expected, normal or typical use. UAVs are treated in the Thesis as a unified system on the basis of their salient features, namely the inherent unmanned characteristics and attack capabilities that make them superiorly offensive, and as such they are to be thought of as tools of warfare designed, developed and employed to locate and strike targeted individuals. The technological advance as represented by the advent of UAVs promised, we are told, legal and ethical progress in wartime behaviour; that is, the killing of individuals can now be imposed with precision. However, this cannot provide an argument for compliance with the law as the inevitability of the effect inflicted by UAVs is in conflict with the prohibition itself, its spirit and object.

Furthermore, the Thesis demonstrated that UAV technology enables conduct that cannot internalise the ethical possibilities of protection from direct attack that the law opens up for the human adversary in conditions of vulnerability in an environment of mutual danger, namely as persons *hors de combat* on the basis of the conditions detailed in the law. In UAV warfare targets are placed in extreme vulnerability, which is further aggravated by the fact that the UAV model of violence actively closes off a realistic opportunity for surrender or capture. On this basis, the Thesis showed that UAV targets could be considered defenceless adversaries and as such they could fall within the scope of the *hors de combat* safeguard and benefit from the threat-based exception to the targetability of opponents that this protection incorporates.

Finally, incarnating a model of violence that renders death inevitable and denies any opportunity for surrender, UAV warfare strikes at the essence of the law's prohibition on quarter, which prohibits to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

On the basis of the foregoing analysis the Thesis suggested that the one-sided imposition of overwhelming lethal force against targeted individuals by means of UAVs does away with the prohibitive nature of the law on the conduct of hostilities as embodied in the rules examined. UAV warfare runs counter to the obligations and duties that the LOAC imposes to the 'benefit' of one's adversary by virtue of humanity. And in so doing, it challenges our claim to humanity at the most fundamental level, that of the dignity of the human adversary as a matter of existence. In the respect for the human dignity of the adversary is also where one's own humanity can be found. The law could protect oneself from their own inhumanity through its 'other-directed' prescriptions and proscriptions, as Henri Meyrowitz has suggested. But the basic reality of UAV warfare is Janus-faced; it guarantees absolute safety for the UAV-using side in a way that recognises the value of human life for self, which is part of an ethical argument of force protection, while at the same time it exposes the UAV target to ineluctable lethality. For all the technological appearances and precision promised or perhaps because of it, the first casualty in UAV warfare has been the humanity of the adversary. The LOAC cannot play any meaningful role and remain relevant if it is expected to accommodate a model of violence that is exhausted to the targeting of individuals for death and killing. The Thesis demonstrated that humanity is the irreducible core of the LOAC in the conduct of hostilities, which means that the 'relevance' of the law in new technological contexts and compliance with the law are bound up with the understanding that the human adversary is to retain and 'benefit' from the law's protection.

While the Thesis set up the problématique of a legal and ethical interregnum around UAV warfare, the importance of this study is broader. The Thesis articulated compliance with the LOAC on the basis of the inherent

normativity of the law, as this emanates from the ethical assumptions of an armed confrontation and the humanity of the adversary, and captured the law's ethical dynamic towards safeguarding the adversary's opportunity to fight back in response or in defence and a reasonable chance to survive. This approach expresses the concern for the human adversary and thus transcends the UAV-specific context so long as the LOAC is invoked in arguments for compliance in the context of weapon technologies that expose the adversary to conditions of extreme vulnerability and subject them to absolutely unilateral lethal force.

UAV technology, which the Thesis examined, is to be deemed a manifestation of an 'ideology of high-tech war', which has long been linked to the persistence of the trend towards the 'unmanning' of military violence and accompanied by the disregard for those who are found on the other side of the adversarial divide. This is tellingly described by Chris Hables Gray writing about the United States as far back as 1989:

> There are projects to create autonomous land vehicles, minelayers, minesweepers, obstacle breachers, construction equipment, surveillance platforms, … They are working on smart artillery shells, smart torpedoes, smart depth charges, smart rocks (scavenged meteors collected and then 'thrown' in space), smart bombs, smart nuclear missiles and brilliant cruise missiles. ... the Army even hopes to have a robot to "decontaminate human remains, inter remains, and refill and mark the graves".[4]

No argument for technological smartness and precision, effectiveness and utility can substitute for a claim to humanity under the LOAC – this would verge on 'hybris technico-militaire',[5] as it were. If UAVs are 'here to stay' and 'something we will have to live with', as the deluge of lethal force already delivered by means of UAVs[6] and the prominent place reserved for drone

[4] Chris Hables Gray, 'The Cyborg Soldiers: The U.S. Military and the Post-Modern Warrior' in Les Levidow and Kevin Robins (eds), *Cyborg Worlds: The Military Information Society* (Free Association Books and Columbia UP 1989).
[5] Meyrowitz, 'Bombardement Stratégique', 66.
[6] This refers generally to the large-scale use of UAVs in the context of operations conducted by the United States, United Kingdom and Israel, the most active users of armed UAVs, which are not, however, the only states known to have employed drone strikes.

weaponry in future conflicts[7] reveal, there is hardly any room for optimism. Because this means that UAVs have escaped and are already beyond the prohibitive reach of the LOAC. It seems as though we have fallen asleep at the switch while the human adversary in UAV warfare ceased to form part of the concerns raised under the LOAC and only remerged as human in the debates about autonomous weapons systems.[8] In UAV warfare the adversary remains a target stripped of the humanity that the LOAC acknowledges to them. And it is at this point that the question that appeared in the first lines of the Introduction to the Thesis becomes relevant to humans: 'are we obligated to apply our rules when we fight [aliens]?'.

[7] See e.g. the New America Foundation <www.newamerica.org/in-depth/world-of-drones/>; New America <www.newamerica.org>.

[8] Albeit as part of a different set of 'ethical' concerns that are not centred on the target but rather on who or what 'will pull the trigger' or 'push the button', see e.g. Peter Asaro, 'On Banning Autonomous Weapons Systems: Human Rights, Automation and the Dehumanization of Lethal Decision-Making' (2012) 94(886) IRRC 687; Noel Sharkey, 'Staying in the Loop: Human Supervisory Control of Weapons' in Bhuta et al, *Autonomous*; Noel Sharkey, 'Towards a Principle for the Human Supervisory Control of Robot Weapons' (2014) 2 Politica e Società 305 on the morally acceptable level of human involvement in targeting decision-making.

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