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TARGETING, GENDER, AND INTERNATIONAL *POSTHUMANITARIAN* LAW AND PRACTICE: FRAMING THE QUESTION OF THE HUMAN IN INTERNATIONAL HUMANITARIAN LAW

Matilda Arvidsson*

Abstract. Focusing on targeting law and practice in contemporary high-tech warfare, this article brings international humanitarian legal scholarship into conversation with posthumanist feminist theory for the purpose of rethinking international humanitarian law (IHL) in terms of the posthuman condition. I suggest that posthumanist feminist theory – in particular Rosi Braidotti’s scholarship – is helpful to the IHL scholar for understanding and describing high-tech warfare that recognises the ‘targetable body’ as both material and digital. Posthumanist feminist theory, moreover, avails us of a much-needed critical position from which to reframe the question of what the ‘humanitarian’ aim in IHL is: who, and what, can the ‘human’ of this humanitarianism be? This article sets out the framework for a posthumanitarian international law as an ethical-normative order worthy, as Braidotti puts it, of the complexity of our times.

1.0 INTRODUCTION

Contemporary critical international humanitarian law (IHL) scholarship concerned with new technologies in warfare rarely, with few exceptions, employs feminist theories in its analyses.¹ Moreover, while such scholarship critiques a range of technological

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¹ Relevant scholarship includes Frédéric Megret, ‘The Humanitarian Problem with Drones’ (2013) 5 *Utah Law Review* 1283; Markus Gunneflo, *Targeted Killing: A Legal and Political History* (Cambridge University Press 2016); Caroline Holmqvist, ‘Undoing War: War Ontologies and the Materiality of Drone Warfare’ (2013) 41(3) *Millennium: Journal of International Studies* 535; Gregor Noll, ‘The Emergent Form of War and its Law’ in Max Liljefors, Gregor Noll, and Daniel Steuer (eds)

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and digital practices, technology as a whole is often positioned as an overwhelmingly destructive force rather than an already present and necessary condition for human existence. When feminist analysis is considered in these and more conventional IHL scholarship, IHL's essentialist notion of 'women' as an object of knowledge is more often than not reproduced.² These latter analyses usually call for more and better protection of 'women' in armed conflicts.³ In gender studies scholarship, in contrast, the

Manifesto on the Emergent Form of War (forthcoming 2019); Gregor Noll, 'Weaponizing Neurotechnology: International Humanitarian Law and the Loss of Language' (2014) 2(2) *London Review of International Law* 201; Gregor Noll, 'Analogy at War: Proportionality, Equality and the Law of Targeting' in Janne E Nijman and Wouter G Werner (eds) (2012) *Netherlands Yearbook of International Law* 205; Amin Parsa, 'Military Uniform and Legitimation of Lethal Targeting in International Law of Armed Conflict' in Jane Tynan and Lisa Godson (eds) *Understanding Uniform: Clothing Discipline in the Modern World* (Bloomsbury forthcoming 2019); Amin Parsa, *Knowing and Seeing the Combatant: War, Counterinsurgency and Targeting in International Law* (Lund University 2017); and Heather M Roff, 'Advancing Human Security Through Artificial Intelligence' (2017) *Chatham House research paper* (online) <<https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2017-05-11-ai-human-security-roff.pdf>> (last accessed 9 February 2018). See also Pierre Bélanger and Alexander Arroyo, *Ecologies of Power: Countermapping the Logistical Landscapes & Military Geographies of the U.S. Department of Defense* (MIT Press 2016). Other IHL scholarship particularly relevant for the discussion in this article includes the articles featured in the *International Review of the Red Cross* 2012 issue on 'New Technologies and Warfare', in particular Vincent Bernard, 'Science Cannot be Placed Above its Consequences' 547; Alan Backstrom and Ian Henderson, 'New Capabilities in Warfare: An Overview of Contemporary Technological Developments and the Associated Legal and Engineering Issues in Article 36 Weapons Reviews' 483; Herbert Lin, 'Cyber Conflict and International Humanitarian Law' 515; William Boothby, 'Some Legal Challenges Posed by Remote Attack' 579; Cordula Droegge, 'Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and Protection of Civilians' 533; and Peter Asaro, 'On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making' 687. Relevant examples of IHL scholars analysing contemporary high-tech warfare while drawing on posthumanist feminist theory include Gina Heathcote, 'War's Perpetuity: Disabled Bodies of War and the Exoskeleton of Equality' and Emily Jones, 'A Posthuman-Xenofeminist Analysis of the Discourse on Autonomous Weapons Systems and Other Killing Machines' this current issue (2018).

² On special protection of 'women', see in particular Geneva Convention (I) for the Amelioration of the Wounded and Sick in Armed Forces in the Field (12 August 1949) (hereafter GKI) art 12, para 4; Geneva Convention (II) for the Amelioration of the Wounded and Sick in Armed Forces in the Field (12 August 1949) (hereafter GKII) art 12 para 4; Geneva Convention (III) for the Amelioration of the Wounded and Sick in Armed Forces in the Field (12 August 1949) (hereafter GKIII) art 14, para 2; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) (hereafter GKIV) arts 16, 17, 21, 22, 23, 27 para 2, 38, 50, 76 para 4, 85, 89 para 5, 91 para 2, 97 para 4, 124 para 3, 127 para 3, 132 para 2; Protocol Additional to the Fourth Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) (hereafter API) arts 8, 70, 75 para 5, 76, 119; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) (hereafter APII) art 5 para 2a, art 6 para. 4; United Nations Declaration on the Protection of Women and Children in Emergency and Armed Conflict, GA Res 3319, UN GAOR, 29th sess, 2319th plan mtg, UN Doc A/RES/3318(XXIX) (14 December 1974) para 4, 5; and the United Nation Security Council Resolutions on 'Women, Peace and Security': 1325 (2000); 1820 (2008); 1888 (2009); 1889 (2009); 1960 (2010); 2106 (2013); and 2122 (2013).

gendering of the ‘human’ performed through high-tech warfare targeting is well established.⁴ Yet, these analyses rarely recognise the specific work done by law in that operation.⁵ Instead, law is seen as a passive tool in the service of power. Feminist, queer, and posthumanist international legal scholarship on war, gender, and technology often ends up equally unenthusiastic about the role of law in the posthuman condition. Calling for a new (posthumanist) ethics rather than offering new ways of thinking about the role of law, I argue the latter has failed as a mode of political imagination in these analyses.⁶

Taking the law and practice of targeting in contemporary high-tech warfare as its example, this article therefore reframes the relevant question for IHL scholarship, from concerning only technological and digital practices to instead (also) asking who or what the ‘human’ of international *humanitarian* law is, and can be, in the posthuman condition.⁷ Recalling queer and postcolonial critique, the question of the ‘human’ is foregrounded by posthumanist feminist scholar Rosi Braidotti’s work.⁸ Posthumanist feminist scholarship – in particular that of Braidotti – is helpful when describing and analysing contemporary high-tech warfare practices as well as contemporary life and death in warzones and beyond.⁹ Like her posthumanist feminist peers, including Donna Haraway and Karen Barad, Braidotti considers nature and culture as a continuum: self-organising and co-produced through entanglement between different ‘natural’ and ‘non-natural’ elements or aspects.¹⁰ Rather than understanding

³ Although a very old debate, its contemporary articulations are often engendered by UN Security Council Resolution 1325 (2000) on Women, Peace and Security, and the resolutions following it (see above note 2).

⁴ See in particular Lauren Wilcox, ‘Embodying Algorithmic War: Gender, Race and the Posthuman in Drone Warfare’ (2017a) 48(1) *Security Dialogue* 11. See also Lauren Wilcox, ‘Drones, Swarms and Becoming-Insect: Feminist Utopias and Posthuman Politics’ (2017b) 116(1) *Feminist Review* 25.

⁵ For a prominent example to the contrary, see Judith Butler, ‘Human Shields’ (2015) 3(2) *London Review of International Law* 223.

⁶ For relevant examples of a call for ethics rather than law, see: Jones above note 1; and Vanja Hamzic, ‘International Law as Violence: Competing Absences of the Other’ in Dianne Otto (ed) *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2018) 77. Yoriko Otomo’s analysis of international law and technology (*Unconditional Life: The Postwar International Law Settlement*, Oxford University Press 2016) offers a rare example to the contrary, as she develops a feminist legal method of critique in which international law’s language is turned on itself through *l’écriture féminine* (Hélène Cixous, ‘The Laugh of the Medusa’ (1976) 1(4) *Signs* 875).

⁷ The use of ‘high-tech’ simply indicates that whereas much of contemporary IHL discussions engage with new technological development, ‘low-tech’ technologies, such as kitchen knives, scissors, and homemade bombs based on agricultural fertilisers, are simultaneously prevalent in contemporary warfare and beyond.

⁸ Rosi Braidotti, *The Posthuman* (Polity Press 2013); see also ‘Posthuman, All Too Human’, YouTube video lecture delivered by Rosi Braidotti on 25 January 2017 at Durham University, published 25 May 2017 (online) <<https://www.youtube.com/watch?v=JZ7GnwelrM0&t=721s>> at 11:00–12:00 (last accessed 9 February 2018).

⁹ See, for example, Braidotti (2013) as above; and Bolette Blaagaard and Iris van der Tuin (eds) *The Subject of Rosi Braidotti: Politics and Concepts* (Bloomsbury 2014).

¹⁰ Relevant scholarship by Haraway and Barad includes: Donna Haraway, *Simians, Cyborgs and Women: The Reinvention of Nature* (Free Association Books 1991, 2nd edn); and Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke Press 2007). See also Jannice Käll, *Converging Digital and Material Bodies: Posthumanism,*

technology in warfare as affording ‘humanity greater control over the world’ – as if humanity existed apart from or above the world – or ‘for machines to do the “seeing” for us’ in IHL targeting practices – as if the ‘human’ and the ‘machine’ could ever be fully told apart – posthumanist feminist theory de-thrones the ‘human’ as a given or ‘natural’ entity distinctly separate from other species and technologies.¹¹ A posthumanist feminist analysis recognises that ‘[t]here can no longer be a pre-given boundary between a body and its environment’, regardless of that ‘environment’ consisting of other species, digital platforms, or technology at large.¹² The ‘post-human predicament’ in which we live enforces, as Braidotti argues:

the necessity to think again and to think harder about the status of the human, the importance of recasting subjectivity accordingly, and the need to invent forms of ethical relations, norms and values worthy of the complexity of our times. This calls for a re-definition of the aims and structures of critical thought.¹³

In this article I try to take her call for new ‘forms of ethical relations, norms and values worthy of the complexity of our times’ seriously. What, I ask, defines the ‘human’ in IHL and what if that ‘human’ cannot be fully distinguished from the ‘other(s)’ that IHL scholarship and practice wants to keep outside ‘the loop’? ‘Keeping the human in the loop’ in terms of command responsibility and legal accountability is a major theme in contemporary debates on drone warfare and autonomous weapon systems (AWS), the latter of which, ‘once activated, can select and engage targets without further intervention by a human operator’.¹⁴ In response to widespread

Property, Law (Juridiska institutionens skriftserie 2017) 98; and Andreas Philippopoulos-Mihalopoulos, ‘Lively Agency: Life and Law in the Anthropocene’ in Irus Braverman (ed) *Animals, Biopolitics, Law: Lively Legalities* (Routledge 2016) 193.

¹¹ Asaro above note 1 at 709; Christopher Coker, ‘On Humanising War’ (2000) 1(2) *Politics, Religion & Ideology* 77 at 84.

¹² Philippopoulos-Mihalopoulos above note 10 at 199. See also Matilda Arvidsson, ‘Embodying Law in the Garden: An Autoethnographic Account of an Office of Law’ (2013) 39 *Australian Feminist Law Journal* 21; Donna Haraway, *When Species Meet* (University of Minnesota Press 2008); Anna Grear, ‘Deconstructing Anthropos: A Critical Legal Reflection on “Anthropocentric” Law and Anthropocene “Humanity”’ (2015) 26(3) *Law & Critique* 225; and Käll above note 10.

¹³ Braidotti (2013) above note 8 at 186.

¹⁴ On ‘keeping the human in the loop’, see Noel Sharkey, ‘Staying in the Loop: Human Supervisory Control of Weapons’ in Nehal Bhuta, Susanne Beck, Robin Geiß, Hin-Yan Liu, and Claus Kreß (eds) *Autonomous Weapons Systems: Law, Ethics, Policy* (Cambridge University Press 2016) 23. See also Asaro above note 1 at 696. On AWS and the ‘human’, see Kjølsv Egeland, ‘Lethal Autonomous Weapon Systems Under International Humanitarian Law’ (2016) 86 *Nordic Journal of International Law* 89; Rebecca Crotoof, ‘War Torts: Accountability for Autonomous Weapons’ (2016) 164(6) *University of Pennsylvania Law Review* 1347; Jones above note 1; and US Department of Defense Directive no. 3000.09, *Autonomy in Weapon Systems*, 21 November 2012 at 13–14 (online) <<https://www.hsdl.org/?view&did=726163>> (last accessed 9 February 2018). Command responsibility, essentially amounting to the criminal responsibility of a superior – civilian or military – for preventing and/or punishing the unlawful actions or inactions of a subordinate, has long been recognised as part of customary international law. The doctrine has been further developed in international criminal law through the jurisprudence of the International Criminal Tribunals for the former Yugoslavia, and for Rwanda as well as the International Criminal Court (flowing from Article 28 of the Rome Statute). See further Chantal Meloni, ‘Command Responsibility: Mode of Liability for the Crimes

worries about the consequences of AWS, the US Department of Defense has assured, in a briefing in 2009, that

[f]or a significant period into the future, the decision to pull the trigger or launch a missile from an unmanned system will not be fully automated, but it will remain under the full control of a *human* operator (emphasis added).¹⁵

But who and what can this ‘human’ (who appears to be in ‘full control’) be? What if they are not in control and the incapacities we ascribe to other-than-human entities in contemporary high-tech warfare – such as the drone or the AWS – are also our own? What if we ‘humans’ are, just like ‘them’, unable to fully know the cause of our actions, be the sole authors of our decisions and therefore unable to assume responsibility – or in legal terms accountability – for ‘our’ actions in warfare and beyond? These inevitable questions call, I argue, for an international *posthumanitarian* law. This would be a law that recognises legal subjectivity and accountability of ‘non-human’ entities in warfare alongside and in conjunction with ‘human’ and more-than-human entities: not as separate and superior/subordinate, but as relationally responsible.

The article is structured as follows: building on Helen Kinsella’s historically oriented work on gender and IHL, as well as on Amin Parsa’s work on contemporary targeting practices in high-tech warfare, the article starts by explaining how IHL understands the ‘human’ as material and binary-gendered while practice adds to this an understanding of the targetable ‘human’ as also digital, best described, I argue, as posthuman or more-than-human.¹⁶ In setting this out, the article briefly explains the basic rules on targeting and distinction, highlighting IHL’s privileging of ‘women’ as an object of special knowledge and protection. By expanding on a well-known drone attack that took place in Uruzgan, Afghanistan, in 2010, the article explains in some detail how technology and data-driven agency in practice intertwines with ‘humans’ and ‘human’ intelligence to co-produce the converging digital and material more-than-human target.¹⁷ It is only in a final turn, in an effort

of Subordinates or Separate Offence of the Superior?’ (2007) 5 *Journal of International Criminal Law* 619.

¹⁵ *US Unmanned Systems Integrated Roadmap (Fiscal Years 2009–2034)* (Washington DC 2009) (online) <https://www.globalsecurity.org/intell/library/reports/2009/dod-unmanned-systems-roadmap_2009-2034.pdf> (last accessed 9 February 2018) 10. See also US Department of Defense directive 3000.9, 21 November 2012 (online) <<https://www.hsdl.org/?view&did=726163>> (last accessed 9 February 2018) 2: ‘Autonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force’.

¹⁶ See Helen Kinsella, *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian* (Cornell University Press 2011); and Parsa (2017) above note 1.

¹⁷ While already substantially analysed and rather ‘old’, this 2010 case is helpful for illustrating the targeting process – substantial primary data has been made available, showing in detail the relations between different entities taking part in the targeting – as well as to illustrate how feminist analyses of high-tech warfare reinforce essentialist notions of ‘women’ and fail to question why saving more ‘women’s’ lives should be the feminist response. See Wilcox (2017a) above note 4; David Cloud, ‘Anatomy of an Afghan War Tragedy’ *Los Angeles Times* 10 April 2011 (online) <<http://www.latimes.com/world/la-fg-afghanistan-drone-20110410-story.html>> (last accessed 27 August 2017);

to satisfy the binary-gendered distinction infused by IHL, that the target is gendered: ‘civilians’ become ‘women’ and ‘combatants’ become ‘men’.

Against this background and taking seriously the worry expressed in much of contemporary IHL scholarship that the ‘machine’ will overtake the ‘human’ in performing both military analysis and execution of targeting decisions, the article goes on to ask who and what the ‘human’ performing the targeting is or can be.¹⁸ Drawing on Judith Butler’s notion of the subject, this ‘human’ is re-read, in a posthumanist feminist turn, as the always-already digital and material more-than-human: neither fully ‘machine’ nor fully ‘human’ and by necessity never autonomous nor free.¹⁹

Finding, in both the first and the second part of the article, that posthumanist feminism offers a better description of contemporary practices of targeting – in the ways in which digital and material targeted life appears as well as how digital and material lives converge in the process of performing the targeting – I suggest that the binary-gendered notion of the ‘human’ in IHL (combatant/man, civilian/woman), as well as the privileging of the ‘human’ and human agency, requires us to rethink the boundaries of responsibility and accountability. I conclude by setting out the road ahead for such an ethical-normative order, and end on a cautiously optimistic note about our possibilities of thinking law, life, and technology as scholars of an international *post-humanitarian* law and ethics.

2.0 TARGETING, THE ‘HUMAN’, AND ITS GENDERS IN INTERNATIONAL HUMANITARIAN LAW AND PRACTICE

It is often said that IHL strikes a balance between ‘the need for military necessity and concerns for “humanity”’.²⁰ This law’s telos may be described as securing the survival of the human species through regulating the modes of lawful killings in armed conflicts, by privileging the ‘human’ over other species and entities. Such a humanitarian cause may, paradoxically, be expressed in terms of how well a particular weapon technology kills.²¹ Humanity should, by this logic, be the master of its own destiny, and

Grégoire Chamayou, *A Theory of the Drone* (trans Janet Lloyd) (The New Press 2014); Jamie Allinson, ‘The Necropolitics of Drones’ (2015) 9(2) *International Political Sociology* 113; Andrew Cockburn, *Kill Chain: The Rise of the High-Tech Assassins* (Verso 2015); Derek Gregory, ‘From a View to a Kill: Drones and Late Modern War’ (2011) 28(7–8) *Theory, Culture & Society* 118; and Lucy Suchman, ‘Situational Awareness: Deadly Bioconvergence at the Boundaries of Bodies and Machines’ (2015) 5(1) *MediaTropes* 1.

¹⁸ This worry is perhaps most clearly expressed by Christof Heynes as he asks: ‘Less often discussed, however, is the extent to which autonomous weapons may also affect the right to dignity, a less clearly defined right but one that has played a foundational role in the development of both human rights law and IHL. Is it not an affront to human dignity if robots have the power of life and death over humans?’ (Christof Heynes, ‘Autonomous Weapons in Armed Conflict and the Right to a Dignified Life: An African Perspective’ (2017) 33(1) *South African Journal of Human Rights* 48).

¹⁹ Relevant parts of her scholarship include: Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999, 10th edn); Judith Butler, *The Psychic Life of Power* (Stanford University Press 1997); and Judith Butler, *Giving an Account of Oneself* (Fordham University Press 2005).

²⁰ Brian Rappert, Richard Moyes, Anna Crowe, and Thomas Nash, ‘The Roles of Civil Society in the Development of Standards Around New Weapons and Other Technologies of Warfare’ (2012) 94 (886) *International Review of the Red Cross* 765 at 766.

IHL operationalises this through a series of distinctions: the binary-gender distinction defining the targetable ‘human’, and the human/other distinction defining the ‘human’ as a distinctly separable subject capable of accountability in military decision-making while ‘the machine’ – the drone or AWS – lacks this ‘human-only’ capacity for assuming responsibility in a legal sense.

2.1 *Contemporary Targeting Practices: How to Lawfully Kill Converging Digital and Material Life*

In conducting war lawfully, a warfighter – ‘human’ or ‘other’ – must distinguish between civilian and non-civilian targets: this is the principle of distinction in IHL.²² The laws of targeting, more broadly, involve a range of steps that must be checked against IHL before and after an armed attack is launched: this includes the identification of a potential target, as well as the planning, execution, and assessment upon conclusion of the attack. The military operational, strategic, and tactical objective of an attack must always be weighed against the potential damage it may cause.²³ An attack must thus be *proportional* in relation to its estimated concrete military advantage – the principle of proportionality in IHL – and the principle of precaution imposes a wide set of obligations on belligerents ranging from seniority in decision-making to risk assessment, advance warnings, weaponry, and means of warfare.²⁴ It is against this detailed and well-established process of recognition, assessment, judgement, and evaluation that the debates on targeting in contemporary warfare – and its related debates on drone warfare and AWS – must be read.

Conventionally, within the IHL targeting context, an individual becomes a ‘lawful’ target based on her material and digital performance.²⁵ Identification within the targeting context is described in IHL and its doctrine as hinging on whether or not the potential target is in military uniform and bearing weapons openly.²⁶ This

²¹ However, as Jack M Beard points out, humanitarianism is not the only aim: the US military has long been driven by ‘institutional, strategic, monetary, and practical objectives (and not mainly by humanitarian considerations)’ in their endeavours to ‘achieve more accurate bombing capabilities’: Jack M Beard, ‘Law and War in the Virtual Era’ (2009) 103 *The American Journal of International Law* 409 at 412.

²² A civilian is defined as someone who is *not* a combatant: see Article 50 API. The principle of distinction is part of customary law (see rule 1, in the International Committee of the Red Cross Customary IHL study (online) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1> (last accessed 17 July 2018)), expressed also in Articles 48, 51(2), and 52(2) API.

²³ Military objectives are defined in Article 52(3) API.

²⁴ The principle of proportionality: Article 51(5)(b) API; and rule 14 in the *ICRC Customary IHL Handbook* (Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law. Volume 1: Rules* (Cambridge University Press 2005) (online) <<https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>> (last accessed 9 February 2018). The principle of precaution: Article 57 API; and the *ICRC Customary IHL Handbook*, rules 15–24.

²⁵ Parsa (2017) above note 1. The distinction between only two identifiable categories – combatant and civilian – is a schematic simplification as an individual can fluctuate between the two categories in many different forms, eg as a human shield, as a civilian actively participating in battle, etc.

²⁶ Article 4, para 1 and 2 GKIII.

identification/self-identification is a way of entering into the production of life and death through, as Butler formulates it:

a stylized repetition of acts ... which are internally discontinuous ... [so that] the appearance of substance is precisely that, a constructed identity, a performative accomplishment which the mundane social audience, including the actors themselves, come to believe and to perform in the mode of belief.²⁷

Relying on this visual performance, an identification as to whether the potential target is either combatant/targetable (uniform) or civilian/non-targetable (non-uniform) is made. The combatant performs the 'one' male form (the *uniform* co-constituting the combatant) which in turn creates the 'other': the civilian/female (wearing non-uniform clothes, concealing any weapons from visual inspection).²⁸ It is striking how the identity/identification of the combatant/targetability within IHL law, doctrine, and practice is conflated with gender: the distinction between appearance and substance – of, on the one hand, *being seen as* performing and, on the other hand, *being* – is dispersed. This performative work is also known as 'the uniform wearing the body' rather than bodies wearing uniforms.²⁹ Combatant (male)/civilian (female) identity/identification thus emerges with IHL targeting law and doctrine as a 'style guide' on how to 'pass' as a particular gender/identity as well as how to identify the 'human' as a particular gendered form of life for the purpose of targeting.

In high-tech warfare, practice targeting is, however, done not exclusively on the basis of observations of the performance of the combatant (male) and civilian (female) gendered identity/identification. Rather, large portions of the identification are digital and automated in self-learning systems that have been coded to identify potential targets and improve the targeting capacity through feedback loops within the targeting process.³⁰ Within this context the digital appearance of individuals – our digital bodies – constitutes an important part of the identity/identification.

Digital bodies comprise the large set of data we produce as we interact with and through the digital technologies available to us.³¹ Although these sets of data are

²⁷ Butler (1999) above note 19 at 179. Emphasis in original.

²⁸ This creation of the 'other' (female) through the definition of the 'one' is described by Monique Wittig in 'Homo Sum' in *The Straight Mind and Other Essays* (Beacon Press 1992) 46. Gina Heathcote's analysis of the exoskeleton as part of contemporary military uniforms identifies, in a similar mode, the military uniform as performative of the 'one' (male) gender: Heathcote above note 1.

²⁹ On the uniform wearing the body, see Jennifer Craik, 'The Cultural Politics of the Uniform' (2003) 7(2) *Fashion Theory: The Journal of Dress, Body and Culture* 129. The exoskeleton, analysed in Heathcote (above note 1) is an example of how the 'skeleton' that keeps the body fit for certain movements and duration literally wears the body as it appears on the 'outside' of the body, as part of the uniform structure. Or rather, and in a posthumanist feminist turn, the out/inside distinction is dissolved. See also Parsa (2017) above note 1 at 84–5.

³⁰ This applies specifically to self-learning systems which, as Fleur Johns explains it, moderate their performance through 'machine learning', which means that they have the 'capacity to modify their processing operations autonomously on the basis of newly acquired information': Fleur Johns, 'Global Governance Through the Pairing of List and Algorithm' (2016) 34(1) *Society and Space* 126 at 127.

made lethal use of for targeting purposes in high-tech warfare, the data is mostly generated by the uneventful everyday uses of cell phones, email programs, apps, and ‘smart’ household items such as ‘connected’ refrigerators.³² Our digital-embodied visibility often remains undisclosed to us, and the full consequences of our digital lives rarely dawn on us, if at all. A recent widely debated example is the data generated through athletes’ use of a training app – Strava – owned and made public by a private corporation. Data generated through the app has been used to map and reveal secret military bases and outposts around the globe.³³ The digital appearance of individuals (military personnel) trying, supposedly, to keep fit – digital information voluntarily submitted in the app – has enabled anyone with a device connected to the Internet to log onto the app company’s website to identify digital bodies in physical geographies around the globe, and also in my neighbourhood: see [Figures 1 and 2](#).

In the targeting process, digital bodies are identified through these and similar types of data harvested *en masse* and analysed in order to single out potential military targets. Discussing US military targeting practices, Parsa shows how what I term ‘digital performance’ and ‘digital bodies’ and life are transformed into ‘seeds’, ‘identifiers of interest’, and ‘targets’ ([Figure 3](#)).³⁴ A ‘seed’, Parsa explains, is “an identifier of a communications endpoint” and is deemed a potential threat’. The ‘seed’ is not equivalent to any ‘human’ individual as separated from technologies, but rather refers to:

a communication channel such as a phone number, an Internet Portal (IP) address or an email address that a target (or many others at many different times) may use ... Analysts use a particular seed identifier, e.g. a cellphone number, to dig into a vast database and gather information about other persons or networks that are in communication with the particular seed.³⁵

Digital visibility, relations, and entangledness render, in this way, converging digital and material bodies recognisable in various degrees as targetable: each of the categories of ‘seed’, ‘identifier of interest’, ‘target’, and ‘unknown’ performs both digital and material life and identity.

³¹ See further Käll above note 10.

³² The connected refrigerator is a Wi-Fi-connected household item controlled by a smartphone app through which temperature and performance can be adjusted. See, for example, <<https://jennair.com/appliances/details/JFFCC72EFS>> (last accessed 9 February 2018). These and similar ‘smart’ household items are sometimes referred to as part of ‘the Internet of Things’.

³³ Alex Hern, ‘Fitness Tracking App Strava Gives Away Location of Secret US Army Bases’ *The Guardian* (online) 28 January 2018 <<https://www.theguardian.com/world/2018/jan/28/fitness-tracking-app-gives-away-location-of-secret-us-army-bases>> (last accessed 9 February 2018).

³⁴ Parsa (2017) above note 1 at 182. The original image is published in *Bulk Collection of Signals Intelligence: Technical Options*, 2015, Committee on Responding to Section 5(d) of Presidential Policy Directive 28: The Feasibility of Software to Provide Alternatives to Bulk Signals Intelligence Collection; Computer Science and Telecommunications Board; Division on Engineering and Physical Sciences; National Research Council (online) <<https://www.nsa.gov/about/civil-liberties/resources/assets/files/BulkCollectionofSignalsIntelligenceTechOptions.pdf>> (last accessed 9 February 2018).

³⁵ Parsa (2017) above note 1 at 183.



Figure 1. Digital life at the RAF Mount Pleasant, the Falkland Islands. Photo: Strava heatmap showing digital bodies at RAF Mount Pleasant in the Falkland Islands. <<https://labs.strava.com/heatmap/#13.00/13.00888/55.59811/hot/all>> (last accessed 9 February 2018). With kind permission from Strava.



Figure 2. Digital life at Värnhem, Malmö, Sweden. Photo: Strava heatmap showing digital bodies at Värnhem <<https://labs.strava.com/heatmap/#13.00/13.00888/55.59811/hot/all>> (last accessed 9 February 2018). With kind permission from Strava.

Recalling the principle of distinction in IHL it becomes important to note that the digital body does not necessarily perform ‘one’ (male/uniform/combatant) or ‘other’ (female/non-uniform/civilian) form of life or gender: it entangles, in other words, but

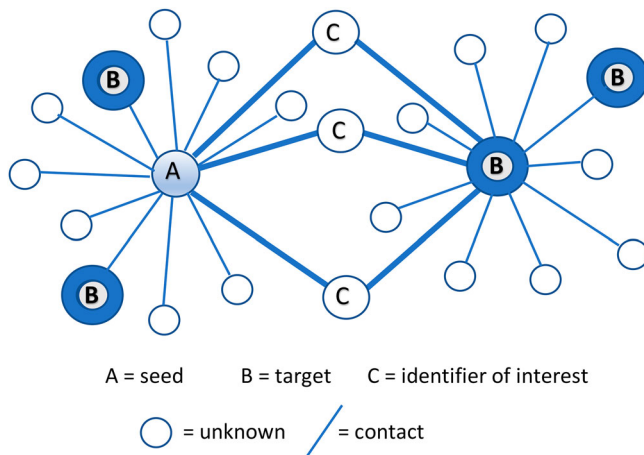


Figure 3. Contact-chaining graph: a network of contacts amongst identifiers.
Note: See also: *Bulk Collection of Signals Intelligence: Technical Options*, 2015, Committee on Responding to Section 5(d) of Presidential Policy Directive 28: The Feasibility of Software to Provide Alternatives to Bulk Signals Intelligence Collection; Computer Science and Telecommunications Board; Division on Engineering and Physical Sciences; National Research Council. <<https://www.nsa.gov/about/civil-liberties/resources/assets/files/BulkCollectionofSignalsIntelligenceTechOptions.pdf>> (last accessed 9 February 2018); and Parsa (2017) above note 1 at 182.

should not be conflated with our material bodies. An IP address can, for example, be materially embodied by several different individuals at different times. Moreover, our digital bodies can comprise of several different digital aspects, including such different aspects as avatars from online gaming or non-gaming online life as well as our past and present workplace email accounts. The manifold aspects of our digital bodies make them ephemeral and ever-changing yet, at the same time, unaffected by time: as our material bodies fall sick, die, and decompose, our digital bodies remain and may even continue to evolve.³⁶ Or, conversely, our digital bodies may be attacked by hackers, suffer from online viruses and technical malfunctions, or be eradicated with or without our consent. Emerging through the mechanisms of global capitalism,

³⁶ An example of the latter is artificial pacemakers which continue to send detectable signals after the death and decomposition of the material body of their carrier. Another example is our digital bodies flowing from our various digital user accounts and apps, for example, and drawing on part of my own (and rather old-fashioned and uneventful) digital life: Outlook app (my professional email account); LinkedIn; Facebook; Instagram; a range of train, tram, and airline company apps (many of which are linked to my debit and credit cards, the latter of which constitute a large part of my digital everyday life); the Swedish Tax Authority app (connected to my personal digital ID – ‘BankID’); online shopping apps tracing my search and shopping patterns (mostly home delivery food – vegan and vegetarian – and children’s clothing); a weather forecasting app ‘AccuWeather’ (tracking my movements in meteorological space); and HappyCow (an app for vegan eating out around the globe, tracing my movement in geography as well as my dietary preferences). The list could grow long.

our digital lives, moreover, are an extension of a global market economy in which life exists only insofar as it has a market value.³⁷

The lives identified in contemporary high-tech targeting warfare are thus quite different from conventional bodies identified through IHL's binary-gendering distinctions: they queer those categories, as distinctions between species and nature/culture dissolve.³⁸ This undoing of the binary-gender distinction renders the principle of distinction impossible to pursue in practice.³⁹ After all, how would we tell the civilian/female apart from the combatant/male based on digital performance alone? The important observation is not so much that the digital body 'lacks' a gender, as the work done by the undoing of the binary-gender distinction: it reveals IHL as resting on the assumption of 'humanity' as necessarily being of one (male) or the other (female) gender.

In practice, and in order to perform it in a way that satisfies the requirements of IHL, targeting is performed through an identification of the *converging* digital and material body where the material body becomes gendered according to IHL's categorisation for the purpose of targeting. How this convergence, the targeting, and the binary-gendering through IHL is done in practice will be set out below as I analyse the Uruzgan targeting case.

2.2 *A Practice of Gendered Gendering Targeting*

Let us turn to the Uruzgan province of Afghanistan, where in early 2010 three vehicles were spotted by a US 'Predator drone' crew. The scene offers a detailed account of the entities and actors central in performing targeting, as well as how digital and material bodies converge in contemporary targeting practice. Moreover, it demonstrates an example of how the special status of 'women' in IHL is transformed into a body of knowledge of what a 'woman' is (or ought to be). The following is an excerpt from the transcript of communication between some of the acts and actors co-producing the targeting:

- Sensor: That's weird.
 Pilot: Can't tell what the fuck they're doing.
 Safety observer: Are they wearing burqas?
 Sensor: That's what it looks like.
 Pilot: They were all PIded as males. No females in the group.
 Sensor: That guy looks like he's wearing jewelry and stuff like a girl, but he ain't ... if he's a girl, he's a big one.⁴⁰

³⁷ Braidotti (2013) above note 8.

³⁸ This is not to say that a queer or posthumanist feminist analysis celebrates targeting based on the identification of digital bodies. For a similar observation, see Wilcox (2017b) above note 4.

³⁹ Similar observations, noting that AWS are unable to perform targeting according to IHL, have been made before. Yet, the reason given in these observations is often that however 'intelligent' non-human warfighters become, and how ever-improving self-learning algorithms may become, they will lack the human ethical capacity for judgement. See, for example, Heynes above note 18 at 51.

⁴⁰ Wilcox (2017a) above note 4 at 12; see the full transcript of the attack available at 'Transcripts of U.S. Drone Attack', *Los Angeles Times* (online) 8 April 2011 <<http://documents.latimes.com/transcript-of-drone-attack/>> (last accessed 9 February 2018).

The tasks of recognising and assessing the targetability of the individuals travelling in the convoy – all positively identified ('PIDed as males') – were, in this scene of war, distributed between a range of 'human' and 'other' actors: primarily, but not exclusively, the military commander, the 'Predator drone' pilot, the sensor operator (a crew member 'on' unmanned drones located at Creech Air Force Base in Nevada); a team of screeners (image analysts employed to watch footage transmitted from a battlefield drone processed together with multiple intelligence hubs responsible for sharing 'anything noteworthy with mission control and the wider intelligence network' sitting at US Air Force's special operations headquarters in Okaloosa, Florida); and the disposition matrix (developed as part of the US military strategy to track, capture, and kill 'suspected enemies' – a grid or 'computerised process' based on mathematical algorithms). Between these 'human' and 'non-human' actors, positive identification was made of all the individuals in the convoy as 'MAM' (military age male).⁴¹ The visual-material performance of these individuals – taken together with the digital performance that had initially rendered them of military interest – were, in other words, identified (gendered) as male/combatant. They were attacked, in their moving vehicles, by three US Special Forces piloting 'Little Bird helicopters' releasing 'Hellfire' missiles and rockets. After the attack, in which 23 individuals died and several more were injured, the military investigating report (USFOR incident investigation) concluded that all individuals were 'civilians'. The 'engagement', the report tells us, did not cease until the missile and rocket operators 'spotted *bright* clothing and suspected *women* were present' (emphasis added) (Figure 4).⁴² In other words, the missile and rocket operators realised they had targeted, wounded, and killed civilians only when the gender ascribed to the targets (all male/MAM) did not match with how the operators identified the individuals' performance of gender, based on their 'bright clothing' (non-uniform/female).

The criticism afforded by scholarship that analyses the massacre in Uruzgan tends to focus on how, despite indications to the contrary, all individuals in the convoy were seen as 'male' and not 'women' (conflating 'women' and 'civilians'). Such criticism is unhelpful, feminist or not. Why, we must ask, argue that the

⁴¹ A sensor operator, together with the pilot, operates the drone over satellite links. According to a US Airforce description of an AFSC 1U0X1, Unmanned Aerospace System (UAS) Sensor Operator, 'Conducts reconnaissance and surveillance of potential targets and areas of interest. Detects, analyzes and discriminates between valid and invalid targets using synthetic aperture radar, electro-optical, low-light, and infrared full-motion video imagery, and other active or passive acquisition and tracking systems': (online) <<https://www.thebalance.com/air-force-enlisted-job-descriptions-3344226>> (last accessed 9 February 2018). On the role of the analyst, see: "'When You Mess Up, People Die": Civilians Who Are Drone Pilots' Extra Eyes' *The Guardian* (online) 30 July 2015 <<https://www.theguardian.com/us-news/2015/jul/30/when-you-mess-up-people-die-civilians-who-are-drone-pilots-extra-eyes>> (last accessed 9 February 2018). According to Article 57(2)(a) of API, a PID of any 'objectives' identified as potential targets must be made as 'neither civilians nor civilian objects'.

⁴² USFOR investigation (AR 15-6 Investigation, 21 February 2010 CIVCAS incident in Uruzgan Province) on file in excerpts with author. The entire investigation was released on 22 March 2012 by Contcom.mil (since then unavailable). See further Chris Cole, 'US Military Investigation Damns Drone Operators' *Drone Wars UK* blog (online) 18 March 2012 <<https://dronewars.net/2012/03/28/us-military-investigation-damns-drone-operators/>> (last accessed 9 February 2018).

6. Immediately after the engagement SOTF- and CJSOTF-A had ample evidence of a possible CIVCAS incident but failed to report it. Both commands sought to confirm the existence of CIVCAS rather than reporting suspected CIVCAS as required. The OH-58Ds which fired the missiles and rockets, ceased their engagement when they spotted bright clothing and suspected women were present. Despite the reports sent by the OH-58Ds, the Full Motion Video (FMV) from the Predator showing women and children on the objective site and reports from the Predator over the Internet Relay Chat (mIRC), neither SOTF- or CJSOTF-A reported suspected CIVCAS. Even after receiving a First Impression Report from the aviation unit which conducted the strike and performed the MEDEVAC, CJSOTF-A refused to report CIVCAS as the information contradicted initial reports from the and did not come from a CJSOTF-A unit. SOTF- and CJSOTF-A finally reported the CIVCAS nearly twelve (12) hours after the strike when the SOTF- surgeon reported the casualties in the hospital.

Figure 4. USFOR incident investigation report summary. USFOR investigation (AR 15-6 Investigation, 21 February 2010 CIVCAS incident in Uruzgan Province) on file in excerpts with author.

pilot/drone/sensors/safety observer/algorithm targeting agent(s) should have protected the Uruzgasi civilians because of their (assumed female/non-uniform) gender? After all, do not ‘women’ act as warfighters in armed conflicts (and do not individuals of all kinds of genders/non-genders wear ‘bright clothing’, at least sometimes)? Surely, a feminist critique must have something more to offer than arguing that ‘women’ should not be killed because they are ‘women’ or appear to be so by way of their visual performance/clothes and bodily features? Yet, to abandon gendering distinctions in IHL where some deemed ‘women’ are protected because of their material bodily features and attire whereas others, lacking ‘female-coded’ features, remain unprotected would only, in practice, result in a total of less life protected.

3.0 TECHNOLOGY, WARFARE, AND THE ‘HUMAN’

I set out the war scene in Uruzgan in some detail above to show not only how existing feminist analyses of the massacre are insufficient, but also to show how contemporary high-tech warfare targeting is done in multiple ways, simultaneously in multiple places, and by a range of ‘human’ and ‘other’ entities working in conjunction. In the following I will shift focus from how the targeting process frames humanity in a binary male/female gender matrix to ask instead about the ‘human in the loop’: the one partaking in performing the targeting.

3.1 *Framing the Question of the ‘Human’ in International Humanitarian Law: Human and Data-Driven Agency*

At the beginning of this article I argued that it is helpful to take on Braidotti’s question of who and what the ‘human’ in IHL – the one who is ‘in the loop’ – is, or can be. We must ask what distinguishes the ‘human’ from the ‘other-than-human’ in the targeting process. For want of any explicit definition in IHL, one way to know the ‘human’ is to ask what the ‘non-human’ and non-human agency in the targeting process is. Mireille Hildebrandt gives us the following explanation of what such agency is:

Data-driven agency refers to a specific type of artificial intelligence, capable of perceiving an environment and acting upon it, based on the processing of massive amounts of digital data. Data-driven agents can be more or less embodied, ranging from robots (drones, self-driving cars or even companion robots) to software bots (search engines, advertising auctions, smart energy grids).⁴³

In the targeting context, data-driven agency denotes a capacity to see, know, and act based on digital data. This includes data that does *not* result from a ‘human’-only intelligence. It has sometimes been argued that data-driven agency is superior to human agency, in particular in AWS due to their capacity to process large amount of data and act autonomously at a high level. However, ‘autonomous systems may’, as Christof Heynes puts it, ‘sometimes respond in unpredictable ways, and are, to the extent that this happens, outside human control’.⁴⁴

In contrast, ‘human’ agency implies a capacity to see, know, and act based on human cognition and consciousness: in particular, it implies human capacity to control one’s actions and act intentionally in the world.⁴⁵ Agency in the latter tradition, David Kyuman Kim explains, ‘reflects the conditions of freedom, autonomy, and liberation’.⁴⁶ To ‘freely’ and ‘autonomously’ see and know the enemy in a war scene is what IHL affords to the ‘human’ warfighter.⁴⁷ Yet, as the above analysis of US targeting practice shows, such ‘freedom’ and ‘autonomy’ are restricted insofar as they are performed within a particular body of knowledge (of gendering distinction) and insofar as they rely on non-human material and digital entities and agencies. The example from Uruzgan is helpful as it avails a very concrete understanding to us of the ‘humans’ and ‘others’ involved in the targeting process. No single individual within that context can be identified as acting ‘autonomously’ or outside non-human agency and technology. The military commander, the ‘Predator drone’ pilot, the sensor operator, and the team of screeners acted in coordination with digital intelligence gathered and processed in a disposition matrix; they communicated through digital platforms; and their capacities to see, know, and act flowed from the technologies of the body, such as, for example, the movements of limbs, ‘old’ technologies, such as corrective lenses to enhance bad eyesight, and ‘new’ technologies, such as medically enhanced screening capacity.⁴⁸ High-tech and low-tech warfare offers, on this account, similar results: human agency and action is entangled with whichever means of warfare is chosen. Ethical responsibility is also magically diluted in these webs of command.

⁴³ Mireille Hildebrandt, ‘Law *As* Information in the Era of Data Driven Agency’ (2016) 79(1) *The Modern Law Review* 1 at 4.

⁴⁴ Heynes above note 18 at 48. See also Johns above note 30.

⁴⁵ Heynes as above.

⁴⁶ David Kyuman Kim, *Melancholic Freedom: Agency and Spirit of Politics* (Oxford University Press 2007) 84.

⁴⁷ On the development of IHL as an order designed to control human autonomy in warfighters, see Eyal Benvenisti and Amichai Cohen, ‘War Is Governance: Explaining the Logic of the Laws of War from a Principal–Agent Perspective’ (2014) 111(8) *Michigan Law Review* 1363.

⁴⁸ On the latter, see Noll (2014) above note 1.

Even if we were to consider the ‘human’ apart from technologies and other species, we would still find it difficult to describe her as either free or autonomous. Butler’s scholarship on subjectivisation has convincingly shown us that we all emerge as individuals entangled with our ‘human’ others.⁴⁹ To be an individual ‘human’ with agency and intentionality means, in Butler’s view, to constantly emerge in relationality. We can, she points out, neither recall our own psychic emergence nor, as a consequence, fully know who we are: we cannot fully give an account of ourselves, our actions, and the causes for those actions.⁵⁰ There is, Butler argues, an opacity to the subject instilled through the process of subjectification in which the other becomes part of the self, including the other’s unconsciousness.⁵¹ This makes parts of our basic psychic structure irretrievable to us and we become irreversibly bound to our others through this process of subjectivisation. To consider the ‘human’ responsible and capable of assuming accountability for her acts based on notions of ‘autonomy’ and ‘freedom’ appears, against this background, purely fictitious.⁵² Human intentionality – that which many describe as the reason why ‘man’ and not ‘machine’ can be trusted to safeguard ‘humanity’ and must be kept ‘in the loop’ – appears as a desire rather than a human attribute.

Drawing on Butler again, we may say that the ‘human’ in the targeting ‘loop’ can neither fully account for her acts, nor secure the cause of those acts as fully and only hers.⁵³ IHL and international criminal law, at this point, demands a transcendental subject. The only thing asked of such a subject is the ability to tell a persuasive story: a sequential-linear narrative of events where cause (intentionality) and effect (targeting decision and execution) follows.⁵⁴ It does not matter if the individual ‘human’ has the psychic capacity to know her intentions and how those are linked to the effect of her actions, as long as her narrative capacity remains intact. The narrative becomes, as Butler puts it, ‘a performative accomplishment which the mundane social audience, including the actors themselves, come to believe and to perform in the mode of belief’.⁵⁵ The application of IHL and the international and domestic legal provisions ensuring accountability within the targeting context thus works on the basis of narrative capacity and performative belief: the ‘human’ is presumed to have, as Alex Sharpe puts it, a ‘capacity for reason’ and ‘a conclusion of corporeal integrity’.⁵⁶ The latter is a body that passes as ‘human’ – performing ‘humanness’ – yet which may be technological and digital in various degrees.⁵⁷ ‘Humans’, in IHL,

⁴⁹ Butler (1997) above note 19; Butler (2005) above note 19; Judith Butler, ‘Reflections on Ethics, Destructiveness, and Life: Rosi Braidotti and the Posthuman’ in Blaagaard and van der Tuin above note 9 at 21. Butler primarily considers the ‘other’ another human (Butler 2005), yet the psychic structure of the human subject may also be considered to be non-human agents. See, for example, Matilda Arvidsson, *The Subject in International Law* (Lund University 2017).

⁵⁰ Butler (2005) as above.

⁵¹ Jean Laplanche, *Essays on Otherness* (Routledge 1999). Laplanche makes use of the term ‘excess’ while I here adopt the more conventional term ‘unconsciousness’.

⁵² Butler (2005) above note 19 at 37.

⁵³ As above; Arvidsson above note 52.

⁵⁴ Butler (2005) above note 19 at 12.

⁵⁵ Butler (1999) above note 19 at 179. Emphasis in original.

⁵⁶ Alex Sharpe, *Foucault’s Monsters and the Challenge of Law* (Routledge 2010) 114. See also Braidotti (2013) above note 8 at 13; and Gear above note 12 at 233ff.

are attributed psychic and bodily material core features which are neither, following Butler, indicative of the psychic structure of the human species, nor consistent with how ‘human’ existence is interdependent with technology.

3.2 *Posthumanist Feminist Re-Descriptions of Law/Life/Technology*

If such bold and fictitious assumptions as those set out above can be made about the ‘human’ in IHL, could something similar – in a posthumanist feminist turn – be imagined about other entities and agents partaking in the targeting process, those with data-driven agency as well as others? Could we imagine a range of entities, ‘human’ as well as ‘others’, held accountable for acts undertaken within the targeting process? Constructing (additional) legal subjectivity and accountability for ‘others’ in ‘the loop’ is one possible answer, affording legal subjectivity and accountability to warfighting ‘entities’ with data-driven agency – converging the digital and material, such as we find these entities in our posthuman condition. Efforts in this direction would look into how agents and entities – including drones and AWS – could be recognised as legal subjects, at least in part.⁵⁷ Moreover, plants and insects – both of which are part of core US military research programs and in part already operational in warfare – whose biomasses have been altered and enhanced in order to transmit intelligence⁵⁹ and act as warfighters (insects, or Hybrid Insect Micro-Electro-Mechanical Systems: HI-MEMS),⁶⁰ may also in such an effort be considered legal subjects for limited purposes.⁶¹

A posthuman feminist analysis following Braidotti’s scholarship emphasises the need to ‘recast subjectivity’ and ‘invent forms of ethical relations’ rather than only

⁵⁷ On performativity, see Butler (1999) above note 19. See also Heathcote’s discussion of dis/able-bodiedness: Heathcote above note 1.

⁵⁸ Rather than affording subjectivity to AWS, Crotof revisits international criminal responsibility for similar purposes, arguing for an accountability for acts performed by AWS drawing on international torts law and state responsibility: see Crotof above note 14.

⁵⁹ The US Defense Advanced Research Projects Agency (DARPA) program on ‘Advanced Plant Technology’ (APT) was presented last year (11 November 2017) on DARPA’s website under the heading ‘Nature’s Silent Sentinels Could Help Detect Security Threats: New Program Envisions Plants As Discreet, Self-Sustaining Sensors Capable of Reporting Via Remotely Monitored, Programmed Responses to Environmental Stimuli’. The APT program is well on its way to becoming fully integrated in conventional intelligence monitoring, as is apparent from the information availed by DARPA: ‘APT will rely on existing ground-, air-, and space-based technology to remotely monitor plant reporting. Such systems are already capable of measuring plants’ temperature, chemical composition, reflectance, and body plan, among other qualities, from a standoff distance.’ See <<https://www.darpa.mil/news-events/2017-11-17>> (last accessed 9 February 2018).

⁶⁰ On insect-driven warfighting methods, including warfighting enhanced insects in which microsystems are implanted, see: *US Army Roadmap for UAS 2010–2035: The Eyes of the Army* (US Army UAS Center of Excellence, ATZQ-CDI-C, 2010). See also DARPA’s HI-MEMS project, which was originally launched in 2006 and <<http://www.darpa.mil/mto/programs/himems>> but the web page has subsequently been taken down by DARPA. However, the program is summarised in Alper Bozkurt, Robert Gilmour, David Stern and Amit Lal, *MEMS-Based Bioelectronic Neuromuscular Interfaces for Insect Cyborg Flight Control* paper presented at the 2008 IEEE 21st International Conference, Wuhan, China 3–17 January 2008 and discussed in some detail in Adam Dodd, ‘The Trouble with Insect Cyborgs’ (2014) 22(2) *Society & Animals* 153. See also Wilcox (2017b) above note 4.

or primarily adding new legal norms and categories of legal subjects onto those already existing in IHL.⁶² A *posthumanitarian* international law for a posthuman condition would therefore need to recognise the legal subjectivity and accountability of ‘non-human’ (intelligent, data-driven agency) entities in warfare as relational with ‘human’ and more-than-human entities and not as separate and superior/subordinate.

Both life and death in contemporary high-tech warfare – of those targeted as well as those performing the targeting – can be best described as part of the posthuman condition of digital and material convergence where distinctions between nature and culture, genders, species, and technology are undone. To remake IHL as we know it could imply an opportunity to build on existing legal figures for accountability of artificial persons, such as corporations, organisations, and professional offices, as opposed to ‘natural’ persons (individual ‘humans’).⁶³ Yet, to further set apart – to further fragment international law by creating specialised legal provisions (ex post facto) for each new entity appearing in the context of high-tech warfare – rather than to embrace the convergence of digital and material bodies and lives, as well as persons and things, would be as unhelpful as leaving IHL as it is.⁶⁴ In order to arrive at a *posthumanitarian* international law, a first and necessary step involves recognition, which is not to say a recognition of legal ‘sameness’ (‘oneness’, or equality of legal subjects in international law).⁶⁵ A posthumanist feminist ethics serving as a foundation for a *posthumanitarian* international law would, as a start, facilitate the survival of life, *tout court*, in the posthuman condition.⁶⁶ Humankind would be among the species and entities for which the telos of the law could be made to work, but humanity’s survival as set above and apart from its others could not be the law’s purpose: neither, for example, would ‘the environment’ nor ‘endangered species’ be safeguarded for the purpose of humanity. Rather than furthering subordination, exclusion, and othering/gendering, such a posthumanist feminist normative-ethical order would facilitate recognition, protection (insofar that law can at all protect in war or otherwise), and allocate responsibility and accountability among relations. Recognition of the other is, as Butler has argued, the only viable ground on which ethical responsibility can be built.⁶⁷ To this I add that a law operative in the posthuman

⁶¹ Horses and dogs, as well as donkeys, camels, birds, and elephants have long been used in war but never considered as legal subjects, only as symbols of martyrdom and so as metaphors for loyalty to the state. I thank Yoriko Otomo for pointing this out.

⁶² Braidotti (2013) above note 8 at 186.

⁶³ On the corporate criminal subject in the anthropocene, see Grear above note 12, especially at 237ff. See also Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan 2010). On the ethical responsibility of artificial persons, see Elisabeth Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations* (Stanford University Press 1992).

⁶⁴ This may also be expressed as the individualisation of responsibility performed by modern law. See Noll (2019) above note 1.

⁶⁵ On the homosocial, fraternal recognition of sameness in international law, see Arvidsson above note 52 at 62–69.

⁶⁶ To this end some work towards a posthumanist feminist ethical-legal order has already been proposed within environmental law. See, for example, Grear above note 12.

⁶⁷ Butler (2005) above note 19.

condition needs to be able to recognise and offer recognition to the relational, entangled, and converging digital and material ways in which life and death appear.

4.0 CONCLUSION

Human is not a value-neutral term. It is a term that indexes access to power. So, can we have a human that looks like this? Can a woman represent humanity? Can the woman be the measure of all things? ... Can 'the universal' be carried by turns other than white masculinity, can we have alternatives to this?

Rosi Braidotti⁶⁸

Braidotti's question of what the 'human' is and can be is a serious challenge to contemporary IHL and it connects equally well with posthuman feminist, postcolonial, intersectional, and queer concerns over the exclusionism embedded in contemporary international law and practice. In responding to the rhetorical question 'if we can have alternatives' to 'this' current order, I have described, in the first part of the article, how IHL hinges on and furthers a binary-gendering distinction in which combatants are conflated with 'men' (uniform/one) and civilians are conflated with 'women' (non-uniform/other). Moreover, I have described how high-tech warfare targeting practice identifies 'alternatives' to the binary-gendered (by IHL) 'human' or, in other words, how the converging digital and material body renders individuals military targets in contemporary high-tech warfare. At the other end, and in the second part of the article, the 'human in the loop' – the one performing and executing targeting – has turned out to be indistinguishable from the 'other' data-driven agents, agencies, and technological entities co-producing targeting in practice. Furthermore, the 'free' and 'autonomous' 'human' (in the loop) is, as Butler's scholarship has shown, fictitious. In practice, then, of life and death in armed conflicts and beyond, the alternative to the 'human' is already in place: we are already more-than-humans. This posthuman condition and existence calls for, as I have suggested, a *posthumanitarian* international law: a turn towards a normative-ethical order 'worthy of', as Braidotti puts it, 'the complexity of our times'.⁶⁹

On the one hand, it seems as if IHL has never been as useless as it is now. At least, that is, if we define its purpose as trying to ease human suffering by containing violence, a violence that IHL itself enables and indeed, produces – an observation I share with many other contemporary critical international legal scholars.⁷⁰ We do not experience less violence in the world but rather new and other forms of violence. On the other hand, law has never been more useful than it is now as it is truly fully *at use* in contemporary warfare. As Parsa points out, new technologies and IHL 'are not different strategies of warfare or radically distinct developments'.⁷¹ Rather, IHL and technologies in warfare are co-constitutive. The lawful relations in war have never been as manifold and put to work within so many fields of law/life/technology. IHL, in this

⁶⁸ Braidotti (2017) above note 8 at 12:45–13:45.

⁶⁹ Braidotti (2013) above note 8 at 186.

⁷⁰ Recent scholarly works expanding on this observation include Hamzic above note 6.

⁷¹ Parsa (2017) above note 1 at 28.

sense, offers itself to the use of any materiality and technology. It is, to put it bluntly, business as usual in terms of lawful killings and large-scale death: digital, material, and entangled. Where can we find optimism in this? The cautious optimistic note on which I want to end relates to our possibilities of thinking about law/life/technology as post-humanist feminist international legal scholars-assemblages. I believe that the analytic tools posthumanist feminist scholarship avails us of, are particularly apt for thinking about law in our times, IHL included. In embracing the vitality of auto-poietic life in the posthuman condition we might find it in ourselves to worry less about what technological advancement may do to us as a species in a more or less developed dystopia of cybernetic-robotic cataclysmic war-takeover of the world, and think more about what we, as the converging digital-material entangled assemblages that we always already are, do to and for our others.